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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK ET AL.
(SC 19721)

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

Syllabus

The plaintiff, M Co., which had obtained a judgment in California against the defendants, J and G, sought to enforce that judgment in Connecticut and to recover damages from the defendants in connection with a home staging services contract between the parties. The contract was signed by J, the owner of the home where M Co. was to provide design and decorating services, including the staging of home furnishings. G signed an addendum to the contract that authorized M Co. to charge him for certain fees and that indicated his personal guarantee to M Co. When the defendants later defaulted on their payment obligations under the contract and failed to cooperate with M Co.'s attempts to repossess the furnishings, M Co. filed an action in California Superior Court. The

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

defendants failed to appear or defend, and the California court rendered a default judgment against the defendants. In the present action, M Co. filed a three count complaint, seeking enforcement of the California judgment in count one and alleging breach of contract in count two and quantum meruit in count three. That complaint alleged no facts relating to the substantive nature of the claims on which the California judgment was based. The court found for M Co. and against G on count one, but found for J and against M Co. on that count on the ground that the California court lacked personal jurisdiction over J. The court found for M Co. and against J on count two and concluded that, because M Co. had prevailed on its breach of contract claim, the court did not need to consider the alternative claim for quantum meruit in count three. In resolving counts two and three, the trial court made no reference to G. The trial court awarded damages against G on count one and against J on count two, and rendered judgment for M Co., from which the defendants filed a joint appeal with the Appellate Court. The Appellate Court affirmed the trial court's judgment, rejecting the defendants' claims on the merits. On the granting of certification, the defendants appealed to this court. *Held* that, because the trial court's judgment was not final as to G, as that court failed to dispose of counts two and three with respect to G, the Appellate Court lacked jurisdiction over the defendants' joint appeal, and, accordingly, the judgment of the Appellate Court was reversed, and the case was remanded to that court with direction to dismiss the appeal: although the trial court's judgment as to J was final because that court expressly disposed of counts one and two as to her and implicitly disposed of count three as to her, as the breach of contract and the quantum meruit counts alleged mutually exclusive theories of recovery such that establishing the elements of one precluded recovery on the other, the trial court's judgment as to G was not final because that court disposed of count one, but not count two or three, as to him, as the court could have found G liable under either count two or three without returning a verdict that was legally inconsistent with its determination with respect to count one; moreover, because M Co. did not withdraw counts two and three as to G or give any indication that it had unconditionally abandoned those counts, those counts remained unadjudicated as to G, and, accordingly, it could not be said that further proceedings could have no effect on him.

Argued November 13, 2017—officially released May 15, 2018

Procedural History

Action to, inter alia, enforce a foreign default judgment rendered against the defendants in California, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendants filed an answer and special defense alleging that the judg-

ment was not enforceable due to lack of personal jurisdiction by the California court; thereafter, the matter was tried to the court, *Tyma, J.*; judgment for the plaintiff, from which the defendants appealed to the Appellate Court, *Gruendel, Alvord* and *Pellegrino, Js.*, which affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Michael S. Taylor, with whom were *James P. Sexton*, and, on the brief, *Matthew C. Eagan*, for the appellants (defendants).

Anthony J. LaBella, with whom, on the brief, was *Deborah M. Garskof*, for the appellee (plaintiff).

Opinion

McDONALD, J. A threshold jurisdictional issue in this case requires us to clarify the circumstances under which there can be an appealable final judgment when the trial court's decision does not dispose of counts advancing alternative theories of relief. The plaintiff, Meribear Productions, Inc., brought an action against the defendants, Joan E. Frank and George A. Frank, for common-law enforcement of a foreign default judgment, breach of contract and quantum meruit. Judgment was rendered in favor of the plaintiff against each of the defendants under different counts of the complaint. The Appellate Court affirmed the judgment on the merits, and this court thereafter granted the defendants' petition for certification to appeal from that judgment. Upon further review, it is apparent that the judgment was not final as to George Frank, and, therefore, the Appellate Court lacked jurisdiction over the defendants' joint appeal.

The following facts were found by the trial court or are otherwise reflected in the record. The defendants, who are husband and wife, decided to sell their West-

port home. They hired the plaintiff, a home staging services provider, to provide design and decorating services, which included the staging of home furnishings owned by the plaintiff, to make the residence more attractive to potential buyers. The plaintiff is a California corporation with its principal place of business located in Los Angeles. The staging agreement was signed only by Joan Frank, the owner of the property. George Frank signed an addendum to the agreement, which authorized the plaintiff to charge his credit card for the initial staging fee, which included the first four months of rental charges, and indicated his personal guarantee to the plaintiff, but he crossed out the phrase "any obligations that may become due."

More than four months after the furnishings were delivered and staged in the defendants' home, the defendants defaulted on their payment obligations and failed to cooperate with the plaintiff's attempts to repossess the furnishings. The plaintiff filed an action against the defendants in a California Superior Court. The defendants did not appear or defend. The California court entered a default judgment against the defendants in the amount of $259,746.10, which included prejudgment interest and attorney's fees.[1]

Approximately one month later, the plaintiff commenced the present action in Connecticut seeking to hold the defendants jointly and severally liable under the foreign default judgment and to recover additional attorney's fees, costs, and postjudgment interest. In response to the defendants' assertion of a special defense that the judgment was void because the California court lacked personal jurisdiction over them, the plaintiff amended the complaint to add two counts seek-

[1] The complaint alleged breach of contract, conversion and fraud, and sought total damages in the amount of $253,000 ($18,000 in lost rent and $235,000 in converted inventory). For reasons that are not clear, the court awarded damages in the amount of $248,300.

ing recovery against both defendants under theories of breach of contract and quantum meruit. Prior to trial, a prejudgment attachment in the amount of $259,764.10, together with 10 percent postjudgment interest, pursuant to provisions of the California Code of Civil Procedure, was entered against the Westport real property owned by Joan Frank.

In a trial to the court, the plaintiff litigated all three claims. In its posttrial brief, the plaintiff requested that the court give full faith and credit to the California judgment, plus postjudgment interest; "[i]n the alternative," find that the defendants had breached the contract and award damages in the same amount awarded in the California judgment, plus interest, fees and costs; and, "[f]inally, in the event [that] neither request is . . . granted," render judgment in the plaintiff's favor on the quantum meruit count in the same amount.

The court issued a memorandum of decision finding in favor of the plaintiff on count one against George Frank and on count two against Joan Frank. The court acknowledged at the outset that the three count complaint was for "common-law enforcement of a foreign default judgment, and alternatively, for breach of contract and quantum meruit." Turning first to count one, the trial court determined that, as a result of the manner in which process was served, the California court lacked personal jurisdiction over Joan Frank but had jurisdiction over George Frank. In rejecting George Frank's argument that the exercise of jurisdiction did not comply with the dictates of due process, the court cited his admission "that he signed a guarantee of the staging agreement . . . that provides that Los Angeles is the appropriate forum." Consequently, the court stated that it would render judgment on count one for Joan Frank and against George Frank.

In resolving the remaining counts, the court made no further reference to George Frank. As to count two,

the court concluded that Joan Frank had breached the contract, that she could not prevail on her special defenses to enforcement of the contract, and that judgment would be rendered for the plaintiff and against Joan Frank. As to count three, the court cited case law explaining that parties routinely plead alternative counts of breach of contract and quantum meruit, but that they are only entitled to a single measure of damages. The court concluded: "The plaintiff has proven that Joan Frank breached the contract. Therefore, the court need not consider the alternative claim for quantum meruit."

The court awarded damages against George Frank on count one and against Joan Frank on count two. Although both awards covered inventory loss and lost rents, the California judgment included prejudgment interest and attorney's fees, whereas the breach of contract award included late fees related to the rental loss. The judgment file provided: "The court, having heard the parties, finds the issues for the plaintiff. Whereupon it is adjudged that the plaintiff recover of the defendant Joan E. Frank $283,106.45 damages and that the plaintiff recover of the defendant George A. Frank $259,746.10." The court indicated that a hearing would be scheduled on attorney's fees, but did not address the subject of postjudgment interest.

The defendants jointly appealed from the judgment to the Appellate Court, claiming that (1) the California judgment was unenforceable against George Frank because he did not have sufficient minimum contacts with California for its court to exercise personal jurisdiction over him, (2) the staging services agreement was not enforceable because it failed to comply with certain provisions of the Home Solicitation Sales Act, General Statutes § 42-134a et seq., and (3) the damage award was improper because (a) the judgment against George Frank under the first count and against Joan

Frank under the second count constituted double recovery for the same loss, and (b) the award under the second count improperly included damages for conversion of the home furnishings. See *Meribear Productions, Inc.* v. *Frank*, 165 Conn. App. 305, 311, 316, 321–22, 140 A.3d 993 (2016). The Appellate Court affirmed the trial court's judgment, rejecting the defendants' claims on the merits. Id., 307. With respect to the double damages issue, the Appellate Court noted that "the plaintiff may recover the full amount awarded by the trial court based on count one or count two of its complaint. It may, however, recover only once for the harm that it suffered." Id., 322.

The defendants' certified appeal to this court followed.[2] During the course of oral argument, the defendants conceded that the plaintiff was entitled to some recovery under quantum meruit and asserted that, although that count had not been addressed in any manner by the trial court as to George Frank, the plaintiff could obtain a ruling on that count on remand should the defendants succeed on their appeal. In response, this court questioned whether George Frank's appeal had been taken from a final judgment when the trial court's ruling had not disposed of all counts against him. Because this issue had not been addressed in the parties' briefs, we ordered supplemental briefs on that issue. In those briefs, the parties agreed that there was a final judgment. They contended that the failure to rule on an alternative claim for relief does not affect

[2] This court granted certification, limited to the following issues: "Did the Appellate Court correctly determine that the trial court properly determined that: (1) the foreign judgment against George A. Frank was enforceable after concluding that he had minimum contacts with California that warranted the exercise of its jurisdiction; (2) the contract signed by Joan E. Frank was enforceable notwithstanding the provisions of the Home Solicitation Sales Act; and (3) an award of double damages to the plaintiff was appropriate." *Meribear Productions, Inc.* v. *Frank*, 322 Conn. 903, 138 A.3d 288 (2016).

the finality of the judgment.[3] Although there is Appellate Court authority to support the parties' position, we conclude that one line of this case law, applicable to the present case, is inconsistent with our final judgment law. We conclude that the trial court's failure to dispose of either the contract count or the quantum merit count as to George Frank resulted in the lack of a final judgment. Accordingly, the Appellate Court should have dismissed the defendants' joint appeal.[4] See *In re Santi-*

[3] The discussion at oral argument focused exclusively on the trial court's failure to dispose of the quantum meruit count as to George Frank. As there was no discussion at oral argument regarding its failure to dispose of the breach of contract count as to him, we did not ask the parties to address both counts in their supplemental briefs. Nonetheless, their argument as to alternative claims applies to both counts.

The defendants did argue, however, that the judgment was final because the second and third counts of the complaint had been brought against only Joan Frank. The allegations in the complaint, the plaintiff's posttrial brief, and the trial court's decision plainly belie that argument. It is evident that the trial court did not rule on the second and third counts of the complaint as to George Frank because the plaintiff had presented these counts as alternatives should it fail to prevail on the first count. Although the trial court's findings of fact include a finding that George Frank was "not a party to the staging agreement," we do not construe that finding as a determination that George Frank could not be held liable for breach of contract. Rather, it appears that the court was emphasizing that George Frank, unlike Joan Frank, had not signed the agreement.

[4] In the defendants' supplemental brief on this issue, there was no request for this court to consider Joan Frank's appeal separately should we conclude that the judgment is not final as to George Frank. Nor did they contend that the issues as to each defendant overlapped to such an extent that we should consider both. This court has recognized that, "[i]n some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so inextricably intertwined with another argument, the appealability of which is established that we should assume jurisdiction over both." (Internal quotation marks omitted.) *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 90, 10 A.3d 498 (2010). However, that circumstance is not applicable in the present case. We have previously relied on this exception when there is a final judgment as to all of the parties before the reviewing court, and the question is whether we can also consider an interlocutory ruling affecting those parties properly before us. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354 n.9, 63 A.3d 940 (2013); *Canty* v. *Otto*, 304 Conn. 546, 553–56, 41 A.3d 280 (2012). In the present case, the judgment is final as to Joan Frank only. In addition, we have

ago G., 325 Conn. 221, 229, 157 A.3d 60 (2017) ("the lack of a final judgment is a jurisdictional defect that [necessitates] . . . dismissal of the appeal" [internal quotation marks omitted]).

"When judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment." Practice Book § 61-2. As a general rule, however, a judgment that disposes of only a part of a complaint is not final, unless it disposes of all of the causes of action against the appellant. *Manifold* v. *Ragaglia*, 272 Conn. 410, 417–18 n.8, 862 A.2d 292 (2004); *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 262 Conn. 240, 246, 811 A.2d 1272 (2002); see also Practice Book § 61-3 (party may appeal if partial judgment disposes "of all causes of action . . . against a particular party or parties").

If a party wishes to appeal from a partial judgment rendered against it, barring a limited exception not applicable to the present case, it can do so only if the remaining causes of action or claims for relief are withdrawn or unconditionally abandoned before the appeal is taken.[5] Compare *Stroiney* v. *Crescent Lake*

invoked this exception when resolution of the interlocutory ruling would control or bear on the resolution of the final judgment or the case generally. See, e.g., *Santorso* v. *Bristol Hospital*, supra, 354 n.9 (action was not barred by res judicata but was barred under statute of limitations); *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 28–30, 836 A.2d 1124 (2003) (analysis of class certification issues would equally apply to claims that are subject to immediate review and those not subject to immediate review); *Taff* v. *Bettcher*, 243 Conn. 380, 384 n.2, 703 A.2d 759 (1997) ("orders relating to custody and support are part of a carefully crafted mosaic such that a change to one will necessarily create a change to the other"). In the present case, our resolution of George Frank's jurisdictional challenge to the California judgment could have no bearing on Joan Frank's challenge to the judgment against her for breach of contract or on any potential liability under quantum meruit. Nor would it be dispositive of the challenge to the damages awarded.

[5] Practice Book § 61-4 (a), setting forth the exception to that rule, provides that when partial summary judgment has been granted upon fewer than all of the causes of action against a party, "[s]uch a judgment shall be considered an appealable final judgment only if the trial court makes a written determination that the issues resolved by the judgment are of such significance to

Tax District, 197 Conn. 82, 84, 495 A.2d 1063 (1985) (There was no final judgment when the trial court rendered summary judgment on a claim seeking declaratory judgment without disposing of the claims for injunctive relief and damages. "The plaintiffs have not withdrawn or abandoned their claims for relief that have not yet been adjudicated. The situation, therefore, is similar to where a judgment has been rendered only upon the issue of liability without an award of damages."), with *Zamstein* v. *Marvasti*, 240 Conn. 549, 555–57, 692 A.2d 781 (1997) (final judgment after trial court granted motion to strike four of six counts because plaintiff abandoned remaining claims in motion for judgment by representing that he would withdraw counts, and plaintiff did so after court rendered judgment).

In assessing whether a judgment disposes of all of the causes of action against a party, this court has recognized that the trial court's failure to *expressly* dispose of all of the counts in the judgment itself will not necessarily render the judgment not final. Rather, the reviewing court looks to the complaint and the memorandum of decision to determine whether the trial court explicitly *or implicitly* disposed of each count. See, e.g., *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, 230 Conn. 486, 488 n.1, 646 A.2d 1289 (1994) (final judgment despite absence of explicit finding on count four, alleging misrepresentation, because court implicitly rejected count four on merits when its resolution of another count found that defendant's conduct came "*close to* a misrepresentation" and court's judgment provided that it was entered for plaintiff and against defendant "on counts one, two and three of the complaint *only*" [emphasis altered; internal

the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs" [emphasis omitted]).

quotation marks omitted]); *Martin* v. *Martin's News Service, Inc.*, 9 Conn. App. 304, 306 n.2, 518 A.2d 951 (1986) (final judgment when neither judgment file nor memorandum of decision specifically indicated that judgment was entered on counterclaim because "[i]t is clear that had judgment been entered specifically on the counterclaim, it would have been entered in favor of the plaintiff" when court's decision discussed subject of counterclaim at length, and judgment provided that court " 'finds the issues for the plaintiff' "), cert. denied, 202 Conn. 807, 520 A.2d 1287 (1987); see also *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 529 n.1, 893 A.2d 389 (2006) ("[w]hen there is an inconsistency between the judgment file and the oral or written decision of the trial court, it is the order of the court that controls because the judgment file is merely a clerical document, and the pronouncement by the court . . . is the judgment" [internal quotation marks omitted]).

In so concluding, this court explained that, "[a]though it is preferable for a trial court to make a formal ruling on each count, we will not elevate form over substance when it is apparent from the memorandum of decision [whether the plaintiff prevailed on each count]." *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, supra, 230 Conn. 488 n.1. Whereas the court's memorandum of decision in *Normand Josef Enterprises, Inc.*, implicitly disposed of the count lacking a formal ruling by indicating that the proof was insufficient to establish an essential element or elements of the claim, the Appellate Court has since relied on this "form over substance" proposition in other circumstances.

The Appellate Court has held that there was a final judgment when the trial court rendered judgment "in favor of the plaintiff" and expressly found for the plaintiff on one or more counts, but did not address claims raising alternative theories of recovery. See, e.g., *Nation*

Electrical Contracting, LLC v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 814–15 n.6, 74 A.3d 474 (2013) (final judgment when trial court rendered judgment for plaintiff on unjust enrichment count but made no reference to quantum meruit count; latter claim viewed "as having been resolved because the plaintiff would not have been entitled to recover under both [counts]," which raised "alternative theories of restitution," differing only in that one remedy is available despite unenforceable contract and other is available despite absence of quasi-contractual relationship); *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 306 n.6, 61 A.3d 1164 (2013) (The trial court rendered judgment for the plaintiffs on certain counts and for the defendants on another count, but "did not specify its rulings with respect to the plaintiffs' breach of fiduciary duties and breach of contract claims. As the judgment file states, however, that the court found 'the issues on the [c]omplaint for the [p]laintiffs,' we conclude that this is an appealable final judgment."); *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 738 and n.4, 49 A.3d 1003 (2012) (The trial court rendered judgment in favor of the plaintiff, and in its decision found for the plaintiff on five of the eleven counts in the complaint, even though "[t]he court did not address explicitly the plaintiff's restitution claim. Nevertheless, we conclude that the present appeal was taken from a final judgment."); *Hardie* v. *Mistriel*, 133 Conn. App. 572, 574 and n.2, 36 A.3d 261 (2012) (There was a final judgment when the trial court rendered judgment in favor of the plaintiff on the trespass count but did not render "formal" judgment on the conversion and negligence counts to recover for the same injury and did not discuss those counts in its memorandum of decision. "It is apparent from the memorandum of decision, and is reiterated in the judgment file, that the court found in favor of the plaintiff on its trespass count and awarded

damages on that count."); *Rent-A-PC, Inc.* v. *Rental Management, Inc.*, 96 Conn. App. 600, 604 n.3, 901 A.2d 720 (2006) (final judgment in case in which eight count complaint alleged various theories of recovery for same injury where court found issues on one count, unjust enrichment, for plaintiff, without addressing other issues); *Raudat* v. *Leary*, 88 Conn. App. 44, 49, 868 A.2d 120 (2005) (final judgment on two count complaint alleging intentional and negligent misrepresentation when court stated in memorandum of decision that because it had ruled in favor of plaintiff on intentional misrepresentation count, it did " 'not need to address the second count of the complaint as to negligent misrepresentation,' " and made similar statement in judgment file, when law indicated that these theories are mutually exclusive); *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 416 n.2, 679 A.2d 421 (1996) ("The trial court's memorandum of decision discusses only the action in breach of contract. The court, therefore, did not need to address the plaintiff's alternative cause of action of unjust enrichment. The judgment file indicates judgment was rendered on the complaint and therefore there is a final judgment.").

A closer review of these alternative theory cases reveals that they actually fall into two categories. One category involves counts alleging claims that are legally inconsistent, also referred to as mutually exclusive, such that establishing the elements of one precludes liability on the other (e.g., negligent infliction of emotional distress and intentional infliction of emotional distress, or breach of contract and promissory estoppel). See, e.g., *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 693, 846 A.2d 849 (2004) ("[i]ntentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive" [citation omitted; internal quotation marks omitted]); *Harley* v. *Indian Spring Land*

Co., 123 Conn. App. 800, 831, 3 A.3d 992 (2010) ("[b]ecause the elements of a breach of contract include the formation of an agreement . . . which, in turn, requires the presence of adequate consideration . . . and promissory estoppel is appropriate when there is an absence of consideration to support a contract . . . we conclude that the court rendered an inconsistent judgment when it found in favor of the plaintiff on both counts" [citations omitted]). In such cases, it is fair to infer that a judgment in favor of the plaintiff on one count *legally* implies a judgment in favor of the defendant on the other count. See *Harley* v. *Indian Spring Land Co.*, supra, 831–32 ("Although a party may plead, in good faith, inconsistent facts and theories, a court may not award a judgment on inconsistent facts and conclusions. . . . Where a party is entitled to only a single right to recover, it is the responsibility of the trial court to determine which of the inapposite sets of facts the party has proved, and then to render judgment accordingly." [Internal quotation marks omitted.]).

The second category involves claims that present alternative theories of recovery for the same injury, but are not legally inconsistent. In such cases, there is no legal impediment to the trier of fact finding that the plaintiff has established both claims, although the plaintiff can recover only once for the same injury. See *Rowe* v. *Goulet*, 89 Conn. App. 836, 849, 875 A.2d 564 (2005) ("Duplicated recoveries . . . must not be awarded for the same underlying loss under different legal theories. . . . Although a plaintiff is entitled to allege respective theories of liability in separate claims, he or she is not entitled to recover twice for harm growing out of the same transaction, occurrence or event." [Citations omitted.]). Indeed, in some cases, the damages may be measured differently and, in turn, result in a different recovery under the alternative theories. See, e.g., *Jonap* v. *Silver*, 1 Conn. App. 550, 553, 561–62, 474 A.2d 800

(1984) (award reduced by $24,000 where jury awarded plaintiff $24,000 on counts alleging invasion of privacy for appropriating his name and $32,000 on counts alleging invasion of privacy for placing plaintiff in false light because elements of damage establishing liability for each were duplicative). In such cases, when the court has found in favor of the plaintiff on one count, this ruling does not imply as a matter of fact or law whether the plaintiff has established the defendant's liability under the other count.

Because of the different effect of the rulings in these categories, drawing a distinction between them for purposes of the final judgment rule advances the policies underlying that rule, "namely, the prevention of piecemeal appeals and the conservation of judicial resources." *Niro* v. *Niro*, 314 Conn. 62, 78, 100 A.3d 801 (2014); see also *Canty* v. *Otto*, 304 Conn. 546, 554, 41 A.3d 280 (2012) (citing policy " 'to facilitate the speedy and orderly disposition of cases at the trial court level' "). At trial, the parties have expended resources to fully litigate all of the claims advanced. A rule that would allow the trial court not to dispose of counts that present alternative, legally consistent theories of recovery could lead to multiple unnecessary appeals and retrials. In exceptional circumstances in which the trial court and the parties agree that litigating only some of the alternative claims for relief and proceeding to appeal on those issues before litigating alternative claims would constitute the greater efficiency, our rules provide a mechanism to address those circumstances. See Practice Book § 61-4 (a) (set forth in relevant part in footnote 5 of this opinion).

In sum, we conclude that when the trial court disposes of one count in the plaintiff's favor, such a determination implicitly disposes of legally inconsistent, but not legally consistent, alternative theories. When a

legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment.

That having been said, it is our view that, whenever feasible, the far better practice would be for the trial court to fully address the merits of all theories litigated, even those that are legally inconsistent.[6] If the trial court determines that the plaintiff has established more than one theory of recovery for the same injury, the trial court would render judgment in the plaintiff's favor on the primary count and render judgment for the defendant on the other(s), albeit solely due to the nature of the alternative claims. By so doing, we envision several economies that would inure to the benefit of the parties and the judicial system. The losing party would be able to more accurately assess the likelihood of success on appeal to decide whether to invest the resources to pursue further litigation. If the appeal proceeds, the case would typically be resolved in that appeal, thus substantially reducing the number of retrials and successive appeals.

Applying these rules to the present case, we conclude that the judgment as to Joan Frank was final. The trial court expressly disposed of counts one and two as to her. Counts two and three alleged mutually exclusive theories. See, e.g., *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 587 n.9, 57 A.3d 730 (2012) ("[q]uantum meruit is an equitable remedy to provide restitution for the reasonable value of services despite an unenforceable contract"); *300 State, LLC* v. *Hanafin*, 140 Conn. App. 327, 330–31, 59 A.3d 287 (2013) (breach of lease and quantum meruit counts are mutually exclusive). By stating that it did not need to consider the quantum meruit claim in count three in light of its

[6] By this, we mean that the court would make all of the findings of fact and any legally consistent conclusions of law related to the alternative claim(s), as well as the damages established in relation to that claim.

finding of liability on the breach of contract claim in count two, the court implied that Joan Frank was entitled to judgment on count three solely due to the alternative nature of the claim.

The judgment as to George Frank, however, was not final. Of the three counts brought against him, the court disposed of only count one, finding him liable under the California default judgment. However, the court also could have found him liable under either, but not both, of the other counts without returning a legally inconsistent verdict. To prevail on count one, the plaintiff needed to establish only that (1) a valid default judgment had been entered in the California court against George Frank, and (2) the judgment remained unsatisfied. In fact, the complaint in the present action alleged no facts relating to the substantive nature of the claims on which judgment was rendered in California. Although the trial court relied on George Frank's admission that he had signed a guarantee of the staging agreement in rejecting his due process defense to count one, that finding would not be legally inconsistent with a finding against him on either the breach of contract count or the quantum meruit count. Insofar as the plaintiff suggests that the trial court found facts that would sustain a verdict on quantum meruit, we conclude that it is improper for us to make such a determination, especially in the context of a jurisdictional defect. See *Crowell* v. *Danforth*, 222 Conn. 150, 158, 609 A.2d 654 (1992) (determination of quantum meruit claim "requires a factual examination of the circumstances and of the conduct of the parties . . . that is not a task for an appellate court [but rather for the trier of fact]" [internal quotation marks omitted]). Therefore, counts two and three have not been disposed of, explicitly or implicitly.

The plaintiff has neither withdrawn counts two and three as to George Frank, nor given any indication that

it has unconditionally abandoned them. Indeed, not only do these counts remain unadjudicated, they present the possibility that George Frank could be found liable for additional damages. As previously noted, the damages on count two as to Joan Frank exceeded those on count one as to George Frank. Therefore, it cannot be said that further proceedings could have no effect on him.

As there was no final judgment, the Appellate Court did not have jurisdiction over the appeal.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to dismiss the defendants' joint appeal.

In this opinion the other justices concurred.

MACDERMID, INC. *v.* STEPHEN J. LEONETTI (SC 19817)

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

Syllabus

The plaintiff, alleging, inter alia, unjust enrichment, sought to recover a severance payment it had made pursuant to a termination agreement with the defendant, its former employee. The defendant, who had sustained an injury in 2004 during the course of his employment, filed a timely workers' compensation claim. Following the termination of his employment in 2009, the defendant signed the termination agreement in exchange for twenty-seven weeks of severance pay. In that agreement, the defendant agreed to release the plaintiff from, inter alia, all workers' compensation claims and recited his understanding that the severance pay was all that he was entitled to receive from the plaintiff and greater than the amount required under the plaintiff's normal policies and procedures. The agreement also contained a severability clause providing that, in the event any provision was found to be invalid, the remaining terms would be construed so as to give effect to the intent of the parties. Following a hearing, a workers' compensation commissioner concluded that, without administrative approval of the agreement, the defendant had not effectively waived his rights under the Workers' Compensation

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

Act (§ 31-275 et seq.). The commissioner then concluded that the agreement should not be approved because the severance pay was based on length of the defendant's employment and, therefore, contained no compensation for his injury. The plaintiff appealed from that decision to the Compensation Review Board, which affirmed. On the plaintiff's subsequent appeal, this court concluded that the release contained in the agreement was unenforceable without the commissioner's approval and, accordingly, affirmed the board's decision. This court reasoned that the Workers' Compensation Commission is not competent to rule on contractual rights and obligations in the absence of legislative authorization and that the enforceability of the agreement's remaining provisions was not a question for the workers' compensation forum. Following the close of the plaintiff's evidence in the present action, the defendant filed a motion seeking a directed verdict, claiming lack of consideration for the release. The trial court reserved decision on that motion, and, thereafter, the jury returned a verdict for the plaintiff on its claim of unjust enrichment. The defendant then filed postverdict motions, asserting, inter alia, that the verdict violated public policy embodied in statutes (§§ 31-290 and 31-296) prohibiting agreements from relieving employers of obligations created under the act without the approval of a workers' compensation commissioner. The trial court denied the defendant's postverdict motions and rendered judgment in accordance with the jury verdict. On appeal, the defendant claimed, inter alia, that the plaintiff was barred from pursuing recovery for unjust enrichment under the doctrine of collateral estoppel and that such recovery was precluded by §§ 31-290 and 31-296, public policy, and the severability clause of the agreement. *Held*:

1. The plaintiff's unjust enrichment claim was not barred by the doctrine of collateral estoppel, this court having concluded that there was not a sufficient identity of the issues between the present case and the workers' compensation proceedings; the workers' compensation proceedings did not resolve the issues underlying the plaintiff's claim for unjust enrichment, as those proceedings were jurisdictionally limited to determining whether to approve the termination agreement as a release of the defendant's workers' compensation claim and did not involve adjudication of the defendant's allegedly deceptive conduct in entering into the agreement, on which the plaintiff's unjust enrichment claim was predicated.

2. The defendant could not prevail on his claims that the plaintiff's recovery was barred by §§ 31-290 and 31-296, public policy, and the severability clause in the termination agreement, as the defendant did not adequately preserve those claims for appeal; the defendant did not timely alert the plaintiff and the trial court to these claims because his statutory and public policy claims, which were raised in his postverdict motions, had not previously been addressed in his motion for a directed verdict, and

because the defendant asserted his claim pertaining to the severability clause for the first time on appeal.

3. This court declined to address the defendant's claims that the trial court improperly failed to instruct the jury in accordance with certain of his preliminary requests to charge and that the trial court's instruction on unjust enrichment improperly permitted the jury to find for the plaintiff in the absence of proof that any of the defendant's actions or omissions caused the plaintiff to suffer injury: the defendant, having devoted only cursory attention in his appellate brief to the harmfulness of the trial court's failure to instruct the jury in accordance with his requests to charge, inadequately briefed those claims of instructional error; moreover, the defendant's claim that the trial court improperly instructed the jury on unjust enrichment was unreviewable under the general verdict rule, as the plaintiff's unjust enrichment claim was predicated on separate legal theories of recovery, and the defendant failed to request interrogatories that would establish the ground on which the jury made its decision.

4. The defendant could not prevail on his claim that the trial court improperly excluded six documents from evidence: the defendant's claims relating to five of those documents were dismissed as moot because the defendant had challenged their exclusion only on the limited basis of hearsay and had failed to address other, independent grounds for their exclusion; moreover, the defendant did not explain how the verdict was likely affected by the trial court's particular exclusion of the sixth document, and, accordingly, that claim was inadequately briefed.

Argued November 6, 2017—officially released May 15, 2018

Procedural History

Action to recover damages for, inter alia, unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a counterclaim; thereafter, the court, *Shapiro*, *J.*, denied the defendant's motion for summary judgment and granted the plaintiff's motion for summary judgment as to the counterclaim and rendered judgment thereon, from which the defendant appealed to the Appellate Court, *Gruendel*, *Alvord* and *West*, *Js.*, which affirmed the trial court's judgment; subsequently, the case was tried to the jury before *Shapiro*, *J.*; verdict in part for the plaintiff; thereafter, the court, *Shapiro*, *J.*, denied the defendant's motions for judgment notwithstanding the verdict and to set aside the verdict

and rendered judgment in accordance with the verdict, from which the defendant appealed. *Appeal dismissed in part*; *affirmed.*

Marc P. Mercier, with whom were *Bruce S. Beck* and, on the brief, *Alexa J.P. Lindauer*, for the appellant (defendant).

John R. Horvack, Jr., for the appellee (plaintiff).

Opinion

ROBINSON, J. The defendant, Stephen J. Leonetti, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, MacDermid, Inc., on its claim of unjust enrichment.[1] On appeal, the defendant contends the following: (1) the plaintiff's unjust enrichment claim is barred by collateral estoppel on the basis of the proceedings underlying our decision in *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 76 A.3d 168 (2013); (2) the plaintiff's recovery is precluded by General Statutes §§ 31-290[2] and 31-296 (a),[3] the terms

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

[2] General Statutes § 31-290 provides: "No contract, expressed or implied, no rule, regulation or other device shall in any manner relieve any employer, in whole or in part, of any obligation created by this chapter, except as herein set forth."

[3] General Statutes § 31-296 (a) provides: "If an employer and an injured employee, or in case of fatal injury the employee's legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner. The commissioner's statement of approval shall also inform the employee or the employee's dependent, as the case may be, of any rights the individual may have to an annual cost-of-living adjustment or to participate in a rehabilitation program administered by the Department of Rehabilitation Services under the provisions of this chapter. The commissioner shall retain the original agreement,

of a termination agreement (agreement) between the parties, and public policy; (3) the trial court's jury instructions were improper; and (4) the trial court improperly excluded certain evidence. The plaintiff disagrees and claims that many of the defendant's arguments are unpreserved, inadequately briefed, or both. We agree with the plaintiff. Accordingly, we affirm the judgment of the trial court.

The record, including our decision in *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 195, reveals the following facts and procedural history. "The [defendant] worked for the [plaintiff] for twenty-eight years until he was discharged in early November, 2009. Five years earlier, in June, 2004, the [defendant] sustained a lower back injury during the course of his employment. The [defendant] timely filed notice of a workers' compensation claim related to this injury on April 14, 2005. The parties stipulated to the [Workers' Compensation Commissioner (commissioner)] that the injury suffered by the [defendant] was a compensable injury.

"At the time that the [plaintiff] informed the [defendant] that he would be discharged from his employment, the [plaintiff] presented the [defendant] with a proposed . . . agreement." Id., 199. Under the terms of the agreement, the defendant's purpose in entering into the agreement was to provide "a binding agreement and understanding" with the plaintiff. As such, the agreement provided that the parties desired "to make the proposed transition as amiable and [trouble free]

with the commissioner's approval thereof, in the commissioner's office and, if an application is made to the superior court for an execution, the commissioner shall, upon the request of said court, file in the court a certified copy of the agreement and statement of approval."

We note that § 31-296 (a) has been amended since the events underlying the present appeal. See, e.g., Public Acts, Spec. Sess., June, 2012, No. 12-1, § 85. Those changes are not, however, relevant to the present appeal. For the sake of simplicity, we refer to the current revision of the statute.

as possible . . . .' 'Article II of the agreement signed by the parties provides that the [defendant] agreed to release the [plaintiff] from the following: 'any and all suits, claims, costs, demands, attorney's fees, damages, back pay, front pay, interest, special damages, general damages, workers' compensation claims, punitive damages, liabilities, actions, administrative proceedings, expenses, accidents, injuries and any other cause of action in law or equity that [the defendant] has or may have or might in any manner acquire which arise out of, relate to, or is in connection with his . . . employment with, relationship with or business dealings with [the plaintiff] or the termination of that employment, relationship or dealings, or any other act, occurrence or omission, known or unknown, which occurred or failed to occur on or before the date this [a]greement is executed.'

"Article III of the agreement provides that, in consideration 'for the agreements and covenants made herein, the release given, the actions taken or contemplated to be taken, or to be refrained from,' the [defendant] would be paid twenty-seven weeks 'severance pay, determined solely upon the [defendant's] current base salary,' which amounted to $70,228.51, within thirty days of the [plaintiff's] receipt of the properly executed agreement; the [defendant] would continue to earn paid time off through his final day of employment; the [defendant] would be able to continue to obtain medical and dental benefits for up to eighteen consecutive months from his last date of employment under the Consolidated Omnibus Budget Reconciliation Act of 1985; 29 U.S.C. §§ 1161 through 1168 [2006]; and the [defendant] had the option to convert group life insurance to individual life insurance within thirty days of his last day of employment.

"Article III of the agreement also provided that '[the defendant] understands that the payments and benefits

listed above are *all* that [the defendant] is entitled to receive from [the plaintiff]. . . . [The defendant] agrees that the payments and benefits above are more than [the plaintiff] is required to pay under its normal policies, procedures and plans.' . . .

"Article IV of the agreement also required the [defendant] to enter into a one year noncompete agreement and also contained a clause stating in part that '[the defendant] acknowledges that he has been given a reasonable period of time of at least thirty . . . days to review and consider this [a]greement *before* signing it. [The defendant] is encouraged to consult his or her attorney prior to signing this [a]greement.' " (Emphasis in original.) *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 199–201.

Article V (b) of the agreement, entitled "[i]nvalid [c]lauses," provides: "It is understood and agreed that if any terms or provisions of this [a]greement shall contravene or be invalid under the laws of the United States, such contravention or invalidity shall not invalidate the whole [a]greement, but it shall be construed and enforced as to most nearly give effect to the intentions of the parties as expressed herein as possible."

"The [defendant] did not want to release his preexisting workers' compensation claim relating to the 2004 injury by signing the agreement. He consulted with his attorney, who contacted the [plaintiff's] counsel and requested that the [plaintiff] remove from the agreement the language that could operate to release the [defendant's] workers' compensation claim. The [plaintiff] refused to modify the language of the agreement. The [defendant's] counsel wrote a letter to the [plaintiff's] counsel asserting that the release language of article II of the agreement 'really has no effect without the [c]ommissioner's approval' and scheduled an informal hearing before a workers' compensation commis-

sioner for January 8, 2010. The [plaintiff's] counsel did not attend the informal hearing, although a representative of Liberty Mutual Insurance Group, which administered the claim on behalf of the [plaintiff], did attend. Nothing was resolved on January 8, and, on January 27, 2010, the hearing was rescheduled for March 1, 2010.

"On January 26, 2010, the [plaintiff] sent the [defendant] a letter stating that, unless the [defendant] signed the unmodified agreement within the next ten days, it would withdraw its offer of $70,228.51 in severance pay. The [defendant] signed the agreement on February 2, 2010, and the commissioner found that the [defendant] did so because he did not wish to forfeit his severance pay. After the [plaintiff] received the signed agreement from the [defendant], it paid the [defendant] the $70,228.51. At that time, the commissioner had not approved the agreement as a 'voluntary agreement' or stipulation as defined in § 31-296.

"A formal hearing was held several months later to determine the enforceability of the language in article II of the agreement that dealt with the release of the [defendant's] workers' compensation claim. Specifically, the parties asked the commissioner to determine as follows: (1) '[w]hether a signed termination agreement between [an] employer and [an] employee can effectively waive the parties' rights and obligations set forth in the [Workers' Compensation Act (act), General Statutes § 31-275 et seq., in the absence of] approval of the agreement by a [commissioner]'; and (2) '[i]f the . . . agreement does not waive the parties' rights and obligations set forth in the [act]—whether the [c]ommissioner would issue an order that the . . . agreement be entered as a full and final stipulation of the [defendant's] workers' compensation claim against the [plaintiff].'

"The commissioner first found that, without approval by a commissioner, the agreement did not effectively

waive the parties' rights and obligations under the act. Next, the commissioner found that the agreement should not be approved as a full and final stipulation of the [defendant's] workers' compensation claim. In making this determination, the commissioner credited the [defendant's] testimony that 'the [agreement] and payment of $70,228.51 was based on the number of years [the defendant] worked for the [plaintiff] and there was no money paid in this agreement for [the defendant's] workers' compensation claim.' As a result, the commissioner found that the [plaintiff] had paid no consideration to the [defendant] for his accepted workers' compensation claim. In light of these findings, the commissioner found that the Workers' Compensation Commission (commission) retained jurisdiction over the [defendant's] 2004 injury and scheduled a further hearing on the [defendant's] assertion that the injury has rendered a 10 percent permanent partial disability rating to the [defendant's] lumbar spine." *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 201–203. The plaintiff appealed from the commissioner's decision to the Workers' Compensation Review Board (board), which affirmed the commissioner's decision. Id., 203. Thereafter, the plaintiff appealed from the decision of the board. Id., 199. We then transferred that appeal to this court. Id.

On appeal, this court concluded that, under § 31-296, a contractual release of a workers' compensation claim is unenforceable until it has been approved by the commissioner. Id., 207. We then upheld the board's decision affirming the commissioner's refusal to approve the release as a full and final settlement of the defendant's workers' compensation claim in light of its finding that the defendant had not intended to release his compensation claim by signing the agreement. Id., 208. Importantly, we went on to explain that the commission "is not competent to rule on the rights and obligations of

the parties to a contract when those rights and obligations do not involve the issues that the legislature has authorized the commission to consider." Id., 220. Thus, we noted that "[t]he enforceability of the remainder of the agreement is not a question for the workers' compensation forum. . . . *Of course*, [*the plaintiff*] *retains the right to seek whatever civil recourses it deems appropriate with respect to the remainder of the agreement, a matter about which we express no opinion*." (Emphasis added.) Id., 221.

On November 30, 2011, while the workers' compensation matter was still pending on appeal, the plaintiff commenced the present action against the defendant, asserting claims of civil theft, fraud, unjust enrichment, conversion, and seeking rescission of the agreement.[4] Specifically, the plaintiff claimed that its promise to pay the defendant under the agreement was rendered unenforceable by the defendant's conduct, false promises, and misrepresentations. The defendant denied the plaintiff's allegations and asserted certain special defenses, including res judicata or collateral estoppel, on the basis of the proceedings underlying this court's decision in *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 195. The defendant also claimed that enforcement of the worker's compensation release provisions in the agreement would render the contract illegal under §§ 31-290 and 31-296.[5] The plaintiff denied the special defenses.

[4] The plaintiff subsequently amended its complaint on January 15, 2013, to include a sixth count, alleging that the defendant filed a fraudulent claim for workers' compensation benefits as defined in General Statutes § 31-290c. Given that the jury returned a verdict in favor of the defendant on this count and that this count is unrelated to the agreement, the defendant has not challenged it on appeal.

[5] The defendant also filed a counterclaim, alleging that the plaintiff instituted the present action against him in retaliation for the exercise of his rights under the act. The trial court subsequently denied the plaintiff's motion to dismiss that counterclaim on the basis of absolute immunity. The plaintiff filed an interlocutory appeal, and, in *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 625–26, 79 A.3d 60 (2013), this court upheld the trial court's denial of

The matter was tried to a jury, and, after the close of the plaintiff's evidence, the defendant moved for a directed verdict. The trial court reserved decision on that motion. Both parties filed preliminary requests to charge the jury, which were later supplemented. See part III of this opinion. Thereafter, the defendant took exception to the trial court's jury charge, claiming various errors in the charge given as well as the trial court's failure to instruct the jury in accordance with the defendant's request to charge.

On February 26, 2016, the jury returned a verdict in favor of the plaintiff on the claim of unjust enrichment, awarding $70,228.51 in damages, and in favor of the defendant on the remaining counts of the complaint. Thereafter, on March 7, 2016, the defendant filed a motion for judgment notwithstanding the verdict and a motion to set aside the verdict as to unjust enrichment. The trial court denied the defendant's motions in a memorandum of decision dated April 22, 2016, and rendered judgment in accordance with the jury's verdict. The trial court also awarded the plaintiff interest in accordance with a previous offer of compromise in the amount of $24,689.65 and attorney's fees of $350. This appeal followed. See footnote 1 of this opinion. Additional relevant facts will be set forth as necessary.

On appeal, the defendant contends that (1) the plaintiff's unjust enrichment claim is barred by collateral estoppel on the basis of the proceedings underlying this court's decision in *Leonetti* v. *MacDermid, Inc.*, supra,

the motion to dismiss, concluding that, "when an employer's interest in unfettered access to the courts is weighed against an employee's interest in exercising his rights under the act without fear of facing a baseless retaliatory civil action, the employee's interest prevails." In the proceedings that followed, the trial court rendered summary judgment in favor of the plaintiff on the defendant's counterclaim, concluding that it was premature. See *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 178, 118 A.3d 158 (2015) (upholding trial court's award of summary judgment on defendant's counterclaim). This counterclaim is not at issue in the present appeal.

310 Conn. 195, (2) the plaintiff's recovery is precluded by §§ 31-290 and 31-296, the terms of the agreement, and public policy, (3) the trial court's jury instructions were improper, and (4) the trial court improperly excluded certain evidence. We address each of these claims in turn.

I

We first address the question of whether the plaintiff's unjust enrichment claim is barred by the doctrine of collateral estoppel.[6] The defendant argues that the material facts underlying *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 195, are the same as those at issue in the present case. Specifically, the defendant contends that it has already been finally determined that the agreement's workers' compensation release, upon which, the defendant argues, the plaintiff's claim is based, is unenforceable, and, therefore, his agreement to release his claim was not binding on him and cannot legally constitute a pretense or a promise. As such, the defendant further contends that *Leonetti* served as a final judicial determination that the agreement was neither enforceable nor effective with respect to the release of the defendant's workers' compensation claim. The defendant argues, therefore, that the princi-

[6] Insofar as the defendant also argues that the plaintiff's unjust enrichment claim is barred by the doctrine of res judicata, we conclude that argument is inadequately briefed. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . *Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned.*" (Emphasis added; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008). Although the defendant claims that the plaintiff's recovery for unjust enrichment is "precluded pursuant to the doctrines of collateral estoppel and/or res judicata," the defendant provides no analysis of res judicata, instead analyzing only the issue of collateral estoppel.

ples of collateral estoppel barred the plaintiff from relitigating that same issue in the present case.

In response, the plaintiff argues, inter alia, that the defendant's collateral estoppel claim is meritless because he fails to identify any element of the plaintiff's unjust enrichment claim that was actually litigated and previously decided.[7] The plaintiff also argues that the defendant's claim "stem[s] from the false premise that [the plaintiff's] unjust enrichment claim is an attempt to enforce the unenforceable workers' compensation release." We agree with the plaintiff and conclude that the doctrine of collateral estoppel does not bar the plaintiff's recovery for unjust enrichment.

We begin by setting forth the applicable standard of review. The defendant's claim requires us to determine whether the doctrine of collateral estoppel precludes

[7] The plaintiff also argues that an interlocutory appeal previously taken by the defendant bars this appeal on the issue of collateral estoppel. On April 21, 2014, the defendant filed an interlocutory appeal from the trial court's denial of his motion for summary judgment, which was based on a collateral estoppel argument. The plaintiff moved to dismiss the appeal asserting, inter alia, that the Appellate Court lacked subject matter jurisdiction because no final judgment had been rendered. The Appellate Court granted the plaintiff's motion to dismiss the defendant's appeal for lack of subject matter jurisdiction. Accordingly, the dismissal of that interlocutory appeal cannot serve as a bar to the present appeal because the Appellate Court did not render a final judgment on the merits of the defendant's collateral estoppel argument. Cf. *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 351, 63 A.3d 940 (2013).

Additionally, the plaintiff argues that the defendant failed to adequately preserve his collateral estoppel defense at trial because the defendant's directed verdict and postverdict motions did not "mention 'collateral estoppel' at all." Although the defendant did not use the phrase "collateral estoppel" in his motions, the record reflects that he did assert the controlling effect of *Leonetti* in his motion for a directed verdict, his supplemental request to charge, and his posttrial motions. Thus, the defendant provided the trial court and the plaintiff with the basis of his collateral estoppel defense with sufficient clarity to put them on reasonable notice of this defense. Given that the "sine qua non of preservation is fair notice to the trial court," we conclude that the defendant adequately preserved this defense. *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

the plaintiff's unjust enrichment claim. This presents a question of law over which our review is plenary. *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 345, 15 A.3d 601 (2011).

The fundamental principles underlying the doctrine of collateral estoppel are well established. "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lyon* v. *Jones*, 291 Conn. 384, 406, 968 A.2d 416 (2009). "Before collateral estoppel applies [however] there must be an *identity of issues* between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be *identical* to those considered in the prior proceeding." (Emphasis in original; internal quotation marks omitted.) *Corcoran* v. *Dept. of Social Services*, 271 Conn. 679, 689, 859 A.2d 533 (2004). In other words, "collateral estoppel has

no application in the absence of an identical issue." *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 261, 773 A.2d 300 (2001). Further, "an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." *Wiacek Farms, LLC* v. *Shelton*, 132 Conn. App. 163, 172, 30 A.3d 27 (2011), cert. denied, 303 Conn. 918, 34 A.3d 394 (2012); see also *Corcoran* v. *Dept. of Social Services*, supra, 691 (acknowledging that there was overlap of issues but declining to apply collateral estoppel because issues were not identical).

We conclude that there is not a sufficient identity of issues between the present case and *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 195, to establish that the plaintiff's recovery is barred by collateral estoppel. A successful claim of unjust enrichment requires proof that (1) the defendant received a benefit, (2) the defendant did not perform in exchange for that benefit, and (3) the failure to perform operated to the detriment of the plaintiff. *Gagne* v. *Vaccaro*, 255 Conn. 390, 409, 766 A.2d 416 (2001). These issues were not considered in *Leonetti*. In *Leonetti*, this court identified the principal issue as "whether the [board] properly affirmed the commissioner's refusal to approve as a valid 'stipulation' [the agreement] between [the plaintiff] and [the defendant]." *Leonetti* v. *MacDermid, Inc.*, supra, 198. We concluded that, under the act, the agreement's release of the defendant's workers' compensation claim was unenforceable "unless and until the commissioner approved the agreement." Id., 207. In *Leonetti*, we noted that the commission's subject matter jurisdiction was limited to whether to approve the agreement as a release of the defendant's workers' compensation claim; as such, we explained that "[t]he enforceability of the remainder of the agreement is not a question for the workers' compensation forum . . . ."[8] Id., 221.

[8] We also note that no preclusive effect can attach when the prior tribunal lacked jurisdiction to consider the relevant issues. See *Bender* v. *Bender*,

Thus, we concluded that any consideration of the defendant's "allegedly deceitful" conduct in entering into the agreement was properly left to another forum. Id., 215–16. Specifically, we explained that, "once the commissioner determined that the $70,228.51 was not paid to the [defendant] in exchange for his release of his workers' compensation claim, the actions engaged in by the [defendant] warranted no further consideration in the workers' compensation forum." Id., 220. Importantly, we noted that the plaintiff "*retains the right to seek whatever civil recourses it deems appropriate with respect to the remainder of the agreement, a matter about which we express no opinion.*" (Emphasis added.) Id., 221. The plaintiff now seeks to have this "deceitful" conduct adjudicated in the context of the present unjust enrichment action, an issue that cannot be deemed barred by collateral estoppel given that *Leonetti* expressly did not address that issue.

The defendant, however, asserts that the plaintiff's claim of unjust enrichment is predicated on the defendant's "alleged[ly] deceptive conduct" and "[t]he only deceit that the [p]laintiff alleged was [the] [d]efendant's misrepresentation in the [a]greement that he would release his workers' compensation claim." We disagree. The plaintiff's claims do not depend on the enforceability of the release of workers' compensation claims contained in the agreement. It is undisputed that the defendant was allowed to pursue his workers' compensation claim and that the payment of $70,228.51 was not a workers' compensation benefit. Id., 203. Rather, the plaintiff's unjust enrichment claim is based on the parties' actions as they relate to the remainder of the

292 Conn. 696, 716–17, 975 A.2d 636 (2009). As such, given that *Leonetti* expressly states that the commission's subject matter jurisdiction was limited to determining the enforceability of the workers' compensation release, that claim cannot have collateral estoppel effect on the plaintiff's recovery for unjust enrichment.

agreement. Specifically, the plaintiff points to several instances of the defendant's conduct, apart from the unenforceable release, that form the basis of its claim. For example, the plaintiff notes that the defendant acted contrary to the purpose of the agreement, which was "to make the proposed transition as amiable and trouble-free as possible . . . ." The plaintiff also notes that the defendant breached article IV (d) of the agreement, which provided that he had received a "reasonable period of time" to review the agreement prior to signing it, by arguing to the contrary before the commission. Most importantly, the plaintiff contends that the defendant breached article III of the agreement that provided that the defendant understood that "the payments . . . are all that [the defendant] is entitled to receive from [the plaintiff]. . . . [The defendant] agrees that the payments . . . are *more* than [the plaintiff] is required to pay under its normal policies, procedures and plans."[9] (Emphasis altered.) Accordingly, the prior proceedings in *Leonetti* did not resolve identical issues, and, as such, the plaintiff's recovery under its unjust enrichment claim is not barred by the doctrine of collateral estoppel.

II

We next turn to the defendant's claims that the plaintiff's recovery is barred by §§ 31-290 and 31-296, by the terms of the agreement, and by public policy and that, as such, the plaintiff cannot prevail on its unjust enrichment claim as a matter of law.

The record reveals the following additional facts and procedural history that are relevant to our resolution of these claims. On February 18, 2016, after the close

[9] As the trial court noted, "[t]he jury reasonably could have concluded that [the defendant] was unjustly enriched [because, in the absence of] the agreement, [the plaintiff] had no obligation to pay any severance benefits, and [the defendant] had no right to receive them."

of the plaintiff's evidence, the defendant filed a motion seeking a directed verdict. With respect to the plaintiff's unjust enrichment claim, this motion centered on the fact that the defendant had "received no consideration in exchange for the workers' compensation release." The defendant referenced his supplemental request to charge number forty-two, which stated that, "[b]ecause [the plaintiff] did not pay [the defendant] any consideration . . . in exchange for releasing his workers' compensation claim, the workers' compensation release . . . failed to comply with the requirements of Connecticut law . . . ." The trial court reserved decision on that motion. Thereafter, on March 7, 2016, the defendant filed a motion for judgment notwithstanding the verdict and a motion to set aside the verdict as to the claim of unjust enrichment. Both of those motions asserted that the plaintiff's recovery for unjust enrichment "would violate the public policy embodied in [the act], including but not limited to the provisions of [§§ 31-290 and 31-296]." The trial court denied the defendant's motions on April 22, 2016.

On appeal, the defendant claims that § 31-296 provides that a voluntary agreement between an employer and an injured employee must be reviewed by the commissioner to ascertain whether it conforms with the provisions of the act. Accordingly, the defendant claims that, because § 31-290 prohibits contracts from relieving employers of "any obligation created by [the act]," the plaintiff is improperly attempting to circumvent the approval requirement of § 31-296 by "couching its claim as one based upon unjust enrichment/implied contract . . . ." The defendant also argues that article V (b) of the agreement provides that, if the defendant's release of his workers' compensation claim was found to be invalid, the remainder of the agreement would still be enforced. According to the defendant, this, in turn, would bar the plaintiff from recovering under a theory

of unjust enrichment, or a contract implied in law, because an express contract between the parties forecloses the possibility of recovery under an implied-in-law contract. Finally, the defendant claims that the agreement violates public policy and is, therefore, unenforceable.[10] In response, the plaintiff argues, inter alia, that the defendant did not adequately preserve these claims. We agree with the plaintiff and conclude that the defendant failed to adequately preserve these claims in his motion for a directed verdict.

Whether the evidence presented by the plaintiff is sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary. *Curran* v. *Kroll*, 303 Conn. 845, 855, 37 A.3d 700 (2012). "Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny a defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017); see also *Gagne* v. *Vaccaro*, supra, 255 Conn. 400 (same standard applies to motions for judgment notwithstanding verdict).

A motion for a directed verdict serves to "adequately [alert the opposing party] and the trial court to the

[10] Specifically, the defendant contends that, in "Connecticut, there are strong public policy reasons for the oversight of releases by employees of workers' compensation claims." Thus, the defendant claims that, because the plaintiff failed to obtain approval of his workers' compensation claim release, the plaintiff cannot recover under a theory of unjust enrichment as a matter of law. Accordingly, the defendant asserts that the "appropriate remedy is the rendering of judgment for the defendant, notwithstanding the verdict for the plaintiff."

[relevant] legal issue[s] . . . .'' *Salaman* v. *Waterbury*, 246 Conn. 298, 309, 717 A.2d 161 (1998). Specifically, ''[a] motion for a directed verdict is a prerequisite to the filing of a motion to set aside the verdict. . . . [T]o permit the appellant first to raise posttrial an issue that arose during the course of the trial would circumvent the policy underlying the requirement of timely preservation of issues.'' (Citations omitted.) *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 49, 717 A.2d 77 (1998). ''[A] motion for judgment notwithstanding the verdict is not a new motion, but the renewal of a motion for a directed verdict.'' (Internal quotation marks omitted.) *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014). Thus, such postverdict motions may not be predicated on a ground not previously raised in a motion for a directed verdict. *Salaman* v. *Waterbury*, supra, 309; see also Practice Book § 16-37 (''a party who has moved for a directed verdict may move to have the verdict and any judgment rendered thereon set aside and have judgment rendered *in accordance with his or her motion for a directed verdict*'' [emphasis added]).

In the present case, the defendant's motion for directed verdict, as to the unjust enrichment claim, was based solely on the ground that the defendant ''received no consideration in exchange for the [w]orkers' [c]ompensation release.'' Although the defendant's motion for a directed verdict referenced his supplemental request to charge forty-two, which in turn mentions the requirements of Connecticut law *generally*, there is no mention of § 31-290, § 31-296, article V (b) of the agreement, or public policy. Moreover, the defendant also made no mention whatsoever of article V (b) of the agreement in his postverdict motions. The defendant did, however, assert that the plaintiff's recovery ''would violate the public policy embedded in [§§ 31-290 and 31-296]'' in his motion for judgment notwith-

standing the verdict and motion to set aside the verdict. The defendant's attempt to preserve these statutory and public policy arguments by including them in his postverdict motions is unsuccessful because such motions may not be predicated on a ground not previously raised in a motion for a directed verdict.[11] See *Salaman* v. *Waterbury*, supra, 246 Conn. 309. Thus, the defendant did not timely alert the plaintiff and the trial court to his public policy and statutory arguments and never alerted the trial court to his argument regarding article V (b) of the agreement. Accordingly, we conclude that defendant did not adequately preserve these claims for appeal.[12]

III

We next address the defendant's challenges to the trial court's jury instructions. The record reveals the following additional relevant facts and procedural his-

[11] To the extent that the defendant raises additional challenges to the trial court's denial of his postverdict motions, we conclude that any such argument is inadequately briefed. The defendant's brief claims, on a single page, that the trial court "erred in denying the defendant's postverdict motions" and simply incorporates arguments he made throughout the rest of his brief with no analysis specific to his postverdict motions. See *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." [Internal quotation marks omitted.]).

[12] We also note that the defendant's contention that the plaintiff's recovery for unjust enrichment violates §§ 31-290 and 31-296 and public policy is grounded on the incorrect presumption that the plaintiff's unjust enrichment claim is based solely on the unenforceable workers' compensation release. As discussed previously in this opinion, it is undisputed that the $70,228.51 payment was not a workers' compensation benefit; rather, it was a voluntary severance payment. Moreover, the defendant received full workers' compensation benefits. Thus, the plaintiff's recovery of the $70,228.51 severance payment does not affect the defendant's workers' compensation benefits and did not relieve the plaintiff of its obligations under the act. Accordingly, restitution in this case does not defeat the purpose of the act and, as such, does not violate public policy.

tory. The defendant filed a preliminary request to charge on November 6, 2015. Request thirty-six in that document sought an instruction relating to the provisions of §§ 31-290 and 31-296. Thereafter, on February 16, 2016, the defendant filed a supplemental request to charge. Request forty-four in that document pertained to this court's holding in *Leonetti*. Specifically, it sought the following instruction: "In considering the claims raised by [the plaintiff] concerning its severance agreement, [the plaintiff] is free to seek recourse with respect to the provisions contained in its agreement, other than the workers' compensation release. In other words, you may consider [the plaintiff's] claims of fraud, theft, conversion and unjust enrichment only as they pertain to the remainder of the severance agreement." The trial court declined to provide the jury with those specific instructions.

On appeal, the defendant contends that the trial court improperly failed to instruct the jury in accordance with requests forty-four and thirty-six and that the court's unjust enrichment charge was not proper. Specifically, the defendant claims that, in refusing to charge the jury in accordance with request forty-four, the plaintiff was able to "pursue its claim of unjust enrichment based on the very clause that had previously been judged unenforceable under the act." With respect to request thirty-six, the defendant claims that, in failing to charge the jury on the provisions of §§ 31-290 and 31-296, the trial court "permitted the jury to rely upon the unenforceable promise contained in the [a]greement in order to find the defendant liable in derogation of the public policy" of the act. The defendant also contends that the trial court's instructions on unjust enrichment improperly permitted the jury to find in favor of the plaintiff in the absence of proof that any of the defendant's actions or omissions caused the plaintiff injury.

In response, the plaintiff argues, inter alia, that the defendant failed to adequately brief the harmfulness of the alleged instructional errors. The plaintiff further argues that the trial court adequately instructed the jury on the legal principles of *Leonetti* and the provisions of §§ 31-290 and 31-296, and, as such, was under no obligation to charge the jury in the specific manner requested by the defendant. With respect to the trial court's instruction on unjust enrichment, the plaintiff argues, inter alia, that the defendant's claim is barred by the general verdict rule. We agree with the plaintiff and conclude that, with respect to requests forty-four and thirty-six, the defendant failed to adequately brief the harmfulness of the alleged instructional errors. We also conclude that the defendant's argument with respect to the trial court's unjust enrichment instructions is barred by the general verdict rule.

A

Requests Forty-Four and Thirty-Six

We begin our analysis of the defendant's claims with respect to requests forty-four and thirty-six by noting that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008). Moreover, without adequate briefing on the harmfulness of an alleged error, "the defendant is not entitled to review of [the] claim on the merits." *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn.

811, 829, 95 A.3d 1063 (2014). Specifically, with respect to jury instructions, we have explained that "[i]t is axiomatic . . . that not every error is harmful. . . . [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Citation omitted; internal quotation marks omitted.) *Scanlon* v. *Connecticut Light & Power Co.*, 258 Conn. 436, 448, 782 A.2d 87 (2001).

As the party challenging the jury instructions, the defendant was required to prove that the instructions likely affected the verdict. With respect to request forty-four, the defendant's harm analysis consists of only one sentence in which he claims that, had the trial court given his requested instruction, he "would have been entitled to judgment as a matter of law on the [f]ourth [c]ount of the amended complaint . . . ." As to request thirty-six, the defendant's harm analysis is similarly brief and asserts that the trial court's charge permitted the plaintiff to recover "in derogation of the protections afforded by the [a]ct" and misled the jury and caused injustice to him. Thus, the defendant's harm analyses consist of only cursory statements. In the absence of additional detail regarding the question of harm, we conclude that these claims of instructional error were inadequately briefed.[13]

[13] While we are not required to reach the merits of the defendant's argument with respect to requests forty-four and thirty-six, we note that the substance of the defendant's arguments are unpersuasive because, contrary to the defendant's contentions, the trial court adequately instructed the jury regarding this court's holding in *Leonetti* and the provisions of §§ 31-290 and 31-296. "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the

B

Unjust Enrichment Jury Instruction

Turning to the defendant's claim that the trial court improperly instructed the jury on the plaintiff's unjust enrichment cause of action, we note that "[u]nder the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party." (Internal quotation marks omitted.) *Tetreault* v. *Eslick*, 271 Conn. 466, 471, 857 A.2d 888 (2004). As such, the general verdict rule precludes an appeal claiming instructional error when the jury could have decided the case on a ground not implicated by the challenged instruction. See *Kalams* v. *Giacchetto*, 268 Conn. 244, 251–52, 842 A.2d 1100 (2004) (declining to consider claim of instructional error under general verdict rule); see also *Dowling* v. *Finley Associates, Inc.*, 248 Conn. 364, 371, 727 A.2d 1245 (1999) (noting that "if any ground for the verdict is proper, the verdict must stand" and that "only if every ground is improper does the verdict fall" [internal quotation marks omitted]). The purpose of the rule is based "on the policy of the conservation of judicial resources, at both the appellate and trial levels. On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from

issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . We do not critically dissect a jury instruction." (Citation omitted; internal quotation marks omitted.) *Ancheff* v. *Hartford Hospital*, 260 Conn. 785, 811, 799 A.2d 1067 (2002). Additionally, while "[a] request to charge [that] is relevant to the issues of [a] case and [that] is an accurate statement of the law must be given . . . [i]nstructions to the jury need not be in the precise language of a request." (Citation omitted; internal quotation marks omitted.) *Scanlon* v. *Connecticut Light & Power Co.*, supra, 258 Conn. 445–46. Thus, the trial court was under no obligation to fashion its own charge using the specific language contained in requests forty-four and thirty-six.

the actual source of the jury verdict that is under appellate review. . . . In the trial court, the rule relieves the judicial system from the necessity of affording a second trial if the result of the first trial potentially did not depend upon the trial errors claimed by the appellant." (Internal quotation marks omitted.) *Gajewski* v. *Pavelo*, 229 Conn. 829, 836, 643 A.2d 1276 (1994).

"This court has held that the general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, supra, 268 Conn. 255.

In the present case, the defendant claims that the following unjust enrichment instruction by the trial court was improper: "When considering [the defendant's promise to release his workers' compensation claim] I instruct you, as a matter of law, that a promise includes within it a promise to do all that is necessary to carry the promise into effect." The third general verdict situation—separate legal theories of recovery pleaded in one count—is implicated in the present case, barring review of this claim. See *Kalams* v. *Giacchetto*, supra, 268 Conn. 255. The plaintiff's unjust enrichment claim not only relied on the defendant's intentions not to release his workers' compensation claim and to do all that was necessary to carry that into effect, but also on other misrepresentations contained in the agreement, such as the statements indicating the defendant believed that he had sufficient time to review the agreement and that $70,228.51 was more than he was

entitled to receive.[14] See *Brown* v. *Bridgeport Police Dept.*, 155 Conn. App. 61, 70, 107 A.3d 1013 (2015) (third situation was implicated because pleading "set forth distinct legal theories on which the jury could find [that] use of deadly force was statutorily authorized"); *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 782, 720 A.2d 242 (1998) (given that plaintiff had several theories of recovery supporting one count, case fell into third situation); cf. *Staudinger* v. *Barrett*, 208 Conn. 94, 99–100, 544 A.2d 164 (1988) (general verdict rule applied when "defendants' denial of negligence and their allegations of contributory negligence constitute[d] two discrete defenses, either of which could have supported the jury's general verdict"). The defendant did not request jury interrogatories that would properly establish the ground on which the jury made its decision on the unjust enrichment count. As such, the defendant's claim of instructional error as to unjust enrichment is unreviewable under the general verdict rule.

IV

Finally, we address the defendant's evidentiary claims. The following additional facts are relevant to our resolution of these claims. In accordance with the court's trial management orders, the plaintiff moved to exclude, inter alia, all evidence and argument showing that the commissioner had imposed a $500 fine on the plaintiff as a result of its general counsel's refusal to attend a workers' compensation hearing, including exhibit I, which is the January 8, 2010 order from the commission imposing that fine. The defendant objected

[14] The defendant similarly claims that the trial court improperly instructed the jury that it should not consider whether the defendant's promises were unenforceable and that, "[because] the [commission] did not approve the [agreement], you may find that [the defendant] would be unjustly enriched by retaining the benefits of that agreement." These claims are also barred by the general verdict rule for the same reason.

to that motion and also opposed the plaintiff's objections to the introduction of defendant's exhibits C, D, and F through L, which were based on similar legal arguments.[15] The plaintiff also sought to exclude exhibit Z, which was an April 5, 2010 letter from the defendant's attorney. The defendant opposed that motion. After oral argument, the trial court issued a ruling excluding exhibit I and ruling that it would consider other evidentiary issues briefed in the motion during trial. The trial court ultimately excluded defendant's exhibits G, H, I, J, Z, and JJJ[16] on the basis of hearsay, the danger of unfair prejudice substantially outweighing probative value, and confusion of the issues.

On appeal, the defendant claims that the trial court improperly excluded his exhibits G, H, I, J, Z, and JJJ. The defendant contends that these exhibits revealed relevant communications between the parties and the state of mind of the defendant. Moreover, the defendant contends that, contrary to the plaintiff's objection at trial, exhibits G, H, I, J, Z, and JJJ did not constitute hearsay. Specifically, the defendant contends that exhibits G, J, Z, and JJJ did not constitute hearsay because they were not offered for the truth of the mat-

[15] Exhibits C, F, and G are various letters from the defendant's attorney to the plaintiff's attorney regarding the workers' compensation release contained in the agreement. Exhibit D is a December 22, 2009 letter from the defendant's attorney to the plaintiff's attorney containing a copy of a notice for an informal hearing before the commission on January 8, 2010. Exhibit H is an affidavit from the attorney that represented the plaintiff before the commission in support of its motion to quash and motion for a protective order. Exhibit J is a January 19, 2010 letter from the plaintiff's former attorney advising the commission that he no longer represented the plaintiff. Exhibit K is a copy of a notification of appearance dated January 27, 2010. Exhibit L is copy of a notice for an informal hearing before the commission on March 1, 2010.

[16] Exhibit JJJ is a version of exhibit G, a letter from the defendant's attorney to the plaintiff's attorney, created by the defense during trial. The trial court excluded it on the same grounds as exhibit G—namely, hearsay, its probative value was substantially outweighed by the danger of unfair prejudice, and confusion of the issues.

ters asserted. In response, the plaintiff argues, inter alia, that the defendant's arguments with respect to exhibits G, H, I, J, and JJJ, are unreviewable because the defendant does not address all of the trial court's bases for excluding these exhibits. The plaintiff also argues that the defendant failed to adequately brief the harmfulness of the trial court's evidentiary rulings, and, as such, the defendant's claim with respect to exhibit Z may not be considered. We agree with the plaintiff, and conclude that, because the defendant did not challenge all of the bases under which the trial court excluded exhibits G, H, I, J, and JJJ, his claims on appeal related to those exhibits are moot. With respect to exhibit Z, we further conclude that the defendant failed to adequately brief the harmfulness of the evidentiary ruling.

A

Exhibits G, H, I, J, and JJJ

We begin our analysis of the defendant's claims with respect to exhibits G, H, I, J, and JJJ by noting that "[m]ootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *Lyon* v. *Jones*, supra, 291 Conn. 392. "The fundamental principles underpinning the mootness doctrine are well settled. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Citation omitted; internal quotation

marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526, 153 A.3d 647 (2017). "[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from *the determination of which no practical relief can follow*. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Lyon* v. *Jones*, supra, 394.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, supra, 324 Conn. 526–27; see also *Lyon* v. *Jones*, supra, 291 Conn. 395 ("even if we were to agree with the plaintiff on the issue that she *does* raise with respect to her . . . claims, we still would not be able to provide her any relief in light of the binding adverse finding with respect to those claims" [emphasis in original]).

In the present case, the trial court excluded exhibits G, H, J, and JJJ as both hearsay and because their probative value was substantially outweighed by the danger of unfair prejudice. The trial court excluded exhibit I because its probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. On appeal, the defendant challenges the trial court's exclusion of these exhibits only on the limited basis of hearsay. Because there are independent bases for the trial court's exclusion of the evidence that the defendant has not challenged in the present appeal,

even if we were to hold that the trial court improperly excluded exhibits G, H, I, J, and JJJ on the basis of hearsay, we could grant no practical relief to the defendant. Accordingly, we conclude that the defendant's evidentiary claims pertaining to these exhibits are moot and that, therefore, this court lacks subject matter jurisdiction to consider those claims.[17]

B

Exhibit Z

Turing to the defendant's claim with respect to exhibit Z, we set forth the applicable standard of review. "Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence . . . and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 423, 121 A.3d 697 (2015). Moreover, "evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 489, 958 A.2d 1195 (2008).

"It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing

[17] We also note that, during oral argument before this court, the defendant appears to have conceded this point by acknowledging that he failed to challenge all of the bases on which the trial court excluded these exhibits. Specifically, in response to the assertion that there were alternative grounds for the exclusion of these exhibits, the defendant stated: "I would concede, Your Honor, that we briefed the question of admissibility on the basis of hearsay . . . . We'll continue to rely on the brief."

that there has been an erroneous ruling *which was probably harmful to him*." (Emphasis added; internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 527, 864 A.2d 847 (2005). Thus, "[w]e do not reach the merits of [a] claim [where] the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling." *State* v. *Baker*, 168 Conn. App. 19, 35, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016); see also *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 829 (without adequate briefing of harmfulness of error, "the defendant is not entitled to review of [the] claim on the merits").

The only mention of the harmfulness of this evidentiary ruling in the defendant's brief consists of only broad statements and a conclusory assertion that the alleged errors "deprived [the] defendant of his opportunity to properly and fairly present his case to the jury and misled the jury . . . ." Nowhere does the defendant's brief explain how the verdict was likely affected by the trial court's particular exclusion of exhibit Z. Accordingly, because we conclude that the defendant failed to adequately brief the harmfulness of the trial court's evidentiary ruling, he is not entitled to review of his claim with respect to exhibit Z on the merits.

The appeal is dismissed with respect to the defendant's claims regarding exhibits G, H, I, J, and JJJ; the judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.* ROBERT S.

The defendant's petition for certification to appeal from the Appellate Court, 179 Conn. App. 831 (AC 38667), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

James P. Sexton, assigned counsel, in support of the petition.

Rita M. Shair, senior assistant state's attorney, in opposition.

Decided May 2, 2018

VALLEY NATIONAL BANK *v.* PRIVATE TRANSERVE, LLC, ET AL.

The petition by the defendants John Tartaglia and Linda Tartaglia for certification to appeal from the Appellate Court, 179 Conn. App. 479 (AC 39542), is denied.

John Tartaglia, self-represented, and *Linda Tartaglia*, self-represented, in support of the petition.

Andrew M. McPherson, in opposition.

Decided May 2, 2018

JAMES M. STACKPOLE *v.* CITY OF STAMFORD ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 179 Conn. App. 908 (AC 39872), is denied.

McDONALD and ROBINSON, Js., did not participate in the consideration of or decision on this petition.

James D. Moran, Jr., in support of the petition.

Decided May 2, 2018

ANDREA MICEK-HOLT, EXECUTRIX (ESTATE OF EDWARD W. MICEK) *v.* MARY PAPAGEORGE ET AL.

MARY PAPAGEORGE *v.* ANDREA MICEK-HOLT ET AL.

The petition by Mary Papageorge, a defendant in the first case and the plaintiff in the second case, and George Papageorge, a defendant in the first case, for certification to appeal from the Appellate Court, 180 Conn. App. 540 (AC 39668), is denied.

Mathew Olkin, in support of the petition.

Beth A. Steele, in opposition.

Decided May 2, 2018

STATE OF CONNECTICUT *v.* EUGENE L. WALKER

The defendant's petition for certification to appeal from the Appellate Court, 180 Conn. App. 291 (AC 39797), is granted, limited to the following issue:

"Did the Appellate Court properly determine that the defendant's sixth amendment right to confrontation was not violated by testimony from a lab analyst regarding a known DNA profile generated from a swab processed by another analyst who did not testify at trial?"

KAHN, J., did not participate in the consideration of or decision on this petition.

Damian K. Gunningsmith and *John L. Cordani, Jr.*, in support of the petition.

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

Decided May 2, 2018

STATE OF CONNECTICUT *v.* QUAN SOYINI

The defendant's petition for certification to appeal from the Appellate Court, 180 Conn. App. 205 (AC 40059), is denied.

Tejas Bhatt, assistant public defender, in support of the petition.

Leonard C. Boyle, deputy chief state's attorney, in opposition.

Decided May 2, 2018

STATE OF CONNECTICUT *v.* WINFRED THOMAS

The defendant's petition for certification to appeal from the Appellate Court, 180 Conn. App. 901 (AC 40065), is denied.

Jodi Zills Gagne, assigned counsel, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided May 2, 2018

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CONNECTICUT APPELLATE REPORTS

Vol. 181

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TRACY M. THOMASI *v.* EDWARD J. THOMASI, SR.

(AC 39452)

(AC 39814)

Keller, Prescott and Bishop, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from certain postjudgment orders of the trial court regarding the division of the defendant's defined benefit pension plan. She claimed that the trial court erred in determining that the term "marital portion," as used in the parties' marital dissolution agreement regarding a division of the defendant's defined benefit pension plan, clearly and unambiguously provided for the coverture method to be utilized in calculating the marital portion. The defendant filed a separate appeal from the trial court's postjudgment orders denying his motion for modification of alimony and interpreting the dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the dissolution. *Held*:

1. The trial court incorrectly determined that the language of the dissolution agreement clearly and unambiguously provided for the coverture method, a fractional calculation, to be utilized to determine the marital portion: although the term marital portion was clear and unambiguous in the sense that the parties agreed to its general meaning, the term nevertheless contained a latent ambiguity under the specific circumstances of this case because the determination of that amount was not self-defining, nor was it defined anywhere else in the agreement, and it could be deduced by using more than one methodology, each of which yielded a significantly different outcome, and although it was not improper for the trial court to hear evidence from the attorney who drafted a domestic relations order as to her normal approach for determining the martial portion of a defined benefit plan when the particular methodology has not been specified to her, the court's focus on that testimony should have been on the attorney's knowledge of the parties' intent in employing the language at issue and whether the parties were aware of her usual practice when referring this matter to her, and the court should have permitted testimony from the parties as to their intentions in employing the language in question; accordingly, the court was legally incorrect in concluding that there was nothing ambiguous about the language used, especially given the attorney's testimony that there is more than one methodology employed to determine the martial portion of a defined benefit pension, and its order regarding the division of the defendant's defined benefit pension plan could not stand.

2. The trial court improperly denied the defendant's motion for a modification of alimony, which was premised on its conclusion that the defendant had caused his loss of employment through his own fault, thereby negating a finding of a substantial change in his financial condition necessary to reduce his alimony obligation; that court's factual conclusion was not supported by the record and was clearly erroneous, as there was insufficient evidence to show that the defendant was fired, rather than mutually separated or laid off, from his employment at a college, and the court's reliance on an unsigned employment separation agreement and a third party's revised complaint involving the defendant as evidence that the defendant caused his own termination of employment was incorrect.

3. The defendant could not prevail on his claim that the trial court erred in interpreting the parties' dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the marital dissolution: the agreement plainly ordered the defendant to immediately transfer one half of the marital portion of his pension plan as of the date of dissolution and did not state that the plaintiff would realize her entitlement only once a domestic relations order was put into place, and, thus, as of the date of the dissolution, the plaintiff was entitled, as her own property, to receive one half of the marital portion of the defendant's monthly pension benefits; nevertheless, the court should have adjusted the defendant's retroactive payments for any tax liability the defendant incurred for the portion of his pension that was intended for the plaintiff as her share of the marital portion, and, therefore, further proceedings were required to calculate the amount of the defendant's retroactive payment after adjusting for the taxes he paid for the plaintiff's one half of the marital portion.

Argued December 5, 2017—officially released May 15, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden and tried to the court, *Klatt*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Klatt*, *J.*, enforced the parties' domestic relations order, and the plaintiff appealed to this court; subsequently, the court, *Klatt*, *J.*, denied the plaintiff's motion for contempt; thereafter, the court, *Klatt*, *J.*, denied the defendant's motion to modify alimony, and the defendant appealed to this court; subsequently, the court, *Harmon*, *J.*, granted the plaintiff's motion for order. *Reversed in part*; *further proceedings*.

Timothy J. Fitzgerald, with whom was *Douglas T. Barall*, for the appellant in AC 39452 and appellee in AC 39814 (plaintiff).

Maria F. McKeon, for the appellee in AC 39452 and appellant in AC 39814 (defendant).

Opinion

BISHOP, J. These appeals arise from the dissolution of marriage between the plaintiff, Tracy M. Thomasi,[1] and the defendant, Edward J. Thomasi, Sr. In AC 39452, the plaintiff appeals from the postdissolution order of the trial court regarding the division of the defendant's defined benefit pension plan. In her appeal, the plaintiff argues that the court erred in determining that the term "marital portion," as used in the parties' marital dissolution agreement regarding a division of the defendant's defined benefit pension plan, clearly and unambiguously provided for the coverture method to be utilized in calculating the marital portion. We conclude that the term, under the limited circumstances of this case, contains a latent ambiguity, and, accordingly, reverse the judgment of the trial court.

In AC 39814, the defendant appeals from the trial court's postdissolution orders denying his motion for alimony modification and interpreting the dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the marital dissolution. On this claim, he makes four arguments that the court erred (1) by finding that he did not experience a substantial change in his financial circumstances justifying a downward modification in his alimony obligation; (2) by declining to consider the plaintiff's receipt of settlement proceeds from a personal injury lawsuit; (3) by improperly taking into consideration his receipt of a pension; and (4) by

[1] The plaintiff is now known as Tracy Andreoli.

determining that the dissolution agreement requires him to make pension payments to the plaintiff as of the date of the marital dissolution even though the qualified domestic relations order (QDRO) contemplated by their agreement was not then in place. We agree with the trial court that a fair reading of the agreement requires the defendant to begin making payments from his pension to the plaintiff as of the date of the dissolution. We do not believe, however, that the record supports the court's finding that the defendant's loss of employment was due to his own fault. Accordingly, we reverse in part, and affirm in part, the orders of the trial court.

The following facts pertain to both appeals. The defendant began working for the state of Connecticut in November, 1967, and, as a state employee, he participated in the Connecticut state employees retirement system, which features a defined benefit pension program.[2] The parties were married on April 5, 1991, by which time the defendant had accrued twenty-four years and four months of state service. The defendant retired from state employment on June 1, 2003, after thirty-seven years and six months of service. The marriage of the parties was dissolved on July 22, 2015. Thus, the parties were married for a total of approximately twenty-four years and three months. Although the defendant was employed by the state for a total of 426 months, the parties' marriage spanned 145 months within this period, or approximately 34 percent of the defendant's total period of employment with the state.

[2] Generally, a defined benefit pension plan is one in which the periodic benefit to be provided to an employee participant is stated, in plan documents, in terms of a formula based on the employee's earnings, length of employment service and the plan's vesting requirements. In contrast, a defined contribution plan is one which sets forth, in some specified manner, the amount of the employer's periodic contribution to an employee's retirement plan. In sum, one defines the benefit to be received; the other the contribution to be made.

As part of the parties' property settlement agreement, paragraph 9B of the dissolution agreement provided: "Husband shall immediately transfer one-half of the marital portion of [h]usband's [s]tate of Connecticut [p]ension [p]lan that is currently in pay status to [w]ife valued as of the date of dissolution and including cost of living over the payment period. This transfer shall be by a QDRO[3] that shall be drafted by Attorney Elizabeth McMahon, with the parties splitting Attorney McMahon's fees equally. The [c]ourt will retain jurisdiction over this entire [p]aragraph to effectuate the intent of the parties." (Footnote added.)

I

AC 39452

In this appeal, the parties do not dispute that the term "marital portion" refers to the amount of pension benefit earned during the course of the marriage, and agree that the plaintiff is entitled to one half of that

[3] A qualified domestic relations order, or QDRO, is "an order of the court assigning to an alternate payee, in compliance with the Internal Revenue Code, 26 U.S.C. § 414 (p), the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056 (d) (3), and General Statutes § 46b-81, a portion or all of the benefits payable to a participant in a retirement plan." *Kremenitzer* v. *Kremenitzer*, 81 Conn. App. 135, 136 n.1, 838 A.2d 1026 (2004). A QDRO "is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." (Internal quotation marks omitted.) *Richman* v. *Wallman*, 172 Conn. App. 616, 617 n.1, 161 A.3d 666 (2017).

We note, however, that the procedures set forth in the United States Code for a QDRO do not apply to a governmental pension plan, such as the Connecticut state employees retirement systems. See 29 U.S.C. § 1003 (b) (1). Accordingly, a "qualified domestic relations order" does not apply to the defendant's state government pension plan. Neither the parties nor the court has claimed any impropriety in the characterization of the QDRO in the dissolution agreement; accordingly, we only note the mischaracterization and will refer to the QDRO as a "domestic relations order" in this opinion. See *Bender* v. *Bender*, 258 Conn. 733, 738 n.3, 785 A.2d 197 (2001); accord *Krafick* v. *Krafick*, 234 Conn. 783, 786–87 n.4, 663 A.2d 365 (1995); *Hansen* v. *Hansen*, 80 Conn. App. 609, 612–13 n.2, 836 A.2d 1228 (2003).

amount. Thus, the term "marital portion" is not patently ambiguous.[4] The question remains, however, whether the term, as used in the parties' marital dissolution agreement, contains a latent ambiguity because there is more than one method for calculating the marital portion of a defined benefit pension.

The following additional facts and procedural history are relevant to the resolution of this appeal. Following the marital dissolution, Attorney McMahon sent a letter dated September 17, 2015, along with a drafted domestic relations order to both parties. In the letter, Attorney McMahon stated in relevant part: "Since the judgment does not specify how to determine the marital portion, I have used a coverture fraction . . . . If this approach is not acceptable to [either party], please let me know and then contact your attorneys for guidance." The September 17, 2015 domestic relations order prepared by Attorney McMahon was signed by the defendant, but not by the plaintiff. On October 26, 2015, Attorney McMahon recirculated a revised domestic relations order, dated September 26, 2015, which corrected a miscalculation in the coverture formula. Later, on December 2, 2015, Attorney McMahon sent a letter to the parties and their prior attorneys stating in relevant part: "The judgment does not specify how the marital portion is to be calculated, and there is more than one way to do so. My role is to craft an order that is consistent with the judgment; I do not advocate for either party. If the parties cannot reach an agreement on their own, they will have to return to court for clarification of the judgment." Pursuant to a request from the defendant's prior counsel, Attorney McMahon drafted a revised domestic relations order on January 11, 2016,

[4] "A patent ambiguity is evident on the face of the contract, from the language of the contract itself . . . ." (Footnote omitted.) 17A C.J.S., Contracts § 388 (2018).

that utilized the subtraction method to calculate the marital portion.

Following the marital dissolution and over a period of several months, the parties, through counsel, exchanged correspondence regarding their disagreement on how to calculate the marital portion of the defendant's pension in accordance with the terms of the marital dissolution agreement, and both parties filed several motions reflecting their disagreement. In conjunction with these exchanges, the plaintiff received a correspondence from the State of Connecticut Retirement Services Division dated December 9, 2014, which had been sent to the defendant.[5] This letter outlined the defendant's participation in the state employees retirement system. The correspondence indicates that as of April 5, 1991, the date of the parties' marriage, the defendant had accrued the right to receive $1833 as a monthly pension benefit upon the normal retirement age of sixty-five. The letter states, as well, that by the time the defendant retired on June 1, 2003, his monthly benefit had risen to $5227.49. As of the date of the parties' marital dissolution, his monthly benefit had risen to $6937.92 due to cost of living increases built into the pension plan. Neither the contents nor accuracy of this letter is disputed by the parties.

A hearing on the parties' motions was scheduled for May 23, 2016. At the hearing, and in response to arguments that there are different methods to calculate the "marital portion" of the defendant's pension benefits,

[5] We note that the letter states in relevant part: "Please be advised that [the state employees retirement system] is a governmental retirement plan and, as such, is exempt under United States Code, Title 29, Section 1003 from the federal requirements of the Employee Retirement Security Act (ERISA) as they pertain to a Qualified Domestic Relations Order. However, [the state employees retirement system] will divide a member's benefit in recognition of child or spousal support obligations when so ordered by a Connecticut court . . . ." See footnote 3 of this opinion.

the court stated the following: "[A]s far as the court is concerned, if Attorney McMahon, the person preparing the qualified domestic relations order says the word marital portion is ambiguous to her, [t]hen, I think you have an argument. The bottom line . . . you are going to have to have [Attorney McMahon] in here, to testify, that [the] term is ambiguous." The court further opined that it would not permit testimony from other individuals until it heard from Attorney McMahon.

Consequently, on July 7, 2016, the court heard testimony from Attorney McMahon. She stated that when she first reviewed the dissolution agreement, to her, "marital portion meant one thing. . . . I have seen other approaches in other cases. That's not how I do it. So I didn't see an ambiguity initially, but . . . when a discussion arose and I saw the parties were . . . taking different approaches, then I thought either approach could fit what the judgment [stated]." When the plaintiff's counsel asked Attorney McMahon "if marital portion, standing alone without any further formula or description, was ambiguous," she replied in the affirmative.

On cross-examination by the defendant's counsel, the following exchange occurred:

"Q. [W]hen you get no other instruction from the court or from the parties or you see the agreement as you did in this, do you . . . normally use the coverture method?

"A. I do.

"Q. Okay. The subtraction method, is that a method you ever use?

"A. Only if it's specified in the judgment."

On that same day, the court issued an order, stating: "The court heard evidence on the motions in limine

and finds the contract in the separation agreement is clear and unambiguous regarding [paragraph] 9B, 'marital portion.' The last sentence of the paragraph, the court determines means the enforcement of the signing of the [QDRO] by the parties. The other motions are moot. See transcript . . . for the elaboration of the court's ruling and findings."

The transcript of the July 7, 2016 hearing reveals that the court stated: "I see nothing ambiguous or hear nothing and determine nothing ambiguous about the language. It is the typical language that you see . . . in a situation such . . . as this. . . . [T]estimony from Attorney McMahon established just that, there is nothing ambiguous. The parties agreed to use Attorney McMahon, therefore, they agreed to use her method of calculation and she clearly testified as to what her method of calculation was. Moreover, [paragraph] 9C of the parties' agreement uses the same . . . term, marital portion, and there's no claim of ambiguity there."[6] Finding no ambiguity in the language of the agreement, the court concluded that the September 26, 2015 domestic relations order which employed the coverture method of determining the marital portion of a monthly pension benefit was the appropriate version to be enforced. This appeal followed.

We begin with our standard of review. "It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is to be regarded and construed as a contract. . . . Accordingly, our review of a trial court's interpretation of a

[6] Paragraph 9C of the parties' marital dissolution agreement concerns the division of the parties' retirement accounts. There, the parties agreed to equalize the marital portions of their retirement accounts valued as of the date of dissolution by a transfer of a sum certain from the defendant's defined contribution plan to the plaintiff. Because the amount to be transferred was specified, the use of the term "marital portions" in this paragraph is merely descriptive and not operational.

separation agreement is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 354–55, 999 A.2d 713 (2010).

"[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Watkins* v. *Watkins*, 152 Conn. App. 99, 104, 96 A.3d 1264 (2014). "A word is ambiguous when it is capable of being interpreted by reasonably well informed persons in either of two or more senses. . . . Ambiguous can be defined as unclear or uncertain, or that which is susceptible of more than one interpretation, or understood in more ways than one." (Internal

quotation marks omitted.) *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 269, 990 A.2d 1274 (2010).

As noted, the plaintiff asserts that she believed the parties intended to calculate the domestic relations order by utilizing the subtraction method. Attorney McMahon testified that determination of the marital portion by this method involves taking "the benefit earned as of the date of marriage and subtract[ing] it from the benefit earned as of the date of divorce. . . . [T]he difference would be what they call the marital portion." See generally E. Brandt, "Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where Are We?" 35 Fam. L.Q. 469, 476–81 (2001); M. Snyder, "Challenges in Valuing Pension Plans," 35 Fam. L.Q. 235, 249 (2001).

In her postjudgment motions, the plaintiff, using the subtraction method for determining the marital portion of the defendant's pension and the data provided by the State Retirement Services Division, determined that the defendant's pension benefit had increased by $5104.92 (benefit on date of marital dissolution less accrued benefit on date of marriage) and therefore, her marital portion is half that amount, or $2552.46. On the basis of these calculations and by application of the subtraction method, the plaintiff asserted that her share of the defendant's monthly pension benefit as of the date of the marital dissolution should be 36.7 percent of the defendant's total pension equaling $2552.46.

The defendant does not dispute the mathematical consequences of applying the subtraction method for determining the marital portion of a defined benefit pension plan. He disputes only the propriety of utilizing this approach. Thus, it is not disputed that the defendant's premarital monthly pension value was $1833 as of the date of the marriage and that his pension benefit

had risen to $6937.92 as of the date of the marital dissolution. Subtracting the lesser from the greater results in a marital portion of $5104.92, representing the increase in benefit accrued during the course of the marriage. One half of this amount is $2552.46 or 36.7 percent of the total monthly pension payment due to the defendant as of the date of the marital dissolution. As discussed earlier in this opinion, this calculation was reflected in Attorney McMahon's January 11, 2016 domestic relations order draft prepared at the behest of the defendant.[7]

In contrast, the defendant contends that the parties agreed to execute the September 26, 2015 domestic relations order initially drafted by Attorney McMahon, in which she employed the coverture method of determining the marital portion. There, the defendant indicates that Attorney McMahon used "the marital portion of the defendant's [s]tate of Connecticut [p]ension [p]lan calculated using the fraction where the numerator equals the number of months married during the years of employment by the defendant and the denominator equals the total years of credited service for the [defendant's] employment by the [s]tate of Connecticut." Attorney McMahon testified that the determination of the marital portion by this method involves: "[Taking] the years of benefits accrued during the marriage over the total years of benefits accrued as of the date of divorce and then multiply that times the benefit earned as of date of divorce and that would give you the marital portion."[8] Under the coverture fraction, as

[7] We note that the January 11, 2016 domestic relations order utilizing the subtraction method was requested by the defendant's prior counsel. Furthermore, evidence in the record shows that the defendant's prior counsel gave the calculations to Attorney McMahon via an e-mail correspondence on January 11, 2016.

[8] "The numerator of [the coverture] fraction is the number of months between the commencement of the employee-spouse's employment (or other date on which earning of the subject benefit was commenced) and the date of dissolution. The denominator of the fraction is the total number of months between the commencement of the accumulation of the benefit

calculated by Attorney McMahon and recited in her September 17, 2015 letter to the parties, the plaintiff's one half of the marital portion of the monthly pension payment would be $1180.83, or 17.02 percent of the defendant's total pension entitlement as of the date of marital dissolution.[9]

As noted, the different methods of calculation in this instance yield substantially different portions of the pension benefits to the plaintiff. The plaintiff argues that the court erred when it concluded that the language was clear and unambiguous because Attorney McMahon's preferred methodology for determining the marital portion of a pension is not set forth in paragraph 9B of the dissolution agreement. In short, the plaintiff asserts that the court's reference to factors outside of the language utilized in the agreement is a demonstration itself that the language is not clear and unambiguous and is "susceptible to more than one reasonable interpretation." From the record, and notwithstanding the court's conclusion, Attorney McMahon's testimony plainly supports this conclusion. Nevertheless, the defendant maintains that the court properly found that paragraph 9B of the dissolution agreement unambiguously provided for the domestic relations order to be

and the date on which the options first become exercisable, or the pension or other benefit becomes payable. The resulting portion of the total options granted represents the amount earned during the marriage." (Footnote omitted.) A. Rutkin, S. Oldham & K. Hogan, 7 Connecticut Practices Series: Family Law (3d Ed. 2010) § 29:6, p. 608.

For a general discussion on classification, valuation and distribution of pension benefits, see *Krafick* v. *Krafick*, 234 Conn. 783, 663 A.2d 365 (1995). See generally 24 Am. Jur. 2d, Divorce and Separation § 551 (2018) (alternative methods of valuing and distributing pension rights); 27C C.J.S., Divorce § 969 (2018) (valuation and allocation of pensions).

[9] Attorney McMahon divided 145 months (months of service from April 5, 1991 [date of marriage] to June 1, 2003 [retirement date]) by 426 months (months of service from November 27, 1967 [date of employment] to June 1, 2003). This resulted in a marital portion of 34.04 percent, of which one half is 17.02 percent.

drafted by Attorney McMahon using the coverture fraction on the basis of her testimony that this is the approach she routinely utilizes in drafting pension division orders.

"A latent ambiguity arises from extraneous or collateral facts which make the meaning of a written instrument uncertain although the language thereof be clear and unambiguous. The usual instance of a latent ambiguity is one in which a writing refers to a particular person or thing and is thus apparently clear on its face, but upon application to external objects is found to fit two or more of them equally." (Internal quotation marks omitted.) *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 782, 653 A.2d 122 (1995). That is precisely the circumstance the court faced in the case at hand. Here, the ambiguity of the term "marital portion" arises not from the language of the contract itself, but instead from the fact, gleaned from extraneous evidence, that there is more than one method for determining the marital portion of a defined benefit plan. The evidence adduced at the hearing on this issue demonstrates that computations utilizing the two methodologies result in significantly different outcomes in terms of the monthly payments to be received by the nonemployee spouse and, reciprocally, the amount of the monthly benefit to be retained by the employee spouse.

The court determined that the term "marital portion" was unambiguous, not on the basis of the language itself, but on the basis that Attorney McMahon, the expert whose services the parties agreed to effectuate their pension agreement, typically uses the coverture method. Although we conclude that the term "marital portion" is clear and unambiguous in the sense that the parties agree to its general meaning, the term, nevertheless, contains a latent ambiguity under the specific circumstances of this case.

On the basis of our review of the dissolution agreement, we conclude that the trial court incorrectly determined that the language in paragraph 9B is clear and unambiguous. The term "marital portion" of the defendant's pension contains a latent ambiguity because the determination of that amount is not self-defining and can be deduced by using more than one methodology, each of which yields a significantly different outcome. Also, the term "marital portion" is not elsewhere defined in the dissolution agreement. As noted, although Attorney McMahon expressed a preference for utilizing the coverture method for determining the marital portion of a pension, she, with equal clarity, also acknowledged the legitimacy of the use of the subtraction option for making such a determination.[10] Because the term "marital portion" can be reasonably susceptible to more than one method of calculation not specified in the parties' agreement, a latent ambiguity exists in the parties' agreement.

In its decision to rely on extrinsic evidence to resolve the parties' disagreement as to the import of the term "marital portion," the court's focus on Attorney McMahon's usual practice was misplaced. Rather, the task of the court in resolving the ambiguity was to discern the

[10] Although there are different methods in calculating a marital portion; see, e.g., E. Brandt, supra, 35 Fam. L.Q. 472–81; we note that "there is no set formula that a court must follow when dividing the parties' assets, including pension benefits." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 435, 175 A.3d 601 (2017). For a detailed discussion on the coverture fraction and comparison to the present value difference method (subtraction method), see 2 B. Turner, Equitable Distribution of Property (3d Ed. 2005) § 6.25, p. 149–63.

A search of other jurisdictions reveals that Washington appellate courts have debated the use of the coverture fraction and subtraction method. See generally *In re Marriage of Rockwell*, 141 Wn. App. 235, 253–54, 170 P.3d 572 (2007), review denied, 163 Wn. 2d 1055, 187 P.3d 752 (2008); *In re Chavez*, 80 Wn. App. 432, 436, 909 P.2d 314, review denied, 129 Wn. 2d 1016, 917 P.2d 576 (1996).

intent of the parties in employing the language at issue.[11] See *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 546 n.17, 791 A.2d 489 (2002) ("[E]xtrinsic evidence may be introduced to clarify the meaning of terms in an integrated contract. . . . Such evidence may not be used, however, once the terms are found to have a clear and unambiguous meaning . . . ." [Citation omitted; emphasis omitted.]). Although it was not inappropriate for the court to hear evidence from Attorney McMahon as to her normal approach for determining the marital portion of a defined benefit plan when the particular methodology has not been specified to her, the focus of this testimony should have been on Attorney McMahon's knowledge of the parties' intent in employing the language at hand and whether the parties were aware of her usual practice when referring this matter to her. The court should also have permitted testimony from the parties as to their intentions in employing the language in question.

And yet, notwithstanding the testimony from Attorney McMahon that there is more than one methodology employed to determine the marital portion of a defined benefit pension, the court concluded that there was "nothing ambiguous about the language" because the parties agreed to use Attorney McMahon. In reaching this conclusion, the court was legally incorrect.[12]

[11] In *Ranfone* v. *Ranfone*, 119 Conn. App. 341, 346, 987 A.2d 1088 (2010), this court affirmed the trial court's application of latent ambiguity to the interpretation of its original pension order in a marital dissolution action. "[L]atent ambiguities are those which appear only as the result of extrinsic or collateral evidence showing that a word, thought to have but one meaning, actually has two or more meanings. . . . Latent ambiguities [can] be shown and explained by pleading and parol proof." (Internal quotation marks omitted.) Id. See also *Kronholm* v. *Kronholm*, 16 Conn. App. 124, 131, 547 A.2d 61 (1988) ("[e]xtrinsic evidence is admissible to assist the court in resolving the question of intent where the terms of a contract are either latently or patently ambiguous").

[12] We leave to the trial court, on remand, the determination of whether the court, in conjunction with resolving the meaning of the term utilized for purpose of the pension division, must then reconsider all of its financial

Accordingly, the trial court's postjudgment order regarding the division of the defendant's defined benefit pension plan cannot stand.

II

AC 39814

As noted previously in this opinion, in AC 39814, the defendant claims that the court incorrectly denied his motion for alimony modification and interpreted the dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the marital dissolution. We review each of his claims in turn.

At the outset, we note the following additional pertinent facts and procedural history. In her March 18, 2016 motion for contempt, the plaintiff requested, due to the fact that the domestic relations order had not been completed, that the defendant be ordered to make retroactive payments for her portion of his monthly pension benefits effective as of July 22, 2015, the date of the marital dissolution judgment. The court conducted a

orders under the mosaic doctrine. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

"Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Citation omitted; internal quotations marks omitted.) Id.

hearing on September 27, 2016, in which the parties testified and provided argument on the issues of retroactive payments and attorney's fees in response to the plaintiff's motion. The court issued a memorandum of decision on October 6, 2016, in which it determined that the plaintiff's portion of the defendant's monthly pension benefits "are a property distribution and the amount to be calculated as owed to the plaintiff is to be calculated from the date of dissolution." The court declined to grant either parties' requests for attorney's fees. The court denied the defendant's subsequent motion to reconsider and/or reargue.

Additionally, on June 24, 2016, the defendant filed a motion to modify alimony alleging a substantial change in his circumstances due to a loss of employment. The defendant filed an amended motion to modify alimony on October 24, 2016, additionally alleging that the plaintiff had a significant increase in her income due to her receipt of a settlement stemming from a claim she had made in an unrelated civil litigation. Following a hearing on November 3, 2016, the court determined that because the defendant "was clearly not laid off" and that it was his "own fault that he's no longer employed," his attendant loss of earnings could not be considered in assessing whether he had experienced a substantial change in his financial circumstances. The court further articulated that it considered the defendant's receipt of monthly pension benefits as income. The court determined, as well, that the receipt by each party of certain settlement proceeds from civil litigation should not be considered in assessing whether either had experienced a substantial change in financial circumstances after their marital dissolution because it was "property distribution." Thus, the court denied the defendant's motion to modify alimony in an order dated November 3, 2016. This appeal followed.

A

We first address the court's denial of the defendant's motion to modify alimony. On appeal, the defendant claims that the court incorrectly determined that he caused his own loss of employment and therefore that factor could not be considered in assessing his quest for a reduction of his alimony obligation. The defendant claims, as well, that the court erred in declining to consider the plaintiff's receipt of lawsuit settlement proceeds in assessing whether she had experienced an upward change in her financial circumstances. Finally, the defendant asserts that the court should not have considered his receipt of pension benefits as income for purposes of assessing his motion for a modification of alimony. We conclude that the record does not support the court's conclusion that the defendant caused his own loss of employment through his own fault. Therefore, the court's order denying the defendant's motion for a modification of alimony premised on this conclusion cannot stand.

Our legal principles and standard of review governing the modification of an award of alimony are well established. "Our review of a trial court's granting or denial of a motion for modification of alimony is governed by the abuse of discretion standard. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have broad discretion in deciding motions for modification." (Internal quotation marks omitted.) *Spencer* v. *Spencer*, 177 Conn. App. 504, 526, 173 A.3d 1 (2017), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . 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." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 507–508, 4 A.3d 288 (2010).

Modification of alimony in this case is governed by General Statutes § 46b-86 (a),[13] and the party seeking the modification has the burden of proving a substantial change in circumstances of either party. *Spencer* v. *Spencer*, supra, 177 Conn. App. 526–27. "When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider

[13] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . . After the date of judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution. By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court. . . . If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82."

the motion and, on the basis of the . . . § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties. . . . Simply put, before the court may modify an alimony award pursuant to § 46b-86 [a], it must make a threshold finding of a substantial change in circumstances with respect to one of the parties. . . . A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Citation omitted; internal quotation marks omitted.) Id., 527.

"A conclusion that there has been a substantial change in financial circumstances justifying a modification of alimony based only on income is erroneous; rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award to determine if there has been substantial change." (Internal quotation marks omitted.) *Coury* v. *Coury*, 161 Conn. App. 271, 283, 128 A.3d 517 (2015). Lastly, "[t]o qualify as a substantial change in circumstances, a change or alleged inability to pay must be excusable and not brought about by the defendant's own fault." (Internal quotation marks omitted.) *Tittle* v. *Skipp-Tittle*, 161 Conn. App. 542, 551, 128 A.3d 590 (2015); see also *Sanchione* v. *Sanchione*, 173 Conn. 397, 407, 378 A.2d 522 (1977) ("'Inability to pay' does not automatically entitle a party to a decrease of an alimony order. It must be excusable and not brought about by the defendant's own fault. There is no way to determine simply from the affidavits and finding what factors the court considered . . . whether his inability to pay was a result of his own extravagance, neglect, misconduct or other unacceptable reason . . . .").

Accordingly, in order to demonstrate a substantial change in financial circumstances, a party seeking a

reduction of alimony based on a loss of income has the burden of proving not only the loss of earnings but that the inability to pay "must be excusable and not brought about by the defendant's own fault." (Internal quotation marks omitted.) *Tittle* v. *Skipp-Tittle*, supra, 161 Conn. App. 551. Here, the defendant testified that he was laid off from his position as director of facilities at Albertus Magnus College (college) on April 5, 2016, where he had been earning just over $75,000 per year, and that he has been unable to find employment since then. On cross-examination, the defendant acknowledged that a former coworker had brought a pending civil action against him and the college. As evidence of this claim, the plaintiff filed a copy of the revised complaint in that action. The plaintiff also filed a copy of a proposed separation agreement and letter from the college, dated April 5, 2016, addressed to the defendant. Although a representative of the college signed the separation agreement, the defendant did not. The letter states in relevant part: "This will confirm the discussion that we had today to the effect that your employment with [the college] is terminated as of the close of business today . . . . If you decline to execute the [separate agreement] . . . the [c]ollege's offer to enter into the [separation agreement] will automatically be rescinded as of the close of business on April 26, 2016." The defendant testified that he did not sign the agreement because he "wasn't sure [he] agreed with the severance."[14] Thereafter, the defendant received unemployment compensation for twenty-six weeks. The defendant testified that he has continued to seek employment since being terminated by the college but without success.

The defendant testified that he believes he lost his job because his position was being cut by the college.

[14] The defendant further clarified that he signed a different separation agreement, but the college "turned it down." That agreement was not produced as evidence in the course of these proceedings.

He further stated that the college did not object to his collection of unemployment, which he understood would have been unavailable to him had he been fired. In response to plaintiff's counsel's inquiries as to whether he thought he was at fault for the termination of his employment, the defendant asserted that he was not. The defendant also stated that there were no reprimands or criticisms against him in his personnel file at the college.

At the end of the hearing, the court calculated that the defendant received a total gross annual income of $92,560 based upon his social security and pension benefits. The court also stated: "And, quite frankly, I credit the evidence that shows that [the defendant] was clearly not laid off, and I find that [it is] the defendant's own fault that he's no longer employed and making this $75,000 per year. . . . To qualify for a substantial change in circumstances, a change or alleged inability to pay must be excusable and not brought about by the defendant's own fault. I find credible testimony that it clearly was brought about by his own fault. There's evidence of [the college's] letter . . . . There's evidence regarding the revised [c]omplaint. . . . [H]is actions ultimately led to what was clearly . . . an offer to either retire or get fired. He was clearly not laid off as he testified to. So I'm making a finding that any reduction in his income was at the fault of the defendant." The court concluded that the defendant had not met his burden in demonstrating a significant change in financial circumstances as to warrant a modification and, accordingly, denied his motion to modify alimony.

As the party seeking the modification, the defendant had the burden of proving a substantial change in his financial circumstances. It is undisputed that the defendant is no longer employed by the college, resulting in a loss of income of approximately $75,000 per year.

Evidence and testimony was presented during the hearing to support this claim. The court also credited the defendant's testimony that he had been actively seeking alternative employment.

In opposition to the defendant's motions to modify alimony, the plaintiff submitted the revised complaint against him and the college, the proposed separation agreement between him and the college, which the defendant never signed, and an accompanying letter. This evidence was proffered to demonstrate that the change in the defendant's circumstances was not excusable because it was brought about by his own fault. Although the court correctly opined that a party who suffers a diminution in earnings through his or her own fault is not thereby entitled to a reduction of an alimony obligation, there was no credible evidence adduced at the hearing on the motion to modify that the defendant, in fact, lost his employment with the college through his own fault.[15] Thus, from our careful review of the record, we conclude that the court's factual conclusion that the defendant caused his discharge from employment through his own fault finds no support in the record. The court's reliance on an unsigned employment separation agreement and a third party's revised complaint as evidence that the defendant caused his own termination of employment was incorrect. In sum, innuendo aside, whether the defendant was laid off or terminated by the college, there was no evidence presented to the court that the defendant's loss of employment was due to his own fault.

[15] See *Schade* v. *Schade*, 110 Conn. App. 57, 65 n.6, 954 A.2d 846 ("[I]f a party's culpable conduct causes an inability to pay an alimony award, then the threshold question of whether a substantial change of circumstances exists is not met. Accordingly, a trial court may not then modify the alimony award."), cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008); see also *Bauer* v. *Bauer*, 173 Conn. App. 595, 600, 164 A.3d 796 (2017) ("The burden of proving an inability to pay rests with the obligor. Whether the obligor has established his inability to pay by credible evidence is a question of fact. The obligor must establish that he cannot comply, or was unable to do so.").

As noted, the defendant testified that his personnel file from the college, which was available during the hearing, contained no reprimands or criticisms regarding his service to the college. The submission of a revised complaint from a former coworker that named the defendant, the college, and others as parties and contained claims for workers' compensation retaliation and infliction of emotional distress, was merely an unproved allegation without any supporting evidence. As such, the mere allegations set forth in this complaint could not suffice as any proof of culpable behavior by the defendant during his employment with the college. Moreover, the complaint contains no allegation that the defendant was terminated due to his own fault.[16]

In response, the plaintiff cites this court's opinion in *Tittle* v. *Skipp-Tittle*, supra, 161 Conn. App. 546, 551, in which a panel of this court determined that evidence showing the party seeking a modification of alimony had been arrested for stalking and for violating a protective order provided a sufficient basis for determining that any change in her financial circumstances had been caused by her own fault. The facts in *Tittle* and those we face in the present case, however, are not parallel. In *Tittle*, the court could reasonably consider the moving party's arrests as evidence of fault, because in order for the arrests to occur an independent magistrate had to have found probable cause of culpable conduct. In the case at hand, however, the court was confronted with mere allegations without any factual support.

In sum, although we recognize it is the duty of a moving party in a motion to modify alimony or support

[16] We take judicial notice that the case in the revised complaint was dismissed on December 6, 2017. *Hardy* v. *Albertus Magnus College*, Superior Court, judicial district of New Haven, Docket No. CV-16-6059830-S. Appellate courts have the authority to take judicial notice of files of the trial court in the same or other cases. *McCarthy* v. *Commissioner of Correction*, 217 Conn. 568, 580 n.15, 587 A.2d 116 (1991); *Disciplinary Counsel* v. *Villeneuve*, 126 Conn. App. 692, 703 n.15, 14 A.3d 358 (2011).

to demonstrate that an inability to pay is not due to his or her own "extravagance, neglect, misconduct or other unacceptable reason"; *Sanchione* v. *Sanchione*, supra, 173 Conn. 407; the court's conclusion in this matter that the defendant was at fault for his loss of employment finds no factual support in the record.

After reviewing the record, we are "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Spencer* v. *Spencer*, supra, 177 Conn. App. 513–14. Although the court, as the fact finder, is free to weigh and interpret evidence and determine credibility; see *Watrous* v. *Watrous*, 108 Conn. App. 813, 823, 949 A.2d 557 (2008); there was insufficient evidence to show that the defendant was fired, rather than mutually separated or laid off, from his employment with the college. Even if we make every reasonable presumption in favor of the court's ruling, the record simply does not support the court's finding that the defendant lost his employment through his own fault. Accordingly, we conclude that the court's determination that the defendant caused his own termination of employment was clearly erroneous as it was not supported by any evidence in the record. Cf. *Bauer* v. *Bauer*, 173 Conn. App. 595, 606, 164 A.3d 796 (2017) (trial court's findings that defendant was not culpable for his termination of employment were supported by record and court concluded that defendant proved substantial change in circumstances).

In conjunction with the court's denial of his motion to modify alimony, the defendant also claims that the court should have considered the plaintiff's receipt of the proceeds from a personal injury claim and the court should not have taken into account his receipt of pension benefits.[17] We are unpersuaded by either claim. As

[17] We address the issues in the interest of judicial economy, on the assumption that the issues will likely arise on remand. *Mueller* v. *Tepler*, 312 Conn. 631, 646 n.14, 95 A.3d 1011 (2014).

to the plaintiff's receipt of the proceeds from a personal injury claim, the parties dealt specifically with this topic in their marital dissolution agreement. Paragraph 9G states as follows: "Any funds received by either party from his or her pending personal injury law suits shall be retained by that party free and clear from any claim of the other." Because this contingency was provided for in the parties' agreement, it was well within the court's discretion to disregard the plaintiff's subsequent receipt of the anticipated funds. See *Ceddia* v. *Ceddia*, 164 Conn. App. 266, 271, 137 A.3d 830 (2016) ("[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented" [internal quotation marks omitted]).

Finally, in assessing the defendant's motion to modify alimony, it was appropriate for the court to consider his present overall circumstances in assessing whether he had experienced a substantial change in his financial condition. Accordingly, in taking the defendant's receipt of pension benefits into consideration, the court committed no error.[18] See *Krafick* v. *Krafick*, 234 Conn. 783, 804–806, 663 A.2d 365 (1995); see also *Dinunzio* v. *Dinunzio*, 180 Conn. App. 64, 72–75, A.3d (2018).

Therefore, the court's order denying the defendant's motion for modification of alimony cannot stand and further proceedings are necessary.[19]

[18] To the extent that the defendant claims that the court erroneously considered his total pension benefit, which included the plaintiff's marital portion, as part of his financial circumstances in assessing his motion to modify, we agree. On remand, once the court determines the amount of the defendant's defined benefit pension which must be allocated to the plaintiff as her share of the marital portion, that amount may not be considered by the court as part of the defendant's financial circumstances for alimony purposes. See *Krafick* v. *Krafick*, supra, 234 Conn. 804–805 n.26.

[19] We recognize that on remand, the defendant, in order to prove a substantial change in circumstances due to loss of employment, has the burden of

B

We next address the issue of whether the court properly determined that the dissolution agreement provided for the plaintiff's receipt of pension benefits from the defendant as of the date of the marital dissolution. The defendant claims that because the dissolution agreement contemplated the preparation of a domestic relations order to effectuate the parties' pension agreement, the court's order for a division of pension benefits would only become operable once such an order was put in place and that there was no provision in the judgment requiring him to make interim payments. The plaintiff responds that the language of the agreement and judgment provide for her receipt of pension benefits to take place immediately following the judgment and, thus, she is entitled to retroactive payments for the period of time between the date of the dissolution and the effective date of the domestic relations order (gap period).

We restate our standard of review when interpreting the language of a marital dissolution agreement. "If a contract is unambiguous within its four corners, the intent of the parties is a question of law, requiring plenary review. . . . If, however, a contract is ambiguous, the clearly erroneous standard of review is used because the intent of the parties is a question of fact." (Citation omitted.) *Kremenitzer* v. *Kremenitzer*, 81 Conn. App. 135, 140, 838 A.2d 1026 (2004).

The relevant section of the dissolution agreement, paragraph 9B, bears repeating: "Husband *shall immediately transfer* one-half of the marital portion of [h]usband's [s]tate of Connecticut [p]ension [p]lan that is

proving that his inability to pay must be excusable and not brought about by the his own fault. If the defendant was culpable for his own termination of employment, it would foreclose the threshold determination of a substantial change in circumstances. See *Olson* v. *Mohammadu*, 310 Conn. 665, 674, 81 A.3d 215 (2013) ("in order to meet the threshold of a substantial change in circumstances, the alleged inability to pay must be excusable and not

currently in pay status to [w]ife valued as of the date of dissolution and including cost of living over the payment period. This transfer shall be by a QDRO that shall be drafted by Attorney Elizabeth McMahon . . . .'' (Emphasis added.)

We are unpersuaded by the defendant's contention that the parties ''negotiated the agreement to provide that payments begin after the [domestic relations order] was put in place.'' The dissolution agreement plainly states that the defendant ''shall immediately transfer'' one half of the marital portion of his pension plan as of the date of dissolution. The agreement does not state that the plaintiff would realize her entitlement only once the domestic relations order was put in place.

It is well established that pension benefits are a form of property. See *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 331, 983 A.2d 293 (2009). In *Cifaldi*, this court opined: ''A QDRO is merely an administrative tool used to effectuate the transfer of marital property, in this case pension benefits, from an employee to a nonemployee spouse.'' Id., 332. ''Given the well recognized importance of pension benefits as a piece of marital property, the obvious significance of pension benefits to any property allocation made as part of a dissolution judgment and the expectations of the parties to that judgment, we do not read the parties' agreement . . . to make the vesting of the plaintiff's property interest in a portion of the defendant's pension benefits to be in some way contingent on the successful processing of the QDROs. To put it simply, we conclude that the plaintiff's property interest in portions of the defendant's pension benefits was not predicated on the processing of paperwork . . . .'' (Footnote omitted.) Id., 332–33. The reasoning of *Cifaldi* is applicable to the circumstances at hand.

brought about by the defendant's own fault.'' [internal quotation marks omitted]); see also *Sanchione* v. *Sanchione*, supra, 173 Conn. 407.

We disagree with the defendant's perspective, in which a party could reduce his or her liability to the other party by simply delaying the processing of the domestic relations order. Accordingly, as of the date of the dissolution, the plaintiff was entitled, as her own property, to receive one half of the marital portion of the defendant's monthly pension benefits. Her entitlement was not contingent on a successfully executed domestic relations order.

The defendant further contends that the court failed to adjust for taxes when it ordered retroactive payments for the gap period. As a result, he asserts that he is required to pay the plaintiff a disproportionate amount from each pension payment because of federal and state tax withholdings. In response, the plaintiff states that "an appropriate tax adjustment can be fashioned" once the marital portion and the dollar amount of the post-judgment payments during the gap period have been calculated, and the defendant establishes the amount of taxes he has already paid. We agree that the defendant's retroactive payments should be adjusted for any tax liability he incurred for the portion of his pension that was intended for the plaintiff as her share of the marital portion. See *Cifaldi* v. *Cifaldi*, supra, 118 Conn. App. 336 ("court could . . . determine the amount of taxes, if any, that the defendant paid on the overpayments he received and reduce the plaintiff's remuneration accordingly").

The court's order regarding the pension is incomplete, as the retroactive amount must be determined once the court determines, after a hearing, the amount due to the plaintiff and then adjusts that amount for taxes the defendant has already paid on the portion to be received by the plaintiff.

In AC 39452, the judgment is reversed and the case is remanded for further proceedings consistent with

this opinion. In AC 39814, the court's order denying the defendant's modification of alimony is reversed and the case is remanded for further proceedings according to law; the court's order regarding the pension is reversed in part and the case is remanded for further proceedings consistent with this opinion; the order regarding the pension is affirmed in all other respects.

In this opinion the other judges concurred.

WILSON PUENTE *v.* PROGRESSIVE NORTHWESTERN INSURANCE COMPANY (AC 39708)

Lavine, Prescott and Elgo, Js.

Syllabus

The plaintiff, who had sustained injuries when a motor vehicle operated by a third party struck him after he had exited and stepped away from his vehicle, sought to recover underinsured motorist benefits allegedly due under a policy of automobile insurance issued by the defendant to the plaintiff's business, W Co. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. The plaintiff claimed that there were genuine issues of material fact as to whether the policy provided underinsured coverage to him personally, regardless of whether he was occupying the vehicle, and as to whether he was "occupying" the insured vehicle within the meaning of the policy when he sustained his injuries. *Held* that the trial court properly granted the defendant's motion for summary judgment, there having been no genuine issue of material fact regarding the defendant's obligation to the plaintiff under the terms of the insurance contract: that court properly determined that the policy unambiguously provided that W Co. and not the plaintiff was the named insured, as there was no ambiguity in the policy language as to whether "insured" referred to the plaintiff personally or to W Co. where, as here, the declarations page of the policy listed W Co. as the named insured, the use of the term "you" did not create ambiguity in that the term referred to the named insured shown on the declarations page, which was W Co., and the policy provided further that when the named insured was not a natural person, the policy covered only individuals who were occupying the insured vehicle; moreover, the plaintiff failed to raise a genuine issue of material fact as to whether he was "occupying" an

insured vehicle when he sustained his injuries, as the relevant underinsured motorist statute (§ 38a-363 [c]) defined "occupying" a vehicle as "to be in or upon entering into or alighting from the vehicle," which required physical contact with the insured vehicle, that definition was consistent with, although not identical to, the language of the policy in the present case, which defined "occupying" as "in, on, entering or exiting" the insured vehicle, although the policy at issue in the present case used the term "exiting" rather than "alighting" in defining the word "occupying," it was nevertheless clear from case law that "occupying" a vehicle requires physical contact, which supported the trial court's construction of the policy to require physical contact with the insured vehicle in order to trigger coverage, and it was undisputed here that the plaintiff, who had stepped out of the insured vehicle and walked past the rear of that vehicle before he was struck, was not in physical contact with the vehicle when he was injured.

Argued February 1—officially released May 15, 2018

Procedural History

Action to recover damages for underinsured motorist benefits allegedly due under a policy of automobile insurance issued by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford, where the court, *Povodator*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John C. Turner, *Jr.*, for the appellant (plaintiff).

John W. Cannavino, *Jr.*, with whom, on the brief, was *Alexandra J. Zeman*, for the appellee (defendant).

Opinion

PRESCOTT, J. In this action to recover underinsured motorist benefits pursuant to an insurance policy issued by the defendant, Progressive Northwestern Insurance Company, to Wilson Roofing, LLC (Wilson Roofing), the plaintiff, Wilson Puente, appeals from the judgment of the trial court granting the defendant's motion for summary judgment. The plaintiff claims that the trial court improperly granted the motion because a genuine

issue of material fact existed regarding whether (1) he was a named "insured" within the meaning of the policy issued to Wilson Roofing or (2) even if he was not the named insured, he is still entitled to recover pursuant to the policy because he was "occupying" a vehicle covered by the policy when he sustained his injuries. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiff alleged in his complaint that he was occupying or in the process of exiting a 2001 GMC Savana G3500 in a parking lot in Norwalk when Cristian Zuna, a nonparty, struck him with her 2008 Honda Accord, causing him to suffer injuries. The plaintiff further alleged that any damages he suffered as a result of the accident were covered under a commercial auto policy through which the defendant provided uninsured/underinsured motorist coverage to the plaintiff's business, Wilson Roofing.

On May 6, 2016, the defendant filed a motion for summary judgment in which it argued that there is no genuine issue of material fact regarding whether (1) the plaintiff was insured under the policy because he was not "occupying" the vehicle at the time of the accident, and (2) the vehicle was not an "insured auto" under the policy. The plaintiff filed a motion in opposition to the motion for summary judgment arguing that there was a genuine issue of material fact as to whether he was the named insured within the meaning of the policy or that he was "occupying" an insured vehicle at the time he sustained his injuries.

At his deposition, a transcript of which the defendant attached as an exhibit to its motion for summary judgment, the plaintiff testified that he operates a home improvement company known as Wilson Roofing and

Siding, LLC, which has four or five employees.[1] On the morning of May 15, 2014, the plaintiff drove to a parking lot at Rick's Main Roofing at 26 Fitch Street in Norwalk. The plaintiff worked for Rick's Main Roofing as a subcontractor and had two assigned parking spaces in that lot. The plaintiff left for a job assignment and returned to the parking lot at Rick's Main Roofing sometime between 3 and 3:30 p.m. The plaintiff parked his vehicle with the front end of his vehicle facing into the parking space.[2] He gathered the papers he needed to take into Rick's Main Roofing, stepped out of the vehicle, and walked toward the rear of the vehicle. After he walked past the rear of his vehicle, he noticed a Honda Civic traveling toward him and was forced to jump onto the front end of the Honda to avoid being hit. He suffered injuries to his left foot after it was caught under the front end of the Honda Civic.

It is undisputed that the commercial auto insurance policy issued by the defendant to the plaintiff, which was in effect at the time of the accident, provided coverage for some of Wilson Roofing's vehicles. The declarations page of that policy states that the defendant provided commercial auto insurance coverage and that the "named insured" was "Wilson Roofing, LLC."

Following a hearing, the court granted the defendant's motion for summary judgment. The court concluded that the language of the policy was unambiguous

[1] Although the plaintiff asserts that he is the sole member of the limited liability company, he presented no evidence regarding the corporate governance of his business.

[2] There is a factual dispute between the parties as to the make and model of the vehicle that the plaintiff drove into the parking lot of Rick's Main Roofing. The defendant asserts that the plaintiff had been driving his Chevrolet Suburban, which the parties agree is not a vehicle insured under the policy. The plaintiff contends that he had been driving a GMC Savana, which the parties agree was a vehicle covered by the policy. Because we conclude that there is no genuine issue of material fact as to whether he was "occupying" *any* vehicle when he sustained his injuries, the factual dispute is not relevant.

and that there was no genuine issue of material fact regarding whether the plaintiff was a named insured within the meaning of the policy. Specifically, the court concluded as a matter of law that Wilson Roofing, and not the plaintiff, was the named insured under the policy. The court also concluded that, even if he was not the named insured, the plaintiff had failed to raise a genuine issue of material fact that he was still entitled to recover pursuant to the policy language that extends coverage to persons "occupying" a vehicle insured under the policy because he failed to raise a genuine issue of material fact that he was "occupying" such a vehicle when he sustained his injuries. This appeal followed.

The plaintiff claims on appeal that the court improperly concluded that there was no genuine issue of material fact as to whether (1) the policy provided underinsured coverage to him personally regardless of whether he was occupying the vehicle and (2) he was "occupying," within the meaning of the policy, an insured vehicle at the time he sustained his injuries. We are not persuaded.

We first set forth the applicable standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 684, 956 A.2d 581 (2008).

"Summary judgment shall be granted if the pleadings, affidavits and any other proof submitted show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . A fact is material when it will make a difference in the outcome of a case. . . . The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 90, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, A.3d (2018).

I

The plaintiff first claims that because the general definitions section of the policy uses the words "you" and "relative" in defining the term "insured," the policy is ambiguous as to whether "insured" refers to the plaintiff's business or the plaintiff personally.[3] He argues that

[3] The plaintiff also claims on appeal that he is the "alter ego" of his business and, thus, should be considered the named insured for purposes of uninsured coverage. This assertion was not pleaded in his complaint, does not appear in his objection to the defendant's motion for summary judgment and was not raised orally by the plaintiff during argument on the motion. Although the court refers briefly to the doctrine in its memorandum of decision and declines to import it from other unrelated contexts to create an ambiguity in a contract where none otherwise exists, we conclude that this claim was not distinctly raised in the trial court. "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014); see id., 619 (declining to review challenge to summary judgment ruling because particu-

this ambiguity creates a genuine issue of material fact as to whether the policy provided underinsured coverage to him personally, regardless of whether he was occupying the vehicle. We disagree.

"[A]n insurance policy is a contract that is construed to effectuate the intent of the parties as expressed by their words and purposes. . . . [U]nambiguous terms are to be given their plain and ordinary meaning. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 740, 95 A.3d 1031 (2014).

The policy contains the following relevant provisions. In the general definition section, the policy states: "GENERAL DEFINITIONS . . . .

"5. 'Insured auto' or 'your insured auto' means:

a. Any auto specifically described on the declarations page . . .

"9. 'Occupying' means in, on, entering or exiting. . . .

"17. 'You,' 'your,' and 'yours' refers to the named insured shown on the declaration page." (Emphasis omitted.)

With respect to underinsured motorist coverage, the endorsement for uninsured and underinsured coverage provides that, "[s]ubject to the Limits of Liability, if you pay the premium for Uninsured/Underinsured Motorist Coverage, we will pay for damages . . . which an insured is legally entitled to recover from the owner or

lar claim was not raised before trial court). Because the defendant was never given notice of the plaintiff's reliance on this doctrine, it did not have an opportunity to present competent summary judgment evidence to support an assertion that the doctrine is factually or legally inapplicable in this case. We therefore decline to review it.

operator of an uninsured auto because of bodily injury: 1. sustained by an insured; 2. caused by an accident; and 3. arising out of the ownership, maintenance or use of an uninsured auto." (Emphasis omitted.)

The endorsement contained additional definitions as follows: "When used in this endorsement, whether in the singular, plural or possessive:

"1. 'Insured' means:

"a. if the named insured shown on the Declarations Page is a natural person:

"(i) you or a relative;

"(ii) and person occupying your insured auto . . . and

"(iii) any person who is entitled to recover damages covered by this endorsement because of bodily injury sustained by a person described in (i) or (ii) above; or

"b. if the named insured shown on the Declarations Page is a corporation, partnership, organization, or any other entity that is not a natural person:

"(i) any person occupying your insured auto . . . and

"(ii) any person who is entitled to recover damages covered by this endorsement because of bodily injury sustained by a person described in (i) above." (Emphasis omitted.)

As previously discussed, there is no genuine issue of material fact that the declarations page lists "Wilson Roofing, LLC," as the named insured.[4]

[4] The plaintiff also argues that the policy is ambiguous because the declarations page lists "Wilson Roofing, LLC," as the named insured, rather than the business name used by the plaintiff when he testified at his deposition, Wilson Roofing and Siding, LLC. The fact that the name of the business set forth on the declarations page does not match precisely the name of the business given by the plaintiff during his deposition does not create an ambiguity as to whether the policy covers the business or the plaintiff personally.

We conclude that the court properly determined that the policy unambiguously provided that Wilson Roofing and not the plaintiff was the named insured. The use of the terms "you" and "your" in the policy does not create an ambiguity. The general definitions section of the policy states that " 'you' 'your' and 'yours' refer to the named insured shown on the declarations page." The policy in the endorsement for underinsured motorist benefits provides that if the name listed on the declarations page as the named insured is a corporation, partnership, organization, or any other entity that is not a natural person, then the term "insured" means, inter alia, "any person occupying your insured auto . . . ." Accordingly, the terms "you" and "your" in the policy refer to Wilson Roofing rather than the plaintiff personally because he is not listed as the named insured on the declarations page. Furthermore, the section of the policy that uses the terms "you or a relative" does not create ambiguity because the policy clearly provides that those terms apply only if the named insured on the declarations page is a natural person.

The plaintiff contends that the language in the policy is "not entirely clear given the phrasing and placement of pertinent definitions, including if the named insured is a natural person and 'relative' located in the general definitions section." He argues that the Supreme Court in *Ceci* v. *National Indemnity Co.*, 225 Conn. 165, 622 A.2d 545 (1993), concluded that the policy at issue in that case was ambiguous as to who was covered under the underinsured motorist coverage provision: "According to these provisions, the defendant would pay for damages caused by an uninsured vehicle. Individuals covered by this provision included: (1) you or any family member (2) anyone else occupying a covered auto or a temporary substitute for covered auto. The policy defined Family member as a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

The policy defined occupying as in, upon, getting in, on or off." (Internal quotation marks omitted.) Id., 167. The court stated that "[b]y inserting a family member provision in a business policy, the defendant has left the [plaintiffs] in the unenviable position of having to divine the meaning and purpose of the family member language in the context of the policy. This is precisely the problem that the rules of insurance policy construction were designed to avoid." Id., 175. The policy in the present case, unlike that in *Ceci*, is clear and unambiguous and provides that the named insured is Wilson Roofing and that if the named insured is not a natural person then the policy only covers individuals who are occupying the insured vehicle.

The plaintiff also argues that the policy is ambiguous because it improperly identifies the named insured as a corporation rather than a limited liability company. The declarations page of the policy lists the name insured as "Wilson Roofing, LLC," but then states that "[t]he named insured organization type is a corporation." Regardless of this discrepancy, there is no genuine of material fact that the named insured is not a natural person, and, as such, is encompassed by the definition of "insured" that pertains to both limited liability companies and corporations. In sum, we are not persuaded by the plaintiff's first claim on appeal.

II

Because it is clear that the policy covers Wilson Roofing and not the plaintiff personally, in order to be entitled to underinsured motorist coverage under the policy, the plaintiff was obligated to raise a genuine issue of material fact as to whether he was "occupying" an insured vehicle at the time he sustained his injuries. In that regard, the plaintiff claims that the court improperly determined that there was no genuine issue of material fact regarding whether he was "occupying"

the vehicle at the time of the accident. Specifically, he contends that the court improperly relied on the physical contact test used in *Gomes* v. *Massachusetts Bay Ins. Co.*, 87 Conn. App. 416, 431–36, 866 A.2d 704, cert. denied, 273 Conn. 925, 871 A.2d 1031 (2005), rather than using a proximity test in determining that the plaintiff was not occupying the vehicle at the time of the accident. We disagree.

The policy defines "occupying" as "in, on, entering or exiting," but the policy does not define the term "exiting." The definition of "occupying" used by the policy, however, is consistent with, but not identical to, the definition set forth in the uninsured/underinsured motorist statute, General Statutes § 38a-363 (c), which defines "occupying" a vehicle as "to be in or upon entering into or alighting from the vehicle." Our Supreme Court and this court have interpreted § 38a-363 (c) to require physical contact with the insured vehicle in order for one to "occupy" it. See *Testone* v. *Allstate Ins. Co.*, 165 Conn. 126, 328 A.2d 686 (1973); *Allstate Ins. Co.* v. *Howe*, 31 Conn. App. 132, 623 A.2d 1031, cert. denied, 226 Conn. 911, 628 A.2d 983 (1993). Although the policies at issue in *Testone* and *Howe* did not use the same definition of "occupying" as that set forth in § 38-363 (c), the respective courts in *Testone* and *Howe* nonetheless required physical contact with the insured vehicle.

In *Testone* v. *Allstate Ins. Co.*, supra, 165 Conn. 128–29, a tow truck operator was injured when an uninsured vehicle struck a disabled car he was attaching to the tow truck. The insurances policies covering the tow truck and the disabled car required the tow truck operator to be "occupying" the vehicle, which was defined in the policies as "in or upon or entering into or alighting from" the vehicle. Id., 130–31. Our Supreme Court determined that "[t]he fact that the plaintiff was near his employer's wrecker when injured is of no significance."

Id., 131. It concluded that the plaintiff was not occupying the disabled vehicle because he was "not in physical contact with the [disabled] vehicle and it cannot be said that he was 'upon' that vehicle." Id., 134.

In *Allstate Ins. Co.* v. *Howe*, supra, 31 Conn. App. 133–34, an insured sought underinsured motorist coverage after she was struck by a vehicle when she was in the process of returning to her friend's vehicle after that vehicle stopped due to a road accident. To trigger coverage, the insurance policy at issue required her to be "in, on, getting into or out of" an insured vehicle. (Internal quotation marks omitted.) Id., 133. Relying on *Testone*, the court concluded that the plaintiff's physical contact with the insured vehicle and the fact that she "was taking steps to reenter the vehicle after only a brief interruption in her travels related to the operation of the vehicle"; id., 140; would "appear to afford coverage." Id., 138.

The plaintiff argues, however, that because no Connecticut appellate authority has considered a policy, like the one at issue here, that employs the term "exiting" rather than "alighting" in defining the word "occupying," the physical contact test does not apply. We reject the notion that the physical contact test only applies to policies that use the term "alighting." In *Howe*, this court applied a physical contact test where the policy did not mirror the exact language of § 38a-363 (c) and instead defined "occupying" as "in, on, getting into or out of." Although *Testone*, *Howe*, and *Gomes* did not consider policies that use the precise term "exiting," the case law is nonetheless clear that "occupying" a vehicle requires physical contact. Thus, precedent supports a construction of the policy in this case that contains similar language to require physical contact with the insured auto in order to trigger coverage.

The plaintiff further argues that we should adopt a proximity test in place of the physical contact test. We decline that invitation. In *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 87 Conn. App. 431–36, this court held, inter alia, that a volunteer fire police officer who was struck by an underinsured motorist while directing traffic in the middle of an intersection and away from his vehicle was not "occupying" a motor vehicle for the purposes of § 38a-336 (f). Id., 435–36. In that case, this court declined to adopt the proximity test reasoning, inter alia, that "we are compelled to follow our Supreme Court's express approval of the physical contact test in *Testone* v. *Allstate Ins. Co.*, supra, 165 Conn. 134 . . . ." *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 435.

Moreover, the proximity test urged by the plaintiff also suffers from being far too nebulous a standard. Such a test, in our view, would be difficult to apply and is not rooted necessarily in the language of the policy or, more generally, in the plaintiff's relationship with the vehicle at the time he suffers any injury. For example, a plaintiff could park his car and then sit on a sidewalk for hours in very close proximity to his or vehicle. Under the proximity test, if the plaintiff is injured while sitting in close proximity to his or her vehicle, but hours after exiting his vehicle the insured might be entitled to coverage under the policy despite the fact that the circumstances of the accident have little to do with the insured vehicle.

In the present case, it is undisputed that the plaintiff parked his vehicle, stepped out, walked past the rear of his vehicle, and was not in physical contact with his vehicle when he was struck by an oncoming vehicle. Therefore, the plaintiff was not "in, on, entering or exiting" his vehicle at the time of the accident. We conclude that the court properly granted the plaintiff's motion for summary judgment and determined that

there was no genuine issue of material fact regarding whether the plaintiff was occupying his vehicle at the time of the accident.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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JOHN S. KAMINSKI *v.* COMMISSIONER
OF CORRECTION
(AC 40863)

Keller, Elgo and Norcott, Js.

Argued April 24—officially released May 15, 2018

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bright*, *J.*

Per Curiam. The judgment is affirmed.

SAUNDRA MAGANA *v.* WELLS FARGO BANK, N.A., TRUSTEE, ET AL.
(AC 40301)

Sheldon, Keller and Lavery, Js.

Argued April 25—officially released May 15, 2018

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Robaina*, *J.*

Per Curiam. The judgment is affirmed.

BRIAN E. LAMBECK *v.* SILVER HILL HOSPITAL, INC., ET AL.
(AC 40096)

Keller, Elgo and Norcott, Js.

Argued April 24—officially released May 15, 2018

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Heller*, *J.*

Per Curiam. The judgment is affirmed.

BRIAN E. LAMBECK *v.* SILVER HILL HOSPITAL, INC., ET AL.
(AC 40097)

Keller, Elgo and Norcott, Js.

Argued April 24—officially released May 15, 2018

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Heller*, *J.*

Per Curiam. The judgment is affirmed.

STEVEN CORTEZ *v.* COMMISSIONER
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(AC 39769)

Sheldon, Prescott and Lavery, Js.

Argued April 25—officially released May 15, 2018

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Assault in first degree; carrying pistol without permit; whether trial court improperly instructed jury on consciousness of guilt; whether consciousness of guilt instruction on basis of flight was proper where evidence revealed that defendant returned to place of residence and left scene of crime in open or nonfurtive manner; claim that prejudicial effect of instruction on flight outweighed probative value.

State *v.* Kukucka. 329

Strangulation in first degree; sexual assault in third degree; assault in third degree; claim that trial court improperly failed to inquire into potential conflict of interest between defendant and defense counsel involving grievance defendant had filed against defense counsel; claim that trial court improperly denied motion to suppress out-of-court and in-court identifications of defendant made by witness to assault; whether trial court failed in duty to inquire into potential conflict of interest between defendant and defense counsel; whether defendant made claim before trial court that grievance filed against defense counsel presented conflict of interest; whether defendant demonstrated how inquiry into nature of grievance would have been materially different from inquiry that trial court conducted; whether trial court had reason to believe that conflict of interest existed or that further inquiry was necessary; whether witness' identifications of defendant were reliable; whether trial court properly found that police procedure of showing witness Facebook photo of alleged assailant forty-five minutes after assault was necessary due to exigent circumstances.

State *v.* Lamantia 648

Interfering with officer; tampering with witness; sufficiency of evidence; whether evidence was sufficient to support conviction of interfering with officer when

communications that formed basis of conviction were nonviolent and nonthreatening text messages directed to third party in order to induce that person to lie to police officer and to report to officer version of events concerning altercation that matched defendant's own prior statements to police; claim that state failed to prove that defendant had specific intent to influence witness at official proceeding by sending text messages; whether evidence was sufficient to support conviction of tampering with witness.

State *v.* Liebenguth 37

Breach of peace in second degree; tampering with witness; whether evidence was insufficient to support conviction of breach of peace in second degree; whether victim was likely to retaliate with immediate violence to defendant's conduct; whether defendant's racial slurs were fighting words; whether evidence adduced at trial was sufficient to support conviction of tampering with witness; whether defendant intended to induce victim to absent himself from court proceeding; whether state was required to prove, and trial court required to find, that defendant directly threatened victim in order to establish that defendant sought to induce victim not to testify.

State *v.* Mara (Memorandum Decision). 901

State *v.* Raynor. 760

Murder; whether trial court abused its discretion by denying motion in limine to exclude or limit scope of testimony of state's expert witness on firearm and toolmark identification; claim that because recent studies and reports established that methodology underlying firearm and toolmark identification was not sufficiently reliable, trial court improperly denied request for hearing pursuant to State *v.* Porter *(241 Conn. 57), to determine reliability of firearm and toolmark identification; claim that trial court improperly allowed state's expert to opine that various cartridge casings recovered from crime scene were fired from particular firearm; whether trial court abused its discretion by granting motion for admission of uncharged misconduct evidence; whether trial court properly determined that probative value of uncharged misconduct evidence outweighed its prejudicial effect.*

State *v.* Rivera 215

Capital felony; conspiracy to commit murder; claim that trial court abused its discretion in refusing to admit into evidence certain statements made by coconspirator under residual exception to hearsay rule; whether trial court properly concluded that statements lacked trustworthiness and reliability that are required for admission under residual exception to hearsay rule; whether defendant demonstrated that allegedly improper exclusion of statements was harmful.

State *v.* Stephenson 614

Failure to appear in first degree; possession of narcotics; engaging police in motor vehicle pursuit; falsely reporting incident in second degree; interfering with officer; whether trial court abused its discretion when it denied defendant's request for ten minute recess to discuss with his attorney plea deal offered by court; whether evidence was sufficient to sustain conviction of possession of narcotics; whether jury reasonably could have found that defendant had exclusive control of vehicle in which narcotics were found and that he constructively possessed narcotics found in vehicle he had abandoned while fleeing from police.

State *v.* Turner 535

Felony murder; robbery in first degree; conspiracy to commit robbery in first degree; whether there was sufficient evidence to convict defendant of conspiracy to commit robbery in first degree; reviewability of unpreserved claim that defendant's due process right to fair trial was violated when trial court qualified police officer as expert witness and admitted cell phone coverage maps into evidence; whether trial court's qualification of police officer as expert witness and admission of cell phone coverage maps into evidence warranted reversal of judgment under plain error doctrine; claim that multiple instances of prosecutorial impropriety during closing arguments deprived defendant of due process right to fair trial; claim that prosecutor improperly referred to facts that were not in evidence or invited speculation when he urged jury to find where defendant was at particular times on basis of cell phone evidence; claim that prosecutor improperly vouched for his own credibility when he commented about defendant's having offered fake address and identification to police; claim that prosecutor's comment that defendant did things that pointed only to his guilt and not to his innocence improperly suggested to jury that defendant had burden to prove his innocence; claim that prosecutor's sarcastic remark about defendant's ability to cash checks

was improper; unpreserved claim that trial court's second supplemental instruction misled jury about essential elements of robbery in first degree.

State *v.* Vega 456

Murder; home invasion; burglary in first degree; attempt to commit murder; attempt to commit assault in first degree; carrying pistol without permit; whether trial court abused its discretion in admitting into evidence as spontaneous utterances under applicable provision (§ 8-3 [2]) of Connecticut Code of Evidence certain statements that witnesses had made to police; whether statements of certain witnesses were made under circumstances that negated opportunity for deliberation and fabrication; whether trial court properly determined that statements in letter from witness were inadmissible under applicable provision (§ 8-6 [4]) of Connecticut Code of Evidence on ground that they were not against witness' penal interest; unpreserved claim that trial court violated defendant's right to confrontation when it admitted into evidence certain statements that witness made during phone conversation that was overheard by police officer; unpreserved claim that trial court violated defendant's right to confrontation when it admitted into evidence certain statements that witness made directly to police officer; whether statements were testimonial in nature; whether admission of witness' statements to police officer was harmless beyond reasonable doubt.

Steller *v.* Steller 581

Dissolution of marriage; motion for modification; claim that trial court improperly determined that defendant's earning capacity was less than his actual income; whether trial court misinterpreted or misapplied term "earning capacity" as that term is used in relevant statute (§ 46b-82); claim that trial court's findings as to defendant's gross and net earning capacities and that sale of defendant's dental practice was expected to occur in 2016 were clearly erroneous; reviewability of claim challenging trial court's findings as to plaintiff's gross annual earning capacity and net weekly earning capacity; whether trial court properly conducted "second look" de novo review of defendant's alimony obligation in accordance with parties' agreement and properly considered criteria set forth in § 46b-82 in accordance with relevant case law; claim that trial court abused its discretion by lowering defendant's life and disability insurance obligations.

Thomasi *v.* Thomasi 822

Dissolution of marriage; postjudgment orders; claim that trial court erred in determining term "marital portion" was clear and unambiguous as to calculation method of plaintiff's portion of defendant's pension plan; claim that trial court erred in denying motion for modification of alimony and interpreting dissolution agreement to require defendant to make retroactive payments to plaintiff; whether trial court correctly determined that language of dissolution agreement clearly and unambiguously provided for coverture method to be utilized to determine marital portion; whether term "marital portion" contained latent ambiguity; whether trial court misplaced focus by relying on extrinsic evidence to resolve parties' disagreement as to import of term "marital portion"; whether trial court erred in denying motion for alimony modification; whether trial court's factual finding that defendant caused loss of employment through his own fault was clearly erroneous; whether, as of date of dissolution, plaintiff was entitled to receive one half of marital portion of defendant's monthly pension benefits; whether trial court should have adjusted defendant's retroactive payments for any tax liability defendant incurred for portion of pension that was intended for plaintiff as share of marital portion.

Torrington Savings Bank Mortgage Servicing Co. *v.* Chance (Memorandum Decision) . . 903

Turner *v.* Commissioner of Correction 743

Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal from denial of petition for writ of habeas corpus as to claim that petitioner was denied due process right to fair trial in violation of Brady *v.* Maryland *(373 U.S. 83); whether prosecutor improperly failed to correct witness' false testimony that she did not expect to receive consideration, aside from plane fare she already had received, in exchange for testimony; whether habeas court applied incorrect legal standard when it determined that petitioner had not proven* Brady *violation because there was no evidence of formal plea agreement between witness and state; whether petitioner must establish existence of formal plea agreement in order to prove* Brady *violation.*

Wells Fargo Bank, N.A. *v.* Melahn 607

Foreclosure; whether trial court abused its discretion when it struck eight count amended counterclaim on grounds of legal insufficiency and failure to meet

transaction test; whether trial court properly rendered judgment in favor of plaintiff after having stricken each count of amended counterclaim despite named defendant's attempt to replead four of eight stricken counts by adding conclusory sentence to each of those counts; whether appeal from striking of special defenses was from appealable final judgment.

Windsor *v.* Loureiro Engineering Associates 356

Professional negligence; whether present action was barred by applicable seven year statute of limitations (§ 52-584a) where defendant architects had been retained to produce report regarding structural soundness of existing building and, more than ten years later, auditorium roof suffered partial collapse; claim that analysis provided by defendants in report was never substantially completed because they failed to inform plaintiff about defect in auditorium roof; whether defendants failed to satisfy burden to demonstrate that action was commenced outside limitation period; whether date of substantial completion under § 52-584a was date of report when report did not itself require or effect physical alteration of real property and there was no readily discernible date of substantial completion of such improvement to real property; claim that triable issue of fact existed with respect to substantial completion.

CONNECTICUT APPELLATE REPORTS

Vol. 182

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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MARIA UGALDE, ADMINISTRATRIX (ESTATE OF RICHARD UGALDE) *v.* SAINT MARY'S HOSPITAL, INC., ET AL.
(AC 39343)

Sheldon, Bright and Harper, Js.

Syllabus

The plaintiff administratrix of the estate of the decedent sought to recover damages for medical malpractice from the defendant hospital and the defendant surgeon in connection with the allegedly wrongful death of the decedent. The trial court granted the hospital's motion to dismiss the action against it and rendered judgment thereon. The hospital had claimed that the plaintiff's complaint was supported by an opinion letter from a health care provider that was legally insufficient under the applicable statute (§ 52-190a [a]). The plaintiff then filed a request for leave to amend the complaint and attached an amended opinion letter to the proposed amended complaint. The trial court denied the plaintiff's request for leave to amend the complaint, concluding that it had been filed beyond the statute of limitations for wrongful death actions, and dismissed the action against the hospital on the ground that the court lacked personal jurisdiction over the hospital because the initial opinion letter that had been filed with the complaint was legally insufficient. The trial court also granted the surgeon's motion for a judgment of nonsuit and rendered judgment thereon, determining that the plaintiff had failed to comply with certain of the surgeon's discovery requests and the court's orders to comply with those requests. The court thereafter denied the plaintiff's motions to set aside the judgment of nonsuit and to reargue the denial of the motion to set aside the judgment of nonsuit. On the plaintiff's appeal to this court, *held*:

1. The trial court did not err in denying the plaintiff's request for leave to amend the complaint or in dismissing her claim against the hospital for lack of personal jurisdiction; the plaintiff could not amend the complaint after the expiration of the statute of limitations for wrongful death actions, as such an approach to actions that are supported by insufficient opinion letters would circumvent and be inconsistent with the mandate of the legislature that such actions be dismissed for lack of personal jurisdiction, and because actions that have been dismissed for want of personal jurisdiction after the expiration of the statute of limitations can be saved if they are timely refiled in proper form under the accidental failure of suit statute (§ 52-592 [a]), the legislature plainly contemplated that a malpractice action that has been dismissed for not being supported by a qualifying opinion letter could be saved under § 52-592 (a), after the expiration of the statute of limitations, by refiling it along with a proper opinion letter.

2. The trial court did not abuse its discretion in denying the plaintiff's motion to reargue the denial of her motion to set aside the judgment of nonsuit; the plaintiff was afforded multiple opportunities to properly respond to the surgeon's discovery requests and the court's orders that she comply with those requests, but she failed to do so.

Argued February 8—officially released May 15, 2018

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Shapiro*, *J.*, granted the motion for a nonsuit filed by the defendant Shady Macaron and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to set aside the judgment of nonsuit; subsequently, the court denied the plaintiff's motions for leave to amend the complaint and to reargue the denial of the motion to set aside the judgment of nonsuit, and granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, this court dismissed the appeal as to the defendant Shady Macaron. *Affirmed.*

Jeffrey M. Cooper, for the appellant (plaintiff).

Michael R. McPherson, with whom, on the brief, were *Sally O. Hagerty* and *Ilyssa H. Kelson*, for the appellee (named defendant).

David J. Robertson, with whom were *Christopher H. Blau* and, on the brief, *Madonna A. Sacco* and *Matthew M. Sconziano*, for the appellee (defendant Shady Macaron).

Opinion

SHELDON, J. In this medical malpractice action, the plaintiff, Maria Ugalde, administratrix of the estate of Richard Ugalde (decedent), appeals from the judgments of the trial court rendered in favor of the defendants, Saint Mary's Hospital, Inc. (hospital), and Shady Macaron, M.D. On appeal, the plaintiff claims that the trial court erred (1) in dismissing her claim against the hospital for failure to file a legally sufficient opinion letter authored by a similar health care provider, as required by General Statutes § 52-190a (a); and (2) in denying her motion to reargue the denial of her motion to set aside the judgment of nonsuit that had been rendered against her in favor of Macaron for her failure to comply with discovery requests.[1] We affirm the judgments of the trial court.

In her complaint dated August 6, 2015, the plaintiff alleged that, in May, 2013, her decedent was treated at the hospital by Macaron, a general surgeon, who performed a robot-assisted sleeve gastrectomy upon him, after which, while he was still hospitalized, he suffered a postoperative gastric leak that caused his

[1] As to Macaron, the plaintiff initially appealed from the judgment of nonsuit and the denial of her motion to set aside the judgment of nonsuit. Macaron filed a motion to dismiss the appeal from the judgment of nonsuit for untimeliness. This court granted the motion to dismiss the appeal from the judgment of nonsuit. The plaintiff's appeal from the denial of the motion to reargue the motion to set aside the nonsuit is now before us.

death. After counsel appeared for both defendants, they filed the motions which led ultimately to the judgments that have been challenged on this appeal. We set forth the procedural history leading to each challenged judgment in turn.

I

The plaintiff first challenges the dismissal of her claim against the hospital for failure to comply with the requirements of § 52-190a (a). The plaintiff argues that the trial court should have permitted her to amend her complaint—specifically, the opinion letter attached to her complaint—to add the professional qualifications of the author of that letter, and thus to cure the defect contained therein.

The following procedural history is relevant to the plaintiff's claim. The plaintiff's decedent died on May 13, 2013. The plaintiff obtained a ninety day extension of the statute of limitations to bring this action pursuant to § 52-190a (b).[2] Both defendants were timely served with the plaintiff's writ of summons and complaint on August 7, 2015. The return date in this matter was September 15, 2015.

Attached to the plaintiff's complaint was a certificate signed by the plaintiff's attorney, attesting that he had a good faith belief that grounds existed for the bringing of this action on the basis of the defendants' medical negligence in their care and treatment of the decedent. Also accompanying the complaint was an opinion letter, which stated, inter alia: "It is my professional medical opinion based upon my education, training, and 35 years

[2] General Statutes § 52-190a (b) provides: "Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods."

of surgical experience and surgical critical care, and my review of the medical records that the care provided to the [decedent] by general surgeon . . . Macaron and the surgical team under his direction grossly departed and deviated from the accepted standard of care one would expect from a general surgeon providing postoperative care for a patient undergoing a previous gastrointestinal surgical procedure."

On October 14, 2015, the hospital filed a motion to dismiss the plaintiff's claim against it on the ground that the court lacked personal jurisdiction over it because the opinion letter attached to the plaintiff's complaint failed to set forth the professional qualifications of the author of the opinion letter as required by § 52-190a (a), and thus that it was legally insufficient.[3]

On October 20, 2015, in response to the defendants' motions to dismiss, the plaintiff filed a request for leave to amend her complaint, seeking to add to the opinion letter the professional qualifications of its author. Attached to the proposed amended complaint was an amended opinion letter, which stated, inter alia, that the writer's professional medical opinion was based "upon my education, training, and 35 years of surgical experience with surgical critical care, *and as a board certified general, board certified cardiovascular surgeon and with previous board certification in surgical critical care* . . . ."

The hospital objected to the plaintiff's request for leave to amend on the ground that it was untimely and improper in light of its outstanding challenge to the court's jurisdiction over it.

On January 19, 2016, the plaintiff filed an objection[4] to the hospital's motion to dismiss on the ground that

[3] Macaron also filed a motion to dismiss, but did not pursue it.

[4] The trial court agreed to consider the plaintiff's objection despite her failure to timely file it within thirty days as required by Practice Book § 10-31.

her proposed amended opinion letter satisfied the requirements of § 52-190a (a) and was filed within the applicable statute of limitations.

By way of a memorandum of decision filed on June 8, 2016, the court denied the plaintiff's request for leave to amend her complaint, sustained the hospital's objection thereto, and granted the hospital's motion to dismiss due to her failure to comply with the requirements of § 52-190a (a). The court denied the plaintiff's request for leave to amend her complaint because it was untimely. The court explained that her decedent died on May 13, 2013, that the statute of limitations for a wrongful death claim is two years, and that the plaintiff had obtained a ninety day extension of the statute of limitations pursuant to § 52-190a (b). Thus, the statute of limitations on the plaintiff's claims expired two years and ninety days from May 13, 2013, which fell on August 11, 2015. The plaintiff filed her request for leave to amend on October 20, 2015. The court reasoned that because the plaintiff's request for leave to amend was filed beyond the statute of limitations, it could not grant that request. And because the opinion letter filed with the plaintiff's complaint was legally insufficient, the court lacked personal jurisdiction over the hospital and, thus, dismissed the plaintiff's claim against it. This appeal followed.

We begin by setting forth the following relevant legal principles. Section 52-190a (a) provides in relevant part that, in any medical malpractice action, "[n]o civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances

to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . [T]he claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [General Statutes §] 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ." Section 52-190a requires that the written opinion letter must have been obtained prior to filing the action and that the good faith certificate and opinion letter must be filed when the action commences. Section 52-190a (c) provides: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

"[T]he written opinion letter, prepared in accordance with the dictates of § 52-190a, like the good faith certificate, is akin to a pleading that must be attached to the complaint in order to commence . . . the action [properly]. . . . Accordingly . . . [t]he failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process, which implicates personal jurisdiction over the defendant. . . . [Dismissal on the basis of an inadequate opinion letter is] without prejudice . . . and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute . . . ." (Citations omitted; internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350–51, 63 A.3d 940 (2013). "[W]hen a medical malpractice action has been dismissed pursuant to § 52-190a (c) for failure to supply [a legally sufficient] . . . opinion letter by a similar health care provider required by § 52-190a (a), a plaintiff may commence an otherwise time barred new action

pursuant to the matter of form provision of [the accidental failure of suit statute, General Statutes] § 52-592 (a) only if that failure was caused by a simple mistake or omission, rather than egregious conduct or gross negligence attributable to the plaintiff or his attorney." *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 46–47, 12 A.3d 885 (2011).

The plaintiff does not claim on appeal, nor did she before the trial court, that the opinion letter that she filed with her initial complaint complied with the requirements of § 52-190a (a). She argues, as she did before the trial court, that she should have been permitted to amend her opinion letter to bring it into compliance with § 52-190a (a), and thus within the jurisdiction of the court. We are not persuaded.

In *Gonzales* v. *Langdon*, 161 Conn. App. 497, 128 A.3d 562 (2015), this court held, as a matter of first impression, that a legally insufficient opinion letter may be cured by amendment under two circumstances. The court held: "[I]f a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter for the original opinion letter, the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day and the action was brought within the statute of limitations, and (2) has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day. The court may abuse its discretion if it denies the plaintiff's request to amend despite the fact that the amendment would cure any and all defects in the original opinion letter and there is an absence of other independent reasons to deny permission for leave to amend." Id., 510.

The plaintiff concedes that she cannot prevail under the first prong of *Gonzales* because she failed to request

leave to amend her complaint within thirty days of the return day. She thus relies on the second prong of *Gonzales*, which provides that the court "has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations . . . ." Id. She claims, as she did before the trial court, that her request for leave to amend was filed within the applicable statute of limitations because it related back to the filing of her original complaint, and thus that she was entitled to amend her complaint pursuant to this court's reasoning in *Gonzales*. In rejecting this argument, the trial court reasoned as follows: "[T]he plaintiff relies on *Gonzales* v. *Langdon*, supra, 161 Conn. App. 522, where the court stated, 'The defendants in this case never argued before the trial court that the amendment did not relate back to the original complaint or that they would have been prejudiced by undue delay, and, therefore, there were no other independent reasons for the trial court to deny leave to amend.'

"The plaintiff asserts that, since her amendment existed, 'albeit in an allegedly defective form,' at the commencement of the action, it is proper to rely on the relation back doctrine. . . . She states that she believes that the only reason *Gonzales* concerned itself with the fact that the plaintiff there filed her amendment within the statute of limitations period was because the amendment contained an entirely new opinion letter which did not exist when the action was commenced. . . .

"The plaintiff contends that the Appellate Court in *Gonzales* must have been contemplating situations such as that presented here, otherwise it would have had no reason to discuss the relation back doctrine. However, in *Gonzales*, the court repeatedly referenced the requirement that the amendment must be presented within the statute of limitations. It stated that '[t]he legislative purpose of § 52-190a (a) is not undermined

by allowing a plaintiff leave to amend his or her opinion letter or to substitute in a new opinion letter if the plaintiff did file, in good faith, an opinion letter with the original complaint, and later seeks to cure a defect in that letter *within the statute of limitations*. Amending within this time frame typically will not prejudice the defendant or unduly delay the action.' . . . Id., 519. The court explained [in *Gonzales*] that '[a]llowing amendments filed after the thirty days to amend as of right but before the statute of limitations period has run favors judicial economy . . . .' Id.

"In particular, the court emphasized the requirement of the filing of an amendment before the limitations period has run, by distinguishing its prior decision in *Torres* v. *Carrese*, 149 Conn. App. 596, 611 n.14, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014), where the Appellate Court 'noted that the trial court could not consider a new opinion letter attached to the amended complaint because it was obtained after the action commenced, after the defendants had filed their motions to dismiss, *and after the statute of limitations had expired* . . . . Therefore, *Torres* is distinguishable from the present case and falls outside the time frame for when amending an opinion letter is allowed.' . . . *Gonzales* v. *Langdon*, supra, 161 Conn. App. 520 n.10.

"Thus, *Gonzales* emphasizes the requirement that the amendment must be filed within the limitations period. As in *Torres*, the plaintiff's amendment here was filed after the statute of limitations period had expired. In view of the fact that attachment of a written opinion letter that does not comply with § 52-190a constitutes insufficient process, and service of that insufficient process does not subject a defendant to the jurisdiction of the court, which implicates personal jurisdiction; see *Morgan* v. *Hartford Hospital*, [301 Conn. 388, 401–402, 21 A.3d 451 (2011)]; the court concludes that the reference in *Gonzales* to the relation back doctrine was

employed to illustrate that, in the circumstances there, there were no 'other independent reasons for the trial court to deny leave to amend,' *Gonzales* v. *Langdon*, supra, 161 Conn. App. 522. The reference to the relation back doctrine does not contradict the court's earlier statements concerning the requirement for filing the request to amend within the limitations period, not after it expired." (Citations omitted; emphasis in original.) The court thus concluded: "Since it was filed after the expiration of the limitations period, the plaintiff's proposed amendment to the opinion letter may not be considered."

In her reply brief to this court, the plaintiff emphasized her reliance on this court's ruling in *Gonzales* to support her claim that she filed her request for leave to amend within the applicable statute of limitations. She explained that she "does not rely on the relation back doctrine as precedent for her right to file an amended opinion letter. Quite to the contrary, plaintiff relies on this court's decision in *Gonzales*, which states in pertinent part: 'Not only does § 52-190a not prohibit amendments, but judicial economy and justice support allowing amendments in cases, like this one, where a legally insufficient opinion letter in a seemingly nonfrivolous medical malpractice claim can be easily cured by amendment within a short time frame.' [*Gonzales* v. *Langdon*, supra, 161 Conn. App. 521]." When read in context, however, that portion of *Gonzales* clearly pertained to cases allowing amendments filed *before the expiration of the statute of limitations*. The court reasoned that, "[a]llowing amendments filed after the thirty days to amend as of right but before the statute of limitations period has run favors judicial economy . . . [because dismissal] for lack of a legally sufficient opinion letter . . . is without prejudice, and *even if the statute of limitations has run*, relief may well be available under the accidental failure of suit statute . . . .

Thus, if a plaintiff is unable to amend the original opinion letter during this time frame, the action would be dismissed without prejudice and could be filed anew, either within the statute of limitations or pursuant to the accidental failure of suit statute." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 519–20.

We agree with the trial court that the plaintiff's reliance on *Gonzales* is misplaced. The holding in *Gonzales* permits amendments to legally insufficient opinion letters only if they are sought prior to the expiration of the statute of limitations. Otherwise, *Gonzales* suggests that a plaintiff's only vehicle for saving his improperly pleaded action, after its mandatory dismissal as required by statute, is to refile the action with a proper, amended opinion letter under the accidental failure of suit statute. To hold that an amendment can be permitted after the expiration of the statute of limitations on the theory that the amended pleading relates back to the date of the filing of the improperly pleaded action would render all references to the statute of limitations and the accidental failure of suit statute in *Gonzales* irrelevant, for under that analysis, every amendment, however unseasonable, would relate back to the date of the original complaint without need for invoking, or thus complying with, the requirements of the accidental failure of suit statute. The plaintiff has not provided any appellate authority supporting such an expansion of this court's ruling in *Gonzales*, and thus we are disinclined to permit one, for such an approach to actions supported by insufficient opinion letters would be fundamentally inconsistent with that taken by the legislature in mandating the dismissal of such actions for lack of personal jurisdiction. Because actions dismissed for want of personal jurisdiction after the expiration of the statute of limitations can be saved if they are timely refiled in proper form under the accidental failure of

suit statute, the legislature plainly contemplated that a malpractice action dismissed for not being supported by a qualifying opinion letter could be saved under that same statute, after the expiration of the statute of limitations, by refiling it along with a proper opinion letter. That procedure would be circumvented by allowing insufficient opinion letters to be amended after the expiration of the statute of limitations. We thus conclude that the trial court did not err in denying the plaintiff's request for leave to amend or in dismissing her claim against the hospital for lack of personal jurisdiction.

II

The plaintiff also challenges the judgment of nonsuit entered in favor of Macaron. Specifically, she claims that the court erred in denying her motion to reargue the court's denial of her motion to set aside the judgment of nonsuit. We disagree.

In denying the plaintiff's motion to reargue the denial of her motion to set aside the judgment of nonsuit, the trial court set forth the following relevant procedural history. "On September 21, 2015, Macaron filed a notice stating that he had directed interrogatories and requests for production to the plaintiff (discovery request). . . . The plaintiff did not seek an extension of time to respond or file objections thereto within the requisite thirty day period. See Practice Book [(2015)] §§ 13-7 and 13-10. Thus, pursuant to the Practice Book, discovery responses were due in October 2015.

"When discovery responses were not received, Macaron filed a motion for [a] nonsuit. . . . The plaintiff did not respond to this motion. In its order dated November 9, 2015 . . . the court afforded the plaintiff additional time to comply with the discovery request and stated: Discovery compliance by December 4, 2015, is directed. If compliance does not occur, the movant

may apprise the court by motion and a nonsuit may be considered. Thus, the plaintiff was put on notice that compliance was required and that failure to comply could result in a nonsuit.

"On December 7, 2015, Macaron filed a motion for [an] order . . . in which he stated that the plaintiff had failed to comply with the court's order by again failing to provide discovery responses. Macaron again moved for a nonsuit. The plaintiff filed no response to this second motion for [a] nonsuit and did not provide discovery responses before the court considered the motion.

"By order dated December 21, 2015 . . . the court noted that discovery compliance is necessary to afford a defendant a fair opportunity to prepare a defense and, in the exercise of its discretion, found that a nonsuit was warranted. The court also stated, [i]f compliance occurs by January 15, 2016, the court would consider setting aside the nonsuit. . . .

"On December 30, 2015, the plaintiff filed a notice of compliance . . . in which she stated that she had complied with the court's December 21, 2015 order by furnishing her discovery responses. On the same date, she filed her motion to set aside . . . . Therein, she stated that she had provided good faith compliance with the order weeks before it was due and that the defendant is simply not prejudiced by the timing of the disclosure. . . .

"On January 6, 2016, Macaron filed his objection to the plaintiff's motion to set aside and his motion for costs. . . . Therein, Macaron asserted that the plaintiff had failed to answer interrogatories 75 [through] 78, pertaining to expert witnesses, by stating that she would provide the requested information in a timely fashion in accordance with any case specific scheduling order or similar discovery order and the rules of practice.

. . . This response by the plaintiff ignored this court's two previous orders, discussed above, in which the plaintiff was specifically directed to provide discovery compliance. In addition, Macaron cited other alleged deficiencies in the responses. . . .

"The plaintiff and codefendant Saint Mary's Hospital, Inc., submitted a proposed scheduling order . . . which was filed on January 7, 2016. This proposed scheduling order was not signed by Macaron's counsel and has not been approved by the court.

"On January 15, 2016, the plaintiff filed a notice of supplemental compliance, objections to Macaron's interrogatories, and a reply to Macaron's objection to the motion to set aside. . . . In the objections to the interrogatories concerning expert witnesses, the plaintiff states that she [o]bjects on the grounds that the scheduling order trumps the interrogatory request and provides until April 1, 2017, to do so. . . . As stated above, the proposed scheduling order has not been approved by the court. It is not a court order. . . .

"The plaintiff does not challenge the court's previous entry of a nonsuit as to her claims against Macaron. Although she did not do so previously, and although, as stated above, she previously filed no objections to Macaron's motions for [a] nonsuit, the plaintiff, in her motion for reargument, contends for the first time that the entry of a nonsuit was improper." (Citations omitted; internal quotation marks omitted.)

By way of a memorandum of decision dated June 8, 2016, the court denied the plaintiff's motion to reargue the court's March 2, 2016 denial of her motion to set aside the nonsuit. In so doing, the court explained, inter alia: "Previous to the entry of the nonsuit on December 21, 2015, [the plaintiff] had a complete opportunity to oppose it. Also, as stated above, in the court's order dated November 9, 2015 . . . she was specifically put

on notice that a nonsuit would be considered if she did not comply with Macaron's discovery request. As stated above, she filed no objections to Macaron's two motions seeking the entry of a nonsuit, including Macaron's December 7, 2015 motion . . . .

"The plaintiff's failure to oppose the entry of a nonsuit may not result in later reconsideration of the decision to enter a nonsuit after she received an adverse decision on her motion to set aside.

"Prior to granting the unopposed motion for the entry of a nonsuit, the court afforded the plaintiff additional time to comply with the discovery requests, but the plaintiff did not fully comply. The entry of a nonsuit was a result of the plaintiff's own failure to respond to motions and to comply with court orders. This consequence was a result of the plaintiff's own conduct; no injustice was involved. . . ."

"Thus, in the court's order, the plaintiff was explicitly put on notice of the governing statute and Practice Book section by reference to Supreme Court authority.

"The plaintiff also asserts that she was not apprised by the court that the entry of the nonsuit required her to immediately disclose her expert witnesses. . . . To the contrary, the court's orders . . . specifically directed her to comply with Macaron's discovery requests, which included interrogatories concerning experts.

"The court's order was clear. It stated that the court would consider setting aside the nonsuit if discovery compliance occurred by January 15, 2016. The plaintiff did not seek clarification. In support of her motion to set aside the nonsuit, she did not claim that the order was unclear. Her belated argument that the court's order was unclear is a prohibited attempt at a 'second bite of the apple.' " (Citations omitted.)

The court further explained: "[The] plaintiff's] recitation of events . . . omits her failure to respond to the defendant's initial motion for [a] nonsuit . . . . It also ignores the plaintiff's failure to comply with the court's order dated November 9, 2015 . . . in which the court afforded her additional time to comply, up to December 4, 2015. As stated above, in that order, the plaintiff was put on notice that if compliance did not occur, a nonsuit could result. The plaintiff has ignored [her] obligation to present [her] reason for the delay with any degree of particularity. . . .

"The plaintiff characterizes her omissions as meeting the definition of oversight, but not amounting to inattention. . . . [B]oth oversight and inattention are . . . synonyms for neglect or negligence. The plaintiff's failures to provide timely responses to the discovery requests and her failures to comply with the court's orders do not amount to a showing that she was prevented from prosecuting her action by mistake, accident, or other reasonable cause." (Citations omitted.)

Finally, even though the plaintiff claimed for the first time in her motion to reargue that the nonsuit was disproportionate to her offenses, and thus that the court was not required to address it, it did so, explaining, inter alia: "First, the plaintiff mischaracterizes the history of this matter by asserting that the record is completely silent as to whether the court exercised its discretion with due caution and restraint in ordering the nonsuit and that the order was entered after she had complied with a total of 217 requests by the deadline set by the court. . . .

"To the contrary, the court's order, dated December 21, 2015 . . . specified that the plaintiff had filed no objection to the entry of a nonsuit, and had not complied with the court's order of November 9, 2015, directing discovery compliance by December 4, 2015 . . . . No

discovery compliance had occurred when the nonsuit was granted. In addition, the court's order specifically referenced the exercise of discretion and cited *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 235, 963 A.2d 943 (2009), where the court stated, [i]n order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met: First, the order to be complied with must be reasonably clear. . . . Second, the record must establish that the order was in fact violated. . . . Third, the sanction imposed must be proportional to the violation. . . .

"Second, the plaintiff mischaracterizes the history of this matter by asserting that when she failed to comply with the court's November 9, 2015 order, it [was] the only order in the entire case that [the] [p]laintiff missed. . . . To the contrary, as discussed in the court's decision on the motion to set aside the nonsuit . . . the court also found that she had not fully complied with the court's order of December 21, 2015. . . .

"Under the circumstances here, the three requirements for sanctions for violation of a discovery order to withstand scrutiny are met. First, as discussed above, the court's orders were clear. Also, as discussed above, the record establishes that the plaintiff violated two court orders . . . and that the violation continues, since the plaintiff still has not provided responses to the discovery requests concerning her experts. . . .

"In its December 21, 2015 order, the court exercised its discretion mindful of Connecticut's policy which favors bringing about a trial on the merits of a dispute wherever possible and to secure for litigants their day in court. . . .

"Integral to that process is discovery compliance. . . . When the court found that a nonsuit was warranted, the plaintiff had failed to comply with the court's

November 9, 2015 order directing her to comply and the court noted that no discovery compliance had occurred. As the record reflects, in its orders, the court previously provided the plaintiff with extensions of time for compliance. In ordering a nonsuit, the court noted that it would consider setting aside the nonsuit if compliance occurred.

"Here . . . the plaintiff's belated discovery responses remained incomplete even after the court afforded the plaintiff an additional opportunity to comply by stating that it would consider setting aside the nonsuit if compliance occurred. In her memorandum [of law] . . . the plaintiff again argues that, based on Practice Book § 13-4 (g), she was not required to comply with Macaron's interrogatories concerning her experts.

"The court previously addressed this contention . . . stating that her objections to the interrogatories were untimely and that her reliance on Practice Book § 13-4 (g) was misplaced, since the court had ordered compliance. Having failed to object to the interrogatories in a timely manner, she was required to respond to them. The court's orders directed her to comply. Under the circumstances, Practice Book § 13-4 (g) is inapplicable.

"Thus, the plaintiff's argument that, in its December 21, 2015 order . . . the court effectively imposed a deadline of January 15, 2016, for expert disclosure with no notice is unfounded. As she acknowledges . . . Macaron served his discovery request, including the interrogatories concerning experts, on September 21, 2015. Responses were due thirty days later. . . . The court's orders subsequently directed the plaintiff to comply.

"The plaintiff belatedly provided compliance with respect to many of Macaron's requests. However, after failing to timely object and waiving her right to object, and in defiance of the court's orders, she steadfastly refuses to provide discovery responses concerning

experts. Review of the plaintiff's motion for reargument shows that her discovery responses still remain incomplete, notwithstanding this court's orders. . . .

"As discussed above, here, noncompliance was not caused by inability. No mitigating factors are present. . . . Further . . . the plaintiff's failure to respond to the discovery requests and the violations of the court's orders were not isolated events. . . . Rather, they evidence a pattern of noncompliance. . . . In view of the history of noncompliance, the court concludes that such conduct would persist. . . .

"The information that was sought is central to the plaintiff's claims. The plaintiff's continued failure to fully comply evidences a lack of due regard to necessary rules of procedure. . . . Lack of full compliance prejudices the defendant's ability to investigate the plaintiff's claims and to prepare a defense. . . .

"The plaintiff had ample, and extended, time to fully comply, but did not do so within the deadlines set by the court, and still has not done so. . . .

"In the exercise of its discretion, the court found that a nonsuit was an appropriate sanction. A court should not set aside a nonsuit where a party simply chose to ignore the court's authority. . . .

"The plaintiff may not be permitted to continue not complying with the court's orders. In so doing, the progress of this matter has been inexcusably delayed. . . . At this juncture, nonsuit remains warranted as the only reasonable remedy available to vindicate the legitimate interests of the defendant and the court." (Citations omitted; internal quotation marks omitted.) The court thus denied the plaintiff's motion to reargue. This appeal followed.[5]

[5] The plaintiff filed this appeal on June 23, 2016. On July 1, 2016, the plaintiff filed a motion to open the judgment of nonsuit, which the court denied on July 26, 2016. The plaintiff has not challenged that ruling on appeal.

"The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . Likewise, [t]he determination of whether to set aside [a] default [or nonsuit] is within the discretion of the trial court . . . and will not be disturbed unless that discretion has been abused or where injustice will result. In the exercise of its discretion, the trial court may consider not only the presence of mistake, accident, inadvertence, misfortune or other reasonable cause . . . factors such as [t]he seriousness of the default, its duration, the reasons for it and the degree of contumacy involved . . . but also, the totality of the circumstances, including whether the delay has caused prejudice to the nondefaulting party." (Citation omitted; internal quotation marks omitted.) *Spatta* v. *American Classic Cars, LLC*, 150 Conn. App. 20, 27, 90 A.3d 318, cert. denied, 312 Conn. 919, 94 A.3d 640 (2014).

As aptly recounted by the trial court, the plaintiff was afforded multiple opportunities to properly respond to Macaron's discovery requests, and its orders that she comply with those requests. At every turn, the plaintiff failed to do either. In light of the court's thorough and well reasoned memorandum of decision, as substantially quoted previously, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to reargue the denial of her motion to set aside the judgment of nonsuit.[6]

The judgments are affirmed.

In this opinion the other judges concurred.

[6] On page fourteen of her fourteen page brief to this court, in the portion of her brief that is titled, "Conclusion and Statement of Relief Sought," the plaintiff states, inter alia: "[The] [p]laintiff does not believe a judgment of nonsuit three months into the case for what amounts to a violation of one court order with compliance occurring mere days after the original deadline set and well before the second, with a trial date in January, 2018, meets the threshold set by the court in *Millbrook*." Not only does the plaintiff fail to provide the full name and legal citation of the case on which she relies, but she fails to state the "threshold" that she meets according to that case. This is the first and only time that the plaintiff even suggests that the sanction

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(AC 39208)

Lavine, Keller and Harper, Js.

Syllabus

The state of Connecticut appealed to this court from the judgments of the trial court affirming in part the decisions of a family support magistrate granting a motion to open an acknowledgment of paternity concerning the minor child and rendering judgment of nonpaternity. The child's mother, A, and G had executed a written acknowledgment of paternity for the child. Thereafter, the state filed a petition for support in A's name against G, who, in a separate action, filed a motion to open the acknowledgment of paternity, pursuant to statute ([Rev. to 2011] § 46b-172 [a] [2]), challenging the validity of the acknowledgment of paternity on the statutory grounds of fraud, mistake of fact, and duress. The support petition and the motion to open were consolidated for a hearing before the family support magistrate, who granted the motion to open the paternity judgment solely based on the best interests of the minor child and rendered judgment of nonpaternity and dismissing the support petition. The state thereafter appealed from the decisions of the magistrate to the trial court, which affirmed the decisions of the magistrate in part and remanded the cases for further proceedings, and this appeal followed. The state claimed that the trial court erred in concluding that *Ragin* v. *Lee* (78 Conn. App. 848) provided a nonstatutory ground to open an acknowledgment of paternity and that the magistrate had the inherent authority to grant the motion to open on the basis of the best interests of the child. *Held*:

1. The trial court erred in concluding that *Ragin* provided a fourth and independent ground to open an acknowledgment of paternity, apart from the statutory grounds of fraud, mistake of fact, and duress, as set forth in § 46b-172 (a) (2); the legislature clearly and unambiguously has set forth the three statutory grounds on which an acknowledgment of paternity may be challenged in court where, as here, G did not rescind the acknowledgment within sixty days of its execution, it was not the province of this court to create an independent basis for opening a

of a judgment of nonsuit might be disproportionate to her repeated violations. This lone sentence, which misstates the trial court's findings—which she has not challenged as clearly erroneous—is devoid of any legal analysis. The plaintiff's desultory, unexplicated reference to *Millbrook* cannot reasonably be construed as an adequately briefed legal argument.

* The full names of the parties involved in this appeal are not disclosed.

judgment that is governed by statute, and *Ragin* did not create an independent ground for opening a judgment of paternity on the basis of the best interests of the child in lieu of any applicable statutory requirements but, instead, discussed the best interests of the child in considering the issue of whether the minor child had standing to file a motion to open.

2. The trial court erred in determining that the family support magistrate had the inherent authority to open the judgment of paternity on the basis of the best interests of the child; no statutory provision exists that expressly grants the family support magistrate division, the authority of which is limited by statute, the power to open an acknowledgment of paternity on the basis of the best interests of the child, as the authority to open an acknowledgment of paternity on the basis of the best interests of the child is not included in the magistrate's enabling statute (§ 46b-231 [m]) or in § 46b-172 (a) (2), which clearly states that an acknowledgment of paternity may be challenged in court or before a family support magistrate after the rescission period only on the basis of fraud, duress or material mistake of fact, and, thus, the magistrate, having found that there was no fraud, duress, or a material mistake of fact, did not have the authority to grant the motion to open the judgment after the sixty day rescission period had passed.

(*One judge concurring separately*)

Argued January 11—officially released May 15, 2018

Procedural History

Appeals from the decisions of the family support magistrate, *David A. Dee*, dismissing a petition for financial and medical support and maintenance of the minor child, granting a motion to open an acknowledgment of paternity and rendering judgment of nonpaternity, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Albis*, *J.*; judgments affirming in part the decisions of the family support magistrate and remanding the matters for further proceedings, from which the state appealed to this court. *Reversed; further proceedings.*

Joan M. Andrews, assistant attorney general, with whom were *Sean O. Kehoe*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellant (state).

Richard A. Rochlin, with whom was *Jennifer R. Flynn*, for the appellee (defendant in the first case, plaintiff in the second case).

Robert B. McLaughlin, for the guardian ad litem of the minor child.

Opinion

HARPER, J. The state of Connecticut appeals from the judgments of the trial court rendered in favor of the plaintiff, Geoffrey M., Jr.,[1] affirming in part the decision of the family support magistrate (magistrate) that opened an acknowledgment of paternity. On appeal, the state claims that the court erred in concluding that (1) *Ragin* v. *Lee*, 78 Conn. App. 848, 829 A.2d 93 (2003), provided a nonstatutory ground for opening an acknowledgment of paternity, apart from the statutory grounds set forth in General Statutes (Rev. to 2011) § 46b-172 (a) (2)[2]; and (2) the magistrate had the inherent authority to grant the plaintiff's motion to open the judgment on the basis of the best interests of the child. We agree with the department and, accordingly, reverse the judgments of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On April 26, 2011, the plaintiff and the defendant, Asia A. M., executed a

[1] This appeal was taken from two consolidated cases in which Geoffrey M., Jr., was the defendant in the first case and the plaintiff in the second case. For the purposes of this opinion, and consistent with the parties' briefs on appeal, we refer to Geoffrey M., Jr., as the plaintiff and to Asia A. M. as the defendant.

The state, as an interested party providing HUSKY health insurance benefits to the child, filed a support petition on behalf of defendant, the child's mother; see General Statutes § 46b-231 (t) (3) and (u) (1); and has appealed on behalf of the Office of Child Support Services of the Department of Social Services; see General Statutes § 46b-207; which is acting on behalf of the mother. See *Walsh* v. *Jodoin*, 283 Conn. 187, 191 n.2, 925 A.2d 1026 (2007); *Esposito* v. *Banning*, 110 Conn. App. 479, 480 n.1, 955 A.2d 609 (2008).

[2] Hereinafter, unless otherwise indicated, all references to § 46b-172 in this opinion are to the 2011 revision of the statute.

written acknowledgment of paternity (acknowledgment) for the minor child, who was born in February, 2011. See General Statutes (Rev. to 2011) § 46b-172 (a) (1). On October 28, 2014, the state filed a support petition against the plaintiff in the name of the defendant. On December 9, 2014, the plaintiff filed a motion to open the judgment pursuant to § 46b-172,[3] challenging the validity of the acknowledgment on the grounds of fraud, mistake of fact, and duress. Specifically, in his affidavit accompanying his motion to open, the plaintiff averred that (1) the defendant committed fraud by "intentionally conceal[ing] the fact that she had sexual relations with other men" and "represent[ing] to the plaintiff that they were in a sexually exclusive relationship"; (2) a DNA test demonstrated "that there is a 0 percent chance that [the plaintiff] could be the biological father of the minor child" and "[t]he fact of the plaintiff being the biological father is . . . a mistake of fact"; and (3) "[t]he plaintiff was under duress from the pressure being applied to him by the defendant and other family members, and [he] felt compelled to sign this acknowledgment due to this duress." The plaintiff further averred in his affidavit that "[t]he plaintiff does not have a [parent-child] relationship with the minor child at this time . . . and it is in the best interests of the minor child" to establish the biological father.

On January 6, 2015, the state's support petition and the plaintiff's motion to open were consolidated for a hearing. On February 24, 2015, a hearing was held on the plaintiff's motion to open before a magistrate. On March 3, 2015, relying on *Ragin* v. *Lee*, supra, 78 Conn. App. 848, the magistrate granted the plaintiff's motion to

[3] Pursuant to § 46b-172 (a) (1), an "acknowledgment of paternity . . . shall have the same force and effect as a judgment of the Superior Court." Accordingly, any reference herein to the motion to open the judgment refers to the acknowledgment of paternity, which, by statute, had the force and effect of a judgment.

open the judgment, ordered a judgment of nonpaternity, and ordered the dismissal of the department's support petition. In its written order, the magistrate concluded that "[t]he plaintiff clearly and convincingly proved it is in the best interest of the minor child to open the judgment. A minor child has a fundamental and independent right and compelling interest in an accurate determination of paternity. [Id., 863]. . . . While the plaintiff did prove it is in the best interest of the child to open the judgment, he failed to prove any of the statutory grounds of fraud, duress or . . . mistake. See [General Statutes (Rev. to 2011)] § 46b-172 (a) (2). . . . The credible evidence clearly indicates the plaintiff was aware he was not the biological father of the minor child when he executed the acknowledgment. The defendant did not defraud the plaintiff at the time he signed the acknowledgment. The plaintiff was not under duress when he signed the acknowledgment. The parties were not . . . mistaken when the acknowledgment was executed. The motion to open is granted solely based upon the best interest of the minor child."

On March 17, 2015, the state appealed from the decision of the magistrate to the trial court pursuant to General Statutes § 46b-231 (n)[4] and Practice Book § 25a-29,[5] claiming, inter alia, that "[i]n the absence of fraud, duress or mistake, the [m]agistrate lacked the [authority] to open the judgment of paternity . . . ." A hearing took place on May 5, 2015, before the court, and the parties filed posthearing briefs. On March 29, 2016, the court affirmed the decision of the magistrate in part, and remanded the case to the magistrate to hear additional

[4] General Statutes § 46b-231 (n) (1) provides that "[a] person who is aggrieved by a final decision of a family support magistrate is entitled to judicial review by way of appeal under this section."

[5] Practice Book § 25a-29 provides that "[a]ny person who is aggrieved by a final decision of a family support magistrate may appeal such decision in accordance with the provisions of . . . § 46b-231. The appeal shall be instituted by the filing of a petition which shall include the reasons for the appeal."

evidence with respect to the best interests of the child. In its memorandum of decision, the court held that (1) *Ragin* v. *Lee*, supra, 78 Conn. App. 848, provided a fourth, nonstatutory ground to open a judgment of paternity, apart from the statutory requirements set forth in § 46b-172 (a) (2); and (2) the magistrate had the inherent authority to open the judgment on the basis of the best interests of the minor child. The court further held, however, that "it was an error of law for the magistrate to open the judgment . . . based solely on the results of genetic testing, without sufficient evidence as to other factors affecting the best interests of the child."

On April 11, 2016, the state filed a motion to reargue, which the court denied on April 28, 2016. This appeal followed.[6]

We begin by setting forth the applicable standard of review. The state's claims present a question of law over which our review is plenary. See *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 283, 928 A.2d 566 (2007) ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" [internal quotation marks omitted]); see also *Commissioner of Social Services* v. *Zarnetski*, 175 Conn. App. 632, 637, 168 A.3d 646 (2017). "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct

[6] "It is axiomatic that the jurisdiction of an appellate tribunal is limited to appeals from judgments that are final." *Cardona* v. *Negron*, 53 Conn. App. 152, 156, 728 A.2d 1150 (1999). "[A]n order opening a judgment ordinarily is not a final judgment within [the meaning of General Statutes] § 52-263. . . . [Our Supreme Court], however, has recognized an exception to this rule where the appeal challenges the power of the [trial] court to act to set aside the judgment." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Works*, 160 Conn. App. 49, 57, 124 A.3d 935, cert. denied, 320 Conn. 904, 127 A.3d 188 (2015); see also *Solomon* v. *Keiser*, 212 Conn. 741, 746–47, 562 A.2d 524 (1989). Because the state challenges the authority of the court to open the judgment, the present case is an appealable final judgment.

and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Ragin* v. *Lee*, supra, 78 Conn. App. 855.

I

The state claims that the "court erred in concluding that *Ragin* v. *Lee*, [supra, 78 Conn. App. 848], provides a fourth and independent ground to open an acknowledgment of paternity," apart from the requirements set forth in § 46b-172 (a) (2). The state contends that, pursuant to § 46b-172 (a) (2), absent a finding of fraud, duress, or material mistake of fact, the magistrate lacked the authority to open the judgment outside of the rescission period, and that the court "erred in finding that the [f]amily [s]upport [m]agistrate . . . did not have to comply with the statutory criteria of . . . § 46b-172." In response, the plaintiff and the attorney for the guardian ad litem claim that the court properly concluded that the best interests of the child is a nonstatutory ground for opening an acknowledgment of paternity. We agree with the state.

Paternity may be acknowledged voluntarily and extrajudicially through a written acknowledgment of paternity. See General Statutes (Rev. to 2011) § 46b-172 (a) (1). "[T]he acknowledgment procedure provides an alternative to a full scale judicial proceeding, and an agreement reached pursuant to it does not require court approval. The acknowledgment procedure may be followed [i]n lieu of or in conclusion of a paternity action initiated pursuant to [General Statutes] § 46b-160." (Internal quotation marks omitted.) *Cardona* v. *Negron*, 53 Conn. App. 152, 154 n.4, 728 A.2d 1150 (1999). Section 46b-172 (a) (1) sets forth the process by which an acknowledgment may be executed, including the required notices that must be provided to the

parties.[7] An executed "acknowledgment of paternity . . . shall have the same force and effect as a judgment of the Superior Court." General Statutes (Rev. to 2011) § 46b-172 (a) (1). "The mother and the acknowledged father shall have the right to rescind such affirmation or acknowledgment in writing within the earlier of (A) sixty days, or (B) the date of an agreement to support such child approved in accordance with subsection (b) of this section or an order of support for such child entered in a proceeding under subsection (c) of this section. An acknowledgment executed in accordance with subdivision (1) of this subsection may be chal-

[7] General Statutes (Rev. to 2011) § 46b-172 (a) (1) provides, in relevant part, that "a written acknowledgment of paternity executed and sworn to by the putative father of the child when accompanied by (A) an attested waiver of the right to a blood test, the right to a trial and the right to an attorney, and (B) a written affirmation of paternity executed and sworn to by the mother of the child shall have the same force and effect as a judgment of the Superior Court. It shall be considered a legal finding of paternity without requiring or permitting judicial ratification, and shall be binding on the person executing the same whether such person is an adult or a minor, subject to subdivision (2) of this subsection. Such acknowledgment shall not be binding unless, prior to the signing of any affirmation or acknowledgment of paternity, the mother and the putative father are given oral and written notice of the alternatives to, the legal consequences of, and the rights and responsibilities that arise from signing such affirmation or acknowledgment. The notice to the mother shall include, but shall not be limited to, notice that the affirmation of paternity may result in rights of custody and visitation, as well as a duty of support, in the person named as father. The notice to the putative father shall include, but not be limited to, notice that such father has the right to contest paternity, including the right to appointment of counsel, a genetic test to determine paternity and a trial by the Superior Court or a family support magistrate and that acknowledgment of paternity will make such father liable for the financial support of the child until the child's eighteenth birthday. In addition, the notice shall inform the mother and the father that DNA testing may be able to establish paternity with a high degree of accuracy and may, under certain circumstances, be available at state expense. The notices shall also explain the right to rescind the acknowledgment, as set forth in subdivision (2) of this subsection, including the address where such notice of rescission should be sent, and shall explain that the acknowledgment cannot be challenged after sixty days, except in court upon a showing of fraud, duress or material mistake of fact."

lenged in court or before a family support magistrate after the rescission period only on the basis of fraud, duress or material mistake of fact which may include evidence that he is not the father, with the burden of proof upon the challenger." General Statutes (Rev. to 2011) § 46b-172 (a) (2).

In the present case, the plaintiff and the defendant executed the acknowledgment on April 26, 2011. The plaintiff filed a motion to open the judgment more than three years later, on December 9, 2014. Because the plaintiff did not rescind the acknowledgment within sixty days, he could challenge it "*only* on the basis of fraud, duress or material mistake of fact." (Emphasis added.) General Statutes (Rev. to 2011) § 46b-172 (a) (2); see also General Statutes (Rev. to 2011) § 46b-172 (a) (1) ("the acknowledgment cannot be challenged after sixty days, except in court upon a showing of fraud, duress or material mistake of fact"). In its written order, the magistrate explicitly found that there was no fraud, duress, or mistake of fact, stating that "[t]he credible evidence clearly indicates the plaintiff was aware he was not the biological father of the minor child when he executed the acknowledgment. The defendant did not defraud the plaintiff at the time he signed the acknowledgment. The plaintiff was not under duress when he signed the acknowledgment. [The defendant and the plaintiff] were not . . . mistaken when the acknowledgment was executed." Consequently, pursuant to § 46b-172 (a) (2), the magistrate lacked the authority to consider the plaintiff's motion to open the judgment.

Despite this, the magistrate granted the plaintiff's motion to open because it concluded that it was in the child's best interests to do so. Relying on this court's decision in *Ragin* v. *Lee*, supra, 78 Conn. App. 848, the magistrate concluded that "[t]he plaintiff clearly and convincingly proved it is in the best interest of the minor

child to open the judgment." The trial court similarly concluded that *Ragin* created an independent ground for granting a motion to open a judgment of paternity on the basis of the best interests of the child.[8] Therefore, we first must determine whether this court held in *Ragin* that a court may open a judgment of paternity, absent a finding of fraud, duress, or material mistake of fact as required by § 46b-172 (a) (2), solely because it is in the best interests of the child to do so. We conclude that it did not.

In *Ragin*, the magistrate rendered a default judgment of paternity against the defendant after he failed to appear at the paternity action, which was initiated by the Commissioner of Social Services on behalf of the state pursuant to General Statutes § 46b-162. Id., 850. Counsel for the minor child timely filed a motion to open the default judgment, alleging that (1) there was insufficient service of process on the defendant and he did not receive actual notice of the proceedings, and

[8] In its memorandum of decision, the court states that "[t]he trial courts of Connecticut have been divided in their view of whether, under *Ragin*, there is a so-called 'fourth ground' for opening a judgment of paternity," and the court cites to the decisions that it alleges similarly have concluded that *Ragin* permits a judgment of paternity to be opened on the basis of the best interests of the child, in the absence of fraud, duress, or material mistake of fact. We note, however, that those courts did not consider the motion to open the judgment *solely* on the basis of the best interests of the child. See, e.g., *Oppelt* v. *Oppelt*, Superior Court, judicial district of Hartford, Docket Nos. FA-09-4047137-S, FA-09-4045512-S (September 21, 2011) (noting that best interest of child provides basis for opening judgment, but opening judgment because there were "significant and meaningful procedural irregularities in this matter which deprived the defendant of the due process afforded to him," namely that "the acknowledgment was not executed in accordance with the provisions of . . . § 46b-172"); *Campbell* v. *Barrow*, Superior Court, judicial district of Hartford, Docket No. FA030634839 (December 28, 2004) (noting that best interests of child may provide "further basis to open the paternity judgment," but opening and setting aside acknowledgment of paternity because "the defendant did not fully comprehend or assent to a full waiver of his rights under § 46b-172 (a) (1)" and, therefore, statutory requirements were not followed).

(2) it was in the best interests of the child to open the judgment and order genetic testing to eliminate any doubt regarding the child's biological father. Id., 851, 852. A hearing was held on the motion to open, but the magistrate did not render a decision on the motion at that time. Id., 853. The state then appealed to the trial court, claiming, inter alia, that the magistrate lacked the authority to consider the merits of the child's motion to open. Id., 854. The trial court agreed with the state and reversed the decision of the magistrate. Id. Counsel for the minor child appealed to this court. Id.

On appeal, this court addressed two issues: (1) whether there was an appealable final judgment; and (2) whether the minor child had standing to file the motion to open. Id., 850. Importantly, nowhere in the opinion did this court state that the best interests of the child was a basis for opening the judgment as an alternative to the applicable statutory requirements. Rather, this court discussed the best interests of the child in considering the second issue raised on appeal—whether the minor child had standing to file the motion to open. Id., 861–62. This court held that the minor child did have standing because, inter alia, "a child who is the subject of a paternity action has a fundamental interest in an accurate determination of paternity that is independent of the state's interest in establishing paternity for the benefit of obtaining payment for the child's care and any interest that the parents may have in the child." Id., 863. Thus, this court vacated the judgment of the trial court and remanded the case "to the . . . magistrate for further proceedings with direction also to consider the child's motion to open the default judgment of paternity . . . ." Id., 864. Counsel for the minor child still needed to and did actually comply with the relevant statutory requirements for filing a motion to open a default judgment of paternity. See General

Statutes § 52-212 (a).[9] *Ragin* did not, however, create an independent ground for opening a judgment of paternity on the basis of the best interests of the child, in lieu of any applicable statutory requirements.

Indeed, it is not the province of this court to create an independent basis for opening a judgment that is governed by statute. It is well established that "[i]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language." (Internal quotation marks omitted.) *McCullough* v. *Swan Engraving, Inc.*, 320 Conn. 299, 309, 130 A.3d 231 (2016). Rather, "[w]e are obligated to construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions . . . . It is axiomatic that the court itself cannot rewrite a statute . . . . That is a function of the legislature." (Internal quotation marks omitted.) *In re Quidanny L.*, 159 Conn. App. 363, 371, 122 A.3d 1281, cert. denied, 319 Conn. 906, 122 A.3d 639 (2015); see also *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 215–16, 901 A.2d 673 (2006). Here, the legislature clearly and unambiguously has set forth the three grounds on which an acknowledgment of paternity may be challenged in court.[10] See General Statutes (Rev. to 2011) § 46b-172

[9] We note that the grounds set forth in § 52-212 (a) for opening a court judgment, the statute at issue in *Ragin*, differs from the grounds set forth in § 46b-172 (a) (2) for voiding an acknowledgment of paternity.

General Statutes § 52-212 (a) provides in relevant part that "[a]ny judgment rendered . . . upon a default . . . in the Superior Court may be set aside, within four months following the date on which it was rendered . . . and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment . . . and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

[10] The legislature has included the best interests of the child elsewhere as a basis for the magistrate's authority. See, e.g., General Statutes § 46b-231 (m) (8) ("[a]greements between parties as to custody and visitation of minor children . . . shall be reviewed by a family support magistrate, who

(a) (2). Absent a finding of fraud, duress, or material mistake of fact, an acknowledgment of paternity may not be challenged in court.

As set forth previously, the magistrate found that the plaintiff "failed to prove any of the statutory grounds of fraud, duress or . . . mistake."[11] The trial court found "ample support in the record for [the] factual

shall approve the agreement unless he finds such agreement is not in the best interests of the child"). If the legislature had intended for the best interests of the child to be a ground upon which to challenge an acknowledgment of paternity in court, we presume that it would have included such language in § 46b-172 (a) (2). See *State* v. *Kevalis*, 313 Conn. 590, 604, 99 A.3d 196 (2014) ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly" [internal quotation marks omitted]). To the extent that the plaintiff suggests that the best interests of the child should be a basis upon which an acknowledgment of paternity may be challenged in court or before a magistrate, that is an issue for our legislature to address.

[11] The plaintiff and the attorney for the guardian ad litem also argue on appeal that the magistrate erred in finding no evidence of fraud. Specifically, they argue that the plaintiff and the defendant committed fraud on the state, on the child, and on the child's biological father by executing the acknowledgment when the plaintiff and the defendant both knew that the plaintiff was not the child's biological father. We do not address these claims of fraud because, as the state asserts, and the attorney for the guardian ad litem conceded at oral argument in this appeal, the claims were not raised at trial. The claim of fraud raised at trial was that the defendant had committed fraud on the plaintiff. See *DiGiuseppe* v. *DiGiuseppe*, 174 Conn. App. 855, 864, 167 A.3d 411 (2017) ("We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [him] or issues never clearly presented to [him]." [Citation omitted; internal quotation marks omitted.]); see also *State* v. *Hilton*, 45 Conn. App. 207, 222, 694 A.2d 830, cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

We note that we certainly find it concerning that the parties, as they allege, have committed fraud on the state. We cannot, however, make this finding of fact. See *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 830, 138 A.3d 935 (2016) ("[I]t is axiomatic that this appellate body does not engage in fact-finding. Connecticut's appellate courts cannot find facts; that function is, according to our constitution, our statute, and our cases, exclusively assigned to the trial courts." [Internal quotation marks omitted.]).

finding by the magistrate" that the plaintiff "was aware when he executed the acknowledgment that he was not [the child's] biological father," and the court did not disturb the magistrate's findings that the plaintiff failed to establish fraud, duress, or material mistake of fact. Because the statutory criteria set forth in § 46b-172 (a) (2) were not satisfied, the magistrate lacked the authority to open the judgment of paternity.

On the basis of the foregoing, we conclude that the trial court erred in determining that the magistrate had the authority to open the judgment solely on the basis of the best interests of the child.

II

The state next claims that the trial court erred in concluding that the magistrate had the inherent authority to open the judgment of paternity. Specifically, the state claims that the family support magistrate division is a court of limited jurisdiction, and "such authority is not included in the magistrate's enabling statute . . . § 46b-231 (m), or the acknowledgment of paternity statute . . . § 46b-172." The state further contends that "[g]iven the magistrate's factual findings, specifically that fraud, mistake or duress [were] not proven, the magistrate court lacked the authority to open the judgment of paternity, pursuant to . . . § 46b-172 . . . ." (Citation omitted.) In response, the plaintiff argues that a magistrate "may, pursuant to [its] inherent authority, open a judgment of paternity, when acting reasonably, the magistrate finds good cause to do so, regardless of finding fraud, duress, or mistake. Good cause may be based on the 'best interests of the child' standard." We agree with the state.

"[T]he legislature, by the passage of § 46b-231 (d), created the family support magistrate division of the [S]uperior [C]ourt for the purpose of the impartial administration of child and spousal support." (Internal

quotation marks omitted.) *O'Toole* v. *Hernandez*, 163 Conn. App. 565, 572–73, 137 A.3d 52, cert. denied, 320 Conn. 934, 134 A.3d 623 (2016); see also General Statutes § 46b-231 (d). Section 46b-231 (m) lists the "powers and duties" of magistrates. "As a creature of statute, the family support magistrate division has only that power that has been expressly conferred on it." *Pritchard* v. *Pritchard*, supra, 103 Conn. App. 284.

It is undisputed that no statutory provision exists that expressly grants the family support magistrate division the power to open an acknowledgment of paternity on the basis of the best interests of the child. The trial court determined, however, that the magistrate had the inherent authority to open the judgment. We disagree.

"The authority of family support magistrates is defined and limited by statute." (Internal quotation marks omitted.) *O'Toole* v. *Hernandez*, supra, 163 Conn. App. 573. Although "[o]ur courts have the inherent authority to open, correct, or modify judgments . . . this authority is restricted by statute and the rules of practice." *Jonas* v. *Playhouse Square Condominium Assn., Inc.*, 173 Conn. App. 36, 39, 161 A.3d 1288 (2017); see also *Cornfield Associates Ltd. Partnership* v. *Cummings*, 148 Conn. App. 70, 75, 84 A.3d 929 (2014), cert. denied, 315 Conn. 929, 110 A.3d 433 (2015). The power of the family support magistrate division is *limited* by § 46b-172 (a) (2), which clearly states that an acknowledgment of paternity "may be challenged in court or before a family support magistrate after the rescission period *only on the basis of fraud, duress or material mistake of fact* . . . ." (Emphasis added.)

In its memorandum of decision, the court acknowledged that "§ 46b-172 (a) (2) limits the grounds for opening [a] judgment that may be asserted belatedly by the parties to an acknowledgment of paternity," but nonetheless concluded that "[i]t does not limit the

court's inherent authority" to open the judgment. See *Paddock* v. *Paddock*, 22 Conn. App. 367, 372, 577 A.2d 1087 (1990) ("The authority to open and vacate a judgment is within the inherent power of the trial courts. . . . A motion to open and vacate should be granted when the court, acting reasonably, finds good cause to do so." [Citation omitted.]). In so holding, the court impermissibly has contravened the statutory requirements set forth in § 46b-172 (a) (2). See also General Statutes (Rev. to 2011) § 46b-172 (a) (1) ("the acknowledgment cannot be challenged after sixty days, except in court upon a showing of fraud, duress or material mistake of fact"). We reiterate that "[c]ourts may not by construction supply omissions . . . or add exceptions [to statutes] merely because it appears that good reasons exist for adding them." (Internal quotation marks omitted.) *Vincent* v. *New Haven*, 285 Conn. 778, 792, 941 A.2d 932 (2008).

The plaintiff's motion to open was governed by § 46b-172 (a) (2). Beyond the sixty day rescission period, and absent a finding of fraud, duress, or material mistake of fact, the magistrate did not have the authority to grant the motion to open the judgment.[12] See part I of this opinion. On the basis of the foregoing, we conclude that the trial court erred in determining that the magistrate had the inherent authority to open the acknowledgment on the basis of the best interests of the child.

The judgments are reversed and the cases are remanded for further proceedings.

In this opinion, LAVINE, J., concurred.

[12] In its current form, § 46b-172 is susceptible to being misused by parties in the manner discussed in the present case. See footnote 10 of this opinion. Thus, we look favorably on Judge Keller's concurring opinion in the present case, which sets forth a suggested revision of the statute that would help to achieve accuracy in the acknowledgment of paternity process.

KELLER, J., concurring. I concur in the well reasoned analysis and result set forth in the majority opinion. In determining whether the trial court properly has opened a paternity acknowledgement, we are constrained by the statutory authority that our legislature has conferred on family support magistrates in General Statutes § 46b-172.

I write separately to draw attention to what I believe is an obvious shortcoming of our acknowledgement of paternity statute, § 46b-172, which, as the present case illustrates, easily may be abused. I do so not merely in light of my experience as an Appellate Court judge, but in light of my experience as a family support magistrate and a Superior Court judge, all of which has made me keenly aware of the late surfacing problems that frequently arise from the operation of the statute in its current form.

Simply put, questions surrounding a child's paternity readily may be resolved *accurately* by DNA testing. Fortunately, DNA testing is readily available and far less invasive and costly than it has been in the past. In light of the importance of the issue of a child's paternity,[1] I believe it would be worthwhile for our legislature

[1] Nearly fifteen years ago, this court, in *Ragin* v. *Lee*, 78 Conn. App. 848, 861–63, 829 A.2d 93 (2003), aptly discussed the fundamental interest that a child has in an accurate determination of his or her paternity: "The United States Supreme Court has recognized that both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination. . . . Connecticut has long recognized that children have a separate and independent interest in family relations matters. . . . Our Supreme Court has recognized that both the father and the child in a paternity proceeding have an interest in seeing that their rights to companionship, care and custody are accurately adjudicated. . . . [T]he child's interests also extend to [his or her] health, which may depend on an accurate family medical history. . . . The child's interests in this regard are particularly strong. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. . . . It is in the child's interest not only to have it adjudicated that *some* man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified. . . . In his concurrence in

to consider revising the statute such that it requires the Department of Public Health, as a prerequisite to accepting a paternity acknowledgement, to require the submission of DNA testing results that are consistent with the paternity acknowledgement.

In the present case, there is no dispute that the plaintiff, Geoffrey M., Jr.,[2] is not the child's biological father. Under § 46b-172, an acknowledgement of paternity depends upon the accuracy of the representations of the putative father and the mother of the child, not a more reliable source, such as DNA testing. In the present case, the plaintiff and the defendant, Asia A. M., who is the mother of the child at issue, effectively utilized the statute to accomplish an adoption of the child by the plaintiff. They did so with full knowledge that the plaintiff was not the child's biological father, without first having to terminate the parental rights of the biological father, and without having to be subjected to the scrutiny that any proposed adopted parent would be subject to under our established procedures regarding termination of parental rights and adoptions in the juvenile and probate courts. And, given the restrictions in the statute, this court is compelled to perpetuate the fabrication of the plaintiff and the child's mother, the

[*Palomba*] *v. Gray*, 208 Conn. 21, 543 A.2d 1331 (1988), Associate Justice David M. Shea stated that the issue of paternity is of paramount importance to the child and that the court should exercise its authority to require genetic marker tests where the parties neglect to provide them. Id., 37 (*Shea*, *J.*, concurring). . . .

"Courts in other jurisdictions have found that a child has a right to pursue paternity and support issues, and to accuracy in a paternity determination. . . .

"We hold that a child who is the subject of a paternity action has a fundamental interest in an accurate determination of paternity that is independent of the state's interest in establishing paternity for the benefit of obtaining payment for the child's care and any interest that the parents may have in the child." (Citations omitted; emphasis in original; internal quotation marks omitted.)

[2] See footnote 1 of the majority opinion.

negative effects of which are likely to be deeply personal and long-lasting for the child.

Although I believe that this court has reached the correct result under the current state of our law, I remain hopeful that our legislature will take reasonable steps to ensure accuracy in the acknowledgement of paternity process, thereby preventing consequences such as those reflected in the present case.

MARCO BATTISTOTTI *v.* SUZANNE A.*
(AC 39643)

DiPentima, C. J., and Alvord and Dewey, Js.

Syllabus

The plaintiff father appealed to this court from the judgment of the trial court awarding the defendant mother sole legal and primary physical custody of the parties' minor child. The plaintiff, who resided in New York City and rented an apartment in the Greenwich solely for parenting time with his son, had brought this child custody action seeking, inter alia, joint legal custody and visitation on a schedule to be determined. After a trial, the court awarded, inter alia, the plaintiff a minimum of seventeen hours of parenting time biweekly and ordered that such parenting time occur within the town of Greenwich. On appeal, the plaintiff claimed, inter alia, that the trial court erred in failing to consider how its orders impacted his expenses, particularly the rental of the Greenwich apartment, and abused its discretion in requiring that the plaintiff's parenting time take place only within the town of Greenwich. *Held:*

1. The trial court abused its discretion in failing to analyze whether the plaintiff's visitation expenses warranted a deviation from the child support guidelines; that court did not address in its decision the plaintiff's request that his child support obligation reflect the undisputed expenses related to the Greenwich apartment even though it had expressly found that the plaintiff rented and renovated the apartment to be able to spend time with his child, and the court, having made that finding, should have analyzed whether the application of the guidelines would have been inequitable or inappropriate and should have determined, pursuant to the relevant state regulation [§ 46b-215a-5c], whether the criterion for

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

deviation on the basis of significant visitation expenses was met, especially given that both parties recognized that the Greenwich apartment was maintained for the child and was referenced in their proposed orders, and the plaintiff consistently identified the costs associated with maintaining the Greenwich apartment as expenses related to the child, which were not challenged by the defendant.

2. The plaintiff failed to demonstrate that the trial court abused its discretion by restricting his parenting time with his child to the town of Greenwich; the plaintiff's reliance on the court's finding that both parents demonstrated a respect for court orders and had the ability to be actively involved in the life of the child was unavailing, as the court also made findings expressing concern about the plaintiff's lack of understanding of his child's needs and the factors hindering the plaintiff's establishment of a healthy relationship with his child, and the plaintiff did not address those findings.

Argued February 8—officially released May 15, 2018

Procedural History

Action for custody of the parties' minor child, brought to the Superior Court in the judicial district of Stamford-Norwalk; subsequently the matter was transferred to the judicial district of New Haven and tried to the court, *Tindill*, *J.*; judgment awarding sole legal and primary physical custody to the defendant, and ordering, inter alia, visitation to the plaintiff from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

John R. Williams, for the appellant (plaintiff).

David M. Moore, for the appellee (defendant).

Opinion

ALVORD, J. In this protracted and bitterly contested family matter, the plaintiff father, Marco Battistotti, appeals from the judgment rendered by the court following a ten day trial on his custody action filed against the defendant mother, Suzanne A. On appeal, the plaintiff claims that the court: (1) improperly found that his earning capacity was $174,000 per year, (2) erred in failing to consider how its orders impacted his

expenses, particularly the rental of an apartment in Greenwich used solely for parenting time, and (3) abused its discretion in requiring that the plaintiff's parenting time take place only within the town of Greenwich. We agree with the plaintiff's second claim and conclude that the trial court abused its discretion. Accordingly, we reverse the judgment with respect to the child support orders and remand the matter for further proceedings on the issue of calculation of child support.[1] We affirm the judgment in all other respects.

The following facts and procedural history are necessary for the resolution of the plaintiff's appeal. The plaintiff and the defendant, who were never married, became parents to a son in June, 2014. On June 13, 2014, the plaintiff, a resident of New York City, filed a child custody action in the judicial district of Stamford[2]

[1] Because we agree with the plaintiff's second claim and reverse the judgment and remand the case for further proceedings on the issue of calculation of child support, we need not reach his first claim. See *Kavanah* v. *Kavanah*, 142 Conn. App. 775, 782, 66 A.3d 922 (2013) (remanding to trial court for new hearing on financial issues regarding child support where court abused its discretion in ordering downward deviation from guidelines). However, we note as a general matter that under the child support guidelines, "the child support obligation first is determined without reference to earning capacity, and earning capacity becomes relevant only if a deviation from the guidelines is sought" under § 46b-215a-5c (b) (1) (B) of the Regulations of Connecticut State Agencies. *Fox* v. *Fox*, 152 Conn. App. 611, 635, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014); see footnote 8 of this opinion.

[2] We note that the plaintiff properly commenced this action in the judicial district of Stamford-Norwalk, where the defendant and child reside. General Statutes § 51-345 (a) (3) (E) governs venue in civil actions and provides in relevant part that if either the plaintiff or the defendant resides in the town of Greenwich, the "action may be made returnable at the option of the plaintiff to either the judicial district of Stamford-Norwalk or the judicial district of Fairfield." Although neither of the parties appear to have filed a motion to transfer the action, the court transferred the action from Stamford to the judicial district of New Haven on March 16, 2018.

General Statutes § 51-347b (a) provides in relevant part: "Any action . . . may be transferred, by order of the court on its own motion or on the granting of a motion of any of the parties, or by agreement of the parties, from the superior court for one judicial district . . . to a superior court

seeking joint legal custody of the parties' child. He requested that the primary residence of the child be with the defendant and sought visitation on a schedule to be determined. He further sought a parenting responsibility plan for the parental decision-making regarding the child. The court, *Tindill, J.*, conducted a trial over the course of ten days. Both parties testified, as did the child's guardian ad litem.

The court issued a written memorandum of decision on September 7, 2016. The plaintiff filed a motion for articulation, and the court issued an articulation on October 6, 2016. On November 18, 2016, the court issued a corrected memorandum of decision, in which it made a number of findings with respect to the parties and their respective abilities to meet the needs of the child. The court found that the defendant had rebutted the presumption of joint legal custody and awarded sole legal custody, primary physical custody, and final decision-making authority to the defendant. The court awarded the plaintiff a minimum of seventeen hours of parenting time biweekly, and ordered that such parenting time occur within the town of Greenwich. The court prohibited the plaintiff from removing the child from Greenwich or the state of Connecticut. The court ordered the defendant or her designee to transport the child to and from the apartment the plaintiff had rented in Greenwich solely for effectuating his parenting time.

location for any other judicial district, upon notice by the clerk to the parties after the order of the court, or upon the filing by the parties of a stipulation signed by them or their attorneys to that effect."

Practice Book § 12-1 further provides in relevant part: "Any cause . . . may be transferred from a judicial district court location to any other judicial district court location or to any geographical area court location, or from a geographical area court location to any other geographical area court location or to any judicial district court location, by order of a judicial authority (1) upon its own motion or upon the granting of a motion of any of the parties, or (2) upon written agreement of the parties filed with the court."

The plaintiff was prohibited from driving the child anywhere without obtaining a valid driver's license, and was ordered to provide the defendant twenty-four hours advance notice of any intention to transport the child in any moving vehicle, with the notice to include confirmation that the vehicle is properly licensed, registered, and insured. The court found that the plaintiff had a minimum net annual earning capacity of $174,356. Referencing the Connecticut Child Support Guidelines, the court ordered the plaintiff to pay $253 per week in child support beginning September 12, 2016.[3] This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we note the well settled standard of review applicable in domestic relations cases. "[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . [T]he foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Citations omitted; internal quotation marks omitted.) *Dowling* v. *Szymczak*, 309 Conn. 390, 399, 72 A.3d 1 (2013). With respect to child support, however, "the parameters of the court's discretion have been somewhat limited by the factors set forth in the child support guidelines." (Internal quotation marks omitted.) *Colbert* v. *Carr*, 140 Conn. App. 229, 240, 57 A.3d 878, cert. denied, 308 Conn. 926, 64 A.3d 333 (2013).

I

We first address the plaintiff's claim that the court erred in failing to consider how its orders impacted his

[3] The court made further orders with respect to the guardian ad litem, coparenting counseling, notice of issues concerning the child, and health insurance.

expenses, particularly the expense associated with the rental of an apartment in Greenwich used solely for effectuating parenting time with his son. He claims that although the court found that he lived in New York City, the court required that his parenting time take place in the apartment he rented in Greenwich "for the sole purpose of visiting his son" and prohibited him from taking the child out of Greenwich, which order effectively required him to "maintain two separate residences." He argues that the order to pay $253 weekly in child support coupled with the requirement of maintaining two residences "imposed an unsustainable financial burden," and he seeks to have the orders integrated.[4] We agree that the court abused its discretion in failing to analyze whether the plaintiff's visitation expenses warranted a deviation from the child support guidelines.

The following additional facts are necessary for our resolution of this claim. In its memorandum of decision, the court found that it was in the child's best interest to live with his mother and to spend "significant, quality time with his father." The court noted that the defendant "proposes certain restrictions regarding transportation and location of the plaintiff's parenting time that she believes are essential to address the child's safety." The court found that the plaintiff rented and renovated a Greenwich apartment near the residence shared by the defendant and child, to be able to spend time with the child. With respect to child support, the court ordered

[4] The plaintiff also briefly challenges the court's orders that he pay approximately $45,000 of the outstanding guardian ad litem fees and half of any coparenting counseling fees. He offers no support for this challenge other than asserting generally that the totality of the court's financial orders "imposed an unsustainable financial burden." The plaintiff's cursory argument does not provide a basis in law for this court to conclude that the trial court abused its discretion in issuing these orders. See *Juma* v. *Aomo*, 143 Conn. App. 51, 61, 68 A.3d 148 (2013).

that, "[i]n accordance with the Connecticut Child Support Guidelines (Court Exhibit A, attached), the plaintiff father is ordered to pay $253.00/week as child support to the defendant mother beginning September 12, 2016." Exhibit A consisted of the Child Support Guidelines, prepared by "Connecticut Judicial Service Center" and dated September 7, 2016, the date of the memorandum of decision. Figures for gross weekly income, federal income tax, social security tax, medicare tax, and state and local income tax were listed for both parties. Net weekly income was also included for both parties in the amounts of $3,028 with respect to the defendant and $3,353 with respect to the plaintiff. A presumptive support amount of $253 was entered for the plaintiff. Section VII of the worksheet, Deviation Criteria, was not utilized.

"[W]e first set forth the relevant legal principles applicable to our resolution of this claim. The legislature has enacted several statutes to assist courts in fashioning child support orders. . . . The legislature also has provided [in General Statutes § 46b-215a] for a commission to oversee the establishment of child support guidelines, which must be updated every four years, to ensure the appropriateness of child support awards . . . ." (Internal quotation marks omitted.) *Righi* v. *Righi*, 172 Conn. App. 427, 435, 160 A.3d 1094 (2017). The guidelines provide a schedule for calculating "the basic child support obligation," which is based on the number of children in the family and the combined net weekly income of the parents. Regs., Conn. State Agencies § 46b-215a-2c (e).

In support of the application of these guidelines, General Statutes § 46b-215b (a) provides in relevant part: "The child support and arrearage guidelines issued pursuant to [§] 46b-215a . . . shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable

presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under [§] 46b-215a, shall be required in order to rebut the presumption in such case."

Section 46b-215a-5c of the Regulations of Connecticut State Agencies, which describes the circumstances that may justify a support order different from the presumptive support amounts calculated under the child support guidelines, provides as a criterion for deviation under subsection (b): "(3) Extraordinary parental expenses . . . In some cases, a parent may incur extraordinary expenses that are not considered allowable deductions from gross income, but which are necessary for the parent to maintain a satisfactory parental relationship with the child, continue employment, or provide for the parent's own medical needs. Only the following expenses, when found to be extraordinary and to exist on a substantial and continuing basis, may justify a deviation from presumptive support amounts under this subdivision: (A) significant visitation expenses . . . ."

"Our courts have interpreted this statutory and regulatory language as requiring three distinct findings in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." *Righi* v. *Righi*, supra, 172 Conn. App. 436–37.

There is negligible appellate case law explicating the deviation criterion for significant visitation expenses.[5] In the present case, both parties referenced the Greenwich apartment rental in their proposed orders. The plaintiff requested that "[p]ast, current and future child related expenses [in]curred by plaintiff such as traveling from and to Greenwich for parenting time, rent and utilities of the Greenwich apartment used solely for parenting time with the minor child should be . . . paid in accordance to the child support guidelines currently in effect, 80 [percent] defendant, 20 [percent] plaintiff, unless modified. Plaintiff do[es] not reside at the Greenwich apartment except during parenting time

[5] This court has explained that "[m]any non-custodial parents have some transportation costs to see their child—for parents living within driving distance of each other, for example, the non-custodial parent is likely to pay for fuel and other costs picking up or dropping off the child, but these ordinary expenses usually do not warrant a deviation from the presumptive amount." (Internal quotation marks omitted.) *Kavanah* v. *Kavanah*, supra, 142 Conn. App. 781–82 (trial court abused its discretion in ordering a deviation based on travel expenses defendant incurred in driving from Monroe to Southington every other weekend of his parenting time with his child, where court failed to identify why such travel costs were "extraordinary" so as to warrant deviation). The trial court, however, has had occasion to consider similar facts involving a parent's rental of an apartment for the purpose of spending parenting time with his child, finding such expenses to constitute "extraordinary visitation expenses" necessary to maintain a healthy and satisfactory parental relationship with the child. See *Doroski* v. *Doroski*, Superior Court, judicial district of New London, Docket No. FA-04-0129861-S (Oct. 2, 2012) (after defendant moved to New York City, his $700 per month expense to rent Niantic residence "which he would not otherwise do but for the need to have a place to stay while visiting with the minor child" and $250 per month additional gas expense justified child support award that deviated from guidelines); see also *Milbert* v. *Milbert*, Superior Court, judicial district of Hartford, Docket No. HHD-FA-155039631-S (July 17, 2017) (finding deviation justified on the basis of the father's increased visitation expenses, including flights, hotels, meals, and renting a car, after the child's mother moved with the child to Oregon); *Bushey* v. *Bushey*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-96-0152020-S (Mar. 12, 2002) (finding payment of presumptive support obligation by the plaintiff would be inequitable and that deviation from guidelines is appropriate because of significant visitation expenses and maintaining living accommodations for children when they visit plaintiff).

with the minor child." In the defendant's amended proposed orders, she specifically requested that the plaintiff's parenting time be "at his Greenwich apartment and only within the Town of Greenwich, CT." In its memorandum of decision, the court expressly found that "[t]he plaintiff rented and renovated an apartment in proximity to the defendant's and child's residence to be able to spend time with [the child]." The court also prohibited the plaintiff from removing the child from Greenwich, which proscribed the plaintiff from spending his parenting time at his residence in New York City.

Both parties also recognized that the Greenwich apartment was maintained for the child. During the March 4, 2015 status conference, the court asked the plaintiff what time he would be "home" in Greenwich, to which the plaintiff responded that he lived in New York City. Although the defendant's counsel interjected that he lived in "both places," the plaintiff clarified that the apartment in Greenwich is "the baby's apartment" and stated that he had "a bed on top of the kitchen." The defendant's counsel, in closing argument, also referred to the Greenwich apartment as "Baby [L]'s apartment."

Moreover, the plaintiff consistently identified the costs associated with maintaining the Greenwich apartment as expenses related to the child, and such expenses were not challenged by the defendant. In his financial affidavit dated May 4, 2016, the plaintiff reported the following monthly expenditures: Greenwich apartment rent ($1475), Greenwich electricity ($60), Greenwich cable/internet/phone ($117), and Greenwich apartment up-keeping ($10).[6] He further reported monthly travel expenses to and from Greenwich in the amount of $702. He also listed these

[6] The plaintiff previously had identified Greenwich apartment expenses in his May 1, 2015 financial affidavit.

expenses in an attachment to his amended proposed orders dated May 10, 2016. During trial, the plaintiff introduced into evidence a list of expenses related to the Greenwich apartment from October, 2014 through May, 2015, in the amount of $45,399.13. Rather than dispute these expenses, the defendant's counsel referenced the list in closing argument, remarking that the plaintiff "spent $45,399 in less than six months on Baby [L]'s apartment in Greenwich."

In its memorandum of decision, the court did not address the plaintiff's request that his child support obligation reflect the undisputed expenses related to the Greenwich apartment. The trial court did, however, expressly find that the plaintiff had rented and renovated the apartment to be able to spend time with his child. In order to make that finding, the trial court necessarily had before it evidence that it deemed credible that the plaintiff had both rented and renovated that apartment.[7] Having made that finding, the court should have then analyzed whether application of the guidelines would be inequitable or inappropriate and should have determined, pursuant to § 46b-215a-5c of the Regulations of Connecticut State Agencies, whether the criterion for deviation on the basis of significant visitation expenses was met. The court should have considered whether the expenses are "necessary for the parent to maintain a satisfactory parental relationship with the child," and whether such expenses "exist on a substantial and continuing basis." On remand, in determining whether the plaintiff has incurred significant visitation

[7] Although the trial court broadly rejected "the information on the plaintiff-appellant's sworn financial affidavits regarding his income from employment and expenses" as not truthful, we read this language contained in the court's articulation as necessarily rejecting only certain of the plaintiff's expenses. A reading of the articulation as rejecting the plaintiff's reported monthly *child expenses*, which included the expenses associated with the renting of the Greenwich apartment, would be inconsistent with the court's express finding that the plaintiff had rented and renovated the apartment.

expenses warranting a deviation from the presumptive support amounts calculated under the child support guidelines, the court may consider that the plaintiff consistently represented that he resided in New York City at the time of the child's birth and that he continues to reside in New York City, but is required to spend his parenting time within the town of Greenwich. The court may further consider that the defendant never challenged the amount of the Greenwich apartment expenses or that such expenses were incurred by the plaintiff for the sole purpose of effectuating parenting time with their child.

Accordingly, we conclude that the court, having found that the plaintiff "rented and renovated an apartment in proximity to the defendant's and child's residence to be able to spend time with" the child, abused its discretion in failing to analyze whether his visitation expenses warranted a deviation from the child support guidelines. The proper remedy is to remand the matter for the court to hold a new hearing on the issue of calculation of child support.[8]

[8] Although we need not address the plaintiff's claim that the court erred in finding that he had an earning capacity of $174,356; see footnote 1 of this opinion; we reiterate the procedure that a court must follow before ordering child support on the basis of the deviation criteria of a party's earning capacity.

"Under the guidelines, the child support obligation first is determined without reference to earning capacity, and earning capacity becomes relevant only if a deviation from the guidelines is sought" under § 46b-215a-5c (b) (1) (B) of the Regulations of Connecticut State Agencies. (Internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 635, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014); see also *Unkelbach* v. *McNary*, 244 Conn. 350, 371, 710 A.2d 717 (1998); *Berger* v. *Finkel*, 161 Conn. App. 416, 427, 128 A.3d 508 (2015) ("[a] party's earning capacity is a deviation criterion under the guidelines" [internal quotation marks omitted]). "[T]he amount of support determined without reference to the deviation criteria is presumed to be the correct amount of support, and that presumption may only be rebutted by a specific finding on the record that the application of the guidelines would be inequitable or inappropriate under the circumstances of a particular case." (Internal quotation marks omitted.) *Fox* v. *Fox*, supra, 635.

This court previously has found significant that there is no express or implied reference to earning capacity in § 46b-215a-2c of the Regulations of Connecticut State Agencies, which provides that the regulation "shall be used to determine the current support . . . components of all child support awards within the state, subject to [§ 46b-215a-5c] of the Regulations of Connecticut State Agencies." (Internal quotation marks omitted.) Id. Where the regulation refers to any type of earned income, it does so in the context of "gross income" and "net income." Id., 635–636. "Gross income" is defined in relevant part as "the average weekly earned and unearned income from all sources before deductions" and "net income" as "gross income minus allowable deductions." Id., 636; see Regs., Conn. State Agencies § § 46b-215a-1 (11) and (18). Earning capacity is not listed among the "gross income inclusions." *Fox* v. *Fox*, supra, 52 Conn. App. 636. Earning capacity is instead found among the criteria for deviation from presumptive support amounts, as a type of "financial [resource] that [is] not included in the definition of net income, but could be used by such parent for the benefit of the child or for meeting the needs of the parent." Regs., Conn. State Agencies § 46b-215a-5c (b) (1).

Given this regulatory framework, a court errs in calculating child support on the basis of a parent's earning capacity without first stating the presumptive support amount at which it arrived by applying the guidelines and using the parent's actual income *and* second finding application of the guidelines to be inequitable or inappropriate. See *Deshpande* v. *Deshpande*, 142 Conn. App. 471, 478–79, 65 A.3d 12 (2013) ("[b]ecause the court failed to specify the presumptive amount or make any findings regarding a deviation from that amount, we can only speculate as to the amount, whether the court's child support order deviated from that amount and, to the extent that there was a deviation, whether the circumstances of this case justified a variance from the presumptive amount based on the court's application of the deviation criteria"); see also *Righi* v. *Righi*, supra, 172 Conn. App. 439 ("enactment's 'specific finding' requirement must be stated explicitly by the court and cannot be inferred merely from the court's determination that deviation from the guidelines is fair and equitable"); *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 215, 118 A.3d 657 (court's award was improper in part because it failed to cite the presumptive support amount calculated with the defendant's actual net income, and then did not invoke the defendant's earning capacity as a deviation criterion in calculating his child support obligation), cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

This court previously has stated that "the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to facilitate appellate review in those cases in which the trial court finds that a deviation is justified. . . . In other words, the finding will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 320, 9 A.3d 708 (2010).

II

The plaintiff also claims that the court abused its discretion in restricting the plaintiff's parenting time with his child to the town of Greenwich. He argues that the court made no findings supporting this onerous order, and that the restriction is inconsistent with the court's finding that it is in the best interest of the child to "spend significant, quality time with his father." We disagree that the court abused its discretion.

"The authority of a court to render custody, visitation and relocation orders is set forth in General Statutes § 46b-56. In making or modifying any order with respect to custody or visitation, the court shall . . . be guided by the best interests of the child . . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment. . . . The trial court is vested with broad discretion in determining what is in the child's best interests." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Gina M.G.* v. *William C.*, 77 Conn. App. 582, 587–88, 823 A.2d 1274 (2003). The foundation for the abuse of discretion standard in family matters is "that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties at the hearing." (Internal quotation marks omitted.) *Szczerkowski* v. *Karmelowicz*, 60 Conn. App. 429, 432, 759 A.2d 1050 (2000).

The following additional facts are relevant to this claim. In its corrected memorandum of decision, the court began by noting that it had reviewed and considered the criteria contained in relevant statutes, including § 46b-56. The court concluded that it was in the best interest of the child to live with the defendant and

"spend significant, quality time" with the plaintiff. It also, however, recognized a "high level of conflict and mistrust between the parents," and noted that the defendant "proposes certain restrictions regarding transportation and location of the plaintiff's parenting time that she believes are essential to address the child's safety." With respect to the parties' capacity to meet the needs of the child, the court concluded that the plaintiff "has exhibited considerable lack of knowledge and understanding of the needs of his son as a newborn, infant, and toddler. While his parenting skills improved with supervision, the evidence reveals that his singular focus on what he perceives to be the failings of the defendant appears to diminish his capacity for recognizing and prioritizing the developmental needs of his son."

The court further found that the plaintiff had made efforts to establish a healthy relationship with his child, but that his efforts were hindered in part by the plaintiff's arrest for disorderly conduct, which prohibited contact with the child for nearly four months. Although the court found that both parents demonstrate a respect for court orders, the court also found that the plaintiff "engages in manipulation and coercive behavior in an effort to involve the child in the parents' dispute." The court ordered a minimum of seventeen hours biweekly parenting time for the plaintiff, and further ordered that such parenting time shall occur in Greenwich.

The plaintiff argues that the court's restriction of his parenting time to the town of Greenwich was capricious and points to the court's findings that both parents "demonstrate a respect for court orders" and "have the ability to be actively involved in the life of the child."[9] The plaintiff does not challenge and, instead, ignores the

[9] The plaintiff's related argument that the geographic limitation "imposes a very substantial financial burden upon the plaintiff which interferes with the court's stated desires concerning support and payments to the guardian ad litem," has been addressed in part I of this opinion.

court's findings expressing concern about the plaintiff's lack of understanding of his child's needs and the factors hindering the plaintiff's establishment of a healthy relationship with his child, who was just twenty-three months old at the time of trial. We conclude that the plaintiff has failed to demonstrate that the court abused its discretion in limiting the plaintiff's parenting time to the town of Greenwich.[10]

The judgment is reversed only as to the child support related orders and the case is remanded for further proceedings on those issues; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

TOWN OF PLAINVILLE ET AL. *v.* ALMOST HOME ANIMAL RESCUE AND SHELTER, INC.
(AC 39731)

Sheldon, Prescott and Elgo, Js.

Syllabus

The plaintiff town and its animal control officer, W, sought to recover damages for negligence per se and unjust enrichment from the defendant company in connection with the defendant's operation of an animal rescue facility in the town. After investigating complaints that animals at the defendant's facility were being abused and neglected, W, pursuant to a criminal search and seizure warrant, seized numerous animals from the facility. The town thereafter paid for the animals' medical care and provided them with food, water and shelter. The plaintiffs then commenced an action against the defendant by filing a petition in the Superior Court pursuant to statute (§ 22-329a). The petition sought an order determining the animal's legal status and requiring the defendant

[10] The defendant argues in her brief that the plaintiff's appeal is frivolous and claims that the plaintiff cited facts not found by the trial court. She requests sanctions in the form of attorney's fees under Practice Book § 85-2. We decline to address this issue because the defendant failed to make her request in a separate motion. See *Tyler* v. *Tyler*, 163 Conn. App. 594, 598 n.3, 133 A.3d 934 (2016) (declining to review request for sanctions when not raised in motion for sanctions); *Hernandez* v. *Dawson*, 109 Conn. App. 639, 644, 953 A.2d 664 (2008) (same); Practice Book § 85-3.

to reimburse the town for its expenses in caring for the seized animals in accordance with § 22-329a (h), which provides a direct remedy for a municipality seeking reimbursement for care that it provides to animals adjudicated as abused or neglected. Prior to trial, the parties reached a stipulated agreement that provided for the adoption of the animals but did not contain a provision addressing reimbursement of the town's expenses. The trial court accepted the stipulated agreement, made it an order of the court and dismissed the action, indicating on the record that because the parties had agreed not to proceed with a hearing on the merits, it made no findings regarding the defendant's alleged abuse or neglect of the animals, and, therefore, it lacked the authority to order the defendant to reimburse the plaintiffs for any costs incurred in caring for the animals. Thereafter, the plaintiffs commenced the present action, alleging negligence per se in count one of their complaint based on the defendant's alleged violation of the statute (§ 53-247 [a]) pertaining to the care of impounded or confined animals, and unjust enrichment in count two based on the defendant's failure to reimburse the town for its expenditures in caring for the seized animals. The defendant filed a motion to strike the complaint, arguing that neither count stated a claim on which relief could be granted. The trial court granted the motion and, subsequently, granted the defendant's motion for judgment and rendered judgment in favor of the defendant. On the plaintiffs' appeal to this court, *held*:

1. The plaintiffs could not prevail on their claim that the trial court applied an improper legal standard in ruling on the defendant's motion to strike; the trial court set forth the appropriate standard of review in its memorandum of decision, and, in the absence of some clear indication to the contrary, it was presumed that the court properly applied that standard, and the plaintiffs' claim that the trial court engaged in impermissible fact-finding rather than limiting its review to those facts alleged in the pleadings was unavailing, as the findings referenced by the plaintiffs were actually legal conclusions germane to the trial court's evaluation of the legal sufficiency of the plaintiffs' complaint.
2. The trial court properly struck count one of the complaint alleging negligence per se, that court having correctly determined that the plaintiffs were not among the intended beneficiaries of § 53-247 (a), which was a sufficient basis on which to strike that count: the trial court properly reviewed § 53-247 (a), as it was the asserted basis of the negligence per se count, and because that statute was intended only to protect abused or neglected animals and to criminalize misconduct by their caretakers and the plaintiffs were not abused animals or the perpetrators of criminal conduct against animals, the plaintiffs fell outside of any class protected by or directly affected by the statute, and, therefore, as a matter of law, they could not rely on § 53-247 (a) as a basis for maintaining a negligence per se action against the defendant; moreover, the plaintiffs' argument that they did not have notice that the trial court would engage in an

analysis of whether they were part of a protected class under the statute in considering whether to grant the motion to strike was belied by the fact that the defendant had raised that issue in its memorandum of law in support of its motion to strike.

3. The trial court properly struck count two of the complaint, as the plaintiffs could not avail themselves of an action sounding in unjust enrichment in light of the adequate statutory remedy available to them under § 22-329a: the plaintiffs had filed an action in accordance with § 22-329a but voluntarily agreed to settle that action without the court having adjudicated the animals abused or neglected, and the plaintiffs, by choosing to proceed in that manner, were precluded from seeking an order by the court directing the defendant to reimburse them pursuant to the statutory scheme, and, therefore, it was the plaintiffs' own actions that prevented them from recovering in accordance with the available statutory remedy, and they advanced no argument that the statutory scheme for reimbursement provided for in § 22-329a (h) was in any manner inadequate; moreover, there was no merit to the plaintiffs' claim that the defendant had stipulated in the prior action that they were entitled to seek damages at a later time without regard to § 22-329a, as the parties' stipulation contained no express agreement by the defendant regarding the plaintiffs' right to pursue other legal actions against it, and although the trial court had made a statement indicating its understanding that the plaintiffs were not waiving their right to pursue reimbursement by way of a separate action, this court construed that statement as simply an indication that the plaintiffs could attempt to pursue other legally appropriate actions, if any existed.

Argued January 23—officially released May 15, 2018

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Swienton*, *J.*, granted the defendant's motion to strike the complaint; thereafter, the court granted the defendant's motion for judgment and rendered judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Jonathan D. Chomick, for the appellants (plaintiffs).

Taryn D. Martin, with whom, on the brief, was *Robert A. Ziegler*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiffs, the town of Plainville (town) and Donna Weinhofer, the town's animal control officer, appeal from the judgment of the trial court rendered in favor of the defendant, Almost Home Animal Rescue and Shelter, Inc., following the court's granting of the defendant's motion to strike both counts of the plaintiffs' two count complaint.[1] Count one of the complaint sounded in negligence per se and alleged that the defendant, which operates an animal rescue facility, had failed to care for animals in its custody in violation of General Statutes § 53-247 (a), and that this violation caused the plaintiffs to suffer damages, namely, costs that the town incurred for medical care, shelter, food, and water for the affected animals. Count two sounded in unjust enrichment and was premised on the defendant's failure to reimburse the town for its expenditures in caring for the seized animals.

On appeal, the plaintiffs claim that the trial court improperly (1) applied an incorrect legal standard in deciding the motion to strike; (2) struck count one of the complaint on the bases that § 53-247 did not establish a duty or standard of care for purposes of maintaining a negligence per se action and that the plaintiffs are not among the class of persons protected by § 53-247; and (3) struck count two of the complaint on the basis that General Statutes § 22-329a (h) provides the exclusive remedy for the damages alleged by the plaintiffs,

[1] The plaintiffs inadvertently included Meda Talley, the defendant's owner and operator, in the case caption of their complaint as if she were an additional party defendant. Both counts of the complaint, however, contained allegations directed at the defendant only and do not mention Talley. Shortly after the action was commenced, the plaintiffs filed a motion for correction of the case caption in which they clarified that it was not their intention to name Talley as a party defendant and that her name was included only because she was the defendant's agent for service of process. They requested that the court order the case caption changed to reflect the actual identity of the parties. The court granted that motion, and, therefore, we utilize the corrected case caption.

thus precluding an action for unjust enrichment, and did so without considering and addressing the plaintiffs' argument that the defendant had stipulated in a prior action that the plaintiffs were entitled to seek damages without regard to § 22-329a. We disagree and affirm the judgment of the court.

The following facts, taken from the complaint, and procedural history are relevant to our consideration of the plaintiffs' claims. The plaintiffs received numerous complaints between July and November, 2015, that animals at the defendant's rescue facility were being abused and neglected. Weinhofer and an assistant animal control officer investigated the complaints, visiting the facility on several different dates. They observed that the facility was filthy and smelled overwhelmingly of feces and urine. Many cats and dogs were being kept in cages for extended periods under unsanitary and unhealthy conditions, and without proper access to food and water. Many animals could not stand up or turn around in their cages. The animals generally appeared to be in poor health and in obvious need of medical care.

Pursuant to a signed criminal search and seizure warrant, Weinhofer seized twenty-three cats, twenty dogs, one rabbit and one hamster from the defendant on December 1, 2015. The animals were evaluated by veterinarians. The majority of the animals had matted and unkempt coats, fleas, or other medical conditions, some requiring hospitalization. The town, in addition to paying for the animals' medical care, provided them with food, water, and shelter at the town's expense.

On December 17, 2015, the plaintiffs commenced an action in the Superior Court by verified petition in accordance with § 22-329a.[2] The petition sought an

[2] General Statutes § 22-329a (b) authorizes a municipal animal control officer to "take physical custody of any animal upon issuance of a warrant finding probable cause that such animal is neglected or is cruelly treated . . . ." Section 22-329a (c) provides in relevant part that, after taking custody

order determining the legal status of the animals in the town's possession and requiring the defendant to reimburse the town for its expenses in caring for the seized animals. See *Plainville* v. *Almost Home Animal Rescue & Shelter, Inc.*, Superior Court, judicial district of New Britain, CV-15-6031669-S.[3] Prior to a trial on the petition, however, the parties reached a stipulated agreement regarding custody of the seized animals, which was discussed at a hearing on January 22, 2016.

The stipulation was filed with the court on February 2, 2016. The agreement provided for the adoption of the seized animals by a number of interested third parties but contained no provision addressing reimbursement by the defendant to the town. On the day it was filed, the court, *Abrams, J.*, accepted the stipulated agreement, made it an order of the court, and dismissed the action. As the court indicated on the record at the January 22, 2016 hearing, because the parties had agreed not to proceed with a hearing on the merits of the plaintiffs' petition, the court made no findings, either express or implied, that the seized animals had been abused or neglected by the defendant. Accordingly, it lacked the authority to order the defendant to reimburse the plaintiffs for any costs incurred in treating or boarding the seized animals.

On February 8, 2016, the plaintiffs commenced this action. Both counts of the two count complaint sought

of an abused animal pursuant to a valid warrant, "[s]uch officer shall file with the superior court which has venue over such matter . . . a verified petition plainly stating such facts of neglect or cruel treatment as to bring such animal within the jurisdiction of the court and praying for appropriate action by the court in accordance with the provisions of this section. Upon the filing of such petition, the court shall cause a summons to be issued requiring the owner or owners or person having responsibility for the care of the animal, if known, to appear in court at the time and place named."

[3] We take judicial notice of the contents of this related file. See *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989) (appellate court may "take judicial notice of the court files in another suit between the parties"), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990).

recovery from the defendant for expenses incurred by the town in caring for the seized animals. As previously indicated, count one advanced a theory of common-law negligence based on the defendant's alleged violation of § 53-247 (a). Count two alleged that the defendant had been unjustly enriched as a result of the unreimbursed expenditures by the town in caring for the seized animals.

On June 14, 2016, the defendant filed a motion to strike both counts of the complaint, arguing that each count failed to state a claim upon which relief could be granted. With respect to count one sounding in negligence per se, the defendant argued that the plaintiffs could not establish liability because the plaintiffs were not within the class of persons that § 53-247 (a) was intended to protect, nor had they suffered the type of injury the statute was designed to prevent. With respect to the unjust enrichment allegations in count two, the defendant argued that § 22-329a (h) provides the town an adequate remedy at law, and, therefore, the plaintiffs could not recover under the common-law principle of unjust enrichment.

The plaintiffs filed a memorandum of law in opposition to the motion to strike in which they argued that § 53-247 (a) establishes a standard of care that applied to the defendant and that a violation of the statute constitutes negligence per se. The plaintiffs also argued that it would be improper for the court to decide by way of a motion to strike whether the plaintiffs are within the class of persons protected by the statute. With respect to the unjust enrichment count, the plaintiffs argued that the stipulated agreement that led to the dismissal of their previous action against the defendant included an understanding that the plaintiffs were not waiving any right to seek damages in a separate subsequent legal action.[4]

[4] The plaintiffs rely on a statement made by the trial court at the January 22, 2016 hearing. After first clarifying on the record that it had no power

The court, *Swienton*, *J.*, heard argument on the motion to strike on August 8, 2016. On August 18, 2016, the court issued a memorandum of decision granting the motion to strike as to both counts. With respect to count one, the court concluded that § 53-247 "fails to establish any kind of duty or standard of care, but instead provides for criminal penalties for violation of said statute." The court explained further that § 53-247 does not impose liability on a person who has engaged in animal cruelty to another person, entity, government, or the general public. Finally, the court indicated that to prevail on a claim of statutory negligence or negligence per se, the plaintiffs needed to demonstrate that they fell within the class of persons protected by the statute and that they were unable to do so in this case. Regarding the second count, the court reasoned that § 22-329a (h) provides the exclusive remedy for the damages sought by the town and recovery pursuant to the equitable doctrine of unjust enrichment is available only if there is no adequate remedy at law.

The plaintiffs did not replead the stricken counts. On September 6, 2016, the defendant filed a motion for judgment on those counts in accordance with Practice Book § 10-44. The court granted the motion on October 3, 2016, and rendered judgment in favor of the defendant. This appeal followed.

I

The plaintiffs first claim that the court applied an improper legal standard in ruling on the defendant's motion to strike. Specifically, the plaintiffs argue that the court's decision rested on three factual conclusions

to order the defendant to reimburse the town for any costs incurred because the parties were not proceeding with a hearing on the merits, the court stated: "However, I do also make clear [that], in entering into this agreement, the town has not waived its right to pursue those costs in a separate action, but it's not going to happen here."

that required the court to impermissibly look beyond the pleadings themselves. We disagree.

Whether the court applied the proper legal standard in ruling on the motion to strike presents a question of law over which we exercise plenary review. See *Robinson* v. *Robinson*, 103 Conn. App. 69, 74, 927 A.2d 364 (2007) (plaintiffs' arguments concerning legal standard applied by court entitled to plenary review). The legal standard applicable to a motion to strike is well settled. "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . [The court takes] the facts to be those alleged in the complaint . . . and [construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252–53, 990 A.2d 206 (2010).

The plaintiffs assert in their appellate brief, without any analysis, that the court "exceed[ed] its authority when ruling on [the defendant's] motion to strike"

because the court made the following three "findings": (1) "[§] 53-247 fails to establish or provide a duty or standard of care"; (2) the plaintiffs are "not within the class of 'persons' for whose benefit [§] 53-247 was intended to benefit and protect"; and (3) "[§] 22-329a (h) provides an exclusive remedy for the type of injuries alleged, and, therefore, the [plaintiffs] cannot allege a theory of unjust enrichment."

We first note that the court set forth the appropriate standard of review in its memorandum of decision. Absent some clear indication to the contrary, we presume that the court properly applied that standard. See *Saunders* v. *Firtel*, 293 Conn. 515, 532 n.17, 978 A.2d 487 (2009) (declining to assume court applied different legal standard from that cited in decision). Furthermore, to the extent that the plaintiffs argue that the court somehow engaged in impermissible fact-finding rather than limiting its review to those facts alleged in the pleadings, we are not persuaded. What the plaintiffs refer to in their brief as the court's "findings" are actually legal conclusions germane to the court's evaluation of the legal sufficiency of the complaint. See discussion in parts II and III of this opinion. To the extent that the plaintiffs intended to raise a different claim, it is not readily discernible from their brief, and, therefore, we decline to engage in further review on the basis of an inadequate brief. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]).

II

The plaintiffs next claim that the court improperly struck count one of the complaint alleging negligence per se. The plaintiff advances two arguments in support

of this claim. First, according to the plaintiffs, the court incorrectly determined that § 53-247 did not establish a duty or standard of care for purposes of establishing negligence per se. Second, the plaintiffs assert that the court improperly determined that the plaintiffs were not among the class of persons protected by § 53-247, an inquiry that the plaintiffs maintain was not properly considered by the court in deciding the legal sufficiency of count one. We conclude that the court properly determined that the plaintiffs were not among the intended beneficiaries of § 53-247 and that that determination alone was a sufficient basis on which to strike count one. Accordingly, we do not reach the remainder of the plaintiffs' claim.

Because our review of a trial court's ruling on a motion to strike is plenary; see *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 33, 974 A.2d 820 (2009), aff'd, 304 Conn. 298, 39 A.3d 1065 (2012); we apply the same standard as the trial court. Having set forth that standard in part I of this opinion, we do not repeat it again here. In sum, "[w]e take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) Id.

It is axiomatic that a cause of action sounding in negligence per se is but a form of the common-law tort of negligence. See D. Wright et al., Connecticut Law of Torts (3d. Ed. 1991) § 38, p.71. "Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, i.e., that standard of care to which an ordinarily prudent person would conform his conduct. To establish negligence, the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. [It] merely decide[s] whether the

relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law."[5] (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 860–61 n.16, 905 A.2d 70 (2006). As our Supreme Court reiterated in *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 60 A.3d 222 (2013), a violation of a statute or regulation will establish a breach of duty necessary to maintain an action for negligence per se only if "(1) the plaintiff is within the class of persons intended to be protected by the statute, and (2) the injury is the type of harm that the statute was intended to prevent." Id., 24, *citing Gore* v. *People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995). A plaintiff must satisfy both conditions to establish liability as a result of a statutory violation. *Gore* v. *People's Savings Bank*, supra, 376.

Because a party must satisfy the two part test in order to maintain an action for negligence per se, it was entirely proper for the trial court to have reviewed the statute that the plaintiffs asserted as the basis for the negligence per se count. Specifically, the court was obligated to determine whether, as a matter of law, the plaintiffs had pleaded facts that, if proven, would demonstrate that they fell within the class of persons the statute is intended to protect. If not, then the plaintiffs failed to state a claim upon which any relief could be granted and the court properly granted the motion to strike.

Section § 53-247 (a) provides in relevant part: "Any person who . . . having impounded or confined any animal, fails to give such animal proper care or neglects

[5] Of course, the plaintiff also must demonstrate the remaining elements of a negligence cause of action, i.e., causation and damages. See *Pickering* v. *Aspen Dental Management, Inc.*, 100 Conn. App. 793, 802, 919 A.2d 520 (2007) ("[t]o prove negligence per se, a plaintiff must show that the defendant breached a duty owed to her and that the breach proximately caused the plaintiff's injury").

to cage . . . or fails to supply any such animal with wholesome air, food and water . . . or, having charge or custody of any animal, inflicts cruelty upon it or fails to provide it with proper food, drink or protection from the weather . . . shall, for a first offense, be fined not more than one thousand dollars or imprisoned not more than one year or both, and for each subsequent offense, shall be guilty of a class D felony."

This court has indicated that § 53-247 "is intended to protect all impounded or confined animals from exposure to conditions that risk harming their health or physical condition . . . ." *State* v. *Acker*, 160 Conn. App. 734, 747, 125 A.3d 1057 (2015), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016). The statute criminalizes a number of acts as constituting cruelty to animals and provides for the imposition of jail time or fines for any person who engages in such acts. There is absolutely no language in the statute, however, that discusses costs regarding the care of animals subjected to acts of abuse or neglect or whether violators of § 53-247 have any obligation to compensate a municipality or other party if they should provide assistance to the affected animals. As set forth in part III of this opinion, those issues are addressed in § 22-329a (h), which provides a direct remedy for a municipality seeking reimbursement for care that it provides to animals adjudicated as abused or neglected.

We conclude, on the basis of our review of the statutory language, that § 53-247 was intended only to protect abused or neglected animals and to criminalize misconduct by their caretakers. The plaintiffs are not abused animals or the perpetrators of criminal conduct. Accordingly, the court properly determined that the plaintiffs fell outside of any class protected by or directly affected by the statute. Therefore, as a matter of law, the plaintiffs could not rely on § 53-247 as a basis for maintaining a negligence per se action against

the defendant. The plaintiffs have not cited to any specific language in the statute, other legal authority, or a factual allegation in the complaint that they contend could support a finding that they fall within the class of "persons" the statute was intended to protect.

Furthermore, to the extent that the plaintiffs argue that they had no notice that the trial court would engage in this particular analysis in considering whether to grant the motion to strike, that argument is fully belied by the fact that the defendant raised this issue in its memorandum of law in support of the motion to strike. In sum, we conclude that the court properly granted the motion to strike count one of the complaint.

III

Finally, the plaintiffs claim that the court improperly granted the defendant's motion to strike count two of the complaint, which sounded in unjust enrichment, because it incorrectly determined that § 22-329a (h) provides the exclusive remedy for the damages alleged by the plaintiffs and failed to consider and address the plaintiffs' argument that the defendant had stipulated in a prior action that the plaintiffs were entitled to seek damages later without regard to § 22-329a. For the following reasons, we reject the plaintiffs' claim.

"The right of recovery for unjust enrichment is equitable, its basis being that in a given situation it is contrary to equity and good conscience for the defendant to retain a benefit which has come to him at the expense of the plaintiff. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Citations omitted; internal quotation marks omitted.) *Polverari* v. *Peatt*, 29 Conn.

App. 191, 200–201, 614 A.2d 484, cert. denied, 224 Conn. 913, 617 A.2d 166 (1992). As with other claims for equitable relief, however, an action seeking to recover on a theory of unjust enrichment is unavailable if there is an adequate remedy at law. See, e.g., *U.S. Fidelity & Guaranty Co.* v. *Metropolitan Property & Liability Ins. Co.*, 10 Conn. App. 125, 128, 521 A.2d 1048 (plaintiff not permitted to bypass statutory remedy by seeking equitable relief unless statutory remedy inadequate), cert. denied, 203 Conn. 806, 525 A.2d 521 (1987).

Furthermore, if "a statutory scheme exists for the recovery of a benefit that is also recoverable at common law, the common law right may be resorted to only [if] the statutory procedures are inadequate." *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 597, 489 A.2d 1034 (1985). In *National CSS, Inc.*, our Supreme Court held that an action for unjust enrichment could not be maintained by a taxpayer seeking a refund of personal property taxes because there was a statutory procedure available that was "more than sufficient in providing the [taxpayer] a method by which a refund could be obtained. The [taxpayer] simply failed to take advantage of this statutory remedy in a timely manner, and now seeks to circumvent the state taxation scheme by way of the common law. The [taxpayer]'s failure to show that the existing remedy could not in itself have afforded [it] a refund, however, precludes it from now resorting to the common law." (Footnote omitted.) Id. The plaintiffs' attempts to distinguish the present case from *National CSS, Inc.*, are unpersuasive.

Section 22-329a provides a remedy for a municipality seeking to recoup costs expended in caring for animals it has seized as a result of abuse and neglect. Subsection (h) of § 22-329a provides: "If the court finds that the animal is neglected or cruelly treated, the expenses incurred by the state or a municipality in providing proper food, shelter and care to an animal it has taken

custody of under subsection (a) or (b) of this section and the expenses incurred by any state, municipal or other public or private agency or person in providing temporary care and custody pursuant to an order vesting temporary care and custody, calculated at the rate of fifteen dollars per day per animal or twenty-five dollars per day per animal if the animal is a horse or other large livestock until the date ownership is vested pursuant to subdivision (1) of subsection (g) of this section shall be paid by the owner or owners or person having responsibility for the care of the animal. In addition, all veterinary costs and expenses incurred for the welfare of the animal that are not covered by the per diem rate shall be paid by the owner or owners or person having responsibility for the animal."

The plaintiffs filed an action in accordance with § 22-329a but voluntarily agreed to settle that action prior to the court having adjudicated the animals either neglected or cruelly treated. The plaintiffs' choice to proceed in this manner precluded an order by the court directing the defendant to reimburse the plaintiffs pursuant to the statutory scheme. Accordingly, like the plaintiff in *National CSS, Inc.*, it was the plaintiffs' own actions that prevented them from recovering in accordance with the available statutory remedy. The plaintiffs advance no argument that the statutory scheme for reimbursement provided for in § 22-329a (h) is in any manner inadequate.

The plaintiffs nevertheless argue that "the defendant agreed by stipulation that the plaintiffs would not be precluded from seeking additional avenues of recovery as part of a stipulation entered into by the parties and adopted by the court." That argument, however, lacks merit. Our review of the written stipulation that was filed and signed by the parties and made an order of the court contains no express agreement by the defendant regarding the plaintiffs' right to pursue other legal

actions against it. The plaintiffs appear to be relying on the trial court's statement at the January 22, 2016 hearing that preceded the filing of the stipulation, in which the court indicated its understanding that the plaintiffs were not waiving their right to pursue reimbursement by way of a separate action. The trial court never indicated, however, what type of action it believed the plaintiffs could pursue, and we construe the court's statement as simply an indication that the plaintiffs could attempt to pursue other legally appropriate actions, if any existed. Certainly, the trial court had no authority to sanction the filing of a cause of action that cannot be pursued as a matter of law. Because the plaintiffs cannot avail themselves of an action sounding in unjust enrichment in light of an adequate statutory remedy, the trial court properly granted the motion to strike count two of the complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ERICK BENNETT (AC 40395)

Sheldon, Elgo and Shaban, Js.

Syllabus

The defendant, who had been convicted of the crime of murder, appealed from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, three postjudgment motions he had filed to dismiss the information under which he was convicted, and dismissing in part and denying in part his motion to correct an illegal sentence. *Held*:

1. The trial court properly dismissed the defendants' motions to dismiss the information for lack of subject matter jurisdiction, the defendant having failed to raise issues in his motions over which the court had jurisdiction beyond the defendant's sentencing date; the defendant's motion that challenged the subject matter jurisdiction of the trial court over his murder prosecution was filed more than four years after his conviction, and his motions that challenged the alleged use by the state of information concerning his trial strategy and the state's alleged failure to disclose

exculpatory information pursuant to *Brady* v. *Maryland* (373 U.S. 83) did not fall within any of the narrow exceptions to the common-law rule that a trial court loses jurisdiction over a criminal case after the defendant has begun to serve his sentence.

2. The trial court did not abuse its discretion by denying the portion of the defendant's motion to correct an illegal sentence in which he claimed that he had been sentenced on the basis of materially inaccurate information that was contained in a presentence investigation report; the trial court reasonably determined that the sentencing court did not rely on inaccurate information in sentencing the defendant and, thus, that the defendant's sentence was not imposed in an illegal manner, as the sentencing transcript showed that the sentencing court referred only to charges that were pending against the defendant, those charges were listed in the presentence investigation report, and the defendant requested no changes to the presentence investigation report and raised no issue as to its accuracy when he was sentenced.

Argued February 6—officially released May 15, 2018

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which affirmed the judgment; thereafter, the court, *Clifford*, *J.*, rendered judgment dismissing the defendant's motions to dismiss, and dismissing in part and denying in part the defendant's motion to correct an illegal sentence, from which the defendant appealed. *Affirmed*.

Erick Bennett, self-represented, the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Karen A. Roberg*, assistant state's attorney, and *Mary Elizabeth Baran*, former senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Erick Bennett was found guilty by a jury on the charge of murder on June

29, 2011, and was later sentenced on that charge, on August 26, 2011, to a term of fifty years imprisonment. He now appeals from the subsequent judgment of the trial court dismissing three postjudgment motions to dismiss the information on which he was convicted of murder, and dismissing in part and denying in part his contemporaneous motion to correct an illegal sentence in relation to the sentence imposed on him for that offense, which he filed and prosecuted during the pendency of his ultimately unsuccessful direct appeal. *State* v. *Bennett*, 324 Conn. 744, 155 A.3d 188 (2017). We affirm the judgment of the trial court.

In March, 2016, more than four years after he was sentenced, as aforesaid, for murder, the defendant filed three motions to dismiss the information under which he was convicted of that offense. In his first motion to dismiss, which he titled "Motion Challenging Original Subject Matter Jurisdiction," the defendant alleged that the original trial court lacked subject matter jurisdiction over his murder prosecution because the warrant under which he was arrested was based on evidence seized illegally pursuant to an invalid and illegally executed search and seizure warrant. In his second motion to dismiss, he alleged that the state had violated his right to a fair trial by obtaining without a warrant, and later using against him at trial, detailed information concerning his trial strategy, which its agents had recorded on twenty-two CDs of his telephone conversations with others while he was in jail awaiting trial. In his third motion to dismiss, he alleged that the state had violated his rights to due process and a fair trial under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to disclose to him or his counsel exculpatory information concerning the arrest of the state medical examiner who had performed the autopsy

on the victim in his murder case. On July 6, 2016, the defendant also filed a motion to correct an illegal sentence,[1] which he later amended on July 28, 2016.[2]

The trial court, *Clifford*, *J.*, heard argument on the foregoing motions, then ruled on them from the bench, on August 4, 2016. Initially addressing the defendant's three motions to dismiss, the court concluded that it lacked jurisdiction over such motions because they did not fall within any of the narrow exceptions to the general common-law rule that a trial court loses jurisdiction over a criminal case after the defendant has begun to serve his sentence therein.[3] Accordingly, it

[1] The defendant alleged multiple grounds for the illegality of his sentence, including that the sentencing court relied on inaccurate information because the charging document, which was incorporated into the presentence investigation report (report), was based on a search warrant that was not properly executed; that the sentencing court considered inaccurate information in the report in the matter of two witnesses, Jennifer Matias and Christopher Benjamin; that the state's failure to disclose the twenty-two CDs was structural error because he was not able to use the information to argue in mitigation of his punishment; that the sentencing court's impartiality was called into question after the judge listened to the content of the twenty-two CDs, some part of which included comments about the judge; that the state's failure to disclose the arrest of the state medical examiner was structural error because he was not able to use the information to argue in mitigation of punishment; and that the sentencing court considered and relied on inaccurate information in the report, in particular, a pending felony charge.

[2] In the amendment, the defendant alleged that the trial court and the prosecutor had never sworn an oath of office, which omission he claimed constituted structural error, and rendered the sentence void and divested the court of jurisdiction.

[3] Regarding the defendant's first motion, the court stated: "[T]he law in Connecticut is that once the court sentences someone, which Judge Fischer did . . . the trial court loses jurisdiction. We've now turned you over to the Department of Correction or, Judge Fischer did. . . . And the law is that the only way we can have further jurisdiction is if it's been conferred by the legislature or by our Practice Book . . . . But without a legislative or constitutional grant of jurisdiction, the court lacks it, except in the area of a motion to correct an illegal sentence under certain grounds. But that's not what's being claimed. This is a separate motion . . . challenging original subject matter jurisdiction. Issues about arrest warrants being based on a search warrant that's not valid or fourth amendment and due process, this

ordered that each such motion be dismissed. Then, addressing the defendant's amended motion to correct an illegal sentence, the court first noted that, although a trial court retains jurisdiction over a criminal case, after the defendant has begun to serve his sentence in that case, to decide a proper motion to correct, under Practice Book § 43-22, in which the defendant challenges either the legality of his sentence or the legality of the manner in which that sentence was imposed, it has no jurisdiction under that rule to adjudicate any challenge to the legality of the underlying conviction on which the challenged sentence was imposed. To the extent that the motion to correct challenged the legality of the underlying conviction, the court ordered that that motion, like the defendant's three postjudgment motions to dismiss, must also be dismissed. Finally, the court turned to the one claim raised in the defendant's motion to correct over which it found that it had jurisdiction, to wit: that the trial court, in passing sentence on the defendant, had improperly relied on inaccurate information concerning his criminal record. The court rejected that claim on the merits, finding that the defendant had not proved either that materially inaccurate information had been presented to the trial court in

court has, you know—a motion to correct an illegal sentence is geared toward the, you know, toward the sentence and not even how you were convicted. There are other remedies for that. Direct appeals, potential habeas, et cetera. So, I'm—I have no jurisdiction, actually, to rule on your motion challenging the original subject matter jurisdiction."

Regarding the defendant's second and third motions, the court stated: "Now, you have two motions to dismiss, which, I'm just warning you, I'm going to have a similar problem . . . 'cause one concerns suppressing the arrest . . . of the medical examiner because of some procedures they weren't following, and the other was about the recorded phone calls from [the Department of Correction]. And I'm going to have issues once again with me deciding a motion to dismiss, and I'm not—I don't believe I have jurisdiction on those, either, but I will hear you.

* * *

"I don't have a criminal case really pending here. So, I am dismissing your motions to dismiss because this court does not have jurisdiction."

relation to his sentencing for murder or that the court had relied on such information in imposing sentence on him. With respect to that final aspect of the defendant's motion to correct, the court ordered that the motion be denied.[4] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant's first claim on appeal is that the trial court erred in dismissing[5] his first postjudgment motion to dismiss challenging the original trial court's subject matter jurisdiction over his murder prosecution. We conclude that the court correctly determined that it

[4] The following colloquy occurred:

"The Court: "Now—so, I will—what I see in the motion to correct an illegal sentence—you have a number of claims, and I will—well, and I will say, basically, that—that certainly due process precludes a sentencing court [from] relying on materially untrue or unreliable information in imposing a sentence, and the issue on whether the court relied on inaccurate information is, first of all, was there inaccurate information and did the court give explicit attention to it that its sentence was at least based in part on or give specific consideration to it. Now, you make a lot of claims. Okay.

"The Defendant: Yes, sir.

"The Court: That I guess you're going to address. I know, one, you indicate that the sentence is void ab initio. You talk about something about the recorded phone calls again, that you were never declared a hostile witness, but you were threatened by the judge. When you get into inaccurate information, you start talking about the court not taking into consideration information that the crime lab didn't—or the lab didn't follow proper methods. I think there's things you claim in the presentence report that the court said something about you having a knife with a four inch serrated blade, but you indicate no knife was found and the [state medical examiner] could not say how long the—the blade was. That the sentencing court mentioned something about you could have walked away from this incident and gone back home, but you said your home was across town. So, the only thing to me that may bring in—may bring in the jurisdiction of the court are your claims that the court may have relied on inaccurate information, but for that, you must prove to me that there was information that was inaccurate, that it was material, and that the court relied upon it."

[5] In his brief, the defendant refers to the dismissals of his motions to dismiss as denials of the motions. We will refer to motions the court dismissed as dismissals.

lacked jurisdiction over this motion, and thus affirm its judgment dismissing the motion.

"We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016).

"It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence . . . . There are a limited number of circumstances in which the legislature has conferred on the trial courts continuing jurisdiction to act on their judgments after the commencement of sentence. . . . See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting trial court to modify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear petition for a new trial after execution of original sentence has commenced); General Statutes § 53a-39 (allowing trial court to modify sentences of less than three years provided hearing is held and good cause shown). . . . Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment." (Internal quotation marks omitted.) *Turner* v. *State*, 172 Conn. App. 352, 366, 160 A.3d 398 (2017).

On appeal, the defendant reiterates the claims he made before the trial court, arguing that a search and seizure warrant issued for his house and vehicle on July 11, 2009, was not executed and evidence obtained on the basis of the warrant (two pieces of screws from a knife, which had blood like substances on them and

were found in the defendant's car) was "fraudulently fabricated." He thus alleges that the arrest warrant based on the evidence seized was invalid and the jurisdiction of the original trial court was "infect[ed] . . . ." In his appeal, the defendant additionally claims that his conviction was not final and his docket number was still open pursuant to Practice Book § 62-4.[6] He argues that because a challenge to a court's original subject matter jurisdiction can be raised at any time, citing to Practice Book § 10-33, and the power of a court to vacate a judgment due to fraud is "inherent and independent of statutory provisions authorizing the opening of judgment[s]," citing to *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980), the trial court did have jurisdiction to review his motion to dismiss and abused its discretion by dismissing the motion.[7] We are not persuaded.

Following his conviction, the defendant was sentenced in August, 2011. His motion does not raise an issue over which the trial court has jurisdiction beyond his sentencing date, and therefore, the trial court properly dismissed his motion.

II

The defendant's second claim on appeal is that the trial court erred in dismissing his second postjudgment motion to dismiss for alleged "failure to disclose, and theft of [his] trial strategy." As set forth in part I of this opinion, because the defendant's motion challenges the legality of his underlying conviction without falling within any of the narrow exceptions to the general common-law rule that a trial court loses jurisdiction

[6] Practice Book § 62-4 provides: "A case that has been appealed shall remain on the docket of the court where it was tried until the appeal is decided or terminated."

[7] The defendant also requests review pursuant to the plain error rule. See Practice Book § 60-5. Because this request is inadequately briefed, we decline to review it.

over a criminal case after the defendant has begun to serve his sentence therein, the court properly dismissed the motion for lack of jurisdiction.

III

The defendant's third claim on appeal is that the trial court erred in dismissing his third postjudgment motion to dismiss for failure to disclose *Brady*[8] materials. As set forth in part I of this opinion, because the defendant's motion challenges the legality of his underlying conviction without falling within any of the narrow exceptions to the general common-law rule that a trial court loses jurisdiction over a criminal case after the defendant has begun to serve his sentence therein, the court properly dismissed the motion for lack of jurisdiction.

IV

The defendant's fourth and final claim on appeal is that the court erred in denying his motion to correct an illegal sentence.[9]

Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates

[8] See *Brady* v. *Maryland*, supra, 373 U.S. 83.

[9] The trial court found that all but one of the defendant's alleged grounds for his motion merely attacked the defendant's conviction; see footnote 1 of this opinion; and did not prove that the sentencing court had relied on inaccurate information or that the information was material in the defendant's sentencing. Therefore, the court dismissed those portions of the defendant's motion to correct an illegal sentence because it did not have jurisdiction over those claims. For the reasons stated previously in this opinion, we affirm the trial court's dismissal of the defendant's motion to correct an illegal sentence on that basis.

a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right to be sentenced by a judge relying on accurate information or considerations solely in the record*, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law. . . .

"[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . .

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [presentence investigation report (report)], [a] defendant [cannot] . . . merely alleg[e] that [his report] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was *materially* inaccurate and that the [sentencing] judge *relied* on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific

consideration to the information before imposing sentence." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Antwon W.*, 179 Conn. App. 668, 672–73, A.3d , cert. denied, 328 Conn. 924, A.3d (2018).

On appeal, the defendant reiterates the claim that he made before the trial court, arguing: "[U]pon commencing the sentence upon the defendant, the trial judge relied on vital inaccurate information in the presentence report . . . because the trial judge took into consideration a pending case of the defendant . . . which was interfering/and [carrying] a firearm while under the influence, which is a misdemeanor, but . . . the presentence . . . report that he considered said that the defendant had a pending case that consist[s] of interfering/resisting arrest and illegal use of a firearm while under the influence, which is a felony. . . . Thus, violating the [defendant's] right to be sentence[d] by a judge relying on accurate information . . . ."[10] (Citations omitted.)

The trial court acknowledged that it had jurisdiction over the defendant's motion to correct an illegal sentence on the basis of his claim that he had been sentenced on the basis of materially inaccurate

[10] At the hearing before Judge Clifford, the following colloquy occurred:

"The Defendant: . . . Thus, this inaccurate information . . . that was taken into account is untrue because the defendant has never been charged with illegal use of a firearm, which is a class D felony, which indicates General Statutes § 53a-216, which states in relevant part, a person is guilty of criminal use of a firearm or electric—or electronic defense weapon when he commits any class A, B or C unclassified felony as defined in [General Statutes §] 53a-25 and in the commission of such felony—

"The Court: I need to ask you a question.

"The Defendant: Yes, sir.

"The Court: The presentence report showed you had the pending charge. What did it—how did it read in the presentence report?

"The Defendant: That's how it read. It read in the presentence report that I was—

"The Court: What did it read as the pending case?

"The Defendant: That's what it read.

information. The court denied the motion because it found that the defendant failed to satisfy his burden of proving that the information was inaccurate or that the sentencing judge gave the allegedly inaccurate information explicit attention and that it affected the defendant's sentence.

We agree with the court's conclusion that the defendant's claim is belied by the record. Our review of the August 26, 2011 sentencing transcript reveals that the court explicitly referenced only the defendant's pending charges for interfering with a police officer and illegal use of a firearm, and in fact that the court gave the defendant a degree of credit in sentencing because of his lack of a criminal record.[11] Moreover, our review of the report reveals that the defendant's pending charges were listed as violations of General Statutes §§ 53a-167a and 53-206d (a).[12]

Last, we note that at the time of sentencing before the original trial court, when the defendant was asked if he wanted to make any changes to the report after having had an opportunity to review it with his trial

"The Court: Well—

"The Defendant: As a pending case, it read that I was arrested for interfering with police, resisting arrest and illegal use of a firearm."

[11] The relevant portion of the transcript reveals the following comments by Judge Fischer: "To your credit, you've had no substance abuse history and also to your credit your criminal record consists of just two pending matters initiated out of the same incident. One's interfering with a police officer and one's illegal use of a firearm. And, Mr. Bennett, I will give you a degree of credit for lack of your criminal record when I impose the sentence."

[12] General Statutes § 53-206d (a) provides: "(1) No person shall carry a pistol, revolver, machine gun, shotgun, rifle or other firearm, which is loaded and from which a shot may be discharged, upon his person (A) while under the influence of intoxicating liquor or any drug, or both, or (B) while the ratio of alcohol in the blood of such person is eight-hundredths of one per cent or more of alcohol, by weight.

"(2) Any person who violates any provision of this subsection shall be guilty of a class B misdemeanor."

counsel, he requested no changes and otherwise raised no issue as to the accuracy of the report.[13] Therefore, the trial court reasonably determined that the sentencing court did not rely on inaccurate information in sentencing the defendant, and thus that the defendant's sentence was not imposed in an illegal manner. We conclude, on that basis, that the trial court did not abuse its discretion by denying that limited portion of the defendant's motion to correct an illegal sentence over which it had subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

GENERAL INSURANCE COMPANY OF AMERICA *v.* AGATHA OKEKE ET AL.
(AC 39738)

Lavine, Elgo and Harper, Js.

Syllabus

The plaintiff insurance company sought a declaratory judgment to determine whether it was obligated to defend and indemnify the defendant insureds, A and M, under a certain homeowner's insurance policy in connection with certain civil actions brought against them by C. The civil actions brought by C involved an incident in which M had assaulted her. The trial court, following a hearing, granted the plaintiff's motion for summary judgment, concluding that the plaintiff's claim as to M was

[13] The relevant portion of the transcript at sentencing reflects the following colloquy between the court and defense counsel:

"The Court: Thank you. I'll ask Attorney [Joseph A.] Jaumann and Attorney [John C.] Drapp, gentlemen, have you had a chance to review the presentence investigation yourselves?

"Mr. Jaumann: Yes, Your Honor.

"The Court: Did you have a chance to review it with [the defendant]?

"Mr. Jaumann: Yes, Your Honor.

"The Court: Any changes to the presentence investigation?

"Mr. Jaumann: No, Your Honor.

"The Court: Again, [the defendant] has had a chance to review it; is that correct?

"Mr. Jaumann: That's correct."

not moot, and that the plaintiff had no duty to defend and indemnify either defendant. From the judgment rendered thereon, A and M appealed to this court. On appeal, they claimed, inter alia, that the trial court improperly determined that the plaintiff had no duty to defend and indemnify them. *Held* that the trial court properly rendered summary judgment in favor of the plaintiff, and that court having thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned memorandum of decision as a statement of the facts and the applicable law on the issues.

Argued March 5—officially released May 15, 2018

Procedural History

Action for a declaratory judgment to determine, inter alia, whether the plaintiff was obligated to defend or indemnify the named defendant et al. under a certain homeowner's insurance policy, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Huddleston*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Affirmed.*

Andrew J. Cates, with whom were *P. Jo Anne Burgh* and, on the brief, *Sean Nourie*, for the appellants (named defendant et al.).

Kerry R. Callahan, with whom was *Christopher A. Klepps*, for the appellee (plaintiff).

Opinion

PER CURIAM. In this declaratory action, the defendants Agatha Okeke and her son, Michael Okeke,[1] appeal from the summary judgment rendered by the trial court in favor of the plaintiff, General Insurance Company of America. The defendants claim that the court improperly concluded (1) that the plaintiff did

[1] Teresa Craft, who also was named as a defendant in this action, has not appealed from the judgment of the trial court. For clarity, we refer to Agatha Okeke and Michael Okeke individually by their first names and collectively as the defendants in this opinion.

not owe a duty to defend and indemnify them in certain judicial proceedings, and (2) that the plaintiff's claim against Michael was not moot. We affirm the judgment of the trial court.

This action concerns a physical altercation that allegedly occurred on January 11, 2013. As the court noted in its memorandum of decision, the defendants at all relevant times lived at 10 Morton Lane in East Hartford. Agatha purchased a homeowner's insurance policy (policy) with respect to that property from the plaintiff, which was in effect on January 11, 2013. On that date, Michael, who was fifteen years old, allegedly assaulted, stabbed, and beat Teresa Craft in her residence at 2 Morton Lane in East Hartford. Michael thereafter was arrested and charged with assault of an elderly person in the first degree in violation of General Statutes § 53a-59a and disorderly conduct in violation of General Statutes § 53a-182.[2]

Craft subsequently commenced separate civil actions against Michael and Agatha. In the action against Michael, Craft alleged causes of action for intentional

[2] Appended to the plaintiff's motion for summary judgment was a copy of the police report prepared by the East Hartford Police Department, which states that Michael was arrested and charged with those offenses. According to that report, when officers arrived at the scene of the assault, the sixty-one year old Craft was "bleeding heavily from a head wound, and there was a large amount of blood on the floor and surrounding area. There also was a clump of hair on the floor with the blood." In her complaint against Michael, which also was appended to the plaintiff's motion for summary judgment, Craft alleged that she sustained multiple puncture wounds, lacerations, and scarring to her head and left shoulder as a result of the January 11, 2013 assault. In addition, the "Petition/Information/Face Sheet—Delinquency" that also accompanied the plaintiff's motion for summary judgment likewise states in relevant part that "[t]he Juvenile Prosecutor has reason to and does believe" that Michael committed the offenses of assault of an elderly person in the first degree and disorderly conduct. The defendants raised no objection to that documentary evidence before the trial court, which properly could consider those materials in rendering summary judgment. See *Catz* v. *Rubenstein*, 201 Conn. 39, 49, 513 A.2d 98 (1986); *Carrasquillo* v. *Carlson*, 90 Conn. App. 705, 711, 880 A.2d 904 (2005).

assault, negligent assault, negligent infliction of emotional distress, and intentional infliction of emotional distress. All four counts were predicated on Michael's conduct in assaulting Craft on January 11, 2013. In the action against Agatha, Craft alleged negligent supervision, negligence, and negligent infliction of emotional distress. As the trial court observed, "[t]he essential allegations of liability in each of the counts are that Agatha knew or should have known that Michael was a danger to himself and others but negligently failed to supervise him and to prevent him from obtaining access to knives."

In response, Agatha contacted the plaintiff, which initially agreed to defend both actions subject to a full reservation of rights. With respect to the action against Michael, the court stated that "[a]lthough counsel retained by [the plaintiff] initially appeared . . . counsel subsequently moved to withdraw, stating that the claims against Michael were excluded under the policy and that the appearance had been filed by mistake. Permission to withdraw was granted, and Michael was subsequently defaulted for failure to appear. After a hearing in damages, Craft was awarded $407,113.03 in economic and noneconomic damages and costs against Michael. The action against Agatha remains pending . . . ." In their respective appellate briefs, the parties both acknowledge that the plaintiff is providing Agatha with a defense in that action, subject to a reservation of rights.[3]

While those actions were pending, the plaintiff commenced this declaratory action, in which it sought a decree that it "has no duty to defend or indemnify" the defendants and that the plaintiff "may instruct [its]

[3] The defendants also have included, in the appendix to their appellate brief, a copy of the appearance that was filed on behalf of Agatha on January 18, 2017, by the law firm retained by the plaintiff.

counsel to withdraw from" the actions brought by Craft. The defendants subsequently filed an answer and three special defenses. In their first special defense, they alleged that "the declaratory action as to [Michael] is moot and/or otherwise not justiciable" because the plaintiff had "unilaterally decided" not to defend him in the underlying action. Their second special defense alleged that the plaintiff was equitably estopped from denying coverage to Michael due to its failure to provide a defense on his behalf. In their third special defense, the defendants claimed that the plaintiff had failed to acknowledge an endorsement to the policy that allegedly amended certain exclusions contained therein.

On February 24, 2016, the plaintiff filed a motion for summary judgment. Appended to that motion were: (1) a copy of the policy; (2) copies of the complaints brought in the Superior Court by Craft against the defendants; and (3) copies of the police report and the "Petition/Information/Face Sheet—Delinquency" regarding the assault that allegedly transpired on January 11, 2013. The defendants filed an objection to that motion, which was not accompanied by any affidavits or other documentation. The court held a hearing on the motion on June 14, 2016. In its subsequent memorandum of decision, the court rejected the defendants' contention that the issue of the plaintiff's duty to defend Michael was moot. The court also determined that the plaintiff had no duty to defend or indemnify either of the defendants. From that judgment, the defendants appealed to this court.

Our examination of the record and briefs and our consideration of the arguments of the parties persuade us that the judgment should be affirmed. On the facts of this case, the issues properly were resolved in the court's well reasoned memorandum of decision. See *General Ins. Co. of America* v. *Okeke*, Superior Court,

judicial district of Hartford, Docket No. CV-15-6060103-S (October 3, 2016) (reprinted at 182 Conn. App. 88). We therefore adopt it as the proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Pellecchia* v. *Killingly*, 147 Conn. App. 299, 301–302, 80 A.3d 931 (2013).

The judgment is affirmed.

APPENDIX

GENERAL INSURANCE COMPANY OF AMERICA *v.* AGATHA OKEKE ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-15-6060103-S

Memorandum filed October 3, 2016

Proceedings

Memorandum of decision on plaintiff's motion for summary judgment. *Motion granted.*

Kerry R. Callahan and *Christopher A. Klepps*, for the plaintiff.

Andrew J. Cates, for the named defendant et al.

Brian V. Altieri, for the defendant Teresa Craft.

Opinion

HUDDLESTON, J. The plaintiff, General Insurance Company of America (General Insurance), brought this declaratory judgment action to resolve the question of its duty to defend and to indemnify Agatha Okeke

* Affirmed. *General Ins. Co. of America* v. *Okeke*, 182 Conn. App. 83, A.3d (2018).

(Agatha) and her son, Michael Okeke (Michael), under a homeowner's policy issued to Agatha, with respect to separate civil actions brought against them by Teresa Craft. The underlying civil actions allege that on January 11, 2013, Michael, who was then fifteen years old, assaulted and stabbed Craft, severely injuring her.

As to both Michael and Agatha, General Insurance argues that (1) Michael's conduct was not accidental and therefore did not constitute an "occurrence" covered under the policy, and (2) the policy excludes coverage for "bodily injury" that arises out of physical abuse. As to Michael only, it further argues that the policy excludes coverage for injuries that are expected or intended by the insured or that result from a violation of criminal law by the insured. The Okeke defendants argue that the declaratory judgment action is moot as to Michael because General Insurance declined to defend him in the underlying civil action, which went to judgment upon default after Michael failed to appear. Michael and Agatha further argue that under the "four corners doctrine," the complaints against each of them contain allegations of negligence that constitute an "occurrence" under the policy. Agatha further argues that even if Michael is not covered under the policy, the claims against her sound in negligence and are covered. Finally, Craft argues that the claims against Agatha are covered because they sound in negligence and in parental vicarious liability under General Statutes § 52-572. Parental vicarious liability is covered by an endorsement to the policy.

For the reasons discussed below, the court concludes as follows. The declaratory judgment action is not moot as to Michael because the failure to defend is claimed as a basis for special defenses and a counterclaim against General Insurance. The motion for summary judgment is granted as to Michael because the alleged conduct does not constitute an "occurrence" under the policy

and, even if it did, it is expressly excluded from coverage because the injury was intended or expected by Michael, resulted from a violation of criminal law, and arose from physical abuse. The motion is granted as to Agatha because even if the claims against her constitute an "occurrence," Craft's bodily injuries nevertheless arise from Michael's physical abuse of her, and such injuries are excluded from coverage under the policy.

FACTS

The following facts are either alleged in the complaint, and for the purpose of this motion are uncontested, or shown upon the record of the court in this case and in the underlying civil actions brought by Craft against Agatha and Michael.

The defendants, Agatha and her son Michael, lived at 10 Morton Lane in East Hartford, Connecticut, in January, 2013. Michael was fifteen years old then. He is now believed to live in Nigeria.

In January, 2013, defendant Craft lived at 2 Morton Lane in East Hartford. She subsequently moved to Guilford, Connecticut.

Agatha obtained a homeowner's insurance policy from General Insurance for the period from December 14, 2012 to December 14, 2013. On January 11, 2013, while the policy was in effect, Michael is alleged to have attacked, assaulted, and stabbed Craft at her residence at 2 Morton Lane in East Hartford. This attack is alleged to have violated General Statutes § 53a-59a, assault of an elderly person in the first degree, and General Statutes § 53a-182, disorderly conduct.

By a complaint dated December 31, 2014, returnable to court on February 3, 2015, Craft commenced an action against Michael, docketed as *Teresa Craft* v. *Michael Okeke*, Docket No. CV-15-6052308-S, in New Haven Superior Court. Her complaint, in four counts,

alleged causes of action for intentional assault (count one); negligent assault (count two); negligent infliction of emotional distress (count three); and intentional infliction of emotional distress (count four). All four counts were predicated on the same conduct—that is, Michael's assault on Craft on January 11, 2013—although in the negligent assault count the conduct was characterized differently from the way it was characterized in the intentional assault count.

By a complaint dated December 31, 2014, returnable to court on February 3, 2015, Craft also commenced an action against Agatha, docketed as *Teresa Craft* v. *Agatha Okeke*, Docket No. CV-15-6052310-S, in New Haven Superior Court. Craft's action against Agatha alleges negligent supervision (count one), negligence (count two), and negligent infliction of emotional distress (count three). The essential allegations of liability in each of the counts are that Agatha knew or should have known that Michael was a danger to himself and others but negligently failed to supervise him and to prevent him from obtaining access to knives.

Agatha tendered the actions to General Insurance for defense and indemnification. General Insurance initially agreed to defend both actions subject to a full reservation of rights. Although counsel retained by General Insurance initially appeared in Craft's action against Michael, that counsel subsequently moved to withdraw, stating that the claims against Michael were excluded under the policy and that the appearance had been filed by mistake. Permission to withdraw was granted, and Michael was subsequently defaulted for failure to appear. After a hearing in damages, Craft was awarded $407,113.03 in economic and noneconomic damages and costs against Michael. The action against Agatha remains pending in New Haven Superior Court and is scheduled for trial on November 7, 2016.

The policy is "occurrence" based. Pursuant to its terms, General Insurance is required to defend and indemnify the insureds for "damages because of *bodily injury or property damage* caused by an *occurrence* to which this coverage applies . . . ." (Emphasis added.) Under the terms of the policy, "*occurrence*" means "an accident, including exposure to conditions which result in: bodily injury . . . during the policy period . . . ." (Emphasis added.) Under the policy's terms, personal liability insurance does not apply to bodily injury "which is expected or intended by any *insured* or which is the foreseeable result of an act or omission intended by any *insured*." (Emphasis added.) Personal liability insurance also does not apply under the policy to bodily injury "which results from violation of criminal law committed by, or with the knowledge or consent of any *insured*." (Emphasis added.)

General Insurance seeks a declaration that it is not required to defend or indemnify Agatha and Michael under the terms of the policy. All persons with an interest in this action have been named as parties.

Craft has asserted two special defenses and a counterclaim. In her first special defense, she alleges that the policy exclusions do not apply to negligent actions. In her second special defense, she alleges that General Insurance failed to comply with its duty to defend Michael in the underlying action and therefore is now liable to her for the judgment she obtained in that action. In her counterclaim, she alleges that General Insurance is liable to her for the judgment rendered against Michael in the underlying action. Agatha and Michael have also asserted three special defenses. In the first special defense, they allege that the declaratory judgment action is nonjusticiable as to Michael because General Insurance unilaterally decided not to defend Michael in the underlying action. In the second special defense, they allege that General Insurance is equitably

estopped from denying coverage to Michael because it failed to provide a defense for him in the underlying action. In the third special defense, they allege that General Insurance has failed to acknowledge an endorsement to the policy that amends certain provisions on which General Insurance relies.

APPLICABLE LAW

A party seeking summary judgment bears the burden of showing the nonexistence of any genuine issue of material fact. *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). The evidence must be viewed in the light most favorable to the nonmovant. Id. "When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) Id. When a party moves for summary judgment and there are no contradictory affidavits, the court properly decides the motion by looking to the sufficiency of the movant's affidavit and other proof. See *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 795, 653 A.2d 122 (1995).

A declaratory judgment action is a suitable vehicle for testing the rights and liabilities under an insurance policy. *St. Paul Fire & Marine Ins. Co.* v. *Shernow*, 22 Conn. App. 377, 380, 577 A.2d 1093 (1990). A court may address the merits of a declaratory judgment action on a motion for summary judgment. *United Services Automobile Assn.* v. *Marburg*, 46 Conn. App. 99, 102 n.3, 698 A.2d 914 (1997).

Declaratory judgment actions are authorized by General Statutes § 52-29[1] and Practice Book § 17-55.[2] Our Supreme Court has recognized that our declaratory judgment statute provides "a statutory action as broad as it well could be made." (Internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 748, 36 A.3d 224 (2012). "Indeed, our declaratory judgment statute is broader in scope than . . . the statutes in most, if not all, other jurisdictions . . . and [w]e have consistently construed our statutes and the rules under it in a liberal spirit, in the belief that they serve a sound social purpose." (Internal quotation marks omitted.) Id. Although the declaratory judgment procedure cannot be used to secure advice on the law, "it may be employed in a justiciable controversy

[1] General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

[2] Practice Book § 17-55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met:

"(1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations;

"(2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and

"(3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof." (Internal quotation marks omitted.) Id. "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Board of Education* v. *Naugatuck*, 257 Conn. 409, 416, 778 A.2d 862 (2001).

ANALYSIS

I

Mootness

Michael claims that the declaratory judgment action is moot as to the duty to defend him because General Insurance unilaterally decided not to provide a defense to him and the action against him has now gone to judgment. The question of mootness affects the court's subject matter jurisdiction and must, therefore, be decided before the court can proceed to the merits. See id., 412.

As a general matter, "[i]f the insurer declines to provide its insured with a defense and is subsequently found to have breached its duty to do so, it bears the consequences of its decision . . . ." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 571 n.7, 142 A.3d 1079 (2016). That general principle is implicated in this action by the special defenses and counterclaim filed by the

defendants. More specifically, in their second special defense, Agatha and Michael assert that the failure of General Insurance to provide a defense in the underlying action equitably estops General Insurance from denying indemnification. In addition, Craft has asserted a counterclaim seeking to hold General Insurance liable for the judgment she obtained against Michael. These defendants have expressly placed in issue, through the special defenses and counterclaim, the question of General Insurance's duty to defend Michael. Applying the justiciability standard set forth in *Board of Education* v. *Naugatuck*, supra, 257 Conn. 409, the court concludes that (1) there is an actual and continuing controversy between these parties about the duty to defend Michael, (2) their interests are plainly adverse, (3) the matter in question presents an issue of contract interpretation and is capable of being adjudicated by judicial power, and (4) the determination of the issue may result in practical relief to General Insurance because, if it had no duty to defend Michael, the defense of estoppel will not apply and it will not be required to indemnify the judgment Craft obtained in the underlying action against Michael. The question of General Insurance's duty to defend Michael is therefore not moot.

II

Duty to Defend and Indemnify Michael

General Insurance argues that it had no duty to defend or indemnify Michael for several reasons: (1) his alleged conduct was intentional and therefore not an "occurrence" that is covered by the policy; (2) the policy excludes coverage for bodily injury that is "intended or expected" by the insured; (3) the policy excludes coverage for bodily injury that results from a violation of criminal law; and (4) the policy excludes coverage for bodily injury arising from "physical

abuse." The defendants argue that Craft asserts negligence claims against Michael that trigger a duty to defend under the "four corners" rule. The court concludes that under the clear and unambiguous terms of the policy, General Insurance owes no duty to defend or indemnify Michael.

The principles governing the determination of this issue are well settled. "[A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint. . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint. . . . Hence, if the complaint sets forth a cause of action within the coverage of the policy, the insurer must defend." (Internal quotation marks omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 398, 757 A.2d 1074 (2000). Indeed, "[i]f an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) Id., 399. "On the other hand, if the complaint alleges a liability which the policy does not cover, the insurer is not required to defend." (Internal quotation marks omitted.) Id.

Where a policy excludes coverage for damages resulting from intentional acts, the court examines the factual allegations to determine whether intentional acts and intended results are present. *State Farm Fire & Casualty Co.* v. *Tully*, supra, 322 Conn. 574. Moreover,

"Connecticut courts have long eschewed the notion that pleadings should be read in a hypertechnical manner. . . . They thus read the complaint in a manner that advances substantial justice, construing it reasonably to contain all that it may fairly mean." (Internal quotation marks omitted.) Id., 574–75. The result is that even when an action is pleaded as an unintentional tort, such as negligence, "the court examines the alleged activities in the complaint to determine whether the insured intended to commit both the acts and the injuries that resulted. If so, regardless of the title of the action, the court holds the action to be outside the coverage of the policy." (Internal quotation marks omitted.) Id., 575. "Furthermore, harmful intent may be inferred at law in circumstances where the alleged behavior in the underlying action is so inherently harmful that the resulting damage is unarguably foreseeable." (Internal quotation marks omitted.) Id. "Case law is clear that where the provisions in the insurance policy expressly exempt intentional acts of an insured from coverage, the court will grant summary judgment in favor of the insurer who relies upon such exception." (Internal quotation marks omitted.) Id. "When an insurer relies on an exclusionary clause to deny coverage, the initial burden is on the insurer to demonstrate that all the allegations within the complaint fall completely within the exclusion." Id. "If the complaint alleges liability that falls completely within the exclusion, the insurer is not required to defend." Id.

Finally, the Supreme Court has recently observed that where an insurer denies coverage on the ground that a complaint fails to allege an "occurrence," defined under a policy as an "accident," and whether the alleged act falls within an intentional act exclusion, "the ultimate inquiry—whether the act was intentional—is the same." Id., 571 n.8. If the court concludes that the

alleged conduct falls within the intentional act exclusion, it need not consider whether it is also an "occurrence."

The underlying action against Michael included two counts that expressly alleged intentional acts—intentional assault in count one and intentional infliction of emotional distress in count four—and purported to allege "negligent assault" in count two and negligent infliction of emotional distress in count three. Although captioned "negligent assault," count two in Craft's complaint against Michael alleged that the "occurrence" was due to Michael's "negligence and carelessness" in that "he violently struck the plaintiff about the head, shoulder and torso, causing serious injury to the plaintiff, when he knew or should have known that this conduct was likely to inflict injury . . . ." Calling such conduct "negligence" does not make it negligent. Similarly, count three, which alleges negligent infliction of emotional distress, incorporates the following allegations from count one: "At that time and place, the minor defendant stabbed, assaulted, and beat the plaintiff," and "[t]he assault, stabbing, and beating by Michael Okeke was willful, wanton, and malicious." These allegations are plainly inconsistent with a negligence claim. They plainly describe intentional conduct. Such intentional and violent conduct is expressly excluded from coverage under "Liability Losses We Do Not Cover," which provides in relevant part as follows: "1. Coverage E—Personal Liability, and Coverage F—Medical Payments to Others do not apply to *bodily injury* . . . a. which is expected or intended by any insured or which is the foreseeable result of an act or omission intended by the insured . . . [and] b. which results from violation of criminal law committed by . . . any insured." (Emphasis added.) Because bodily injury to Craft was the highly foreseeable result of Michael's alleged actions in violently stabbing and beating her about the

head, shoulder, and torso, it is expressly excluded from coverage under the policy. General Insurance owed no duty to defend Michael because his conduct was not an "occurrence" (defined as an accident) covered by the policy, but an intentional act, and a violation of criminal law, that was expressly excluded from coverage.

A further provision of the policy excludes coverage for bodily injury "arising out of physical or mental abuse, sexual molestation or sexual harassment." See "Liability Losses We Do Not Cover," provision 1k. The defendants argue that the term "physical abuse" is not defined in the policy and is therefore ambiguous. That argument has been expressly rejected by the Appellate Court in *Merrimack Mutual Fire Ins. Co.* v. *Ramsey*, 117 Conn. App. 769, 982 A.2d 195, cert. denied, 294 Conn. 920, 984 A.2d 67 (2009). In that case, the insured allegedly stabbed the defendant, with whom he was involved in a romantic relationship, twenty-four times. In the declaratory judgment action brought by the insurer to determine whether it had a duty to defend or indemnify its insured, the defendant (the injured party) argued that exclusion 1k, which excluded coverage for bodily injuries arising out of "physical or mental abuse," contained an implicit intentionality requirement. The trial court, and subsequently the Appellate Court, disagreed. "The exclusion expressly exempts coverage for bodily injury arising out of physical abuse. Nowhere does it provide that a consideration of the abuser's intent is required. In fact, the policy contains a separate exclusion that applies specifically to intentional acts. . . . When both exclusions are read together, it is clear that exclusion 1k does not require a consideration of the insured's intent. . . . The only plausible interpretation of the . . . insurance policy is the natural and ordinary one accorded to it by the court . . . . The stabbing of the defendant clearly constituted

physical abuse within the language of the policy. As such, the injuries suffered by the defendant are not covered, and the plaintiff has no duty to defend or indemnify [its insured]." Id., 772–73. The same conclusion is compelled here. The violent stabbing and beating of Craft cannot plausibly be considered anything other than "physical abuse." As such, the injuries suffered by Craft are not covered, and the plaintiff has no duty to defend or indemnify Michael.[3]

III

Duty to Defend and Indemnify Agatha

General Insurance argues that it owes no duty to defend or indemnify Agatha because the claim arises from an intentional act that does not constitute an "occurrence" under the policy. It acknowledges that coverage is not excluded for Agatha under the intentional acts exclusion because an endorsement expressly provides that the intentional act exclusion will not apply to an insured "not participating in the intentional loss." It argues, however, that the exclusion for "physical abuse" does apply to Agatha because that exclusion, unlike the intentional conduct exclusion, does not make the exclusion inapplicable to insureds who did not participate in the abuse. Because the court agrees with General Insurance as to the "physical abuse" exclusion, it need not consider whether Agatha's own alleged negligence constitutes an "occurrence" under the policy.

As another Connecticut trial court has concluded, the "physical abuse" exclusion negates an insurer's duty to defend parents who are alleged to be liable on the basis of physical abuse inflicted by their minor child. See *Covenant Ins. Co.* v. *Sloat*, Superior Court, judicial

[3] Because the duty to defend is significantly broader than the duty to indemnify, "where there is no duty to defend, there is no duty to indemnify . . . ." *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 382, 773 A.2d 906 (2001).

district of Fairfield, Docket No. 385786 (May 23, 2003) (*Levin*, *J.*) (34 Conn. L. Rptr. 687) (considering whether statutory vicarious parental liability claim was barred by an exclusion for injuries arising out of "physical and mental abuse"). As the court observed in *Sloat*, "[u]nlike exclusion 'a,' which focuses on the intent of the insured, exclusion 'k' precludes coverage for an entire class of risks arising out of specified conduct, and does not turn on the intent of the insured." Id., 694. Relying on *LaBonte* v. *Federal Mutual Ins. Co.*, 159 Conn. 252, 259, 268 A.2d 663 (1970), the court in *Sloat* concluded that "in determining whether the complaint alleges a claim for bodily injury arising out of excluded activity, the court must inquire not merely into the status of the parents as parents but into the underlying conduct of their son—'the subject matter of the [incident] without regard to the involvement of the insured' parents." *Covenant Ins. Co.* v. *Sloat*, supra, 694. Here, the subject matter of the incident is Michael's physical abuse of Craft. Because all of the claims against Agatha "arise out of"[4] such physical abuse, they are expressly excluded from coverage. Consequently, General Insurance owes no duty to defend or indemnify Agatha.

CONCLUSION

General Insurance has met its burden of showing that it had no duty to defend, and has no duty to indemnify, Michael Okeke. The acts in which Michael engaged

[4] To "arise out of" or "arise from" a particular event, injuries must be shown only to have some logical causal relationship to the event. For instance, in *Hogle* v. *Hogle*, 167 Conn. 572, 356 A.2d 172 (1975), which concerned a policy that excluded liability for injuries arising out of the use of an automobile, the Supreme Court stated that "it is generally understood that for liability for an accident or an injury to be said to 'arise out of' the 'use' of an automobile for the purpose of determining coverage under the appropriate provisions of a liability insurance policy, it is sufficient to show only that the accident or injury 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile . . . ." Id., 577.

were intentional and therefore (1) did not constitute an "occurrence" under the policy, and (2) were excluded because the bodily injuries that resulted were intended or expected within the meaning of exclusion 1a and were caused by a violation of criminal law. In addition, the bodily injuries resulting from Michael's conduct unquestionably arose out of his physical abuse of Craft, and coverage is therefore excluded under exclusion 1k, the physical abuse exclusion.

Similarly, General Insurance met its burden of showing that it has no duty to defend or indemnify Agatha because the bodily injury at issue in the claims against her arose out of Michael's physical abuse of Craft and are excluded under exclusion 1k, the physical abuse exclusion.

For the reasons stated above, General Insurance's motion for summary judgment is granted.

STATE OF CONNECTICUT *v.* JEFFREY W. HALL
(AC 39355)

Lavine, Prescott and Elgo, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree in connection with the stabbing death of the victim, the defendant appealed to this court. He claimed, for the first time on appeal, that the trial court violated his constitutional right to present a defense by failing to provide the jury with an instruction concerning his lack of a duty to retreat from the scene of the incident. *Held* that the trial court's decision not to instruct the jury concerning the duty to retreat was proper under the circumstances of this case; because the duty to retreat played no part in the defendant's criminal trial, as the state did not advance that theory or mention the word retreat before the jury, a jury instruction on the defendant's duty to retreat was not necessary and might have confused the jury, and, therefore, the defendant could not establish the existence of a constitutional violation that deprived him of a fair trial.

Argued February 1—officially released May 15, 2018

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *D'Addabbo*, *J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree; thereafter, the court rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Jade N. Baldwin, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Brian Preleski*, state's attorney, and, on the brief, *Brett Salafia*, assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Jeffrey W. Hall, appeals from the judgment of conviction, rendered after a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1).[1] On appeal, the defendant claims that the trial court improperly declined to provide the jury with an instruction on the duty to retreat. We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. At all relevant times, the defendant lived with Michelle Lewis and Karen Letourneau at a residence known as 19 Lincoln Street in Bristol. In the early hours of June 21, 2013, Letourneau, the defendant, and other individuals were celebrating Lewis' birthday at the residence. Among the attendees was Jerry Duncan, who had been invited by Letourneau. The attendees enjoyed birthday

[1] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

cake and then drinks together on a front porch. At some point, a disagreement arose between the defendant and Duncan, and the defendant indicated that he wanted Duncan to leave. In response, Letourneau told the defendant that "I pay rent [here] and he's my company and he's not leaving." The party then continued for approximately one hour without incident.

Sometime after 3 a.m., the Bristol Police Department received an anonymous noise complaint regarding the party at the residence. Officer Daniel Colavolpe was on patrol that evening and responded to the complaint with Officer Al Myers. When they arrived at the residence, Colavolpe saw multiple people on the porch who were "conversing loudly," at which point the officers advised them to "go inside and call it a night." The individuals agreed and went inside the house.

Nevertheless, the party later resumed on the porch. When Letourneau went inside to check on her minor son, she heard a "commotion in the front hallway." Letourneau opened the front door and found the defendant and Duncan "physically attacking each other." At trial, Letourneau described what happened next: "I froze, I panicked. I came back in the house and then about a minute later, I went back out and that's when I saw everything covered with blood. . . . There was blood flying everywhere." Letourneau retreated inside the house and then "went back out a third time" and found the defendant seated on the porch. When she peered over the railing, Letourneau saw Duncan "laying on the bottom of the stairs face up and his legs were going up the stairs."[2]

[2] Another attendee at the party, William Plocharski, was on the porch at the time of the altercation between the defendant and Duncan. Plocharski testified that he heard a ruckus and glanced inside the residence. When he saw the defendant and Duncan fighting, he thought to himself that it was "none of my business" and returned to the porch. The defendant then came crashing through a screen door with "blood all over him" and Plocharski helped him up. The defendant went back inside the residence, while Plocharski remained on the porch until police arrived.

While those events unfolded, the police received a second noise complaint. Colavolpe and Myers again responded to the residence, arriving at approximately 3:45 a.m. As he stood on the front porch, Colavolpe heard "a male voice fairly loudly say, 'Yeah, call 911, there's a corpse at the bottom of the stairs,' and then followed up a very short time later with, 'I don't fucking care, tell him I stabbed him.' " Colavolpe then opened the door and saw Duncan lying motionless at the bottom of the stairs with "a large amount of blood around his head . . . ."

Colavolpe entered the residence with his gun drawn and ordered everyone inside to the ground. In response, the defendant, who was "covered in blood," informed Colavolpe that the other individuals "were fine" and that "he was the one [who] stabbed [Duncan] but [that] it was in self-defense." Colavolpe then moved the defendant from the crime scene to the porch while awaiting assistance from additional officers. At that time, the defendant was "very calm" and did not appear to be injured in any way. The defendant then stated to Colavolpe: "I just did what I was trained to do. [Duncan] punched me and I grabbed what I could and stabbed him. I stabbed him and broke off the knife. . . . I hope I killed him. I really hope I did. And if he wasn't such a dick, he wouldn't be dead."

The defendant made similar statements to Officers Tyler Meusel and Craig Duquette in the hours that followed. When Meusel responded to the scene, the defendant's demeanor was "[v]ery passive, almost nonchalant." As he sat in a police cruiser with Meusel, the defendant stated that he had acted in self-defense. The defendant asked if he had killed Duncan and then stated, "I hope I did." The defendant also asked Meusel what his sentence was likely to be for this crime, inquiring whether "it would be man[slaughter] second." As to how the altercation took place, the defendant informed

Meusel that "[h]e came at me so I stabbed him in the throat." Duquette was involved in booking the defendant on June 21, 2013. When Duquette asked if he was injured, the defendant, pointing to his hand, said "maybe right here . . . from where I stuck the knife in him" and then laughed. The defendant stated that Duncan "had come to fuck with him" so he defended himself "[b]y stabbing him in the neck with a knife." The defendant also told Duquette that he was a veteran of the United States Army and "had utilized his military training to inflict the wounds" on Duncan.

Duncan died as a result of the injuries he sustained on June 21, 2013. The official cause of death was a stab wound to the carotid artery in his neck. The defendant subsequently was arrested and charged, by long form information dated January 25, 2016, with murder in violation of General Statutes § 53a-54a. At trial, the defendant presented a theory of self-defense.[3] The state's theory was that the defendant acted with the intent to cause death or serious physical injury to Duncan, and did not act in response to a fear of great bodily harm. Significantly, the state never suggested that the defendant had a duty to retreat or submitted evidence related thereto. Indeed, the word "retreat" was not mentioned at trial.

Following the close of evidence, the defendant filed a request to charge that sought, inter alia, an instruction indicating that he "did not have a duty to retreat." At the February 19, 2016 charging conference, the court discussed that request at length with the parties. The court reminded the parties that, under Connecticut law, the duty to retreat "does not apply if [the defendant was] in his home . . . ."[4] In light of the parties' stipulation that the physical altercation between the defendant

[3] The defendant did not testify or call any witnesses at trial.

[4] See General Statutes § 53a-19 (b) (1) ("a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . .

and Duncan took place in the defendant's home, the court opined that the requested instruction on the inapplicability of the duty to retreat likely would be confusing to jurors. The court then took the matter under advisement.

Prior to closing arguments on February 22, 2016, the court revisited the defendant's request to charge. At that time, the court stated that it was concerned about injecting "law to the jury that is not part of the case." The court reiterated its view that an instruction on the inapplicability of the duty to retreat would be unnecessarily confusing to the jury and therefore denied the defendant's request. Following closing arguments, the court provided a comprehensive instruction on self-defense in its charge to the jury. The defendant in this appeal raises no claim with respect to the propriety of that charge, save for its exclusion of an instruction on the duty to retreat.

The jury thereafter found the defendant not guilty of murder, but guilty of the lesser included offense of manslaughter in the first degree in violation of § 53a-55 (a) (1). The court rendered judgment accordingly and sentenced the defendant to a term of twenty years incarceration. From that judgment, the defendant now appeals.

On appeal, the defendant claims that the court improperly declined to provide the jury with an instruction concerning the duty to retreat, in violation of his sixth amendment right to present a defense.[5] The defendant did not preserve that constitutional claim at trial

by retreating, except that the actor shall not be required to retreat if he or she is in his or her dwelling"); see also *State* v. *Shaw*, 185 Conn. 372, 378–79, 441 A.2d 561 (1981), cert. denied, 454 U.S. 1155, 102 S. Ct. 1027, 71 L. Ed. 2d 312 (1982).

[5] Although the defendant also alleges a violation of his right under article first, § 9, of the Connecticut constitution in his appellate brief, he has provided no independent analysis thereof. Accordingly, we consider his claim under the federal constitution alone. See *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016).

and now seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[6] We review the defendant's claim because the record is adequate for review and the claim is of constitutional magnitude. See *State* v. *Salters*, 78 Conn. App. 1, 4–5, 826 A.2d 202, cert. denied, 265 Conn. 912, 831 A.2d 253 (2003). We nevertheless conclude that the claim fails to satisfy *Golding*'s third prong.

The duty to retreat is one of the "statutory exceptions" to the defense of self-defense.[7] *State* v. *Diggs*,

[6] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

[7] Those exceptions are codified in General Statutes § 53a-19, which provides in relevant part: "(b) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he or she is in his or her dwelling, as defined in section 53a-100, or place of work and was not the initial aggressor, or if he or she is a peace officer, a special policeman appointed under section 29-18b, or a motor vehicle inspector designated under section 14-8 and certified pursuant to section 7-294d, or a private person assisting such peace officer, special policeman or motor vehicle inspector at his or her direction, and acting pursuant to section 53a-22, or (2) by surrendering possession of property to a person asserting a claim of right thereto, or (3) by complying with a demand that he or she abstain from performing an act which he or she is not obliged to perform.

"(c) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force, or (3) the physical

219 Conn. 295, 301, 592 A.2d 949 (1991). The appellate courts of this state have held that a jury instruction on the duty to retreat is required under the sixth amendment only if the state has advanced a theory related thereto. In the seminal case of *State* v. *Lemoine*, 256 Conn. 193, 197, 770 A.2d 491 (2001), the defendant claimed that "it was improper for the trial court to refrain from instructing the jury [about the] duty to retreat under . . . § 53a-19 (b)." The defendant further contended that "the absence of an instruction on the duty to retreat denied him his right to present a defense under the sixth amendment . . . ." Id., 198. Our Supreme Court disagreed, stating that "[i]n the present case, although the defendant was entitled to a jury charge on self-defense, we do not agree that such an instruction necessarily should have included an explanation of the defendant's duty to retreat. Such an explanation was not relevant to the present case because the state did not argue to the jury that the defendant should have retreated." Id., 199. The court emphasized that "had the state's attack on the defendant's self-defense claim been based on the defendant's failure to retreat, a complete jury instruction on the duty to retreat would have been necessary. . . . Because the state made no claim that the defendant should have retreated, however, the defendant did not suffer constitutional harm by the trial court's omission of an unnecessary and potentially confusing instruction on the duty to retreat." (Citations omitted.) Id., 200. Furthermore, no sixth amendment violation can be established when the prosecutor "never referenced the defendant's duty to retreat" at trial and "never argued to the jury that the defendant had an obligation to retreat under Connecticut law . . . ." *State* v. *Dawes*, 122 Conn. App. 303, 323, 999 A.2d 794, cert. denied, 298 Conn. 912, 4

force involved was the product of a combat by agreement not specifically authorized by law."

A.3d 834 (2010). The same could be said of the prosecutor in the present case, as no theory was advanced, and no remark was made, on the defendant's duty to retreat.[8]

The defendant nonetheless posits that, without an instruction on the duty to retreat, "the jury may have decided that the defendant, rather than the victim, should have chosen to leave the residence to avoid further conflict . . . ."[9] That claim was raised before, and rejected by, our Supreme Court in *Lemoine*. As the court explained: "The defendant . . . argues that, even if the state did not use the duty to retreat to attack the defendant's claim of self-defense, the jurors' commonsense reaction when instructed to evaluate the reasonableness of the defendant's reaction naturally would be to consider whether he could have retreated from the situation. In making such a determination, the defendant argues, the jurors incorrectly would have assumed that the defendant had a duty to retreat . . . . We disagree. To require that the jury be instructed, not only on matters at issue, but also on all arguably related but factually inapplicable areas of the law not only would be impractical, but would impair the jury's understanding of the relevant legal issues. The defendant's position essentially would require that a duty to retreat instruction be given to the jury in every case where the defendant presents a self-defense claim. Such an instruction

[8] At oral argument, defense counsel conceded that the state never argued at trial that there was a duty to retreat on the part of the defendant.

[9] The defendant also argues that he "certainly [would] have altered his trial strategy had he known that the court would fail to fully inform the jury on the law of self-defense by leaving out the portion on [the] duty to retreat." Beyond that bald assertion, the defendant has provided no further explanation or analysis as to how his trial strategy would have changed, rendering his briefing of that claim inadequate. See, e.g., *State* v. *Pink*, 274 Conn. 241, 255–56, 875 A.2d 447 (2005) (mere assertion does not constitute adequate briefing). Moreover, in light of the fact that the duty to retreat plainly does not apply to the undisputed circumstances of this case, as the parties stipulated that the altercation took place in the defendant's home, we cannot envision how the defendant would have altered his trial strategy.

would have been unnecessary and potentially confusing to the jury." *State* v. *Lemoine*, supra, 256 Conn. 200–201; accord *State* v. *Bellino*, 31 Conn. App. 385, 391, 625 A.2d 1381 (1993) ("[l]egal principles concerning the duty to retreat did not play a part in this case, and there is no reason to believe that the jury would have considered that issue on its own"), appeal dismissed, 228 Conn. 851, 635 A.2d 812 (1994). The trial court here expressly relied on *Lemoine* in concluding that an instruction that the duty to retreat did not apply in the present case was unnecessary and likely to confuse jurors.

The duty to retreat played no part in the defendant's criminal trial. The state did not advance any such theory and not once did the prosecutor utter the word "retreat" before the jury. Bound by *State* v. *Lemoine*, supra, 256 Conn. 200–201, we therefore conclude that the defendant cannot establish the existence of a constitutional violation that deprived him of a fair trial. Mindful of its obligation to "adapt its instructions to the issues in the case in order to provide appropriate guidance to the jury"; *State* v. *Bellino*, supra, 31 Conn. App. 390; we conclude that the court's decision not to instruct the jury concerning the duty to retreat was proper under the circumstances of this case.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICES OF CONNECTICUT STATE AGENCIES

NOTICE OF EXTENSION TO OPEN SEASON FOR BLACK SEA BASS

Pursuant to Conn. Gen. Stat. § 26-25, the Commissioner of Energy and Environmental Protection (''the Commissioner'') is providing notice of a season extension for black sea bass (*Centropristis striata*) which shall be effective from the date that this notice is published in the Connecticut Law Journal through and including April 30, 2019.

In support of this notice the Commissioner finds that the sport fishing harvest level for black sea bass will fail to meet the harvest level for efficient management without addition to the open season as noted below.

The season for black sea bass shall be *closed* from the date this notice is published in the Connecticut Law Journal until and including May 18, 2018, and shall be *open* from May 19, 2018 to December 31, 2018, inclusive, after which the season shall be *closed* and will remain *closed* from January 1, 2019 to April 30, 2019.

As a reminder, no person, while on the waters of this state or on any parcel of land, structure, or portion of a roadway abutting tidal waters of this state shall take, possess or land any of the species noted above by sport fishing methods, regardless of where taken, during a closed season, except as may otherwise be authorized by law.

For further information, contact the Department of Energy and Environmental Protection's Marine Fisheries Program by email at deep.marine.fisheries@ct.gov or by telephone at 860-434-6043 Monday through Friday, 8:30am – 4:30 pm.

DEPARTMENT of SOCIAL SERVICES

Notice of Intent to Amend Personal Care Assistant and Home Care Program for Elders Medicaid Waivers

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services intends to amend the Personal Care Assistant (PCA) and Elder waivers to increase the individual cost cap to reflect wage and rate increases for self-directed Personal Care Assistants.

Both waivers will have a phased cap increase beginning July 1, 2018 and a second increase on July 1, 2019. The cost cap for the Home Care Program for Elders will increase to 125% of the average Medicaid cost of nursing home effective 7/1/18 and to 130% effective 7/1/19. The PCA waiver will increase to 120% of the average Medicaid cost of nursing home effective 7/1/18 and to 125% effective 7/1/19. This will also be reflected in the calculations in the fiscal appendices in the waivers.

No waiver participants will be negatively impacted by these proposed changes. Service availability will remain the same but the waiver caps need to be increased to accommodate this change.

A complete text of the waiver amendment is available, at no cost, upon request to the Community Options Unit, Department of Social Services, 55 Farmington Ave., Hartford, Connecticut 06106; email shirlee.stoute@ct.gov.

All written comments, questions, and concerns regarding these amendments may be submitted within 30 days of the publication of this notice to the Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford or to Kathy.a.bruni@ct.gov.

Department of Social Services

Notice of Intent to Operate Updated Policies and Procedures

Regulation 17-01 – Person-Centered Medical Home Plus (PCMH+) Program (PR 2016-087)

In accordance with and pursuant to the authority of section 17b-263c of the Connecticut General Statutes, the Department of Social Services (the ''Department'') gives notice that, effective May 1, 2018, it intends to operate under updated policies and procedures (also known as an operational policy) pending full adoption of regulations concerning the Person-Centered Medical Home Plus (PCMH+) Program. On January 17, 2017, the Department previously published notice that it intends to adopt said regulations and to operate under policies and procedures effective January 1, 2017. On January 16, 2018, the Department published notice that it intends to operate under updated policies and procedures effective January 1, 2018.

The updated operational policy is posted to the Connecticut eRegulations System, http://eregulations.ct.gov, select ''Regulations in Progress'', then select Department of Social Services – PCMH+ or search for the DSS PCMH+ regulation on the Connecticut eRegulations System and then scroll down to view the updated operational policy that is effective January 1, 2018.

In addition to accessing the updated operational policy on the Connecticut eRegulations System, anyone may also request a copy from the Department of Social Services by email: joel.norwood@ct.gov or by writing to: Department of Social Services, Office of Legal Counsel, Regulations and Administrative Hearings, 55 Farmington Avenue, Hartford, Connecticut 06105, Attention: Joel Norwood, Staff Attorney.

DEPARTMENT OF SOCIAL SERVICES
DEPARTMENT OF DEVELOPMENTAL SERVICES

NOTICE OF INTENT TO SEEK AMENDMENT OF MEDICAID WAIVERS FOR INDIVIDUAL AND FAMILY SUPPORT AND EMPLOYMENT AND DAY SUPPORTS

In accordance with the provisions of section 17b-8(c) of the Connecticut General Statutes, notice is hereby given that the Commissioner of Social Services intends to submit the following two applications to the Centers for Medicare and Medicaid Services (''CMS''), each to be effective October 1, 2018:

(1) Amendment of the Medicaid Waiver for Individual and Family Support;
(2) Amendment of the Medicaid Waiver for Employment and Day Supports.

Both of the above-referenced waivers are operated by the Department of Developmental Services. The Department of Social Services and the Department of Developmental Services are proposing the following changes to these waivers:

(1) Increasing the individual cost cap for the Individual and Family Support waiver from $59,000 to $130,000;
(2) Increasing the individual cost cap for the Employment and Day Supports waiver from $28,000 to $58,000;
(3) Adding Blended Supports as a service on both waivers. Blended Supports provide waiver participants an opportunity to enhance their community-based skills;
(4) Adding Customized Employment as a service on both waivers. Customized Employment promotes integrated work opportunities in order to maximize the skills for waiver participants;
(5) Adding Transitional Supports as a service on both waivers. Transitional Supports provide waiver participants an opportunity to develop skills and resources to enhance their opportunity for employment;
(6) Adding Training, Counseling and Support Services for Unpaid Caregivers as a service to the Employment and Day Supports Waiver. Training, Counseling and Support Services for Unpaid Caregivers provides unpaid caregivers an opportunity to access supports to provide the optimal care to their family members;
(7) Alignment of the Performance Measures across both waivers; and
(8) Technical and administrative clarifications requested by CMS.

No current enrollees will be negatively impacted by the changes in these applications.

Copies of the complete text of the waiver applications are available upon request from: Siobhan Morgan, Director of Medicaid Operations, DDS Central Office, 460 Capitol Avenue, Hartford, CT, 06106, or via email at Siobhan.Morgan@ct.gov. They are also available on the Department of Social Services' website, www.ct.gov/dss, under ''News and Press,'' and the Department of Developmental Services' website, www.ct.gov/dds, under ''Latest News.''

All written comments regarding these applications must be submitted by June 14, 2018 to: Division of Waiver Services, DDS Central Office, 460 Capitol Avenue Hartford, Connecticut, 06106, Attention Siobhan Morgan, or via email at Siobhan.Morgan@ct.gov.

NOTICES

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

February 2, 2018:	Joseph John D'Agostino, Jr., Wallingford, Connecticut - #408646
February 9, 2018:	Peter W. Shafran, Stamford, Connecticut - #102551
February 23, 2018:	James R. Hardy, II, Hartford, Connecticut - #432408

Copies of the full text of the decisions of the Statewide Grievance Committee are available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decisions is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel

Notice of Application for Reinstatement to the Bar

On May 1, 2018, Ira Mayo filed in the Superior Court for the Judicial District of Waterbury, in docket number UWYCV166032650S, an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Richard L. Haas
Chief Clerk, Judicial District of Waterbury

OFFICE OF THE PROBATE COURT ADMINISTRATOR

CONTRACT CONSERVATOR PROGRAM

The Office of the Probate Court Administrator seeks attorney and non-attorney professional conservators to serve as court-appointed conservators for indigent individuals under a fixed fee contract arrangement.

Contract conservators are paid a monthly fee of $86 per case, plus a one-time fee of $1,250 for preparation of a Title XIX application. Contractors may specify the Probate Courts for which they will serve as conservator and may set a maximum number of appointments that they will accept.

Enrollment for the program is currently open for the period from July 1, 2018 to June 30, 2019.

For more information and the contract to enroll in the program, please visit ctprobate.gov and click on the link for conservators.

Notice of Attorney Reprimand

CV18-6076790 S. DISCIPLINARY COUNSEL VS. MICHAEL PETELA. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, MAY 8, 2018.

ORDER: The Court orders that the Respondent is hereby reprimanded as per Stipulation recorded in the court file.

By the Court,
Abrams, Judge
