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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* QUENTINE L. DAVIS (SC 20157)

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

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of criminal possession of a pistol and carrying a pistol without a permit, the defendant appealed, claiming, inter alia, that the trial court improperly denied his motion to suppress the handgun that had given rise to those charges. On the evening of the defendant's arrest, an anonymous tipster had called 911 to report that a group of men was gathered near a vehicle parked outside of his window and that "a young man" in that group was in possession of a handgun. The caller could not say exactly how many men there were because they were moving back and forth across the street. The caller further stated that, although he had seen the handgun, he could not identify the specific person who was carrying it because all of the men were wearing dark clothing. When police officers responded to that location, a group of approximately six men who were standing around the vehicle began to walk away. The police officers then ordered the men to stop in order to conduct a search pursuant to *Terry* v. *Ohio* (392 U.S. 1), but the defendant continued to walk away. The officers repeated their order, after which they witnessed the defendant drop an object into a nearby garbage can. The police ultimately arrested the defendant, searched the garbage can, and discovered the handgun. On the basis of these facts, the defendant filed a motion to suppress the handgun, claiming, inter alia, that the *Terry* stop was

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

unlawful and that the subsequent discovery of the handgun was tainted by the unlawful *Terry* stop. Specifically, the defendant claimed that the anonymous tip did not give rise to a reasonable suspicion that he had been engaged in criminal activity and that his detention therefore violated his right to be free from unreasonable seizures under the fourth amendment to the United States constitution. The trial court denied the motion to suppress, and the defendant appealed. *Held* that the trial court improperly denied the defendant's motion to suppress, this court having concluded that the detention of the defendant violated the fourth amendment because the anonymous tip that the police received did not give rise to a reasonable suspicion that the defendant had been engaged in criminal activity: although the information conveyed in the anonymous tip may have supported a reasonable suspicion that a young man possessed a handgun in the location where the group of men were spotted under the standard set forth in *Navarette* v. *California* (572 U.S. 393), that information was not sufficiently detailed or specific to enable the police to know which of the approximately six individuals subject to the *Terry* stop possessed the handgun and, therefore, did not give rise to a reasonable suspicion that the defendant himself was in possession of the handgun.

Argued November 16, 2018—officially released April 2, 2019

Procedural History

Information charging the defendant with the crimes of criminal possession of a pistol, carrying a pistol without a permit, possession of less than one-half ounce of cannabis-type substance, breach of peace in the second degree and interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the court, *B. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Cradle*, *J.*, on a conditional plea of nolo contendere to the charges of criminal possession of a pistol and carrying a pistol without a permit; judgment of guilty in accordance with the plea, from which the defendant appealed. *Reversed*; *further proceedings*.

Daniel M. Erwin, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Devant Joiner*, assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. The sole issue in this appeal is whether, under *Navarette* v. *California*, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), the trial court properly denied a motion to suppress evidence discovered by the police during the forcible detention of the defendant, Quentine L. Davis, pursuant to *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), on the basis of an anonymous telephone tip regarding "a young man that has a handgun." After the police detained the defendant, they saw him drop an object in a garbage can, a subsequent search of which revealed a handgun. The defendant was arrested and charged with, inter alia, criminal possession of a pistol in violation of General Statutes § 53a-217c and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[1] The defendant moved to suppress the handgun, claiming that the evidence resulting from the search of the garbage can was tainted as the result of his unlawful seizure. Specifically, the defendant claimed that the anonymous tip did not give rise to a reasonable suspicion that he was engaged in, or was about to be engaged in, criminal activity, and, therefore, that his detention violated his right to be free from unreasonable seizures under the fourth amendment to the United States constitution[2] and article first, §§ 7 and 9, of the Connecticut constitution. The trial court denied the motion to sup-

[1] We note that, although these statutes have been amended since the events underlying the present appeal; see, e.g., Public Acts 2016, No. 16-34, § 16; those amendments have no bearing on the merits of this appeal. For the sake of simplicity, we refer to the current revision of these statutes.

[2] "The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution." *State* v. *Kelly*, 313 Conn. 1, 8 n.3, 95 A.3d 1081 (2014).

press. Thereafter, the defendant entered a conditional plea of nolo contendere to the gun charges pursuant to General Statutes § 54-94a. See also footnote 4 of this opinion. The trial court accepted that plea and rendered a judgment of conviction. This appeal followed.[3] We agree with the defendant's claim that his detention violated his fourth amendment rights under *Navarette*. Accordingly, we conclude that the trial court improperly denied the motion to suppress and reverse the judgment of the trial court.

The record reveals the following facts that were found by the trial court or are undisputed, and procedural history. At approximately 7:26 p.m. on the evening of September 28, 2016, the New Haven Police Department received an anonymous 911 telephone call regarding "a young man that has a handgun." The caller reported that he could see "a whole bunch" of men between 472 and 476 Winthrop Avenue in New Haven, some of whom were gathered around a black Infiniti. The caller could not "say exactly how many" men there were because they were crossing back and forth across the street. The caller stated that he could see the handgun from his window but that he could not identify the specific person who was carrying it because all of the men were wearing dark clothing. When asked, the caller denied that the men were fighting or arguing. When the dispatcher inquired, the caller declined to give his name or telephone number.

The dispatcher relayed the anonymous tip to police officers on the beat. Within minutes, three police cruisers containing at least five uniformed police officers arrived at the scene. At least one of the cruisers was sounding its siren. As the police officers exited the

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

cruisers, a number of them unholstered their guns. The officers considered this location to be in a high crime area.

The officers observed approximately six men standing around a black Infiniti. As the police approached the men, they walked away. Officer Thomas Glynn ordered them to stop, and five of them did. Glynn and another officer, Matthew Collier, recognized two of the men from previous criminal interactions. The sixth individual, later identified as the defendant, continued to walk away from the police down Winthrop Avenue, despite additional orders to stop by Collier and Glynn. The defendant held his right hand at his waist in front of his body, extended his arm, and dropped an object into a garbage can. Shortly after dropping the object, the defendant turned toward Collier and Glynn and said something to the effect of "who, me?" At that point, the police arrested the defendant. A subsequent search of the garbage can produced a 9 millimeter handgun.

The defendant was charged with criminal possession of a pistol in violation of § 53a-217c and carrying a pistol without a permit in violation of § 29-35 (a).[4] Thereafter, he filed a motion to suppress the handgun, claiming that his detention violated the fourth amendment of the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution, and that the search of the garbage can was tainted by his unconstitutional seizure. Specifically, the defendant contended that the anonymous telephone tip was not sufficiently reliable to give rise to a reasonable suspicion that he was engaged in criminal activity. After conducting an evidentiary hearing, the trial court determined that the

[4] The defendant was also charged with possession of less than one-half ounce of cannabis in violation of General Statutes § 21a-279a, breach of the peace in the second degree in violation of General Statutes § 53a-181, and interfering with an officer in violation of General Statutes § 53a-167a. The state subsequently nolled these charges.

police effectuated an investigative stop of the defendant when Glynn initially ordered the six men to stop.[5] The trial court further concluded that, under the United States Supreme Court's decision in *Navarette* v. *California*, supra, 572 U.S. 393, the anonymous telephone tip was sufficiently reliable to give rise to a reasonable suspicion that the defendant was engaged in criminal activity because (1) the caller was relaying his firsthand, eyewitness observations, (2) the caller's observations were contemporaneous with the call, (3) the caller was using the 911 system, and (4) the caller was reporting what would have been a "startling event" for a person in his position. In addition, the trial court found it "significant" that the police officers knew that this location was in a high crime area and that the six individuals who were gathered around the black Infiniti immediately began to disperse upon seeing the police. The trial court also noted, without further comment, that the police recognized two of the individuals from prior criminal encounters. Accordingly, the trial court denied the defendant's motion to suppress.

Thereafter, the defendant filed a "motion to reconsider and/or articulate" in which he contended that the trial court's reliance on *Navarette* was misplaced because the state had not cited that case. The defendant further argued that, because *Navarette* was based on

[5] The trial court rejected the state's argument that, if the initial stop of the six individuals was unconstitutional because the anonymous tip was not sufficiently reliable to give rise to a reasonable suspicion of criminal activity, the defendant's subsequent conduct in ignoring the police commands to stop, walking away from the police and dropping the handgun in the garbage can, nevertheless constituted criminal activity warranting a stop. Citing this court's decision in *State* v. *Hammond*, 257 Conn. 610, 627, 778 A.2d 108 (2001), the trial court concluded that the evidence would have to be suppressed if the initial stop was illegal because the "disposal of the gun would not be sufficiently distinguishable from the illegal seizure and [was] in some sense the product of the illegal government activity." (Internal quotation marks omitted.) The state does not challenge that determination in the present appeal.

specific concerns arising in the context of anonymous tips about drunk driving, it should be limited to that context. The defendant also requested that the trial court clarify whether it had rejected his claim under the state constitution. The trial court summarily denied this motion.

Thereafter, the defendant entered a conditional plea of nolo contendere to the gun charges pursuant to § 54-94a. The trial court accepted the plea and imposed an effective sentence of ten years imprisonment, execution suspended after five years, followed by five years of probation. This appeal followed. See footnote 3 of this opinion.

On appeal, the defendant contends that the trial court improperly determined that the anonymous 911 call was sufficiently reliable under the United States constitution to give rise to a reasonable suspicion that he was engaged in, or about to engage in, criminal activity, thereby warranting a *Terry* stop. Specifically, he again contends that *Navarette* v. *California*, supra, 572 U.S. 393, should be limited to cases involving anonymous tips about drunk driving. The defendant further contends that, even if *Navarette* extends beyond drunk driving, the anonymous tip in the present case was insufficient to give rise to a reasonable suspicion that the defendant was engaged in criminal activity because the anonymous caller "identified only a group of young men as opposed to an individual," and he "did not report an ongoing crime [but] specifically repudiated the threat of violence."

Assuming, without deciding, that *Navarette* is not limited to anonymous tips about drunk driving, we conclude that, although the anonymous tip in the present case was sufficiently reliable under the *Navarette* standard to give rise to a reasonable suspicion that a young man in the vicinity of 472-476 Winthrop Avenue had a

handgun, it was *not* sufficiently detailed to give rise to a reasonable suspicion that the *defendant* was in possession of that gun.[6] Accordingly, we conclude that the forcible detention of the defendant violated the fourth amendment to the United States constitution.[7]

We begin our analysis with the standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Citation omitted; internal quotation marks omitted.) *State* v. *Burroughs*, 288 Conn. 836, 843, 955 A.2d 43 (2008). Because the defendant in the present case does not challenge the trial court's factual findings but claims only that those findings do not support the conclusion that the police had

[6] In light of this conclusion, we need not address the defendant's contention that the anonymous tip did not give rise to a reasonable suspicion that criminal activity was afoot.

[7] The defendant also contends that, even if the anonymous tip was sufficiently reliable under *Navarette*, article first, §§ 7 and 9, of the Connecticut constitution embodies a more protective standard. We recently stated in *State* v. *Kono*, 324 Conn. 80, 123, 152 A.3d 1 (2016), that, "if the federal constitution does not clearly and definitively resolve the issue in the defendant's favor, we turn first to the state constitution to ascertain whether its provisions entitle the defendant to relief." In *Kono*, however, we had "no idea how a majority of the members of the United States Supreme Court would decide the issue." Id., 129. In the present case, we conclude that it is sufficiently clear, under the standard that we articulated in *Kono*, that the United States Supreme Court would conclude under *Navarette* that the anonymous tip did not give rise to a reasonable suspicion that the defendant was engaged in criminal activity. Accordingly, we decide the issue under the federal constitution and need not reach the defendant's state constitutional claims.

a reasonable and articulable suspicion that he was engaged in criminal activity, our review is de novo. See, e.g., *State* v. *Benton*, 304 Conn. 838, 842–43, 43 A.3d 619 (2012). The state has the "burden of proving that the police had a reasonable and articulable suspicion to justify an investigatory detention." *State* v. *Batts*, 281 Conn. 682, 694, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007).

We next review the governing legal principles. "Under the fourth amendment to the United States constitution, and under article first, [§§ 7 and 9, of the] Connecticut constitution, a police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." (Internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 281, 764 A.2d 1251 (2001); see also *Terry* v. *Ohio*, supra, 392 U.S. 30–31 (police officer may detain suspect and engage in stop and frisk investigation if officer has reasonable and articulable suspicion that suspect is armed and dangerous). "When considering the validity of a [*Terry*] stop, our threshold inquiry is twofold. . . . First, we must determine at what point, if any . . . the encounter between [the police officers] and the defendant constitute[d] an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officers] possessed a reasonable and articulable suspicion [that the individual is engaged in criminal activity] at the time the seizure occurred. . . . In assessing whether the police officers possessed the requisite reasonable and articulable suspicion, we must consider whether, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific information available to the

police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." (Citation omitted; internal quotation marks omitted.) *State* v. *Benton*, supra, 304 Conn. 843–44.

"Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police would have had that level of suspicion. . . . The police officer's decision . . . must be based on more than a hunch or speculation. . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Internal quotation marks omitted.) *State* v. *Hammond*, 257 Conn. 610, 617, 778 A.2d 108 (2001).

"An anonymous tip generally does not satisfy the requirement of reasonable suspicion . . . ." *State* v. *Mann*, 271 Conn. 300, 326 n.21, 857 A.2d 329 (2004), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). This is because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams* v. *Williams*, 407 U.S. 143, [146–47, 92 S. Ct. 1921, 32 L. Ed. 2d 612] (1972), an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity, *Alabama* v. *White*, [496 U.S. 325, 329, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)]. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." (Internal quotation marks omitted.) *State* v. *Hammond*, supra, 257 Conn. 617; see also *Navarette* v. *California*, supra, 572 U.S. 397 ("[O]rdinary citizens generally do not provide extensive recitations of the basis of their

everyday observations, and an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable. . . . But under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." [Citation omitted; internal quotation marks omitted.]).

"Whether an anonymous tip suffices to give rise to reasonable suspicion depends on both the quantity of information it conveys as well as the quality, or degree of reliability, of that information, viewed under the totality of the circumstances." *United States* v. *Wheat*, 278 F.3d 722, 726 (8th Cir. 2001), cert. denied, 537 U.S. 850, 123 S. Ct. 194, 154 L. Ed. 2d 81 (2002). "[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Alabama* v. *White*, supra, 496 U.S. 330.

In *Navarette* v. *California*, supra, 572 U.S. 397, a majority of the United States Supreme Court found its decisions in *Alabama* v. *White*, supra, 496 U.S. 325, and *Florida* v. *J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), to be "useful guides" in determining whether an anonymous tip had sufficient indicia of reliability to give rise to a reasonable suspicion. See also *State* v. *Hammond*, supra, 257 Conn. 617–20 (United States Supreme Court's decisions in *White* and *J. L.* "dominate this analysis"). "In *White*, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. . . . After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. . . . [The United States Supreme Court] held that the officers' corroboration of certain details made the anon-

ymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated a special familiarity with [the suspect's] affairs, which in turn implied that the tipster had access to reliable information about that individual's illegal activities. . . . [The court] also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, including the claim that the object of the tip is engaged in criminal activity. . . .

"In *J. L.*, by contrast, [the court] determined that no reasonable suspicion arose from a barebones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. . . . The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs. . . . As a result, police had no basis for believing that the tipster [had] knowledge of concealed criminal activity. . . . Furthermore, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. . . . [The court] accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk." (Citations omitted; internal quotation marks omitted.) *Navarette* v. *California*, supra, 572 U.S. 397–98.

On the basis of its decisions in *Alabama* v. *White*, supra, 496 U.S. 325, and *Florida* v. *J. L.*, supra, 529 U.S. 266, the majority in *Navarette* identified the following four factors to be considered in determining whether an anonymous tip has sufficient indicia of reliability: (1) whether the tipster had firsthand knowledge of the alleged criminal behavior; (2) whether the report was contemporaneous with the alleged criminal behavior; (3) whether the report was made "under the stress of excitement caused by a startling event"; and (4) whether the tipster used the 911 emergency system, which allows calls to be recorded, thereby providing

"victims with an opportunity to identify the false tipster's voice and subject him to prosecution . . . ." *Navarette* v. *California*, supra, 572 U.S. 399–400. Once a court has determined that an anonymous tip is reliable on the basis of these factors, that court must then determine whether the tip "creates reasonable suspicion that criminal activity may be afoot." (Internal quotation marks omitted.) Id., 401; see also id. (upon determining that anonymous 911 call was reliable, court was required to "determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness").

In *Navarette*, the anonymous 911 call was recorded as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago." (Internal quotation marks omitted.) Id., 395. Applying the four reliability factors that it had identified, the court noted that (1) the tipster had firsthand knowledge of the defendant's conduct, (2) the tip was contemporaneous with the conduct and contained innocent details later corroborated by police observations, (3) the observed conduct was startling, and (4) the tipster used the 911 system. Id., 399–401. The court ultimately concluded that, although it was a close case, the police reasonably could rely on the veracity of the tipster's report. Id., 404. The court further concluded that the observed conduct gave rise to a reasonable suspicion of drunk driving. Id. Accordingly, it concluded that the *Terry* stop of the defendant was lawful.[8] Id.

[8] Justice Scalia authored a dissenting opinion in *Navarette*, in which Justices Ginsburg, Sotomayor, and Kagan joined, arguing that the fact that the anonymous tipster had specifically identified the subject's vehicle "in no way makes it plausible that the tipster saw the car run someone off the road" and that the tipster's claim to eyewitness knowledge "supports *not at all* [the] veracity" of the tip. (Emphasis in original.) *Navarette* v. *California*, supra, 572 U.S. 407. The dissent further posited that the rationale underlying

Like the anonymous tipster in *Navarette*, the anonymous caller in the present case used the 911 system, and provided a contemporaneous, firsthand account of the alleged criminal conduct[9] containing innocent details later corroborated by the police. Likewise, the caller reasonably might have been startled by seeing a handgun. We therefore assume for purposes of this opinion that, *as far as it went*, the police reasonably could have relied on the caller's statement.[10] In other words, we assume that, under *Navarette*, the police reasonably could have believed the anonymous caller's statement that he saw a young man with a handgun in the vicinity of 472 to 476 Winthrop Avenue shortly before they arrived at the scene. We conclude for the following reasons, however, that, even if the tip was trustworthy, it did not give rise to a reasonable suspicion that the *defendant* was in possession of that gun.

the excited utterance exception to the hearsay rule did not support the reliability of the tipster's report because she had "[p]lenty of time to dissemble or embellish," and that it was unclear whether that exception even applied in the absence of other proof of the alleged criminal conduct. Id., 408. The dissent also argued that the tipster's use of the 911 system proved "absolutely nothing . . . unless the anonymous caller was *aware* of [the] fact" that 911 callers can be identified, and that, even if the tip was reliable, a single instance of careless driving did not give rise to a reasonable suspicion of "*ongoing intoxicated driving.*" (Emphasis in original.) Id., 409–10; see also *Florida* v. *J. L.*, supra, 529 U.S. 272 ("[a]n accurate description of a subject's readily observable location and appearance" is not alone sufficient to establish reliability of allegation that subject had concealed weapon because "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"). Because we conclude that the defendant in the present case can prevail even under the majority's analysis in *Navarette*, we need not consider whether we would find Justice Scalia's concerns to be persuasive in a state constitutional analysis.

[9] Because the issue is not before us, we express no opinion as to whether a report that an individual is in possession of a handgun gives rise to a reasonable suspicion that criminal activity is afoot for purposes of *Terry*.

[10] As we have explained previously, we assume, without deciding, that the *Navarette* standard applies outside the context of drunk driving and that the police need not independently corroborate the allegation that the suspect was engaged in illegal activity before initiating a stop if the other reliability factors are satisfied.

Unlike the tipster in *Navarette*, who provided a detailed description of the specific vehicle that had run her off the road, thereby enabling the police to identify that particular vehicle, the anonymous caller in the present case did not provide a sufficiently detailed, specific description of the "young man" who had the handgun to allow the police to identify that particular individual. Numerous courts have recognized that the lack of a detailed, specific description sufficient to enable the police to identify the particular individual or vehicle that is alleged to have been involved in criminal conduct fatally undermines the sufficiency of an anonymous tip. In *United States* v. *Wheat*, supra, 278 F.3d 731, for example, the United States Court of Appeals for the Eighth Circuit stated that "the anonymous tipster must provide a sufficient quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller." In *Wheat*, the court further observed that, although *Florida* v. *J. L.*, supra, 529 U.S. 266, "focused on deficiencies in the quality, rather than in the quantity, of the information contained in the tip at issue in that case . . . it [was] significant that that tip only spoke of a young black male wearing a plaid shirt, standing at a particular bus stop. See [*Florida* v. *J. L.*, supra, 268]. That is a rather generic description [creating] the possibility for confusion of the suspect's identity . . . ." *United States* v. *Wheat*, supra, 731.

Similarly, the District of Columbia Court of Appeals has observed that, "[i]n order to pass muster under *Terry* and its progeny, the articulable suspicion must be particularized as to the individual stopped. . . . Accordingly, in the absence of other circumstances that provide sufficient particularity, a description applicable to large numbers of people will not suffice to justify

the seizure of an individual." (Citations omitted; internal quotation marks omitted.) *In re S.B.*, 44 A.3d 948, 954–55 (D.C. 2012). In that case, the court concluded that an anonymous tip that a black male who was wearing white pants and "messing around" with a girl in a particular playground had a gun was insufficient to establish reasonable suspicion as to the defendant in that case because the police officers lacked "a rational basis for differentiating [the defendant] from [a different] individual in white clothing whom they had just searched (or any other juvenile in white pants who might come along) . . . ." Id., 956–57; see also *Goodson* v. *Corpus Christi*, 202 F.3d 730, 737 (5th Cir. 2000) (lookout broadcast for "tall, heavy-set, white man dressed as a cowboy" did not give police "reasonable suspicion to stop and frisk any tall, heavy-set, white man" because "[s]uch a description would simply be too vague, and fit too many people, to constitute particular, articulable facts on which to base reasonable suspicion"); *United States* v. *Jones*, 998 F.2d 883, 884–85 (10th Cir. 1993) (tip from identified callers regarding suspicious activity by two African-American men who left scene in black Mercedes was not sufficiently specific to give rise to reasonable suspicion to stop black Mercedes in which two African-American men were traveling); *United States* v. *Jones*, 619 F.2d 494, 497 (5th Cir. 1980) (radio bulletin indicating that "the police were looking for a black male, [five] feet [six] inches to [five] feet [nine] inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket" did not give rise to probable cause to arrest individual merely because he matched that description); *In re A.S.*, 614 A.2d 534, 539 (D.C. 1992) (lookout broadcast was not sufficient to establish reasonable suspicion when police officer's description "could have fit not merely the five individuals [in the specified location], but a potentially

much greater number of youths in the area"); *State* v. *Golotta*, 178 N.J. 205, 222, 837 A.2d 359 (2003) (911 caller "must provide a sufficient quantity of information, such as an adequate description of the vehicle, its location and bearing, or similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller" [internal quotation marks omitted]); see also *State* v. *Benton*, supra, 304 Conn. 843 (police must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity" [internal quotation marks omitted]).[11] Indeed, we entirely agree

[11] In *State* v. *Hammond*, supra, 257 Conn. 623–24, this court concluded that the fact that the police corroborated the anonymous tipster's description of the alleged wrongdoers as two black males, one of whom was taller than the other, and one of whom was wearing a blue and white coat and the other of whom was wearing a blue and red coat, "added nothing to the reliability or credibility of the tip, but merely allowed the police to pinpoint the persons who were the targets of the accusation." Thus, the court appears to have followed the reasoning of the court in *Florida* v. *J. L.*, supra, 529 U.S. 272, that "[a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." We note, however, that this line of reasoning was arguably overruled, or at least weakened, as a matter of federal constitutional analysis under the fourth amendment, by *Navarette* v. *California*, supra, 572 U.S. 399, when the court concluded that a detailed description sufficient to allow the police to identify the specific vehicle observed by the tipster, together with an allegation that the vehicle had been driven dangerously, was sufficient to give rise to a reasonable suspicion of drunk driving. See Note, "The Supreme Court—Leading Cases," 128 Harv. L. Rev. 119, 240 (2014) ("in [*Navarette*'s] wake the police may lawfully stop a person when someone else anonymously claims to be the victim of a crime by that person, despite lacking evidence that a crime even occurred"). This court also stated in *Hammond* that "[t]oo many people fit [the tipster's] description for it to justify a reasonable suspicion of criminal activity"; (internal quotation marks omitted) *State* v. *Hammond*, supra, 624; a remark that would appear to be inconsistent with the immediately preceding statement that the tip was sufficiently detailed to allow the police to identify the targets of the accusation. See id. In any event, regardless of the reasoning underlying this court's decision in *Hammond*, nothing in that case or in *Navarette* undermines the principle that an anonymous tipster's description must be sufficiently detailed and specific to allow the police to identify a particular individual or vehicle.

with the District of Columbia Court of Appeals that the "dragnet seizure of [multiple] youths who resembled a generalized description cannot be squared with the long-standing requirement for particularized, individualized suspicion." *In re A.S.*, supra, 540; see also id. ("[t]o allow the seizure of three people on the basis of a generalized description that would fit many people is directly contrary to the central teaching of the [Supreme] Court's [f]ourth [a]mendment jurisprudence demanding specificity" [internal quotation marks omitted]).

In the present case, the anonymous caller indicated only that the handgun was in possession of one of several young men wearing dark clothing in the vicinity of 472 to 476 Winthrop Avenue. It is clear, therefore, that the tip was not sufficiently detailed or specific to enable the police to know which of the six individuals subjected to the *Terry* stop had the handgun. Indeed, they had no way of knowing whether *any* of those individuals had that gun. The caller could not specify exactly how many individuals he had seen, and he indicated that some of the individuals were gathered around the Infiniti, while others were "crossing the street . . . back and forth." Thus, for all the police knew, it was possible that the individual with the handgun was not part of the group gathered around the Infiniti. Accordingly, we conclude that the tip was not sufficiently specific to give rise to the particularized, individualized suspicion required by the fourth amendment. The fact that the tip involved the possession of a firearm does not affect this conclusion. See *Florida* v. *J. L.*, supra, 529 U.S. 272 ("an automatic firearm exception to our established reliability analysis would rove too far").[12]

[12] In *J. L.*, the court concluded that the danger posed by firearms did not outweigh the possibility that an anonymous tip might be *false* for purposes of determining whether police had a reasonable suspicion that criminal activity was afoot. See *Florida* v. *J. L.*, supra, 529 U.S. 272. Even if we were to assume that *Navarette* tends to undermine that conclusion; see footnote 11 of this opinion; nothing in *Navarette* suggests that there is a "dangerous

We therefore conclude that the anonymous 911 call in the present case did not give rise to a reasonable suspicion that any of the individuals gathered in the vicinity of the black Infiniti, including the defendant, was in possession of a handgun, justifying an investigative *Terry* stop. We, therefore, further conclude that the seizure of the defendant violated his fourth amendment rights. Accordingly, we also conclude that the trial court improperly denied the defendant's motion to suppress.

In reaching these conclusions, we are mindful of the gun violence that plagues our state and our nation and the importance of ensuring that the police have the tools that they need to combat this pestilence. We emphasize that the police have not only the right, but the duty to respond appropriately and effectively to gun complaints. For example, as the defendant conceded at oral argument before this court, the police in the present case could have responded to the anonymous 911 call by going to the scene and observing the men or approaching them to ask about the handgun without effecting a *Terry* stop. See *United States* v. *Watson*, 900 F.3d 892, 898 (7th Cir. 2018) (when police receive anonymous tip about gun, they can respond "with a strong and visible police presence, one that involved talking with people on the scene when they arrived" or "make their own observations about the developing situation, which could transform an innocuous tip into reasonable suspicion" [internal quotation marks omitted]); *United States* v. *Lowe*, 791 F.3d 424, 436 (3d Cir. 2015) ("[o]fficers proceeding on the basis of an anonymous tip that does not itself give rise to reason-

conduct" exception to the requirement that an anonymous tip be sufficiently detailed and specific to allow the police to identify a particular individual. In other words, if the only details reported by anonymous caller in *Navarette* had been that she had been run off the road by a Ford pickup, we find it unlikely that the court would have found that the police had reasonable suspicion to stop every Ford pickup in the vicinity merely because the caller had made an otherwise reliable allegation of dangerous conduct.

able suspicion have many tools at their disposal to gather additional evidence that could satisfy the requirements of *Terry* and therefore allow police to stop the individual . . . [including] investigation, surveillance, and even approaching the suspect without a show of authority to pose questions and to make observations about the suspect's conduct and demeanor" [citation omitted]); see also *United States* v. *Harger*, 313 F. Supp. 3d 1082, 1092 (N.D. Cal. 2018).

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to suppress.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TERRANCE BROWN (SC 19960)

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

Syllabus

Pursuant to statute ([Rev. to 2009] § 54-47aa), a law enforcement official may request an ex parte order from a Superior Court judge to compel a telecommunications carrier to disclose basic cell phone subscriber information and information identifying the origin and destination of each communication generated or received by the subscriber. The judge shall grant the order if the law enforcement official states a reasonable and articulable suspicion that a crime has been or is being committed.

The defendant, who had been charged in multiple informations with various crimes, including burglary and larceny, for his alleged role in the theft or attempted theft of automated teller machines from gas stations and convenience stores, filed motions to suppress the historical and prospective cell phone call and location data obtained by the state as a result of three ex parte orders that had been issued pursuant to § 54-47aa. A police task force had been organized to investigate a series of crimes in which an individual or individuals, using various stolen vehicles, had backed those vehicles into the stores or gas stations and removed freestanding automated teller machines. As a result of information obtained by the police, an officer conducted a motor vehicle stop of

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

the defendant, who was released after questioning. After uncovering further information about the defendant, including his cell phone number, the police determined that the defendant may have been involved in the various thefts under investigation. The police then obtained the first ex parte order, which directed the defendant's cell phone carrier to disclose the past three months of his cell phone data and other basic subscriber information. An analysis of that data led the police to determine that the defendant had used his cell phone in relevant locations during times and dates that coincided with dates on which the various thefts under investigation had occurred. On the basis of this information, the police obtained two more ex parte orders that were prospective in nature, requiring the defendant's cell phone carrier to disclose caller identification information linked to his cell phone number, including live updates every ten minutes, for two consecutive early morning periods and for a later three day period. Based on the cell phone data that had been obtained pursuant to the orders, J, who had been in communication with the defendant at certain relevant times, was arrested and taken into custody in connection with an automated teller machine theft. During their interview of J, the police revealed to J that his cell phone number was listed in the defendant's phone log and that the cell phone data indicated that the defendant and J had contacted each other at or around the time of certain of the alleged thefts or attempted thefts. J then gave a statement implicating himself and the defendant in connection with many of the thefts and attempted thefts that had been under investigation. Relying on the state's concession that the second and third orders authorizing the disclosure of prospective cell phone data violated § 54-47aa and its determination that the first order authorizing the disclosure of historical data also violated § 54-47aa, the trial court granted the defendant's motions to suppress all of the cell phone data, J's statement to the police, and any potential testimony by J. The trial court also concluded that the state had failed to prove that the inevitable discovery exception to the exclusionary rule applied to J's statement and potential testimony. Thereafter, the trial court granted the defendant's motions to dismiss the charges and rendered judgments thereon, from which the state, on the granting of permission, appealed. *Held*:

1. The trial court correctly concluded that the state obtained the defendant's cell phone data illegally; the state had conceded that the two court orders authorizing the disclosure of prospective cell phone data were obtained in violation of § 54-47aa, and the disclosure of historical cell phone data pursuant to the first ex parte order violated the defendant's fourth amendment rights in light of the United States Supreme Court's recent decision in *Carpenter* v. *United States* (138 S. Ct. 2206), in which the court held that an individual has a legitimate expectation of privacy in the historical record of his physical movements as captured through cell phone data and that the government must generally obtain a warrant

supported by probable cause before acquiring such data, because the police obtained the defendant's historical data on the basis of a reasonable and articulable suspicion, rather than on the basis of a warrant supported by probable cause.

2. The trial court correctly concluded that the suppression of the historical and prospective cell phone data that had been illegally obtained by the state was the appropriate remedy: notwithstanding the state's claim that, because the police officers acted in reasonable reliance on the court's order authorizing the disclosure of the historical cell phone data, they acted in good faith, and that the purpose of the exclusionary rule, namely, to deter police misconduct, did not apply under these circumstances,, this court's prior case law has uniformly established a bright-line rejection of the good faith exception to the exclusionary rule under the state constitution, and, accordingly, the trial court properly suppressed the defendant's historical cell phone data; moreover, the state could not prevail on its claim that, with respect to the disclosure of the prospective cell phone data, suppression was not a remedy for a violation of § 54-47aa, this court having determined, after reviewing the statute's text and legislative history, as well as related statutes, that the statute's legislative history provided strong support for the conclusion that the legislature intended that suppression would be an appropriate remedy for violations of § 54-47aa and that the tracking of the defendant's cell phone, in the absence of a showing of probable cause and in violation of § 54-47aa, implicated important privacy interests that are traditionally the type protected by the fourth amendment, which required the application of the exclusionary rule and the suppression of the prospective cell phone data.

3. The trial court correctly determined that the state failed to meet its burden of proving that the inevitable discovery exception to the exclusionary rule applied to J's statement to the police implicating the defendant and J's potential testimony, which the trial court suppressed on the ground that the state conceded that, in the absence of the illegally obtained cell phone data, the police would not have interviewed J and obtained his statement; the trial court properly determined that the state, in order to bear its burden of proving that that inevitable discovery exception applied, was required to prove by a preponderance of the evidence not only that the police would have identified and located J by legal means, but also that J would have cooperated and provided the same information in the absence of the illegally obtained cell phone data, and, although the state presented credible evidence at the defendant's suppression hearing that it inevitably would have discovered J by lawful means, it failed to present any evidence to demonstrate that J would have similarly cooperated with the police in the absence of being confronted with the illegally obtained cell phone data.

Argued December 15, 2017—officially released April 2, 2019

Procedural History

Informations, in twelve cases, charging the defendant with nine counts each of the crimes of larceny in the third degree and criminal mischief in the first degree, six counts of the crime of burglary in the third degree, four counts each of the crimes of conspiracy to commit burglary in the third degree and conspiracy to commit larceny in the third degree, three counts of the crime of conspiracy to commit criminal mischief in the first degree, two counts each of the crimes of attempt to commit burglary in the third degree and criminal trover in the first degree, and one count each of the crimes of burglary in the first degree, larceny in the fourth degree, conspiracy to commit larceny in the fourth degree, larceny in the fifth degree and possession of burglar tools, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, granted the defendant's motions to suppress certain evidence; thereafter, the court, *Clifford*, *J.*, granted the defendant's motions to dismiss the charges and rendered judgments thereon, from which the state, on the granting of permission, appealed. *Affirmed.*

Harry Weller, senior assistant state's attorney, with whom were *John P. Doyle*, *Jr.*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, *Timothy J. Sugrue*, assistant state's attorney, and *Dana Tal*, certified legal intern, for the appellant (state).

Jennifer B. Smith, for the appellee (defendant).

Opinion

KAHN, J. The present case is in large part governed by the recent decision of the United States Supreme Court in *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 2217, 2221, 201 L. Ed. 2d 507 (2018), in which the court held that an individual has "a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location infor-

mation]" (CSLI), and, therefore, "the [g]overnment must generally obtain a warrant supported by probable cause before acquiring such records." The state appeals[1] from the judgments of dismissal rendered by the trial court after it granted the oral motion of the defendant, Terrance Brown, seeking dismissal of all charges in thirteen separate dockets.[2] The state claims that the trial court improperly granted the defendant's motions to suppress any and all "cellular-telephone-derived location information" obtained by the state as a result of three ex parte orders that had been granted pursuant to General Statutes (Rev. to 2009) § 54-47aa.[3]

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

[2] The defendant was charged in twelve of the informations with, inter alia, various burglary and larceny charges. As to the thirteenth information, Docket No. CR-11-0076427-S, referenced in the trial court's corrected consolidated memorandum of decision, the record contains neither the information nor the judgment file for that docket. Nor is there any other document in the record that identifies the charges filed against the defendant in that docket. We observe that, although the trial court, *Clifford*, *J.*, subsequently indicated that it was granting dismissal in all thirteen dockets, in its appeal form, the state did not list the judgment in Docket No. CR-11-0076427-S as a judgment from which the state is appealing. The state appeals only from the judgments in the remaining twelve dockets.

[3] General Statutes (Rev. to 2009) § 54-47aa provides in relevant part:

"(a) For the purposes of this section:

"(1) 'Basic subscriber information' means: (A) Name, (B) address, (C) local and long distance telephone connection records or records of session times and durations, (D) length of service, including start date, and types of services utilized, (E) telephone or instrument number or other subscriber number or identity, including any assigned Internet protocol address, and (F) means and source of payment for such service, including any credit card or bank account number;

"(2) 'Call-identifying information' means dialing or signaling information that identifies the origin, direction, destination or termination of each communication generated or received by a subscriber or customer by means of any equipment, facility or service of a telecommunications carrier;

. . .

"(b) A law enforcement official may request an ex parte order from a judge of the Superior Court to compel (1) a telecommunications carrier to disclose call-identifying information pertaining to a subscriber or customer, or (2) a provider of electronic communication service or remote computing

In their original briefs and arguments to this court, the parties focused primarily on whether the trial court properly granted the defendant's motions on the basis of its conclusion that the state obtained the prospective and historical CSLI in violation of § 54-47aa, and that suppression of the records was the appropriate remedy. Following oral argument, however, this court stayed the appeal pending the decision of the United States Supreme Court in *Carpenter* and ordered the parties to submit supplemental briefs concerning the relevance of that decision to this appeal. In light of the court's holding in *Carpenter*, we conclude that, because the state obtained the defendant's historical CSLI solely on the basis of a reasonable and articulable suspicion, rather than on a warrant supported by probable cause, the records were obtained in violation of the defendant's fourth amendment rights. We further conclude that the trial court properly determined that suppression of both the historical and prospective CSLI—which the state concedes it obtained in violation of § 54-47aa—was the appropriate remedy. Finally, we conclude that the trial court properly rejected the state's reliance on the inevitable discovery doctrine. Accordingly, we affirm the judgments of the trial court.

The record reveals the following facts and procedural background. From July 30 through November 23, 2010,

service to disclose basic subscriber information pertaining to a subscriber or customer. The judge shall grant such order if the law enforcement official states a reasonable and articulable suspicion that a crime has been or is being committed or that exigent circumstances exist and such call-identifying or basic subscriber information is relevant and material to an ongoing criminal investigation. The order shall state upon its face the case number assigned to such investigation, the date and time of issuance and the name of the judge authorizing the order. The law enforcement official shall have any ex parte order issued pursuant to this subsection signed by the authorizing judge within forty-eight hours or not later than the next business day, whichever is earlier. . . ."

Unless otherwise indicated, all subsequent references to § 54-47aa in this opinion are to the 2009 revision.

Connecticut State Police Detective Patrick Meehan was a member of a task force investigating a series of burglaries and attempted burglaries at a variety of gas stations and convenience stores in the New Haven, Waterbury and Fairfield areas. In the late night and early morning hours, the thieves targeted businesses that had freestanding ATMs inside a windowed storefront. Using a stolen vehicle, in many instances a Dodge Caravan minivan, the thieves backed the vehicle into the building when the business was closed, smashing through the glass and, in many cases, knocking over the ATM. The thieves would then load the ATM into the back of the vehicle, from which the rear seats had been removed, and drive away. Several of the ATMs had subsequently been recovered; those machines appeared to have been cut open with a reciprocating saw. Three of the ATMs were recovered in a cemetery not far from where the defendant lived. The stolen vehicles were later abandoned in different locations from where the ATMs had been discarded.

Following a task force meeting on September 15, 2010, Meehan learned that, on or about May 26, 2009, a police officer patrolling in the town of Monroe had observed a Dodge Caravan swerve over the double yellow line in the road several times. The officer pulled the Caravan over and, because there was heavy traffic, directed the driver to a nearby parking lot. As the driver of the Caravan began to pull into the parking lot, a Lincoln Navigator pulled up alongside the Caravan. The Lincoln's driver briefly spoke to the driver of the Caravan, then drove away. The Caravan continued into the parking lot but, while the van was still in gear, the driver opened the door and fled on foot. Although the officers attempted to pursue the driver, he was never apprehended or identified. The rear seats of the Caravan, which had been stolen in Bridgeport just prior to the incident, had been removed. The Lincoln Navigator was

stopped moments later. At the time of the stop, the defendant, who was driving that vehicle, informed the officers that he was a student at Southern Connecticut State University (Southern) and played for the football team. After being questioned by the officers, the defendant was allowed to leave.

Meehan subsequently began investigating the defendant. From the campus police at Southern, Meehan obtained the defendant's cell phone number and his address in New Haven, a location not far from where a couple of the stolen vehicles had been recovered. When Meehan ran a criminal history check on the defendant, he discovered that he previously had been convicted of burglary and larceny. Specifically, the defendant had been convicted of committing two burglaries over the course of several weeks at a gun shop. Of particular interest to Meehan was the fact that the defendant had used a vehicle to smash through the front door to enter the shop.

On October 4, 2010, Meehan and other police officers conducted overnight surveillance of the defendant. Sometime after 10 p.m., they observed the defendant leave his house, get into his car and drive to the cemetery where three of the stolen ATMs had been recovered approximately two weeks earlier. The officers followed him to the cemetery, where he remained for a few minutes. He then returned to his home and did not leave for the rest of the night.

On the basis of all of this information, Meehan obtained the first of the three ex parte orders that are the subject of this appeal and which was the sole order that authorized the disclosure of historical cell phone records. In this first ex parte order, issued on October 22, 2010, the court, *Holden*, *J.*, directed T-Mobile Com-

munications (T-Mobile)[4] to disclose telephone records, including basic subscriber information and call identifying information, pertaining to the defendant's cell phone number for the period of July 29 to September 29, 2010. The order specified that basic subscriber information included "name, address, local and long distant telephone connection records, records of session times and durations, length of service (including start date, and types of service utilized), telephone or instrument number, other subscriber number or identity, assigned internet protocol addresses, and means and source of payment for such service including any credit card or bank account number." "Call identifying information" included "dialing or signaling information that identifies the origin, direction, destination or termination of each communication generated or received by a subscriber or customer by means of any equipment, facility or service of telecommunications carrier." The order also directed the disclosure of "cellular site/tower information including addresses of cellular towers . . . ."

The remaining two ex parte orders were prospective in nature. In the second order, issued on November 15, 2010, the court, *Shaban*, *J.*, directed T-Mobile to disclose call identifying information for the defendant's cell phone number, including live updates from T-Mobile on cell phone pings every ten minutes between midnight and 6 a.m. on both November 16 and 17, 2010. In the third order, issued on November 22, 2010, the court, *Cremins*, *J.*, directed T-Mobile to disclose call identifying information for the defendant's cell phone number, including "E911 pings," every ten minutes from midnight on November 23, 2010 until 7 a.m. on November 25, 2010.

[4] The November 15 and 22, 2010 ex parte orders were directed to T-Mobile USA, Inc., at the same business address as the October 22, 2010 order. The record does not clarify any reason for the difference in corporate name, and we refer in this opinion to the telecommunications carrier as T-Mobile.

From the records disclosed as a result of the October 22, 2010 order, following consultation with other officers who assisted in the analysis of the records, Meehan noticed that, during the period between July 29 and September 29, 2010, the defendant's daily cell phone calls ordinarily stopped sometime between 10 and 11 p.m. There were some exceptions to that general pattern—certain days when the defendant made several phone calls between 2 and 4 a.m. Those dates and times coincided with the dates on which there had been attempted or completed ATM burglaries. In addition, Meehan observed that the location information recovered from the cell phone records often "match[ed] . . . up" with the location of the burglaries or attempts that had occurred on a given date. That is, during the time period of the burglaries, the defendant's cell phone records showed that his phone was pinging off of nearby cell towers.

Meehan particularly focused on the defendant's phone records for the early morning hours of September 28, 2010, when two attempted or completed ATM burglaries had occurred, both of which had involved stolen vans smashing through storefronts. An ATM was removed from a business in Shelton at approximately 2:15 a.m., and there was an attempt to steal an ATM in Ansonia at 5:04 a.m. At the time that these two incidents occurred, six phone calls were exchanged between the defendant's cell phone and a New Jersey telephone number. Meehan discovered that the New Jersey telephone number was registered under the name "Ollie Twig."

On November 23, 2010, Meehan reported to the Wallingford Police Department, where a suspect, Ramon Johnson, had been arrested and taken into custody in connection with an ATM burglary. The police had located Johnson as a result of the real time tracking of the defendant's CSLI on that date, pursuant to the

prospective ex parte order granted on November 22, 2010. During his interview of Johnson, Meehan learned that Johnson, like the defendant, was a student at Southern and a member of the school's football team. Johnson informed Meehan that, when not at school, he lived in New Jersey with his grandmother, Ollie Twig. At that point, Meehan showed Johnson the defendant's phone log for September 28, 2010, which he had obtained pursuant to the October 22, 2010 order, and in the margins of which Meehan had written "Ollie Twig" and drawn arrows pointing to the New Jersey phone number that the defendant had been calling when the Shelton burglary and the Ansonia attempted burglary were taking place. Johnson admitted that the phone number in the log was his and gave a statement implicating himself and the defendant in connection with the series of ATM burglaries and attempted burglaries.

The defendant was subsequently arrested and charged in thirteen separate informations under thirteen different docket numbers, with committing numerous offenses, including burglary, attempt to commit burglary, conspiracy to commit burglary, larceny, conspiracy to commit larceny, criminal mischief and possession of burglar tools. See footnote 2 of this opinion. The defendant filed motions to suppress any and all "cellular-telephone-derived location information," both historical and prospective in nature, as well as any evidence found to be the fruit of such information, including any potential testimony by Johnson.[5] Included in the evidence considered by the trial court during the suppression hearing were stipulated facts submitted by the parties, including: "As a result of the real time

[5] The trial court noted that the defendant had filed identical motions to suppress in four of the criminal dockets and further noted that, "[a]lthough no written suppression motions have been filed in the remaining files, the parties agreed at the hearing that the already filed motions address issues common to all files." Accordingly, the court considered the defendant to have filed motions to suppress in the remaining files.

tracking of the defendant through the monitoring of [his] cell site location data, the police were able to track the defendant's activities on November 23, 2010, and to thereby locate [Johnson]. . . . But for the ability of the police to track [the defendant's] movements by monitoring [his] cell phone on a real time basis, Johnson would never have been stopped, detained, arrested or interrogated by the police on November 23, 2010."

Following the suppression hearing, the trial court granted the defendant's motions to suppress in all of the cases pending against him. In its memorandum of decision, the court acknowledged that the defendant's motions implicated both statutory and constitutional principles, but, because the constitutional question of whether the ex parte orders violated the defendant's fourth amendment rights had not yet been clearly settled, the court first considered whether the ex parte orders violated § 54-47aa, and, if so, whether suppression was the proper remedy.

As to the prospective ex parte orders, issued on November 15 and 22, 2010, the state conceded that those orders violated § 54-47aa. The first part of the court's inquiry focused, therefore, on whether the October 22, 2010 order, which authorized the disclosure of the defendant's historical cell phone records, violated § 54-47aa, a question that the court answered in the affirmative. The court then addressed the second issue—whether suppression was the appropriate remedy for evidence that the state had obtained in violation of § 54-47aa. The court acknowledged that suppression was not always required for evidence obtained in violation of state law. The court observed, however, that, because § 54-47aa implicates important fourth amendment privacy interests and because the failure to apply the exclusionary rule would encourage further violations, suppression was the appropriate remedy.

Finally, the court considered the defendant's claim that, because the state had conceded that, in the absence of the illegally obtained CSLI, it would not have interviewed Johnson and obtained his statement implicating himself and the defendant on November 23, 2010, the court should suppress Johnson's statement and potential trial testimony. The court observed that there was ample evidence in the record to sustain the defendant's burden to prove that Johnson's arrest was tainted. The remaining question for the court was whether the state had proven that one of the exceptions to the exclusionary rule applied. The court began with the observation that, because Johnson did not testify at the suppression hearing, "the record is utterly barren concerning the circumstances of [his] interrogation and [his] willingness or unwillingness to give his statements or to testify." Although the court credited the testimony and evidence presented by the state that supported a finding that the state eventually would have identified and located Johnson even without the CSLI, it noted that it was unclear whether Johnson would have confessed if he had not been confronted with the damning CSLI evidence. In light of that lacuna in the record, the court concluded that the state had failed to prove that it inevitably would have obtained the statement from Johnson incriminating himself and the defendant.[6]

Following the granting of the defendant's motions to suppress, the state entered nolles prosequi on all of the charges against the defendant in the pending cases. In response, the defendant made an oral motion to dismiss

[6] The trial court also concluded that the state had failed to prove that Johnson's statement and potential testimony were sufficiently attenuated from the tainted arrest. The state claims that the attenuation doctrine is not implicated under the facts of the present case and challenges only the trial court's finding that it failed to prove that the inevitable discovery exception to the exclusionary rule applied. Accordingly, we consider only whether the trial court properly analyzed the inevitable discovery doctrine.

all charges, which the trial court granted. This appeal followed.

We consider the question of whether the trial court properly granted the defendant's motions to suppress the CSLI records in two parts. First, we conclude that those records were obtained illegally. The state's concession that the prospective orders were issued in violation of § 54-47aa resolves that question for the two prospective orders. As for the October 22, 2010 ex parte order authorizing the disclosure of approximately three months of the defendant's historical CSLI, we conclude that the order violated his fourth amendment rights. See *Carpenter* v. *United States*, supra, 138 S. Ct. 2206. Second, we conclude that the trial court properly determined that suppression was the appropriate remedy as to all three sets of illegally obtained records. Finally, we conclude that the trial court properly determined that the suppression of those records also required that Johnson's statement and potential testimony be suppressed.

I

We first consider whether the trial court properly concluded that the state obtained the defendant's CSLI illegally. Before proceeding to the substance, we set forth the applicable standard of review of a trial court's decision on a motion to suppress. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the

legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Because the state's claim that the trial court improperly concluded that law enforcement obtained the CSLI illegally challenges the trial court's legal conclusions, we exercise plenary review. See id.

We begin, as did the trial court, with the state's concession of the illegality of the two prospective ex parte orders. Given that concession, we need only resolve the legality of the October 22, 2010 ex parte order, which authorized the disclosure of the defendant's historical CSLI. That question is resolved by the recent decision of the United States Supreme Court in *Carpenter* v. *United States*, supra, 138 S. Ct. 2206. In *Carpenter*, the court considered whether the state "conducts a search under the [f]ourth [a]mendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." Id., 2211. The court answered that question in the affirmative and held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Id., 2217. Accordingly, the state "must generally obtain a warrant supported by probable cause before acquiring such records." Id., 2221.

It is undisputed that the state did not obtain a warrant supported by probable cause in order to procure the defendant's historical CSLI. Instead, the state relied on § 54-47aa (b) to obtain the ex parte order authorizing the disclosure of those records. At the time of the offenses, § 54-47aa (b) authorized a judge of the Superior Court to issue an ex parte order compelling a telecommunications carrier to disclose call identifying information and/or basic subscriber information per-

taining to a customer if the law enforcement official seeking the order swore under oath that there was a "reasonable and articulable suspicion that a crime has been or is being committed or that exigent circumstances exist and such call-identifying or basic subscriber information is relevant and material to an ongoing criminal investigation."[7] General Statutes (Rev. to 2009) § 54-47aa (b). Accordingly, because the record is clear that the state obtained the defendant's historical CSLI in the absence of a warrant supported by probable cause, the disclosure of those records violated the defendant's fourth amendment rights.[8]

[7] The statute has subsequently been amended to clarify that a judge of the Superior Court must make a finding of probable cause prior to issuing an order compelling a telecommunications carrier to disclose "the geolocation data associated with such subscriber's or customer's call-identifying information . . . ." General Statutes § 54-47aa (b); see Public Acts 2016, No. 16-148, § 1.

[8] The state contends that we should not apply *Carpenter* to this appeal unless we first conclude that the October 22, 2010 ex parte order was issued in violation of § 54-47aa (b). The state relies on the principle that this court "eschew[s] unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). The jurisprudential principles underlying that policy are not implicated in the present case, however, where *Carpenter* is clearly dispositive of the issue of whether the state obtained the defendant's historical CSLI in violation of the fourth amendment.

In the alternative, the state contends that *Carpenter* would not prohibit the October 22, 2010 ex parte order. The state points to the majority's response in *Carpenter* to Justice Kennedy's claim in his dissent that the majority had established "an arbitrary [six day] cutoff . . . [that] suggests that less than seven days of location information may not require a warrant." *Carpenter* v. *United States*, supra, 138 S. Ct. 2234 (Kennedy, J., dissenting). The majority rejected that characterization, responding that "we need not decide whether there is a limited period for which the [g]overnment may obtain an individual's historical CSLI free from [f]ourth [a]mendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes . . . to hold that accessing seven days of CSLI constitutes a [f]ourth amendment search." Id., 2217 n.3. We believe that a fair reading of the decision is that accessing CSLI for seven days or more is clearly a search for purposes of the fourth amendment. What the court left unsettled is whether accessing CSLI for fewer than seven days constitutes a search. At best, therefore, *Carpenter* leaves unanswered the question of whether an order targeting a very short time frame would be permitted under the fourth amendment.

II

We next address the question of whether the trial court properly concluded that suppression of the historical and real time CSLI was the appropriate remedy. The issue presents a question of law over which we have plenary review. See, e.g., *State* v. *Kendrick*, supra, 314 Conn. 222. Because the illegality of the historical CSLI is grounded on our conclusion that the seizure of those records violated the defendant's fourth amendment rights, we first consider whether those records properly were suppressed. The state contends that, because the officers acted in reasonable reliance on the court's ex parte order, they acted in good faith and the purpose of the exclusionary rule—to deter police misconduct—does not apply. In response, the defendant relies on the greater protection provided under the state constitution for fourth amendment violations. That is, relying on this court's decision in *State* v. *Marsala*, 216 Conn. 150, 171, 579 A.2d 58 (1990), the defendant responds that Connecticut has rejected the good faith exception to the application of the exclusionary rule. We agree with the defendant.

More importantly for purposes of the present case, however, is that, even if the state were correct that *Carpenter* is limited to cases in which the state accesses more than six days of CSLI, the October 22, 2010 ex parte order falls well within that rule. As the state acknowledges, that order authorized the disclosure of sixty-two days of historical CSLI, from July 29 to September 29, 2010.

Finally, we observe that the state appears to suggest that, if it is correct that the holding in *Carpenter* is limited to instances in which the state has accessed seven days or more of historical CSLI, this court should remand to the trial court for a hearing to determine which six days of historical CSLI the state *would have sought* if they had been aware of the supposed six day limit. Even if we agreed with the state's reading of *Carpenter*, we would categorically reject that claim. We find the procedure requested by the state to be inappropriate in the present case, in which the state seeks the opportunity to return to the trial court so that it may belatedly attempt to "correct" the infringement with the benefit of having reviewed all the data for the critical pieces of evidence.

We have recognized that, "[a]s a general principle, the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution. See *Wong Sun* v. *United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). [T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the [f]ourth [a]mendment against unreasonable searches and seizures. *United States* v. *Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 72–73, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

Under the "[good faith] exception" to the exclusionary rule under the federal constitution, suppression of "reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate" is not required. *United States* v. *Leon*, 468 U.S. 897, 913, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In *Marsala*, however, this court categorically rejected the good faith exception, holding that it is "incompatible with article first, § 7, of our state constitution, which provides: 'The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.' " *State* v. *Marsala*, supra, 216 Conn. 159. Nothing in our decision in *Marsala* suggested that we intended courts to accord the higher level of protection to defendants on a case-by-case basis. Instead, the decision established a bright-line rejection of the good faith exception under our state constitution. Id., 171.

Our subsequent decisions citing to *Marsala* uniformly have characterized *Marsala* as categorically rejecting

the good faith exception—not, as suggested by the state, on a case-by-case basis. See, e.g., *State* v. *Kelly*, 313 Conn. 1, 15 n.13, 95 A.3d 1081 (2014) (in *Marsala*, court declined "to recognize, for purposes of state constitution, good faith exception applicable to fourth amendment exclusionary rule"); *State* v. *Buie*, 312 Conn. 574, 584, 94 A.3d 608 (2014) (summarizing holding of *Marsala* as "good faith exception to warrant requirement does not exist under article first, § 7, of state constitution"); *State* v. *Jenkins*, 298 Conn. 209, 291, 3 A.3d 806 (2010) (*Katz*, *J.*, dissenting) (noting that *Marsala* "reject[ed] good faith exception to exclusionary rule adopted by United States Supreme Court"); *State* v. *Lawrence*, 282 Conn. 141, 205–206, 920 A.2d 236 (2007) (citing general principle relied on in *Marsala* for rejection of good faith exception: "[a]lthough we recognize that the exclusionary rule exacts a certain cost from society in the form of the suppression of relevant evidence in criminal trials, we conclude, nevertheless, that this cost is not sufficiently substantial to overcome the benefits to be gained by our disavowal of the *Leon* court's good faith exception to the exclusionary rule" [internal quotation marks omitted]). Accordingly, because the only exception on which the state relies is one that this court expressly and consistently has held is not recognized in Connecticut, the trial court properly suppressed the CSLI obtained pursuant to the October 22, 2010 ex parte order.

As to the two prospective ex parte orders issued on November 10 and 22, 2010, once again we begin with the state's concession that those two orders were obtained in violation of § 54-47aa.[9] Notwithstanding that

[9] As we noted previously in this opinion, the state's concession that the two prospective orders violated § 54-47aa has rendered it unnecessary to resolve whether those orders also violate the fourth amendment. Moreover, it is at best unclear whether the holding in *Carpenter* would extend to the two prospective orders. Neither of the two orders authorized the release of more than three days of CSLI and both applied prospectively. Although we see no difficulty in extending the rationale of *Carpenter* as applied to

concession, the state contends that, because § 54-47aa does not identify suppression as an available remedy for a violation of the statute, the trial court improperly granted the motion to suppress the CSLI obtained as a result of those two orders. The defendant responds that the trial court properly concluded that, because § 54-47aa implicates important fourth amendment interests, suppression of the CSLI obtained as a result of the two prospective orders is required. We conclude that, although the plain language of § 54-47aa is unclear as to whether suppression is available as a remedy for a violation of the statute, the legislative history provides strong, albeit not conclusive, support for the conclusion that the legislature intended the remedy to be available for violations. We find further support for interpreting § 54-47aa to provide for suppression as the appropriate remedy in the policy principles underlying the exclusionary rule itself. That is, we conclude that the real time tracking of the defendant's cell phone, in the absence of a showing of probable cause and in violation of § 54-47aa, implicated important fourth amendment interests, requiring the application of the exclusionary rule. We therefore conclude that the trial court properly determined that the violation of § 54-47aa required the suppression of the CSLI obtained from the two prospective ex parte orders.

The question of whether § 54-47aa provides suppression as a remedy for a violation presents a question of

historical CSLI to prospective orders, the court expressly declined to resolve whether its holding would extend to orders authorizing the disclosure of fewer than seven days of CSLI. *Carpenter* v. *United States*, supra, 138 S. Ct. 2217 n.3. See footnote 8 of this opinion. This court "eschew[s] unnecessarily deciding constitutional questions . . . ." (Citations omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009). Accordingly, in light of the state's concession and the court's failure in *Carpenter* to provide a clear resolution of the constitutional question—at least as to the two prospective orders—we confine our analysis to considering whether application of the exclusionary rule is the proper remedy for a violation of § 54-47aa.

statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent). We turn first to the statutory text, which does not clarify whether the legislature intended to require or allow suppression for a violation of § 54-47aa. The statute neither expressly identifies nor precludes *any* remedies for violations of the statute. See footnote 3 of this opinion. By contrast, as the state points out, General Statutes § 54-41m expressly provides that a person aggrieved by a communication that was allegedly "unlawfully intercepted" pursuant to chapter 959a, which governs wiretapping and electronic surveillance, may file a motion to suppress.[10] The state contends that the provision of suppression as a remedy for a violation of the wiretapping statutes,[11] contrasted with the absence of a similar provision for a violation of § 54-47aa, supports its posi-

[10] General Statutes § 54-41m provides: "Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state of Connecticut, or of a political subdivision thereof, may move to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted under the provisions of this chapter; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion, in which case such motion may be made at any time during the course of such trial, hearing or proceeding. If the motion is granted, the contents of the intercepted wire communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter and shall not be received in evidence in any such trial, hearing or proceeding. The panel, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection the intercepted communication and evidence derived therefrom."

[11] Other statutes to which the state refers that expressly provide for suppression as a remedy include General Statutes §§ 54-41*l*, 54-1c, 46b-137 (a) and 14-227a (b).

tion that suppression is not available as a remedy pursuant to § 54-47aa.

We observe, however, that a comparison of § 54-47aa with the federal Stored Wire and Electronic Communications and Transactional Records Access Act (SCA), one of the statutory schemes on which § 54-47aa generally was modeled, yields a different contrast. Unlike § 54-47aa, the SCA lists the remedies available for a violation of that act. See 18 U.S.C. § 2707 (b) (2012) (authorizing persons aggrieved by violations of SCA to bring civil action and listing "appropriate relief," including equitable or declaratory relief, damages and attorney's fees). Suppression of illegally obtained evidence is not one of the listed remedies. Furthermore, the SCA includes an exclusivity of remedies provision: "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (2012). By contrast, as we have noted, § 54-47aa neither specifies available remedies nor limits them. The legislature easily could have incorporated the SCA's limited list of remedies into § 54-47aa, along with the SCA's exclusivity of remedies provision. The failure to do so supports the conclusion that the legislature did not intend to limit the remedies available for a violation of § 54-47aa.[12] At best, therefore, the plain language of the

[12] The state claims that the reporting requirement in § 54-47aa (g) suggests a remedy other than suppression. Subsection (g) requires the chief state's attorney to submit an annual report itemizing certain statistics regarding orders issued pursuant to § 54-47aa, including the number of motions to vacate that were filed, and the number of such motions granted and denied. See General Statutes (Rev. to 2009) § 54-47aa (g) (6).

The state's suggestion, however, that a motion to vacate could serve as a remedy for an order granted in violation of § 54-47aa, cannot be reconciled with the nature of the order—it is ex parte. Notice of the order is only required to be provided to the subscriber forty-eight hours after the order is issued, and there are numerous bases upon which a law enforcement officer may request that notice not be given. See General Statutes (Rev. to 2009) § 54-47aa (d). Given the delayed notice available to a subscriber, a motion to vacate can hardly be considered an efficacious remedy.

statute is ambiguous as to whether suppression is an available remedy.

Because the plain language of the statute is ambiguous, we turn to the legislative history, which provides at least some support for the conclusion that the legislature intended that suppression would be available as a remedy for abuses of § 54-47aa. Section 54-47aa was first enacted through No. 05-182 of the 2005 Public Acts in order to address the difficulties encountered by law enforcement in gaining access to the basic subscriber information associated with a telephone number. Previously, that information had been readily obtained from local telephone companies. With the expansion of the telecommunications industry and the increasing prevalence of cell phones, however, law enforcement personnel increasingly found themselves dealing with out of state providers that were less cooperative in providing that basic information. See 48 S. Proc., Pt. 11, 2005 Sess. pp. 3435–36, remarks of Senator Andrew J. McDonald.

One of the primary concerns in crafting the legislation was to strike the proper balance between the need for law enforcement to have access to such information and the need to safeguard the legitimate privacy interests of citizens. See 48 H.R. Proc., Pt. 26, 2005 Sess., pp. 7869, 7871, remarks of Representative Michael P. Lawlor. During the public hearing on the bill, Fanol Bojka, an attorney speaking on behalf of the Connecticut Criminal Defense Lawyers Association, spoke in opposition to the bill, expressing concern that the standard required in the proposed legislation was merely a reasonable suspicion rather than probable cause. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 14, 2005 Sess., pp. 4122, 4124–25. In light of the lower standard and the absence of any express language specifying any recourse available to aggrieved parties, Bojka questioned: "What is the remedy under this bill . . . if

there are abuses?" Id., 4125. Representative Robert Farr responded immediately that suppression would be the appropriate remedy. Id. Nothing in the legislative history counters that representation.

Representative Farr's assertion that suppression is available as a remedy for a violation of § 54-47aa is consistent with the legal principles governing suppression. As the trial court correctly noted, the "Connecticut Code of Evidence does not prescribe a specific rule governing the admissibility of evidence obtained under these circumstances. 'Where the code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of common law as they may be interpreted in the light of reason and experience.' Conn. Code Evid. § 1-2 (b)." Reason and experience counsel that the exclusionary rule requires the suppression of prospective CSLI obtained in violation of § 54-47aa. Although the United States Supreme Court has applied "the exclusionary rule primarily to deter constitutional violations"; *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 348, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006); it has identified narrow circumstances under which the rule properly applies to exclude evidence obtained in violation of statutory law. The circumstances under which the exclusionary rule may be applied to statutory violations, however, has been limited to those violations that implicate "important [f]ourth [or] [f]ifth [a]mendment interests." Id.[13]

[13] We find unpersuasive the state's reliance on *Virginia* v. *Moore*, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008), for the proposition that this court cannot conclude that suppression is an appropriate remedy for a violation of a statute that implicates the same important interests that are protected by the fourth amendment. The state's argument relies on a misreading of *Moore*. That case involved the question of whether "a police officer violates the [f]ourth [a]mendment by making an arrest based on probable cause but prohibited by state law." Id., 166. In *Moore*, the defendant was arrested for the misdemeanor of driving with a suspended license. Id., 167. Under applicable state law, however, the officers should have issued the defendant a summons instead of arresting him. Id. In a search incident to

In the present case, the evidence obtained in violation of § 54-47aa—the prospective CSLI yielded from the real time tracking of the defendant's cell phone—implicates important privacy interests that are traditionally the type protected by the fourth amendment. In fact, as one court has observed, much of the rationale that the court relied on in *Carpenter* to hold that accessing historical CSLI implicates legitimate privacy interests applies with equal force to CSLI obtained by real time tracking, because the two types of records are not "meaningfully different . . . ." *Sims* v. *State*, Docket No. PD-0941-17, 2019 WL 208631, *7 n.15 (Tex. Crim. App. January 16, 2019). In *Carpenter*, the court began its analysis by describing the nature of the interests

the arrest, the officers discovered that the defendant had crack cocaine on his person. Id. The defendant sought suppression of the crack cocaine on the basis that, because the arrest violated state statutory law, it automatically violated the defendant's fourth amendment rights, and, therefore, he was entitled to the protection of the exclusionary rule. Id., 167–68. The court rejected that argument, explaining, "[w]e are aware of no historical indication that those who ratified the [f]ourth [a]mendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted." Id., 168. The court explained further that the problem is that "the [f]ourth [a]mendment's meaning [does] not change with local law enforcement practices—even practices set by rule. While those practices vary from place to place and from time to time, [f]ourth [a]mendment protections are not so variable and cannot be made to turn upon such trivialities." (Internal quotation marks omitted.) Id., 172.

In contrast to *Moore*, we are not presented in this appeal with the question of whether a violation of § 54-47aa automatically constitutes a violation of the fourth amendment, thus entitling the defendant to the protection of the exclusionary rule. The defendant's argument is that the violation of § 54-47aa triggers the rule's protections because of the *important nature of the interests* implicated by the statute, interests that are also protected by the fourth amendment. Accordingly, the concerns expressed by the court in *Moore* do not apply in the present case, in which we hold only that suppression is required for a violation of § 54-47aa because the statute implicates important interests protected by the fourth amendment. It is the importance of the protected interests—not the force of the fourth amendment itself—that requires suppression in the present case. Our decision does not reduce the fourth amendment to a redundancy; it simply recognizes that the fourth amendment is not the only means by which those important interests are protected.

implicated, explaining: "A person does not surrender all [f]ourth [a]mendment protection by venturing into the public sphere. To the contrary, what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . A majority of this [c]ourt has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. [*United States* v. *Jones*, 565 U.S. 400, 430, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Alito, J., concurring); id., 415 (Sotomayor, J., concurring)]. Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any extended period of time was difficult and costly and therefore rarely undertaken. Id., [429 (Alito, J., concurring)]. For that reason, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." (Citation omitted; internal quotation marks omitted.) *Carpenter* v. *United States*, supra, 138 S. Ct. 2217. The court further observed that, "like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools." Id., 2217–18.

Cell phone tracking, the court observed, presented "even greater privacy concerns than the GPS monitoring of a vehicle [it] considered in *Jones*. Unlike [a] bugged container . . . or the car in *Jones*, a cell phone—almost a feature of human anatomy . . . tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. . . . Accordingly, when the [g]overnment tracks the location of a cell phone it achieves near

perfect surveillance, as if it had attached an ankle monitor to the phone's user." (Citations omitted; internal quotation marks omitted.) Id., 2218.

The concerns expressed by the court in *Carpenter* regarding historical CSLI apply with equal force to prospective CSLI. As that court observed, "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." (Internal quotation marks omitted.) Id., 2217. An individual's cell phone has the ability to disclose increasingly exhaustive information regarding that person's movements, revealing the most intimate details of that individual's life. See generally J. Valentino-DeVries et al., "Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret," N.Y. Times, December 10, 2018, p. A1 (describing abilities of smartphone apps to track individuals' movements and discussing privacy implications of smartphone technology). We therefore conclude that the trial court properly granted the defendant's motions to suppress the CSLI obtained from the two prospective ex parte orders.[14]

III

Finally, we address the state's claim that, although, as the state concedes, Johnson's arrest was tainted by the illegally obtained CSLI, the trial court improperly concluded that the state had failed to prove that, in the absence of the illegally obtained CSLI, it inevitably would have obtained Johnson's postarrest statement through lawful means. Therefore, the state contends,

[14] To the extent that the state's brief may be read to suggest that the good faith exception to the exclusionary rule applies in Connecticut when the basis for the rule's application is a statutory, rather than a constitutional violation, we reject that argument. As we have explained in this opinion, in *State* v. *Marsala*, supra, 216 Conn. 171, we *categorically rejected* the good faith exception to the exclusionary rule.

the trial court improperly suppressed Johnson's potential trial testimony.[15] The state argues that, in arriving at that conclusion, the trial court improperly concluded that in order to prove inevitable discovery, the state was required to prove that Johnson would have testified in a manner similar to and consistent with the statement that he gave to the police when he was confronted with the illegally obtained CSLI.[16] The state claims that all it was required to prove under the inevitable discovery doctrine was that it would inevitably have identified and located Johnson. The defendant responds that the trial court correctly concluded that the state failed to meet its burden to prove that the inevitable discovery doctrine applied under the facts of the present case.

The trial court credited the testimonial evidence presented by the state at the suppression hearing in support of its claim that, even if it had not relied on the illegally obtained CSLI, it inevitably would have discovered Johnson by lawful means. The court further found, however, that the state failed to sustain its burden to prove that, in the absence of the illegally obtained CSLI, it would have obtained the same information from Johnson. We conclude that the trial court properly determined that, in order to bear its burden to prove that

[15] The state does not challenge the portion of the trial court's ruling suppressing Johnson's postarrest statement and concedes that Johnson's statement was obtained illegally. We observe that, although the state challenges only the portion of the trial court's ruling suppressing Johnson's potential testimony, if called to testify, he would have had to testify consistent with his prior statement to the police or risk negative consequences, including further charges. Accordingly, we question the efficacy of the state's concession of the inadmissibility of Johnson's statement in light of its challenge to his potential testimony.

[16] The state claims that, in concluding that the inevitable discovery doctrine required the state to prove that Johnson would have testified in a similar manner, the trial court improperly conflated the attenuation and inevitable discovery doctrines. Because we conclude that the trial court properly applied the inevitable discovery doctrine, we need not resolve the state's claim that the court conflated the two doctrines.

the inevitable discovery exception to the exclusionary rule applied, the state was required to prove by a preponderance of the evidence not only that it inevitably would have identified and located Johnson by legal means, but also that, under the different circumstances, Johnson would have cooperated and provided the same information.

We have explained that " '[a]pplication of the exclusionary rule . . . is not automatic.' " *State* v. *Spencer*, 268 Conn. 575, 599, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004). "Under the inevitable discovery rule, evidence illegally secured in violation of the defendant's constitutional rights need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means." *State* v. *Badgett*, 200 Conn. 412, 433, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). The inevitable discovery doctrine is "based on the premise that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Vivo*, 241 Conn. 665, 672, 697 A.2d 1130 (1997).

This court has not addressed the question of whether the state must prove not only that it would inevitably have discovered the witness but also that it would have obtained the testimony or statements of that witness that were procured through illegal means. The decisions of the United States Court of Appeals for the Second Circuit discussing the state's burden to prove that the inevitable discovery exception to the exclusionary rule applies in a given case, however, are instructive. See *Martinez* v. *Empire Fire & Marine Ins. Co.*, 322 Conn.

47, 62, 139 A.3d 611 (2016) ("[w]hen addressing questions of federal law, we give special consideration to the decisions of the Second Circuit"). Specifically, the Second Circuit has explained that "proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment, *United States* v. *Eng*, 971 F.2d 854, 859 (2d Cir. 1992), quoting [*Nix* v. *Williams*, 467 U.S. 431, 445 n.5, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)]. The focus on demonstrated historical facts keeps speculation to a minimum, by requiring the [D]istrict [C]ourt to determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred. . . . Evidence should not be admitted, therefore, unless a court can find, with a *high level of confidence*, that *each* of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." (Citations omitted; emphasis altered; internal quotation marks omitted.) *United States* v. *Stokes*, 733 F.3d 438, 444 (2d Cir. 2013), citing *United States* v. *Cabassa*, 62 F.3d 470, 472–73 (2d Cir. 1995).

The United States District Court for the Southern District of New York has applied the standard set forth by the Second Circuit to conclude that one of the contingencies that the state must establish is that a witness whose statement had been obtained by illegal means would have been cooperative if the state had identified, located and questioned the witness through legal means. *United States* v. *Ghailani*, 743 F. Supp. 2d 242, 254 (S.D.N.Y. 2010). The court reasoned that, pursuant to the standard that was first announced in *United States* v. *Cabassa*, supra, 62 F.3d 472–73, "[i]nevitable discovery analysis . . . requires a court to examine *each of the contingencies* that would have had to have been resolved favorably to the government in order for

the evidence to have been discovered legally and to assess the probability of that having occurred." (Emphasis in original; internal quotation marks omitted.) *United States* v. *Ghailani*, supra, 253–54.

The requirement that the state prove that each contingency would have been resolved in its favor demands that, at the least, the state had to prove at the suppression hearing that it would have identified, located and secured the same level of cooperation from Johnson in the absence of the illegally obtained CSLI. The trial court found that the state had established that it would have identified and located Johnson. The court grounded its rejection of the state's reliance on the inevitable discovery doctrine, however, on the state's failure to prove that, if found by legal means and if questioned without the reliance on the illegally obtained CSLI, Johnson would have cooperated to the same extent. Johnson's cooperation was a contingency upon which the procurement of a statement incriminating himself and the defendant depended. The state bore the burden, therefore, to prove that this contingency would have resolved in its favor.

The state failed, however, to present *any* evidence to demonstrate that Johnson would have similarly cooperated in the absence of being confronted with the illegally obtained CSLI. For example, as the trial court observed, the state did not present Johnson's testimony at the hearing. Due to that failure, the court observed, "the record is utterly barren concerning the circumstances of [his] interrogation and [his] willingness or unwillingness to give his statements or to testify." We further observe that the state failed to present any evidence at the suppression hearing as to how it would have obtained the same cooperation from Johnson in the absence of the illegally obtained CSLI and did not make a proffer or otherwise articulate what other sources or means it had available that would have led

the state to discover the same information it obtained from Johnson. Because the state failed to present any evidence regarding the likelihood of Johnson's cooperation under different circumstances, the trial court properly reasoned that any conclusion regarding Johnson's cooperation would have rested on pure speculation. The court properly concluded that the state failed to sustain its burden to prove that the inevitable discovery exception applied.

The judgments are affirmed.

In this opinion the other justices concurred.

PETER GOULD *v.* CITY OF STAMFORD ET AL. (SC 20004)

Palmer, Mullins, Kahn, Vertefeuille and Ecker, Js.*

Syllabus

The plaintiff appealed from the decision of the Compensation Review Board, claiming that the board improperly upheld the decision of the Workers' Compensation Commissioner denying and dismissing his claim for benefits under a provision (§ 31-310) of the Workers' Compensation Act (§ 31-275 et seq.) that allows for additional benefits in certain circumstances when an injured employee worked for more than one employer as of the date of the compensable injury. The plaintiff sustained an injury in the course of his part-time employment with the defendant city. At the time of his injury, the plaintiff was also the sole member of a limited liability company, I Co., which provided video production services for corporations. I Co. occasionally hired independent contractors, but the plaintiff otherwise was solely responsible for completing I Co.'s projects. I Co. had purchased a workers' compensation insurance policy that covered the period in which he had been injured while working for the

* This case originally was argued before a panel of this court consisting of Justices Palmer, Mullins, Kahn, Espinosa and Vertefeuille. Thereafter, Justice Espinosa retired from this court and did not participate in the consideration of the case. Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

city. After his injury, the plaintiff filed a claim for workers' compensation based on both his earnings from the city and from I Co. Although the city accepted the compensability of the injury, the defendant Second Injury Fund denied the plaintiff's claim for concurrent employment benefits on the grounds that there was no employer-employee relationship between the plaintiff and I Co., and that members of single-member limited liability companies are presumptively excluded from the act pursuant to a 2003 memorandum issued by the chairman of the Workers' Compensation Commission that provided, inter alia, that members of single-member limited liability companies are presumed to be excluded from the act unless they elect to be covered by filing Form 75, which serves to notify the commission that the limited liability company is electing to accept the provisions of the act. In reviewing the Second Injury Fund's denial of the plaintiff's claim, the Workers' Compensation Commissioner concluded that the plaintiff was not entitled to concurrent benefits, reasoning that the plaintiff was not an employee of I Co. because, among other things, he controlled the means and methods of the services that he performed on behalf of I Co., lacked a fixed salary, reported to no one, and treated I Co. as a sole proprietorship for tax purposes. The commissioner also observed that I Co. had not elected to accept the provisions of the act by filing Form 75 in accordance with the dictates of the 2003 memorandum. The plaintiff thereafter appealed to the board, which affirmed the commissioner's decision. The board concluded that, regardless of whether I Co. elected to accept the provisions of the act by filing Form 75, and regardless of whether the commission chairman correctly determined in the 2003 memorandum that such an election is required for single-member limited liability companies, the plaintiff could not prevail because the commissioner properly found that the plaintiff was not an employee of I Co. The board reasoned that, because the plaintiff was not paid on the basis of the number of hours he worked but, rather, compensated himself for his activities solely as a business owner obtaining profits from his business, he commingled his personal activities with I Co.'s activities, and, thus, I Co. did not maintain the appropriate corporate formalities to establish an employer-employee relationship with its principal. The board also observed that the plaintiff did not receive a tax form for reporting wages from I Co. but reported his income from I Co. as a self-employed individual, which, according to the board, supported the determination that he was self-employed. On appeal from the board's decision, the plaintiff claimed, inter alia, that he was an employee of I Co. for purposes of the act and, therefore, was eligible for concurrent employment benefits. *Held*:

1. This court rejected the rationale that the board relied on in affirming the commissioner's decision, namely, that, because I Co. distributed its profits to the plaintiff instead of paying him an hourly rate, it did not maintain the appropriate corporate formalities, and, thus, I Co.'s status as a limited liability company had to be disregarded: the Second Injury

Fund never claimed that I Co.'s corporate status as a limited liability company must be disregarded, and the board cited no persuasive authority for the proposition that it is improper for a single-member limited liability company to distribute profits to the member rather than paying him or her an hourly wage or that it was improper for the member to report earnings from the company as self-employment earnings rather than wages, and the governing law appeared to be to the contrary; accordingly, I Co. was treated as a properly constituted limited liability company for purposes of the present case.

2. There was no requirement under the act that a single-member limited liability company must elect to accept the act's provisions before its member can be covered thereunder, and, therefore, the commission chairman did not have the authority to adopt, in the 2003 memorandum, a conclusive presumption that members of single-member limited liability companies are not their employees; nothing in § 31-275 (10), which defines "employer" for purposes of the act to include a limited liability company, and which also provides that a person who is a sole proprietor of a business may accept the provisions of the act by notifying the commissioner of his intent to do so and thereby become an employer for purposes of the act, requires single-member limited liability companies to elect to accept the provisions of the act before their members are covered thereunder, and the legislature's choice not to include single-member limited liability companies in the election provision of § 31-275 (10) indicated that it intended that single-member limited liability companies may be employers of their members.

3. The board incorrectly concluded that the plaintiff was not an employee of I Co. and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310; this court clarified that the proper test for determining whether the member of a single-member limited liability company is an employee of the company is whether the member performed services for the company and was subject to the hazards of the company's business, and, because there was no dispute in the present case that the plaintiff provided services to I Co. and was subject to the hazards of I Co.'s business, he was I Co.'s employee for purposes of the act.

Argued April 5, 2018—officially released April 2, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District denying and dismissing the plaintiff's claim for certain additional workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commis-

sioner's decision, and the plaintiff appealed. *Reversed*; *judgment directed.*

John J. Morgan, for the appellant (plaintiff).

Kenneth H. Kennedy, Jr., assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

PALMER, J. The issue that we must resolve in this appeal is whether the plaintiff, Peter Gould, the sole member of a single-member limited liability company, Intervale Group, LLC (Intervale), qualifies as Intervale's employee for purposes of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., and is therefore eligible for concurrent compensation benefits from the defendant Second Injury Fund (fund) pursuant to General Statutes § 31-310.[1] The plaintiff was a part-time

[1] General Statutes § 31-310 (a) provides in relevant part: "Where the injured employee has worked for more than one employer as of the date of the injury and the average weekly wage received from the employer in whose employ the injured employee was injured, as determined under the provisions of this section, [is] insufficient to obtain the maximum weekly compensation rate from the employer under section 31-309, prevailing as of the date of the injury, the injured employee's average weekly wages shall be calculated upon the basis of wages earned from all such employers in the period of concurrent employment not in excess of fifty-two weeks prior to the date of the injury, but the employer in whose employ the injury occurred shall be liable for all medical and hospital costs and a portion of the compensation rate equal to seventy-five per cent of the average weekly wage paid by the employer to the injured employee, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contribution Act made from such employees' total wages received from such employer during the period of calculation of such average weekly wage, but not less than an amount equal to the minimum compensation rate prevailing as of the date of the injury. The remaining portion of the applicable compensation rate shall be paid from the Second Injury Fund upon submission to the Treasurer by the employer or the employer's insurer of such vouchers and information as the Treasurer may require. . . ."

employee of the named defendant, the city of Stamford (city),[2] and, according to him, was concurrently employed by Intervale. After the plaintiff was injured while working for the city, he filed a claim, pursuant to the act, seeking compensation based on the earnings that he received from both the city and Intervale. The city accepted the compensability of the injury and paid its indemnity obligations to the plaintiff but, pursuant to § 31-310, transferred the concurrent compensation obligation to the fund. The fund denied the claim for benefits on the ground that the plaintiff was not Intervale's employee. The plaintiff sought review of this ruling by the Workers' Compensation Commission (commission). After a hearing, the Workers' Compensation Commissioner for the Seventh District (commissioner) determined that the plaintiff was not an employee of Intervale for purposes of the act and, therefore, did not qualify for compensation benefits based on his allegedly concurrent employment. The plaintiff appealed from the decision of the commissioner to the Compensation Review Board (board), which affirmed that decision. This appeal followed.[3] We conclude that the plaintiff qualifies as Intervale's employee for purposes of the act and, therefore, is eligible for concurrent employment benefits pursuant to § 31-310. Accordingly, we reverse the decision of the board.

The record reveals the following procedural history and facts that were found by the commissioner or that are undisputed. In 2000, the plaintiff formed Intervale, a limited liability company of which he is the sole member. Intervale provided various video production services to corporations. Intervale occasionally hired

[2] The city and the fund are both defendants in the present case. The city, however, has not participated in the litigation regarding this issue at any stage of the proceedings in the case, including on appeal to this court.

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

independent contractors, but the plaintiff was otherwise solely responsible for completing the company's projects, which included field production work. He reported to no one other than Intervale's clients.

Intervale did not pay the plaintiff a fixed salary. Rather, when Intervale received a payment from a customer, the plaintiff would deposit the payment in Intervale's bank account and then withdraw funds as needed. In 2012 and 2013, the plaintiff reported his income from Intervale for federal tax purposes on schedule C of Internal Revenue Service Form 1040, which is the form used to report "Profit or Loss From Business (Sole Proprietorship)."

In 2012, a shopping mall in Massachusetts hired Intervale to shoot a video at the mall. As a condition of the engagement, the mall required Intervale to obtain workers' compensation insurance. The premium for the policy that Intervale purchased was based on an estimated annual employee remuneration of $12,750, which was the figure that the insurance company recommended for small businesses with an undetermined payroll. The plaintiff's gross earnings from Intervale were $43,600 in 2012 and $97,496 in 2013. Thereafter, Intervale purchased a workers' compensation insurance policy for the period from April 4, 2013, to April 4, 2014.

In 2013, in addition to his work in connection with Intervale, the plaintiff worked part-time for the city as a park police officer. On July 28, 2013, the plaintiff injured his back and legs during the course of his employment with the city. Thereafter, he filed a claim for compensation under the act based on both his earnings from the city and his earnings from Intervale. The city paid its indemnity obligation to the plaintiff and transferred the claim for compensation to the fund pursuant to § 31-310 based on the plaintiff's allegedly concurrent employment with Intervale. The fund denied

the plaintiff's claim for concurrent employment benefits on the grounds that (1) there was no employer-employee relationship between the plaintiff and Intervale, and (2) members of single-member limited liability companies are presumptively excluded from the act pursuant to a memorandum issued by the chairman of the commission in 2003. See John A. Mastropietro, Chairman, Workers' Compensation Commission, State of Connecticut, Memorandum No. 2003-02, "WCC Limited Liability Companies & Revised Forms Memorandum—April 17, 2003" (2003 memorandum), available at https://wcc.state.ct.us/memos/2003/2003-02.htm (last visited March 26, 2019). The 2003 memorandum provides in relevant part: "After carefully considering this matter, we have determined that members of [limited liability companies (LLCs)] that contain only one member (single-member LLCs) should be presumed to be *excluded* from the [a]ct unless they have elected to be covered, [whereas] members of multiple-member LLCs should be presumed to be *covered* under the [a]ct unless they have elected to be excluded. In order to clarify this policy, we have amended our Form 6B and . . . Form 75[4] accordingly, and direct all members of LLCs to use such forms in the future." (Emphasis in original.) The 2003 memorandum thus analogized single-member limited liability companies to sole proprietors, who are excluded from the provisions of the act pursuant to General Statutes § 31-275 (10)[5] unless they elect to

[4] "Form 75" is a preprinted form created by the commission that may be used by a sole proprietorship or, after the issuance of the 2003 memorandum, a single-member limited liability company, to notify the commission that the entity is electing to accept the provisions of the act pursuant to General Statutes § 31-275 (10). See footnote 5 of this opinion. The form is entitled "Coverage Election by Sole Proprietor or Single-Member LLC."

[5] General Statutes § 31-275 (10) provides in relevant part: " 'Employer' means any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock associate, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer . . . . A person who is the sole proprietor of a business may accept the provisions of [the act] by

accept its provisions, and analogized members of multiple-member limited liability companies to the partners of a partnership, who, under the same statute, are deemed to have accepted the provisions of the act with respect to themselves unless they elect to be excluded.

The plaintiff thereafter sought the commission's review of the fund's denial of his claim for concurrent employment benefits. In his proposed finding and award, the plaintiff contended that there was "no serious dispute that [he was] an employee of [Intervale]" and that the rule promulgated by the 2003 memorandum, namely, that the member of a single-member limited liability company is presumed not to be an employee of the company, is inconsistent with the definition of "employer" set forth in § 31-275 (10), which includes limited liability companies. In its proposed finding and dismissal, the fund contended that, because the plaintiff was the sole member of Intervale, he was a sole proprietor. Accordingly, the fund argued, under both the provision of § 31-275 (10) requiring sole proprietorships to elect to accept the provisions of the act and the 2003 memorandum, the plaintiff was required to elect coverage by filing a Form 75 before he would be entitled to compensation based on his work for Intervale. The fund also summarily stated that "[t]here is no employer-employee relationship between the [plaintiff] and [Intervale]."

After conducting an evidentiary hearing, the commissioner concluded that the plaintiff was not an employee

notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of [the act] he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner. Any person who is a partner in a business shall be deemed to have accepted the provisions of [the act] and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, unless the partnership elects to be excluded from the provisions of [the act] by notice, in writing and by signed agreement of each partner, to the commissioner."

of Intervale because he controlled "the means and method[s] of the services [that] he performed on behalf of [Intervale]," he lacked a fixed salary, he reported to no one, he treated Intervale as a sole proprietorship for tax purposes, and it was "questionable . . . whether the [plaintiff] intended to cover himself as an employee when [Intervale] procured [workers' compensation coverage] . . . ." The commissioner also observed that Intervale had not elected to accept the provisions of the act pursuant to § 31-275 (10) by filing a Form 75 with the commission, as required by the 2003 memorandum. The commissioner concluded, however, that, irrespective of whether Intervale had filed Form 75, he was not Intervale's employee and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310.

The plaintiff then appealed from the commissioner's decision to the board. In his brief to the board, the plaintiff asserted that, because the definition of "employer" set forth in § 31-275 (10) expressly includes limited liability companies, the commission chairman had no authority to require single-member limited liability companies to elect to accept the provisions of the act pursuant to § 31-275 (10) before the single member would be covered, as the chairman had done in the 2003 memorandum. The fund maintained in its brief to the board that the commissioner had correctly determined that, because the plaintiff controlled the means and methods of the services that he performed for Intervale, had no fixed salary but, rather, withdrew money from Intervale's bank account as needed, and reported his earnings from Intervale as earnings from self-employment, the plaintiff was not Intervale's employee. The fund also claimed that the commissioner correctly had determined that, because the plaintiff's gross earnings from Intervale were far in excess of the $12,750 reflected in the workers' compensation insurance policy that the plaintiff had purchased, it was doubtful that

he intended to be covered by the policy. Finally, the fund argued that, contrary to the plaintiff's contention, the 2003 memorandum did not require single-member limited liability companies to elect to accept the provisions of the act before their members would be covered but, instead, merely created a rebuttable presumption that such members are not covered.

The board concluded that, regardless of whether Intervale elected to accept the provisions of the act by filing Form 75, as provided by the 2003 memorandum, and regardless of whether the commission chairman correctly determined that such an election is required, the plaintiff could not prevail because the commissioner had found as a factual matter that he was not Intervale's employee, and this factual finding was supported by the evidence. Specifically, the board concluded that, because the plaintiff was not paid on the basis of the number of hours he worked for Intervale but "compensated himself for his activities . . . solely as a business owner obtaining profits from the firm," the plaintiff had commingled his personal activities with the company's activities. Thus, the board concluded, "Intervale was the alter ego of the [plaintiff] and did not maintain the appropriate corporate formalities to establish an employer-employee relationship with its principal." In addition, the board explained that the fact that the plaintiff did not receive a W-2 federal income tax form from Intervale, which is the Internal Revenue Service form for reporting wages but, instead, reported his income from Intervale as a self-employed individual, supported the determination that he was self-employed. On the basis of these considerations, the board affirmed the commissioner's decision.

The plaintiff then filed this appeal. The plaintiff claims that, because the underlying facts are undisputed, the board should have applied plenary review to the commissioner's decision that he was not Intervale's

employee instead of deferring to the commissioner's factual finding on that issue. The plaintiff also contends that, under the plain language of § 31-275 (9) (A) (i),[6] which defines "employee" for purposes of the act, he was Intervale's employee and, therefore, was eligible for concurrent employment benefits pursuant to § 31-310. Accordingly, the plaintiff contends, the commission chairman had no authority to alter the statutory provisions of the act by promulgating the rule set forth in the 2003 memorandum, which was premised on the assumption that the members of single-member limited liability companies are not employees of those companies.

The fund responds that, under the act, there is no meaningful distinction between a sole proprietor and a member of a single-member limited liability company, and, therefore, the presumption created by the 2003 memorandum that such members are not employees—which presumption the fund contends is rebuttable—is consistent with the provision of § 31-275 (10) requiring sole proprietors to elect to accept the provisions of the act before they are covered. The fund further maintains that the commissioner's finding that the plaintiff was not Intervale's employee pursuant to the traditional "right to control" test is supported by the record. See, e.g., *Doe* v. *Yale University*, 252 Conn. 641, 680–81, 748 A.2d 834 (2000) ("[t]he right to control test determines the [relationship between a worker and a putative employer] by asking whether the putative employer has the right to control the means and methods used by the worker in the performance of his or her job" [internal quotation marks omitted]).

[6] General Statutes § 31-275 (9) (A) provides in relevant part: " 'Employee' means any person who:

"(i) Has entered into or works under any contract of service or apprenticeship with an employer, whether the contract contemplated the performance of duties within or without the state . . . ."

Before addressing the merits of these claims, we pause to clarify what is and what is not at issue in this appeal. As we indicated, in its brief to the board, the fund argued that, for a variety of reasons, the *plaintiff* was not an *employee* of Intervale. The fund did *not* make the very different claim that *Intervale* has effectively been converted into a *sole proprietorship* because the plaintiff failed to observe the rules governing limited liability companies.[7] Nevertheless, the board's affirmance of the commissioner's decision was based on its determination that, because Intervale distributed its profits to the plaintiff instead of paying him

[7] The fund also appears to make no such claim on appeal. The fund does assert that the fact that the plaintiff reported his earnings from Intervale in the same manner as a sole proprietorship for federal tax purposes, which, as the fund acknowledges, he was entitled to do under federal law; see *McNamee* v. *Dept. of the Treasury*, 488 F.3d 100, 109 (2d Cir. 2007) ("[t]he . . . regulations allow the single-owner limited liability company to choose whether to be treated as an association—i.e., a corporation—or to be disregarded as a separate entity" [internal quotation marks omitted]); supports the board's determination that the plaintiff was not Intervale's employee. The fund, however, does not appear to claim—at least not expressly—that electing this method of reporting earnings for federal tax purposes somehow prevents Intervale from claiming the status of a limited liability company for any state law purpose. To the extent that the fund implicitly makes this claim, we reject it. As the court in *McNamee* recognized, "state laws of incorporation control various aspects of business relations; they may affect, but do not necessarily control, federal tax provisions. . . . As a result . . . *single-member* [*limited liability companies*] *are entitled to whatever advantages state law may extend*, but state law cannot abrogate [their owners'] federal tax liability." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 111; cf. *In re Bourbeau Custom Homes, Inc.*, 205 Vt. 42, 52, 171 A.3d 40 (2017) (rejecting suggestion that interpretation of Vermont's unemployment compensation laws should be driven by choice by member of single-member limited liability company to pay federal taxes as sole proprietorship because "[n]othing in the [Vermont] unemployment compensation statute, or the [Vermont] statute creating the [limited liability company] structure, suggests that the [Vermont] [l]egislature intended federal tax law to control how the [unemployment compensation] statute [is to be] applied"). In other words, the fact that a single-member limited liability company elects to have the company disregarded as a separate entity for federal tax purposes does not mean that that limited liability company can no longer claim that status for any state law purpose.

an hourly rate, it "did not maintain the appropriate corporate formalities." Accordingly, the board concluded, Intervale was the plaintiff's "alter ego," and, therefore, its status as a limited liability company must be disregarded. The board cited no persuasive authority, however, for the proposition that it is somehow improper for a single-member limited liability company to distribute profits to the member rather than paying the member wages or, relatedly, that it is improper for the member to report earnings from the company as self-employment earnings rather than wages.[8] Indeed, the governing law appears to be to the contrary. See, e.g., General Statutes (Rev. to 2013) § 34-152 ("[t]he

[8] The board cited four of its decisions, namely, *Diaz* v. *Capital Improvements & Management, LLC*, No. 5616, CRB 1-11-1 (January 12, 2012), *Caus* v. *Hug*, No. 5392, CRB 4-08-11 (January 22, 2010), *Bonner* v. *Liberty Home Care Agency*, No. 4945, CRB 6-05-5 (May 12, 2006), and *Dupree* v. *Masters*, No. 1791, CRB 7-93-7 (April 25, 1995). In *Diaz*, the principal of a limited liability company apparently paid an employee with personal checks, and the employee, in turn, paid himself and three other employees, including the claimant, in cash. In addition, the principal's "personal expenses and bills were paid from the [limited liability company's] checking account . . . ." *Diaz* v. *Capital Improvements & Management, LLC*, supra. The board concluded that, because the principal had "commingled firm assets for personal use and failed to maintain corporate formalities," he was personally liable for the benefits owed to the claimant. Id. In *Caus*, the employer, Paul Hug, operated a number of businesses, one of which was apparently a sole proprietorship and others of which were limited liability companies, and failed to establish which of the businesses had employed the claimant. See *Caus* v. *Hug*, supra. The board concluded that the commissioner reasonably could have concluded that Hug had "commingled the activities of his various businesses and that each firm acted as an alter ego of . . . Hug personally." Id. In *Dupree*, the respondent did not withhold social security or federal income tax from the claimant's wages; rather, the claimant paid his own income taxes and social security taxes at self-employment rates. See *Dupree* v. *Masters*, supra. The board concluded that these facts supported the commissioner's finding that the claimant was not the respondent's employee. Id. *Bonner* v. *Liberty Home Care Agency*, supra, involved the same factual situation as *Dupree*. Thus, none of these cases directly supports the proposition that, if a single-member limited liability company distributes profits to the member or if the member reports earnings from the company in the same manner as a sole proprietorship, the company must be treated as the member's alter ego.

profits and losses of a limited liability company shall be allocated among the members, and among classes of members, in the manner agreed to in the operating agreement"); General Statutes (Rev. to 2013) § 34-158 ("distributions of cash or other assets of a limited liability company shall be allocated among the members . . . in the manner provided in the operating agreement"); see also *Riether* v. *United States*, 919 F. Supp. 2d 1140, 1159 (D.N.M. 2012) (when business entity with single owner does not elect corporate style taxation pursuant to 26 C.F.R. § 301.7701-3 [a], earnings of owner are subject to taxation as self-employment earnings); 26 C.F.R. § 301.7701-3 (a) (2013) (business entity that is not classified as corporation and that has single owner can elect either to be classified as association or to be disregarded as entity separate from its owner for federal tax purposes); General Statutes (Rev. to 2013) § 34-113 (for purposes of state tax law, limited liability company is treated in accordance with classification for federal tax purposes). Because the fund has never made any claim that Intervale's corporate status as a limited liability company must be disregarded due to the method by which the plaintiff was paid, and because the board's conclusion to that effect is not supported by any authority, we cannot accept the board's rationale for affirming the decision of the commissioner. For present purposes, therefore, we treat Intervale as a properly constituted limited liability company that operated as such.

Thus, the first issue that we must address is whether a single-member limited liability company must elect to accept the provisions of the act before the member is covered, as the commission chairman determined in the 2003 memorandum, or, instead, the member may be covered automatically as an employee of the company.[9]

[9] We recognize that neither the commissioner nor the board addressed this issue because each of them determined that, even if Intervale was not required to elect to accept the provisions of the act in order for the plaintiff

Second, if we agree with the plaintiff that the member of a single-member limited liability company may be the company's employee, we also must determine whether the plaintiff was an employee of Intervale for purposes of the act. We conclude that a single-member limited liability company is not required to elect to accept the provisions of the act in order for its member to be covered; rather, the member may be covered automatically as an employee. We further conclude that an employer-employee relationship existed between Intervale and the plaintiff because the plaintiff provided services to Intervale and was subject to the hazards of Intervale's business.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an

to be covered, the plaintiff did not meet the definition of "employee" for purposes of the act. Because the question of whether Intervale was required to elect to accept the provisions of the act before the plaintiff could be covered is inextricably intertwined with the question of whether the plaintiff was Intervale's employee, however, and, because the question presents a pure question of law and has been fully briefed by both parties, we are free to address it.

agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Citation omitted; internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 550, 108 A.3d 1110 (2015). "In addition to being time-tested, an agency's interpretation must also be reasonable." *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 356, 10 A.3d 1 (2010).

"Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 550–51.

I

We first consider the plaintiff's contention that there is no requirement under the act that a single-member limited liability company elect to accept the provisions of the act before its member can be covered. We begin our analysis of this claim with the language of the applicable statutory provisions. Section 31-275 (9) (A) defines "employee" in relevant part as any person who "(i) [h]as entered into or works under any contract of service or apprenticeship with an employer, whether

the contract contemplated the performance of duties within or without the state," or "(ii) [i]s a sole proprietor or business partner who accepts the provisions of [the act] in accordance with subdivision (10) of this section . . . ." Section 31-275 (10) defines an "employer" as "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer . . . ." Section 31-275 (10) also provides in relevant part that "[a] person who is the sole proprietor of a business may accept the provisions of [the act] by notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of [the act] he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner. Any person who is a partner in a business shall be deemed to have accepted the provisions of [the act] and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, unless the partnership elects to be excluded from the provisions of [the act] by notice, in writing and by signed agreement of each partner, to the commissioner."

The plaintiff contends that, because the first sentence of § 31-275 (10) includes limited liability companies in the definition of "employer," and because the election provision of subdivision (10) applies exclusively to sole proprietors, the legislature clearly did not intend that the election provision would apply to single-member limited liability companies. Consequently, he contends, the commission chairman lacked the authority to promulgate the rule set forth in the 2003 memorandum requiring single-member limited liability companies to

elect coverage for their members. The plaintiff further maintains that, because there is no presumption that single-member limited liability companies are not the employers of their members, to qualify as Intervale's employee for purposes of the act, he was required to satisfy only the statutory definition of "employee" set forth in § 31-275 (9) (A) (i).

The fund does not seriously dispute the plaintiff's claim that the election provision of § 31-275 (10) does not, by its terms, apply to single-member limited liability companies. Nor does the fund claim that, if we agree with it that single-member limited liability companies are not employers of their members, the commission chairman had the authority to promulgate the rule set forth in the 2003 memorandum requiring single-member limited liability companies to elect to accept the provisions of the act in order to obtain coverage for their members in the absence of any statutory basis for that rule. The fund does contend, however, that the presumption that underlies the rule contained in the 2003 memorandum—that single-member limited liability companies are not the employers of their members—is correct, because single-member limited liability companies are not meaningfully distinguishable from sole proprietorships in this regard.[10]

[10] The fund also contends that the presumption underlying the 2003 memorandum is rebuttable. Nothing in the 2003 memorandum suggests, however, that, when a single-member limited liability company does not elect to accept the provisions of the act, the member nevertheless may be covered if the member presents evidence that he or she was an employee of the company. To the contrary, the 2003 memorandum provides that "members of [limited liability companies (LLCs)] that contain only one member (single-member LLCs) should be presumed to be *excluded* from the [a]ct unless they have elected to be covered"; (emphasis in original); and Form 75, which implements the 2003 memorandum, expressly provides that "[t]he [s]ole [p]roprietor or [s]ingle-[m]ember [limited liability company] is NOT covered by the [act], *unless coverage is elected through the use of this form*." (Emphasis added.) Moreover, if the 2003 memorandum merely created a presumption that may be rebutted by evidence that the member satisfied the definition of "employee" set forth in § 31-275 (9) (A) (i), the 2003 memorandum effectively would be superfluous, inasmuch as the burden of proof is always on

We agree with the plaintiff that nothing in § 31-275 (10) requires single-member limited liability companies to elect to accept the provisions of the act before their members are covered, and, therefore, the commission chairman had no authority to adopt that rule. Indeed, as we indicated, the fund does not seriously contend otherwise. For the reasons that follow, we further conclude that the legislature's choice not to include single-member limited liability companies in the election provision of § 31-275 (10) indicates that the legislature intended that single-member limited liability companies may be employers of their members.

First, it is reasonable to conclude that the legislature adopted the provision of § 31-275 (10) allowing sole proprietors to elect to adopt the provisions of the act because it otherwise might appear that, in the absence of such a provision, a sole proprietorship would not be considered the employer of the sole proprietor under § 31-275 (10), even though that provision defines "employer" to include "any person . . . ." In turn, it is

a claimant to prove that he or she was an employee. See, e.g., *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197 ("[i]t is well established that the claimant has the burden of proving that he is an employee of the employer from whom he seeks compensation"), cert. denied, 306 Conn. 905, 52 A.3d 731 (2012). Finally, it is unclear what evidence, in the fund's view, would be sufficient to rebut the presumption created by the 2003 memorandum. The fund contends that, because the plaintiff necessarily controlled Intervale, Intervale had no right to control him and, therefore, that he cannot be Intervale's employee. That invariably will be the case, however, with single-member limited liability companies. It is therefore apparent that the 2003 memorandum sets forth a conclusive presumption that single-member limited liability companies are not employers of their members, and that that presumption cannot be rebutted by additional evidence. See *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 548, 970 A.2d 630 (2009) ("[g]enerally, a conclusive or irrebuttable presumption is [a] presumption that cannot be overcome by any additional evidence *or argument*" [emphasis in original; internal quotation marks omitted]). In other words, the 2003 memorandum sets forth a substantive rule of law. See id. ("[a] conclusive or irrebuttable presumption is . . . a substantive rule of law" [internal quotation marks omitted]).

reasonable to believe that the legislature maintained this view because a sole proprietor and a sole proprietorship are, for all intents and purposes, one and the same entity, and it would be anomalous to conclude that an individual can work under a contract of service with himself. See *National Fire Ins. Co. of Hartford* v. *Beaulieu Co., LLC*, 140 Conn. App. 571, 584, 59 A.3d 393 (2013) (although "sole proprietor" is not defined for purposes of act, "Black's Law Dictionary [9th Ed. 2009] defines 'sole proprietorship' as '[a] business in which *one person . . . operates in his or her personal capacity*' or '[o]wnership of such a business.' " [emphasis added]); 6 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2018) § 76.05 [2], p. 76-13 ("[t]he compensation act cannot be supposed to have contemplated [the] combination of employer and employee status in one person").[11] Thus, the election provision set forth in § 31-275 (10) allowing sole proprietors to elect to accept the provisions of the act effectively creates an *exception* to the rule that only employees are covered by the act, consistent with the policy in favor of broad eligibility for coverage to accomplish the act's humanitarian purpose.[12] See, e.g., *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 432,

[11] This statement in Larson's treatise is made in the context of a discussion of the employee status of partners. See 6 L. Larson & T. Robinson, supra, § 76.05 [2], p. 76-13. The authors assert that, for purposes of workers' compensation law, a partnership generally "is not . . . an entity separate from its members," and, therefore, the members are not employees of the partnership. (Footnote omitted.) Id. As we noted, however, under the act, partners are deemed to be covered unless the partnership elects to opt out. See General Statutes § 31-275 (10).

[12] In other words, the election provision of § 31-275 (10) does not *create a presumption* that sole proprietors are not covered by the act. If sole proprietors would have been eligible for coverage in the absence of the election provision, the legislature presumably would have provided that they could opt *out* of coverage if it wished to provide them with that choice. Rather, the election provision appears to reflect the fact that, as a matter of substantive law, sole proprietors are not employees of their sole proprietorships and, therefore, would be ineligible for coverage in the absence of a provision allowing them to opt in.

994 A.2d 1265 (2010) (act was intended "to be as wide as possible in its scope," with "no employment left out that can practicably be included" [internal quotation marks omitted]); see also *Sullins* v. *United Parcel Service, Inc.*, supra, 315 Conn. 550 (" '[t]he humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation' ").

In contrast to sole proprietorships, however, business entities organized as limited liability companies are entirely distinct from their members. See, e.g., *Wasko* v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978 ("[a] limited liability company is a distinct legal entity whose existence is separate from its members"), cert. denied, 289 Conn. 922, 958 A.2d 155 (2008). Thus, it is reasonable to conclude that the legislature chose not to include single-member limited liability companies in the election provision of § 31-275 (10) because it contemplated that the member of a single-member limited liability company *can* work under a contract of service with the company—because the company is a distinct entity—and, therefore, the member *can* be the company's employee, as defined in § 31-275 (9) (A) (i). See

The plaintiff contends, to the contrary, that the board held in *Verrinder* v. *Matthew's Tru Colors Painting & Restoration*, No. 4936, CRB 4-05-4 (December 6, 2006), that an individual can be his own employer and employee. In that case, however, the board merely recognized that, when a sole proprietor has elected to accept the provisions of the act pursuant to § 31-275 (10), the sole proprietorship is *treated as* the sole proprietor's employer and, pursuant to § 31-275 (9) (A) (ii), the sole proprietor is *treated* as an employee under the act. See id. ("[T]he situation [in which] a self-employed individual in the compensation system is acting as both employee and employer is unlikely to result in an adversarial investigation of the claim. However, [in § 31-275 (9) (A) (ii) and (10)] the General Assembly specifically permitted sole proprietors to be defined as 'employers' and to have the concurrent status of both 'employers' and 'employees' . . . ." [Citations omitted.]). The case did not hold that, even in the absence of these statutory provisions, one individual could be treated as both an employer and an employee with respect to himself.

82 Am. Jur. 2d 167, Workers' Compensation § 143 (2013) ("[a]n ownership interest or officer position in a corporate enterprise generally does not prevent an injured worker from being an 'employee' within the meaning of workers' compensation acts"); Restatement, Employment Law, § 1.03, comment (a), p. 33 (2015) ("[s]ome laws treat controlling owners as employees in order to further specific statutory goals, such as facilitating the collection and calculation of taxes or encouraging owners to make employee benefits broadly available to their workforce").[13] Indeed, if the legislature had believed that the members of single-member limited liability companies cannot be employees of the companies, we can perceive no reason why it would have excluded such members from the opt-in provision of the act, thereby making such members categorically ineligible for coverage. The act as written reveals no such intention to exclude any type of worker. Indeed, the act was intended to "be as wide as possible in its scope," with "no employment left out that can practicably be

[13] As the fund observes, there is authority for the proposition that a person who works for a business entity that he or she owns or controls is not the entity's employee. See Restatement, supra, § 1.03, comment (a) p. 32 ("[a]n individual who renders services to an enterprise that the individual controls through ownership is not as a general matter treated as an employee of that enterprise for purposes of the laws providing protections or benefits to or imposing obligations on employees"); id., comment (b), p. 33 ("[O]wners of a [limited liability] company that have entrepreneurial control over their own remuneration and activities on the company's behalf are not employees of the company," and, "[i]n partnerships, too, each partner [who] exercises control approximating that of a sole proprietor over his or her remuneration and activities within the partnership is a controlling owner excluded from employee status"). These provisions, however, are not specific to workers' compensation law. The fact that owners of a business entity are not its employees for some purposes, such as determining the owner's tax liability, does not necessarily mean that they are not employees for purposes of the act. We note, for example, that, whereas the Restatement of Employment Law provides that partners do not have employment status, § 31-275 (10) reflects a conclusive presumption that partners *are* employees of the partnership unless the partnership elects to be excluded from the provisions of the act.

included." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, supra, 296 Conn. 432. We note in this regard that, if a member of a single-member limited liability company cannot be an employee of the company, such members would appear to be the *only* workers who are categorically ineligible for coverage.[14] See General Statutes § 31-275 (9) (A) (i) ("employee" includes any person who "[h]as entered into or works under any contract of service or apprenticeship with an employer"); General Statutes § 31-275 (10) ("employer" includes "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer," and "all contracts of employment . . . shall be conclusively presumed to [provide] . . . [A] [t]hat the employer may accept and become bound by the provisions of [the act]"); see also General Statutes § 31-275 (9) (B) (v) (employees of corporation who are corporate officers are covered by act unless they elect to be excluded);[15] General Statutes § 31-275 (10) (sole proprietors may opt to be covered by act);[16] General

[14] We recognize that, when the commission chairman drafted the 2003 memorandum, he attempted to mitigate this policy concern by providing that single-member limited liability companies could elect to accept the provisions of the act if the member wanted to be covered. As the fund essentially concedes on appeal, however, if such members were not employees under the act, and the legislature chose not to allow them to elect to accept the provisions of the act, neither the commission chairman nor this court would have the authority to mitigate that arguably harsh result by effectively changing the plain terms of the act.

[15] As we discuss more fully hereinafter, a corporate officer who provides no services to the corporation, and is not subject to the hazards of the corporation's business, is not the corporation's employee.

[16] Presumably, this provision would allow any independent contractor to elect to accept the provisions of the act. Cf. *Pulsifer* v. *Pueblo Professional Contractors, Inc.*, 161 P.3d 656, 660 n.5 (Colo. 2007) ("[t]he term 'independent contractor' describes the relationship with those for whom work is done, whereas 'sole proprietor' describes the organization of the business with whom the contract is made").

Statutes § 31-275 (10) (partners are covered by act unless they elect to be excluded). Because we are aware of nothing in the language, history or purpose of the act to indicate that the legislature had any such intent, we conclude that the legislature contemplated that the member of a single-member limited company may be an employee of the company.[17]

In reaching this conclusion, we are mindful that a limited liability company is a hybrid entity "that adopts and combines features of both partnership and corporate forms." (Internal quotation marks omitted.) *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 834 n.13, 43 A.3d 607 (2012). "From the partnership form, the [limited liability company] borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. . . . From the corporate form, the [limited liability company] borrows the characteristic of protection of members from . . . liability" similar to the protection enjoyed by corporate shareholders. (Internal quotation marks omitted.) Id. Thus, for purposes of the act, the legislature *could have* concluded that single-member limited liability companies should be treated in the same manner as sole proprietorships and multiple-member limited liability companies in the same manner as partnerships, as the commission chairman indicated in the 2003 memorandum. Indeed, the legislature's choice not to treat limited liability companies in this manner may have potentially negative ramifications for single-member limited liability companies and their members. Specifically, the decision to treat single-member limited liability companies as distinct entities from their members for purposes of the act

[17] We address the test for determining whether the member of a single-member limited liability company is the company's employee in part II of this opinion.

means that a single-member limited liability company will be statutorily required to obtain coverage for its member even if the member would prefer not to be covered. It is not the function of this court or the commission, however, to "substitute its judgment of what would constitute a wiser provision for the clearly expressed intent of the legislature." (Internal quotation marks omitted.) *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 416–17, 880 A.2d 882 (2005). We therefore conclude that the commission chairman did not have the authority to adopt a conclusive presumption that the members of single-member limited liability companies are not their employees, as he did in the 2003 memorandum.

II

We next consider the plaintiff's claim that the board incorrectly determined that the plaintiff was not Intervale's employee. We agree.

As we explained, the sole basis for the board's conclusion that the plaintiff was not Intervale's employee was its determination that Intervale must be treated as a sole proprietorship as the result of its purported failure to observe the corporate formalities governing limited liability companies when it distributed profits to the plaintiff instead of paying him an hourly salary. We have already rejected this conclusion because the fund made no such claim and the board cited no authority to support it. The board did not address the commissioner's finding that the plaintiff was not Intervale's employee in view of the fact that the plaintiff controlled the means and methods of his own work, which is the fund's position on appeal. Nevertheless, because we are in as good a position as the board to review the commissioner's factual finding concerning this issue, and because neither party objects to our review of the issue, which has been fully briefed, we may address it. Furthermore,

because the underlying facts are not in dispute, we agree with the plaintiff that our review of the commissioner's determination that the plaintiff was not Intervale's employee is de novo. See, e.g., *State* v. *Donald*, 325 Conn. 346, 354, 157 A.3d 1134 (2017) ("[w]hen the facts underlying a claim on appeal are not in dispute . . . that claim is subject to de novo review" [internal quotation marks omitted]).

As we previously indicated, the fund claims that the commissioner correctly determined that the plaintiff is not Intervale's employee because the plaintiff, not Intervale, had "the right to control the means and methods used by the [plaintiff] in the performance of his" services. (Internal quotation marks omitted.) *Doe* v. *Yale University*, supra, 252 Conn. 680. We recognize that the right to control test is the traditional test for determining the existence of an employer-employee relationship. The test generally has been used, however, to distinguish between an independent contractor and an employee, which is not the issue presented in this case. See id., 681 ("The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." [Internal quotation marks omitted.]). Rather, the issue for us to decide is whether the sole member of a limited liability company who has the right to control the company and who also performs services for the company can be the company's employee. If the right to control test applied in this situation, then, contrary to the apparent legislative intent, the member of a single-member limited liability company could *never* be found to be the company's employee, because a single-member limited liability company can *only* exercise control over the member through the member.

The Missouri Court of Appeals addressed a similar problem in *Lynn* v. *Lloyd A. Lynn, Inc.*, 493 S.W.2d 363 (Mo. App. 1973). In that case, the widow of the sole

owner and manager of a corporation who had been killed while performing services for the corporation claimed that the decedent was an employee of the corporation and, as a consequence, that she was eligible for death benefits under the workers' compensation laws of Missouri. See id., 363–64. The Missouri Industrial Commission and the state circuit court concluded that the decedent was not the corporation's employee because he did not satisfy the traditional controllable services test for employment under Missouri law. See id. On appeal, the Missouri Court of Appeals observed that "[t]he policy behind the controllable services test, developed to distinguish between an employee and an independent contractor, was that an independent contractor is only temporarily and peripherally connected with the master's or employer's business." Id., 365. The court concluded that "the controllable services test was inappropriate as applied to executive officers. Such officers, by virtue of their managerial abilities, often accompanied by substantial stock ownership, are naturally apt to be under less control in the performance of their duties than the typical employee. But, unlike the independent contractor, the executive officer is intimately and permanently involved in the operation of the business. Accordingly, the criteria by which independent contractor status is determined [are] not adequate to meet the needs of the unique problems created by executive officers of corporations." Id.

The court in *Lynn* concluded that, under Missouri's workers' compensation law, which defined "employee" to include "every person in the service of any employer . . . under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations"; Mo. Rev. Stat. § 287.020 (1) (1969); the word "employee" included "executive officers . . . irrespective of whether . . . these officers rendered controllable services or exer-

cised control over the services of others. If by reason of their employment they were subjected to the hazards of the occupation or industry, then under the liberal extension of [Missouri's workers' compensation law] and the directive of the [l]egislature contained in [the statutory definition of "employee"], they should be considered employees within the terms of [that law]." *Lynn* v. *Lloyd A. Lynn, Inc.*, supra, 493 S.W.2d 366; see also *Gottlieb* v. *Arrow Door Co.*, 364 Mich. 450, 454, 110 N.W.2d 767 (1961) (individual who was sole incorporator and stockholder of corporation and who had exclusive control over corporation was employee of corporation for purposes of state workers' compensation laws when individual provided services to corporation and was subject to hazards of corporation's business); *McFarland* v. *Bollinger*, 792 S.W.2d 903, 906–907 (Mo. App. 1990) (clarifying that, to qualify as employee for workers' compensation purposes under *Lynn*, it is essential that corporate officer provide services to corporation); cf. *McFarland* v. *Bollinger*, supra, 907 ("[the] court does not believe that the legislature intended that executive officers of corporations were to be counted as employees if they do nothing but lend their name to the position and perform no service for the corporation").

The court in *Lynn* further concluded that, "[t]o hold that the decedent was not an employee at the time of his death because of the office he held and his stock ownership in the corporation is to disregard the separate and distinct legal identities of [the] decedent and [the corporation]. Since [the] defendants have failed to show that the separate identities were used as a subterfuge to defeat public convenience, for the perpetration of a fraud, or as a means to justify a wrong, [the court has] no reason to pierce the corporate veil in these proceedings." *Lynn* v. *Lloyd A. Lynn, Inc.*, supra, 493 S.W.2d 366–67. Accordingly, the court concluded that the decedent was an employee of the corporation. Id., 367.

We find the reasoning of the court in *Lynn* persuasive and equally applicable to the members of single-member limited liability companies. In particular, we agree that the right to control test is not an appropriate test for determining whether the member of a single-member limited liability company is an employee of the company. Rather, the test is whether the member performed services for the company and was subject to the hazards of the company's business. Cf. General Statutes § 31-275 (9) (A) (i) (defining "employee" as any person who "[h]as entered into or works under any contract of service . . . with an employer").

Because there is no dispute in the present case that the plaintiff provided services to Intervale and was subject to the hazards of Intervale's business, it is clear that the plaintiff was Intervale's employee for purposes of the act.[18] Thus, the board improperly upheld the decision of the commissioner that the plaintiff was not Intervale's employee and that he therefore was not entitled to concurrent employment benefits pursuant to § 31-310 in connection with his employment by Intervale.

The decision of the board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner dismissing the plaintiff's claim for concurrent employment benefits and to remand the case to the commissioner with direction to grant the plaintiff's claim.

In this opinion the other justices concurred.

[18] To the extent that the fund claims that the plaintiff was not Intervale's employee for purposes of the act because the commissioner found that it was "questionable as to whether the [plaintiff] intended to cover himself as an employee when [Intervale] procured [the workers' compensation insurance policy]," we disagree. Even if we were to assume that the plaintiff did not intend to obtain coverage for himself, the plaintiff's subjective beliefs regarding his employee status at the time he obtained the policy have no direct bearing on the question of whether he was covered by the act as a matter of law.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.* MIGUEL JUAREZ

The defendant's petition for certification to appeal from the Appellate Court, 179 Conn. App. 588 (AC 38953), is denied.

A. Paul Spinella, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided March 20, 2019

STATE OF CONNECTICUT *v.* CARROLL L. BUMGARNER-RAMOS

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 725 (AC 39923), is denied.

Erica A. Barber, assigned counsel, in support of the petition.

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

Decided March 20, 2019

FRANCIS ANDERSON *v.* CHARLES DIKE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 187 Conn. App. 405 (AC 40799), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Francis Anderson, self-represented, in support of the petition.

Decided March 20, 2019

CONNECTICUT COMMUNITY BANK, N.A. *v.*
JAMES T. KIERNAN, JR., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 187 Conn. App. 868 (AC 41378), is denied.

Houston Putman Lowry, in support of the petition.

Decided March 20, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

PREMIER CAPITAL, LLC *v.* JAY SHAW
(AC 40785)

Keller, Bright and Moll, Js.

Syllabus

The plaintiff, L Co., sought to enforce a judgment rendered in 1991 against the defendant that was predicated on a default on a loan. The trial court found that L Co. proved by a preponderance of the evidence that it owned the 1991 judgment and rendered judgment in favor of L Co., from which the defendant appealed to this court. Thereafter, L Co. filed with the trial court a postjudgment motion to correct the record to reflect that the plaintiff in the present action should have been designated as I Co., rather than L Co., claiming that L Co. and I Co. are two separate Massachusetts entities comprised of the same principals and principal offices, but that I Co. was the proper entity designation. Because the present case was on appeal, the trial court declined to take any action on L Co.'s motion to correct. On appeal, the defendant claimed that L Co. lacked standing, which deprived the trial court of subject matter jurisdiction. *Held* that because L Co. did not have standing to seek enforcement of the 1991 judgment, the trial court lacked subject matter jurisdiction over the present case and, thus, should have dismissed the case rather than deciding it on the merits; the evidence at trial indicated that I Co., and not L Co., had acquired assets in 1998 that purportedly included the 1991 judgment, it was undisputed that there was no evidence demonstrating that L Co. had a real interest in the 1991 judgment, L Co. conceded that it was a separate and distinct entity from I Co., and the listing of L Co. as the plaintiff in this action did not amount to a scrivener's error as claimed by L Co.

Argued January 4—officially released April 2, 2019

Procedural History

Action to enforce a judgment, and for other relief, brought to the Superior Court for the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee; judgment for the plaintiff; thereafter, the plaintiff filed a motion to correct, and the defendant appealed to this court. *Reversed; judgment directed.*

Ellery E. Plotkin, for the appellant (plaintiff).

Thomas J. Lengyel, for the appellee (defendant).

Opinion

MOLL, J. The defendant, Jay Shaw, appeals from the judgment of the trial court, following a bench trial, rendered in favor of the plaintiff, Premier Capital, LLC (plaintiff LLC). On appeal, the defendant claims that (1) the trial court lacked subject matter jurisdiction over the present case as a result of the plaintiff LLC's lack of standing, (2) the court erred in determining that the plaintiff LLC established ownership of the prior judgment it sought to enforce because there were breaks in the chain of title, and (3) the court erred in concluding that his special defense was invalid. We agree with the defendant on the first claim and, accordingly, reverse the judgment of the trial court.[1]

The following facts and procedural history are relevant to our resolution of this appeal. In 1990, Charter Federal Savings commenced an action against the defendant predicated on a default on a loan. See *Charter Federal Savings* v. *Shaw*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-90-0109612. On August 7, 1991, following a hearing in damages, the trial court rendered judgment against the defendant and

[1] In light of our resolution of the defendant's first claim, which is dispositive of the appeal and requires dismissal of the plaintiff LLC's action, we need not reach the merits of the defendant's remaining claims.

in favor of Charter Federal Savings in the amount of $293,259.81, including costs, attorney's fees, and expenses (1991 judgment).

On August 5, 2016, the plaintiff LLC commenced the present case against the defendant. The summons identified the plaintiff as "Premier Capital, LLC," with a place of business located at 336 Lowell Street in Wilmington, Massachusetts. In its operative one count complaint filed on August 11, 2016, in which "Premier Capital, LLC," was identified as the plaintiff, the plaintiff LLC alleged, inter alia, that, following a series of transactions, it had acquired ownership of the 1991 judgment and that the 1991 judgment had not been satisfied. As relief, the plaintiff LLC sought, inter alia, enforcement of the 1991 judgment and postjudgment interest.[2] Thereafter, the defendant filed an answer and special defenses,[3] and the plaintiff LLC filed a reply denying the allegations in the special defenses.

On May 2, 2017, the matter was tried to the court. During trial, the plaintiff LLC offered and had admitted into evidence several exhibits that, according to the plaintiff LLC, established a chain of title demonstrating that it had acquired ownership of the 1991 judgment in 1998. Notably, none of the exhibits makes any reference to "Premier Capital, LLC"; instead, the plaintiff LLC's

[2] Prior to trial, the parties stipulated that the plaintiff LLC commenced the present case within twenty-five years following the 1991 judgment. See General Statutes § 52-598 (a) ("[n]o execution to enforce a judgment for money damages rendered in any court of this state may be issued after the expiration of twenty years from the date the judgment was entered and no action based upon such a judgment may be instituted after the expiration of twenty-five years from the date the judgment was entered").

[3] The defendant raised two special defenses. In his first special defense, the defendant alleged that the plaintiff LLC failed to state a cause of action on which relief could be granted. The defendant withdrew his first special defense prior to trial. In his second special defense, the defendant alleged that the present case was oppressive and harassing as a result of, among other things, his advanced age and poor health.

exhibit number one indicates that "Premier Capital, Inc.," which is not a party to the present case, had acquired certain assets that purportedly included the 1991 judgment. This incongruity was not raised as an issue during trial.

On August 8, 2017, the court issued a memorandum of decision in which it concluded, inter alia, that the plaintiff LLC had proven the allegations of its complaint by a preponderance of the evidence, including that it owned the 1991 judgment. The court rendered judgment in favor of the plaintiff LLC in the amount of $289,794.81,[4] plus postjudgment interest at a rate of 4 percent annually. On August 28, 2017, the defendant filed this appeal.

On September 13, 2017, the plaintiff LLC filed with the trial court a postjudgment motion to "correct the trial court record" (motion to correct) to reflect that the plaintiff in the present case should have been designated as "Premier Capital, Inc.," rather than "Premier Capital, LLC." The plaintiff LLC claimed that Premier Capital, Inc., and the plaintiff LLC are two separate Massachusetts entities comprised of the same principals and principal offices, and that Premier Capital, Inc., is the "proper entity designation." The plaintiff LLC characterized the listing of "Premier Capital, LLC," as the plaintiff as a scrivener's error. On October 11, 2017, the court issued an order noting that the present case is on appeal and, accordingly, the court declined to take any action on the plaintiff LLC's motion to correct absent approval from this court.[5]

[4] At trial, Louis Auciello, who testified that he is an account manager employed by "Premier Capital," testified that, from 2007 to 2010, the defendant made $3465 in payments against the balance of the 1991 judgment and, thus, the remaining balance of the 1991 judgment was $289,794.81.

[5] The plaintiff LLC has not sought appellate review of the October 11, 2017 order.

The defendant raises on appeal the dispositive claim that the trial court lacked subject matter jurisdiction over the present case as a result of the plaintiff LLC's lack of standing. Specifically, the defendant contends that the evidence adduced at trial demonstrates that Premier Capital, Inc., rather than the plaintiff LLC, acquired assets purportedly including the 1991 judgment and that, absent a real interest in the 1991 judgment, the plaintiff LLC lacked standing to seek enforcement of the 1991 judgment. In response, the plaintiff LLC argues that the listing of "Premier Capital, LLC," as the plaintiff is a scrivener's error that has not prejudiced the defendant. We agree with the defendant.

At the outset, we note that the defendant is raising this standing claim for the first time on appeal. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . . Because the [defendant's] claim implicates the trial court's subject matter jurisdiction, we conclude that it is reviewable even though the [defendant has] raised it for the first time on appeal." (Citations omitted; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012). "The issue of whether a party had standing raises a question of law over which we exercise plenary review." *Arciniega* v. *Feliciano*, 329 Conn. 293, 301, 184 A.3d 1202 (2018).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party

to request an adjudication of the issue . . . .'' (Internal quotation marks omitted.) *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 794, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016).

The evidence in the record indicates that Premier Capital, Inc., acquired certain assets in 1998 that purportedly included the 1991 judgment. It is undisputed, however, that there is no evidence demonstrating that the plaintiff LLC has a real interest in the 1991 judgment. As the plaintiff LLC concedes, Premier Capital, Inc., and the plaintiff LLC are separate, distinct entities. The listing of ''Premier Capital, LLC,'' as the plaintiff does not amount to a scrivener's error, as the plaintiff LLC contends; rather, the wrong entity commenced the present case.[6] See *Cardi Materials Corp.* v. *Connecticut Landscaping Bruzzi Corp.*, 77 Conn. App. 578, 581–82, 823 A.2d 1271 (2003) (plaintiff, named ''Cardi Materials Corporation,'' lacked standing to commence breach of

[6] In its appellate brief, the plaintiff LLC argues that Premier Capital, Inc., and the plaintiff LLC ''are not that different, practically and/or logistically speaking, as they have a certain relationship that in essence undermines the main thrust of [the] defendant's standing argument.'' Regardless of the affiliation between the plaintiff LLC and Premier Capital, Inc., the record remains devoid of any evidence establishing that the plaintiff LLC has a real interest in the 1991 judgment.

In addition, the plaintiff LLC argues that the defendant was not prejudiced by the plaintiff LLC being named as the plaintiff, noting that at trial, there was evidence that the defendant made payments to partially satisfy the judgment between 2007 and 2010. Where, as here, the erroneous designation of a plaintiff is a substantial error rather than a circumstantial error, whether the defendant was prejudiced by the error is immaterial. See *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 136 Conn. App. 683, 694, 47 A.3d 394 (2012) (concluding that plaintiff's commencement of action under fictitious name did not constitute circumstantial error and, thus, declining to consider plaintiff's argument that defendants were not prejudiced by error); *America's Wholesale Lender* v. *Pagano*, 87 Conn. App. 474, 480, 866 A.2d 698 (2005) (concluding that, although defendant could not argue that she suffered prejudice as result of corporation commencing action under trade name, lack of subject matter jurisdiction required dismissal of action regardless of whether prejudice existed).

contract action where contracting parties were defendant and "Cardi Corporation," a separate and distinct corporate entity not named as plaintiff in action). In sum, the plaintiff LLC did not have standing to seek enforcement of the 1991 judgment and, therefore, the court lacked subject matter jurisdiction over the present case. Accordingly, the court should have dismissed the present case rather than deciding it on the merits. See id., 582 (concluding that trial court should have dismissed case for lack of subject matter jurisdiction rather than deciding case on merits).

The judgment is reversed and the case is remanded with direction to render judgment dismissing the plaintiff's action.

In this opinion the other judges concurred.

DEBRA B. MARINO *v.* STATEWIDE GRIEVANCE COMMITTEE
(AC 40274)

Alvord, Prescott and Eveleigh, Js.

Syllabus

The plaintiff attorney appealed to the trial court from the decision of the reviewing committee of the defendant, the Statewide Grievance Committee, imposing sanctions on the plaintiff for violating rule 4.4 (a) of the Rules of Professional Conduct. The plaintiff had represented the former husband of the complainant, M, in connection with postjudgment marital dissolution proceedings. After a marshal served a subpoena duces tecum on M with respect to a noticed deposition, M, who had filed an appearance as a self-represented party, informed the plaintiff that she would not be attending the deposition. Subsequently, the plaintiff commenced the deposition for the purpose of noting on the record that M had failed to appear, and she thereafter prepared and filed a motion for a capias, in which she represented that M failed to appear for the deposition and that no motion to quash or for a protective order had been filed. The day before the scheduled deposition, however, M had filed a motion for a protective order requesting that the court issue an order preventing the deposition from taking place. M subsequently filed a grievance against the plaintiff. The reviewing committee for the defendant found,

by clear and convincing evidence, that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct by engaging in unethical conduct in filing the motion for a capias, which the committee found had no substantial purpose other than to embarrass or burden M. After the defendant affirmed the decision of the reviewing committee, the plaintiff appealed to the trial court, which dismissed the plaintiff's appeal. On the plaintiff's appeal to this court, *held* that the trial court's decision that the defendant properly concluded that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct was not based on clear and convincing evidence; the plaintiff, when filing the motion for a capias, was mistaken when she stated that no objection or motion to quash had been filed and there was no clear and convincing proof to the contrary, nor was there clear and convincing proof that she filed the motion for a capias for no substantial purpose other than to embarrass or burden M, as the reviewing committee made no factual finding to support its conclusion to that effect, there was no finding that the plaintiff was aware that M had filed her objection and motion the day before the plaintiff filed her motion for a capias, there is no statutory authority or rule of practice that requires an attorney to contact the court or to check the judicial website prior to filing a motion for a capias, which may properly be requested when a party is served with a subpoena duces tecum and fails to appear for a scheduled deposition, and although the fact that M was a self-represented party was a factor in the reviewing committee's determination that the plaintiff had violated rule 4.4 (a), that rule does not impose additional obligations on an attorney when dealing with a self-represented party.

Argued December 4, 2018—officially released April 2, 2019

Procedural History

Appeal from the decision of the defendant's reviewing committee imposing sanctions on the plaintiff, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, dismissed the plaintiff's appeal and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Barbara M. Schellenberg, with whom, on the brief, was *David B. Zabel*, for the appellant (plaintiff).

Leanne M. Larson, assistant chief disciplinary counsel, with whom, on the brief, was *Beth L. Baldwin*, assistant chief disciplinary counsel, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Debra B. Marino, an attorney, appeals from the judgment of the trial court dismissing her appeal from the sanctions imposed by the reviewing committee of the defendant, the Statewide Grievance Committee, for violating rule 4.4 (a) of the Rules of Professional Conduct.[1] The plaintiff claims that the court improperly upheld the defendant's conclusion that the motion for a capias that she filed while representing a client in a family proceeding had no substantial purpose other than to embarrass or burden the complainant, Melissa Mathison.[2] We agree with the plaintiff and reverse the judgment of the trial court.

The following relevant facts largely are undisputed. The plaintiff represented the complainant's former husband, Jeffrey Samoncik, in connection with postjudgment proceedings following the dissolution of the Samonciks' marriage on April 24, 2009. In September, 2013, the complainant filed a motion to modify child support. On March 15, 2015, the complainant filed a self-represented appearance in the matter. A hearing on the complainant's motion for modification was scheduled for August 4, 2015. The discovery process in connection with the complainant's motion for modification had been somewhat prolonged and engendered communications between the plaintiff and the complainant that were sometimes strained. They exchanged a series of e-mails that addressed the issue of conducting a deposition of the complainant prior to the scheduled August hearing.

[1] Rule 4.4 (a) of the Rules of Professional Conduct provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

[2] Melissa Mathison was formerly known as Melissa Samoncik. Following her divorce from Jeffrey Samoncik, she married Michael Mathison.

The plaintiff noticed the complainant's deposition for July 7, 2015. On July 3, 2015, a marshal served a subpoena duces tecum on the complainant with respect to the noticed deposition. That same day, the complainant e-mailed the plaintiff and informed her that she would not be attending the scheduled deposition. The complainant's July 3, 2015 e-mail reads as follows:

"Please find motions that were recently filed by me.

"Please make note that I will be unable to attend a deposition on July 7. My resources are limited for child care costs.

"In regards to the deposition items, 1-8 are erroneous requests as this information has been supplied to your office on more than one occasion and there are no new documents to produce. Items 9-11 are irrelevant requests and have no bearing on this case. I will be filing an objection to your deposition.

"Have a great weekend."

A few minutes later, the plaintiff responded: "You will need to appear. I'm proceeding." The complainant immediately e-mailed the following response: "I will not be attending on the 7th. Proceed as you please."

On July 7, 2015, the plaintiff commenced the deposition for the purpose of noting on the record that the complainant had failed to appear. That same day, the plaintiff prepared and filed a "Postjudgment Motion/Application for Capias/Civil Arrest Warrant." In her motion, the plaintiff made the representation that the complainant "was duly subpoenaed for a deposition [and] . . . failed to appear for said deposition in violation of a valid subpoena duces tecum and no motion to quash or for protective order was filed." In addition to requesting that the complainant pay for the costs of the subpoena, court reporter, and counsel fees, the plaintiff moved that the complainant "be precluded

from proceeding with her motions until she appears for a deposition."

On July 6, 2015, the day before the scheduled deposition, the complainant filed a motion for a protective order, requesting that the court issue an order preventing the deposition from taking place for the following reasons: (1) the complainant was not given sufficient notice to schedule the deposition at a mutually convenient date and time; (2) the complainant was not given sufficient notice to allow her to gather the documents requested by the plaintiff; (3) the documents requested by the plaintiff already had been produced or were the subject of objections filed by the complainant; and (4) the complainant's discovery objections should be resolved by the court prior to her deposition.

The plaintiff claimed that she did not receive a copy of the complainant's motion for a protective order until July 8, 2015, which was one day after she had filed her motion for a capias. She also claimed that, historically, the complainant e-mailed her copies of the pleadings that she filed with the court, but that she did not do so with her motion for a protective order.

In response, the complainant contended that her husband, Michael Mathison, after filing the motion for a protective order at the courthouse on July 6, 2015, drove to the plaintiff's office and handed a copy of that pleading to a woman he identified as Rose Rodriguez, the plaintiff's legal assistant. Rodriguez, however, claimed she had been on vacation on the day in question. At that time, the only other person who worked in the plaintiff's office was Danielle Vailonis, and Vailonis denied ever receiving any documents from Mathison.

The court, *Malone*, *J.*, held a hearing on the plaintiff's motion for a capias, the complainant's objection to that motion, and other outstanding motions on July 27, 2015. At the beginning of the hearing, the plaintiff stated that

the complainant's motion to modify child support was scheduled for a hearing on August 4, 2015. She represented that she needed information from the complainant in order to prepare adequately for the upcoming hearing on the complainant's motion scheduled for the following week. She claimed that she had tried to schedule the complainant's deposition twice before, unsuccessfully, and that the complainant would not provide her with alternate dates and times. The plaintiff requested that the court issue a capias and then stay its execution to afford the complainant the opportunity to appear at the plaintiff's office for a deposition two days later, Wednesday at 2 p.m. The plaintiff further stated: "If she can't do Wednesday at 2 [p.m.], I'm happy to do it at 3 [p.m.]. I'll do it at 4 [p.m.]. I'll even do it after five o'clock if that's more convenient for her but I want to take her deposition." The complainant responded that she could not attend a deposition on the proposed date because she "would have to secure child care. I don't know. I have a special needs child and it's very hard. It's very difficult for me." She did not suggest an alternate date. The court ruled: "It's no problem. Until you can agree to a notice for a deposition, the hearing next week is off."

Five days prior to the hearing before Judge Malone, the complainant filed a grievance complaint with the defendant on July 22, 2015. On September 25, 2015, the Ansonia-Milford judicial district grievance panel filed a determination that there was probable cause that the plaintiff violated rules 4.4 (a) and 8.4 (4)[3] of the Rules of Professional Conduct. On February 10, 2016, a three person reviewing committee conducted a hearing on the matter. In its decision dated April 15, 2016, the reviewing committee found the following facts by clear

[3] The reviewing committee determined that the record lacked clear and convincing evidence that the plaintiff violated rule 8.4 (4) of the Rules of Professional Conduct, and that determination was not challenged.

and convincing evidence: "The [plaintiff] represented the [c]omplainant's ex-husband in a dissolution of marriage proceeding. A judgment of dissolution entered on April 24, 2009, after an uncontested hearing. In September of 2013, the [c]omplainant filed a [postjudgment] motion to modify child support. On July 3, 2015, the [c]omplainant was served with a subpoena duces tecum for a July 7, 2015 deposition at the [plaintiff's] law office. The [c]omplainant was a pro se party at the time she was served with the subpoena. On July 3, 2015, the [c]omplainant advised the [plaintiff] that she was unable to appear for the July 7, 2015 deposition and that she would be filing an objection. The [plaintiff] declined to reschedule the deposition.

"On July 6, 2015, the [c]omplainant filed an [o]bjection and a [m]otion for [p]rotective [o]rder to prevent the deposition from taking place on July 7, 2015. The [c]omplainant did not appear at the July 7, 2015 deposition. The deposition went forward. Thereafter on that same day, the [plaintiff] filed a [m]otion for [c]apias in connection with the subpoena and the [c]omplainant's failure to appear at the deposition. The [plaintiff] did not check with the [c]ourt or the [c]ourt's docket to see whether the [c]omplainant had filed a [m]otion for [p]rotective [o]rder. Ultimately, the [c]ourt did not grant the capias."

On the basis of the reviewing committee's factual findings, it found "by clear and convincing evidence" that the plaintiff violated rule 4.4 (a). It stated: "This reviewing committee concludes that the [plaintiff] engaged in unethical conduct in filing a [m]otion for a [c]apias, in connection with a subpoena duces tecum served on the [c]omplainant on July 3, 2015, for a deposition scheduled for July 7, 2015. The [plaintiff's] filing of the [m]otion for a [c]apias on the day of the deposition, with a [m]otion for [p]rotective [o]rder and an objection pending, had no substantial purpose other

than to embarrass or burden the [c]omplainant, in violation of [r]ule 4.4 (a) of the Rules of Professional Conduct. The [c]omplainant had advised the [plaintiff] that she was unable to appear for the July 7, 2015 deposition and that she would be filing an objection. The [plaintiff] did not check to see whether a [m]otion for [p]rotective [o]rder had in fact been filed before filing the [m]otion for a [c]apias." After concluding that the plaintiff was in violation of rule 4.4 (a), the reviewing committee set forth sanctions to be imposed.

Upon the plaintiff's request for review pursuant to Practice Book § 2-35 (k),[4] the defendant affirmed the decision of the reviewing committee at a meeting held on June 16, 2016. The defendant stated: "The [defendant] concluded that the reviewing committee's findings, conclusions and decision that the [plaintiff] violated [r]ule 4.4 (a) of the Rules of Professional Conduct were not in excess of the authority of the reviewing committee; erroneous and contrary to law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The [defendant] concluded that the decision was fully supported by the substantial evidence in the record."

Pursuant to Practice Book § 2-38,[5] the plaintiff filed an appeal with the Superior Court. In its March 9, 2017

[4] Practice Book § 2-35 (k) provides in relevant part: "Within thirty days of the issuance to the parties of the final decision by the reviewing committee, the respondent may submit to the Statewide Grievance Committee a request for review of the decision. . . ."

[5] Practice Book § 2-38 (a) provides in relevant part: "A respondent may appeal to the Superior Court a decision by the Statewide Grievance Committee or a reviewing committee imposing sanctions or conditions against the respondent . . . . A respondent may not appeal a decision by a reviewing committee imposing sanctions or conditions against the respondent if the respondent has not timely requested a review of the decision by the Statewide Grievance Committee under Section 2-35 (k). . . ."

memorandum of decision, the court found that there was "sufficient evidence in the record to support the [defendant's] conclusion" that the motion for a capias had no substantial purpose other than to embarrass or burden the complainant. In dismissing the plaintiff's appeal, the court concluded: "Having reviewed the record and considered the arguments presented to this court, the court concludes that the facts as found and the conclusion of the [defendant] are correct upon the application of the standard required." From that judgment, the plaintiff now appeals to this court.

Before considering the plaintiff's claim, we first address the standard of review applicable to grievance appeals. "[T]he clearly erroneous standard . . . is the preferable standard of review in attorney grievance appeals. . . . The clearly erroneous standard of review provides that [a] court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . .

"Additionally, because the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . we must consider whether the [fact finder's] decision was based on clear and convincing evidence. . . . [C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Citations omitted; internal quotation marks omitted.)

Chief Disciplinary Counsel v. *Zelotes*, 152 Conn. App. 380, 386, 98 A.3d 852, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014). "The burden is on the statewide grievance committee to establish the occurrence of an ethics violation by clear and convincing proof." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 226, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006).

Accordingly, the principal issue in this appeal is whether there is clear and convincing evidence in the record for the defendant to find that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct. For us to make that determination, we must construe the language in that rule. "Given that the Rules of Professional Conduct appear in our Practice Book, and given that [t]he interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation . . . *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010); we employ our well established tools of statutory construction" to determine the meaning of the relevant language in rule 4.4 (a). (Internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 459, 148 A.3d 1105 (2016), aff'd, 329 Conn. 726, 189 A.3d 1173 (2018). "The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . .

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking

to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Wiseman* v. *Armstrong*, supra, 295 Conn. 99–100.

In accordance with § 1-2z, we turn to the relevant language of rule 4.4 (a) of the Rules of Professional Conduct, which provides that a lawyer, in representing a client, "shall not use means that have *no substantial purpose other than to embarrass . . . or burden* a third person . . . ." (Emphasis added.) We conclude that the meaning of the rule is clear and unambiguous. An attorney is in violation of rule 4.4 (a) if he or she, in representing a client, employs resources and methods that, although not illegal, have no important or considerable purpose other than to embarrass, delay, or burden a third person. Such actions are prohibited when the attorney engages in them for no other significant purpose other than to harass the third person. It is important to note that an attorney's lawful actions taken on behalf of his or her client may often cause embarrassment or inconvenience to an opposing party or another person. The attorney does not violate the rule, however, unless the means were employed for no legitimate and considerable purpose *other than* to cause embarrassment or inconvenience to the third person.

Accordingly, for the defendant to conclude that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct, there must be clear and convincing proof that the only significant reason that the plaintiff had for filing

the motion for a capias was to embarrass or burden the complainant. We therefore must look to the factual findings of the reviewing committee to determine whether they support the conclusion that the rule was violated. The reviewing committee found: (1) the complainant, a self-represented party at the time, was served with a subpoena duces tecum to appear at a July 7, 2015 deposition at the plaintiff's office; (2) the day she was served, the complainant advised the plaintiff that she was unable to appear at the scheduled deposition and that she would be filing an objection; (3) the plaintiff declined to reschedule the deposition; (4) the complainant filed an objection and a motion for a protective order on July 6, 2015, to prevent the deposition from going forward on July 7, 2015; (5) the complainant did not appear at the scheduled deposition, but the deposition went forward; (6) the plaintiff thereafter filed a motion for a capias on the same day referencing the subpoena and the complainant's failure to appear at the scheduled deposition; (7) the plaintiff did not "check with the [c]ourt or the [c]ourt's [d]ocket" to see if the complainant had filed a motion for a protective order before filing her motion for a capias; and (8) the court did not grant the plaintiff's motion for a capias.[6]

Significantly, the reviewing committee made no factual finding to support the conclusion that the plaintiff's action in filing the motion for a capias had no legitimate or significant purpose other than to embarrass or burden the complainant.[7] Prior to making the conclusory

[6] The reviewing committee failed to note Judge Malone's actual ruling on the plaintiff's motion for a capias and the complainant's objection to that motion. The court's order was as follows: "Until there is an agreement on a deposition date and time then no hearing on a modification of child support can take place. Hearing off."

[7] At the hearing before Judge Malone on July 27, 2015, the plaintiff represented that the hearing on the complainant's motion to modify child support was scheduled for August 4, 2015, and that she had tried, without success, to schedule the complainant's deposition in preparation for that hearing. The plaintiff indicated that she had noticed the complainant's deposition twice, but that the complainant was "completely interfering with the discov-

statement that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct, the statement was made by the reviewing committee that the plaintiff filed the motion for a capias while the complainant's objection and a motion for a protective order were pending. There was, however, no finding that the complainant's husband had delivered a copy of her motion for a protective order at the plaintiff's office, or that the plaintiff was aware that the complainant had filed her objection and motion the day before the plaintiff filed her motion for a capias. Instead, the reviewing committee focused on the fact that the complainant was a self-represented party, that she indicated that she would be filing an objection, and that the plaintiff failed to contact the court or check the judicial website[8] to determine whether the complainant had filed such a pleading.[9]

ery process, I can't even get her to appear for a deposition." The plaintiff then asked the court to issue the capias, but to stay its execution in order to afford the complainant the opportunity to appear for a deposition at the plaintiff's office.

[8] The record reflects that the family matter at issue between the plaintiff's client and the complainant was not an electronically filed case. If a party files a pleading electronically, the time and date of the filing is available for verification shortly after the filing. This family case is a paper file; the pleadings are in paper form and are mailed, faxed or hand-delivered to the office of the court clerk. The clerk date stamps the pleading upon receipt (the "official" filing date), but data entry of that pleading into the court's computer system frequently is not made the same day that the pleading is received. The defendant's counsel conceded at the hearing before the reviewing committee that although the complainant's objection and the motion for a protective order were delivered to the court and have an official filing date of July 6, 2015, there is no evidence as to when data entry of those filings actually occurred. Accordingly, there is no evidence as to when those filings were available for opposing counsel to view. As noted by the plaintiff's counsel, and not disputed by the defendant's counsel, data entry of those filings could have been made "on July 6th or July 7th or July 8[th] or any other time."

[9] At the hearing before the reviewing committee, the plaintiff testified that she had no reason to check with the court to see if the complainant had filed a motion for a protective order because, historically, the complainant copied her on motions via e-mail. The complainant did not dispute that representation.

At oral argument before this court, the defendant's counsel admitted that there is no statutory authority or Practice Book rule that would require an attorney to contact the court or to check the judicial website prior to filing a motion for a capias under such circumstances. Additionally, the defendant's counsel did not dispute that a capias properly may be requested when a party is served with a subpoena duces tecum and fails to appear for a scheduled deposition. Instead, the defendant's counsel argued that the plaintiff should have waited another day before filing her motion for a capias.

The fact that the complainant was self-represented appears to have been a factor in the reviewing committee's determination that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct. As previously noted, it was one of the factual findings that the reviewing committee stated had been found by clear and convincing evidence in its April 15, 2016 decision. Further, a review of the transcript of the February 10, 2016 hearing before the reviewing committee reveals that one of the members of the panel had serious concerns about the self-represented status of the complainant. That member addressed the plaintiff as follows: "Yeah, but the issue here though, you're talking about a pro se [party]. So then somebody who is not a lawyer with an arrest warrant based on information that she received from her saying that she would not be able to make the 7th. Is it your practice generally if somebody does not appear in a deposition to right away issue a capias, or do you try to somehow find another date for deposition and then go ahead and do what you need to do?" The plaintiff responded that she normally did not subpoena people to attend depositions because in most cases she coordinates a date with the attorney representing the other party. She also said that in this case, she subpoenaed the complainant because it had

been a very contentious matter and that she and the complainant were unable ever to coordinate dates.

The same member of the panel subsequently made the following remarks: "In this particular instance, doing something that, honestly, you know, you're talking about a pro se person. You know, having somebody see a motion for arrest that has children to take care of, I mean, it's a scary proposition, honestly.[10] . . .

"So I think that it would have been, perhaps, much more prudent for you to go on the docket and see whether or not a motion, an objection, a [m]otion for [p]rotective [o]rder, has been filed or call the court and say, oh, by the way, you know, you may not have docketed it yet, but did somebody file an objection, a [m]otion for [p]rotective [o]rder against my motion . . . before going ahead . . . and doing a request for a capias. . . . That's my issue with this particular case not having made a—I'm not making a decision on it." (Footnote added.) When the plaintiff responded that she understood, the same member continued: "I'm just looking at issues that come up and facts that come up that do not quite make sense from a pro se perspective."[11] We note that rule 4.4 of the Rules of Professional Conduct does not impose additional obligations on an attorney when dealing with a self-represented party.[12]

[10] In his closing argument before the reviewing committee, the plaintiff's attorney stated: "It is clear that a lawyer has a right to file an application for a capias. An application is not a capias. Somebody isn't getting [arrested]. Whether or not the pro se litigant understood that is irrelevant to the lawyer's ethical obligations."

[11] Although this panel member suggested that different rules should apply when interacting with a self-represented party, it is well settled that "the right of self-representation provides no attendant license not to comply with relevant rules of procedure and substantive law." (Internal quotation marks omitted.) *Anghel* v. *Saint Francis Hospital & Medical Center*, 118 Conn. App. 139, 139 n.1, 982 A.2d 649 (2009), cert. denied, 294 Conn. 932, 986 A.2d 1055, cert. denied, 559 U.S. 1069, 130 S. Ct. 2111, 176 L. Ed. 2d 726 (2010).

[12] We do not determine that the fact that the complainant was self-represented may not be introduced for the purpose of giving the fact finder the entire relevant context of the plaintiff's conduct. We determine only that

For these reasons, we conclude that the court's decision that the defendant properly concluded that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct is not based on clear and convincing evidence. The conclusory statement that the defendant demonstrated such a violation by clear and convincing evidence is belied by the dearth of proof in the record. We are particularly concerned about the determinations of the reviewing committee, the defendant, and the trial court for the reasons set forth in *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). The administration and interpretation of prohibitions against actions that a lawyer legitimately employs when zealously representing a client, which actions may cause embarrassment or inconvenience to a third person, "*should be tempered by concern to avoid overenforcement.* . . . For that reason, [t]ribunals usually sanction only extreme abuse." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 620.

Rule 4.4 (a) of the Rules of Professional Conduct "should be applied cautiously in light of its potential for chilling legitimate but difficult advocacy." Id. Danger exists that courts or disciplinary authorities might punish conduct as unethical that is the result of a simple mistake on the part of counsel, perceiving such conduct as deliberate indifference to the Rules of Professional Conduct. See id., 620–21. In the present case, the plaintiff filed a motion for a capias and stated that no objection or motion to quash had been filed. She was mistaken; there was no clear and convincing proof to the contrary. Moreover, there was no clear and convincing proof that she filed the motion for no substantial

the particular evidence that she was a self-represented party does not of itself provide a proper basis for an adverse inference that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct.

purpose other than to embarrass or burden the complainant. Accordingly, because the evidence in the record does not support the court's determination, we order that the sanctions be vacated. See *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111–12, 890 A.2d 104 (2006).

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal and vacating the sanctions imposed by the reviewing committee.

In this opinion the other judges concurred.

MOUY TAING *v.* CAMRAC, LLC
(AC 40941)

Sheldon, Bright and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant company for, inter alia, the allegedly wrongful termination of her employment on the basis of pregnancy discrimination. The plaintiff, who worked for the defendant as an account executive in car sales, had received numerous performance evaluations documenting that she was habitually tardy for her shifts. In July, 2014, the plaintiff received a written warning, which stated that her tardiness was unacceptable and that, if her attendance record did not improve, she would be subject to further discipline up to and including termination. In December, 2014, shortly after notifying the defendant that she was pregnant, the plaintiff received a final written warning, noting that she continued to be habitually tardy despite adjustments made to her work schedule and that her position would be terminated if she was tardy again. On December 24, 2014, the plaintiff was sent home after she arrived late to work, and her employment was subsequently terminated. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon in favor of the defendant, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on her claim that a genuine issue of material fact existed as to whether the defendant's proffered reason for her termination was pretextual, as the plaintiff failed to produce any evidence to suggest that the proffered reason had not been the only reason for the defendant's employment decision and that her pregnancy was at least one of the motivating factors behind her termination: although

the plaintiff claimed that several of her colleagues who were not pregnant were similarly situated because they were also late for work on December 24, 2014, and were not sent home or otherwise disciplined for their tardiness, the plaintiff did not provide any evidence to demonstrate that any of her fellow employees had the same extensive history of chronic tardiness or had received a written warning stating that he or she would be terminated if he or she was late, and, thus, the plaintiff could not demonstrate that any other employee was similarly situated to her with respect to his or her attendance records; moreover, the defendant provided a plethora of evidence documenting the plaintiff's habitual tardiness, it was evident from both her performance evaluations and the July, 2014 written warning that the plaintiff's habitual tardiness had been a notable issue that long preceded her pregnancy, and the defendant made multiple attempts to assist the plaintiff so that she would arrive to work on time.

Argued November 28, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for, inter alia, alleged pregnancy discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew Muttart, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

Tanya A. Bovée, with whom, on the brief, was *Justin E. Theriault*, for the appellee (defendant).

Opinion

HARPER, J. This appeal arises from a pregnancy discrimination action brought by the plaintiff, Mouy Taing, under the Connecticut Fair Employment Practices Act[1] against the defendant, CAMRAC, LLC, after she was

[1] See General Statutes § 46a-51 et seq.

terminated from her employment with the defendant.[2] On appeal, the plaintiff argues that the trial court improperly rendered summary judgment in favor of the defendant. Specifically, she claims that there was a genuine issue of material fact as to whether the defendant's proffered reason for her termination was pretextual. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff was hired by the defendant in April, 2013, for a position that entailed renting cars to customers. Despite issues with tardiness, the plaintiff was promoted in January, 2014, to the position of account executive, in which she sold cars to customers. Throughout the plaintiff's employment with the defendant, the plaintiff received numerous performance evaluations documenting that she was habitually tardy for her shifts. On July 18, 2014, the plaintiff received a written warning for arriving late to work on multiple occasions without notifying management, in violation of the defendant's attendance and punctuality policy.[3] The warning informed the plaintiff that her tardiness was unacceptable and that, if her attendance record did not improve, she would be subject to further discipline up to and including termination. Matthew Fisher, the plaintiff's manager, and Kevin Hill, a supervisor, met with the plaintiff to assist her in planning out her daily schedule so that she could avoid being tardy. Moreover, the defendant twice permitted

[2] The plaintiff also alleged in her amended complaint violations of the state wage and hour law under General Statutes §§ 31-68 and 31-72 for the defendant's failure to pay her overtime but later conceded at a hearing on the defendant's motion for summary judgment that her position as a salesperson was exempt from those statutory requirements.

[3] The written warning stated that the plaintiff was late to work on nine occasions in June and July of 2014. On two of those occasions, the plaintiff failed to notify management that she was running late.

the plaintiff to alter her work schedule to better accommodate her child care needs.[4]

On or about December 16, 2014, the plaintiff notified the defendant's human resources department that she was pregnant. The plaintiff also notified her supervisors, Hill and Fisher, of her pregnancy. On December 19, 2014, the plaintiff received a final written warning, noting that she continued to be habitually tardy despite adjustments made to her work schedule.[5] Additionally, the warning stated that her position would be terminated if she was tardy again. On December 22, 2014, however, the plaintiff was again late. On December 24, 2014, Fisher sent the plaintiff home after she arrived late to work. On December 29, 2014, the next day that the plaintiff was scheduled to work, she was terminated. At that time, Fisher informed the plaintiff that she was being terminated for tardiness.

After obtaining a release of jurisdiction from the Commission on Human Rights and Opportunities,[6] the plaintiff filed a three count complaint against the defendant, alleging, inter alia, pregnancy discrimination in violation of General Statutes (Rev. to 2013) § 46a-60 (a) (7), now § 46a-60 (b) (7).[7] The defendant subsequently moved for summary judgment on all counts of the plaintiff's complaint. In a memorandum of decision, the court granted the defendant's motion, agreeing with the defendant that the plaintiff had failed to produce any

[4] The plaintiff often dropped her daughter off at daycare before work.

[5] The final written warning noted that she had been late to work on October 1, 13, 24, 27, 30, November 10, 14, 17, 21, 24, and December 6, 11, 12, 13, 18, 19, 2014. The plaintiff disputed being late on October 1, 13, 24, and 27, 2014. Fisher subsequently conceded that she had not been late on October 1 and 13, 2014.

[6] See General Statutes § 46a-100.

[7] General Statutes (Rev. to 2013) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (7) [f]or an employer . . . [t]o terminate a woman's employment because of her pregnancy . . . ."

evidence that raises a genuine issue of material fact that the defendant's proffered reason for terminating the plaintiff was pretextual. This appeal followed. Additional facts will be provided as necessary.

We first set forth the relevant standard of review and legal principles that guide our analysis. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 829, 925 A.2d 1030 (2007).

Although the plaintiff's claim is based solely on Connecticut law, "Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008). "In defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964, the federal statutory counterpart to § 46a-60." *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 164, 717 A.2d 1254 (1998).

"The legal standards governing discrimination claims involving adverse employment actions are well established. The framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States

Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. . . . Under this analysis, the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73–74, 111 A.3d 453 (2015). "[T]o defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination . . . ." (Citations omitted; internal quotation marks omitted.) *Govori* v. *Goat Fifty, LLC*, 519 Fed. Appx. 732, 734 (2d Cir. 2013).

"To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff] . . . ." (Internal quotation marks omitted.) *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 402, 880 A.2d 151 (2005). "Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the

only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Garcia* v. *Hartford Police Dept.*, 706 F.3d 120, 127 (2d Cir. 2013).

Turning to the present matter, the plaintiff argues that a genuine issue of material fact existed as to whether the defendant's proffered reason for her termination was pretextual because similarly situated individuals who were not pregnant were treated differently than she was. Specifically, the plaintiff argues that several of her colleagues were similarly situated because they were also late for work on the morning of December 24, 2014, but they were not sent home or otherwise disciplined for their tardiness. The plaintiff, however, does not provide any evidence to demonstrate that any of her fellow employees had the same extensive history of chronic tardiness or had received a written warning stating that he or she would be terminated if he or she was late without notifying management. See *Harris* v. *Dept. of Correction*, 154 Conn. App. 425, 432–33, 107 A.3d 454 (2014) (plaintiff failed to proffer evidence of employee's comparable disciplinary history), cert. denied, 315 Conn. 925, 109 A.3d 921 (2015). Thus, even when viewing the evidence in the light most favorable to the plaintiff, she cannot, as a matter of law, demonstrate that any other employee was similarly situated to her with respect to his or her attendance records over an extended period of time.

Furthermore, the defendant provided a plethora of evidence documenting the plaintiff's habitual tardiness. It is evident from both her performance evaluations and the July 18, 2014 written warning given to her that the plaintiff's habitual tardiness had been a notable issue that long preceded her pregnancy in December, 2014. In particular, the July 18, 2014 written warning made clear that her tardiness was not acceptable and that she would be subject to further disciplinary action, up to and including termination, if she did not improve

her attendance. Moreover, it is evident that the defendant made multiple attempts to assist the plaintiff so that she would arrive to work on time. This is reflected in the plaintiff's alternative work schedule and the attempt by Fisher and Hill to help her map out her daily schedule. The plaintiff failed to produce any evidence to suggest that the proffered reason for her termination had not been the only reason for the defendant's employment decision and that her pregnancy was at least one of the motivating factors behind her termination. Accordingly, the trial court properly rendered summary judgment in favor of the defendant.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

ION BANK *v.* J.C.C. CUSTOM HOMES, LLC, ET AL. (AC 40424)

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

Syllabus

The plaintiff sought, by way of a replevin action, to recover certain collateral in the possession of the named defendant that was the security for a promissory note, which had been executed by the named defendant in favor of the plaintiff and on which the named defendant had defaulted.

[8] The plaintiff also argues that there is a credibility issue regarding statements made in Fisher's deposition. Principally, the plaintiff points to Fisher's statement that he issued a verbal warning to two of the plaintiff's coworkers, Anastasia Nisyrios and Brianne Donlon, for arriving late to work on December 24, 2014. The plaintiff argues that those verbal warnings should have been recorded in accordance with company policy but were not. As a result, the plaintiff asserts that Fisher must not have actually issued the verbal warnings, and that a jury could reasonably conclude that Fisher was "manufacturing the discipline of other employees in an attempt to conceal his discriminatory treatment of the plaintiff." The plaintiff failed to produce any evidence to support these conclusory statements. In fact, it is well settled that a "plaintiff's opinions and assertions about the motives of the defendants . . . are not sufficient to establish facts as would be admissible in evidence, as required by Practice Book § 17-46." (Internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 97 Conn. App. 527, 540, 906 A.2d 14 (2006).

After the named defendant had defaulted on the note, the plaintiff assigned all of its interest in the note to N Co. Thereafter, the plaintiff commenced this action by filing a writ of replevin in which it expressly identified itself as the party entitled to immediate possession of the collateral. Within thirty days of filing the underlying replevin action, the plaintiff filed an amended complaint, attached to which was an amended prejudgment writ of replevin purporting to substitute N Co. as the plaintiff. The defendants subsequently filed a motion to dismiss the action, which the trial court granted, concluding that because the plaintiff had assigned the note to N Co. prior to commencing the replevin action, it lacked standing to bring the action and that the court, therefore, lacked subject matter jurisdiction over the matter ab initio. The trial court also rejected the plaintiff's claims that it had successfully effectuated a substitution of N Co. as the plaintiff by filing its amended complaint, and that as the assignor of the note to N Co., it had standing to maintain the action on behalf of its assignee. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to dismiss, which was based on its claim that the court should have treated the amended complaint filed by the plaintiff as having cured any defect regarding the plaintiff's standing: the plaintiff's claim that it properly substituted N Co. as the plaintiff by operation of law by filing an amended complaint in compliance with the relevant rule of practice (§ 10-59) was unavailing, as although § 10-59 allows a plaintiff to correct technical or circumstantial defects in a pleading, or to add counts that could have been included in the original complaint, § 10-59 does not confer a right to correct a jurisdictional defect such as standing by allowing the substitution of a new party plaintiff without judicial approval; moreover, the relevant rule of practice (§ 9-20) and statute (§ 52-109) expressly vest discretion in the judicial authority, and not the parties, to permit a substitution of a plaintiff if the court determines that the action was commenced in the name of the wrong party due to mistake and that it is necessary for the determination of the real matter in dispute to allow the substitution.

2. Contrary to the plaintiff's claim, the trial court properly determined that the plaintiff was required to file a motion for permission to substitute N Co. as the party plaintiff and it did not abuse its discretion in declining to treat the plaintiff's amended complaint as such a motion: because the determination of whether to permit the substitution of a party requires an exercise of discretion and an order by the court, our rules of practice required the plaintiff to file a motion accompanied by a memorandum of law requesting that the court issue an order substituting N. Co. as the plaintiff, which the plaintiff did not do; moreover, because the plaintiff's amended complaint neither included nor was accompanied by any request for permission to substitute N Co., it was insufficient to alert the court that the plaintiff was seeking an adjudication and order on

the issue of substitution and there was no motion before the court over which it could have exercised its discretion to treat the amendment as a motion to substitute, and the trial court did not consider or make any finding as to whether the action was initiated by mistake, which was essential for it to evoke its discretionary authority to allow a substitution of N Co.

3. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to dismiss because, as the assignor of the note to N Co., it had standing to maintain the action on behalf of its assignee: the plaintiff, having assigned the note to N Co., was neither a holder of the note nor a nonholder in possession and, therefore, did not have the authority to enforce the note at the time the action was commenced pursuant to the relevant statute (§ 42a-3-301), and, to the extent that prior case law suggested that an action commenced by an assignor of a promissory note would not fail for lack of standing, this court questioned its continued viability, as it was decided prior to the enactment of § 42a-3-301, and the common law of assignments did not displace the clear provisions of § 42a-3-301 because that statute was directly applicable to the situation underlying the present case; moreover, the plaintiff's initial complaint could not reasonably be construed as an action brought by N Co. in the name of the plaintiff, which had alleged that it was the party entitled to immediate possession of the collateral, and because the complaint was otherwise devoid of any jurisdictional facts that would support a determination that the action was brought by an assignee in the name of its assignor, the plaintiff failed to meet its burden of alleging facts demonstrating that it was the proper party to invoke judicial resolution of the dispute.

Argued December 6, 2018–officially released April 2, 2019

Procedural History

Action in replevin to recover certain chattel in the defendants' possession, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher R. LaSaracina, for the appellant (plaintiff).

John J. Ribas, for the appellees (defendants).

Opinion

PRESCOTT, J. In this replevin action, the plaintiff, Ion Bank, appeals from the judgment of the trial court granting a motion to dismiss filed by the defendants, J.C.C. Custom Homes, LLC (J.C.C.), Rock On Excavation Services, LLC (Rock On), John C. Ciappetta, and Dawn E. Ciappetta. The court concluded that the plaintiff lacked standing to bring the action because, prior to commencing it, the plaintiff had assigned its interest in the underlying promissory note to Nutmeg Financial Holdings, LLC (Nutmeg), and, therefore, the court lacked subject matter jurisdiction.

The plaintiff concedes that the action was commenced in the name of the wrong party. Nevertheless, the plaintiff claims on appeal that the court improperly granted the motion to dismiss because it (1) failed to consider an amended complaint that the plaintiff filed pursuant to Practice Book § 10-59, which, the plaintiff argues, substituted Nutmeg in as the proper plaintiff by operation of law and, thus, cured any defect regarding standing, (2) concluded that the plaintiff was required to file a motion for permission to substitute in a new plaintiff and failed to treat the amended complaint as a motion to substitute, and (3) failed to conclude that Nutmeg, as the assignee of the note, is entitled to maintain an action either in its own name or in the name of its assignor, the plaintiff. We are not persuaded by the plaintiff's arguments and, accordingly, affirm the judgment of the court.

The following facts, as set forth by the trial court in its memorandum of decision or taken from the complaint and viewed in the light most favorable to the plaintiff, are relevant to our resolution of the present appeal. J.C.C., through it owners, John C. Ciappetta and Dawn E. Ciappetta, executed a commercial promissory note in favor of the plaintiff on December 29, 2010, in

the principal amount of $170,000. J.C.C. agreed to repay the loan along with interest and any applicable late charges by January 1, 2016. J.C.C. also executed a commercial security agreement in which it pledged a 2004 Ford F350 pickup truck as collateral for the loan. As additional security for the note, Rock On, a limited liability company also owned by the Ciappettas, executed commercial security agreements providing as collateral a 1981 Kenworth W900 truck, a 1989 East Dump trailer, and a 1998 Caterpillar 416 backhoe. Rock On, John C. Ciappetta, and Dawn E. Ciappetta also executed guarantees assuming liability for repayment of the note.

J.C.C. failed to make the required monthly loan payments and defaulted on the note. Despite demands by the plaintiff for repayment, the defendants did not repay the loan or make the collateral available to the plaintiff.

On June 30, 2016, the plaintiff assigned all of its interest in the note to Nutmeg.[1] Despite the assignment, the plaintiff, on July 1, 2016, initiated the underlying replevin action against the defendants by service of process.[2] In addition to a prejudgment writ of replevin

[1] On August 16, 2016, the plaintiff also assigned to Nutmeg the security agreements and guarantees. The plaintiff has not argued on appeal that the late assignment of the secondary obligations is relevant to the issue of standing and, therefore, we do not address whether the assignment of the note also effectively operated as an assignment of the secondary obligations underlying it. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 137, 192 A.3d 455, cert. granted, 330 Conn. 921, 193 A.3d 1213 (2018), and cert. granted, 330 Conn. 922, 194 A.3d 288 (2018).

[2] Replevin actions are governed by General Statutes § 52-515 et seq. General Statutes § 52-515 provides: "The action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property interest with a right to immediate possession and which are wrongfully detained from him in any manner, together with the damages for such wrongful detention." Accordingly, to prevail in a replevin action, a plaintiff must plead and establish not only that the items sought are goods or chattels wrongfully detained by the defendant, but that the plaintiff has a property interest in the items and a right to immediate possession. See *Cornelio* v. *Stamford Hospital*, 246 Conn. 45, 49, 717 A.2d 140 (1998).

expressly identifying the plaintiff as the party entitled to immediate possession of the collateral, the process included the requisite affidavit and bond. See General Statutes § 52-518. The return date on the writ was August 9, 2016.

On August 17, 2016, the plaintiff filed a pleading titled "Plaintiff's Amended Complaint," attached to which was an amended prejudgment writ of replevin substituting Nutmeg as the named plaintiff. The amended complaint stated in relevant part: "Pursuant to Practice Book §§ 9-16[3] and 10-59,[4] the plaintiff hereby amends its complaint as of right to amend, among other things, the named plaintiff. The proper plaintiff, [Nutmeg], has acquired the right to collect the debt due, as evidenced by the allonge to the promissory note as alleged in the complaint. Said note is secured by, among other things, the guarantees and security agreements as described in the complaint, and said guarantees and security agreements have been assigned to [Nutmeg] as well. Accordingly, [Nutmeg] is now the proper plaintiff and should be substituted as the sole plaintiff in this action." (Footnotes added.)

On October 14, 2016, the defendants filed a motion to dismiss the action for lack of subject matter jurisdiction. According to the defendants, because the plaintiff assigned the note to Nutmeg prior to commencing the

[3] Practice Book § 9-16 provides: "If, *pending the action*, the plaintiff assigns the cause of action, the assignee, *upon written motion*, may either be joined as a coplaintiff or be substituted as a sole plaintiff, as the judicial authority may order; provided that it shall in no manner prejudice the defense of the action as it stood before such change of parties." (Emphasis added.) Because the plaintiff assigned the note to Nutmeg prior to the commencement of the action, rather than during its pendency as contemplated by Practice Book § 9-16, this rule is inapplicable.

[4] Practice Book § 10-59 provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. . . ."

replevin action, it lacked a legal interest in the items it sought to replevy and, thus, lacked standing to commence or maintain the action. The defendants further argued that the plaintiff's attempt to substitute in Nutmeg as the real plaintiff in interest by filing an amended complaint was improper and did not "accomplish the desired substitution."[5]

The plaintiff filed an objection to the motion to dismiss. The plaintiff argued with respect to the issue of standing that (1) Nutmeg was substituted in as the real plaintiff in interest by virtue of the amended complaint it filed pursuant to Practice Book § 10-59, (2) even if it was not entitled to substitute in Nutmeg as a matter of right, the court should treat the amended complaint as a motion to substitute pursuant to General Statutes § 52-109, and (3) it was entitled to maintain the action in its own name despite the assignment of the note to Nutmeg.

The court, *Brazzel-Massaro*, *J.*, heard argument on the motion to dismiss on December 5, 2016. On March 20, 2017, the court rendered a decision granting the motion to dismiss, concluding that, because the plaintiff lacked standing at the time it commenced the replevin action, the court lacked subject matter jurisdiction over the matter ab initio. The court rejected the plaintiff's argument that, as the assignor of the note to Nutmeg, it had standing to maintain the action on behalf of its assignee. The court reasoned that, in the present case, the plaintiff "[had given] up all of its rights, title, and

[5] The defendants also argued as an additional ground for dismissal that the plaintiff already had commenced an action to foreclose a mortgage on real property securing the same debt; *Ion Bank* v. *J.C.C. Custom Homes, LLC*, Superior Court, judicial district of Waterbury, Docket No. UWY-CV-14-6025446-S (February 16, 2017); and, therefore, the present action was barred by the prior pending action doctrine. We note that a judgment of strict foreclosure and a deficiency judgment were rendered in that action in 2017. The trial court did not address this claim and the defendants have not raised it as an alternative ground for affirmance.

interest in the note to Nutmeg on June 30, 2016, and did not have standing to commence suit itself." The court further rejected the plaintiff's argument that it had effectuated a substitution of Nutmeg as the plaintiff by virtue of its amended complaint. The court held that, pursuant to § 52-109, substitution of a plaintiff could only be effectuated if the court determined pursuant to a motion for substitution that the action had been "commenced in the name of the wrong plaintiff through mistake." (Internal quotation marks omitted.) The plaintiff, however, had never filed a proper motion with the court. The plaintiff filed a timely motion to reargue the court's granting of the motion to dismiss, which the court subsequently denied. This appeal followed.

We begin with general principles of law, including our standard of review. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss. . . . The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to

dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Citations omitted; internal quotation mark omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 413–14, 35 A.3d 188 (2012). Finally, to the extent that we must engage in the interpretive construction of our rules of practice or related statutory provisions, this "involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Parnoff* v. *Yuille*, 163 Conn. App. 273, 281, 136 A.3d 48, cert. denied, 321 Conn. 902, 138 A.3d 280 (2016). With these principles in mind, we turn to the plaintiff's arguments made in support of its claim that the court improperly granted the defendants' motion to dismiss.[6]

I

The plaintiff first argues that the court improperly granted the defendants' motion to dismiss because it should have treated the amended complaint filed by the plaintiff pursuant to Practice Book § 10-59 as having cured any defect regarding the plaintiff's standing. We are not persuaded.

As previously noted, Practice Book § 10-59 provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition

[6] We address the plaintiff's arguments in the order that they were briefed in its principal brief.

and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. . . ." Practice Book § 10-59 essentially mirrors the language found in General Statutes § 52-128.[7] In seeking to determine the meaning of statutory language, we consider not only the text of the statute but its relationship to other statutes. General Statutes § 1-2z. This same principle applies to our construction of our rules of practice. See *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018).

Considered in light of the overall structure of our rules of practice, we do not construe Practice Book § 10-59 as permitting the correction of jurisdictional defects related to parties. Chapter ten of our rules is titled "Pleadings," and, accordingly, contains rules governing the amendment to the substance of pleadings in civil proceedings. By contrast, rules concerning the nonjoinder or misjoinder of parties and, in particular, the substitution of plaintiffs are found in chapter nine of our rules of practice, titled "Parties." "[I]t is a [well settled] principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *LaFrance* v. *Lodmell*, 322 Conn. 828, 835 n.3, 144 A.3d 373 (2016).

Practice Book § 9-20 specifically addresses the procedure to remedy a defect of the type present in this case: "When any action has been commenced in the name of the wrong person as plaintiff, the judicial authority

[7] General Statutes § 52-128 provides: "The plaintiff may amend any defect, mistake or informality in the writ, complaint, declaration or petition, and insert new counts in the complaint or declaration, which might have been originally inserted therein, without costs, within the first thirty days after the return day and at any time afterwards on the payment of costs at the discretion of the court; but, after any such amendment, the defendant shall have a reasonable time to answer the same."

may, if satisfied that it was so commenced through mistake and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." Practice Book § 9-20. This language is identical to that used in § 52-109, except that where the rule of practice uses the term "judicial authority," the statute uses the term "court."

Practice Book § 9-20 and § 52-109, thus, expressly vest discretion in the judicial authority, not the parties, to permit a substitution of the plaintiff. As our Supreme Court has explained: "Although a plaintiff's lack of standing is a jurisdictional defect . . . it is a type of jurisdictional defect that our legislature, through the enactment of § 52-109, has deemed amenable to correction and, therefore, not irremediably fatal to an action. . . .

"[Section] 52-109 allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as [the] plaintiff, and that such a substitution will relate back to and correct, retroactively, any defect in a prior pleading concerning the identity of the real party in interest. . . . Thus, a substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run. . . . *An addition or substitution is discretionary*, but generally should be allowed when, due to an error, misunderstanding or misconception, an action was commenced in the name of the wrong party, instead of the real party in interest, whose presence is required for a determination of the matter in dispute." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 552–53, 133 A.3d 140 (2016).[8]

[8] "[I]t is well within the authority of a court to permit a substitution of plaintiffs in lieu of dismissing an action provided that the court determines

Although the court in *Fairfield Merrittview Ltd. Partnership* held that a defect in standing potentially could be cured by the filing of an amended complaint, it did not hold that a party could cure such a standing defect on its own simply by filing an amended complaint as of right in compliance with Practice Book § 10-59. Rather, our Supreme Court, relying on the express legislative authority granted under § 52-109, concluded that an addition or substitution of a real party in interest as a plaintiff, *if allowed by the court*, would cure the original plaintiff's lack of standing. See id.

The plaintiff notes that § 52-128 and Practice Book § 10-59 authorize a plaintiff to "amend any defect, mistake or informality" in a complaint. Admittedly, read in isolation, that phrase appears broad. Neither the rule nor the statute, however, defines the term "any defect." Moreover, no court has construed Practice Book § 10-59 or § 52-128 as conferring a right to correct a *jurisdictional* defect such as standing by allowing the substitution of a new party plaintiff as a matter of right without judicial approval. Rather, the rule must be construed as a means to permit parties to correct technical or circumstantial defects in the pleading or, as expressly provided in the rule, for adding counts that could have been included in the original complaint.

For the foregoing reasons, we are unpersuaded by the plaintiff's argument that it properly substituted Nutmeg as the plaintiff by operation of law by filing, in compliance with Practice Book § 10-59, an amended

that the conditions set forth in § 52–109 have been met. . . . [I]f § 52-109 is to have the ameliorative purpose for which it was intended, then even assuming that the specter of subject matter jurisdiction rears its head, the statute is meant to give the trial courts jurisdiction for the limited purpose of determining if the action should be saved from dismissal by the substitution of plaintiffs." (Internal quotation marks omitted.) *Rana* v. *Terdjanian*, 136 Conn. App. 99, 111, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012).

complaint within thirty days of the commencement of the action.

II

The plaintiff next argues that the court improperly concluded that the plaintiff was required to file a motion for permission to substitute Nutmeg as the party plaintiff, and that, even if a motion was required, the court should have treated the amended complaint as a motion to substitute. We disagree with both contentions.

As we have already discussed in part I of this opinion, the court lacks subject matter jurisdiction over an action commenced by a plaintiff without standing. Furthermore, this type of jurisdictional defect cannot be cured simply by resorting to the procedures set forth in Practice Book § 10-59. Other than a dismissal of the action, the only remedy available if the wrong party commences an action is found in § 52-109 and Practice Book § 9-20. Those provisions reflect the discretionary authority of the trial court to substitute the real party in interest as plaintiff if the court determines that due to a mistake—meaning an error, misunderstanding, or misconception—an action was commenced in the name of the wrong party. See *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 552–53. Accordingly, because substitution requires some exercise of discretion and an order by the court, the court correctly determined that a party seeking a substitution must file a motion with the court. See Practice Book § 11-2 ("the term 'motion' means any application to the court for an order, which application is to be acted upon by the court or any judge thereof").

The plaintiff did not file a motion asking the court to issue an order substituting in Nutmeg but, instead, filed its amended complaint. The filing of an amended complaint as of right pursuant to Practice Book § 10-59 is not the equivalent of filing a proper motion. The

docketing of an amended pleading is insufficient to alert the court that a party is seeking an adjudication and order. Moreover, our rules require that a motion seeking to substitute in a new plaintiff pursuant to Practice Book § 9-20 be accompanied by a memorandum of law "outlining the claims of law and authority pertinent thereto." Practice Book § 11-10. The procedures for filing a proper motion to substitute were not followed here.

The plaintiff nevertheless contends that the court should have treat its amended complaint as a motion to substitute. In support of this argument, the plaintiff relies on our Supreme Court's decision in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 535. That reliance, however, is misplaced.

In *Fairfield Merrittview Ltd. Partnership*, our Supreme Court considered whether, in an action initially commenced by a party lacking standing due to its lack of ownership of the property at issue, the prompt filing of an amended complaint[9] that added a party with standing as an additional plaintiff would be sufficient to confer jurisdiction on the trial court. Id., 551. As we discussed previously, the court concluded that the legislature had deemed such a standing defect, if the result of mistake, amenable to correction at the discretion of the court by way of an amended complaint. Id., 552. As in the present case, the amended complaint filed in *Fairfield Merrittview Ltd. Partnership* was filed within thirty days of the return date on the original complaint. The plaintiff in that case also failed to file a motion to substitute, but there was no contemporaneous objection raised by the defendants to the substitution. Id., 546. Our Supreme Court held that, although

[9] The "complaint" in *Fairfield Merrittview Ltd. Partnership* was an administrative appeal of a municipal property tax assessment.

captioned as an amendment, the plaintiffs' filing effectively was a motion, which the trial court, in its discretion, granted. Id., 547

In reaching its decision, the court reasoned as follows: "Although the plaintiffs here *captioned the motion that accompanied their amended complaint* as a request for permission to amend, it clearly was, in its substance, a motion to add or substitute a party plaintiff. . . . Moreover, under the undisputed facts and circumstances of the present case, there is no question that the foregoing requirements for an addition or substitution were met. Because the [limited liability company (LLC)] was the sole owner of the property at issue at the relevant time, its addition as a party plaintiff undeniably was necessary for a determination of the matter in dispute, and the naming of the partnership, instead of the LLC, was due to an error, misunderstanding or misconception. The plaintiffs' counsel quickly took action to add the LLC as a party to the proceedings. The defendants have not identified any prejudice that they suffered from the action having been initiated and briefly maintained in the name of the wrong party, and we are unable to conceive of any. In sum, *the trial court properly allowed* the amendment to add the LLC, which cured any jurisdictional defect in the original complaint." (Citations omitted; emphasis added; footnote omitted.) Id., 554–55.

The outcome in *Fairfield Merrittview Ltd. Partnership* is readily distinguishable from the present case and, therefore, does not control the outcome of this appeal. First and foremost, the plaintiffs in *Fairfield Merrittview Ltd. Partnership* did not simply file an amended complaint. Rather, as indicated by our Supreme Court, their amendment was accompanied by a request asking the court for permission to amend the pleadings. In the present case, the plaintiff did not file a motion to substitute or a motion for permission to

amend; it filed a document captioned "Plaintiff's Amended Complaint." Accordingly, there was no motion before the court over which it could have exercised its discretion to treat the amendment as a motion to substitute.

Moreover, the trial court in *Fairfield Merrittview Ltd. Partnership* actually had exercised its discretion to allow a substitution, and the defendants raised no objection to the amended complaint. Id., 552. In the present case, the defendants moved to dismiss the action and objected to the substitution as invalid and inappropriate. Unlike in *Fairfield Merrittview Ltd. Partnership*, the court in the present case never considered or made a finding of whether the action was initiated by "mistake," a finding essential to evoking its discretionary authority to allow a substitution. See *Rana* v. *Terdjanian*, 136 Conn. App. 99, 112, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012). In sum, we agree with the trial court that, in order to substitute Nutmeg as the plaintiff, the defendant was required to file a motion asking the court to exercise its discretion under § 52-109, and the court did not abuse its discretion by failing to treat a portion of the amended complaint as such a motion.

III

Finally, the plaintiff, citing to our Supreme Court's decision in *Jacobson* v. *Robington*, 139 Conn. 532, 95 A.2d 66 (1953), argues that the court should have concluded that Nutmeg, as the assignee of the promissory note, was entitled to bring an action to recover the property in the name of the plaintiff as its assignor. In other words, the plaintiff argues that the court should have construed the initial complaint as an action brought by Nutmeg in the name of the plaintiff as its assignor. There are a number of flaws in the plaintiff's

argument. First, it fails to take into account the provisions of the Uniform Commercial Code (UCC), General Statutes § 42a-3-101 et seq., which was adopted by Connecticut after the decision in *Jacobson*. See General Statutes § 42a-10-101. Moreover, to credit the plaintiff's argument, we would need to interpret *Jacobson* in a manner that conflicts with more recent jurisprudence regarding standing. Although we briefly discuss these issues, it is not necessary for us to resolve them at this juncture because our review of the initial complaint, particularly the allegations made in support of standing, belies any notion that the plaintiff initiated the action in its name as the assignor of Nutmeg rather than on its own behalf.

In *Jacobson*, the defendant appealed from a judgment of foreclosure by sale rendered against him following the entry of a default for failure to appear. *Jacobson* v. *Robington*, supra, 139 Conn. 534. On appeal, the defendant claimed that the court had abused its discretion by denying a motion to set aside the default and open the judgment of foreclosure because, inter alia, he had a viable defense, namely that "the plaintiff had no standing *to maintain* the case because he was no longer the owner of the note and mortgage." (Emphasis added.) Id., 539. It is important to note that the defendant did not argue that the plaintiff lacked standing at the time he initiated the action. Nevertheless, according to facts set forth in separate portions of the opinion, the plaintiff had assigned its interests in the note and mortgage to a third party on November 24, 1950; id.; but commenced the foreclosure action on December 19, 1950. Id., 534.

Our Supreme Court rejected the defendant's claim that he had a viable standing defense to the foreclosure action, stating that "[s]ince [the third party] took by assignment, it was permissible for him to *maintain* the action in the name of his assignor." (Emphasis added.)

Id., 539. The court never acknowledged that the assignment had occurred prior to the commencement of the action or whether there was any legal significance to that fact. Instead, likely due to the procedural posture of the appeal and how the standing issue was presented to the court, the court focused only on whether the action was properly "maintained" and went to judgment in the name of the party that had assigned its interest.

Because the precise issue now before us was not considered or decided by the court in *Jacobson*, it is questionable whether *Jacobson* reasonably may be read as standing for the proposition that the plaintiff claims it does. Significantly, the limited number of appellate courts that have cited to *Jacobson* in resolving an issue of standing have done so in cases in which the plaintiff had assigned its interest in the case after the action properly was commenced. See, e.g., *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 245, 199 A.3d 57 (2018) (court had subject matter jurisdiction to adjudicate foreclosure action despite original plaintiff having transferred its interest in note to third party during pendency of action), cert. denied, 331 Conn. 903, A.3d (2019); see also *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999).

Even if *Jacobson* reasonably could be interpreted as holding that an action *commenced* by an assignor of a promissory note would not fail for lack of standing, *Jacobson* was decided prior to this state's adoption of the UCC, provisions of which undermine the continued viability of such a holding. Article 3 of the UCC governs negotiable instruments, which includes promissory notes. See General Statutes § 42a-3-102 (a). "Where the UCC expressly addresses an issue, the common law does not supplant the code." *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 553, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018). The UCC contains several provisions addressing who has standing to enforce a note. A " '[p]erson entitled to

enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d)."[10] General Statutes § 42a-3-301. Thus, "[u]nder [the applicable provisions of the UCC], only a holder of an instrument or someone who has the rights of a holder is entitled to enforce the instrument. . . . When a note is endorsed in blank, any person in possession of the note is a holder and is entitled to enforce the instrument. . . . If an endorsement makes a note payable to an identifiable person, it is a special endorsement, and only the identified person in possession of the instrument is entitled to enforce the instrument." (Citations omitted; internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Ugrin*, 150 Conn. App. 393, 401–402, 91 A.3d 924 (2014). The assignment of the note to Nutmeg included an allonge making the note payable to Nutmeg. Thus, when the action was commenced, only Nutmeg had the authority under the UCC to enforce the note. To the extent that *Jacobson* can be read to suggest something to the contrary, we question its continued viability.

Our standing jurisprudence since *Jacobson* clearly establishes that a party can only invoke the jurisdiction of the court if it had some legal interest in the subject matter of the action at the time it commenced the lawsuit. Accordingly, if we were to agree that *Jacobson* holds that a party that has assigned its interest in a note could nevertheless bring an action for enforcement of its terms or to collect property securing the note, this would turn much of our standing precedent on its head.

Ultimately, it is not necessary for us to resolve at this time whether an assignor of a note has standing

[10] Section § 42a-3-301 (iii) concerns enforcement of lost or stolen notes and other situations not applicable here.

to bring an action seeking to enforce terms of the note on behalf of its assignee because the allegations in the plaintiff's initial complaint cannot reasonably be construed as an action brought by Nutmeg in the name of the plaintiff, Ion Bank. Rather, it is quite clear that the action was brought by the plaintiff in its own name. It is axiomatic that "[i]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009). In the plaintiff's initial complaint, it alleged that it had "a right to immediate possession of the collateral." The complaint contained no allegations that the plaintiff had assigned to Nutmeg its interest in the note and in the collateral securing that note, and that the plaintiff was bringing the action, not in its own name, but on behalf of Nutmeg as Nutmeg's assignor. Because the complaint is devoid of any jurisdictional facts that would support a determination that the action was brought by an assignee in the name of its assignor, it is not necessary to resolve whether the court would have had standing if such allegation had been pleaded.

In sum, the plaintiff, which had the burden of alleging facts sufficient to establish a specific, personal and legal interest in the property it sought to replevy, could not properly do so because it had transferred all of its interest in the note to Nutmeg prior to commencing the underlying action. Its subsequent attempt to amend the complaint to remedy the jurisdictional defect without first obtaining permission of the court to substitute Nutmeg as the plaintiff was ineffective, and, accordingly, the court properly granted the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD MCKIERNAN *v.* CIVIL SERVICE COMMISSION OF THE CITY OF BRIDGEPORT ET AL.
(AC 40377)

Sheldon, Keller and Flynn, Js.

Syllabus

The plaintiff police officer brought this action against the defendants, the Civil Service Commission of the City of Bridgeport and its president and personnel director, seeking a declaratory judgment that, inter alia, he be allowed to retake the oral assessment portion of the city's 2015 detective promotional examination. Pursuant to the city's charter, the commission is responsible for formulating and administering promotional examinations for city employees to determine the relative qualifications of persons seeking promotion to any class of position and their capacity to perform the duties of the position. I Co., which specializes in the development and administration of promotional examinations for public safety agencies, was retained to develop, administer and grade the city's 2015 police detective promotional examination, and M, I Co.'s project manager, supervised the project. Seventy-one candidates participated in the oral assessment, and, upon arrival at the test center, each candidate, including the plaintiff, was given and told to read carefully a four page document that provided important orientation information and instructions concerning the oral assessment process. The oral assessment was administered in groups of seven candidates every thirty minutes. M introduced the orientation documents to the plaintiff's group in a preparation room, gave the candidates time to review them and asked the candidates if there were any questions and whether each candidate had all of the test materials. No one in the plaintiff's group reported missing any documents. Following the preparation session, the candidates were escorted by a proctor to their individual assessment rooms. As M brought in the next group of candidates to the preparation room, he was informed by K, the proctor assigned to the preparation room, that someone had left a document on the table in the room. During his oral assessment, the plaintiff complained to his proctor that he was not given all of the necessary test materials. M determined that, in fairness to everyone taking the examination, nothing could or should be done with respect to the plaintiff's complaint. Following a trial, the court rendered judgment in favor of the defendants, concluding that the plaintiff failed to sustain his burden of proving that the defendants' actions in administering the examination were arbitrary, capricious or illegal. On appeal to this court, the plaintiff claimed that the trial court erred by rendering judgment in favor of the defendants on the basis of its

finding that the challenged examination was administered in accordance with the requirements of the city charter. *Held*:

1. The trial court's finding that the test administrators provided the plaintiff with all of the necessary test materials for the oral assessment was not clearly erroneous; that court's finding that the plaintiff had received the allegedly missing test materials but that he left them on the preparation room table when he moved from the preparation room to the assessment room was supported by testimony in the record from K, who testified that immediately after the plaintiff's test group left the preparation room, she discovered a document on the preparation room table with the I Co. logo printed on its first page and that she had informed M of this soon thereafter, and from M, who confirmed in his testimony that K gave him that document when he was bringing the next group of candidates into the preparation room.

2. The trial court's finding that M's description of the procedures that he followed during the examination was corroborated by other witnesses was not clearly erroneous; the record indicated that K and the other participants from the plaintiff's test group testified regarding many of the same procedures that M had described and that were followed during the examination, and that their testimony corresponded to M's testimony, and the court's decision to credit the testimony of M and K regarding the discovery of test materials in the preparation room after the plaintiff's test group had left the room was a factual determination that it was empowered to make, which this court declined to disturb on appeal.

3. The plaintiff's claim that the trial court erred in concluding that the examination was administered in a reasonable manner even though the test administrators failed to take any steps to provide him with the allegedly missing test materials after they were informed of his complaint was unavailing; because that court reasonably found that the plaintiff was provided with all of the necessary test materials in the preparation room, M's decision not to bring the plaintiff the materials that he had left behind did not indicate that the examination was administered in an unreasonable or arbitrary manner, nor did it undermine the policy underlying the civil service legislation to eliminate partisanship and favoritism and to ensure the appointment to the position persons whose merit and fitness have been determined by proper examination, as the administrators thereby ensured that equal treatment was given to all candidates taking the examination by refusing to interrupt the plaintiff's strictly timed oral assessment or to provide him with additional time and materials that the other candidates were not granted.

4. The trial court did not err in concluding that the oral assessment portion of the examination was given in compliance with the requirements of the city charter despite the lack of a system to keep track of the test materials that were provided to the candidates, the oral assessment

having been administered in an organized manner and carefully formulated to fairly determine the capacity of each candidate.

5. The plaintiff could not prevail on his claim that the examination was unreasonable and arbitrary because it was not administered in a uniform manner, which was based on his claim that the instructions given to the candidates on a video in the assessment room were different from those set forth in the documents given to them in the preparation room; because the record was silent as to the trial court's findings with respect to the instructions given on the video in the assessment room, this court was left to speculate about whether these instructions were different from those that the candidates had previously received or that any such differences impacted the reasonableness of the examination, and, therefore, this court presumed that the trial court undertook the proper analysis of the law and the facts in arriving at its conclusion that the examination was administered in accordance with the requirements of the city charter.

Argued January 7—officially released April 2, 2019

Procedural History

Action for a declaratory judgment that, inter alia, the plaintiff be allowed to retake the oral assessment portion of a certain police detective promotional examination, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (plaintiff).

John P. Bohannon, Jr., deputy city attorney, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Edward McKiernan, appeals from the trial court's judgment, rendered after a trial to the court, denying his request for a declaratory judgment allowing him to retake the oral assessment portion of the city of Bridgeport's 2015 detective promotional examination and prohibiting the defendants[1] from

[1] The defendants in this action are the Civil Service Commission of the City of Bridgeport (commission); Leonor Guedes, the commission's president; and David Dunn, the commission's personnel director.

certifying the results of that examination or promoting candidates on the basis of those results. On appeal, the plaintiff claims that the trial court erred by rendering judgment in favor of the defendants on the basis of its finding that the challenged examination was administered in accordance with the requirements of the charter of the city of Bridgeport. We affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to our disposition of this appeal. The plaintiff has been employed as a Bridgeport police officer since May, 2000. The defendant Civil Service Commission of the City of Bridgeport (commission) is responsible for formulating and administering promotional examinations for certain employees of the city of Bridgeport. In March, 2015, the commission held a promotional examination for the position of detective, in which the plaintiff participated. The examination consisted of two parts: a written multiple choice portion and an oral assessment. The latter portion of the examination, which was administered on March 16, 2015, is the subject of this appeal.

Seventy-one candidates, including the plaintiff, participated in the oral assessment portion of the promotional examination for the position of detective on that date. The trial court found the following: "Upon arrival each candidate was given a four page document entitled 'Bridgeport Police Department–Detective Assessment Candidate Introduction/Orientation' which, in pertinent part, provided: Welcome to the Detective Assessment Process. This document will provide important information about your participation in this assessment process. Please read over this document carefully. . . . Following this orientation period, you will be taken to a preparation room. In this room, you will receive specific instructions for the various components in this assessment process, a pad of paper and a writing utensil.

. . . The assessment process consists of a series of components that will be performed in a single assessment room and video-recorded.

"[The] [f]ollowing is an overview of the components and their order: Presentation: Your primary task in the preparation room should be to review the warrant affidavit, and prepare your response to the presentation exercise. . . . Scenario-based interview: You will be presented with several distinct scenarios involving crimes and will be asked to respond to them as if you were the detective assigned to the case. The first scenario in this component will not be given to you in the preparation instructions, rather it will be read to you via the video once in the assessment room. The scenario will also be presented on a card on the desk and you will be instructed when to flip it over. Once it is read to you, you must immediately provide your response. The second and third [scenarios] in this component will be given to you in the preparation instructions. These scenarios will not be re-read to you in the assessment, the video will simply ask you to provide your response[s]. You may use your time in the preparation room to review the scenarios. . . .

"Procedural Interview: Immediately after responding to the scenario-based questions, you will respond to two (2) questions that deal with the process of interviewing and interrogating victims/suspects/witnesses. You may use your time in the preparation room to review Question 1. Question 2 will be read to you via the video once in the assessment. . . .

"Preparation: When it is your turn to start the assessment, you will be placed in a preparation room and will be provided with the presentation instructions along with the warrant affidavit; two (2) of the scenario-based interview scenarios; and one (1) of the procedural-based interview questions. You will have thirty minutes

(30:00) to read these instructions and prepare any notes. . . . Transition: After preparation, proctors will escort you promptly to the assessment room. . . .

"Assessment: You will be placed in an assessment room. There will be a proctor in this room who will start an audio/video recording that will guide you through the assessment process. The proctor will also start two video cameras that will record your performance. Once the audio/video starts, it will instruct you to respond to the following items in this order . . . . Delivery of responses to [s]cenario-based [i]nterview questions: Scenario 1: Scenario 1 WILL be read to you via the video. It will also be imprinted on a card that will be on the desk in the assessment room. You will have four minutes (4:00) to respond to this scenario. Scenario 2: Scenario 2 WILL NOT be read to you via the recording. The video will simply prompt you when to respond. You will have four minutes (4:00) to respond to this scenario. Scenario 3: Scenario 3 WILL NOT be read to you via the recording. The video will supply prompt you when to respond. You will have four minutes (4:00) to respond to this scenario.

"Delivery of responses to [p]rocedural-based [i]nterview questions: Question 1: Question 1 WILL NOT be read to you via the recording. The video will simply prompt you when to respond. You will have five minutes (5:00) to respond to this question. Question 2: Question 2 WILL be read to you via the video. It will also be printed on a card that will be on the desk in the assessment room. You will have two minutes (2:00) minutes to respond to this question. . . . Remember to read over the preparation document carefully and completely. Everything you need to know will be contained within. . . .

"When [the plaintiff] arrived at the assessment center, he was given a complete copy of these Candidate Introduction/Orientation instructions and was told to study

them carefully. [He] testified that he did so, and knew that it was imperative to be able to follow the instructions during the examination process.

"The city of Bridgeport had retained a Chicago based company, Industrial and Organizational Solutions (IO Solutions) to develop, administer and grade the 2015 Bridgeport police detective promotional examination. IO Solutions specializes in the development and administration of entry level and promotional examinations for public safety agencies. Brian Marentett, formerly IO Solutions' project manager, personally supervised the development, administration and scoring of the promotional examination. . . . Marentett holds a bachelor's degree in psychology, a master of arts degree in industrial and organizational psychology, and a Ph.D in industrial and organizational psychology. Industrial and organizational psychology is the application of psychological principles and theories in the workplace. It is the scientific method to study workplace human phenomena to assess job applicants or incumbent candidates for promotional purposes. . . .

"Marentett developed the detective's promotional exam by studying the job of police detective and identifying the critical knowledge, skills and abilities that should be assessed in the examination process. This process is known as a job analysis. He interviewed current detectives and supervisors of detectives, asked about the daily duties and the tasks performed, and what knowledge they believed was essential to the job. That information was used to compile a questionnaire which was then administered to incumbent detectives. Data and information was then collected and analyzed in order to identify what the essential knowledge, skills and abilities are for the position of detective.

"For the 2015 detective examination, all candidates were administered the exact same scenarios and questions during the oral assessment. The candidates' oral

responses to various scenario based questions were then scored in accordance with structured preestablished scoring criteria. The overall goal of the oral component was to assess the critical knowledge, skills and abilities for each candidate in the exact same way, using the exact same materials, time and assessment process. Marentett tried to ensure that each candidate was treated exactly the same way to be sure that the result of the assessment, which is the score, was going to be a valid score, and reflected the candidate's performance and nothing else.

"[T]he oral examination was administered during morning and afternoon sessions, in groups of seven candidates every thirty minutes. [The plaintiff] was one of seven candidates in the 10:30 a.m. group. Marentett introduced the orientation documents . . . to them and gave the candidates ten minutes to review the documents. Ten to eleven minutes later, Marentett returned and asked if there were any questions. . . . Marentett had personally prepared and checked all of the materials which he passed out. He asked each candidate whether they had all of the materials. He then read some instructions to them and told them to begin their preparation session, which was thirty minutes, and he told them it was timed. Thirty minutes later, Marentett went back to the preparation room, escorted them out of the room and had a proctor take them to their individual assessment room[s]. Marentett [then went] back to the sign in table to give the orientation introductions to the next group of candidates.

* * *

"As Marentett was bringing the next group of candidates to the preparation room, the plaintiff and others in his group were responding to questions in front of a video camera. When Marentett got to the preparation room, [a proctor] handed him a candidate preparation

document, and informed him that someone had left the document on the table in the preparation room. This was the only document left in the preparation room during the oral assessment process. Marentett continued his set routine for administering the oral assessment.

"Marentett did not know which candidate left the candidate preparation document in the preparation room, but was not concerned since based on his experience, some candidates prefer to take notes and deliver responses from their notes rather than take the document with them. He saw no reason to attempt to identify the person who had left the document in the preparation room or to disturb candidates who were in the process of giving video presentations. The schedule was very tight, timed down to the minute, and Marentett did not want to interfere with anyone's response time, and thereby place them at a disadvantage.

"Marentett's description of his administration of and procedures followed during the oral examination was corroborated by other witnesses, including candidates taking the examination in the plaintiff's group. No one in the plaintiff's group reported missing any documents during the preparation time.

"The video of [the] plaintiff's oral examination shows that he had no trouble following the instructions for answering the warrant affidavit presentation which appear at the top of page two of the candidate preparation document. However, during his examination the plaintiff claimed that he was never given the scenarios and procedural based questions described in the candidate preparation document. . . . [The plaintiff] complained to the proctor during the examination . . . . Marentett had made the determination that nothing could or should be done as a matter of fairness to everyone taking the examination.

"Thereafter, [the plaintiff] filed an appeal with the [commission]. There, as in the present case, [he] claimed that he received the search warrant affidavit but was never given nor received any additional test materials. The commission denied the plaintiff's appeal." (Emphasis omitted.)

The plaintiff commenced the underlying action on July 29, 2015. After a three day trial, the court found that the plaintiff failed to sustain his burden to prove that the defendants' actions were arbitrary, capricious or illegal. The court determined that "[t]he credible evidence demonstrated that the defendants administered a professionally developed job related promotional examination in a uniform manner to all candidates, in accordance with clearly delineated rules and procedures. The instructions and procedures were structured to be identical for all candidates, and Marentett was meticulous in ensuring that the oral examination was administered fairly and uniformly to all candidates. [Marentett] testified that although candidates were not specifically scored on how well they followed the instructions, the instructions contained in the documents were part of the assessment process. The credible evidence demonstrated that the plaintiff left the instructions he had been given behind when he went to the [assessment] room. If, as he claimed, he was given grossly incomplete instructions and materials in the preparation room, he failed to follow repeated instructions to so indicate, even when questioned by [Marentett]." Accordingly, the trial court rendered judgment in favor of the defendants. This appeal followed.

The plaintiff claims that the trial court erred by (1) finding that the administrators provided him with all of the necessary test materials for the oral assessment, (2) finding that Marentett's description of the procedures that he followed during the examination were corroborated by other witnesses, (3) concluding that

the test was properly administered even though neither the commission nor IO Solutions took any steps to provide him with the allegedly missing test materials when they were informed of his complaint, (4) concluding that the test was properly administered even though the commission had no procedure in place to account for the test materials in order to ensure that each candidate received them, and (5) concluding that the test was properly administered even though the assessment video gave different instructions from those given in the test materials that were distributed to the candidates in the preparation room. We disagree with the plaintiff's claims.

Before turning to the merits of this appeal, we first set forth the standard of review that governs this appeal. "[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005).

Section 207 (6) of the charter of the city of Bridgeport (charter) provides that the personnel director of the commission shall "provide for, formulate and hold competitive tests to determine the relative qualifications of persons who seek employment or promotion to any class of position and as a result thereof establish employment and reemployment lists for the various classes of positions . . . ." Section 211 (a) of the charter provides in relevant part that "[t]he personnel director shall, from time to time, as conditions warrant, hold tests for the purpose of establishing employment lists

for the various positions in the competitive division of the classified service. Such tests shall be public, competitive and open to all persons who may be lawfully appointed to any position within the class for which such examinations are held with limitations specified in the rules of the commission . . . . The personnel director shall hold promotion tests whenever there shall be an opening in a superior class to be filled. . . . All tests shall be practical, and shall consist only of subjects which will fairly determine the capacity of the persons examined to perform the duties of the position to which appointment or promotion is to be made . . . ."

"As with any issue of statutory construction, the interpretation of a charter or municipal ordinance presents a question of law, over which our review is plenary. . . . In construing a city charter, the rules of statutory construction generally apply. . . . In arriving at the intention of the framers of the charter the whole and every part of the instrument must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws.

"In addition, the present case involves the city's civil service system, and we previously have emphasized the importance of maintaining the integrity of that system. Statutory provisions regulating appointments under civil service acts are mandatory and must be complied with strictly. . . . The [civil service] law provides for a complete system of procedure designed to secure appointment to public positions of those whose merit and fitness has been determined by examination, and to eliminate as far as practicable the element of partisanship and personal favoritism in making appointments. . . . A civil service statute is mandatory as to every requirement." *Broadnax* v. *New Haven*, 270 Conn. 133, 161, 851 A.2d 1113 (2004). At trial in the present

case, the parties agreed that in order for the plaintiff to prevail he must establish that the promotional examination was created and administered unreasonably, arbitrarily, illegally or in abuse of discretion. See *Murchison* v. *Civil Service Commission*, 234 Conn. 35, 51, 660 A.2d 850 (1995).

The plaintiff first claims that the court erred in finding that the test administrators provided him with all of the necessary test materials for the oral assessment, specifically, the preparation document that contained written instructions for two scenario based questions and one procedural question. As this issue presents a question of fact, our review is limited to deciding whether the challenged finding was clearly erroneous. "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 858, 905 A.2d 70 (2006). The court found that the plaintiff received the allegedly missing test materials but that he left them on the preparation room table when he moved from the preparation room to the assessment room. This finding is supported in the record by the testimony of Marentett and Kathryn Klett, the proctor assigned to the preparation room for the day of the oral assessment. Klett testified that, immediately after the plaintiff's test group left the preparation room, she discovered a document lying on the preparation room table that had the IO Solutions logo printed on its first page and that she informed Marentett of this soon thereafter. Marentett confirmed that Klett gave him this document when he was bringing the next group of candidates into the preparation room. The court's finding that the document discovered by Klett was the allegedly missing test materials and that the plaintiff

had left those materials on the preparation room table is supported by the record and, therefore, was not clearly erroneous.

The plaintiff next claims that the court erred in finding that Marentett's description of his administration of the examination and the procedures that he followed during the examination were corroborated by other witnesses. As this is also a question of fact, our review is limited to deciding whether such finding was clearly erroneous. We conclude that it was not. The procedures that were followed during the examination were testified to at length by Marentett. Klett testified regarding many of those same procedures that she had personally observed, including that Marentett asked the participants if they had received all of the necessary test materials as described in the "introduction/orientation" document when they arrived in the preparation room. The other participants from the plaintiff's test group also testified about the procedures they followed during the oral assessment, which corresponded to Marentett's testimony. The plaintiff contends that the participants from his test group testified that no documents were left on the table at the end of the preparation session, contrary to the testimony of Marentett and Klett. This, however, does not establish that the court erred in finding that Marentett's testimony describing the procedures he followed during the examination was corroborated at trial. To the contrary, the court's decision to credit the testimony of Marentett and Klett regarding the discovery of certain test materials in the preparation room after the plaintiff's test group had left it was a factual determination it was empowered to make, which this court will not disturb on appeal.

The plaintiff next claims that the court erred in finding that the examination was administered in a reasonable manner because neither the commission nor IO Solutions took any steps to provide the plaintiff with

the allegedly missing test materials after they were informed of his complaint. We disagree. As an initial matter, this claim assumes a fact that is inconsistent with the trial court's findings. As a premise of this claim, the petitioner assumes as true his contention that he was never provided with all of the necessary test materials. As previously addressed, however, the court reasonably found that the plaintiff was provided with these materials but that he left them on the table in the preparation room. Therefore, the issue is more accurately stated as whether, having already provided the plaintiff with the necessary test materials, it was unreasonable for the test administrators to not bring those materials to him in the assessment room upon his request.

In *Mattera* v. *Civil Service Commission*, 273 Conn. 235, 237, 869 A.2d 637 (2005), our Supreme Court affirmed a civil service commission's discretionary decision to set a three year service requirement for a candidate to be eligible for promotion to a higher rank even though the city charter simply required candidates to hold the position from which they sought to be promoted for one year or more. Importantly, the court did not conclude that the commission in that case had unfettered discretion to set a minimum service requirement, rather, it concluded that the requirement it established did not result from an abuse of discretion because it was a "rational standard" and a "bona fide employment criterion . . . [that] provides both a stable work force and fiscal stability." (Internal quotation marks omitted.) Id., 238–39. "In other words, [our Supreme Court] concluded that the . . . commission had exercised its authority in that case in a manner that furthered, rather than undermined, the purposes underlying the civil service system. Specifically, in *Mattera*, [our Supreme Court] fully adopted the opinion of the trial court, which reasoned: [I]t cannot be overemphasized that proper competitive examinations are the

cornerstone upon which an effective civil service system is built. Any violation of the law enacted for preserving this system, therefore, is fatal because it weakens the system of competitive selection which is the basis of civil service legislation. . . . Strict compliance is necessarily required to uphold the sanctity of the merit system. . . . [It is] [s]trict, not technical, compliance [that] is required. . . . Only rational results are allowed. . . .

"The object of providing for civil service examinations is to secure more efficient employees, promote better government, eliminate as far as practicable the element of partisanship and personal favoritism, protect the employees and the public from the spoils system and secure the appointment to public positions of those whose merit and fitness have been determined by proper examination. . . .

"Our [Supreme Court's] holding in *Mattera* . . . underscores that the authority of appointed boards must be exercised in conformity with the policy underlying a city's civil service legislation. . . . [I]n *New Haven Firebird Society* v. *Board of Fire Commissioners*, 32 Conn. App. 585, 591–92, 630 A.2d 131, cert. denied, 228 Conn. 902, 634 A.2d 295 (1993), [this court] held that the city of New Haven did not have the authority to construe its civil service rules to allow it to designate candidates for promotion in advance of a vacancy, even though the defendant firefighters' union contended that the practice facilitated filling expected vacancies. Citing to the principles . . . later underscored in *Mattera* . . . [we] concluded that such a construction of the rules was not reasonable, noting that its conclusion is forged by the deeply rooted policies that support civil service examinations." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, supra, 275 Conn. 617–19.

The administrators' decision not to provide the plaintiff with the allegedly missing test materials once he entered the assessment room was not counter to the policy underlying the city's civil service legislation. As the court noted in its memorandum of decision, the administrators took steps to ensure that the examination was administered uniformly to all candidates so that the scores accurately reflected the candidates' capacity to perform the duties of the detective position. Because the facts, as found by the court, are that the plaintiff received all of the necessary test materials in the preparation room in order to prepare for the oral examination, Marentett's decision not to bring the plaintiff the materials that he had left behind does not indicate that the test was administered in an unreasonable or arbitrary manner, nor does it undermine the policy underlying the civil service legislation to eliminate partisanship and favoritism and to ensure the appointment to the position those whose merit and fitness have been determined by proper examination. To the contrary, the administrators thereby ensured that equal treatment was given to all candidates taking the examination by refusing to interrupt the plaintiff's strictly timed oral assessment or to provide him with additional time and materials that the other candidates were not granted. We therefore reject this claim.

The plaintiff next claims that the administrators should have employed a labeling system to keep track of the documents that were given to the participants to ensure that each participant received all of the necessary test materials and that their failure to do so resulted in an unreasonable examination. We disagree. As indicated in the court's memorandum of decision, the test was thoughtfully formulated and administered fairly and uniformly to all candidates. The benefit of hindsight may reveal ways in which the administration of the test could have been improved upon but, even so, that does

not render the test as given unreasonable, arbitrary, illegal, or an abuse of discretion. The oral assessment was administered in an organized manner and carefully formulated to fairly determine the capacity of the candidates. The trial court did not err by concluding that the oral assessment portion of the detective promotional examination was given in compliance with the requirements of the charter despite the lack of a document tracking system. We, therefore, reject this claim.

Finally, the plaintiff claims that the instructions given to the candidates on the video in the assessment room were different from those set forth in the documents given to the candidates in the preparation room and, thus, that the examination was not administered in a uniform manner, resulting in an unreasonable and arbitrary examination. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Because the record is silent as to the court's findings with respect to the instructions given on the video in the assessment room, or whether it even considered the plaintiff's argument in this regard at trial, we are left to speculate about whether these instructions were different from those that the candidates had previously received or that any such differences impacted the reasonableness of the examination. We, therefore, presume that the trial court undertook the proper analysis of the law and the facts in arriving at its conclusion that the examination was administered in accordance with the requirements of the charter.

The judgment is affirmed.

In this opinion the other judges concurred.

SAINT FRANCIS HOSPITAL AND MEDICAL CENTER *v.* EDWARD MALLEY ET AL.
(AC 40619)

Alvord, Sheldon and Eveleigh, Js.

Syllabus

The plaintiff brought this action against the defendants, T and E, to collect a debt for unpaid medical expenses incurred by E. L, an attorney, filed an appearance and answer on behalf of both defendants, although he had filed motions to withdraw his appearance on behalf of T that were denied by the court. After L informed the court that he was prepared to stipulate to a judgment on behalf of E, the court asked how it should proceed with regard to T, to which the plaintiff's counsel responded that it should render a default judgment. L said nothing in response to that request from the plaintiff's counsel, and the court thereupon rendered a default judgment against T in the same amount as the stipulated judgment against E. On T's appeal to this court, *held* that the default judgment rendered against T was improper and constituted plain error: the trial court erred when it entered a default against T because it clearly lacked a basis to do so, as the court acknowledged that although T was not present in court on the scheduled trial date, she did not have to be present because her counsel, L, was present and had appeared on her behalf, and despite L's prior attempts to withdraw his appearance on behalf of T, the court did not grant any of his motions to withdraw and, at the time of the court's entry of a default against T, T was still represented by L; moreover, the consequences of the court's error were so grievous as to be fundamentally unfair or manifestly unjust, as T was unable to challenge her liability for E's medical expenses, the erroneous entry of a default against T was the sole basis for the court's rendering of a substantial judgment against her, the entry of a default against T implicated her due process rights in that she was deprived of her opportunity to be heard on the merits of the case, and the unwarranted rendering of a default judgment against T was likely to undermine public confidence in the judiciary because the court's actions deviated from established rules and procedures and denied T's due process rights.

Argued January 8—officially released April 2, 2019

Procedural History

Action to collect a debt, brought to the Superior Court in the judicial district of New Britain, where the court, *Young, J.*, rendered judgment for the plaintiff in accordance with a stipulation of the parties as against the

named defendant; thereafter, the court rendered a default judgment against the defendant Tracy Malley, from which the defendant Tracy Malley appealed to this court. *Reversed; further proceedings.*

Michael S. Taylor, with whom was *Brendon P. Levesque*, for the appellant (defendant Tracy Malley).

Opinion

EVELEIGH, J. The defendant Tracy Malley[1] appeals from the default judgment rendered against her in favor of the plaintiff, Saint Francis Hospital and Medical Center, in this action to collect a debt for unpaid medical expenses incurred by Edward Malley. On appeal, the defendant claims that there was no basis for the entry of a default against her, and, therefore, the rendering of the default judgment was improper.[2] The plaintiff, who prevailed before the trial court, did not file a brief, therefore, this appeal was considered on the basis of the defendant's brief, argument, appendix and record only. We agree with the defendant and reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claim on appeal. In June, 2016, the plaintiff commenced the present action by serving a complaint, in which it claimed $37,913.27 for unpaid medical services it had provided to Edward Malley on five occasions between February 12, 2015, and July 15, 2015. Further, the plaintiff alleged

[1] The trial court also rendered a judgment by stipulation against Edward Malley. Edward Malley is not a party in the present appeal. All references to the defendant, therefore, are to Tracy Malley.

[2] The defendant also argues that even if the entry of default was proper, the trial court's rendering of a default judgment immediately after the entry of default was improper. Because we conclude that it was plain error for the court to enter a default against the defendant, we need not address this claim.

that, under General Statutes § 46b-37,[3] the defendant was liable for the unpaid medical services rendered to Edward Malley.

In July, 2016, Attorney Jon C. Leary filed an appearance on behalf of the defendant and Edward Malley. Leary also filed an answer on behalf of both individuals on August 26, 2016. On three occasions, however, Leary filed motions with the court for permission to withdraw his appearance on behalf of the defendant. The clerk of court rejected Leary's first two motions to withdraw, and the third motion was marked off by the court and not again considered until the scheduled trial date.

On June 14, 2017, Leary informed the court that he was prepared to stipulate to a judgment on behalf of Edward Malley, and he further indicated that he had unsuccessfully attempted to withdraw his appearance on behalf of the defendant and that he had been unable to communicate with her. The court responded: "I can't just grant you your motion to withdraw as counsel today . . . because we don't have notice of that being heard today with [the defendant]." The court went on to state: "Nevertheless, although [the defendant] has no obligation to be here, she's not here to defend herself."

Leary read into the record a stipulation for judgment against Edward Malley in the amount of $38,355.15 plus costs in the amount of $441.89. The court then asked how it should proceed with regard to the defendant, to which the plaintiff's counsel responded that it should render a default judgment. Leary said nothing in response to this request from the plaintiff's counsel. The court thereupon entered a default against the defendant and, immediately thereafter, rendered a default

[3] General Statutes § 46b-37 (b) provides in relevant part: "[I]t shall be the joint duty of each spouse to support his or her family, and both shall be liable for . . . [t]he reasonable and necessary services of a physician or dentist . . . ."

judgment against the defendant in the same amount as the stipulated judgment against Edward Malley. This appeal followed.

"We first briefly discuss our standard of review of the defendant's claim. To the extent that the defendant challenges the court's authority to enter a default, our review is plenary. . . . We also engage in plenary review with regard to the construction of any relevant statutory provisions or rules of practice. . . . Finally, provided we determine that the court had that authority to act, we review its exercise of that authority under an abuse of discretion standard." (Citations omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 655–56, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013). When, however, the court lacks authority to default a party, its entry of a default is erroneous as a matter of law and, thus, constitutes an abuse of discretion. *People's United Bank* v. *Bok*, 143 Conn. App. 263, 272–73, 70 A.3d 1074 (2013).

Because the defendant's claims were not raised below, we must at the outset also address the issue of reviewability. The defendant argues that "this court should reverse because the trial court's entry of default against [her] constitutes plain error." We agree with the defendant.

"Codified in Practice Book § 60-5, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. . . . It is a doctrine that should be invoked sparingly and only on occasions requiring the reversal of the judgment under review. . . . Success on such a claim is rare. Plain error review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

"We engage in a two step analysis in reviewing claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . . Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 131 Conn. App. 270, 273–74, 26 A.3d 704, cert. denied, 302 Conn. 948, 31 A.3d 383 (2011).

Addressing the first prong of plain error analysis, we conclude that the court erred when it entered a default against the defendant because it clearly lacked a basis to do so. "The failure to follow a procedural rule prescribing court procedures can also constitute plain error." (Internal quotation marks omitted.) *State* v. *Corona*, 69 Conn. App. 267, 274, 794 A.2d 565, cert. denied, 260 Conn. 935, 802 A.2d 88 (2002). One of the rules that governs the court's entry of a default against a party is Practice Book § 17-19, which provides in relevant part: "If a party . . . fails without proper excuse to appear in person *or* by counsel for trial, the party may be nonsuited or defaulted by the judicial authority." (Emphasis added.) "[O]ur rules of practice

do not require parties to be present for trial in civil cases, but permit them, rather, to appear through counsel . . . .'' *Housing Authority* v. *Weitz*, 163 Conn. App. 778, 782–83, 134 A.3d 749 (2016) (reversing court's entry of default against defendant on basis of defendant's failure to appear for trial when her counsel was present). In fact, in this case the court acknowledged that the defendant did not have to be present for the scheduled trial because her counsel was present, stating that ''she has no obligation to be here . . . .''

Despite Leary's attempts to withdraw his appearance for the defendant prior to the scheduled trial date, the court did not grant any of his motions to withdraw. At the time of the court's entry of a default against the defendant, therefore, Leary still represented her in this action. See Practice Book § 3-10 (e) (''[t]he attorney's appearance for the party shall be deemed to have been withdrawn upon the granting of the motion''). Leary admitted as much at the beginning of the hearing held on June 14, 2017, the scheduled trial date, when he introduced himself and stated that he was present ''on behalf of *both* defendants.'' (Emphasis added.) Because the defendant's counsel was present at that time, it was not proper for the court to enter a default against her on the basis of her failure to appear.[4]

Turning to the second prong of plain error analysis, we conclude that the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. The consequences of the error were grievous for the defendant, in that she was unable to challenge

[4] It is worth noting that a party may also be defaulted for failure to plead according the rules and orders of the court; see General Statutes § 52-121, Practice Book §§ 10-18, 17-31, and 17-32; failure to comply with discovery requests; see Practice Book § 13-14; and failure to comply with a court order; see Practice Book § 17-19. There is nothing in the record to suggest the defendant acted in a manner that justified the entry of a default against her on any of these bases.

her liability for Edward Malley's medical expenses. The court's erroneous entry of a default against the defendant was the sole basis for the court's rendering of a substantial judgment against her. Moreover, the entry of a default against the defendant implicated her due process rights, as she was thereby deprived of her opportunity to be heard on the merits of the case. See, e.g., *Perugini* v. *Giuliano*, 148 Conn. App. 861, 883–84, 89 A.3d 358 (2014) ("A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . It is a fundamental tenet of due process of law . . . that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner." [Internal quotation marks omitted.]).

As part of plain error analysis, courts assess whether the error is likely to undermine public confidence in the judiciary. See, e.g., *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 392, 168 A.3d 739 (2018). In the present case, the unwarranted entry of a default and the rendering of a default judgment against the defendant are likely to undermine public confidence in the judiciary because those actions deviated from established rules and procedures and denied the defendant's due process rights.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

GARDEN HOMES PROFIT SHARING TRUST, L.P. *v.* ROBERT CYR
(AC 41034)

Keller, Bright and Moll, Js.

Syllabus

The plaintiff owner of a mobile home community sought, by way of summary process, to regain possession of certain premises occupied by the defendant. The plaintiff's complaint alleged that the defendant resides in a mobile home owned by S, who leases a lot from the plaintiff that is located in the mobile home community, that following the defendant's failure to comply with the guidelines of the community, the plaintiff served him with notice to quit possession of the premises and that the defendant failed to do so. Following a hearing, the trial court rendered judgment in favor of the defendant on the basis of its conclusion that the plaintiff lacked statutory authority to proceed with the summary process action against the defendant in the absence of S, because, as the owner of the mobile home, she was a necessary party to the action. On the plaintiff's appeal to this court, *held*:

1. The trial court properly raised, sua sponte, the issue of nonjoinder in the absence of a motion to strike filed by the defendant; pursuant to the applicable statute (§ 52-108), the trial court has broad authority to address issues of nonjoinder that may arise in a case, including the authority to raise the issue sua sponte.
2. The trial court improperly rendered judgment in favor of the defendant on the basis of nonjoinder without giving the plaintiff an opportunity to add S as a party; that court's rendering of judgment immediately after concluding that S was a necessary party to the action effectively struck the plaintiff's complaint without affording the plaintiff notice and at least fifteen days to add S to the action pursuant to the applicable rule of practice (§ 10-44), and, as a result, the court ultimately defeated the plaintiff's summary process action on the basis of nonjoinder of a party despite being proscribed from summarily doing so by the relevant statute (§ 52-108) and rule of practice (§ 9-19).

Submitted on briefs January 4—officially released April 2, 2019

Procedural History

Summary process action brought to the Superior Court in the judicial district of Danbury, Housing Session, where the court, *Winslow*, *J.*, rendered judgment

for the defendant; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Reversed; further proceedings.*

Thomas T. Lonardo and *Colin P. Mahon* filed a brief for the appellant (plaintiff).

Opinion

KELLER, J. The plaintiff, Garden Homes Profit Sharing Trust, L.P., appeals from the trial court's judgment in favor of the defendant, Robert Cyr.[1] The plaintiff claims that the court erred by (1) concluding that the plaintiff lacked statutory authority to proceed with the summary process action against the defendant in the absence of Susan Scribner, the owner of the mobile home where the defendant resides, (2) rendering judgment in favor of the defendant after concluding that the owner of the mobile home where the defendant resides was a necessary party to the action, and (3) denying the plaintiff's Practice Book § 11-11 motion to reargue the court's initial decision to dismiss the plaintiff's action. For the reasons set forth in this opinion, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

We briefly set forth the procedural course of the case. The plaintiff commenced this summary process action against the defendant by writ of summons and complaint dated August 3, 2017. The complaint alleged that "[o]n or about August 18, 2014, the defendant . . . took occupancy of a certain mobile home located at 68 Apple Blossom Lane, Danbury, Connecticut, in the plaintiff's

[1] We note that the defendant did not participate in this appeal. This court entered an order on July 23, 2018, providing that this appeal would be considered solely on the basis of the plaintiff's brief and the record, as defined by Practice Book § 60-4, in light of the defendant's failure to comply with this court's July 6, 2018 order requiring him to file a brief on or before July 20, 2018.

mobile home community." The complaint also alleged that the defendant "took occupancy of the premises pursuant to approval from the plaintiff community owner," and that the defendant "failed to comply with the community guidelines . . . ." In particular, the complaint alleged that the defendant violated the following guideline: "Activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; and/or any activity that threatens the health or safety of any onsite property management staff responsible for managing the premises."[2] The complaint further alleged that despite the plaintiff causing "notice to be duly served on the defendant to quit occupancy of the premises on or before July 21, 2017," the defendant "still continues to occupy [the premises]." Accordingly, the plaintiff sought "[j]udgment for possession of the premises."

The defendant filed his answer to the plaintiff's complaint on August 11, 2017, in which he indicated that he either disagreed with or had no knowledge of the allegations set forth in the complaint. He did not set forth any special defenses.

After one continuance was granted, the case was scheduled for trial on October 16, 2017. That morning, the defendant filed another motion for a continuance, which was denied by the court. When the case was called, the defendant reiterated his request to continue the case. He informed the court that he was in severe pain and in need of medical treatment. The plaintiff's counsel indicated to the court that he was prepared for trial. While reconsidering the defendant's request for a continuance, the court sought to clarify the plaintiff's claim against the defendant. The plaintiff's counsel indicated to the court that the defendant is a guest of

[2] The plaintiff, however, did not allege how the defendant became subject to the mobile home community guidelines.

Scribner, the owner of a mobile home who leases a lot in the mobile home community owned by plaintiff. The plaintiff's counsel further stated that the defendant is neither a resident nor a tenant but was approved by the plaintiff to "stay with [Scribner] as a guest only." The court expressed concern that the plaintiff might have "standing issues" because the plaintiff was seeking to evict a co-occupant who neither rented directly from the plaintiff nor owned a mobile home situated in the plaintiff's mobile home park. The plaintiff's counsel indicated to the court that he had filed a brief that day addressing the court's concerns. The court then continued the matter for one week and indicated that it would consider the issue of "standing" at the next hearing.

On October 23, 2017, the parties again appeared before the court. At the outset, the plaintiff's counsel indicated to the court that he was prepared to call two witnesses to testify in the matter. The defendant, however, made an oral motion to dismiss but stated no particular ground for his motion. The court then questioned how the plaintiff could seek to evict the defendant without also naming Scribner, the mobile home owner, with whom the defendant resided. The plaintiff's counsel argued that the plaintiff was not trying to take possession of the mobile home but, rather, the land underneath the mobile home. The plaintiff's counsel indicated to the court that the plaintiff was seeking "possession of it as it pertains to [the defendant]." The court stated: "You need to bring an action against [the mobile home owner] in order to get the mobile home off the land. . . . [Y]ou've got the land. But what you want to get rid of is the mobile home that houses [the defendant]." The plaintiff's counsel responded: "No, Your Honor, we want to get rid of [the defendant]." The court indicated that the plaintiff is unable to evict the defendant without bringing an action

against Scribner. It then stated that the "[m]atter is dismissed as to [the defendant]."

After the hearing was over, the court went back on the record without notice to and in the absence of the parties. The court indicated: "I believe I misspoke a few minutes ago when I stated that I was dismissing the case. I do not think this is a matter of jurisdiction. And I want to clarify that I am granting judgment to the defendant . . . on the basis of lack of statutory authority to proceed on the summary process action.

"The plaintiff has brought the action against a man who is neither a tenant of [the plaintiff] nor [does it] own the mobile home in which [the defendant] resides. So, [it is] not the owner either.

"[The plaintiff] represent[s] that [it is] the [owner] of the land on which the mobile home sits. But in order to evict . . . an occupant of a mobile home that's not owned by [the plaintiff, it has] to evict the owner of the mobile home as well as the tenant[3] or at least bring the action against the mobile home owner plus her co-occupant in this case.

"So, [the plaintiff] . . . was not seeking possession of the mobile home. [It] represent[s] that [it was] seeking possession of the land. [It] already [has] possession of the land. And in order to evict one occupant of a mobile home that [it does not] own, [it has] to bring the action against all occupants of the mobile home, and most particularly the owner, who in this case resides with [the defendant].

"So . . . judgment for the defendant is based on lack of statutory authority. I did not wish to and did not claim that the court had no jurisdiction. It's not dismissed.

[3] We believe that the court meant "occupant." The court previously referred to the defendant as an occupant, and the record demonstrates that the plaintiff indicated that the defendant was not a tenant.

Judgment for the defendant for lack of statutory authority." (Footnote added.)

On October 29, 2017, the plaintiff filed a motion for reargument on the basis of the court's October 23, 2017 decision, in which the plaintiff indicated that "the court *sua sponte* dismissed the plaintiff's summary process for lack of jurisdiction." (Emphasis in original.) In particular, the plaintiff argued that the court's decision was in direct conflict with applicable law because (1) "[Scribner] is not an indispensable party, and (2) even if she was indispensable, failure to join her in the action does not constitute a jurisdictional defect that warrants dismissal." The defendant filed an objection to the motion on October 31, 2017.

On October 31, 2017, after the plaintiff already had filed his motion for reargument on the basis of the court's purported dismissal of the case, the court issued written notice to the parties of the corrected decision it had orally rendered in the absence of the parties on October 23, 2017. The written order stated: "The court is granting judgment in favor of the defendant on the basis of lack of statutory authority to proceed on the summary process action. The plaintiff brought this action against a defendant who is not [its] tenant, nor [is] the [plaintiff] the [owner] of the mobile home in which the defendant resides. The plaintiff represents that [it is] the [owner] of the land on which the mobile home sits. In order to evict the tenant of the mobile home, [it had] to bring the action against the mobile home owner in addition to the co-occupant. The plaintiff is seeking possession of the land, not the mobile home, and the plaintiff already has possession of the land." The court denied the plaintiff's motion for reargument on November 2, 2017. This appeal followed.

On appeal, the plaintiff claims, among other things, that the court erred by concluding that the plaintiff

lacked statutory authority to bring the summary process action against the defendant. In the plaintiff's view, the Landlord Tenant Act, General Statutes § 47a-1 et seq., enables it to evict a guest who is residing in a mobile home owned by another person on land owned by the plaintiff. It also claims that the court erroneously determined that Scribner, the mobile home owner, is a necessary party to this action and, even if the court was correct in concluding as such, it was still error for the court to render judgment in favor of the defendant for nonjoinder of Scribner without first allowing the plaintiff the opportunity to add Scribner to the action. We agree with the plaintiff that it should have been afforded the opportunity to add Scribner as a party. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

At the outset, we note that the court's October 23, 2017 order, which was provided in writing to the parties on October 31, 2017, is not a model of clarity. The court indicated that it was "granting judgment in favor of the defendant on the basis of lack of statutory authority to proceed on the summary process action." It did not, however, cite to any law, but indicated that "[t]he plaintiff brought this action against a defendant who is not [its] tenant, nor [is the plaintiff the owner] of the mobile home in which the defendant resides." It also indicated that "[i]n order to evict the tenant of the mobile home, [the plaintiff would] have to bring the action against the mobile home owner in addition to the co-occupant."

In its appellate brief, the plaintiff acknowledges some ambiguity with regard to the court's order. The plaintiff indicates that "[t]he court's ruling could reasonably be construed to mean that the plaintiff could not evict the defendant because a necessary party—Ms. Scribner—was excluded from the action. If this was the trial court's rationale, then the decision should be overturned

because Ms. Scribner is not a necessary party." It also argues that to whatever extent the mobile home owner could be considered a necessary party, the "court's entry of judgment . . . was improper . . . ." It argues that the court improperly raised sua sponte the issue of nonjoinder and, even if it could raise the issue sua sponte, rendering judgment in favor of the defendant was improper on this ground because the plaintiff should have been afforded an opportunity to cite in Scribner as a defendant.

Although the court used language that there was a "lack of statutory authority to proceed" in this case, its rationale was based exclusively on the plaintiff's failure to bring the action against both Scribner, the mobile home owner, and her guest and co-occupant, the defendant. We interpret the court's ruling as raising the issue of nonjoinder. In effect, the court struck the plaintiff's complaint as legally insufficient on the basis that Scribner was a necessary party to the action.[4] Thus, we construe the court's order as rendering judgment in

[4] "Necessary parties . . . are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Bloom* v. *Miklovich*, 111 Conn. App. 323, 334, 958 A.2d 1283 (2008).

The plaintiff alleged in its complaint that the defendant took occupancy "of a certain mobile home located" in its mobile home park after giving him approval to do so. We surmise that the plaintiff, at Scribner's request, gave Scribner permission to allow the defendant to reside with her in her mobile home, perhaps subject to any conditions of the lease between the plaintiff and Scribner. We decline, however, to address the issue of whether Scribner was in fact a necessary party to the action because, as we explain subsequently in this opinion, the court committed reversible error by failing to give the plaintiff an opportunity to amend its pleading to either cite in Scribner or to replead its complaint such that the court may no longer deem it necessary to join Scribner as a party.

favor of the defendant on the basis of the nonjoinder of Scribner. See *Avery* v. *Medina*, 174 Conn. App. 507, 517, 163 A.3d 1271 ("As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as whole." [Internal quotation marks omitted.]), cert. denied, 327 Conn. 927, 171 A.3d 61 (2017).

Although the plaintiff argues that it was improper for the court to have raised the issue of nonjoinder on its own without a motion to strike filed by the defendant, General Statutes § 52-108 gives the court broad authority to address issues of nonjoinder and misjoinder that may arise in a case, including, as the court did in the present case, the authority to raise the issue sua sponte. To be sure, § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require." Concluding that the court properly raised the issue of nonjoinder, we turn now to consider whether the court properly rendered judgment in favor of the defendant on the basis of nonjoinder without giving the plaintiff an opportunity to add Scribner as a party. The plaintiff argues that § 52-108 and Practice Book §§ 9-19 and 10-44 make clear that an action shall not be defeated by the nonjoinder of a party and that "the proper remedy would have been to cite . . . Scribner into the case or to require the plaintiff to replead and bring . . . Scribner into the action."

We begin with the standard of review. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018); see also *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

Practice Book § 9-19, which largely mirrors General Statutes § 52-108, makes clear that "[e]xcept as provided in Sections 10-44 and 11-3 *no action shall be defeated by the nonjoinder* or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the judicial authority, at any stage of the cause, as it deems the interests of justice requires." (Emphasis added.) The rules of practice also make clear that "the exclusive remedy for nonjoinder of parties is by motion to strike." Practice Book § 11-3.

With those provisions in mind, Practice Book § 10-44 further instructs that "[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . has been stricken, and the party whose pleading . . . has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint . . . ." See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017) ("[a]fter a court has granted a motion to strike, [a party] may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal" [internal quotation marks omitted]).

Thus, in the present case, after the court concluded that Scribner was a necessary party to the action,

thereby determining that the plaintiff's complaint was legally deficient due to the nonjoinder of a party, its immediate rendering of judgment in favor of the defendant effectively struck the plaintiff's complaint without affording the plaintiff notice and at least fifteen days to add Scribner to the action. See Practice Book § 10-44. By doing so, the court ultimately defeated the plaintiff's summary process action on the basis of nonjoinder of a party despite being proscribed from summarily doing so.[5] See General Statutes § 52-108; Practice Book § 9-19. Accordingly, we conclude that the trial court improperly rendered judgment in favor of the defendant.[6]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

DEBRA COHEN *v.* PATRICIA A. KING
(AC 40834)

Lavine, Keller and Beach, Js.

Syllabus

The plaintiff attorney sought to recover damages from the defendant attorney for defamation and fraud in connection with a grievance complaint the plaintiff had failed against the defendant with the Statewide Grievance Committee. Specifically, she claimed that the defendant published false

[5] Even if we were to assume that the court properly believed that it lacked statutory authority to proceed in this action because the plaintiff failed to plead an essential fact for obtaining relief under the applicable statute, our case law instructs that, if possible, the plaintiff should be given the opportunity to "amend the complaint to correct the defect . . . ." (Internal quotation marks omitted.) *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012) (explaining difference between lack of jurisdiction and lack of statutory authority). On the basis of the record before us, the plaintiff was not given the opportunity to add a party or to amend its complaint prior to the court rendering judgment in favor of the defendant, even though it is clear that the plaintiff could easily have done so.

[6] In view of our determination that the court committed reversible error by not providing the plaintiff with an opportunity to add Scribner to the case, we need not address the plaintiff's other claims because we cannot say that they are likely to occur on remand.

and defamatory statements and remarks about the plaintiff in the defendant's answer to the plaintiff's grievance complaint. The trial court granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly concluded that the litigation privilege barred the plaintiff's action sounding in defamation and fraud; that court properly concluded that the litigation privilege extends absolute immunity to statements made to the attorney disciplinary authority by an attorney who is the subject of a grievance complaint, as an attorney who is the subject of a grievance proceeding is a party to a quasi-judicial proceeding, and, therefore, relevant statements made by the attorney are shielded by the litigation privilege, and the plaintiff could not prevail in her claim that the litigation privilege did not properly apply because her complaint pleads facts suggesting that the defendant both abused the judicial process and breached the professional duty of candor, as our Supreme Court has refused to apply absolute immunity to causes of action alleging the improper use of the judicial system, which is disctict from attempting to impose liability on a participant in a judicial proceeding for the words used therein, and this court has determined prevously that statements made in a grievance proceeding are shielded by absolute immunity, and that the act of filing a grievance is protected as well.

Argued November 27, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for defamation and fraud, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wahla*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Debra Cohen, self-represented, the appellant (plaintiff).

Philip Miller, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, Debra Cohen, appeals from the judgment of the trial court granting a motion to dismiss filed by the defendant,

Patricia A. King. On appeal, the plaintiff claims that the trial court erred in concluding that the doctrine of litigation privilege barred her action sounding in defamation and fraud. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our decision. The defendant was the chief disciplinary counsel for the Office of Chief Disciplinary Counsel. The plaintiff was terminated from her position as a staff attorney for the Office of the Probate Court Administrator following a disciplinary proceeding conducted pursuant to the Connecticut Judicial Branch Administrative Policies and Procedures Manual Policy 612, titled "Corrective Discipline." While the proceeding was pending, the Probate Court Administrator notified the defendant of the matter.

The defendant then assigned an assistant chief disciplinary counsel to investigate the matter. Thereafter, the defendant initiated grievance proceedings against the plaintiff. A reviewing committee issued a reprimand to the plaintiff. The Statewide Grievance Committee (committee) and the Superior Court affirmed the reprimand.[1]

During the pendency of the grievance proceeding, the plaintiff filed her own grievance complaint against the defendant. The plaintiff alleged that the defendant's decision to file a grievance "violated several sections of the Practice Book, the duties and responsibilities of her office, and the public's trust . . . ." In response, the defendant contended that the plaintiff's grievance complaint was without merit. The grievance panel found no probable cause and dismissed the complaint against the defendant.

[1] The plaintiff has appealed from the judgment of the Superior Court affirming the reprimand in a separate appeal, which is pending before this court.

The plaintiff then instituted the present civil action against the defendant. The plaintiff claimed that the defendant "published false and defamatory statements and remarks about the plaintiff in her (defendant's) answer to [the plaintiff's] Grievance Complaint [against the defendant] . . . ."[2] The defendant moved to dismiss the action on the ground of litigation privilege. The court concluded that the litigation privilege barred the action and granted the motion to dismiss. This appeal followed.

The issue presented is whether the court erred in concluding that the litigation privilege extends absolute immunity to statements made to the attorney disciplinary authority by an attorney who is the subject of a grievance complaint. In deciding a motion to dismiss, a "court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader . . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010). "Additionally, whether attorneys are protected by absolute immunity for their conduct during judicial proceedings is a question of law over which our review is plenary." *Simms* v. *Seaman*, 308 Conn. 523, 530, 69 A.3d 880 (2013).

Connecticut has long recognized the litigation privilege. See id., 535–39. "[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings

[2] Specifically, the plaintiff alleged that the defendant falsely and maliciously stated: "(a) That the plaintiff had engaged in serious misconduct concerning two estate matters, paying herself improper fiduciary fees; and (b) That the plaintiff was engaged in an unauthorized side business while serving as a court official and attorney."

is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, [litigation privilege] furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of litigation privilege] was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized [litigation privilege] as a defense in certain retaliatory civil actions . . . .'' (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 627–28, 79 A.3d 60 (2013).

''The rationale underlying [litigation] privilege is grounded upon the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits. . . . Therefore, in determining whether a statement is made in the course of a judicial proceeding, it is important to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of [litigation privilege] provides. . . . In making that determination, the court must decide as a matter of law whether the allegedly defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding. The test for relevancy is generous and judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials.'' (Citations omitted; internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 839, 925 A.2d 1030 (2007).

"The judicial proceeding to which [absolute] immunity attaches has not been defined very exactly. It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes for example, lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) *Kelley* v. *Bonney*, 221 Conn. 549, 566, 571, 606 A.2d 693 (1992).

In a grievance proceeding, the committee performs a number of judicial functions, such as assigning the case to a reviewing committee, compelling testimony and the production of evidence via subpoena power, holding hearings at which both parties have the right to be heard, and, ultimately, recommending dismissal of the complaint or the imposition of sanctions. *Field* v. *Kearns*, 43 Conn. App. 265, 272–73, 682 A.2d 148, cert. denied, 239 Conn. 942, 684 A.2d 711 (1996), overruled in part on other grounds by *Rioux* v. *Barry*, 283 Conn. 938, 927 A.2d 304 (2007) (overruling grant of absolute privilege in vexatious litigation claim). Accordingly, a grievance proceeding is quasi-judicial in nature. Id., 273. This proposition is not in dispute.

The plaintiff, however, contends that the litigation privilege does not extend absolute immunity to statements made to a disciplinary authority by an attorney who is the subject of the grievance complaint or disciplinary investigation. The plaintiff argues that our conclusion in *Field* v. *Kearns*, supra, 43 Conn. App. 265, that "bar grievants are absolutely immune from liability for the content of any relevant statements made during a bar grievance proceeding"; Id., 273; does not apply

to attorneys who are the subjects of grievance proceedings, and that the privilege should not be so extended.[3] We disagree.

Field contains no language limiting the parties or participants who are protected by the litigation privilege in grievance proceedings. Moreover, this court stated that "parties to or witnesses before judicial or quasi-judicial proceedings are entitled to absolute immunity for the content of statements made therein." Id., 271, citing *Petyan* v. *Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986); see also *Hopkins* v. *O'Connor*, supra, 282 Conn. 839; *Kelley* v. *Bonney*, supra, 221 Conn. 573–74. An attorney who is the subject of a grievance proceeding is a party to a quasi-judicial proceeding, and, therefore, relevant statements made by the attorney are shielded by the litigation privilege. Accordingly, we conclude that absolute immunity applied to relevant statements the defendant made in response to the plaintiff's grievance complaint.

The plaintiff also argues that the litigation privilege did not properly apply because her complaint pleads

[3] In *Field*, the plaintiff was an attorney who was sued for malpractice by a client whom he previously had represented in a foreclosure action. *Field* v. *Kearns*, supra, 43 Conn. App. 267. The defendant, the attorney who handled the client's malpractice case, requested in writing that the plaintiff notify his professional malpractice insurance carrier of the lawsuit. Id. After the plaintiff declined to do so, the defendant filed a complaint against the plaintiff with the statewide grievance committee, alleging that the plaintiff obstructed judicial process by failing to appear in the lawsuit and by failing to confirm that his malpractice carrier had been notified of the claim. Id. Thereafter, the plaintiff provided a panel of the committee with a copy of the declarations page of his professional liability policy, and the defendant then sent a copy of a new complaint to the insurance carrier. Id., 267–68.

The plaintiff then brought a seven count complaint against the defendant concerning the defendant's conduct in both the malpractice action and the grievance complaint. Id., 268. The trial court granted the defendant's motion for summary judgment concluding, in relevant part, that the litigation privilege barred a number of the plaintiff's claims. Id., 269. On appeal, this court affirmed the trial court's judgment, concluding that the grievance proceeding was quasi-judicial and that absolute immunity applied to statements made therein. Id., 273.

facts suggesting that the defendant both abused the judicial process and breached the professional duty of candor. We disagree.

Our Supreme Court has "recognized a distinction between attempting to impose liability upon a participant in a judicial proceeding for the words used therein and attempting to impose liability upon a litigant for his improper use of the judicial system itself . . . . In this regard, we have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system." (Citation omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 629; see also id. at 625–26 (litigation privilege did not shield claim by employee against employer alleging that employer had brought action against employee solely in retaliation for employee exercising his rights under Workers' Compensation Act).

We note that *Field* held not only that statements made in a grievance proceeding were shielded by absolute immunity, but also that the act of filing a grievance was protected. *Field* v. *Kearns*, supra, 43 Conn. App. 273. In *Tyler* v. *Tatoian*, 164 Conn. App. 82, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016), this court held that the litigation privilege barred the plaintiff's claim against an attorney who allegedly made fraudulent statements during the course of a judicial proceeding.[4] Id., 92. This court concluded that "fraudulent conduct by attorneys, while strongly discouraged,

[4] In *Tyler*, the plaintiffs were brothers who were named beneficiaries of their mother's trust. *Tyler* v. *Tatoian*, supra, 164 Conn. App. 83–84. The defendant, an attorney, was the trustee. Id., 84. The plaintiffs brought an action against the defendant, alleging, inter alia, that the defendant mismanaged the trust by failing to diversify the trust's assets. Id. At his deposition, the defendant testified that he had relied on the advice of an investment advisor in deciding not to diversify trust assets. Id., 84–85. The plaintiffs requested that the defendant seek to recover damages from the advisor, but the defendant declined to do so, and the court denied the plaintiffs' motion to compel the defendant to seek recovery from the advisor. Id., 85. At trial, the defendant testified that he did not rely on advice from the investment advisor. Id., 85–86. The jury returned a verdict for the defendant. Id., 86.

(1) does not subvert the underlying *purpose* of a judicial proceeding, as does conduct constituting abuse of process and vexatious litigation, for which the privilege may not be invoked, (2) is similar in essential respects to defamatory statements, which are protected by the privilege, (3) may be adequately addressed by other available remedies, and (4) has been protected by the litigation privilege in federal courts, including the United States Supreme Court and the Second Circuit Court of Appeals, for exactly the same reasons that defamatory statements are protected." (Emphasis in original; internal quotation marks omitted.) Id., 91–92. Our conclusions in *Tyler* and in *Field* dispose of the plaintiff's claims.

The judgment is affirmed.

SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION ET AL.
(AC 40956)

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

Syllabus

The plaintiff administratrix of the estate of the decedent, B, sought to recover damages from the state defendants, the Department of Correction and its inmate health care provider, for the wrongful death of B. On July 16, 2015, the Claims Commissioner had waived the state's sovereign immunity and authorized B to bring a medical malpractice action against

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The plaintiffs then commenced a second action, in which they alleged, inter alia, that the defendant committed fraud when he offered contradictory testimony at his deposition and at trial. Id., 86. The defendant moved to dismiss the plaintiff's complaint, claiming that his communications were made during the course of judicial proceedings and were thus protected by the litigation privilege. Id. The court granted the defendant's motion. Id. On appeal, the plaintiffs claimed that the litigation privilege should not bar their complaint because the defendant's alleged fraud constituted improper use of the judicial system. Id., 87. This court disagreed and affirmed the judgment of the trial court. Id., 94.

the state defendants, but B died on September 26, 2015, without having done so. On September 29, 2016, the plaintiff commenced this wrongful death action on behalf of B's estate. Thereafter, the state defendants filed a motion to dismiss the action, claiming that it was time barred pursuant to the statute (§ 4-160 [d]) that requires a plaintiff who has been granted authorization to sue the state by the Claims Commissioner to bring an action within one year from the date that the authorization was granted, and, therefore, that they were entitled to dismissal of the action for lack of subject matter jurisdiction under the doctrine of sovereign immunity. The trial court granted the state defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly granted the state defendants' motion to dismiss, which was based on her claim that the applicable statute of limitations set forth in the wrongful death statute (§ 52-555), which permits a wrongful death action to be brought within two years from the date of the decedent's death, had not expired and is not limited by § 4-160 (d), and, therefore, her action was not untimely: to bring a timely action against the state defendants, the plaintiff had to comply with both the one year limitation period provided in § 4-160 (d) and the statute of limitations for her wrongful death action set forth in § 52-555, and because her action was not commenced within one year from the date that the Claims Commissioner granted authorization to sue, that authorization had expired, and, therefore, the plaintiff's action was barred by the state's sovereign immunity and the trial court properly dismissed it for lack of subject matter jurisdiction; moreover, the plaintiff's reliance on certain case law in support of her claim was unavailing, as those cases were either misinterpreted by the plaintiff or inapposite.
2. The plaintiff could not prevail on her claim that her action was timely because the one year limitation period prescribed in § 4-160 (d) was extended by statute (§ 52-594); even if § 52-594 were applicable and the plaintiff's contention that it prevents the expiration of the commissioner's waiver of sovereign immunity for one year following the death of a successful claimant to allow a representative of the claimant's estate an opportunity to file an action were correct, the plaintiff's action was still untimely, as it was not commenced within one year of the date B's death.

Argued December 11, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Hartford, where the

court, *Elgo*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*.

Juri E. Taalman, with whom, on the brief, was *David W. Bush*, for the appellant (plaintiff).

James M. Belforti, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellees (defendants).

Opinion

PRESCOTT, J. The plaintiff, Sandra Harvey, administratrix of the estate of Isaiah Boucher, appeals from the judgment of the trial court dismissing the wrongful death action filed against the defendants, the Department of Correction and the University of Connecticut Health Center Correctional Managed Health Care, to which we collectively refer in this opinion as the state. On July 16, 2015, the Claims Commissioner (claims commissioner) authorized Boucher to bring a medical malpractice action against the state. Boucher, however, died during September, 2015, without having filed an action, and the plaintiff did not commence the underlying action on behalf of Boucher's estate until more than one year later. The state filed a motion to dismiss the action because it was untimely pursuant to General Statutes § 4-160 (d),[1] which requires a party who is granted authorization by the claims commissioner to sue the state to do so within one year from the date

[1] General Statutes § 4-160 provides in relevant part: "(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . .

"(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of limitation applicable to such action shall be tolled until the date such authorization to sue is granted. . . ."

such authorization is granted. The plaintiff claims on appeal that the court improperly granted the state's motion to dismiss because the statute of limitations set forth in General Statutes § 52-555 (a), which permits a wrongful death action to be brought within two years from the date of the decedent's death,[2] had not expired and is not limited by § 4-160 (d). Alternatively, the plaintiff claims that the one year limitation period prescribed in § 4-160 (d) was extended in this case by operation of General Statutes § 52-594, and, therefore, her action was timely. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth by the court in its memorandum of decision or as taken from the complaint and viewed in a light most favorable to the plaintiff, are relevant to our consideration of the present appeal. Boucher became ill and eventually was diagnosed with oropharyngeal cancer while incarcerated and in the care and custody of the Department of Correction. In June, 2013, he underwent "a biopsy and surgery for a tracheotomy with a trachlaryngoscopy . . . ." In June, 2015, he filed a notice of claim with the claims commissioner, seeking permission to file a medical malpractice action against the state.[3] On July 16, 2015, the claims commissioner rendered a decision authorizing Boucher to sue the state. In his finding and

[2] General Statutes § 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[3] In essence, Boucher claimed that despite making repeated requests for medical treatment over the course of nearly two years, the state failed to properly evaluate his medical condition or to provide the necessary diagnostic tests to discover his cancer in a timely manner.

order, the claims commissioner indicated that "[the] grant of permission to sue is limited to that portion of the claim alleging malpractice against the state, a state hospital or a sanitarium or against a physician, surgeon, dentist, podiatrist, chiropractor, or all other licensed health care providers employed by the state." (Internal quotation marks omitted.)

Boucher died on September 26, 2015, as a result of the progression of his cancer. On March 23, 2016, the plaintiff was appointed as the administratrix of Boucher's estate. In that capacity, on September 29, 2016, the plaintiff commenced the underlying action against the state.

The state filed a motion to dismiss the action on November 1, 2016. The state asserted in its motion that, pursuant to § 4-160 (d), the plaintiff's claims were time barred and should be dismissed. Specifically, the state argued that § 4-160 (d) requires a plaintiff who has obtained authorization to sue the state from the claims commissioner to bring an action within one year from the date that the commissioner grants authorization. Here, the plaintiff filed the action seventy-three days beyond that one year limitation period, and, thus, the state claimed that the action was untimely and barred by sovereign immunity.

The plaintiff filed an objection and a memorandum of law in opposition to the motion to dismiss. According to the plaintiff, because § 52-555 creates a statutory cause of action for wrongful death that did not exist at common law, that statute must be strictly construed, and the two year statute of limitations embodied in the statute cannot be extended, modified or enlarged in scope.[4] In other words, the plaintiff argues that despite the clear and unambiguous language of § 4-160 (d) requiring an action to be brought within one year of

[4] See footnote 2 of this opinion.

obtaining authorization from the claims commissioner, she had "within two years from the date of death" of Boucher to commence a wrongful death action, and, therefore, her action was timely despite any noncompliance with § 4-160 (d). According to the plaintiff, the one year statutory period for filing a claim against the state is inoperative under the present circumstances and cannot be construed properly to reduce the time period for filing her wrongful death action.

The trial court, *Elgo*, *J.*, agreed with the state's position and granted the motion to dismiss in a memorandum of decision filed on June 21, 2017. The court noted that any waiver of the state's sovereign immunity must be narrowly construed, and, thus, any statutory limitation period placed on bringing an action against the state must also be strictly applied. The court concluded that "the plaintiff, in attempting to bring a statutory cause of action against the state, must comply with two time limitations: (1) the one year limitation to bring suit after authorization is given to sue; and (2) the original statute of limitations on the underlying cause of action. Failure to comply with either deprives the court of subject matter jurisdiction and is grounds for dismissal. . . . Given that the plaintiff's authorization to sue ended on July 16, 2016, and the plaintiff commenced this action after that date, this court lacks subject matter jurisdiction."[5]

The plaintiff filed a motion for reconsideration and reargument on July 10, 2017. In that motion, the plaintiff argued for the first time that the one year limitation

[5] In a footnote, the trial court mentioned, among other things, that the plaintiff's action arguably might be subject to dismissal due to the fact that the claims commissioner had authorized Boucher to file a medical malpractice action against the state whereas the plaintiff's action sounded in wrongful death. Because the court did not grant the motion to dismiss on the basis of any of the issues raised in its footnote, however, we do not reach those issues on appeal.

period of § 4-160 (d) was extended by operation of § 52-594, which provides in relevant part that "[i]f the time limited for the commencement of any personal action, which by law survives to the representative of a deceased person, has not elapsed at the time of the person's death, one year from the date of death shall be allowed to his executor or administrator to institute an action therefor. . . ." According to the plaintiff, at the time Boucher died on September 26, 2015, his authorization to bring an action against the state had not expired and, therefore, under § 52-594, the plaintiff should have had until September 26, 2016, to bring an action. The state filed a memorandum in opposition to the plaintiff's motion, and the plaintiff filed a reply to the opposition. The court denied the plaintiff's motion for reconsideration and reargument without a hearing and without comment on September 28, 2017. This appeal followed.

We begin with our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo. . . . [T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346–47, 977 A.2d 636 (2009).

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In

this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) Id., 347.

I

The plaintiff first claims that the court improperly granted the state's motion to dismiss on the ground that she failed to comply with the one year limitation period set forth in § 4-160 (d) because the applicable statute of limitations for a wrongful death action is the two year period set forth in § 52-555 and that limitation period cannot be limited by operation of § 4-160 (d). The state responds that the plaintiff's claim lacks merit because it ignores the plain language of § 4-160 (d), which imposes a time limit on the claims commissioner's waiver of sovereign immunity, and is premised on a misreading of case law. We agree with the state.

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 258, 932 A.2d 1053 (2007). "Exceptions to this doctrine are few and narrowly construed under our jurisprudence." Id. "[B]ecause the state has permitted itself to be sued in certain circumstances, [our Supreme Court] has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . [T]he state's sovereign right not to be sued without its consent is not to be diminished by statute, unless a

clear intention to that effect on the part of the legislature is disclosed." (Citations omitted; internal quotation marks omitted.) *White* v. *Burns*, 213 Conn. 307, 312–13, 567 A.2d 1195 (1990). "Among the statutes in derogation of sovereignty and subject to the rule requiring strict construction in favor of the state are those allowing suits against the state or its representative, creating a claim against the state or waiving immunity from liability." *Berger*, *Lehman Associates*, *Inc.* v. *State*, 178 Conn. 352, 356, 422 A.2d 268 (1979).

"In the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so. [A] plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner [in accordance with § 4-160 (a)]. . . . When sovereign immunity has not [otherwise] been waived, the claims commissioner is authorized by [§ 4-160] to hear monetary claims against the state . . . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as [the commissioner] may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the [claims] commissioner or other statutory provisions." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services*, *Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 351–52. Because § 4-160 authorizes the claims commissioner to waive sovereign immunity and grant permission to sue the state, the statute is in derogation of common-law sovereign immunity and, therefore, must be strictly and narrowly construed.

Section 4-160 contains limits on when and how an action may be brought if authorization to sue is given by the claims commissioner. Specifically, subsection

(d) provides in relevant part: "No such action shall be brought but within one year from the date such authorization to sue is granted. . . ." General Statutes § 4-160 (d). "[When] . . . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . In such cases, the time limitation is not to be treated as an ordinary statute of limitation[s] . . . but rather is a limitation on the liability itself, and not of the remedy alone. . . . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised [by the court] at any time . . . and may not be waived." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 444, 54 A.3d 1005 (2012). Accordingly, § 4-160 (d) is not an ordinary statute of limitations but, rather, constitutes a strict time limit on the waiver of the state's sovereign immunity granted by the claims commissioner. It follows that, once that time period expires, any action brought against the state would be subject to dismissal for lack of jurisdiction under the doctrine of sovereign immunity in the same manner as if the plaintiff never had been given authorization to sue.

In the present case, the claims commissioner granted Boucher a waiver of the state's sovereign immunity on July 16, 2015, authorizing him to file an action against the state for medical malpractice. That waiver was limited by § 4-160 (d) to a period of one year, which expired, at the latest, on July 17, 2016. Thus, the limited waiver of sovereign immunity had expired by the time the plaintiff commenced the present action on September 29, 2016. Without a valid waiver, the state was entitled to dismissal of the action on the ground of sovereign immunity.

The plaintiff nevertheless advances the novel theory that the two year statute of limitations found in the wrongful death statute somehow superseded or rendered inoperative the one year limitation placed on the claim commissioner's waiver of sovereign immunity by § 4-160 (d). The plaintiff has not directed our attention to any language in either statute that would support the construction she suggests. The legislature, in enacting § 4-160 (d), could have provided: *Except as otherwise provided in § 52-555*, no such action shall be brought but within one year from the date such authorization to sue is granted. It has not done so, and we cannot rewrite the statute. "It is well established that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them." (Internal quotation marks omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 516, 196 A.3d 315 (2018). We agree with the trial court that the plaintiff had the duty to comply with both the statute of limitations set forth in § 52-555 and the one year limitation on the waiver of sovereign immunity provided in § 4-160 (d).

To the extent that the plaintiff suggests that her claim finds support in the decision rendered in *Lagassey* v. *State*, 50 Conn. Supp. 130, 913 A.2d 1153 (2005), which was affirmed and adopted as a proper statement of the law by our Supreme Court in *Lagassey* v. *State*, 281 Conn. 1, 5, 914 A.2d 509 (2007), we disagree with the plaintiff's interpretation of that decision.

In *Lagassey*, the plaintiff, an executrix of an estate, brought a wrongful death action against the state claiming that it had failed to diagnose and treat her decedent's leaking abdominal aortic aneurysm, thereby causing his death on October 8, 1992. Id., 2–3. The plaintiff filed a notice of claim with the claims commissioner on September 19, 1994, nineteen days before the expiration

of the two year wrongful death statute of limitations in § 52-555. Id., 4. She received permission to sue the state on August 23, 2000, but did not commence an action until April 20, 2001. Id., 3. The state subsequently moved for summary judgment, contending that the action was time barred because the plaintiff failed to commence it within the nineteen days remaining in the applicable two year limitation period following the August 23, 2000 decision by the claims commissioner. Id., 3–4. The plaintiff argued that the tolling provision of § 4-160 (d) not only tolled any operative statute of limitations until after authorization to sue was granted but also provided the claimant with an additional one year to bring an action against the state. Id., 4–5. The trial court agreed with the state's construction of § 4-160 (d) and granted its motion for summary judgment, concluding that the plaintiff's action was time barred because the tolling provision of § 4-160 (d) only suspended the running of the applicable statute of limitations. Id., 4. The court rejected the plaintiff's argument that a new limitation period began to run after authorization to sue was granted. Id.

The plaintiff wholly misinterprets the holding in *Lagassey*. The plaintiff notes that the court in *Lagassey* held that the executrix was required to comply with the two year wrongful death statute of limitations, and that the claim commissioner's authorization to file an action against the state did not affect the running of that statute. Although that is true, nothing in the decision suggests that, in a case in which the statute of limitations for a particular cause of action had not yet run, and more than one year remained before it expired, a plaintiff could ignore the one year limit on the waiver of sovereign immunity contained in § 4-160 (d). Rather, a logical reading of *Lagassey* is that a plaintiff who seeks to bring an action against the state following the

granting of permission to sue by the claims commissioner should comply not only with the one year waiver period but also with the statute of limitations for the substantive cause of action because failure to comply with either would render the action time barred.

Section 52-555 authorizes an executor or administrator of an estate to bring an action to recover damages on behalf of the estate against a party legally at fault for injuries resulting in the death of the decedent "provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of." As the plaintiff correctly notes, § 52-555, the wrongful death statute, creates a statutory cause of action that did not exist at common law in Connecticut and, therefore, "must be strictly construed and cannot be *extended or enlarged* by judicial construction." (Emphasis added.) *Ecker* v. *West Hartford*, 205 Conn. 219, 226, 530 A.2d 1056 (1987). Furthermore, "the time limitation contained therein is a limitation upon the right itself, and as such, is jurisdictional in nature and cannot be waived." Id.

The plaintiff's reliance on *Ecker* is inapposite. *Ecker* simply involved a claim by the plaintiff in that case that the defendant had waived the limitation period in § 52-555 by failing to assert it in a timely manner. The question on appeal was whether the limitation period in § 52-555 is jurisdictional in nature and thus could be asserted at any time and could not be waived by the parties. *Ecker* did not involve the question of whether § 52-555 expanded the court's jurisdiction to hear cases that were untimely under other statutes. A conclusion in this case that the plaintiff's action is untimely pursuant to § 4-160 (d) does not in any way extend or enlarge the limitation period in § 52-555.

As the state correctly notes in its appellate brief, statutes of limitation generally are wielded by defendants as shields; their purpose is not to provide additional substantive rights to plaintiffs. "The purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence. . . . These statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 322–23, 94 A.3d 553 (2014). The plaintiff has not cited a single case that supports her theory that she was not required to comply with § 4-160 (d) because the limitation period under § 52-555 continued to run.

Section 4-160 (d) serves a different purpose than an ordinary statute of limitations, and a plaintiff who seeks to bring an action against the state must, as the trial court correctly concluded, comply with both § 4-160 (d) and the underlying, applicable statute of limitations in order to timely bring an action against the state. Consequently, because the plaintiff's action was not commenced within one year from the time the claims commissioner granted authorization to sue, that authorization expired. Accordingly, the plaintiff's action was barred by sovereign immunity, and the court properly dismissed it for lack of subject matter jurisdiction.

II

We briefly turn to the plaintiff's remaining claim, namely, that even if the one year period for filing her action as set forth in § 4-160 (d) was applicable, it, nevertheless, was extended by operation of § 52-594,

which provides: "If the time limited for the commencement of any personal action, which by law survives to the representatives of a deceased person, has not elapsed at the time of the person's death, one year from the date of death shall be allowed to his executor or administrator to institute an action therefor. *In computing the times limited in this chapter*, one year shall be excluded from the computation in actions covered by the provisions of this section." (Emphasis added.)[6] The state argues that § 52-594 is, by its express terms, inapplicable because (1) it only applies to statutes of limitation contained in chapter 926 of the General Statutes, but § 4-160 (d) is found in chapter 53 and (2) it is not a statute of limitations but a limitation on the waiver of sovereign immunity. The state further argues that even if § 52-594 applied, the plaintiff's action was still untimely. We agree with the state that because the plaintiff's action was not commenced within one year of the date of Boucher's death, it is unnecessary for

[6] We note that the plaintiff did not raise her claim concerning the applicability of § 52-594 in her opposition to the motion to dismiss or at oral argument on the motion to dismiss. Rather, the issue was raised for the first time in the plaintiff's motion for reconsideration and reargument, which was rejected by the court without comment. In her motion, the plaintiff argued that Boucher died on September 26, 2015, and, "[t]herefore, his administrator had until September 26, 2016, within which to bring suit pursuant to [§] 52-594." On appeal, the plaintiff attempts to change her claim, suggesting that because at the time of his death Boucher had nine months remaining before the expiration of his authorization from the claims commissioner, the plaintiff had one year from the date of death "plus the unexpired nine months, or until July 16, 2017, to bring suit." As we have consistently stated, however, "[t]he theory upon which a case is tried in the trial court cannot be changed on review. . . . Moreover, an appellate court should not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at trial." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013); see also *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 425, 944 A.2d 925 (2008) (legal theory raised for first time on appeal unreviewable). Accordingly, we limit our review to the claim as it was framed and presented to the trial court, namely, that the plaintiff had one year from the date of Boucher's death to file an action.

us to decide the applicability of § 52-594, because its application would not have saved the plaintiff's action from dismissal.

Boucher died on September 26, 2015. If the plaintiff's theory that § 52-594 prevents the expiration of the claims commissioner's waiver of sovereign immunity for one year following the death of a successful claimant to allow a representative of the claimant's estate an opportunity to file an action were correct, the plaintiff would have had until September 26, 2016, in which to file a timely action. "[U]nder the law of our state, an action is commenced not when the writ is returned but when it is served upon the defendant." (Internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Here, the marshal's return indicates that service on the state was not made until September 29, 2016. Accordingly, even if § 52-594 were applicable, the plaintiff's action was still untimely and, thus, subject to dismissal on the basis of sovereign immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL HOLBROOK *v.* COMMISSIONER OF CORRECTION (AC 41165)

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

Syllabus

The petitioner, who had been convicted of manslaughter in the first degree with a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his prior habeas counsel, D, had rendered ineffective assistance by declining to pursue a claim that the petitioner's criminal trial counsel, R, had rendered ineffective assistance when R chose not to call a witness, T, in the petitioner's second criminal trial after his first trial had ended in a mistrial. The habeas court concluded that D had exercised professional

judgment in winnowing down a list of twenty-seven possibly viable claims he had included in his habeas petition and had made a reasonable strategic decision not to pursue the ineffective assistance claim as to R. The habeas court further concluded that R's decision not to call T to testify at the second criminal trial did not constitute deficient performance but, rather, was a strategic decision. The court reasoned that T was impeachable by virtue of her prior personal connection with the petitioner and two inconsistent written statements that she had given to the police concerning the shooting. In her first statement, T stated that there had been a fight and that the petitioner indicated that he had been hit, but in her second statement she denied that a fight occurred and did not remember the petitioner stating that he had been hit. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner failed to prove that D rendered ineffective assistance by failing to pursue a claim that R had been ineffective for failing to call T as a witness; R's strategic decision not to call T did not constitute deficient performance, as R inferentially made a presumptively prudential decision on whether to use T's second statement to the police, which could have led to further impeachment evidence as to T, R's trial strategy in not calling T to the witness stand was influenced by the fact that the state's witnesses had considerable baggage in terms of prior criminal histories, inconsistent statements, and losses of memory and recantations, which resulted in their prior written signed statements being admitted into evidence for substantive purposes, and the admission into evidence of T's statements would have rendered less persuasive a defense argument that the state's witnesses were all over the place, could not remember and were inconsistent.

2. There was no merit to the petitioner's claim that the prosecution suppressed evidence that was favorable to him when it allegedly failed to disclose that it had delayed making a plea offer to an eyewitness until after the eyewitness testified in the petitioner's second criminal trial; the petitioner failed to present any credible evidence that there was an agreement between the state and the witness that the state failed to disclose, the petitioner's claim was not distinctly raised in his habeas petition, and his counsel conceded at oral argument before this court that there is no authority for the proposition that the state is obligated to make a plea offer to a witness who is himself facing criminal charges before giving testimony in a case.

Argued January 10—officially released April 2, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland and tried to the court, *Hon. John F. Mulcahy, Jr.*, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

C. Robert Satti, Jr., supervisory assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. The petitioner, Michael Holbrook, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that he failed to prove (1) ineffective assistance of his prior habeas counsel, and (2) that the state suppressed exculpatory evidence at his criminal trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).[1] We affirm the judgment of the habeas court.

The following facts and procedural history surrounding the petitioner's conviction were set forth by

[1] The petitioner also claims that the court improperly concluded that he had failed to prove that his trial counsel was ineffective for declining to call a certain witness to testify at the underlying criminal trial. In its memorandum of decision, the habeas court dismissed the claim of ineffective assistance of trial counsel on the grounds that it was barred by res judicata and that it was successive. The court also determined that the claim was barred by laches and, alternatively, that the petitioner could not prevail on the merits. At oral argument before this court, the petitioner's counsel conceded that the claim of ineffective assistance of trial counsel, by itself, was successive. In light of this concession, we do not examine the merits of the petitioner's claim of ineffective assistance of trial counsel separately but only to the extent that his claim of ineffective assistance of prior habeas counsel is premised on such a claim. See *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

this court in our decision on direct appeal affirming the petitioner's conviction: "John Fred Dean was shot and killed inside a Bridgeport nightclub known as the Factory. The state charged the [petitioner] . . . with Dean's murder. In 2003, the [petitioner's] first jury trial ended in a mistrial. After a second trial, in 2004, the jury found the [petitioner] not guilty of murder but found him guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). The jury also made a finding that the [petitioner] had committed a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. The trial court rendered judgment in accordance with the verdict and sentenced the [petitioner] to a total effective term of thirty-five years incarceration." *State* v. *Holbrook*, 97 Conn. App. 490, 492, 906 A.2d 4, cert. denied, 280 Conn. 935, 909 A.2d 962 (2006).

In June, 2007, the petitioner filed a petition for a writ of habeas corpus, which was denied by the court, *T. Santos*, *J.*, following a trial. On appeal, this court affirmed the denial of the petition. *Holbrook* v. *Commissioner of Correction*, 149 Conn. App. 901, 87 A.3d 631, cert. denied, 311 Conn. 952, 91 A.3d 464 (2014).

In June, 2014, the petitioner, who was then self-represented, filed a petition for a writ of habeas corpus. Thereafter, represented by counsel, the petitioner filed an amended petition alleging ineffective assistance of his trial counsel, Attorney Frank J. Riccio, for declining to call Cherise Thomas as a witness; ineffective assistance of prior habeas counsel, Attorney Michael Day, for failing to pursue a claim that trial counsel was ineffective for failing to call Thomas as a witness; and the failure of the state to produce exculpatory information to the petitioner. The court, *Hon. John F. Mulcahy, Jr.*, judge trial referee, denied the petition. The court thereafter granted the petition for certification to appeal. This appeal followed.

I

The petitioner claims that the court erred in concluding that Day did not render ineffective assistance for declining in the prior habeas proceeding to pursue a claim that Riccio was ineffective for failing to call Thomas as a witness in the underlying criminal trial. We do not agree.

"It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 823, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective

assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task . . . .'' (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

The habeas court noted that Day, ''in an abundance of caution,'' included twenty-seven claims in his habeas petition, but upon further analysis pursued only six of the listed claims, which did not include the claim of ineffective assistance of trial counsel for failure to call Thomas as a witness. The habeas court concluded that Day's procedure of ''exercising professional judgment . . . in winnowing down from the long list of claims initially thought to be possibly viable'' did not constitute deficient performance. We will not disturb the court's finding that Day's decision not to pursue the claim at issue was a reasonable strategic decision. ''[A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .'' (Citation omitted; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632–33, 126 A.3d 558 (2015). Additionally, ''the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation.'' (Internal quotation marks omitted.) *Tillman* v. *Commissioner of Correction*, 54 Conn. App. 749, 756–57, 738 A.2d 208, cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999).

The court further found that *Strickland*'s prejudice prong was not satisfied because, "based on the previous analysis of trial counsel's tactical decision regarding the Thomas statements," a reasonable probability did not exist that the result of the first habeas trial would have been different had Day pursued the claim that Riccio was ineffective for failing to call Thomas as a witness. In analyzing the merits of the underlying claim of ineffective assistance of trial counsel, the court concluded that Riccio, who had represented the petitioner in both criminal trials and who had died before the petitioner brought his second petition for a writ of habeas corpus, was "seasoned," and was an "exceedingly experienced, skilled and proficient criminal defense attorney."[2]

The court concluded that Riccio's strategic decision not to call Thomas to testify at the second criminal trial did not constitute deficient performance. Thomas was impeachable by virtue of her prior personal connection with the petitioner, whom she had known for years. Thomas gave two statements on different dates to the police, recounting the events that occurred at the Factory nightclub on the night of the shooting. Both statements were admitted as full exhibits at the second

[2] The court in the petitioner's second habeas trial had ample evidence of the seasoned nature of Riccio's representation, including a transcript of Riccio's testimony in the petitioner's first habeas case that was admitted as a full exhibit in the second habeas proceeding. In the petitioner's first criminal trial, Riccio raised enough doubt that the jury was "hung," unable to agree on a verdict. In the petitioner's second criminal trial, Riccio succeeded in convincing the jury to return a not guilty verdict as to murder, and the petitioner was found guilty of the lesser included and less serious offense of manslaughter in the first degree in violation of § 53a-55a. Riccio testified at the first habeas trial that he had had thirty-five to forty murder trials in Connecticut state courts, had tried twelve federal criminal cases to conclusion and had been involved in approximately 100 other federal criminal cases. The record shows that Riccio had wide experience and had twice obtained results in two successive criminal trials in which the petitioner was not convicted of the most serious crime with which he was charged, namely, murder.

habeas trial. The second habeas court found that the two statements that Thomas had given to the police on separate dates were inconsistent. In the first statement, Thomas said there had been a fight and that the petitioner indicated that he had been "hit," but in her second statement she denied that a fight occurred and did not remember the petitioner stating that he had been hit. The court concluded that Thomas' first statement to the police that the petitioner had told her that he had been hit might "lend support" to the state's position that the petitioner had been involved in a physical fight with the victim, Dean, which precipitated the shooting that caused Dean's death. The court concluded that Riccio, who had been present during both of Thomas' statements to the police, inferentially made a "presumptively prudential decision" on whether to use Thomas' second statement that could have led to further impeachment evidence as to Thomas.

The court noted that Riccio's trial strategy in not calling Thomas to the witness stand was influenced by the fact that the state's witnesses brought considerable " 'baggage' " in terms of prior criminal histories, inconsistent statements, losses of memory and recantations, and that where those witnesses recanted or professed some loss of memory their prior written signed statements were admitted for substantive purposes under authority of *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). In his summation to the jury, Riccio pointed out the inconsistencies in the testimony of the state's witnesses. Riccio testified in the first habeas trial that "I've never seen it [*Whelan*] used as much as it was in this particular case." The second habeas court stated in its decision: "An offer and admission of the Thomas statements by the defense would introduce yet another (in the court's view, material) inconsistency, resulting quite likely in another *Whelan* admission, this

time involving a defense witness. Such would render less persuasive a defense argument in summation that the state's witnesses were all over the place, could not remember, and were inconsistent."

The court concluded that Riccio, who had heard and observed Thomas at the time of her statements, made a strategic decision not to have Thomas testify that "should not now be second-guessed." *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 632–33. As we have noted previously, reasonable strategic choices made after a thorough investigation are virtually unchallengeable. Id. After a careful review of the record, we conclude that the habeas court properly determined that the petitioner had failed to prove his claim of ineffective assistance of habeas counsel.

II

We next turn to the petitioner's claim that the court improperly rejected his claim that the prosecution suppressed evidence favorable to him in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. Specifically, the petitioner claims that the prosecution failed to disclose that it had declined to make any plea offers to Gary Browning, an eyewitness who testified for the state, regarding his charges of robbery until he testified in the petitioner's 2004 criminal trial. We disagree.

"Due process principles require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . In order to obtain a new trial for improper suppression of evidence, the petitioner must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure. . . .

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, we have noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 592, 198 A.3d 562 (2019). "Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles." (Internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 152–53, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). "[A]n unexpressed intention of the state not to prosecute a witness does not fall within the ambit of the *Brady* principles concerning disclosure by the prosecution of evidence favorable to an accused." (Internal quotation marks omitted.) *State* v. *Rucker*, 177 Conn. 370, 376, 418 A.2d 55 (1979).

"The question of whether there existed an agreement between [a witness] and the state is a question of fact . . . . When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 116 Conn. App. 400, 407, 975 A.2d 740, cert. denied, 294 Conn. 908, 982 A.2d 1082 (2009). "Furthermore, the burden is on the defendant to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000). "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*,

170 Conn. App. 654, 689, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

The petitioner contends that the prosecution delayed making a plea offer to Browning until after Browning testified in the petitioner's 2004 criminal trial. This claim rests on a very slender reed. The first habeas court found Browning not to be a credible witness, and he did not testify before the second habeas court. The only evidence of the allegation of a delayed plea offer is in a statement by Browning made in the first habeas trial in which he stated: "No, they wouldn't give me an offer until after I testified." The habeas court made no finding that the prosecution had made any statement to that effect, and the petitioner's claim is not distinctly raised in his habeas petition. At oral argument before this court, the *Brady* claim morphed into a claim that the state had waited to make a plea offer to Browning, the cooperating witness, until after he gave testimony. However, not only is there nothing in the petition that raises this claim distinctly, there is no finding by the habeas court that the prosecution ever told Browning that an offer of a sentence would be made in return for his guilty plea, but not until after his testimony. The petitioner's counsel conceded at oral argument that there is no authority for the proposition urged by the petitioner that the state is under an obligation to make a plea offer to a witness who is himself facing criminal charges before he gives testimony in a case. Here, the court made a finding that "the petitioner has failed to present any credible evidence that there was an actual or implied agreement between the state and Gary Browning that the state failed to disclose." The petitioner's claim of a *Brady* violation is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF (AC 41367)

DiPentima, C. J., and Lavine and Harper, Js.

Syllabus

The defendant, who had been convicted of the crimes of possession of narcotics ([Rev. to 2013] § 21a-279) and possession of less than four ounces of a cannabis-type substance, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. In his direct appeal to this court, the defendant claimed that he was entitled to be resentenced as a result of a legislative amendment to the crime of possession of narcotics because in 2015, subsequent to his conviction, the legislature retroactively reclassified the violation of § 21a-279, for a first offense, as a class A misdemeanor, which carries a maximum sentence of one year of incarceration. This court considered and rejected the defendant's claim, and the defendant's petition for certification to appeal from that decision to our Supreme Court was denied. In his motion to correct an illegal sentence, the defendant claimed that the legislature had intended for the 2015 amendment to apply retroactively, and that the sentence imposed for his violation of § 21a-279 was illegal because it exceeded the maximum sentence allowed under the 2015 amendment. *Held* that there was no merit to the defendant's claim that the 2015 amendment applied retroactively: this court has determined previously that the 2015 amendment to § 21a-279 does not apply retroactively, our Supreme Court previously has rejected the applicability in Connecticut of the amelioration doctrine, which the defendant claimed applied and which provides that amendments that reduce a statutory penalty for a criminal offense are applied retroactively, and the defendant's request that this court overrule that precedent was unavailing, as it is axiomatic that, as an intermediate appellate court, this court is bound by Supreme Court precedent and is unable to modify it, nor can this court overrule a decision made by another panel of this court in the absence of en banc consideration; accordingly, the trial court should have rendered judgment denying rather than dismissing the defendant's motion to correct an illegal sentence.

Argued March 6—officially released April 2, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of possession of narcotics

with intent to sell by a person who is not drug-dependent, possession of narcotics with intent to sell and possession of narcotics, and with the crime of possession of less than four ounces of a cannabis-type substance, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of possession of less than four ounces of a cannabis-type substance and of two counts of possession of narcotics, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Doyle*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Emily H. Wagner*, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Haji Jhmalah Bischoff, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. After reviewing the record and the parties' briefs, we conclude that the defendant's claim is barred by appellate precedent. We further conclude that the form of the judgment is improper, and, accordingly, we reverse the judgment dismissing the defendant's motion to correct an illegal sentence and remand the case to the trial court with direction to render judgment denying the defendant's motion.

The defendant was convicted of possession of heroin in violation of General Statutes (Rev. to 2013) § 21a-279 (a), possession of cocaine in violation of § 21a-279 (a), and possession of less than four ounces of a cannabis-type substance (marijuana) in violation of General Statutes (Rev. to 2013) § 21a-279 (c). *State* v. *Bischoff*, 182 Conn. App. 563, 569, 190 A.3d 137, cert. denied, 330 Conn. 912, 193 A.3d 48 (2018). The trial court merged the conviction of possession of heroin and possession of cocaine into a single conviction of possession of narcotics in violation of § 21a-279 (a), and sentenced the defendant to seven years incarceration, execution suspended after five years, and three years of probation. Id. On the defendant's conviction of possession of less than four ounces of marijuana, the court sentenced the defendant to a concurrent term of one year incarceration. Id.

In his direct appeal, this court considered and rejected the defendant's claim that he was entitled to be resentenced as a result of the legislative amendment to the crime of possession of narcotics. Specifically, we stated: "The defendant finally claims that he is entitled to resentencing on his conviction of possession of narcotics because the legislature has retroactively reclassified the violation of § 21a-279, for a first offense, as a class A misdemeanor, which carries a maximum sentence of one year of incarceration. See Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1. The defendant concedes, as he must, that this court's holding in *State* v. *Moore*, 180 Conn. App. 116, 124, [182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595] (2018), in which this court held that the 2015 amendment to § 21a-279 (a), which took effect October 1, 2015, does not apply retroactively and is dispositive of his claim. The defendant's claim that he is entitled to be resentenced must therefore fail." *State* v. *Bischoff*, supra, 182 Conn. App.

579–80. This court released the decision in the defendant's direct appeal on June 12, 2018. Id., 563. On September 20, 2018, our Supreme Court denied the defendant's petition for certification to appeal. *State* v. *Bischoff*, 330 Conn. 912, 193 A.3d 48 (2018).

On May 11, 2017, the defendant filed the present motion to correct an illegal sentence. He argued that the legislature had intended the 2015 amendment to apply retroactively. According to the defendant, the sentence imposed for his violation of § 21a-279 (a) was illegal because it exceeded the maximum sentence allowed under the 2015 amendment.

On December 22, 2017, the trial court issued a memorandum of decision dismissing the motion to correct an illegal sentence. It concluded that, in the absence of any language indicating that the amendment was to be applied retroactively to crimes committed prior to its effective date, the general rule in Connecticut is that courts apply the law in effect at the time of the offense. It also rejected the defendant's argument as to the amelioration doctrine, which provides that amendments that reduce a statutory penalty for a criminal offense are applied retroactively. Specifically, the trial court stated: "[B]oth our Supreme and Appellate Courts have rejected application of the amelioration doctrine based on the plain language of the savings statutes." See General Statutes §§ 54-194 and 1-1 (t).

In his principal appellate brief, the defendant acknowledges that the present case is controlled by *State* v. *Moore*, supra, 180 Conn. App. 116, and *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014). In *Moore*, this court rejected a claim that the 2015 amendment to § 21a-279 (a) applied retroactively. *State* v. *Moore*, supra, 120–25. Specifically, we concluded that the 2015 amendment contained no language indicating a retroactive application and that the absence of such language

was informative as to the legislature's intent. Id., 123–24. "Thus, if the legislature had intended the 2015 amendment to apply retroactively, it could have used clear and unequivocal language indicating such intent. It did not do so. A prospective only application of the statute is consistent with our precedent and the legislature's enactment of the savings statutes . . . and, therefore, the statutory language is not susceptible to more than one plausible interpretation." (Citation omitted.) Id., 123; see also *State* v. *Bischoff*, supra, 182 Conn. App. 579–80. Additionally, in accordance with *State* v. *Kalil*, supra, 314 Conn. 552–53, this court rejected the applicability of the amelioration doctrine in Connecticut. *State* v. *Moore*, supra, 124.

In the present appeal, the defendant expressly asks us to overrule *State* v. *Kalil*, supra, 314 Conn. 529, *State* v. *Moore*, supra, 180 Conn. App. 116, and *State* v. *Bischoff*, supra, 182 Conn. App. 563. We reject this invitation. First, "[i]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018); see also *State* v. *Corver*, 182 Conn. App. 622, 638 n.9, 190 A.3d 941, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018). Second, "[i]t is this court's policy that we cannot overrule a decision made by another panel of this court absent en banc consideration." *State* v. *Joseph B.*, 187 Conn. App. 106, 124 n.13, A.3d (2019); *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017); see also *State* v. *Houghtaling*, 326 Conn. 330, 343, 163 A.3d 563 (2017) (Appellate Court panel appropriately recognized it was bound by that court's own

precedent), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). For these reasons,[1] we conclude that the defendant's appeal has no merit.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion.

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[1] Due in part to the timing of the ultimate resolution of the defendant's direct appeal and the filing of the motion to correct an illegal sentence, the state claimed, for the first time on appeal, that the defendant's claim is barred by res judicata. While we have considered a res judicata defense under similar circumstances; see *State* v. *Martin M.*, 143 Conn. App. 140, 150–57, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013); *State* v. *Osuch*, 124 Conn. App. 572, 580–84, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010); we decline to travel that path in the present case.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 189

MEMORANDUM DECISIONS

ANTHONY SIMPSON ET AL. *v.* DAMON LEE ET AL. (AC 41475)

Alvord, Bright and Alexander, Js.

Argued March 12—officially released April 2, 2019

Appeal by the named defendant et al. from the Superior Court in the judicial district of Windham, Housing Session at Putnam, *Cole-Chu*, *J.*

Per Curiam. The judgment is affirmed.

JUDDSON LIVELY *v.* COMMISSIONER OF CORRECTION (AC 40802)

Prescott, Elgo and Pellegrino, Js.

Argued March 14—officially released April 2, 2019

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

Per Curiam. The appeal is dismissed.

KHALID IBRAHIM *v.* CAROL CHAPDELAINE ET AL. (AC 41415)

Prescott, Elgo and Pellegrino, Js.

Argued March 14—officially released April 2, 2019

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Gleeson*, *J.*

Per Curiam. The judgment is affirmed.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* PAUL SILADI
(AC 41221)

Alvord, Bright and Alexander, Js.

Argued March 12—officially released April 2, 2019

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Avallone, J.; Hon. Thomas J. Corradino*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* FRANK V. RAGO ET AL.
(AC 41223)

Prescott, Elgo and Pellegrino, Js.

Submitted on briefs March 19—officially released April 2, 2019

Appeal by the defendant Louis A. Rondinello from the Superior Court in the judicial district of Fairfield, *Hon. Alfred J. Jennings, Jr.*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

FRANK J. VAZZANO II ET AL. *v.* GLADYS M. REVERON ET AL.
(AC 41251)

Keller, Bright and Lavery, Js.

Argued March 20—officially released April 2, 2019

Plaintiffs' appeal from the Superior Court in the judicial district of Fairfield, *Arnold, J.*

Per Curiam. The judgment is affirmed.

CHARLES HARRIS *v.* COMMISSIONER OF CORRECTION
(AC 41460)

DiPentima, C. J., and Moll and Norcott, Js.

Argued March 18—officially released April 2, 2019

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

Per Curiam. The appeal is dismissed.

COUNTRYWIDE HOME LOANS SERVICING, LP *v.* ALBINA PIRES
(AC 41353)

Keller, Bright and Lavery, Js.

Submitted on briefs March 20—officially released April 2, 2019

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Hon. William B. Rush*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

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Countrywide Home Loans Servicing, LP *v.* Pires (Memorandum Decision) 903
Deutsche Bank National Trust Co. *v.* Siladi (Memorandum Decision) 902
Garden Homes Profit Sharing Trust, L.P. *v.* Cyr. 75
Summary process; nonjoinder of party; whether trial court had authority to raise, sua sponte, issue of nonjoinder of necessary party in absence of motion to strike filed by defendant; whether trial court improperly rendered judgment in favor of defendant on basis of nonjoinder without giving plaintiff opportunity to add necessary party to action in violation of relevant statute (§ 52-108) and rules of practice (§§ 9-19 and 10-44).
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Wrongful death; sovereign immunity; claim that trial court improperly granted motion to dismiss action for lack of subject matter jurisdiction; whether action was time barred pursuant to statute (§ 4-160 [d]) that requires plaintiff who has been granted authorization to sue state by Claims Commissioner to bring action within one year from date authorization was granted; claim that action was not untimely because applicable statute of limitations (§ 52-555) for wrongful death action, which permits action to be brought within two years from date of decedent's death, had not expired and is not limited by § 4-160 (d); whether plaintiff was required to comply with both one year limitation period provided in § 4-160 (d) and statute of limitations for wrongful death action set forth in § 52-555; claim that action was timely because limitation period prescribed in § 4-160 (d) was extended by statute (§ 52-594).
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Ibrahim *v.* Chapdelaine (Memorandum Decision) 901
Ion Bank *v.* J.C.C. Custom Homes, LLC 30
Replevin; action by way of replevin to recover certain collateral in defendants' possession; claim that trial court improperly granted defendants' motion to dismiss because amended complaint filed by plaintiff cured any defect regarding plaintiff's standing; claim that plaintiff properly substituted proper party as plaintiff by operation of law by filing amended complaint in compliance with relevant rule of practice (§ 10-59); whether plaintiff was required to file motion for permission to substitute proper party as plaintiff; whether trial court abused its discretion in declining to treat amended complaint as motion to substitute parties; claim that plaintiff, as assignor of note, had standing to maintain replevin action on behalf of its assignee.
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defendant properly concluded that plaintiff violated rule 4.4 (a) was based on clear and convincing evidence; whether there was clear and convincing proof that plaintiff filed motion for capias for no substantial purpose other than to embarrass or burden complainant; whether there is statutory authority or rule of practice that requires attorney to contact court or to check judicial website prior to filing motion for capias; whether motion for capias may properly be requested when party is served with subpoena duces tecum and fails to appear for scheduled deposition; whether rule 4.4 (a) imposes additional obligations on attorney when dealing with self-represented party.

McKiernan *v.* Civil Service Commission 50

Declaratory judgment; action seeking declaratory judgment that plaintiff be allowed to retake oral assessment portion of certain police detective promotional examination; claim that trial court erred by rendering judgment in favor of defendants on basis of its finding that oral assessment was administered in accordance with requirements of city charter; whether trial court's finding that test administrators provided plaintiff with all necessary test materials for oral assessment was clearly erroneous; whether trial court's finding that supervising test administrator's description of procedures followed during examination was corroborated by other witnesses was clearly erroneous; claim that trial court erred in concluding that examination was administered in reasonable manner even though test administrators failed to take any steps to provide plaintiff with allegedly missing test materials; whether oral assessment was given in compliance with requirements of city charter despite lack of system to keep track of test materials; claim that examination was unreasonable and arbitrary because it was not administered in uniform manner; claim that instructions given to test participants on video in assessment room were different from those set forth in documents given in preparation room.

Premier Capital, LLC *v.* Shaw 1

Standing; action to enforce judgment; whether trial court lacked subject matter jurisdiction due to plaintiff's lack of standing; whether designation of wrong entity as plaintiff was scrivener's error; whether trial court should have dismissed case rather than deciding it on merits.

Saint Francis Hospital & Medical Center *v.* Malley 68

Default judgment; default for failure to appear; claim that rendering of default judgment was improper and constituted plain error; whether it was improper to enter default against defendant for failure to appear where defendant's counsel was present in court; whether consequences of court's error were so grievous as to be fundamentally unfair or manifestly unjust; whether unwarranted rendering of default judgment against defendant was likely to undermine public confidence in judiciary.

Simpson *v.* Lee (Memorandum Decision) 901

State *v.* Bischoff 119

Possession of narcotics; possession of less than four ounces of cannabis-type substance; motion to correct illegal sentence; claim that 2015 amendment of statute applicable to possession of narcotics (§ 21a-279 [a]) applied retroactively and entitled defendant to resentencing on conviction of possession of narcotics; whether this court is bound by precedent from our Supreme Court; whether trial court should have rendered judgment denying rather than dismissing motion to correct illegal sentence.

Taing *v.* CAMRAC, LLC 23

Employment discrimination; pregnancy discrimination; whether trial court properly granted motion for summary judgment in favor of defendant; claim that genuine issue of material fact existed as to whether defendant's proffered reason for terminating plaintiff's employment was pretextual.

U.S. Bank National Assn. *v.* Rago (Memorandum Decision) 902

Vazzano *v.* Reveron (Memorandum Decision) 902

SUPREME COURT PENDING CASES

STATE *v.* BRUCE JOHN BEMER, SC 20195
Judicial District of Danbury

Criminal; Whether Pretrial Order Compelling Defendant to Undergo Testing for Sexually Transmitted Disease and HIV a Final Judgment; Whether Trial Court Abused its Discretion in Ordering Testing; Whether General Statutes § 54-102a Testing Order Violated Defendant's Rights Against Unreasonable Searches. The defendant was charged with patronizing a prostitute who was a victim of human trafficking in violation of General Statutes § 53a-83 (c) (2) (A) and conspiracy to traffic in persons in violation of General Statutes §§ 53a-48 and 53a-192a. Prior to trial, the state filed a motion seeking that the court order that the defendant undergo testing for sexually transmitted disease and for HIV pursuant to General Statutes § 54-102a. The trial court granted the state's motion and ordered the defendant to submit to testing. The defendant appeals. He acknowledges that, in criminal cases, there is generally no appealable final judgment until the court imposes sentence, but both the defendant and the state urge that the order here, while interlocutory, is nonetheless a final judgment under the finality tests set out in *State* v. *Curcio*, 191 Conn. 27 (1983). As to the merits, the defendant claims that the trial court abused its discretion in ordering the testing where he has yet to be convicted of any crime and where he argues that testing will not assist the state in the criminal case and will not assist the victims or advance the public health. The defendant also contends that the order that he submit to testing violates his state and federal constitutional rights against unreasonable searches.

IN RE ZAKAI F., SC 20234
Judicial District of New Haven

Child Protection; Whether Parent Who Temporarily Relinquished Custody and Seeks Reinstatement of Guardianship Rights Entitled to Constitutional Presumption that Reinstatement is in Child's Best Interest. Kristi F. voluntarily agreed to relinquish temporary guardianship of her minor child, Zakai, to the child's maternal aunt, the petitioner. When Kristi asked that the petitioner return Zakai to her care, the petitioner did not respond and, instead, filed a petition seeking custody and guardianship of Zakai in the Probate Court, which issued an order that vested temporary cus-

tody of Zakai in the petitioner. The matter was then transferred to the Superior Court, where the parties entered into a stipulation providing that guardianship of Zakai would be transferred to the petitioner. Kristi then filed a motion asking that she be reinstated as Zakai's guardian pursuant to General Statutes § 45a-611. The trial court denied the motion, finding that reinstatement of her guardianship rights was not in Zakai's best interests. Kristi appealed, claiming, among other things, that the trial court failed to apply the constitutional presumption that, because she had never been adjudicated an unfit parent, she was entitled to a presumption that she would act in Zakai's best interests. The Appellate Court (185 Conn. App. 752), affirmed the judgment, finding that the trial court properly considered evidence presented by the petitioner and Zakai, through their attorney and guardian ad litem, rebutting the presumption that reunification with Kristi was in Zakai's best interests. The Appellate Court also ruled that the trial court had properly applied the fair preponderance of the evidence standard in determining that reunification was not in the child's best interests. The Supreme Court granted Kristi certification to appeal, and it will decide whether a parent who has temporarily relinquished custody and seeks the reinstatement of guardianship rights under General Statutes § 45a-611 is entitled to a constitutional presumption that reinstatement is in the best interests of the child and, if so, whether a heightened burden of proof is required by *Santosky* v. *Kramer*, 455 U.S. 745 (1982), which held that a clear and convincing evidence standard of proof must be applied when the state is seeking to terminate a parent's rights.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

LAURA KOS et al. *v.* LAWRENCE & MEMORIAL HOSPITAL et al.,
SC 20256
Judicial District of New London

Medical Malpractice; Whether "Acceptable Alternative Treatments" Jury Instruction Supported by Evidence; Whether Precedent Allowing for Acceptable Alternative Treatments Instruction Should be Overruled. The plaintiffs brought this medical malpractice action claiming that the defendants were negligent in inspecting and repairing the plaintiff mother's episiotomy following childbirth and that the mother suffered harm as a result. At the conclusion of the trial, the trial court, pursuant to *Wasfi* v. *Chaddha*, 218

Conn. 200 (1991), instructed the jury that a physician may choose between alternative acceptable methods of diagnosis and treatment without incurring liability solely because that choice may have led to an unfortunate result. The jury returned a verdict for the defendant, and the plaintiffs appeal, claiming that the trial court erred in giving the "acceptable alternatives" charge under the circumstances here. The plaintiffs claim that there was no evidence that there were alternative, appropriate methods for inspecting the tissue tear, emphasizing that the experts who testified at trial disagreed about what inspection technique was appropriate. The plaintiffs also urge that the Supreme Court overrule *Wasfi* or limit its holding, claiming that the era of uniform deference to physician norms and common practices is over and that modern malpractice law is moving away from a "custom-based" standard of care and toward a "reasonable physician" standard.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES

STATE OF CONNECTICUT

DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 300 Corporate Place, Rocky Hill, CT 06067

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 4925/5044

CLOSING DATE: April 19, 2019

Examples of Duties

Appellate Bureau prosecutors represent the State of Connecticut in criminal and habeas corpus appeals before the Appellate Court and Supreme Court. In addition, they perform various other assignments requiring research and writing skills. They also perform related duties, including field support, as required.

Preferred Qualifications

Applicants should have law review, judicial clerkship or equivalent legal writing experience; oral advocacy experience; and the ability to work both independently and cooperatively with other attorneys. Applicants also should have the ability to engage in peer review by editing written work and participating in moot court arguments. Computerized legal research and word processing skills also are essential. Experience handling criminal or habeas corpus appeals is preferred.

Minimum Qualifications

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. Writing sample (maximum 10 pages)

6. The names and contact information for three (3) professional references

By e-mail to: DCJ.HR@ct.gov with a copy to DCJ.OCSA.Appellate@ct.gov.

All documents must be combined into a single pdf
(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **April 19, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of March 18, 2019:

Matthew E. Christoph	Bright Horizons Family Solutions, LLC
Stephen R. Cincotta	United Healthcare
Timothy G. Glasby	Travelers Indemnity Company
Rachel S. O'Neill	Travelers Indemnity Company

Certified as of March 22, 2019:

Aleena L. Burgner	Charter Communications, Inc.
Lauren E. Connell	Nielsen
Paul J. DiMaio	Delta Dental of Connecticut, Inc.
Robert D. Ellis	Verition Group, LLC
Andrew M. Genser	Viking Global Investors LP
Gregory A. Marshall	Lone Pine Capital, LLC
Louie Pastor	Xerox Corporation

Hon. Patrick L. Carroll III
Chief Court Administrator

NOTICE OF SUSPENSION OF ATTORNEY

Pursuant to Practice Book § 2-54, notice is hereby given that on March 25, 2019, Attorney Arik Fetscher, Juris # 418442, was ordered suspended from practice of law by the Hon. John Kavanewsky for a period of eight months. The suspension is effective March 25, 2019.

The full order of the court can be found in FST-CV19-6040003-S Office of Chief Disciplinary Counsel v. Arik Fetscher.

Notice of Resignation of Attorney

Pursuant to § 2-52 of the Connecticut Practice Book, notice is hereby given that on March 27, 2019 in HHD-CV19-6105295, this court accepted the resignation of Richard S. Aries (juris # 305833) of South Windsor, CT and found that he has knowingly and voluntarily both resigned from the Connecticut Bar and waived the privilege of reapplying.

David Sheridan
Presiding Judge

The Connecticut Supreme Court

Policies for the Establishment and Maintenance of a System of Law Libraries

(Approved by the Connecticut Supreme Court on January 18, 2018)

1. Law libraries are established in the Judicial Districts of Danbury at Danbury, Fairfield at Bridgeport, Hartford at Hartford, New Britain at New Britain, Litchfield at Torrington, Middlesex at Middletown, New Haven at New Haven, New London at New London, Stamford/Norwalk at Stamford, Tolland at Rockville, Waterbury at Waterbury and Windham at Putnam.

2. Access to current legal publications shall be provided at each of the above-mentioned law libraries in a format and manner sufficient to meet the needs of the user, including but not limited to print, electronic or microform format. Each law library shall have as a minimum the materials specified in Appendix A.

3. All law libraries shall be open to the public from 9:00 a.m. to 5:00 p.m., Monday through Friday, exclusive of state holidays, unless otherwise posted, and such times as they may be closed due to adverse weather conditions, staff shortages, or as may be ordered by the Chief Court Administrator.

4. In accordance with generally accepted library science principles and practices, law libraries shall provide reference, circulation, bibliographic instruction, computer-assisted research, interlibrary loan, document delivery, computer printer, photocopier, and microform reader-printer services to the courts and citizens of the state at all times the libraries are open and staffed. These services shall be provided free of charge, except that a reasonable fee shall be charged for the photocopier, computer printer, document delivery, and microform reader-printer services.

5. (a) A law library advisory committee, consisting of thirteen members, is hereby established. The members of the committee shall be appointed by the Chief Justice for a term commencing on the date of their appointment and expiring three years after the July 1st following their appointment. The Chief Justice shall designate from among the members of the committee a chairperson and a vice chairperson who shall act in the absence of the chairperson, each for terms of one year commencing July 1st. The Deputy Director of Law Libraries shall attend all meetings and act as Secretary to the Committee.

   (b) The committee shall meet at least annually and more often if its business so dictates. Meetings may be called by the chairperson on the chairperson's own motion or on the request of any three members of the committee.

   (c) The committee, annually and at such other times as it deems necessary, may report to the Chief Justice and the Chief Court Administrator any recommendations it may have concerning the adequacy of the funding and services provided by the various law libraries, whether additions or deletions should be made to the list of law libraries so established, whether amendments should be made to the minimum collection standards (Appendix A) for the law libraries, and such other matters as the committee believes are pertinent to the operation of the law libraries.

6. These policies shall be published annually in the Connecticut Law Journal.

APPENDIX A

(Approved by the Connecticut Supreme Court on Insert Date)

LAW LIBRARY MINIMUM COLLECTION STANDARDS

(1) **Connecticut Materials**

(A) Official and commercially published judicial decisions

(B) Official and commercially published digests

(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service

(D) Official session laws

(E) Official and commercially published statutory compilations

(F) Administrative code and published agency decisions

(G) Official and commercially published practice books

(H) Bar association ethics opinions, Statewide Grievance Committee decisions and the Rules of Professional Conduct

(I) Local charters and ordinances for towns in the judicial district in accordance with C.G.S. § 7-148a

(J) A comprehensive collection of Connecticut textbooks, treatises, looseleaf services, form books, and practice aids

(K) A collection of Connecticut legal newspapers, law reviews, and journals

(L) Records and briefs of cases heard in the appellate courts of the state

(M) Proposed bills, legislative bulletins, list of bills, file copies, calendars, public acts, and journals for the current session

(N) Transcripts of the House and Senate proceedings and the public hearings

(O) Attorney General Opinions

(P) Current state constitution, and various historical versions of the constitution

(2) **Federal Materials**

(A) Official or another reporter of the decisions of the Supreme Court of the United States

(B) All published decisions of the U.S. District Courts, U.S. Courts of Appeal, and U.S. Bankruptcy Courts

(C) A digest of United States Supreme Court reports, or electronic equivalent

(D) A digest of federal reports, or electronic equivalent

(E) A citation service, such as Shepard's or KeyCite, or a comparable citation service

(F) United States Code Congressional and Administrative News, or a comparable online resource for researching federal legislative history

(G) United States Code Annotated or United States Code Service

(H) Federal Register and Code of Federal Regulations

(I) Federal Cases

(J) United States Statutes At Large

(K) United States Treaties And Other International Agreements

(L) United States Government Manual

(M) Federal court rules

(N) Local federal rules and forms for courts within jurisdiction

(3) **General National Publications**

(A) Case law from the courts of last resort in all fifty states

(B) Decennial Digests, or electronic equivalent

(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service for the courts of last resort in all fifty states

(D) American Law Reports

(E) A collection of textbooks, treatises, practice aids, and looseleaf services of contemporary value on legal subjects of interest to the legal community and the public

(F) A collection of legal periodicals

(G) A legal encyclopedia, two law dictionaries, a general dictionary, a medical dictionary, and a general reference collection

(H) A basic form set, a general pleading, a general evidence and a general trial practice set

(I) A legal periodical index, or comparable online service

(J) Restatements Of The Law

(K) Uniform Laws Annotated

(L) Statutory compilations for all fifty states

(M) American Bar Association standards and professional ethics opinions

(N) The published reports of decisions of the courts of last resort prior to the National Reporter System

(O) A collection of general legal and self-help titles on subjects of interest to the public and self-represented parties