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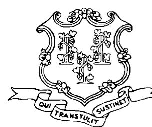

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CAROLYNE Y. HYNES *v.* SHARON M. JONES (SC 20009)

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

Syllabus

The plaintiff, who had received an award from the September 11th Victim Compensation Fund following the death of her husband during the September 11, 2001 terrorist attacks, appealed to the trial court from the Probate Court's denial of her motion to dismiss guardianship proceedings relating to their minor child. The letter from the compensation fund's special master authorizing that award indicated that the plaintiff had elected to receive certain money on behalf of the minor child as a representative payee. The letter further elaborated that, in that capacity, the plaintiff had an obligation to use the money in the minor child's best interest, to invest it prudently, and to distribute it to the minor child once she reached the age of majority. Following receipt of the award, the Probate Court directed the plaintiff to place the money into a guardianship account. The plaintiff complied and subsequently filed an application to be appointed guardian of the minor child's estate. The Probate Court granted that application but, thereafter, declined to allow the plaintiff to use the funds in the account to pay for certain of the minor child's expenses, concluding that that the plaintiff had a common-law duty to use her own resources for the minor child's support. The plaintiff then filed a motion to dismiss the guardianship proceedings, claiming a lack of jurisdiction, which the Probate Court denied. The plaintiff appealed from that decision to the trial court, which concluded that the Probate Court had jurisdiction to appoint a guardian because the plaintiff's election to receive compensation fund money directly as a representative payee did not exempt that money from the statutory protections afforded to the property of minors. The trial court rendered judgment dismissing the plaintiff's probate appeal, from which the plaintiff appealed to the Appellate Court. That court concluded that the award was a substitute for a wrongful death claim and, therefore, constituted part of the husband's estate. The Appellate Court reasoned that, because the husband died intestate while he was domiciled in Norwalk, the court of probate in that district had jurisdiction to appoint a guardian ad litem to protect the minor child's interests in the husband's estate. The court further concluded that the Probate Court had jurisdiction pursuant to the statute (§ 45a-629) governing the use of property to which a minor child is entitled. Accordingly, the Appellate Court affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly upheld the trial court's dismissal of the plaintiff's probate appeal, this court

having concluded that the Probate Court lacked subject matter jurisdiction to appoint a guardian of the minor child's estate: an examination of the compensation fund's history and purpose indicated that, to balance the need to provide flexibility to custodians and to preserve legal protections for minors, the special master had permitted payments to guardians, trustees, and representative payees, and that, although individuals electing to receive awards as representative payees were contractually obligated to follow the conditions imposed by the compensation fund, such awards were paid in express contemplation of the absence of state probate court supervision; moreover, because the compensation fund award paid to the plaintiff was neither part of the husband's estate nor the property of the minor child, the Probate Court lacked statutory authority to exercise jurisdiction to monitor the plaintiff's use of that award or to prohibit such use without the Probate Court's approval.

Argued September 17, 2018—officially released April 16, 2019

Procedural History

Appeal from the order of the Probate Court for the district of Norwalk-Wilton denying the plaintiff's application to dismiss guardianship proceedings with respect to her minor child, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, *Hon. David R. Tobin*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to the Appellate Court, *Sheldon*, *Beach* and *Flynn, Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Michael P. Kaelin, with whom, on the brief, was *William N. Wright*, for the appellant (plaintiff).

Opinion

ROBINSON, C. J. The dispositive issue in this certified appeal is whether the Probate Court has jurisdiction to approve or monitor use of a September 11th Victim Compensation Fund (fund) award that had been paid to a surviving spouse as a "representative payee" for the benefit of her minor child. The plaintiff, Carolyne Y. Hynes, appeals, upon our grant of her petition for

certification,[1] from the judgment of the Appellate Court affirming the judgment of the trial court dismissing her appeal from the decree of the Probate Court. *Hynes* v. *Jones*, 175 Conn. App. 80, 82–85, 167 A.3d 375 (2017). On appeal, the plaintiff claims that the Probate Court lacks jurisdiction over a fund award paid to the plaintiff as a "representative payee" because that award is neither (1) the property of the estate of her late husband, the decedent Thomas Hynes, within the meaning of General Statutes § 45a-98 (a),[2] nor (2) the property of their daughter, Olivia T. Hynes, within the meaning of General Statutes § 45a-629 (a),[3] which governs property to which a minor child is "entitled," or General Statutes § 45a-631 (a),[4] which governs property "belonging to"

[1] We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that a September 11th Victim Compensation Fund award, paid to a surviving spouse as a representative payee for the benefit of her minor child, was subject to the jurisdiction and control of Connecticut probate courts?" *Hynes* v. *Jones*, 327 Conn. 930, 171 A.3d 454 (2017).

[2] General Statutes § 45a-98 (a) provides in relevant part: "Probate Courts in their respective districts shall have the power to (1) grant administration of intestate estates of persons who have died domiciled in their districts . . . (3) except as provided in section 45a-98a or as limited by an applicable statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of . . . any decedent's estate, or any estate under control of a guardian or conservator, which . . . estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the . . . estate . . . ."

Although § 45a-98 has been amended since the events underlying the present case; see, e.g., Public Acts 2018, No. 18-45, § 16; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] General Statutes § 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor. . . ."

[4] General Statutes § 45a-631 (a) provides in relevant part: "A parent of a minor, guardian of the person of a minor or spouse of a minor shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ."

a minor. We agree with the plaintiff and, accordingly, reverse the judgment of the Appellate Court.

The following factual and procedural history informs our review. The decedent was killed in the September 11, 2001 terrorist attack on the World Trade Center and died intestate. The plaintiff and the decedent resided in the city of Norwalk at the time of his death. On March 28, 2002, the plaintiff gave birth to their daughter, Olivia.[5] On April 24, 2003, the plaintiff filed an application with the Probate Court seeking appointment as the administrator of the decedent's estate. The Probate Court granted the application and appointed Attorney Brock T. Dubin as guardian ad litem for the minor child.

After her appointment as administrator of the decedent's estate, the plaintiff filed a claim for compensation from the fund. By letter to the plaintiff, dated June 3, 2004, the fund's special master, Kenneth R. Feinberg,[6] authorized a total award of $2,425,321.70. Specifically, the plaintiff was awarded $1,153,381.58 as a "[b]eneficiary," and the minor child was awarded $1,271,940.12 as a "[b]eneficiary." The award letter stated that the plaintiff had elected to receive benefits directly on behalf of the minor child as a " 'representative payee.' " The letter subsequently identified the plaintiff as the "payee" a second time, and stated that she was to be paid $1,271,940.12 "on behalf of" the minor child. The letter then elaborated on the representative payee's obligations as follows: "As you know, as a representative payee, you are obliged—like a trustee—to ensure that funds are used in the [minor's] best interest. You

[5] For the sake of simplicity, we hereinafter refer to Olivia as the minor child.

[6] The United States Attorney General was required to appoint a special master to promulgate regulations to implement the fund and to determine claimants' eligibility for compensation. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 404 through 405, 115 Stat. 230, 237–38 (2001).

assume full responsibility for ensuring that the [award] paid to you as representative payee [is] used for the [minor's] current needs or, if not currently needed . . . saved for his or her future needs. This includes a duty to prudently invest funds, maintain separate accounts for each minor, and maintain complete records. In addition, upon reaching [eighteen] years of age (or age of majority as recognized by state law), the [minor is] entitled to receive the award paid to you as representative payee. Thus, at such time, you must distribute the award to the [minor] unless the [minor] otherwise willingly [consents]."

On July 31, 2008, the Probate Court appointed the defendant, Sharon M. Jones, as successor guardian ad litem for the minor child in the estate administration proceedings. Thereafter, the Probate Court insisted that the minor child's share of the benefits from the fund be placed into a guardianship account. On June 9, 2010, in compliance with the Probate Court's wishes, the plaintiff filed an application to be appointed guardian of the minor child's estate. The Probate Court granted the application but thereafter refused to allow the plaintiff to utilize the funds held in the guardianship account to pay for certain expenses. The plaintiff argued that the expenses were principally for the benefit of the minor child, but the Probate Court, reasoning that the plaintiff had a common-law duty to support the minor child as long as she possessed the resources to do so, concluded that the minor child's assets should not be used for such expenses.

The plaintiff did not appeal from that decree of the Probate Court. Instead, on August 21, 2013, she moved to dismiss the guardianship proceedings, claiming a lack of jurisdiction. On June 3, 2014, the Probate Court denied the plaintiff's motion to dismiss. Specifically, the Probate Court determined that it had subject matter jurisdiction over the guardianship proceedings, reason-

ing that an award from the fund was a substitute for a wrongful death claim and was, therefore, part of the decedent's estate.[7]

The plaintiff then appealed from the Probate Court decree to the trial court. Pursuant to General Statutes § 45a-186 (a), the trial court heard the matter de novo because no recording had been made of the Probate Court proceedings. The trial court subsequently issued a memorandum of decision dismissing the probate appeal. In reaching this conclusion, the trial court construed the text of § 45a-629 (a), along with other relevant statutes, and determined, inter alia, that jurisdiction to appoint a guardian of the estate of a minor child is conferred upon the Probate Court for the district in which the minor resides at the time the minor first becomes entitled to property. The trial court concluded that the plaintiff's election to have the fund make payment to the plaintiff directly as representative payee did not exempt the award from the statutory protections afforded to the property of minors. Accordingly, the trial court rendered judgment dismissing the plaintiff's probate appeal.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. The Appellate Court agreed with the Probate Court that an award from the fund was a substitute for a wrongful death claim and consequently was part of the decedent's estate. *Hynes* v. *Jones*, supra, 175 Conn. App. 92. The Appellate Court reasoned that, because the decedent died while domiciled in Norwalk, the court of probate in that district had jurisdiction to appoint a guardian ad litem to protect

[7] We note that the Probate Court also concluded that the relocation of the plaintiff and the minor child from Norwalk to Weston in April, 2005, did not divest it of jurisdiction. The Probate Court determined that it retained jurisdiction over the decedent's estate because he had been domiciled in Norwalk at the time of his death, and the minor child's award was part of the estate of the decedent, her father.

the minor child's interests in the decedent's estate. Id. The Appellate Court also concluded that the Probate Court had jurisdiction because the minor child became entitled to property within the meaning of § 45a-629 (a) while she was domiciled in that probate district. Id. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 105. This certified appeal followed.[8] See footnote 1 of this opinion.

On appeal to this court, the plaintiff argues that an award from the fund, when paid directly to a surviving spouse as a "representative payee" in exchange for that spouse's agreement to use the award to pay for the child's current needs, is not subject to the jurisdiction of the Probate Court. The plaintiff claims that the fund award was paid to her as a representative payee for her minor child, not as a representative of her husband's estate, and that the fund never intended that awards paid to representative payees would be subject to the jurisdiction of the various states' probate courts. The plaintiff asserts that § 45a-629 (a) only authorizes the appointment of a guardian for a minor "when a minor is entitled to property," and that the minor child was not entitled to property because the fund award was paid directly to the plaintiff. The plaintiff argues that, under § 45a-98, the Probate Court's jurisdiction is limited to property that comprises, or may comprise, part of a decedent's estate, and that the fund award is not part of the decedent's estate. The plaintiff also claims that § 45a-631 (a), which requires that a parent not receive or use any property belonging to the minor child in an amount more than ten thousand dollars without first being appointed guardian of the minor's estate, is

[8] We note that the defendant has neither filed a brief nor appeared for oral argument in either the Appellate Court or in this court. See *Hynes* v. *Jones*, supra, 175 Conn. App. 91. Consistent with orders from this court dated February 7 and 23, 2018, rendered pursuant to Practice Book § 85-1, we consider this appeal solely on the basis of the record as defined by Practice Book § 60-4 and the plaintiff's brief.

inapplicable given that the fund award did not constitute property belonging to the minor child.

We agree with the plaintiff that the Probate Court lacked subject matter jurisdiction to appoint a guardian of the minor child's estate. Specifically, we first conclude that a fund award paid to the plaintiff as a "representative payee" did not constitute a part of the decedent's estate. We further conclude that the award does not constitute property to which the minor child is "entitled" under § 45a-629 (a), and does not constitute property "belonging" to the minor child under § 45a-631 (a).

Courts of probate "are statutory tribunals that have no common-law jurisdiction. . . . Accordingly, [these courts] can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . [A] court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Connery* v. *Gieske*, 323 Conn. 377, 388, 147 A.3d 94 (2016). The question in this case is whether any existing statute grants the Probate Court authority to exercise jurisdiction over the fund award paid to the plaintiff in her capacity as representative payee for her minor child. Thus, whether the Probate Court has jurisdiction over the fund award presents a question of statutory interpretation, which is an issue of law over which our review is plenary. See, e.g., *In re Henrry P. B.-P.*, 327 Conn. 312, 324, 173 A.3d 928 (2017).

"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, including the question of whether the language actually does apply. . . . 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) Id., 324–25.

In order for the Probate Court to exercise jurisdiction over a fund award, there must be a legislative grant of authority for such jurisdiction. There are a number of possible sources of jurisdiction that could apply in the present case, independently or in combination. When an individual dies intestate, General Statutes § 45a-303 (a) (1)[9] authorizes probate courts to grant letters of administration. Section 45a-98[10] authorizes probate courts to determine title or rights of possession and use for property that constitutes part of a decedent's estate. General Statutes § 45a-438 (a)[11] provides that,

[9] General Statutes § 45a-303 (a) (1) provides: "When any person domiciled in this state dies intestate, the court of probate in the district in which the deceased was domiciled at his death shall have jurisdiction to grant letters of administration."

[10] See footnote 2 of this opinion.

[11] General Statutes § 45a-438 (a) provides in relevant part: "After distribution has been made of the intestate estate to the surviving spouse . . . the residue of the real and personal estate shall be distributed equally, according

after distribution to the surviving spouse, the residue of the real and personal estate shall be distributed equally among a decedent's children. Additionally, General Statutes § 45a-437 (a)[12] provides that a surviving spouse shall take the first $100,000 plus one half of an intestate estate. Therefore, if the fund award at issue in the present case is considered to be property of the decedent's estate, these statutes support the Probate Court's exercise of jurisdiction over the award as part of that court's supervision of the administration and distribution of the decedent's estate.

Alternatively, § 45a-629 (a) provides that when a minor is entitled to property, the probate court for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the minor's estate. See footnote 3 of this opinion. Likewise, § 45a-631 (a) requires a parent to be appointed guardian over the estate of his or her child before receiving or using any property belonging to that minor in an amount exceeding $10,000. See footnote 4 of this opinion. Therefore, if the fund award is considered to be property to which the minor child was entitled, or property that belonged to her, a statute would support the Probate Court's appointment of a guardian for the minor child's estate and its exercise of jurisdiction over the award as property of the plaintiff's minor child.

Our analysis hinges on whether the fund award, paid to the plaintiff as a "representative payee" for the benefit of the minor child, was part of the decedent's estate,

to its value at the time of distribution, among the children, including children born after the death of the decedent . . . ."

[12] General Statutes § 45a-437 (a) provides in relevant part: "If there is no will . . . the portion of the intestate estate of the decedent . . . which the surviving spouse shall take is . . . (3) If there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first one hundred thousand dollars plus one-half of the balance of the intestate estate absolutely . . . ."

or property of the decedent or the minor child, within the meaning of these statutes. In order to make such a determination, we consider the purpose of the fund.

Following the terrorist attacks of September 11, 2001, Congress created the fund in connection with the Air Transportation Safety and System Stabilization Act (Stabilization Act), Pub. L. No. 107-42, 115 Stat. 230 (2001). The express purpose of the fund was "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." Stabilization Act § 403, 115 Stat. 237. A special master was appointed by the United States Attorney General to administer the fund, promulgate "procedural and substantive rules," and determine eligibility for compensation from the fund. Stabilization Act §§ 404 (a), 405 (b) (1) (A), 115 Stat. 238. Congress specified that the following individuals were eligible for compensation from the fund: (1) those present at the World Trade Center, the Pentagon, or the site of the aircraft crash in Shanksville, Pennsylvania, at the time, or in the immediate aftermath, of the terrorist related aircraft crashes on September 11, 2001, who suffered physical harm or death as a result of those crashes; (2) passengers and crew members on the four aircraft involved; and (3) "in the case of a decedent who is an individual described in [one of the two preceding categories], the personal representative of the decedent who files a claim on behalf of the decedent." Stabilization Act § 405 (c) (2), 115 Stat. 239. Congress further required that the United States Attorney General, in consultation with the special master, promulgate regulations concerning implementation of the fund within ninety days of enactment. Stabilization Act § 407, 115 Stat. 240. The United States Department of Justice and the special master solicited public comments and made

efforts to garner the views of interested parties.[13] Interim final regulations providing information about the determination of losses under the Stabilization Act and the procedures for submitting claims were issued on December 21, 2001. Final regulations were issued on March 13, 2002, after the Department of Justice and special master had reviewed 2687 timely comments made by the public. See 28 C.F.R. § 104.1 et seq. (2002); 1 K. Feinberg et al., Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 (2004) p. 5 (final report).

These sources of federal law are unclear as to the legal nature of fund awards. The situation at issue in the present case is sui generis in our case law; a third party, here the United States government, has made an award directly to a parent as a representative payee for her minor child and imposed fiduciary obligations requiring the parent to use the award to provide for the child's current needs.[14] We must, therefore, examine

[13] According to the final report issued by the special master, "[t]he [s]pecial [m]aster and attorneys working with the [s]pecial [m]aster met personally with victims' advocacy groups, individual members of the victims' families, lawyers, employers, government agencies, members of Congress, members of the judiciary, associations, charities, representatives of the military, fire and police departments, and individuals in state governments to solicit views, concerns and comments about the nature of the [p]rogram and its administration. In addition, the [s]pecial [m]aster and senior attorneys reviewed the thousands of comments submitted to the Department [of Justice], researched theories of compensation and methodologies for the calculation of economic loss, as well as the various state laws governing wrongful death actions, appointment of [p]ersonal [r]epresentatives and determination of state law beneficiaries." 1 K. Feinberg et al., Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 (2004) p. 4.

[14] We acknowledge the representative payee terminology is not unique to the fund. The Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001 acknowledged that the option to receive funds as a representative payee was an approach that was utilized in other federal programs, including the administration of social security benefits. 1 K. Feinberg et al., supra, pp. 61 and 94 n.182. At least one Connecticut court has considered whether social security benefits paid to the representative payee of a dependent child are property of the child or the payee, and

more closely the manner in which the award was made in order to determine its proper treatment under Connecticut law.

It is clear from the special master's final report that the fund had two principal intentions when it developed a scheme for payment of awards to or on behalf of minors. The fund wanted to provide flexibility to custodians and protection to minors. 1 K. Feinberg et al., supra, p. 56. The fund contemplated a number of different options for payment, including guardianship, trusts, custodial accounts, representative payees, and periodic payments through structured settlements. Id., p. 60. As the special master explained, there were advantages and disadvantages with each approach. For example, in considering the guardianship approach, the special master observed that, although becoming a guardian is a relatively simple process in undisputed cases, "many states impose significant limitations on the ability of the guardian to access the minor's funds. The fundamental premise in these states is that it is the guardian's duty to protect the funds during the child's minority, and, therefore, the award is to be used only after a parent's obligation of support has been satisfied. In New York, for example, in order to utilize funds a parent must disclose his or her financial means and indicate why access to the funds is necessary. The court then decides whether to allow the expenditure." (Footnote omitted.) Id. The fund ultimately decided to allow guardianship as one option, among several others, noting that it was the "most protective option," but declined to require guardianship in all cases, concluding that such a restric-

has held that they are property of the child. See *Miller* v. *Shapiro*, 4 Conn. Cir. 63, 225 A.2d 644 (1966). That case is clearly distinguishable, as it dealt with the administration of benefits under a long-standing federal program. In the present case, we are confronted by an altogether different benefit, namely, a unique, onetime distribution of federal funds to provide an expedient method of compensation for victims of a notorious terrorist attack. Accordingly, we conclude that *Miller* is inapposite.

tion would "not promote the [p]rogram's goal of providing funds to parents and custodians of minor child ren for purposes of the child's current as well as future needs." Id., 61. Thus, the fund made clear that it would not mandate the most protective option at the expense of flexibility in parents' and custodians' use of the funds to meet minor children's current needs. "Many parents of minor beneficiaries, particularly those residing in New York, argued that requiring a parent to be appointed guardian of the property would be cumbersome and unnecessarily restrictive. These parents complained that they would be unable to provide adequately for their children's needs if they were required to submit to the probate and surrogate's courts requirements in their jurisdiction. They asked the [f]und to provide an alternative mechanism for payment to minors that would be less onerous." Id., p. 60.

The fund provided such an alternative by allowing the option of appointing a parent as a representative payee. "Under this option, a parent would apply to the [f]und to serve as a representative payee. Upon appointment by the [f]und, the representative payee would hold the funds on behalf of the minor and would have the fiduciary responsibility to ensure that the award to the child was utilized for the child's current needs, and, if not currently needed, saved for the child's future needs." Id., p. 61. This approach was at the opposite end of the spectrum from a guardianship; whereas the guardianship approach was perhaps the most protective option, the representative payee approach was arguably the least protective option. "The advantage of this option was its flexibility and ease of administration. The disadvantage was the lack of oversight and supervision of the representative payee by a third party." Id.

After weighing the advantages and disadvantages of these approaches, and others, the fund ultimately chose to allow for payment (1) to parents and custodians

who choose to become appointed guardians and receive awards in that capacity, (2) into a trust if the trust was approved for that purpose by a court of competent jurisdiction, and (3) to a custodial parent as a representative payee on behalf of a minor child if the parent applied with the fund for such status.[15] Id.

The plaintiff elected to be paid as a representative payee on behalf of the minor child. The fund allowed for this option, envisioning that the use of the award would not be subject to oversight by state probate courts. The imposition of fiduciary obligations on the representative payee is best seen as an effort by the fund (1) to ensure that a representative payee, *not* otherwise subject to court supervision, agreed to be bound to use the award in the manner expressly required by the award letter, and (2) to provide access to a remedy in the event that the representative payee violated that agreement. The obligations imposed by the fund are not imposed by statute, but by the fund itself.[16] Therefore,

[15] "A final option of utilizing a structured settlement for minors became available after the [f]und was notified of [a decision by the Internal Revenue Service] regarding the election of a periodic payment option through a structured settlement. Senior attorneys at the [f]und and at the Department [of Justice] worked with the [Internal Revenue Service] and [the] Department of [the] Treasury for well over a year in an effort to obtain a detailed determination on the availability of the structured settlement option. In order to [en]sure that the structure was entered into by an individual with authority to bind the minor, the [f]und required that a parent or custodian signing the structure documents be appointed guardian of the property for the minor by a court of competent jurisdiction. For many parents or custodians, such an appointment had to be made on an expedited basis to allow timely approval of the structure. The various surrogate's and probate courts were able to respond quickly to the [f]und's request to expedite these applications for guardianship by granting such appointments for the limited purpose of entering into a structured settlement agreement for the [f]und award. The cooperation of these various courts was instrumental in making the structured settlement option viable for minors." (Footnotes omitted.) 1 K. Feinberg et al., supra, p. 62.

[16] In addition to appearing in the award letter, the fiduciary obligations were made apparent to and were agreed to by the plaintiff when she applied to be a representative payee. "Applicants for the representative payee program were required to sign an acknowledgment that [they] could be held

a minor child, an appointed guardian, or the special master himself could bring an action sounding in contract against the representative payee, alleging, for example, that the representative payee failed to perform in the manner required by the award letter, which performance was promised in exchange for direct payment of the award to the representative payee. Id., pp. 61–62. Thus, the legal nature of the award is a payment directly to the plaintiff that she is contractually bound to receive and use consistent with the conditions imposed by the fund.[17]

The Appellate Court concluded, however, in contrast to our assessment of the legal nature of the fund award, that the creation of the fund by the United States government was an alternative to the statutory right of action under General Statutes § 52-555 for wrongful death, and that the minor child "was entitled to share in the proceeds of any wrongful death action arising out of her father's death, and her right could be asserted on her behalf when she was born, whether that right was a wrongful death action or a claim made to the fund provided by Congress." *Hynes* v. *Jones*, supra, 175 Conn. App. 100. The Appellate Court reasoned that the minor child's right under § 45a-437 to one half of the intestate estate after the first $100,000 "included her

liable if [they] did not prudently invest the funds, maintain separate accounts, and maintain records, or if [they] misused or misappropriated the funds. In addition, the applicant was required to acknowledge that the minor was entitled to receive the award upon reaching [eighteen] years of age and that, at such time, the award would be distributed to the minor unless the minor otherwise consented." 1 K. Feinberg et al., supra, pp. 61–62.

[17] The plaintiff characterizes the payment of the fund award to a parent as a representative payee of a minor child as analogous to leaving property in trust for the benefit of a minor child. As we have previously explained, we choose to take the award for what it is, a direct payment to the plaintiff that she is contractually bound to receive and use consistent with the conditions imposed by the fund. Therefore, consistent with our choice not to adopt the Appellate Court's analogy to wrongful death law, we decline the plaintiff's invitation to analogize to trust law.

right to share proceeds of any wrongful death action against an airline or that right's statutory alternative, namely, the federally sponsored victim compensation fund." Id., 99. We respectfully disagree with the Appellate Court's characterization of the fund award as an alternative to a wrongful death action. Although the Stabilization Act, which created the fund, included a statement of purpose emphasizing the provision of compensation, the appropriate legal characterization of that compensation was left unclear. Indeed, the special master observed that the comments on the regulations revealed conflicting views on the nature and purpose of the Stabilization Act, including whether Congress intended to create a reparation program or to provide tort like compensation. 1 K. Feinberg et al., supra, p. 5. Thus, the regulations were promulgated with the understanding, on the part of the Department of Justice and the special master, that Congress created a compensation system that included some elements of tort compensation, but not all. Id., p. 6. In light of the sui generis nature of the compensation system created by Congress and implemented by the fund, we take the fund award for what it is—a direct payment to the plaintiff that she is contractually bound to receive and use consistent with the conditions imposed by the fund—rather than confer a legal status on the award incommensurate with the sui generis nature of that system.

Because we conclude that the fund award was paid directly to the plaintiff in express contemplation of the absence of probate court supervision over her receipt and use of the award, and was not the property of the decedent or his estate, we further conclude that the Probate Court lacked jurisdiction over the award as part of its supervision of the administration of intestate estates under §§ 45a-98, 45a-438 (a) and 45a-437 (a).

Similarly, we conclude that §§ 45a-629 (a) and 45a-631 (a) do not afford the Probate Court jurisdiction to prohibit the plaintiff from using the award in the absence of that court's approval. Section 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor. . . ." Section 45a-631 (a) provides in relevant part: "A parent of a minor, guardian of the person of a minor or spouse of a minor shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ." In construing these statutes, the Appellate Court adopted a broad definition of "property" and reasoned that, "[t]o conclude that the [minor] has no property interest or entitlement in and to this award, which merits statutory protection for minors, is without any authority under our law." *Hynes* v. *Jones*, supra, 175 Conn. App. 97–98, 104. We respectfully disagree with the Appellate Court.

The salient question is whether the award constitutes property to which the minor child is entitled or property belonging to her within the meaning of §§ 45a-629 (a) and 45a-631 (a), respectively. In considering these statutes, we do not write on a blank slate. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007) (concluding legislature did not intend § 1-2z to overrule case law decided prior to its enactment construing statute in manner conflicting with plain meaning rule). The Appellate Court's adoption of an extremely broad definition of property is in tension with our previous conclusion that the meaning of property within § 45a-631 is not without limits. Cf. *Steinmann*

v. *Steinmann*, 121 Conn. 498, 504–505, 186 A. 501 (1936) (concluding that statutory predecessor to § 45a-631, which provided "that the parent of a minor child shall not receive or use any property belonging to such child in an amount exceeding $100, unless appointed as guardian of the estate of such minor," did not invalidate child support award because "[t]he amount of the award is not the property of the minor child within the meaning of this statute"). Because we have previously determined that not all interests in property fall within the meaning of property under § 45a-631, a closely related statute to § 45a-629 (a), and because the fund paid the award to the plaintiff in express contemplation of the absence of probate court supervision of her receipt and use of the award, we conclude that a fund award paid directly to a representative payee for the benefit of her minor child is not property to which the minor child is entitled or property belonging to the minor child within the meaning of §§ 45a-629 (a) and 45a-631 (a), respectively.

Mindful that "[a] court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation"; (internal quotation marks omitted) *Connery* v. *Gieske*, supra, 323 Conn. 388; we conclude that our state statutes did not grant the Probate Court jurisdiction to monitor the plaintiff's use of the fund award or to prohibit the plaintiff from using that award in the absence of that court's approval.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other justices concurred.

ENRICO MANGIAFICO *v.* TOWN OF FARMINGTON ET AL. (SC 19993)

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

Syllabus

Pursuant to federal statute (42 U.S.C. § 1983), every person who, under color of any statute, ordinance or regulation of any state, subjects another person to the deprivation of constitutional rights, shall be liable to the injured party in an action at law or suit in equity.

The plaintiff landowner, M, sought, inter alia, injunctive relief and to recover damages under 42 U.S.C. § 1983 from the named defendant, the town of Farmington, among other defendants, alleging that the town's designation of M's property as blighted, its assessment of daily punitive fines, and its imposition of liens on his property constituted a taking in violation of the federal and state constitutions. After the town had received complaints regarding the appearance of M's property, the town council voted to place it on the town's blighted building list. Thereafter, when M failed to make certain improvements, the town began assessing daily punitive fines for the alleged violation of the town's blight ordinance and commenced an action to recover those fines. M neither paid the fines nor filed an administrative appeal challenging them. As a result, the town manager caused two liens to be placed on M's property and to be recorded in the town's land records. After M commenced the present action, the defendants filed a motion to dismiss for lack of subject matter jurisdiction. The trial court granted in part the motion and dismissed most of M's claims, including his § 1983 claims, on the ground that he had failed to exhaust the administrative remedies provided by statute (§ 7-152c [g]) by failing to file an appeal with the Superior Court challenging the assessment of the fines. Subsequently, the trial court granted the defendants' motion for summary judgment as to M's remaining claim and rendered judgment for the defendants, from which M appealed to the Appellate Court. That court affirmed the judgment of the trial court, concluding, inter alia, that M's failure to exhaust his administrative remedies deprived the trial court of subject matter jurisdiction over M's § 1983 claims. On the granting of certification, M appealed to this court. *Held*:

1. The Appellate Court improperly upheld the trial court's dismissal of M's § 1983 claims for lack of subject matter jurisdiction on the ground that M was required but failed to file an appeal challenging the assessment of the fines in accordance with § 7-152 (g) prior to bringing his § 1983 claims, as M was not required to exhaust his available state administrative remedies before filing a claim under 42 U.S.C. § 1983 in state court:

although state courts have concurrent jurisdiction over claims brought under 42 U.S.C. § 1983, state courts are bound by federal precedent governing the construction and application of that federal statute, the United States Supreme Court previously held in *Patsy* v. *Board of Regents* (457 U.S. 496) that, in light of the legislative purpose and history of the law, exhaustion of state administrative remedies generally is not a prerequisite to bringing an action under 42 U.S.C. § 1983, and none of the federal exceptions to that general rule of nonexhaustion applied in the present case; moreover, this court concluded that its prior holdings in *Laurel Park, Inc.* v. *Pac* (194 Conn. 677) and *Pet* v. *Dept. of Health Services* (207 Conn. 346), which created an additional, unwarranted exception to that general rule by requiring the exhaustion of state administrative remedies prior to the filing of a § 1983 action seeking injunctive relief, were inconsistent with *Patsy* and its progeny, and must be overruled, as those cases incorrectly treated a plaintiff's burden of alleging and proving the lack of an adequate legal remedy in a § 1983 action for injunctive relief as a prerequisite to the exercise of a court's subject matter jurisdiction rather than as an essential element of the plaintiff's claim for injunctive relief, and, accordingly, a plaintiff's failure to allege or establish the lack of an adequate remedy does not deprive a court of subject matter jurisdiction over a § 1983 claim.

2. This court declined to address the merits of the defendants' alternative ground for affirming the Appellate Court's judgment, raised for the first time on appeal to this court, that the plaintiff's takings claims were not ripe for judicial review because there purportedly had not been a final administrative decision as required by *Williamson County Regional Planning Commission* v. *Hamilton Bank* (473 U.S. 172): although this court, in *Port Clinton Associates* v. *Board of Selectman* (217 Conn. 588), previously has treated the *Williamson County* finality requirement as jurisdictional in nature, recent developments in federal case law established that it is a prudential rather than a jurisdictional requirement, and, therefore, this court abandoned its conclusion in *Port Clinton Associates* that the *Williamson County* finality requirement is a jurisdictional defect that may be raised for the first time on appeal; accordingly, because the defendants did not raise their ripeness claim in the trial court, and because the purported lack of a final administrative decision did not implicate the subject matter jurisdiction of the court, that claim was not preserved for appellate review.

Argued October 9, 2018—officially released April 16, 2019

Procedural History

Action seeking to enjoin the named defendant from enforcing a blight ordinance, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl, J.*, granted in part

the defendants' motion to dismiss; thereafter, the court, *Scholl, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Alvord*, *Keller* and *Beach, Js.*, which affirmed the judgment of the trial court, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

Jon L. Schoenhorn, for the appellant (plaintiff).

Kenneth R. Slater, Jr., with whom was *Daniel J. Krisch*, for the appellees (defendants).

Opinion

ECKER, J. The principal issue in this certified appeal is whether a claim brought in state court alleging a deprivation of civil rights under 42 U.S.C. § 1983[1] may be dismissed for failure to exhaust state administrative remedies. The plaintiff, Enrico Mangiafico, is a homeowner who was the subject of a series of enforcement actions under a municipal blight ordinance in the town of Farmington.[2] In 2013, the plaintiff commenced this state court action alleging, in relevant part, that the defendants' designation of his property as blighted, their assessment of daily punitive fines, and their imposition of municipal blight liens constituted an unconstitutional taking of his property in violation of the fourteenth amendment to the United States constitution and § 1983. The defendants successfully moved in the trial court to dismiss the plaintiff's § 1983 claims for

[1] Title 42 of the United States Code, § 1983, provides a cause of action against "[e]very person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."

[2] The defendants are the town, Kathleen Eagen, Jeffrey Hogan, Nancy Nickerson, Charles Keniston, and C.J. Thomas. We refer hereinafter to the defendants collectively as the defendants, except when it is necessary to identify a defendant individually by name.

lack of subject matter jurisdiction on the ground that the plaintiff had failed to exhaust his administrative remedies because he had not filed an appeal pursuant to General Statutes § 7-152c (g).[3] The Appellate Court affirmed the trial court's judgment. See *Mangiafico* v. *Farmington*, 173 Conn. App. 158, 177, 163 A.3d 689 (2017).

On appeal, the plaintiff contends that he was not required to exhaust his state administrative remedies. The defendants respond that the plaintiff's § 1983 claims properly were dismissed, under settled Connecticut precedent, for failure to exhaust state administrative remedies. Alternatively, the defendants contend that dismissal was required under the ripeness doctrine articulated by the United States Supreme Court in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (*Williamson County*), because there was no final decision in this case due to the plaintiff's failure to appeal his assessments pursuant to § 7-152c (g).

Our disposition is controlled largely by *Patsy* v. *Board of Regents*, 457 U.S. 496, 501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), in which the United States Supreme Court held in unequivocal terms that "exhaustion of state administrative remedies is not a prerequisite to an action under § 1983 . . . ." We repeatedly have acknowledged that the *Patsy* doctrine applies in § 1983 cases litigated in our state courts. See *Laurel Park, Inc.* v. *Pac*, 194 Conn. 677, 690, 485 A.2d 1272 (1984);

[3] General Statutes § 7-152c (g) provides: "A person against whom an assessment has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee in an amount equal to the entry fee for a small claims case pursuant to section 52-259, at a superior court facility designated by the Chief Court Administrator, which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court."

Fetterman v. *University of Connecticut*, 192 Conn. 539, 549, 473 A.2d 1176 (1984). We have deviated from *Patsy* in one respect, by creating an exception to its applicability in actions for injunctive relief under § 1983. See *Pet* v. *Dept. of Health Services*, 207 Conn. 346, 369, 542 A.2d 672 (1988) (holding that "no form of injunctive relief, under § 1983 or otherwise, is justified as an exception to the [administrative] exhaustion requirement"); *Laurel Park, Inc.* v. *Pac*, supra, 691 (holding that "none of the concerns expressed in *Patsy*" warrant an "exception to the exhaustion doctrine" in cases for injunctive relief). Following oral argument in the present case, this court sua sponte ordered the parties to submit supplemental briefs addressing the continued viability of the injunctive relief exception in light of *Patsy* and its progeny and whether we should "overrule *Pet* v. *Department of Health Services* in this case?"

We conclude, in light of *Patsy* and its progeny, that a plaintiff is not required to exhaust administrative remedies prior to filing a § 1983 claim in state court, regardless of the type of relief sought. We therefore overrule our holdings in *Pet* and *Laurel Park, Inc.*, that exhaustion of state administrative remedies is a jurisdictional prerequisite to the filing of a § 1983 action for injunctive relief. We decline to address the defendants' unpreserved *Williamson County* defense and, accordingly, reverse in part the judgment of the Appellate Court.

I

It will be useful at the outset to review the statutory and regulatory scheme governing blight designations and citations in the town of Farmington. General Statutes § 7-148 (c) (7) (H) (xv) provides municipalities with the power to "[m]ake and enforce regulations for the prevention and remediation of housing blight . . . provided such regulations define housing blight and require such municipality to give written notice of any

violation to the owner and occupant of the property and provide a reasonable opportunity for the owner and occupant to remediate the blighted conditions prior to any enforcement action being taken . . . ." The statute further provides municipalities with the authority to "prescribe civil penalties for the violation of such regulations of not less than ten or more than one hundred dollars for each day that a violation continues and, if such civil penalties are prescribed, such municipality shall adopt a citation hearing procedure in accordance with section 7-152c . . . ." General Statutes § 7-148 (c) (7) (H) (xv).

Pursuant to § 7-148 (c) (7) (H) (xv), the town adopted regulations governing "blighted premises," which are defined, in relevant part, as "[a]ny vacant building or structure" that (A) "pose[s] a serious threat to the health and safety of persons in the [t]own," (B) "is not being maintained and contributes to housing decay," (C) "[is a location at which] [i]llegal activities are conducted . . . as documented in [p]olice [d]epartment records," (D) "is a fire hazard as determined by the [f]ire [m]arshall or as documented in [f]ire [d]epartment records," or (E) "is a factor creating a substantial and unreasonable interference with the use and enjoyment of other premises within the surrounding area as documented by neighborhood complaints, police reports or the cancellation of insurance on proximate properties." Farmington Town Code § 88-2 (A) through (E) (2003) (town code). The regulations provide that "[n]o owner of real property, taxable or tax-exempt, within the [t]own of Farmington shall cause or allow blighted premises to be created, nor shall any owner allow the continued existence of blighted premises." Id., § 88-3. Under the regulations, the town manager must "complete a list of blighted properties," which is then "approve[d], disapprove[d], or modif[ied]" by the town council. Id., § 88-4 (B) and (C). After the list of blighted properties has

been approved by the town council, "the [t]own [m]anager, or his designee, shall undertake regular inspections for the purpose of documenting continuous blight and shall issue a citation and impose a penalty of not more than $100 for each day that the building or structure" continues to be blighted. Id., § 88-5 (A). Each day that the building or structure is deemed to be blighted constitutes "a separate offense." Id.

Section 7-152c (a) authorizes municipalities to "establish by ordinance a citation hearing procedure" to enforce any "assessments and judgments" imposed in the exercise of its municipal powers. Under the citation hearing procedure, the municipality must, "within twelve months from the expiration of the final period for the uncontested payment of fines, penalties, costs or fees . . . send notice to the person cited," informing them "(1) [o]f the allegations against him and the amount of the fines, penalties, costs or fees due; (2) that he may contest his liability before a citation hearing officer by delivering in person or by mail written notice within ten days of the date thereof; (3) that if he does not demand such a hearing, an assessment and judgment shall be entered against him; and (4) that such judgment may issue without further notice." General Statutes § 7-152c (c). The municipality must provide any person requesting a citation hearing with "written notice of the date, time and place for the hearing" and an opportunity to "present evidence in his behalf." General Statutes § 7-152c (e). At the conclusion of the hearing, the hearing officer must "announce his decision . . . ." General Statutes § 7-152c (e). If the hearing officer "determines that the person is not liable" for the violation, he must dismiss the matter. General Statutes § 7-152c (e). If, however, the hearing officer "determines that the person is liable for the violation," he must "enter and assess the fines, penalties, costs or fees against such person as provided by the applicable ordi-

nances of the municipality." General Statutes § 7-152c (e).

A person subject to an assessment of fines under § 7-152c "is entitled to judicial review by way of appeal." General Statutes § 7-152c (g). The appeal must be "instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee . . . which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court." General Statutes § 7-152c (g). Under the rules of the Superior Court, the hearing on the petition to reopen "shall be de novo," and "[t]here shall be no right to a hearing before a jury." Practice Book § 23-51 (c). Any assessment of fines that is not overturned on appeal or paid in full "shall constitute a lien upon the real estate against which the penalty was imposed from the date of such penalty. Each such lien may be continued, recorded and released in the manner provided by the general statutes for continuing, recording and releasing property tax liens." General Statutes § 7-148aa.

II

The following facts are taken as true for purposes of this appeal. The plaintiff owns a home located at 23 Lakeview Drive in Farmington, which suffered catastrophic damage sometime prior to 2009, causing it to become uninhabitable for a lengthy period of time. The demolition and rebuilding of the home was delayed by the plaintiff's insurance company, resulting in a settlement agreement sometime in August, 2011.

In July, 2012, the defendant Kathleen Eagen, who was the town manager, received complaints about the appearance of the plaintiff's home. Chris Foryan, the town building official, verbally informed the plaintiff of these complaints on July 25, 2012. The plaintiff asked Foryan to schedule a meeting with Eagen as soon as

practicable, explaining that he would be away on vacation in early August. A meeting was held on July 27, 2012, but Eagen did not attend.

On August 14, 2012, without prior notice to the plaintiff or an opportunity for him to be heard, the individual defendants—Eagan, Jeffrey Hogan, Nancy Nickerson, Charles Keniston, and C.J. Thomas—convened a town council meeting at which they each voted to place the plaintiff's home on the town's blighted building list. Eight days later, on August 22, 2012, Eagen sent the plaintiff a letter informing him that his home had been placed on the blighted building list and demanding that he undertake certain improvements and construction prior to October 1, 2012. The plaintiff tried to comply with the letter's demands. Nonetheless, on September 4, 2012, without prior notice and more than three weeks before the October 1 deadline, town building officials began imposing daily punitive fines of $100 on the plaintiff based on the alleged blight condition.

On September 14, 2012, the plaintiff sent a letter to the defendants asking them to remove his home from the blighted building list because it did not satisfy the definition of blight in the town code. The defendants declined to remove the plaintiff's property from the list and, instead, began a citation enforcement action to recover the daily punitive fines. The plaintiff requested and was granted a hearing before a municipal hearing officer, at which he challenged the blight designation and the imposition of daily fines. At the hearing, which was conducted on October 15, 2012, the hearing officer stated that he lacked the authority to rule on the propriety of the blight designation or the procedures used to designate the plaintiff's property as blighted. The hearing officer explained, however, that he had the authority to remit some of the daily punitive fines and to amend the plaintiff's construction schedule. At the conclusion of the hearing, the hearing officer reduced

the total amount of fines from $4000 to $2000 and ordered the plaintiff to present a building plan to municipal officials within thirty days.

On January 4, 2013, the town citation officer again began imposing daily punitive fines of $100 for the plaintiff's alleged violation of the blight ordinance. On February 21, 2013, without notice to the plaintiff, a second hearing was held before a municipal hearing officer, resulting in the imposition of $4700 in fines for the time period between January 4 and February 19, 2013. The plaintiff did not have an opportunity to contest his liability because he was not given notice of the hearing.

The plaintiff did not pay the accumulated assessed fines; nor did he file an appeal pursuant to § 7-152c (g). As a result, Eagan, on behalf of the town, caused two municipal real estate liens to be placed on the plaintiff's property and recorded on the town's land records: (1) a lien in the amount of $2000 for nonpayment of the hearing officer's assessment of fines for the period between September 4 and October 15, 2012; and (2) a lien in the amount of $4700 for nonpayment of the hearing officer's assessment of fines for the period between January 4 and February 19, 2013.

III

The plaintiff commenced this action on September 5, 2013. The complaint contains five counts, respectively alleging that (1) the blight designation, the daily punitive fines, and the liens constituted an "unconstitutional taking of property without compensation and [a] violation of due process of law," in violation of the fourteenth amendment to the United States constitution, article first, §§ 10 and 11 of the Connecticut constitution, and 42 U.S.C. §§ 1983 and 1988, (2) the defendants, by their actions, intentionally caused the plaintiff to endure emotional distress, (3) the town's blight ordinance is "unconstitutional as applied to the plaintiff's property,"

pursuant to General Statutes § 52-29 and 28 U.S.C. §§ 2201 and 2202, (4) the plaintiff is entitled to a discharge of the municipal blight liens pursuant to § 7-148aa and General Statutes §§ 49-35a through 49-37, and (5) indemnification from the town for the money damages owed to the plaintiff by the individually named defendants, pursuant to General Statutes §§ 7-101a and 7-465. The plaintiff sought injunctive and declaratory relief, as well as monetary damages. More specifically, he requested (1) an injunction prohibiting the defendants from enforcing the blight ordinance and imposing the daily punitive fines, (2) a declaration that the town's blight ordinance is "unconstitutionally vague and arbitrary as applied to the plaintiff" and that the enforcement of the ordinance has violated the plaintiff's right to due process of law, (3) reasonable attorney's fees, (4) discharge of the municipal blight liens, and (5) compensatory and punitive damages.

The defendants moved to dismiss the plaintiff's complaint for lack of subject matter jurisdiction. The motion was premised on the straightforward legal theory that the plaintiff had failed to exhaust the administrative remedy provided by § 7-152c (g) because he had not filed an appeal with the Superior Court challenging the hearing officer's citation assessments. The trial court granted in part the motion to dismiss on the ground that there was "no dispute that the plaintiff did not file an appeal [with] the Superior Court from any of the decisions of the town or its hearing officer," and such an appeal "would have provided the plaintiff with a de novo hearing in which he could have contested the imposition of the fines as well as the designation of his property as blighted." The trial court's dismissal encompassed counts one (constitutional claims under § 1983), two (intentional infliction of emotional distress), three (declaration that town's blight ordinance is unconstitutionally vague as applied to the plaintiff),

and five (indemnification) of the plaintiff's complaint for lack of subject matter jurisdiction. The trial court denied the defendants' motion with respect to count four (discharge of the municipal blight liens), however, on the ground that the exhaustion doctrine did not apply to that particular claim because § 7-148aa "gives the court subject matter jurisdiction" to "release anti-blight liens in the same manner that property tax liens are released."

The plaintiff moved for reconsideration on the theory that exhaustion would have been futile "because of the ongoing and prospective nature of the daily $100 punitive fines," which continued to accrue unabated each day. Specifically, the plaintiff argued that "requiring [him] to engage in a protracted process whereby he would have to appeal each and every daily punitive fine imposed or to be imposed—past or future—in order to exhaust administrative remedies and obtain judicial review is a futility which is barred by federal legal precedent." The trial court granted the plaintiff's motion for reconsideration but denied the relief requested therein.

On December 11, 2014, the plaintiff filed a second motion for reconsideration, arguing that the trial court "should reconsider its ruling on the plaintiff's futility argument" in light of the defendants' position "in a new action involving blight citations issued . . . *after* the commencement of the current action . . . ." (Emphasis in original.) The plaintiff explained that he had commenced a second action challenging "258 blight citations on his 23 Lakeview Drive, Farmington property, totaling $25,800 in fines, issued between September, 2013 through May, 2014 . . . ." The town had moved to dismiss the plaintiff's second action as premature because it had not commenced, and might not ever commence, a citation assessment action under § 7-152c

to collect the fines imposed.[4] The plaintiff argued that the town's position in the second action was contrary to its position in the present action that § 7-152c (g) provided the plaintiff with an adequate administrative remedy and was "proof that any further efforts made by the plaintiff to exhaust administrative remedies [in connection with the conduct at issue in the present lawsuit] would be, and is, both futile and/or 'useless.' " The defendants opposed the plaintiff's motion for reconsideration on the theory that the second action was in a different procedural posture than the present action, and, therefore, the town's legal arguments in the two actions were neither contrary nor inconsistent. The trial court agreed with the defendants and denied the plaintiff's second motion for reconsideration.

In the meantime, on October 1, 2014, the defendants moved for summary judgment on count four of the plaintiff's complaint on the ground that the blight assessments underlying the municipal liens were indisputably "valid and final and subject to no further challenge on the merits . . . ." The trial court granted the motion because the plaintiff had failed to file an appeal from the assessments underlying the liens in the Superior Court pursuant to § 7-152c (g), and, "[i]n the absence of [such] an appeal, the town's decisions are final and not reviewable." With all counts having been decided as a matter of law, the trial court rendered judgment in favor of the defendants.

[4] The trial court in the second action subsequently denied the town's motion to dismiss and rendered judgment in favor of the plaintiff because the town's "position [was] inconsistent with its prior argument" in this case. See *Mangiafico* v. *Farmington*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-14-5038235-S (February 10, 2015) (order denying motion to dismiss). The Appellate Court reversed the judgment of the trial court in the second action, holding that the plaintiff's claims in that case were not ripe for adjudication because the town never had sought to enforce the citations and the time for doing so had expired. See *Mangiafico* v. *Farmington*, 173 Conn. App. 178, 191, 163 A.3d 631 (2017). The Appellate Court's holding in the second action is not at issue in this appeal.

The plaintiff appealed to the Appellate Court, without success. See *Mangiafico* v. *Farmington*, supra, 173 Conn. App. 177. The Appellate Court rejected the plaintiff's argument that the administrative exhaustion doctrine does not apply to federal claims brought pursuant to § 1983 and his alternative argument that exhaustion would have been futile. See id., 171–72. It held, to the contrary, that the plaintiff was required to exhaust his administrative remedies under § 7-152c (g) and § 91-2 (G) of the town code because "[t]he Superior Court, being a court of general jurisdiction . . . could have addressed all of the plaintiff's claims and provided adequate relief if the plaintiff prevailed." Id., 172. With respect to count four of the plaintiff's complaint, seeking discharge of the municipal blight liens, the Appellate Court held that "the plaintiff could not attack the validity of the assessments secured by the liens because those assessments were final, and therefore valid, and there was no dispute that the liens were in proper form and duly recorded." Id., 175. We granted the plaintiff's petition for certification to appeal limited to the issue of whether "the Appellate Court properly conclude[d] that the trial court lacked subject matter jurisdiction to entertain the plaintiff's federal civil rights complaint due to the plaintiff's failure to exhaust administrative remedies?"[5] *Mangiafico* v. *Farmington*, 327 Conn. 920, 170 A.3d 681 (2017).

[5] In his principal brief, the plaintiff also claims that the Appellate Court improperly (1) upheld the dismissal of his complaint insofar as it contained a claim for inverse condemnation, and (2) upheld the trial court's grant of summary judgment on count four of his complaint, which sought to discharge the blight liens. These issues are outside the scope of the certified question, and, therefore, we decline to address them. See, e.g., *State* v. *Cote*, 314 Conn. 570, 581, 107 A.3d 367 (2014) (declining to review claim that "is beyond the scope of the certified question"); see also Practice Book § 84-9 ("[t]he issues which the appellant may present are limited to those set forth in the petition for certification, except where the issues are further limited by the order granting certification").

IV

We first address the plaintiff's claim that he was not required to exhaust his state administrative remedies prior to bringing a § 1983 action. The plaintiff contends that exhaustion is not a prerequisite to an action for damages or equitable relief under § 1983 and, alternatively, that exhaustion would have been futile because the town's citation appeals process did not permit him to challenge either the inclusion of his property on the blighted buildings list, the unconstitutional vagueness of the blight ordinance as applied to his property, or the defendants' failure to follow the proper statutory and regulatory procedures. The defendants respond that the plaintiff's federal civil rights claims properly were dismissed for lack of subject matter jurisdiction because "[i]t is well established that the doctrine of exhaustion of remedies applies even if a plaintiff asserts constitutional violations." We agree with the plaintiff that he was not required to exhaust his state administrative remedies before filing his § 1983 claims in state court.

"As a preliminary matter, we set forth the applicable standard of review. The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives 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. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary."

(Internal quotation marks omitted.) *Neiman* v. *Yale University*, 270 Conn. 244, 250–51, 851 A.2d 1165 (2004).

Section 1983, aptly called the "workhorse of civil rights litigation"; *Morgan* v. *District of Columbia*, 824 F.2d 1049, 1056 (D.C. Cir. 1987); provides "every person" with a procedural vehicle to obtain redress against state and municipal actors whose conduct has deprived that person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983 (2012). Section 1983 claims often are filed in federal court, but state courts unquestionably "have concurrent jurisdiction over claims brought under § 1983." *Sullins* v. *Rodriguez*, 281 Conn. 128, 133, 913 A.2d 415 (2007). This does not mean, of course, that state courts hearing § 1983 claims are free to depart from United States Supreme Court precedent governing the construction and application of the federal statute. Cf. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 315–23, 5 L. Ed. 257 (1821) (holding that constitutional structure, and supremacy clause in particular, requires that United States Supreme Court have jurisdiction to review judgment of state's high court as to questions of federal law). The elements of a § 1983 action, and the defenses thereto, "are defined by federal law"; (internal quotation marks omitted) *Sullins* v. *Rodriguez*, supra, 134; and state courts applying § 1983 "may not expand or contract the contours" of the right to relief. *Schnabel* v. *Tyler*, 230 Conn. 735, 743, 646 A.2d 152 (1994); see also *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 376, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) (holding that "a state court entertaining a § 1983 action must adhere to [the federal courts'] interpretation" of § 1983). Accordingly, this court has recognized that it must not "erect a constitutionally impermissible barrier to the vindication of federal rights" in state court. *Sullins* v. *Rodriguez*, supra, 136. We also have acknowledged that "[i]t would be a bizarre result" if

this court were to adopt an interpretation of a claim or defense under § 1983 that is different from that of the federal circuit in which our state courts are located, resulting in a different outcome depending on whether the plaintiff filed his § 1983 action in a state courthouse or in a federal courthouse a few blocks away. (Internal quotation marks omitted.) *Schnabel* v. *Tyler*, supra, 743 n.4 (recognizing that decisions of Second Circuit Court of Appeals are "entitled to great weight" in § 1983 cases because "the federal statute confers concurrent jurisdiction on the federal and state courts" [internal quotation marks omitted]). "We do not believe that when Congress enacted the concurrent jurisdiction provision of § 1983 that it intended to create such a disparate treatment of plaintiffs depending on their choice of a federal or state forum." (Internal quotation marks omitted.) Id.

These principles dictate the proper resolution of the present case. As noted previously in this opinion, the United States Supreme Court held more than thirty-five years ago that "exhaustion is not a prerequisite to an action under § 1983 . . . ." *Patsy* v. *Board of Regents*, supra, 457 U.S. 501. The court's holding in *Patsy* is premised on the history and purpose of the Civil Rights Act of 1871 (act), including § 1 of the act, which is the precursor to § 1983. Id., 502–507. Section 1 of the act was intended "to throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights . . . and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." (Citation omitted; internal quotation marks omitted.) Id., 504. "A major factor motivating the expansion of federal jurisdiction through [§ 1 of the act] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of indi-

viduals or to punish those who violated these rights." Id., 505. "[T]his perceived defect in the [s]tates'[fact-finding] processes" was "particularly relevant" to the exhaustion question because "exhaustion rules are often applied in deference to the superior [fact-finding] ability of the relevant administrative agency." Id., 506. In light of the clear legislative intent to provide an immediate remedy for alleged violations of federal law, the United States Supreme Court "conclude[d] that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Id., 516.

The *Patsy* nonexhaustion rule applies broadly, and with very limited exceptions. The United States Supreme Court has recognized only two instances in which an aggrieved party will be required to exhaust his or her administrative remedies before commencing a § 1983 lawsuit. First, exhaustion may be required by some other federal statute, such as the Prison Litigation Reform Act, 42 U.S.C. § 1997e (a), or the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415 (*l*), both of which expressly predicate relief on the exhaustion of administrative remedies. See *Patsy* v. *Board of Regents*, supra, 457 U.S. 508 (recognizing that, "[i]n § 1997e, Congress . . . created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983"); *Frazier* v. *Fairhaven School Committee*, 276 F.3d 52, 64 (1st Cir. 2002) (holding that "plaintiffs who bring an IDEA-based claim under 42 U.S.C. § 1983, in which they seek only money damages, must exhaust the administrative process available under the IDEA as a condition precedent to entering a state or federal court"); see generally *Heck* v. *Humphrey*, 512 U.S. 477, 483, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (noting that "§ 1983 contains no exhaustion requirement beyond what Congress has provided"). Second, the United States Supreme Court has

held that state "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts" without first exhausting their state judicial remedies. *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981). Except in these limited contexts, however, "the Supreme Court [and the] circuit courts of appeals have confirmed that, as a general rule, exhaustion of state administrative remedies is not required prior to bringing suit under § 1983."[6] *Talbot* v. *Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997).

[6] The defendants argue that there is a third exception to the *Patsy* nonexhaustion doctrine when there are ongoing, coercive state administrative proceedings that implicate important state interests. In support of this argument, the defendants rely on *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 and n.2, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986), in which the United States Supreme Court held that the principles of comity underlying the abstention doctrine established in *Younger* v. *Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), require federal courts to abstain from exercising jurisdiction over a § 1983 action filed while coercive state administrative proceedings are ongoing. See generally *Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69, 78, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013) (noting that federal courts will abstain from exercising jurisdiction under *Younger* abstention doctrine only in following "exceptional circumstances": [1] "federal intrusion into ongoing state criminal prosecutions"; [2] "certain civil enforcement proceedings"; and [3] "pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions" [internal quotation marks omitted]); *Spargo* v. *New York State Commission on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003) ("*Younger* abstention is mandatory when: [1] there is a pending state proceeding, [2] that implicates an important state interest, and [3] the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims"), cert. denied, 541 U.S. 1085, 124 S. Ct. 2812, 159 L. Ed. 2d 247 (2004). The United States Supreme Court noted in *Ohio Civil Rights Commission* that application of the *Younger* abstention doctrine was "fully consistent" with the nonexhaustion principles set forth in *Patsy* because the administrative proceedings at issue in that case were "coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest." *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, supra, 628 n.2.

Ohio Civil Rights Commission did not create a general exception to the *Patsy* nonexhaustion doctrine in § 1983 cases; it simply held that the doctrine

This court has never questioned the general proposition that *Patsy* applies with full force to § 1983 claims brought in state court. The point was established as a matter of federal law in *Felder* v. *Casey*, 487 U.S. 131, 146–49, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (applying *Patsy* to hold that plaintiff's failure to comply with Wisconsin's notice of claim requirement could not be used as exhaustion requirement to bar plaintiff from bringing his §1983 claim in state court), and it has been embraced by this court, with the limited deviation dis-

was not an impediment to federal abstention under *Younger* when there is an ongoing, coercive state administrative proceeding that implicates important state interests. The defendants in the present case did not seek abstention under the *Younger* doctrine; nor did they claim that a state analogue to the *Younger* abstention doctrine applies. The cases on which they rely, therefore, are inapplicable. See *Brown ex rel. Brown* v. *Day*, 555 F.3d 882, 890 (10th Cir. 2009) (holding that coercive state administrative proceedings are "exempt from *Patsy* and entitled to *Younger* deference"); *Moore* v. *Asheville*, 396 F.3d 385, 395 n.4 (4th Cir.) (noting that "*Younger* requires federal courts to abstain in favor of pending state administrative proceedings that are coercive in nature"), cert. denied, 546 U.S. 819, 126 S. Ct. 349, 163 L. Ed. 2d 59 (2005); *O'Neill* v. *Philadelphia*, 32 F.3d 785, 793 (3d Cir. 1994) (holding that "considerations of comity demand that we remain sensitive to the legitimate interests of the states" and abstain from exercising jurisdiction under *Younger* when there are ongoing, coercive state administrative proceedings), cert. denied, 514 U.S. 1015, 115 S. Ct. 1355, 131 L. Ed. 2d 213 (1995); *University Club* v. *New York*, 842 F.2d 37, 41–42 (2d Cir. 1988) (noting that abstention under *Younger* doctrine is required when there is ongoing, coercive state administrative proceeding implicating important state interests); *Kercado-Melendez* v. *Aponte-Roque*, 829 F.2d 255, 260–61 (1st Cir. 1987) (observing that, "[i]n *Patsy* and cases like it, abstention [under the *Younger* doctrine] was unnecessary" because state administrative proceeding was neither coercive nor ongoing [footnote omitted]), cert. denied, 486 U.S. 1044, 108 S. Ct. 2037, 100 L. Ed. 2d 621 (1988); *Farm Bureau Town & Country Ins. Co.* v. *Angoff*, 909 S.W.2d 348, 355 (Mo. 1995) ("[a]pplying the *Younger* principle, as reiterated in *Ohio Civil Rights Commission*," because "the proceedings are clearly coercive, the administrative action began before the issues were joined in the § 1983 action, and Missouri has an important interest in preventing unfair discrimination by licensed insurance companies"). Our holding in the present case is limited to the administrative exhaustion claim raised and argued by the parties, and we need not and do not address whether the *Younger* abstention doctrine, or a state analogue thereof, would be applicable under the circumstances of this case.

cussed subsequently in this opinion, in every instance in which the issue has received attention. See *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 831 n.17, 988 A.2d 229 (2010) (noting that "the requirement that a litigant exhaust state administrative remedies . . . is not a prerequisite to bringing an action [in state court] pursuant to § 1983"); *Fetterman* v. *University of Connecticut*, supra, 192 Conn. 549 (holding that plaintiff is not required to exhaust administrative remedies before filing § 1983 action in state court).

We have, unfortunately, deviated from the *Patsy* nonexhaustion rule in one particular context involving claims under § 1983 seeking *injunctive* relief. As in *Laurel Park, Inc.*, we held in *Pet* that although "exhaustion of state administrative remedies is not a prerequisite to an action for *damages* under § 1983," it is a "standard prerequisite for *injunctive relief*."[7] (Emphasis added; internal quotation marks omitted.) *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 368–69; *Laurel Park, Inc.* v. *Pac*, supra, 194 Conn. 691 (holding that *Patsy* did not abrogate "standard prerequisite" that plaintiff seeking injunctive relief have no adequate remedy at law, and, therefore, plaintiff must exhaust available administrative remedies as "condition precedent" to seeking injunctive relief under §1983); see also *Flanagan* v. *Commission on Human Rights & Opportunities*, 54 Conn. App. 89, 95, 733 A.2d 881 ("When the claim is for injunctive relief . . . our Supreme Court has noted, '[i]n *Laurel Park, Inc.* v. *Pac*, [supra, 691], which included a § 1983 count, that notwithstanding [*Patsy* v. *Board of Regents*], supra, [457 U.S. 516] the fundamental requirement of inadequacy of an available

[7] The plaintiff's complaint in the present case sought both injunctive relief and monetary damages under § 1983. Because "exhaustion of state administrative remedies is not a prerequisite to an action for damages under § 1983"; *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 368; the dismissal of the plaintiff's § 1983 claim for monetary damages plainly was improper.

legal remedy in order to obtain injunctive relief remains in full force.' *Pet* v. *Dept. of Health Services*, supra, [368–69]."), cert. denied, 250 Conn. 925, 738 A.2d 656 (1999).

This aspect of our holdings in *Pet* and *Laurel Park, Inc.*, is inconsistent with *Patsy* and its progeny and, therefore, must be overruled.[8] Neither the United States Supreme Court nor the federal circuit courts of appeals have recognized a distinction between claims for damages and injunctive relief for purposes of applying the *Patsy* nonexhaustion rule; the federal circuit courts that have addressed the issue uniformly have concluded that *Patsy* applies regardless of the relief sought. Thus, the *Patsy* nonexhaustion rule is applicable to "a request for injunctive relief in a § 1983 action" because to hold otherwise "would in effect . . . [deny] the precedential effect of *Patsy*" by "requiring exhaustion before bringing this type of § 1983 action." *James* v. *Richman*, 547 F.3d 214, 218 (3d Cir. 2008); see also *DeSario* v. *Thomas*, 139 F.3d 80, 86 (2d Cir. 1998) (holding that availability of state administrative remedy "does not bar injunctive relief for plaintiffs" in light of *Patsy*), vacated on other grounds sub nom. *Slekis* v. *Thomas*,

[8] In overruling our prior precedent, we are mindful of the principle of stare decisis, which "gives stability and continuity to our case law." *Conway* v. *Wilton*, 238 Conn. 653, 658, 680 A.2d 242 (1996). Stare decisis, however, is "not an inexorable command" or an "absolute impediment to change," especially when a prior decision "is clearly wrong." (Internal quotation marks omitted.) Id. 660; see also *State* v. *Miranda*, 274 Conn. 727, 734, 878 A.2d 1118 (2005) ("[i]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations" [internal quotation marks omitted]), quoting *Barden* v. *Northern Pacific Railroad Co.*, 154 U.S. 288, 322, 14 S. Ct. 1030, 38 L. Ed. 992 (1894). Our conclusion today, moreover, is not a matter of choice, but is compelled by the supremacy clause of the United States constitution. See *Haywood* v. *Drown*, 556 U.S. 729, 740–41, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) (holding that supremacy clause of United States constitution prohibits states from "shut[ting] the courthouse door to federal [§ 1983] claims" by divesting their state courts of jurisdiction).

525 U.S. 1098, 119 S. Ct. 864, 142 L. Ed. 2d 767 (1999); *Kercado-Melendez* v. *Aponte-Roque*, 829 F.2d 255, 258 (1st Cir. 1987) (holding that plaintiff was not required to exhaust her administrative remedies prior to filing § 1983 action for injunctive relief and monetary damages because, in *Patsy*, United States "Supreme Court . . . held expressly that [§] 1983 claimants need not avail themselves of state judicial and administrative remedies before going to federal court"), cert. denied, 486 U.S. 1044, 108 S. Ct. 2037, 100 L. Ed. 2d 621 (1988); *United Church of the Medical Center* v. *Medical Center Commission*, 689 F.2d 693, 697 (7th Cir. 1982) (holding that trial court improperly dismissed plaintiff's § 1983 action for declaratory and injunctive relief because "*Patsy* is fully dispositive of the exhaustion question").

The injunctive relief exception created in *Pet* and *Laurel Park, Inc.*, arose from an effort to observe the time-honored equitable principle that a party seeking injunctive relief must establish that he has no adequate remedy at law[9] and that irreparable harm will ensue absent injunctive relief. See *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 369 (noting "the fundamental requirement of inadequacy of an available legal remedy in order to obtain injunctive relief"); *Laurel Park, Inc.* v. *Pac*, supra, 194 Conn. 691 ("[t]he inadequacy of an available legal remedy is a standard prerequisite for injunctive relief"); see generally *Hartford* v. *American Arbitration Assn.*, 174 Conn. 472, 476, 391 A.2d 137 (1978) ("A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. The allegations and proof are conditions precedent to the granting of an injunc-

[9] The required showing of "no adequate remedy at law" typically refers to the availability of alternative relief in the form of monetary damages. See *Register.com, Inc.* v. *Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) ("[i]f an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief").

tion."). In *Pet* and *Laurel Park, Inc.*, we incorrectly treated the existence of an inadequate legal remedy as a prerequisite to the exercise of the court's subject matter jurisdiction, rather than as an essential element of a plaintiff's claim for injunctive relief. See *Murphy* v. *Zoning Commission*, 148 F. Supp. 2d 173, 181–82 (D. Conn. 2001) (observing that "the question of whether a claimant is required to exhaust state administrative remedies is conceptually distinct from the question of whether a party is entitled to injunctive relief after a showing that any legal remedy would be inadequate" because "a § 1983 claimant seeking injunctive relief is [not] required to exhaust state administrative remedies").

Consistent with *Patsy*, we now hold that a § 1983 plaintiff need not exhaust state administrative remedies, regardless of the type of relief sought in the complaint. Although a plaintiff seeking injunctive relief under § 1983 must allege and prove that no adequate remedy at law exists, this burden is not part of the exhaustion requirement but, rather, a part of the plaintiff's burden of pleading and proof.[10] Therefore, a plain-

[10] In *Laurel Park, Inc.*, and *Pet*, we did not view *Patsy* "as having abrogated this fundamental requirement for injunctive relief even in the federal courts." (Internal quotation marks omitted.) *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 369; accord *Laurel Park, Inc.* v. *Pac*, supra, 194 Conn. 691. Although the issue is outside the scope of this certified appeal, we note that subsequent federal case law has cast doubt on this view. See *James* v. *Richman*, supra, 547 F.3d 217–18 (holding that injunctive and declaratory relief are available under § 1983, even if adequate remedy at law exists, because to hold otherwise would "impose a de facto exhaustion requirement" contrary to *Patsy*); *DeSario* v. *Thomas*, supra, 139 F.3d 86 (holding that, in light of *Patsy*, availability of adequate remedy "does not bar injunctive relief for plaintiffs" under § 1983); see also *Romano* v. *Greenstein*, 721 F.3d 373, 376 n.7 (5th Cir. 2013) (rejecting claim that "the [D]istrict [C]ourt lacked subject matter jurisdiction because [the plaintiff] had an adequate remedy at law—judicial review in state court—which precludes her from seeking permanent injunctive relief" because plaintiff "was permitted to bring her § 1983 claim regardless of whether she had exhausted her state judicial remedy").

tiff's failure to allege or establish the lack of an adequate legal remedy does not deprive the trial court of subject matter jurisdiction over a claim brought pursuant to § 1983.

To summarize, the trial court in the present case granted the defendants' motion to dismiss the plaintiff's § 1983 claims because it concluded that the plaintiff had failed to exhaust his available state administrative remedies. We hold that the plaintiff was not required to exhaust his available state administrative remedies before filing a § 1983 claim in state court.[11] The dismissal of the plaintiff's § 1983 claims for lack of jurisdiction, therefore, must be reversed.[12]

The foregoing discussion also explains why we must reject the defendants' argument that the trial court properly dismissed the plaintiff's § 1983 claims on the ground that "exhaustion of remedies applies even if a plaintiff asserts constitutional violations." The defendants are correct that "[i]t is well established [as a matter of Connecticut law] that a plaintiff may not circumvent the requirement to exhaust available administrative remedies merely by asserting a constitutional claim." *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813, 12 A.3d 852 (2011). But § 1983 claims are not governed by state law; they are governed by federal law, and, in *Patsy*, the United States Supreme Court eliminated any exhaustion requirement under § 1983 because the purpose of the statute is to provide "immediate access" to the courts for "individuals who were threatened with, or who had suffered, the deprivation

[11] In light of this conclusion, we need not reach the plaintiff's claim that the exhaustion requirement should be excused under the futility exception; see *Neiman* v. *Yale University*, supra, 270 Conn. 258–59; because an appeal under § 7-152c (g) is inadequate to redress the alleged constitutional violations.

[12] Our holding does not affect the disposition of the plaintiff's state law claims, which are not at issue in this certified appeal.

of constitutional rights . . . notwithstanding any provision of state law to the contrary." (Citation omitted.) *Patsy* v. *Board of Regents*, supra, 457 U.S. 504; see also *Doe* v. *Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998) (recognizing that "*Patsy*'s categorical statement that exhaustion is not required and the expansive view of the federal courts in protecting constitutional rights allow plaintiffs to seek relief under § 1983 without first resorting to state administrative procedures"). The plaintiff, accordingly, was not required to exhaust his state administrative remedies prior to filing his § 1983 claims in state court.

V

Lastly, we address the defendants' alternative argument that the plaintiff's claims are not ripe for judicial review under "the finality doctrine established by the United States Supreme Court in *Williamson County* . . . ." The defendants acknowledge that this finality argument is not the same as the exhaustion argument raised in and decided by the trial court and the Appellate Court. They contend, nonetheless, that this court must address their unpreserved alternative ground for affirmance because it "concerns subject matter jurisdiction," which "must be considered whenever raised." We disagree that the *Williamson County* finality doctrine implicates the court's subject matter jurisdiction, and, therefore, we decline to address the merits of this unpreserved claim.

"This court previously has held that [o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to [alternative] grounds for affirmance."[13] (Internal quotation marks omitted.)

[13] In the absence of a grant of special permission prior to the filing of the appellee's brief, only "those grounds [that] were raised and briefed in the Appellate Court" may be raised as alternative grounds for affirmance in a certified appeal to this court. See Practice Book § 84-11 (a) ("Upon the

Perez-Dickson v. *Bridgeport*, 304 Conn. 483, 498–99, 43 A.3d 69 (2012). A claim that a court lacks subject matter jurisdiction, however, "may be raised at any time during the proceedings," including for the first time on appeal. (Internal quotation marks omitted.) Id., 506. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532, 911 A.2d 712 (2006).

The respondent in *Williamson County* filed a lawsuit in federal court under § 1983, alleging that the application of various government regulations to its property constituted an unconstitutional taking without just compensation in violation of the fifth amendment to the United States constitution. *Williamson County Regional Planning Commission* v. *Hamilton Bank*, supra, 473 U.S. 182. The United States Supreme Court rejected the claim on two related but independent grounds, which have become known as the "finality" and "compensation" prongs of *Williamson County*. Under the finality prong, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id., 186. The court observed

granting of certification, the appellee may present for review alternative grounds upon which the judgment may be affirmed provided those grounds were raised and briefed in the Appellate Court. . . . If such alternative grounds for affirmation . . . were not raised in the Appellate Court, the party seeking to raise them in the Supreme Court must move for special permission to do so prior to the filing of that party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require."). The defendants neither requested nor received special permission to raise an alternative ground for affirmance in this certified appeal.

that the respondent in *Williamson County* could have sought variances to avoid the application of the challenged governmental regulations but failed to do so. Id., 187–91. In light of the respondent's failure to request any variances, the court concluded that the petitioner planning and zoning commission had not "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," and the respondent's § 1983 claim therefore was premature.[14] Id., 191.

Under the compensation prong of *Williamson County*, which is distinct from the finality prong, a

[14] The court in *Williamson County* distinguished between finality and exhaustion, explaining as follows: "The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. . . . While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial [decision maker] has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

"The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, [the] respondent would not be required to exhaust. While it appears that the [s]tate provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities . . . [the] respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, [the] respondent would not be required to appeal the [c]ommission's rejection of the preliminary plat to the Board of Zoning Appeals, because the [b]oard was empowered, at most, to review that rejection, not to participate in the Commission's [decision making].

"Resort to those procedures would result in a judgment whether the [c]ommission's actions violated any of [the] respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the [c]ommissioner whether it would allow [the] respondent to develop the subdivision in the manner [the] respondent proposed." (Citations omitted.) *Williamson County Regional Planning Commission* v. *Hamilton Bank*, supra, 473 U.S. 192–93.

plaintiff's takings claim is not ripe for review until after the plaintiff has sought just compensation in state court. Id., 194. The court reasoned that "[t]he [f]ifth [a]mendment does not proscribe the taking of property; it proscribes taking without just compensation"; id.; and, therefore, a takings claim is "premature until the property owner has availed itself of the process" for obtaining just compensation. Id., 195. Accordingly, a "property owner has not suffered a violation of the [j]ust [c]ompensation [c]lause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the [s]tate for obtaining such compensation . . . ." Id.

Thus, pursuant to *Williamson County*, a plaintiff's takings claim is not ripe for review until (1) the relevant administrative agency has arrived at a final, definitive decision, and (2) the plaintiff has sought just compensation through the procedures provided by the state.[15] See *Sherman* v. *Chester*, 752 F.3d 554, 561 (2d Cir. 2014) (recognizing that, for takings claim to be ripe under *Williamson County* doctrine, "the plaintiff must show that (1) the state regulatory entity has rendered a final decision on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure" [internal quotation marks omitted]); *Severance* v. *Patterson*, 566 F.3d 490, 496 (5th Cir. 2009) ("The Supreme Court . . . has adopted a special, two-prong test for evaluating ripeness under the [t]akings [c]lause. . . . A takings claim is not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner, and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures

[15] The compensation prong of the *Williamson County* doctrine currently is under reconsideration by the United States Supreme Court. See *Knick* v. *Scott*, U.S. , 138 S. Ct. 1262, 200 L. Ed. 2d 416 (2018) (granting plaintiff's petition for writ of certiorari limited to issue of whether property owner is required to ripen federal takings claim by seeking just compensation in state court).

the state provides." [Citation omitted.]). Although developed in the context of fifth amendment takings jurisprudence, the *Williamson County* ripeness doctrine also "applies to due process claims arising from the same nucleus of facts as a takings claim." *Kurtz* v. *Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) (citing cases); see also *John Corp.* v. *Houston*, 214 F.3d 573, 584 (5th Cir. 2000) ("Since *Williamson County* was decided, courts have applied these principles to not only substantive due process claims, but also to procedural due process and equal protection claims. In most cases, however, only *Williamson County*'s finality requirement has been applied to claims other than the 'due process takings' claim described in that case.").

The defendants contend that *Williamson County* established jurisdictional requirements in light of the United States Supreme Court's use of jurisdictional terminology ("finality" and "ripeness") to describe the doctrine. Indeed, this court itself has treated the *Williamson County* finality requirement as jurisdictional in nature.[16] See *Port Clinton Associates* v. *Board of Selectmen*, 217 Conn. 588, 604, 587 A.2d 126, cert.

[16] Prior to the United States Supreme Court's clarification of the prudential nature of the *Williamson County* ripeness doctrine, many other courts also considered one or both prongs of the doctrine to be jurisdictional. See, e.g., *Kolton* v. *Frerichs*, 869 F.3d 532, 534 (7th Cir. 2017) (reversing prior decisions of United States Court of Appeals for Seventh Circuit as "no longer authoritative to the extent they deem *Williamson County* jurisdictional"); *Rosedale Missionary Baptist Church* v. *New Orleans*, 641 F.3d 86, 88–89 (5th Cir. 2011) (recognizing that *Samaad* v. *Dallas*, 940 F.2d 925, 934 [5th Cir. 1991], in which United States Court of Appeals for Fifth Circuit held that "the ripeness of a takings claim under *Williamson County* is a jurisdictional requirement that cannot be waived or forfeited" is "no longer good law" because "the Supreme Court has since explicitly held that *Williamson County*'s ripeness requirements are merely prudential, not jurisdictional"); see generally *Arrigoni Enterprises, LLC* v. *Durham*, U.S. , 136 S. Ct. 1409, 1411–12, 194 L. Ed. 2d 821 (2016) (Thomas, J., dissenting from the denial of certiorari) (noting that, even though United States Supreme Court has "explained—in no uncertain terms—that" second prong of *Williamson County* doctrine is prudential, rather than jurisdictional, "several [federal circuit] [c]ourts of [a]ppeals continue to treat the *Williamson County* rule as a jurisdictional rule limiting the courts' power to consider federal takings claims").

denied, 502 U.S. 814, 112 S. Ct. 64, 116 L. Ed. 2d 39 (1991). In *Port Clinton Associates*, the plaintiff alleged that the denial of permission to expand its marina constituted "an illegal 'taking' under the fifth and fourteenth amendments to the United States constitution, and violations of 42 U.S.C. § 1983 (predicated upon the unconstitutional taking)." Id., 589. The trial court dismissed the plaintiff's § 1983 claim for lack of subject matter jurisdiction because the plaintiff had failed to file an administrative appeal under General Statutes § 8-8. Id., 604–607. We agreed with the plaintiff that "federal law prevent[ed] us from applying the exhaustion doctrine to a § 1983 claim"; id., 599; but affirmed the judgment of the trial court on the alternative jurisdictional ground, under *Williamson County*, that "there can be no regulatory 'taking,' and thus no deprivation of 'private property without just compensation,' until there has been a final administrative decision." Id. Because the plaintiff in that case had failed to present an alternative and less grandiose plan of development to the final decision maker,[17] we held that there was no final decision, and, therefore, "the trial court had no jurisdiction to consider the taking claim . . . ." Id., 609–10.

It has become clear in recent years, long since the issuance of our decision in *Port Clinton Associates*, that the *Williamson County* ripeness doctrine "is not,

[17] Consistent with the distinction between finality and exhaustion delineated in *Williamson County*; see footnote 14 of this opinion; we noted that "a property owner need not pursue *remedial* procedures that merely review the propriety of the initial [decision maker's] action." (Emphasis in original.) *Port Clinton Associates* v. *Board of Selectmen*, supra, 217 Conn. 606. Under the regulatory and statutory scheme at issue in *Port Clinton Associates*, the plaintiff "had no [decision maker] other than the board of selectman itself from which it could have obtained a more favorable result" because "an administrative appeal to the *Superior Court*" under § 8-8 provides only remedial "review of the propriety [of] the initial [decision maker's] action," which is "precisely the type of procedure that a claimant under 42 U.S.C. § 1983 need *not* pursue as a prerequisite to filing his suit." (Emphasis in original; internal quotation marks omitted.) Id., 607.

strictly speaking, jurisdictional." *Horne* v. *Dept. of Agriculture*, 569 U.S. 513, 526, 526 n.6, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013) (reasoning that, because "[a] [c]ase or [c]ontroversy exists once the government has taken private property without paying for it . . . [the existence of] an alternative remedy . . . does not affect the jurisdiction of the federal court"); see also *Sherman* v. *Chester*, supra, 752 F.3d 561 ("[b]ecause *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case" [internal quotation marks omitted]), quoting *Sansotta* v. *Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). It therefore follows that a *Williamson County* ripeness defense may be waived if it is not timely raised. See *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U.S. 702, 729, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (holding that defendants objection that plaintiffs' takings claim was "unripe because petitioner has not sought just compensation" had been waived because objection did not appear "in the briefs in opposition to the petition for writ of certiorari, and . . . is [not] jurisdictional"); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 734, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) (addressing "only the 'final decision' prong of *Williamson* [*County*]" because that was only prong "addressed below and briefed before this [c]ourt"); *Rosedale Missionary Baptist Church* v. *New Orleans*, 641 F.3d 86, 88–89 (5th Cir. 2011) (noting that United States Supreme Court has "explicitly held that *Williamson County*'s ripeness requirements are merely prudential, not jurisdictional, so although a court may raise them sua sponte, it may consider them waived or forfeited as well" [footnotes omitted]).

In light of this doctrinal development, we must abandon our conclusion in *Port Clinton Associates* that the *Williamson County* ripeness doctrine is a jurisdictional

defect that may be raised for the first time on appeal. Because the defendants raised their *Williamson County* defense for the first time in this certified appeal, and because the defense is nonjurisdictional, the viability of that defense is not preserved for appellate review. See, e.g., *State* v. *Darryl W.*, 303 Conn. 353, 371, 33 A.3d 239 (2012) ("[i]t is our long-standing position that [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge" [internal quotation marks omitted]). Accordingly, we decline to address whether there was a final decision by the initial decision maker as required by *Williamson County*.[18]

The judgment of the Appellate Court is reversed with respect to the plaintiff's § 1983 claims and the case is remanded to that court with direction to remand the case to the trial court with direction to deny the defendants' motion to dismiss as to the plaintiff's § 1983 claims and for further proceedings according to law.

In this opinion the other justices concurred.

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[18] Nothing herein is intended to preclude the defendants from raising a defense based on *Williamson County* in the trial court, and we express no opinion regarding the merits of any such defense.

ORDERS

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MARGARET E. DAY, COCONSERVATOR (ESTATE OF SUSAN D. ELIA) *v.* RENEE F. SEBLATNIGG ET AL.

The petition by the defendant First State Fiduciaries, Inc., for certification to appeal from the Appellate Court, 186 Conn. App. 482 (AC 38734), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under General Statutes § 45a-655 (e), regardless of whether the conserved person at the time of the transfer had unimpaired testamentary capacity?"

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

James G. Green, Jr., *Laura W. Ray* and *Jeffrey A. Dorman*, in support of the petition.

Richard E. Castiglioni, in opposition.

Decided April 3, 2019

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON

The state's petition for certification to appeal from the Appellate Court, 187 Conn. App. 20 (AC 40250), is granted, limited to the following issues:

"1. Did the Appellate Court improperly raise sua sponte the issue of sufficiency of evidence with respect to the element of intent?

"2. Did the Appellate Court correctly conclude that the evidence was insufficient on the element of the defendant's intent to commit the crime of tampering with physical evidence under General Statutes § 53a-49 (a) (2)?"

Sarah Hanna, assistant state's attorney, in support of the petition.

Vishal K. Garg, assigned counsel, in opposition.

Decided April 3, 2019

STATE OF CONNECTICUT *v.* ROBERT L. WALKER

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 776 (AC 41114), is denied.

Aimee Lynn Mahon, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided April 3, 2019

TAJAH S. MCCLAIN *v.* COMMISSIONER OF CORRECTION

The petitioner Tajah S. McClain's petition for certification to appeal from the Appellate Court, 188 Conn. App. 70 (AC 40541), is denied.

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

Jennifer B. Smith, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided April 3, 2019

STATE OF CONNECTICUT *v.* JOSE RUIZ

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 413 (AC 40668), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the one-on-one show up identification was not unnecessarily suggestive?"

Mary Boehlert, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided April 3, 2019

MAURICE ROSS *v.* COMMISSIONER OF CORRECTION

The petitioner Maurice Ross' petition for certification to appeal from the Appellate Court, 188 Conn. App. 251 (AC 41091), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that the doctrine of collateral of estoppel precluded the petitioner from litigating the issue of whether defense counsel's failure to object to the prosecutor's improper comments during the petitioner's criminal trial preju-

diced him as part of an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because the Appellate Court had previously held in the petitioner's direct appeal from his criminal conviction that those same improper comments did not deprive him of a fair trial?

"2. If the doctrine of collateral estoppel does not preclude the petitioner from litigating the issue of prejudice, can the petitioner prevail under *Strickland* v. *Washington*, supra, 466 U.S. 668?"

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

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided April 3, 2019

EASTERN SAVINGS BANK, FSB *v.* RASHAD TOOR ET AL.

The defendant Rashad Toor's petition for certification to appeal from the Appellate Court (AC 42371) is denied.

William E. Carter, in support of the petition.

Daniel J. Krisch, in opposition.

Decided April 3, 2019

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

Syllabus

The plaintiff sought to recover damages from the defendant C and his business, the defendant H Co., for, inter alia, slander per se and libel per se. H Co. had conducted audits and investigations on behalf of P Co., a New York entity that bottled soda. The audits were conducted pursuant to a contract that H Co. had with W Co. While conducting audits, C purchased P Co.'s products throughout New York at his own expense in an attempt to procure contracts with other P Co. distributors, and as a result, C accumulated large quantities of soda. When a housing association of which C was a member installed a vending machine, C stocked it with soda, which was sold for the benefit of the association. The plaintiff, who also was a resident of the housing association, complained to C about discarded soda cans and the fact that they could not be returned for a bottle deposit refund in Connecticut because they had been purchased in New York. The plaintiff also made phone calls to P Co., complaining that C was redistributing expired P Co. products that were not redeemable in Connecticut. A, the president of W Co., thereafter informed C that the plaintiff had made false and misleading allegations to P Co. that C was selling expired and dirty soda in Connecticut, and that C had been acting in an otherwise rude and unprofessional manner while doing so. C then gave a written statement to the police in which he claimed that the plaintiff's allegations had caused a threat of cancellation of his services with P Co.'s organization, and that her allegations served no other legitimate purpose than to repeatedly annoy and alarm him and his business associates to the point of unnecessary disruption. The plaintiff was thereafter charged with harassment in the second degree in violation of statute (§ 53a-183), which was punishable by a term of imprisonment. The harassment charge was later dismissed, after which the plaintiff commenced this action. The trial court rendered judgment for C and H Co. on all counts of the plaintiff's complaint. The court concluded that C's statements to the police were not defamatory because they were true. The court also determined, inter alia, that the crime of harassment in the second degree did not involve moral turpitude and, thus, could not support a claim of defamation per se. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly concluded that harassment was not a crime that involves moral turpitude and that C's statements to the police did not constitute slander per se or libel per se. *Held* that the trial court properly rendered judgment in favor of C on the plaintiff's claims of slander per se and libel per se; although the trial court applied the law incorrectly when it concluded

that harassment in the second degree did not involve moral turpitude and, instead, should have also considered whether harassment would constitute a crime to which an infamous penalty is attached, that court's finding that C's statements were not defamatory because they were true was not clearly erroneous, as there was sufficient evidence for the court to find that A had made the statements to C that C in turn relayed to the police, the plaintiff conceded in her original complaint and testimony that she had contacted P Co. and discussed matters concerning C and the vending machine, and, notwithstanding the plaintiff's contention that the court failed to credit evidence that C had misled the police and sold soda that he had confiscated in connection with his business, it was the trial court's exclusive province to weigh conflicting testimony and to make determinations of credibility.

Argued January 3—officially released April 16, 2019

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Fairfield, where the matter was tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Virginia Silano, self-represented, the appellant (plaintiff).

Brock T. Dubin, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Virginia Silano, appeals from the trial court's judgment in favor of the defendant George Cooney[1] on her claims of slander and libel per se. Specifically, the plaintiff argues that the court erred (1) in finding that the defendant's statements to the Trumbull Police Department were not

[1] The plaintiff's complaint also named Hemlock Manor, LLC, as a defendant. Hemlock Manor, LLC, filed an appearance in this appeal and submitted a joint brief with Cooney. The plaintiff, however, has appealed only from the judgment on the third and fourth counts of her complaint; those counts were directed solely to Cooney. Accordingly, we refer to Cooney as the defendant in this appeal.

defamatory and (2) in concluding that the defendant did not abuse his qualified privilege in making such statements to the police.[2] We are not persuaded and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. In 2009, the plaintiff and the defendant were members of the Pinewood Lake Association (association) and residents of Trumbull. At that time, the defendant, a retired New York City police officer, owned and operated a business, Hemlock Manor, LLC (Hemlock), which conducted "audits" and investigations on behalf of Pepsi Cola Bottling Company of New York (Pepsi Bottling). The audits were conducted pursuant to a contract that Hemlock had with a business known as Winthrop Douglas, Inc. (Winthrop), which, in turn, had a contract with Pepsi Bottling.

When conducting a typical audit for Pepsi Bottling, the defendant would purchase Pepsi products at various locations throughout New York in order to recover certain "codes" from these items, which he would later provide to Winthrop. The defendant also would purchase Pepsi products at his own expense in an attempt to procure contracts with other Pepsi distributors. Significantly, as a result of these endeavors, the defendant accumulated large quantities of soda. He often donated the soda to various charitable organizations throughout New York, but he also stored a substantial portion in his home garage.

In 2009, the defendant, while serving as president of the board of governors of the association, proposed

[2] For the reasons set forth in this opinion, we do not disturb the trial court's finding that the defendant's statements were not defamatory and, thus, decline to reach the merits of the plaintiff's second claim regarding whether the defendant abused his qualified privilege in making such statements.

that if the association acquired a vending machine, he would stock it with soda at no cost. The board of governors approved the proposal, and the association eventually acquired a vending machine. The association had the vending machine installed near the community beach on Pinewood Lake and sold the soda for fifty cents each, which was "pure profit" for the association. According to the association's financial statements, the income from the soda was $1093.54 in 2009 and was $1955.83 in 2010.[3]

At some point in 2010, however, the plaintiff became concerned about the amount of litter the vending machine was causing around her home and the quality of the soda being sold. She complained to the defendant about the discarded soda cans and the fact that they could not be returned for a bottle deposit refund in Connecticut because they had been purchased in New York. Despite her complaint, the association continued to operate the vending machine and the defendant continued to stock it. In 2011, the plaintiff began making phone calls to Pepsi Bottling, complaining that the defendant was redistributing expired Pepsi products that were not redeemable in Connecticut. When making her complaints to Pepsi Bottling, the plaintiff provided her name and telephone number as return contact information.

On June 2, 2011, the president of Winthrop, Marc Aliberti, notified the defendant that the plaintiff was making complaints to Pepsi Bottling about him. Specifically, Aliberti told the defendant that the plaintiff was providing Pepsi Bottling with negative character references and making false allegations, including telling the company that the defendant was selling "expired" and

[3] The record does not indicate why the income from these two years is not a multiple of fifty cents, given the court's factual finding respecting the sale price for each can of soda. Nonetheless, the plaintiff does not challenge this finding, and it is ultimately not material to the issues on appeal.

"dirty" soda in Connecticut and acting in a negative manner while doing so. After he was provided with this information, the defendant prepared a statement to the Trumbull Police Department in order to make a record of the situation. Detective Kevin Hammel told the defendant that, while the matter appeared to be civil in nature, if the plaintiff's behavior continued, the defendant could file an additional complaint.

On July 28, 2011, Aliberti again called the defendant to tell him that the plaintiff had made additional false statements about the defendant to Pepsi Bottling. The defendant was informed that the plaintiff had accused him of selling Pepsi products to "every store in Trumbull" and that he was selling the products in an "otherwise negative manner." In a sworn statement, dated August 5, 2011, the defendant relayed this information to the Trumbull Police Department. The defendant indicated that the plaintiff's false allegations to Pepsi Bottling have "caused a threat of cancellation of [his] employment services with the Pepsi organization" and "serve no other legitimate purpose other than to repeatedly annoy and alarm [him] and [his] business associates to the point of unnecessary disruption and threat of cancellation of services."

As a result of the defendant's statements, the Trumbull Police Department commenced a criminal investigation into the matter. In connection with this investigation, Hammel on several occasions spoke with Aliberti, who corroborated the defendant's complaints.[4]

[4] In an affidavit that was appended to the application for an arrest warrant for the plaintiff, Hammel averred: "On October 18, 2011, the affiant received a typed written statement from Marc Aliberti of [Winthrop], related to his knowledge of the calls made to [Pepsi Bottling] and [Hemlock], which employs [the defendant]. Mr. Aliberti reports, among other things, that [Winthrop] conducts business with both, [Pepsi Bottling] and [Hemlock]. Aliberti has been, and continues to be a contact and business associate of both organizations. [Hemlock] is contracted in the scope of audits and investigations and does not represent Aliberti or [Pepsi Bottling] in the scope of sales, customer service or any other public or product interaction.

Hammel concluded on the basis of this information that there was probable cause to arrest the plaintiff on a charge of harassment. He applied for an arrest warrant, and the application was granted on November 22, 2011.

Following her arrest, the plaintiff was charged with harassment in the second degree in violation of General Statutes § 53a-183.[5] After several court appearances, the charge was dismissed. On June 10, 2014, the plaintiff

"Aliberti continues that on June 2, 2011, a representative from [Pepsi Bottling] notified him that they have been contacted by [the plaintiff], who was complaining that [the defendant] was misrepresenting them by selling expired and otherwise unfit Pepsi products and misrepresenting himself, while selling Pepsi products in a negative manner by cursing and being rude to customers in and around the area of Trumbull . . . . [The plaintiff] left her home telephone number as a return contact and there were several communications between [the plaintiff] and [Pepsi Bottling] before the allegation was deemed unsubstantiated. [Pepsi Bottling] expressed to Aliberti [its] displeasure with these allegations and discussed possible ramifications.

"On July 28, 2011, on a separate occasion, Aliberti was again contacted by [Pepsi Bottling] to inform him that they were again contacted by [the plaintiff]. [The plaintiff] once again complained that [the defendant] was misrepresenting the Pepsi organization by selling expired and otherwise unfit Pepsi products 'all over Trumbull' and she provided a negative character reference. [The plaintiff] left her home phone number as a return contact and there were several communications between [the plaintiff] and [Pepsi Bottling]. This time, the representative at [Pepsi Bottling] asked [the plaintiff] to provide further proof of her allegations, which she was unable to provide. [Pepsi Bottling] again expressed their displeasure of [the plaintiff's] continued allegations and further discussed a termination of [its] contract with [Hemlock] due to [the plaintiff's] continuing allegations. Aliberti also stated that he has discussed these incidents with representatives of [Pepsi Bottling] and can confirm that these events have put the future of their relationship with [Hemlock] in jeopardy."

[5] General Statutes § 53a-183 (a) provides: "A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or by any other form of written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

commenced a civil action against the defendant and Hemlock, alleging claims sounding in malicious prosecution, slander per se and libel per se. Following a bench trial, the court rendered judgment in favor of the defendant and Hemlock on all counts. The plaintiff now appeals from the judgment in favor of the defendant on the third and fourth counts of her complaint, which, respectively, allege slander per se and libel per se.

On appeal, the plaintiff claims that the court erred in finding that the defendant's statements to the Trumbull Police Department did not constitute slander per se or libel per se. Specifically, the plaintiff argues that the court misconstrued established precedent in concluding that harassment was not a crime involving "moral turpitude," despite the fact that it was punishable by a term of imprisonment. Although we agree with the plaintiff that the court misconstrued the applicable law, we nonetheless conclude that the court properly found that the defendant's statements were not defamatory.[6]

We begin our analysis by setting forth the relevant legal principles and the proper standard of review. "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . . Defamation is comprised of the torts of libel and slander: slander is oral defamation and libel is written defamation. . . . To establish a prima facie case of defamation at common law, the plaintiff must prove that (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . .

[6] "We note that our rationale is slightly different than that of the trial court. [I]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 51 n.3, 19 A.3d 215 (2011).

"Statements deemed defamatory per se are ones in which the defamatory meaning of the speech is apparent on the face of the statement. . . . Our state has generally recognized two classes of defamation per se: (1) statements that accuse a party of a crime involving moral turpitude or to which an infamous penalty is attached, and (2) statements that accuse a party of improper conduct or lack of skill or integrity in his or her profession or business and the statement is calculated to cause injury to that party in such profession or business." (Citations omitted; internal quotation marks omitted.) *Cohen* v. *Meyers*, 175 Conn. App. 519, 544–45, 167 A.3d 1157, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017). "Once the plaintiff has established that the words are false and actionable per se, barring any statutory provision to the contrary, she is entitled under Connecticut law to recover general damages without proof of special damages. . . . This is because the law presumes general damages where the defamatory statements are actionable per se. . . . On the other hand, if the words are defamatory, but not actionable per se, the plaintiff may recover general damages for harm to her reputation only upon proof of special damages for actual pecuniary loss suffered." (Citations omitted.) *Miles* v. *Perry*, 11 Conn. App. 584, 602, 529 A.2d 199 (1987). "In a defamation case brought by an individual who is not a public figure, the factual findings underpinning a trial court's decision will be disturbed only when those findings are clearly erroneous, such that there is no evidence in the record to support them." *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 628–29, 969 A.2d 736 (2009). Our review is plenary, however, in ascertaining whether the trial court applied the correct legal standard in deciding the merits of the plaintiff's claim. See *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002).

In finding in favor of the defendant on the plaintiff's claims of defamation per se, the court noted that although, "[t]o an attorney or person trained in the law," the defendant's statements to the Trumbull Police Department accused the plaintiff of harassment in the second degree, which is a class C misdemeanor punishable by up to three months incarceration, such a crime does not involve moral turpitude and, thus, cannot support a claim of defamation per se. The plaintiff contends that the court erred in reaching this conclusion because, under the modern view of defamation, a crime of moral turpitude is a chargeable offense punishable by a term of imprisonment, such as harassment in the second degree. To the extent that there is any confusion in our law with respect to this issue, we take this opportunity to clarify our definition of defamation per se vis-à-vis imputations of criminal conduct.

In *Hoag* v. *Hatch*, 23 Conn. 585, 590 (1855), our Supreme Court acknowledged that a statement that accuses a party of a crime involving moral turpitude, or a crime subject to an infamous penalty, is actionable without having to prove special damages.[7] Following

[7] The *Hoag* decision does not cite any authority for this precept, but some scholars contend that the special significance our common law places on accusations of criminal conduct involving moral turpitude or that is punishable by an infamous penalty is a "residue of a bygone age in which defamation was a disfavored action." 2 F. Harper et al., Torts (3d Ed. 2006) § 5.10, p. 118. Specifically, in the Middle Ages, in order to establish the jurisdiction of the English common law courts, the plaintiff was required to show "temporal" harm—i.e., that the false accusation could subject that party to endangerment of life or liberty. Id., p. 109 n.4. In the absence of temporal harm, the claim would likely be treated as a 'spiritual' matter under the jurisdiction of the ecclesiastical courts." Id.; see also W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 112, p. 788 ("[t]he exact origin of these exceptions is in some doubt, but probably it was nothing more unusual than a recognition that by their nature such words were especially likely to cause pecuniary, or 'temporal,' rather than 'spiritual' loss"). Some of these same scholars argue that courts should reevaluate their jurisprudence in this area, given that the ecclesiastical courts were abolished several centuries ago and the distinctions drawn between crimes for the purposes of defamation per se are in some manner arbitrary. Compare *Hoag* v. *Hatch*,

Hoag, our courts consistently have used the disjunctive "or" when listing the two types of criminal accusations that comprise this class of defamation per se under our law. See, e.g., *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 565–66, 72 A.2d 820 (1950); *Cohen* v. *Meyers*, supra, 175 Conn. App. 544–45; *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, 77 Conn. App. 846, 853, 825 A.2d 827 ("[t]o fall within the category of libels that are actionable per se because they charge crime, the libel must be one which charges a crime which involves moral turpitude or to which an infamous penalty is attached"), cert. denied, 267 Conn. 901, 838 A.2d 210 (2003). Although some crimes involving moral turpitude may also be subject to an infamous penalty; see *Yavis* v. *Sullivan*, 137 Conn. 253, 259, 76 A.2d 99 (1950); we are aware of no authority since *Hoag* that has expressly held that the accusation must allege a crime implicating both categories. We agree with the plaintiff, therefore, that the trial court wrongly concluded that, because harassment in the second degree does not involve moral turpitude, the statements at issue were not actionable in the absence of proving special damages.[8] Rather, the

supra, 23 Conn. 590–91 (bribery is crime involving moral turpitude), with *Moriarty* v. *Lippe*, 162 Conn. 371, 383, 294 A.2d 326 (1972) ("[a]ssault is a crime held lacking in the element of moral turpitude" [internal quotation marks omitted]).

[8] We disagree with the plaintiff, however, to the extent that she contends that a crime of moral turpitude is one that can be punished by a term of imprisonment. This argument, we believe, misconstrues *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 493, 523 A.2d 1356, cert. denied, 204 Conn. 802, 803, 525 A.2d 1352 (1987), in which this court held that the modern view of a crime subject to an infamous penalty is a crime punishable by a term of imprisonment. See also 3 Restatement (Second), Torts § 571 (1977) ("[o]ne who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude"). Conversely, "[m]oral turpitude . . . [remains] a vague and imprecise term to which no hard and fast definition can be given. . . . A general definition . . . is that moral turpitude involves an act of inherent baseness, vileness or depravity in the private and social duties which man does to his fellowman or to society in general, contrary to the accepted

court should have also considered separately whether harassment, which is punishable by a term of imprisonment, would constitute a crime to which an infamous penalty is attached. See *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 493, 523 A.2d 1356 ("[t]he modern view of this requirement is that the crime be a chargeable offense which is punishable by imprisonment"), cert. denied, 204 Conn. 802, 803, 525 A.2d 1352 (1987).

Despite our conclusion that the court applied the law incorrectly in deciding whether the plaintiff had established a prima facie case of defamation per se, we nonetheless affirm the court's conclusion that the defendant's statements were not defamatory because the court's finding that the statements were true was not clearly erroneous. "It is well settled that for a claim of defamation to be actionable, the statement must be false . . . and under the common law, truth is an affirmative defense to defamation . . . [and] the determination of the truthfulness of a statement is a question of fact . . . ." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 431, 125 A.3d 920 (2015). "Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Cheshire Land Trust, LLC* v. *Casey*, 156 Conn. App. 833, 839–40, 115 A.3d 497 (2015). Further, "[c]ontrary to the common law rule that required the defendant to establish the literal truth of the precise

rule of right and duty between man and law." (Citations omitted; internal quotation marks omitted.) *Moriarty* v. *Lippe*, 162 Conn. 371, 383, 294 A.2d 326 (1972).

statement made, the modern rule is that only substantial truth need be shown to constitute the justification. . . . It is not necessary for the defendant to prove the truth of every word of the libel. If he succeeds in proving that the main charge, or gist, of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. . . . The issue is whether the libel, as published, would have a different effect on the reader than the pleaded truth would have produced." (Internal quotation marks omitted.) *Cohen* v. *Meyers*, supra, 175 Conn. App. 546.

The alleged defamatory statements at issue in this case assert, in pertinent part, that the defendant had been informed by a business associate, Aliberti, that the plaintiff had made false and misleading complaints to Pepsi Bottling. The defendant further specified that Aliberti had told him that these complaints included allegations that the defendant was selling "expired" and "dirty" soda, that he was selling the soda in an otherwise rude and unprofessional manner, and that he was selling soda to "every store in Trumbull." In its memorandum of decision, the court found that there was uncontroverted evidence that Aliberti had made these statements to the defendant and that the defendant accurately conveyed Aliberti's statements to the Trumbull Police Department. The plaintiff contends that the court's finding that these statements were true was clearly erroneous because the defendant omitted information that would have corroborated the plaintiff's initial complaints to Pepsi Bottling, and the court ignored the testimony of several witnesses who impugned the veracity of the defendant's statements. We disagree.

Our review of the record reveals that there was sufficient evidence adduced at trial for the court to find that Aliberti had made the statements to the defendant that the defendant in turn relayed to the police. Additionally, the plaintiff conceded in her original complaint and trial

testimony that she had contacted Pepsi Bottling and discussed matters concerning the defendant and the vending machine at Pinewood Lake. Further, with respect to the plaintiff's contention that the court failed to credit evidence that supported her claim that the defendant was "selling" Pepsi that he had "confiscated" in connection with his business, and thus misleading the police in claiming that the plaintiff's complaints were made solely for the purposes of harassing him and his family, "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous. . . . If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] [credibility determination]." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017). Thus, having determined that the court's finding that the defendant's statements to the police were true was not clearly erroneous, we conclude that the court properly rendered judgment in favor of the defendant on the plaintiff's claims of slander per se and libel per se.

The judgment is affirmed.

In this opinion the other judges concurred.

LORNA J. DICKER *v.* MICHAEL DICKER
(AC 40644)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying the parties' motions for contempt and issuing a remedial order

regarding certain prior court-ordered payments. In her motion for contempt, the plaintiff claimed that the defendant had wilfully underpaid the fees he owed for their children's extracurricular activities, and in his motion for contempt, the defendant claimed that the plaintiff failed to pay her share of the children's unreimbursed medical expenses. Thereafter, the trial court held hearings on the motions for contempt and various other pending motions, during which it determined that neither party could be held in contempt because they both believed that pursuant to certain prior court orders they were entitled to withhold payment from each other when and to the extent that the other party had failed to make a required payment to the other. The court also issued a remedial order that set forth a detailed procedure that the defendant was required to follow in the future for presenting proof of unreimbursed medical expenses to the plaintiff and calculating any amounts that he claimed the plaintiff owed him under prior court orders. The trial court then held an evidentiary hearing to determine the amounts that the parties currently owed each other related to the subject fees and expenses and ordered the parties to submit proposed orders. Following the hearing, the court found that the defendant owed the plaintiff $3742.08 for unpaid extracurricular activities fees and the plaintiff owed the defendant $2303.59 for unpaid unreimbursed medical expenses, and, therefore, it ordered the defendant to pay the plaintiff $1438.49, which was the net difference between the unpaid sums. Thereafter, the trial court denied in part the plaintiff's motion to reargue. On the plaintiff's amended appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court erred in finding that she had violated its medical reimbursement order and in finding, on that basis, that she owed the defendant $2303.59 in unpaid unreimbursed medical expenses, as she failed to establish that the court's findings were clearly erroneous: despite the plaintiff's claim that the trial court erred in finding that the defendant's accounting summaries as to the amounts he had paid for the children's medical expenses were credible, the record revealed that the court credited the defendant's testimony that he had, in fact, paid what he claimed to have paid for the children's medical expenses and that his testimony explained why there were discrepancies between the summaries and the documentation he had presented to the court; moreover, contrary to the plaintiff's assertions that the defendant's medical expense summaries were unsubstantiated and irreconcilable with the record, and that the court erred in its method of calculation of the amounts that the parties owed to each other, the court sought and received proposed orders from both parties, which included suggested methods of calculation and summaries of the expenses they wanted the court to consider, it heard lengthy testimony as to the amounts allegedly owed and it was well aware of the parties' differing accounting approaches and methods of calculating

those amounts, which it clearly indicated and discussed in its memorandum of decision.

2. The trial court did not abuse its discretion in denying the plaintiff's motion for contempt on the basis of its finding that the defendant was not in contempt for withholding from her payment of the amount he owed for the children's extracurricular activities, as the plaintiff failed to advance any compelling argument as to why the court's determination was not supported by the record, and this court was not left with the definite and firm conviction that a mistake had been made; although the plaintiff contended that because the defendant's actions were knowing and voluntary, they must have constituted wilful contempt, the court's refusal to find the defendant in contempt was not predicated on a finding that the defendant's actions were not knowing or voluntary but, rather, was based on its finding that the parties withheld payments from each other because of their common belief that it was proper to do so.
3. The trial court did not abuse its discretion by permitting the defendant unilaterally to deduct the amount of undisputed unpaid unreimbursed medical expenses owed by the plaintiff from future payments that the defendant owed the plaintiff for the children's extracurricular activities, as that court's remedial order, when viewed in the context of the court's prior orders and in light of the fact that the court was in the best position to give effect to those orders, was not manifestly unreasonable.
4. The plaintiff could not prevail on her claim that the trial court abused its discretion in denying her motion to reargue, which was based on her claim that the court incorrectly concluded that she had ample opportunity to submit any relevant evidence prior to the final hearing on the parties' various motions but had chosen not to do so; despite the plaintiff's contention that the trial court, without explanation, denied her request to present additional new evidence during the subject hearing, the record was clear that the court provided the plaintiff with a sufficient explanation as to why it denied her motion for contempt, and a review of the hearing transcripts indicated that the parties' counsel agreed in advance to prioritize certain issues before the court with respect to their various motions.
5. The plaintiff could not prevail on her claim that the trial court violated her due process right to be heard when it denied her motion for contempt before she had rested her case-in-chief, which she claimed deprived her of a reasonable opportunity to cross-examine the defendant or to present evidence in support of that motion: the record revealed that the plaintiff had a sufficient opportunity to provide the trial court with evidence of the defendant's contempt during the subject hearing and that at no point during the remainder of the hearing did she request to submit additional evidence, and although the plaintiff claimed that she was unable to bring certain relevant evidence to the court's attention, nothing in the record suggested that, had she been allowed even greater latitude and more time, she would have presented evidence with respect to the wilfulness

of the defendant's actions that was not already before the court; moreover, although the plaintiff claimed that the trial court ignored evidence that the defendant knowingly made deductions from court-ordered payments to her, which she claimed constituted acts of wilful contempt, noncompliance alone was not sufficient to support a judgment of contempt, as it was within the sound discretion of the court to deny her claim for contempt because there was an adequate factual basis to explain the defendant's failure to honor the court's prior orders.

Argued December 6, 2018—officially released April 16, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Abrams*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Albis*, *J.*, denied the parties' motions for contempt and issued a remedial order; subsequently, the court, *Albis*, *J.*, issued an order regarding certain unreimbursed medical expenses; thereafter, the court, *Albis*, *J.*, denied in part the plaintiff's motion to reargue, and the plaintiff appealed to this court; subsequently, the plaintiff filed an amended appeal. *Affirmed.*

Lorna J. Dicker, self-represented, the appellant (plaintiff).

Michael Dicker, self-represented, the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Lorna J. Dicker, appeals from the judgment of the trial court, resolving several of the parties' postjudgment motions. On appeal, the plaintiff claims that the court improperly (1) found that the plaintiff owed sums to the defendant, Michael Dicker, for unreimbursed medical expenses for the parties' minor children, (2) found that the defendant

was not in contempt of existing court orders, (3) concluded that the defendant could deduct unreimbursed medical costs from future quarterly activity fee payments that he owed to the plaintiff, and (4) denied the plaintiff's motion to reargue. The plaintiff also claims that the court violated her due process right to be heard on her motion for contempt. For the reasons set forth in this opinion, we disagree with the plaintiff and affirm the judgment of the trial court.

The record discloses the following facts and procedural history. On March 29, 2012, the trial court, *Abrams, J.*, dissolved the parties' marriage, incorporating into its judgment of dissolution the parties' agreement dated February 17, 2012. The agreement provided, inter alia, that the defendant would be responsible for the first $3720 incurred for their children's unreimbursed medical and dental expenses each year and that the parties would share equally in any such expenses that exceeded that amount.[1] As for the children's extracurricular activities, the agreement provided that the plaintiff would pay for such activities up to the sum of $1200 per year and that the parties, thereafter, would share any expenses in excess of that amount equally.[2]

Thereafter, the parties filed numerous motions for contempt against each other for alleged failures to comply with the terms of their agreement. In an effort to resolve their disputes, the parties entered into two additional agreements. In an agreement dated May 27, 2014,

[1] Unreimbursed medical expenses refer to expenses not covered by the defendant's insurance policies.

[2] The parties entered into a postjudgment agreement, dated July 11, 2013, which modified their original agreement to require that the defendant pay the plaintiff, on a quarterly basis, $1200 per year, per child, for the children's extracurricular activities, otherwise, the terms of the 2012 agreement were to remain in full force and effect. The July, 2013 agreement was made a court order on July 15, 2013.

the parties decided, inter alia, that they would reconcile, on a quarterly basis, their respective payments for the children's unreimbursed medical expenses. In a second agreement dated August 18, 2014, the parties settled their dispute with respect to various prior unreimbursed medical expenses. Each of these agreements was approved by the court and made an order of the court.

On June 9, 2016, the plaintiff filed a motion for contempt, claiming that the defendant had wilfully underpaid the fees he owed for the children's extracurricular activities. See footnote 2 of this opinion. On September 23, 2016, the defendant also filed a motion for contempt, claiming that the plaintiff had failed to pay her agreed upon share of the children's unreimbursed medical expenses. The court, *Albis, J.*, held hearings on November 3 and 23, 2016, with respect to the parties' motions.[3] On November 23, 2016, the court ruled that neither party could be held in contempt because each of them believed that he or she was entitled, under the court's previous orders, to withhold payment from the other as a result and to the extent of the other party's nonpayment of sums due to him or her.

During that hearing, the court also issued a remedial order requiring, inter alia, that in the future the defendant provide the plaintiff with calculations sufficient to explain any amounts he claimed that she owed him under the previous orders. The order further provided that if the plaintiff disputed any amount so claimed and documented by the defendant, she was obligated to notify him of that dispute. The order finally provided that if any undisputed expense had not been paid to the defendant by the next due date, he could deduct that undisputed amount from a future installment of

[3] In addition to the parties' contempt motions, the court also heard various other motions filed by the parties. The court's rulings on those motions are not at issue in the present appeal.

the children's extracurricular activity expenses that he then owed to the plaintiff. Critically, if the plaintiff disputed any amount, so claimed and documented by the defendant, she was prohibited from deducting that amount from any future payments she then owed to him until the dispute was resolved by the parties themselves or by the court. At the conclusion of that hearing, the court ordered the parties to attempt to reconcile the amounts they currently owed to one another, but also stated that a subsequent evidentiary hearing would be scheduled to determine those amounts if they were unable to reach an agreement.

The parties could not reach an agreement regarding the amounts they owed one another for their children's extracurricular activities and medical expenses, and, therefore, the court held an evidentiary hearing to resolve those issues on March 28, 2017. At that hearing, the court ordered the parties to submit proposed orders by April 12, 2017. On May 9, 2017, the court filed a written memorandum of decision in which it found that for the period from August 18, 2014 to November 23, 2016, the defendant owed the plaintiff $3742.08 for extracurricular activity fees, while the plaintiff owed the defendant $2303.59 for unreimbursed medical expenses. As a result, the court ordered the defendant to pay the plaintiff $1438.49, the net difference between those unpaid sums.

On June 7, 2017, the plaintiff filed a motion to reargue, asking the court to reconsider many of its findings and rulings on the parties' motions for contempt, including its decision not to hold the defendant in contempt and its method of calculating the amounts the parties owed to one another for their children's expenses. On June 28, 2017, the court issued its memorandum of decision denying the plaintiff's motion to reargue with respect to all issues except that of reimbursement for additional

orthodontic expenses.[4] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in finding that she had violated its medical reimbursement order and in finding, on that basis, that she owed the defendant $2303.59. She further argues that the court erred in finding that the defendant's accounting summaries, as to amounts he had paid for the children's medical expenses, were credible. Specifically, the plaintiff argues that the numerical values listed by the defendant on his quarterly spreadsheets, which were submitted as evidence on the issue of unreimbursed medical expenses, were unsubstantiated by proper documentation. We disagree.

"At the outset, we note that the court's factual determinations will not be overturned on appeal unless they are clearly erroneous. . . . As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . Our review of factual determinations is limited to whether those findings are clearly erroneous. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Chowdhury* v. *Masiat*, 161 Conn. App. 314, 324, 128 A.3d 545 (2015).

During the evidentiary hearing on March 28, 2017, the court heard lengthy testimony as to the amounts

[4] See footnote 10 of this opinion.

allegedly owed by each party to the other. The defendant testified that he had incurred medical expenses for his children's health care that had been paid directly either from his health savings account or by his insurance provider. He claimed that his health savings account, his insurance payment history and his spreadsheets summarizing his children's medical expenses corroborated one another. The plaintiff, who appeared with counsel, was able to cross-examine the defendant at length as to his accounting methods. Moreover, the court questioned the defendant on multiple occasions with respect to his accounting summaries and the other evidence of payments he had presented to the court.

Before issuing its memorandum of decision, the court sought and received proposed orders from each party, which included suggested methods of calculation and summaries of expenses they wanted to have considered. In its revised memorandum of decision, the court addressed the discrepancies between the plaintiff's and the defendant's calculations, noting that many of those discrepancies arose from the parties' different accounting methods.[5] The court stated that the plaintiff interpreted its August 18, 2014 order, which provided that all unreimbursed payments owed at the time of the order had been reconciled, as an indication that the period for determining if the minimum annual threshold had been reached had been restarted. The court explained, however, that "the August 18, 2014 order does not preclude such prior expenses from being included in the calculation of the $3720 threshold for the calendar year 2014 . . . [and] [t]herefore, the expenses found to be incurred by the defendant during

[5] The two approaches differed in that they calculated what was owed on the basis of when the expense was incurred versus when the expense was actually paid. In the present case, the defendant argued that expenses incurred during any relevant quarter could be included in the accounting for that quarter. Conversely, the plaintiff argued that only expenses paid in a relevant quarter should be reimbursed in that quarter.

the remainder of 2014 were in excess of the . . . threshold [amount].'' The court also concluded that the language of its May, 2014 order supported the plaintiff's method of accounting, however, ''[o]nly for the purpose of finding the amounts due at this time, the court adopts the approach of the defendant. It does so primarily because it finds, based on the *credible testimony* of the defendant, that all of his claimed expenses had been paid by him by the time of the [March 28, 2017] hearing.''[6] (Emphasis added.)

Despite the plaintiff's repeated claim that the court erred in finding that the defendant's medical expense spreadsheet summaries were credible, our review of the record reveals that the court, instead, credited the defendant's *testimony* that he had, in fact, paid what he claimed to have paid before the March 28, 2017 hearing.[7] Because the court deduced that a number of the defendant's quarterly summaries included expenses that had been incurred and claimed in one quarter, but

[6] The memorandum of decision also provided that, ''because the plaintiff's proposed findings and orders highlight an issue likely to recur in the reconciliation of future unreimbursed medical expenses, the court makes a remedial order regarding expenses incurred and paid after November 23, 2016 . . . . Going forward, consistent with the terms of the judgement as modified by the May 27, 2014 order, the quarterly unreimbursed medical expense reconciliations shall be based on *actual payments* made during the quarter, and *shall not include expenses* to be paid in the future for services rendered during the quarter.'' (Emphasis added.)

[7] The following exchange occurred on the record:

''The Court: All right. Sir, now, you were asked before about when expenses were accrued as opposed to when they were paid. Is it your testimony now that every expense that you're claiming to have paid for the children, except the ones that your former wife paid herself, any unreimbursed medical expense, that you've paid them all as of now?

''The Defendant: Yes.

''The Court: So, you might not have paid it as of the time you requested reimbursement?

''The Defendant: Yes, Your Honor.

''The Court: But you've paid it by now?

''The Defendant: Yes.''

paid in another quarter, the defendant's testimony was found to have explained why there were discrepancies between his summaries and the documentation he presented to the court. Our review of the record indicates that during the March 28, 2017 hearing and on appeal, these discrepancies provided the basis for many of the plaintiff's claims that the defendant's accounting summaries were inaccurate.

The plaintiff also argues, in addition to claiming that the court erred in its method of calculation, that expenses were listed in the defendant's medical expense summaries that are irreconcilable with the record. As proof of such a contradiction, the plaintiff directed the court's attention to the defendant's medical expense summary sheet and, specifically, to the entry labeled "[Daughter's] Root Canal" for $506.30. The plaintiff claims that this entry is inaccurate, arguing that the reason the defendant could not provide any documentation of any payment or subsequent repayment of the expense was because she had paid for it. We do not agree with the plaintiff's resulting claim that the defendant's medical expense summaries are irreconcilable with the trial court record.

Moreover, at the time the court issued its memorandum of decision, it was in possession of the parties' proposed orders relating to the amounts owed, along with explanations of how the parties believed the expenses should be calculated. It is clear that the court was well aware of the differing accounting approaches with respect to the calculation of amounts owed by both parties, which is clearly indicated and discussed in the court's memoranda of decision. After a thorough review of the record, including the parties' proposed calculations, the exhibits, and the hearing transcripts, we conclude that the plaintiff has failed to establish that the court's determinations as to the amounts the

parties owed one another for their children's expenses were clearly erroneous.

II

The plaintiff next claims that the court abused its discretion in not finding the defendant in contempt for withholding payment from her. Specifically, the plaintiff argues that the court order requiring the payment in question was clear and unambiguous and that there was no evidence before the court suggesting that the defendant's violation of the order was anything other than wilful. We disagree.

The following legal principles guide our resolution of the plaintiff's claim. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Jeffrey C.*, 261 Conn. 189, 196, 802 A.2d 772 (2002). "A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [defendant] were in contempt of a court order. . . . To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . A finding that a person is or is not in contempt of a court order depends on the facts and circumstances surrounding the conduct. The fact that an order has not been complied with fully does not dictate that a finding of contempt must enter. . . . [It] is within the sound discretion of the court to deny a claim for contempt when there is an adequate factual basis to explain the failure to honor the court's order. . . .

"It is therefore necessary, in reviewing the propriety of the court's decision to deny the motion for contempt, that we review the factual findings of the court that led to its determination. The clearly erroneous standard is the well settled standard for reviewing a trial court's

factual findings. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citations omitted; internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 326–27, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

In the present case, the plaintiff argues simply that because the defendant's actions were knowing and voluntary, they must have constituted wilful contempt. The court's refusal to find the defendant in contempt, however, was not predicated on a finding that the defendant's actions were not knowing or voluntary, but was based on its finding that each party withheld payments from the other because of their common belief that it was proper to do so. The court explained this conclusion as follows in its oral decision on the parties' contempt motions: "[G]iven the period of time covered and the number of bills, it would not be possible today to hear all the evidence the court would have to hear in order to make a specific finding as to how much was due with respect to each of those and an ultimate finding as to who owed what to whom. . . . But it is clear to the court based on the evidence presented so far that both parties acted in a way that they believed was permitted by the court order. I don't say that it was appropriate for them to do so and there are principles of Connecticut law against self-help, but I don't believe that there would be grounds for a finding by clear and convincing evidence that either party had wilfully violated the court order."

Because the plaintiff fails to advance any compelling argument as to why the court's determination was not supported by the record and we are not left with the definite and firm conviction that a mistake has been made, we conclude that the court did not abuse its discretion in denying the plaintiff's motion for contempt.

III

The plaintiff next claims that the court abused its discretion when it allowed the defendant to withhold money unilaterally from her in the future if he believed that she owed him money for unreimbursed medical expenses. The plaintiff further claims that the court unnecessarily combined two unrelated orders to provide the defendant with the option of self-help, whereas she had to file a motion for contempt if the defendant failed to make the correct payments. We disagree.

It is well settled that "[c]ourts have continuing jurisdiction . . . to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 159 Conn. App. 194, 198–99, 122 A.3d 713, (2015).

In the present case, contrary to the plaintiff's claim, the court's remedial order lays out a detailed rule of future application that the defendant was to follow when presenting proof of unreimbursed medical expenses to the plaintiff. The court's order provided: "If and when the accumulated receipts for the year reach the threshold so that the plaintiff, under the current orders of the court, would be responsible to reimburse a percentage of those to the defendant, he shall include his calculation of what that amount is. And if the plaintiff disputes that calculation, she shall notify

the defendant in writing within thirty days after she's received those receipts. If she doesn't dispute it, then she shall make payment of her share within sixty days after her receipt of those receipts. If her undisputed portion of those expenses has not been paid to the defendant by the due date of the next quarterly installment of the activity fee, he shall then be entitled to deduct from that quarterly installment the amount of the unpaid share of unreimbursed expenses for medical [costs] owed by the plaintiff. If any amount is in dispute as notified properly by the plaintiff, there shall be no deduction until that dispute has been resolved either by agreement of the parties or by court order."

The order clearly provides that if the plaintiff disputed a future expense claimed by the defendant, then the defendant was not permitted "to deduct from that quarterly installment the amount of the unpaid share of unreimbursed expenses for medical [costs] owed by the plaintiff." Only when the plaintiff did not dispute the expense and it was overdue by an entire quarter, did the order allow for the defendant to make a deduction. After viewing the court's remedial order in the context of its previous orders, and acknowledging that the court, being intimately familiar with the details of the present case, was in the best position to give effect to the prior orders, we conclude that the court's remedial order was not manifestly unreasonable. Accordingly, the plaintiff has failed to demonstrate that the court abused its discretion by allowing the defendant to deduct undisputed unpaid medical expenses from subsequent payments.

IV

The plaintiff also claims that the court abused its discretion when it denied her motion to reargue.[8] Specifically, the plaintiff argues that the court incorrectly

[8] The motion filed with the court was titled "Motion to open, to submit additional and new evidence, to reargue and for reconsideration [of] the court's decision dated May 18, 2017." The court correctly treated the plain-

concluded that she had ample opportunity to submit evidence prior to the final hearing but had chosen not to do so. We disagree.

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *Liberti* v. *Liberti*, 132 Conn. App. 869, 874, 37 A.3d 166 (2012). "The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Mengwall* v. *Rutkowski*, 152 Conn. App. 459, 465–66, 102 A.3d 710 (2014).

In her motion to reargue, the plaintiff argued that she had not been given a meaningful opportunity to present evidence on her motion for contempt. Specifically, she argued that the court had used an improper method in calculating what unreimbursed medical expenses were owed and that representations made by the defendant were not supported by the record.[9] She

tiff's motion as a motion to reargue. See Practice Book § 11–12. For the purpose of our analysis, we adopt the court's characterization and refer to the plaintiff's motion as her motion to reargue.

[9] The plaintiff also argued that the court incorrectly included orthodontic costs with medical and dental costs, despite each being covered by different orders and subject to different calculations. She further argued that she was not afforded a reasonable opportunity to address the issue of the orthodontic costs because they were not previously in dispute. The court

further argued that an additional hearing was warranted because she had acquired relevant evidence on the issue of contempt that arose after the court made its oral order of November 23, 2016, but before it issued its written memorandum of decision.[10]

In its memorandum of decision on the motion to reargue, the court stated: "The plaintiff seeks, among other things, a further opportunity to present evidence in support of a finding of contempt against the defendant. . . . The record will reflect that on November 3, 2016, a hearing commenced with regard to multiple motions filed by the parties, including each party's contempt motion against the other. It was made clear at the outset, and agreed by the parties, that a single combined hearing would be held on all of the pending motions. The hearing lasted essentially the entire afternoon of November 2, 2016, resuming on November 23, 2016, and continuing for most of that day. Both parties testified, with the plaintiff giving testimony for several hours spanning both dates. . . .

"By the end of the second day of the hearing on multiple motions, the court had heard sufficient credible evidence to conclude that while the activity fee and medical reimbursement orders had not been followed,

granted the plaintiff's motion with respect to this issue and permitted both parties to submit to the court any relevant evidence with respect to orthodontic expenses. The court's order provided: "[U]nder all the circumstances, the court concludes that the plaintiff did not understand or expect that orthodontia expenses would be taken into account. In the interest of justice, the court wishes to afford both parties the opportunity to provide evidence of such expenses."

[10] The court restricted the March 28, 2017 hearing to the presentation of evidence with respect to specific amounts owed by either party. In her motion to reargue, the plaintiff claimed that she possessed additional evidence of wilful contempt that occurred after the November 23, 2016 hearing. The court's decision, however, related specifically to the period from August 18, 2014 to November 23, 2016. The court correctly denied the plaintiff's motion with respect to this evidence because it concerned conduct that was outside of the relevant time frame.

there was also sufficient credible evidence to preclude it from finding contempt on the part of either party under the *Brody* standard.[11] For the reasons of judicial efficiency, and after hours of testimony which was sometimes repetitive, the court issued remedial orders at the end of the day on November 23, 2016. . . .

"The bulk of the remainder of the plaintiff's motion requests either the court's reconsideration of evidence presented at the hearing, or its allowance of additional evidence that might have been submitted at the hearing or that relates to events occurring after the conclusion of the hearing. With the exception of one issue,[12] the court denies those requests." (Footnotes added.)

Despite the plaintiff's assertions that the "court, without explanation, denied the plaintiff's request to present additional and new evidence, other than related to the orthodontia payments," the record is clear that the court provided the plaintiff with a sufficient explanation as to why it denied her motion. Furthermore, a review of the hearing transcripts indicates that counsel for the parties agreed in advance to prioritize certain issues before the court with respect to their various motions. Accordingly, the plaintiff has failed to demonstrate that the trial court abused its discretion when it denied her motion to reargue.

V

Lastly, the plaintiff claims that the court violated her due process right to be heard when it denied her motion for contempt before she rested her case-in-chief on that motion. Specifically, the plaintiff claims that she was not afforded a reasonable opportunity to cross-examine the defendant or to present evidence in support of her

[11] See *Brody* v. *Brody*, 315 Conn. 300, 319, 105 A.3d 887 (2015) (finding of civil contempt must be proven by clear and convincing evidence, not by preponderance of evidence).

[12] See footnote 11 of this opinion.

motion for contempt. She further argues that it is unclear how the court could make a credibility finding without the plaintiff's testimony in support of that motion. We disagree.

"It is a fundamental tenet of due process . . . that persons whose property rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained. . . . [A] party's constitutionally protected right to present evidence [however] is not unbounded. . . . To the contrary, we previously have determined that the court reasonably may limit the time allowed for an evidentiary hearing." (Citations omitted; internal quotation marks omitted.) *Harris* v. *Hamilton*, 141 Conn. App. 208, 215 n.5, 61 A.3d 542 (2013), citing *Szot* v. *Szot*, 41 Conn. App. 238, 241–42, 674 A.2d 1384 (1996).

"In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial. . . . Although it is axiomatic that the scope of cross-examination generally rests within the discretion of the trial court, [t]he denial of all meaningful cross-examination into a legitimate area of inquiry constitutes an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Dubreuil* v. *Witt*, 65 Conn. App. 35, 42, 781 A.2d 503 (2001).

The plaintiff argues that our decision in *Szot* applies with equal force in the present case. "In *Szot*, the court, *despite the protests of the plaintiff's counsel* that she

still had additional evidence to present, ended not only cross-examination but also the entire presentation of evidence. . . . This court held that the trial court's termination of the proceedings violated the plaintiff's due process right to be heard." (Citation omitted; emphasis added; internal quotation marks omitted.) *Corriveau* v. *Corriveau*, 126 Conn. App. 231, 237, 11 A.3d 176, cert. denied, 300 Conn. 940, 17 A.3d 476 (2011). Here, unlike in *Szot*, the court's oral decision with respect to the issue of contempt did not terminate the entire presentation of evidence; nor did the court make the order in spite of the plaintiff's express protest that she still had evidence to present with respect to contempt. Rather, near the end of the second day of the evidentiary hearing on November 23, 2016, during a short recess, the trial court met with counsel for both parties in chambers to address the contempt issue; upon resuming the hearing, the court made its ruling with respect to the parties' motions for contempt.[13]

In the court's ruling, it explained the need to make two sets of remedial orders to properly effectuate its previous orders. It stated: "One [set] is a remedial order to make a finding as to exactly what is owed by whom to whom. . . . The other set concerns the future and how we can avoid the situation where these parties are again operating at cross purposes and wind up back in court over the same issues." Thereafter, the court described the basis for its decision not to hold either party in contempt, how it wanted to approach the disputed amounts that were claimed under the court's previous orders, and how it was going to craft the remedial order so as to create a more workable situation in the future. The court then asked counsel: "Any questions or need for clarification of any of those orders?

[13] The court made the following statement: "I would ask [the court] monitor to prepare a transcript of the remarks and the interim orders that I'm about to make following a discussion I had in chambers with counsel during the recess."

Counsel?" In response, both counsel raised issues concerning the manner in which the parties would reconcile amounts owed to one another, the manner in which they should present proof of their expenses to one another, and whether there was a need for a further order expressly stating that the parties must act in good faith when disputing amounts claimed by one another. None of the issues raised with the court, however, concerned the court's announced intention not to hold either party in contempt.

Thereafter, before proceeding to closing argument, the court asked counsel again: "[Are there] [a]ny other questions?" Hearing none, the court stated: "Then that will dispose [of], for the time being, the motions for contempt subject to [a] further hearing if the parties aren't able to resolve the issue of the amounts that, as of this date, are due from either party to the other for unreimbursed medicals or activity fees. If the parties aren't able to reach an agreement, the court will have further hearing for the purpose of those remedial orders . . . ."

At no point during the remainder of the hearing did the plaintiff ask to submit additional evidence. Although the plaintiff continues to argue on appeal that she was unable to bring several pieces of relevant evidence to the court's attention, nothing in the record suggests that, had the plaintiff been allowed even greater latitude and more time, she would have presented evidence with respect to wilfulness that was not already before the court. The record indicates that the evidence that the plaintiff repeatedly claimed the court ignored largely dealt with the fact that the defendant knowingly made deductions from amounts he was ordered to pay to the plaintiff, which she, therefore, claims to have constituted acts of wilful contempt. As discussed previously in this opinion, however, "[n]oncompliance alone will not support a judgment of contempt. . . . [It] is within

the sound discretion of the court to deny a claim for contempt *when there is an adequate factual basis to explain the failure to honor the court's order*." (Emphasis added; internal quotation marks omitted.) *Spencer* v. *Spencer*, supra, 177 Conn. App. 542.

Our review of the record reveals that the plaintiff had a sufficient opportunity to provide the court with evidence of contempt during the November, 2016 hearings. Accordingly, the plaintiff has failed to show that her constitutional rights were violated or that she was deprived of a fair hearing as a result of the court's decision.

The judgment is affirmed.

In this opinion the other judges concurred.

PMC PROPERTY GROUP, INC., ET AL. *v.* PUBLIC UTILITIES REGULATORY AUTHORITY ET AL.
(AC 39609)

Lavine, Bright and Harper, Js.

Syllabus

The plaintiff companies appealed to this court from the trial court's judgment affirming in part the decision of the defendant Public Utilities Regulatory Authority, which found that the plaintiffs had engaged in the unauthorized submetering of electricity and, pursuant to that finding, imposed sanctions. The plaintiffs had installed a heating, ventilation, and air conditioning system in a multifamily apartment building owned and managed by the plaintiff P Co. P Co.'s electric service was measured through an electric company meter that supplied electricity to seven heating and air conditioning outdoor units and the common areas of the building. Two nonutility wattmeters, which were installed after P Co.'s electric company meter, measured the electricity used by the seven outdoor units and provided an input signal to a heating and air conditioning billing program. The plaintiffs billed each tenant for a portion of the heating and air conditioning compressors' electric use in proportion to the thermal use of the rental space of each tenant. Subsequently, the Office of Consumer Counsel and the state attorney

general filed a joint petition requesting that the authority investigate possible unauthorized submetering at P Co.'s apartment building. The statute authorizing the authority to regulate submetering ([Rev. to 2011] § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1) did not provide a definition for submetering, and, thus, in determining that the plaintiffs had engaged in unauthorized submetering, the authority relied on a definition of submetering used in one of its prior decisions. *Held*:

1. The plaintiffs could not prevail on their claim that because the authority previously had not established what constitutes electric submetering and, thus, its definition was not time-tested, the trial court erred in deferring to the authority's definition of electric submetering; an agency interpretation may warrant deference, even if not time-tested, if it involves extremely complex and technical regulatory and policy considerations, the determination of what constitutes electric submetering is a complex and technical regulatory issue that calls for such specialized expertise and policy considerations, and because our statutes authorize the authority to regulate submetering and the authority's utility commissioners also possess the required expertise needed to regulate submetering, the trial court properly determined that, due to the technical nature of the definition, it was appropriate to defer to the authority's definition of electric submetering.
2. The plaintiffs could not prevail on their claim that the trial court erred in concluding that the heating and air conditioning system fell within the authority's definition of submetering, which was based on their claim that the definition of submetering in the authority's previous decision was applicable only to submetering in the context of public gas utilities and, thus, was not applicable to electric submetering: the authority reasonably found through its reliance on its previous decision that the plaintiffs had engaged in unauthorized submetering, as the definition of submetering relied on by the authority did not focus on the form of energy that the tenants received but, instead, focused on the type of energy billed, and although the plaintiffs claimed that the fundamental component of electric submetering is the furnishing of electric service by a nonutility such that electric service is the physical delivery through wires of electricity to the end user for consumption, combined with measuring the electric consumption with an electric submeter, the state regulations (§§ 16-11-100 and 16-11-238) cited by the plaintiffs in support of their claim do not include a definition of submetering, and the decisions of the authority cited by the plaintiffs do not condition electric submetering by an entity on the furnishing of electric service by such entity and, in fact, one of those decisions included a definition of submetering that was similar to the definition employed by the authority in its decision in the present case, namely, the measurement and billing of the consumption of a utility's electric service to an individual end-use customer; accordingly, the trial court did not err in affirming the authority's determination that the plaintiffs' computation of the amount

of electricity used by each residential unit in using the heating and air conditioning system, and the subsequent billing in proportion to each rental space's use, constituted unauthorized submetering of electricity.

Argued January 15—officially released April 16, 2019

Procedural History

Appeal from the decision of the named defendant finding that the plaintiffs had engaged in the unauthorized submetering of electricity and imposing sanctions, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Schuman*, *J.*; judgment sustaining in part the plaintiffs' appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Michael J. Donnelly, with whom was *Paul R. McCary*, for the appellants (plaintiffs).

Robert L. Marconi, assistant attorney general, with whom was *George Jepsen*, former attorney general, for the appellee (named defendant).

Joseph A. Rosenthal, for the appellee (defendant Office of Consumer Counsel).

Vincent P. Pace, for the appellee (defendant The Connecticut Light and Power Company).

Jeffrey R. Babbin, for the appellee (defendant The United Illuminating Company).

Opinion

HARPER, J. The plaintiffs, PMC Property Group, Inc. (PMC), and Energy Management Systems, Inc. (EMS), appeal from the trial court's judgment affirming in part the decision of the defendant Public Utilities Regulatory Authority (authority),[1] which found that the plaintiffs

[1] The other defendants in this appeal are the state Office of Consumer Counsel, The United Illuminating Company, and The Connecticut Light and Power Company. In addition, the Office of the Attorney General, Greater Hartford Legal Aid, Inc., and Mitsubishi Electric Cooling & Heating, a division of Mitsubishi Electric & Electronics USA, Inc., were also named as defendants but are not parties to this appeal. To avoid confusion, we refer to each of the plaintiffs and the defendants by name where necessary.

had engaged in the unauthorized submetering[2] of electricity and, pursuant to that finding, imposed sanctions. On appeal, the plaintiffs claim that the court erred in (1) deferring to the authority's definition of electric submetering where that definition was not time-tested with respect to the heating and air conditioning system at issue in this appeal and (2) affirming the authority's determination that the plaintiffs' use of the heating and air conditioning system constituted submetering of electricity. We affirm the judgment of the court.

The following facts, as found by the authority and adopted by the trial court, and procedural history are relevant to our resolution of this appeal. PMC owns and is the property manager of a multifamily apartment building located at 38 Crown Street, New Haven. The apartment building has sixty-five residential apartments and one commercial unit (rental space). EMS provides billing services for PMC. In 2011, the plaintiffs renovated the building and installed a heating, ventilation, and air conditioning (HVAC) system manufactured by Mitsubishi Electric Cooling & Heating, a division of Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi).[3] The HVAC system is a heat pump system with heat recovery.

Sensors and valves are installed in the indoor piping of each rental space and are used with computer software to measure the HVAC thermal use of each space.

[2] The definition of electrical utility submetering is at the heart of this appeal. Indeed, our research reveals that our General Statutes, regulations, and case law have not defined submetering in this context. New York case law has defined submetering in the electric utility context as when "[t]he owner or operator of a building buys current from a public utility at the wholesale rate and resells it through separate meters to individual tenants, usually at a retail rate." *Campo Corp.* v. *Feinberg*, 279 App. Div. 302, 303, 110 N.Y.S.2d 250, aff'd, 303 N.Y. 995, 106 N.E.2d 70 (1952). This definition is consistent with how the authority has defined the term in connection with the submetering of natural gas, as discussed in part I of this opinion.

[3] The plaintiffs note in their brief before this court that, although the trial court used the acronym HVAC in describing the system, the Mitsubishi system does not have a ventilation component.

Each rental space has a thermostat to control its heating and cooling level, and is separately served through its own meter from The United Illuminating Company (electric company). PMC's electric service is measured through one electric company meter that supplies electricity to seven HVAC outdoor units and the common areas of the building. Two nonutility wattmeters installed after PMC's electric company meter measure the electricity used by the seven outdoor units and provide an input signal to an HVAC billing program.

In March, 2012, PMC, acting through EMS, began billing each tenant for a portion of the seven HVAC compressors' electric use in proportion to the HVAC thermal use of the rental space of each tenant. On August 17, 2012, the Office of Consumer Counsel and the state attorney general filed a joint petition requesting that the authority investigate possible unauthorized submetering at PMC's apartment building. The authority conducted a hearing on November 19, 2012, and rendered a decision on June 5, 2013. In its conclusion, the authority ruled that PMC conducted unauthorized submetering at the building. The authority then entered an order providing that PMC shall immediately stop submetering electricity, EMS shall cease submetered billing to the tenants at the building, and PMC shall return all payments collected from each tenant for submetering electricity.

The plaintiffs appealed to the Superior Court, claiming that the authority erred in concluding that they had engaged in unauthorized submetering and challenging the authority's order of relief. In its memorandum of decision issued August 22, 2016, the court applied a deferential standard of review and concluded that the authority did not act unreasonably, arbitrarily, illegally

or in abuse of its discretion in concluding that the system at issue constituted unauthorized submetering.[4] This appeal followed.

I

The plaintiffs' first claim on appeal is that the trial court erred in deferring to the authority's definition of electric submetering. Specifically, the plaintiffs claim that because the authority previously had not established what constitutes electric submetering, its definition of such was not time-tested, and, thus, the court should not have afforded the authority deference. In response, the defendants claim that an agency's interpretation may warrant deference, even if not time-tested, if it involves extremely complex and technical regulatory and policy considerations. We agree with the defendants.

We begin our analysis with the applicable standard of review. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions

[4] Additionally, although the court concluded that the authority lacked the statutory power to order rebates in this case, it ordered the parties to arrange for the return, with interest, of tenant submetering funds to the tenants, which had been escrowed during the pendency of the appeal to the trial court. The plaintiffs have not challenged this order on appeal.

of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 139–40, 178 A.3d 1043 (2018).

Moreover, "[a]lthough the interpretation of statutes is ultimately a question of law . . . it is the well established practice of [our appellate courts] to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . It is also well established that courts should accord deference to an agency's formally articulated interpretation of a statute when that interpretation is both time-tested and reasonable." (Citation omitted; internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 678–79, 99 A.3d 1038 (2014). Our Supreme Court has determined, however, that the "traditional deference accorded to an 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 . . . ." (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 163, 931 A.2d 890 (2007).

Although our Supreme Court has determined that deference is not ordinarily afforded to an agency's statutory interpretation that has not previously been time-tested or subject to judicial scrutiny, the court also has articulated an exception to that rule. See *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, 283 Conn.

672, 692, 931 A.2d 159 (2007). In *Wheelabrator Lisbon, Inc.*, the Department of Public Utility Control, the authority's predecessor, was required "to determine whether the word 'electricity' as used in [General Statutes] § 16-243a (c) . . . included the renewable energy component of the electricity and whether the purchase of such electricity at the avoided cost rate entitled the utility [company] to credit for the purchase of renewable energy for purposes of [General Statutes] § 16-245a." Id., 691–92. The court stated that "[b]ecause this is a question of statutory interpretation that previously has not been subject to judicial scrutiny, our review ordinarily would be plenary." Id., 692. The court concluded, however, that "*in light of the extremely complex and technical regulatory and policy considerations implicated by this issue*, we are not persuaded that we may substitute our judgment for that of the department. Rather, this is *precisely the type of situation that calls for agency expertise*." (Emphasis added; internal quotation marks omitted.) Id. As such, the court limited its review "to a determination of whether the department [or agency] gave reasoned consideration to all of the relevant factors or whether it abused its discretion." Id.

In the present case, the authority was to determine whether the plaintiffs' method of billing each tenant for a share of the electricity cost to operate the HVAC system at PMC's apartment building constituted electric submetering. The statute authorizing the authority to regulate submetering is General Statutes (Rev. to 2011) § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1,[5] which does not provide a definition for submetering. As such, the authority relied on a definition of

[5] General Statutes (Rev. to 2011) § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1, provides: "(a) Notwithstanding any provisions of the general statutes to the contrary, each electric company or electric distribution company shall allow the installation of submeters at a recreational campground, individual slips at marinas for metering the electric use by individual boat owners or in any other location as approved by the authority and shall provide electricity to such campground at a rate no greater than

submetering used in its Decision and Order, Department of Public Utility Control, "DPUC Investigation into Sub-Metering Natural Gas," Docket No. 06-09-01 (October 17, 2007). That decision defined a "sub-meter" in a natural gas context as "any type of meter or metering device that is placed either in the gas stream, on an appliance, or control system located downstream of the [local distribution company's] meter, which is used to bill individual unit owners or apartment tenants for their usage or estimated usage of a portion of the [local distribution company] customer's total bill." Id., p. 8. In the present case, the authority applied this definition in determining that the plaintiffs had engaged in unauthorized submetering, and the trial court concluded that, due to the technical nature of the definition, it was appropriate to grant deference to the authority's use of it.

As the record reflects, the determination of what constitutes submetering is a complex and technical regulatory issue that calls for specialized expertise and policy considerations. Moreover, not only does § 16-19ff authorize the authority to regulate submetering, but the authority's utility commissioners also possess

the residential rate for the service territory in which the campground or marina is located, provided nothing in this section shall permit the installation of submeters for nonresidential use including, but not limited to, general outdoor lighting marina operations, repair facilities, restaurants or other retail recreational facilities. Service to nonresidential facilities shall be separately metered and billed at the appropriate rate.

"(b) The Public Utilities Regulatory Authority shall adopt regulations, in accordance with the provisions of chapter 54, to carry out the purposes of this section. Such regulations shall: (1) Require a submetered customer to pay only his portion of the energy consumed, which cost shall not exceed the amount paid by the owner of the main meter for such energy; (2) establish standards for the safe and proper installation of submeters; (3) require that the ultimate services delivered to a submetered customer are consistent with any service requirements imposed upon the company; (4) establish standards for the locations of submeters and may adopt any other provisions the authority deems necessary to carry out the purposes of this section and section 16-19ee."

the required expertise needed to regulate submetering in this context. See General Statutes § 16-2 (e).[6] Accordingly, we conclude that the trial court properly deferred to the authority's definition of submetering.

II

The plaintiffs next claim that the trial court erred in concluding that the HVAC system in this case fell within the authority's definition of submetering. Specifically, the plaintiffs argue that the definition of submetering in the authority's previous decision is applicable only to submetering in the context of public gas utilities and, thus, is not applicable to electric submetering.

Because we concluded in part I of this opinion that the trial court appropriately deferred to the authority's definition of submetering, our review is limited "to a determination of whether [the authority] gave reasoned consideration to all of the relevant factors or whether it abused its discretion" in concluding that the plaintiffs had engaged in unauthorized submetering. *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, supra, 283 Conn. 692.

In analyzing whether submetering had occurred at the apartment building, the authority first focused on the situation at the building, including the building layout, the HVAC system and billing related thereto, and the electric service provided to tenants. The authority then applied § 16-19ff and correctly concluded that PMC was not authorized to submeter electricity to the building without the authority's express approval. Finally,

[6] General Statutes § 16-2 (e) provides in relevant part that "any newly appointed utility commissioner of the authority shall have education or training and three or more years of experience in one or more of the following fields: Economics, engineering, law, accounting, finance, utility regulation, public or government administration, consumer advocacy, business management, and environmental management. . . ."

the authority analyzed the activity alleged as submetering and applied the definition of submetering as laid out in its previous decision regarding natural gas. Specifically, the authority found that "PMC indicated that it used the measurements of the refrigerant or heating medium to allocate one of the costs of supplying HVAC to the [building], *by measuring the electricity used by the rooftop compressor to each tenant and billing the proportionate cost to each apartment*." (Emphasis added.) Moreover, the authority found that "in addition to the two third-party electricity meters and a computer program that determines the electricity used by the seven outdoor units, there are other mechanical devices installed in each tenant's [rental] space *that make measurement of thermal use and* [*allocate*] *the electricity costs for the seven outdoor units to each apartment in proportion to its thermal use*." (Emphasis added.) The authority concluded that PMC's use of its "HVAC system and the equipment's sensing devices, its use of two third-party wattmeters, and the allocation and billing of the outdoors units' [kilowatt-hour] use, constitute[d] submetering electricity use," and that this, in addition to EMS's billing of tenants for that use, had not been approved by the agency.

We agree with the trial court and conclude that the authority reasonably found through its reliance on its previous decision that the plaintiffs had engaged in unauthorized submetering. As did the trial court, we conclude that the definition of submetering relied on by the authority "does not focus on the form of energy that the tenants receive," but, "[r]ather, it focuses on the type of energy billed."

The plaintiffs additionally argue that electric submetering is defined as "the secondary furnishing of electric service by a customer to a third party." In particular,

the plaintiffs cite to §§ 16-11-100[7] and 16-11-238[8] of the Regulations of Connecticut State Agencies, in addition to the authority's decisions referencing electric submetering,[9] in arguing that the fundamental component of electric submetering is the furnishing of electric service by a nonutility such that electric service is the physical delivery through wires of electricity to the end user for consumption, combined with measuring the electric consumption with an electric submeter. We are unpersuaded.

As previously discussed, the trial court appropriately deferred to the authority's definition of submetering

[7] Section 16-11-100 of the Regulations of Connecticut State Agencies provides in relevant part: "(f) Submetering Customer means any recreational campground, or other facility as approved by the Department [of Public Utility Control], whose electric service is furnished by an electric company and who is authorized to submeter the service to other parties within such facility;

"(g) Submetered Party means any person, partnership, firm, company, corporation or organization whose electric service is furnished by a submetering customer of an electric company . . . ." (Internal quotation marks omitted.)

[8] Sections 16-11-238 of the Regulations of Connecticut State Agencies provides: "(a) All watt-hour meters installed and owned by a submetering customer shall be tested periodically in conformity with the most recent ANSI Code for Electricity Metering. Meter test data shall be furnished to the Department [of Public Utility Control] upon request.

"(b) Meter records shall be kept by the submetering customer and shall include the identification of each meter, the date and place of its latest installation or removal and the date and results of the most current meter test. These records shall be maintained for the previous two years.

"(c) Every submetering customer shall provide to the Department, upon request data or records as may be deemed necessary by the Department related to the submetering and furnishing of electric service to submetered parties."

[9] The plaintiffs cite to Interim Decision and Order, Public Utilities Regulatory Authority, "PURA Generic Investigation of Electric Submetering," Docket No. 13-01-26 (August 6, 2014) p. 5, and Decision and Order, Department of Public Utility Control, "Request of Brewers Pilots Point Marine et al., for a Declaratory Ruling Regarding Electric Service, Submetering and Rates Applicable to Boat Docks at Marinas," Docket No. 01-08-11 (November 27, 2002) p. 3.

and its decision applying § 16-19ff. See part I of this opinion. In addition, not only do §§ 16-11-100 and 16-11-238 of the Regulations of Connecticut State Agencies not provide for a definition of submetering, but § 16-11-238 is also only relevant to meter testing and record keeping by submetering customers. The authority's decisions cited by the plaintiffs also do not condition electric submetering by an entity on the furnishing of electric service by such entity. Rather, Decision and Order, Department of Public Utility Control, "Request of Brewers Pilots Point Marine et al., for a Declaratory Ruling Regarding Electric Service, Submetering and Rates Applicable to Boat Docks at Marinas," Docket No. 01-08-11 (November 27, 2002) p. 3, merely states that, subject to the authority's approval, marinas may submeter "provided they supply electric service at the same quality as that provided by the local utility." Moreover, the definition of submetering, as laid out in Interim Decision and Order, Public Utilities Regulatory Authority, "PURA Generic Investigation of Electric Submetering," Docket No. 13-01-26 (August 6, 2014) p. 5, does not include language conditioning submetering on the provision of electric service but, rather, appears similar to the definition employed by the authority in its decision in the present case: "measurement and billing of the consumption of a utility's electric service to an individual end-use customer . . . ." The plaintiffs acknowledge that "the system's computer software is used to determine the amount of refrigerant used by each unit." The plaintiffs also concede in their brief that "[this] software . . . uses the refrigerant meter results to allocate the cost of the electricity used by the outdoor compressor units across all the connected indoor units. The system, thus, meters the electricity used by the HVAC compressors and bills this usage to the sixty-five residential apartments . . . in proportion

to each tenant's HVAC thermal use." Finally, it is undisputed that the plaintiffs did not obtain the authority's approval prior to engaging in submetering.

On the basis of the foregoing, we conclude that the trial court did not err in affirming the authority's determination that the plaintiffs' computation of the amount of electricity used by each residential unit in using the HVAC system, and the subsequent billing in proportion to each rental space's use, constituted unauthorized submetering of electricity.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHELLE LEVINE *v.* RANDALL HITE ET AL.
(AC 40626)

Alvord, Prescott and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she suffered when her automobile collided with a vehicle that was operated by the defendant R and owned by the defendant T. Prior to trial, the trial court denied the defendants' motion to compel the production of certain of the plaintiff's medical payment records. The court determined that the motion to compel was untimely in light of a scheduling order that a previous trial court had entered more than one year before, which stated that written discovery was done. The court also noted that the parties were without a jury, as half of the jurors who previously had been chosen had been excused from service on the jury. Thereafter, a different trial court entered an order that included dates for jury selection and trial, and precluded, inter alia, further continuances, motions and discovery without prior permission from the court. The defendants then sought reargument and reconsideration of the denial of their motion to compel, claiming, inter alia, that because the matter had been rescheduled, there was plenty of time to secure the plaintiff's medical records. The trial court that denied the motion to compel denied the defendants' motion for reargument and reconsideration, stating that the motion for reargument and reconsideration had been filed in violation of the court order that required prior permission from the court to file additional pretrial motions. When the parties appeared for jury selection, a different judge,

who had been assigned as the trial judge, granted the plaintiff's motion for a continuance when her counsel requested a postponement for medical reasons and, sua sponte, permitted the defendants to continue with discovery. The trial judge thereafter declined the plaintiff's motion for reargument and reconsideration of his decision to allow the defendants to engage in further discovery, which was based on the plaintiff's assertion that the trial judge's ruling deprived her of her due process rights to notice and an opportunity to be heard, and was contrary to the law of the case doctrine. After a different trial court granted the defendants' motion for an order of compliance to procure certain of the plaintiff's medical records, the defendants filed a motion for a judgment of nonsuit in which they claimed that the plaintiff had failed to comply with the order of compliance. A different trial court denied the defendants' motion for a judgment of nonsuit without prejudice and ordered the plaintiff to produce the previously requested medical records. That court then entered an order of nonsuit after the defendants again sought a judgment of nonsuit on the ground that the plaintiff had failed to comply with the courts' discovery orders. On appeal to this court, the plaintiff claimed, inter alia, that her due process rights were violated when the trial judge improperly reconsidered the trial court's ruling denying the defendants' motion to reargue the denial of their motion to compel, and allowed the defendants to engage in further discovery without affording her a fair opportunity to respond. The plaintiff further claimed that her failure to comply with the trial courts' discovery orders did not warrant the rendering of a judgment of nonsuit against her. *Held*:

1. The trial judge did not violate the plaintiff's due process rights by reconsidering, sua sponte, the defendant's prior request to obtain additional discovery and permitting the defendants to engage in further discovery: the trial judge did not abuse his discretion by permitting additional discovery, as his ruling was a case management decision, he was aware of the filings in the case and was willing to accommodate the plaintiff's request to postpone trial when her counsel requested a continuance for medical reasons, and, notwithstanding the plaintiff's claim that the rulings of the prior trial court were the law of the case, the trial judge emphasized that circumstances had changed since the prior ruling; moreover, because the discovery issue was raised at a hearing that was necessitated by the plaintiff's motion to continue the trial for an additional six to eight weeks, it was not surprising that the trial judge would raise and decide other issues that were impacted by such a lengthy delay, the defendants' ongoing requests to obtain certain of the plaintiff's records, although previously determined to be untimely and made without prior permission of the court, could be seen as reasonable in light of the change in circumstances, the plaintiff made no request for a recess to review the file and prepare her arguments, there was no indication as to what the plaintiff would have argued if she had had advance notice and the opportunity to be heard on the defendants'

request to engage in further discovery, and there was no evidence to support the plaintiff's assumption that the trial judge was unfamiliar with the prior rulings in the case and acted without knowledge of the contents of the file.

2. The trial court did not abuse its discretion in rendering judgment of nonsuit against the plaintiff for failing to comply with three previous orders of the court concerning discovery; the discovery orders of three different trial courts were reasonably clear, it was undisputed that the plaintiff failed to comply with those orders, and the court that rendered judgment properly considered all of the relevant factors in ordering the nonsuit, and given that the plaintiff chose not to comply with the orders of three trial courts, she did so at the risk of having her claims fail on appeal, and the trial judge's sua sponte decision to allow the defendants to engage in further discovery was reasonable and proper.
3. The trial court did not abuse its discretion when it ruled on the defendants' motion for a judgment of nonsuit prior to considering the plaintiff's motion for an order of sanctions against the defendants' counsel; the court's decision was one of case management, and the plaintiff cited no relevant authority that would have required the court to consider her motion first.

Argued January 15—officially released April 16, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, denied the defendants' motion to compel; thereafter, the court, *Sheridan*, *J.*, issued certain orders pertaining to trial; subsequently, the court, *Shapiro*, *J.*, denied the defendants' motion for reargument and reconsideration of its ruling denying the defendants' motion to compel; thereafter, the court, *Noble*, *J.*, granted the plaintiff's motion for a continuance, granted the defendants' motion for reargument and reconsideration of the denial of their motion to compel, and issued certain orders pertaining to discovery; subsequently, the court, *Noble*, *J.*, denied the plaintiff's motion for reargument and reconsideration of its orders pertaining to discovery; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendants'

motion for an order of compliance; subsequently, the court, *Hon. A. Susan Peck*, judge trial referee, denied the defendants' motion for a judgment of nonsuit and issued certain orders pertaining to discovery; thereafter, the court, *Hon. A. Susan Peck*, judge trial referee, issued an order of nonsuit and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

William J. Melley III, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Michelle Levine, appeals from the trial court's judgment of nonsuit rendered in favor of the defendants, Randall Hite and Tanya Hite, as a result of the plaintiff's failure to comply with three previous orders of the court regarding discovery. On appeal, the plaintiff claims that (1) the court, *Noble, J.*, improperly raised and considered a prior ruling of the court, *Shapiro, J.*, without affording her a fair opportunity to respond, (2) the plaintiff's failure to comply with discovery orders did not warrant the rendering of a judgment of nonsuit by the court, *Hon. A. Susan Peck*, judge trial referee, and (3) Judge Peck improperly declined to consider the plaintiff's motion for sanctions against the defendants' counsel prior to rendering the judgment of nonsuit. We affirm the judgment of the trial court.

A review of the following somewhat complicated procedural history is necessary to our resolution of the issues on appeal. In December, 2012, the plaintiff commenced a personal injury action against the defendants claiming that she was operating her vehicle on or about December 6, 2010, when it was struck by another vehicle operated by Randall Hite and owned by Tanya Hite.

The matter was scheduled for trial with jury selection to commence on December 6, 2016. Because of scheduling issues raised by the plaintiff's counsel and the defendants' counsel, the parties discontinued jury selection after one day, and the court continued the trial to January 4, 2017.

Jury selection commenced on January 5, 2017. On January 6, 2017, the defendants filed a "Motion to Compel And/Or Preclude" (motion to compel) in response to a Blue Cross/Blue Shield printout, evidencing medical payments that the plaintiff had provided to the defendants on January 4, 2017. In the motion to compel, the defendants claimed that the plaintiff had failed to produce certain designated records. They requested that the court order her to produce those records at least twenty-four hours prior to the start of evidence or else be precluded from entering any evidence of her physical injuries at trial.

Jury selection was completed on January 11, 2017, and the trial was scheduled to commence on January 18, 2017. On January 12 and 13, 2017, Judge Shapiro heard arguments on the defendants' motion to compel and the defendants' objections to the plaintiff's proposed exhibits that were being premarked by counsel for trial. On January 18, 2017, Judge Shapiro informed the parties that four of the eight jurors selected had written letters to the court requesting that they be excused from serving on the jury. Judge Shapiro stated that the presiding judge had excused those jurors, which left the parties without a jury for trial. Because the case could not proceed at that time, Judge Shapiro indicated that he would put on the record his rulings on the matters previously argued by counsel.

With respect to the defendants' motion to compel, Judge Shapiro concluded that the motion was "untimely" and denied the motion for the following

reasons: "The return date in this matter was January 8, 2013. The plaintiff is proceeding on the original complaint dated November 20, 2012. The plaintiff's deposition was taken in January, 2015.

"On October 7, 2015, the court entered a scheduling order. Therein it was stated that written discovery was done and the—all depositions were to be completed by November 15, 2016.

"On that same date, October 7, 2015, which is obviously over a year ago, the court—not this court but a court officer—held a pretrial conference. It's undisputed that at that pretrial conference, as part of her written presentation, the plaintiff presented a printout of her medical expenses. See Plaintiff's Exhibit 1 to the January 12, 2017 hearing.

"That printout lists dates and services, types of services, and names of medical providers of the plaintiff beginning in December, 2010. The names of providers and dates of services were provided to the defendants, and the bulk of the dates of records they complain of not receiving were made known to them at that time.

"Had the defendants wanted more information or records, they could have taken steps to obtain them before jury selection began. For example, they could have asked the plaintiff to provide the additional records well in advance of the trial. They already had a medical authorization to obtain records and could have used it or asked for another from the plaintiff. The defendants could have sought to redepose the plaintiff. . . .

"Also, in their motion, the defendants provided no exhibits, such as the plaintiff's previous responses to their written discovery requests.

"The defendants could have timely filed a motion to compel long before trial saying that previous discovery

compliance was incomplete, that the plaintiff had failed to disclose her medical condition and treatment. They could have asked for a status conference to discuss issues they have belatedly raised in their motion. The court's docket reflects that no motion to compel was filed until January 6, which was after jury selection had begun.

"The court finds that the defendants were on notice in October, 2015, of issues which they are raising now in their motion, more than a year later. The defendants' presentation is untimely."

On January 20, 2017, the court, *Sheridan, J.*, entered the following order in this case:

"Jury selection will commence on March 14, 2017. This is a firm trial date. Both counsel are responsible for ensuring that they and their clients and witnesses are ready for trial on the scheduled date. NO FURTHER CONTINUANCES OF THE TRIAL DATE WILL BE PERMITTED, absent compelling circumstances which are fully beyond the ability of counsel to anticipate, prevent or control.

"Between now and the commencement of jury selection, no additional pretrial motions, pretrial discovery, or designation of additional witnesses or additional exhibits for trial will be permitted, without the prior permission of the court based upon a showing of good cause."

On January 27, 2017, the defendants filed a motion to reconsider Judge Shapiro's January 18, 2017 denial of their motion to compel. The defendants, noting that the matter had been rescheduled for mid-March, claimed that there was "plenty of time to secure the medical records" and that the plaintiff's prior medical authorization had expired. The defendants requested

that the court order the plaintiff to furnish an authorization for the defendants to secure those records. The plaintiff filed an objection to the defendants' motion on February 8, 2017. One month later, on February 27, 2017, Judge Shapiro denied the defendants' motion to reconsider, referencing Judge Sheridan's order requiring prior permission of the court to file additional pretrial motions and stating that the defendants' motion to reconsider had been filed in violation of that order.

On March 16, 2017, the parties appeared for jury selection before Judge Noble, now assigned as the trial judge for this matter. At that time, the plaintiff's counsel[1] presented the court with a physician's note that indicated she was temporarily "unable to carry out her duties" because of certain medical conditions. On the basis of the physician's note, the plaintiff's counsel requested a six to eight week continuance.

Judge Noble then addressed the defendants' counsel, Attorney William J. Melley III, with the following question: "You had a motion, Mr. Melley, to reconsider and to reargue Judge Shapiro's order denying you the right to continue discovery; is that correct?" Attorney Melley responded: "Yes, Your Honor." At that point, Judge Noble ruled: "All right. Your motion for continuance is granted. The motion to reargue is granted. Your motion to continue discovery is now permitted."

When the plaintiff's counsel objected, stating that she believed that the court was penalizing her because she currently was unable to proceed to trial, Judge Noble provided the following reasons for his ruling: "So, we have six to eight weeks. We have a case that is from

[1] Two attorneys, Harvey L. Levine and Jennifer Beth Levine, filed appearances on behalf of the plaintiff. Attorney Harvey L. Levine told Judge Noble that his health issues prevented him from being lead counsel for this jury trial. When we refer to plaintiff's counsel in the singular in this opinion, we are referring to Attorney Jennifer Beth Levine.

2013. We have a case that encountered significant difficulties because of all counsel in getting to trial. We have one attorney who is unable to continue because of [a] physical [condition] and another attorney who claims that he is unable to continue because of physical disabilities, so I will accommodate both your schedules. Given the fact that we have now another six to eight weeks to go, [the defendants' counsel] has an opportunity to conduct further discovery."

On April 5, 2017, the plaintiff filed a motion to reargue Judge Noble's decision allowing the defendants to engage in further discovery. In that motion, the plaintiff set forth the procedural history of the case, emphasizing that Judge Shapiro had denied the defendants' motion to compel and had denied the defendants' motion to reconsider that had been filed in violation of Judge Sheridan's order. The plaintiff argued that the court's sua sponte reconsideration of Judge Shapiro's ruling deprived her of her due process rights to notice and an opportunity to be heard, and also was contrary to the law of the case doctrine. The defendants filed an objection to the plaintiff's motion to reargue on April 11, 2017. On April 12, 2017, Judge Noble denied the plaintiff's motion to reargue and sustained the defendants' objection to that motion. In sustaining the defendants' objection, Judge Noble stated: "The continuance of the trial date operates to ameliorate the need for discontinuance of further discovery."

On March 30, 2017, the defendants filed a motion for an order for compliance, seeking specified medical records from the plaintiff that the defendants claimed had not been completely disclosed. In the motion, the defendants represented that, if the plaintiff preferred, they would accept an authorization to secure those records. The defendants moved for an order of compliance or, in the alternative, such other relief as the court deemed appropriate, including, inter alia, the entry of

a nonsuit against the plaintiff. The plaintiff filed an objection to the defendants' motion on April 10, 2017, claiming that her motion to reargue Judge Noble's decision should first be considered. She stated that she was incorporating all of the arguments set forth in her motion to reargue in her objection to the defendants' motion. On April 25, 2017, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendants' motion for an order for compliance. Judge Epstein's order provided: "Plaintiff must comply with all outstanding discovery requests for medical records and billings by May 2, 2017." The plaintiff did not move to reargue Judge Epstein's decision.

On May 3, 2017, the defendants moved for a judgment of nonsuit, claiming that the plaintiff had failed to comply with Judge Epstein's order. The plaintiff filed an objection to the defendants' motion for judgment on May 11, 2017, again outlining in detail Judge Shapiro's prior orders denying the defendants' request for further discovery and Judge Sheridan's order requiring prior permission of the court to file additional pretrial motions before jury selection. The plaintiff argued that the prior rulings had never been vacated and, therefore, that Judge Noble's sua sponte ruling allowing the defendants the opportunity for further discovery was made "without any legal or statutory authority" and was "invalid." The plaintiff further claimed that the rulings of Judge Noble and Judge Epstein were contrary to the law of the case. Finally, the plaintiff argued that the sanction of a nonsuit was not proportional to the "purported failure" to comply with Judge Epstein's order.

On May 15, 2017, following a hearing before the court, Judge Peck ruled on the defendants' motion for judgment. In the following order, Judge Peck denied the defendants' motion without prejudice: "However, after review of the several court orders concerning discovery of certain of the plaintiff's medical records relating to

this case, as well as the plaintiff's extensive objection (#154) to this motion, in accordance with the two most recent court orders issued, #149.86 (*Noble, J.*), and #145.86 (*Hon. Constance L. Epstein*, judge trial referee), which have both required production of the documents at issue, the undersigned can discern no compelling reason to disturb those decisions, which now constitute the law of the case. Accordingly, the plaintiff is hereby ordered to produce the requested medical records identified in the defendants' motion for order of compliance (#145), and more particularly identified in [their] motion to compel (#122), or produce appropriate authorization(s) from the plaintiff to the defendants' counsel, no later than 5/30/17, authorizing him to obtain such records directly from the medical providers in question. The court notes that Judge Epstein originally ordered that the same records be produced by 5/2/17. . . ."

The plaintiff did not move to reargue Judge Peck's decision. She filed a notice of intent to appeal the court's ruling on May 26, 2017. Additionally, on May 26, 2017, the plaintiff filed a motion for an order of sanctions against the defendants' counsel. After reciting the extensive factual and procedural history of the case, the plaintiff argued that the defendants' counsel had "consistently misrepresented material facts and the law of the case to the court . . . ." On May 31, 2017, the defendants again moved that the court nonsuit the plaintiff for her failure to comply with the orders of Judge Epstein and Judge Peck. The defendants represented that the plaintiff failed to provide the specified medical records or to produce appropriate authorizations to secure those records. On June 7, 2017, the defendants' counsel filed a motion for an extension of time to respond to the plaintiff's motion for an order of sanctions. In that motion, the defendants stated that a motion for judgment was pending before the court and

that the court's ruling on the defendants' motion for judgment could render moot the issues raised in the plaintiff's request for sanctions.

On June 8, 2017, the plaintiff filed a "Reply To Defendants' Motion For Judgment." In her reply, the plaintiff again extensively reviewed Judge Shapiro's rulings, attaching a transcript of the January 18, 2017 hearing before Judge Shapiro as an exhibit. The plaintiff then claimed that she was "being forced to disclose irrelevant information so that the [d]efendants can inappropriately cause confusion . . . ." The plaintiff additionally requested that the court rule on her motion for an order of sanctions before ruling on the defendants' motion for judgment. Finally, after claiming "a gross violation of her due process rights," the plaintiff requested "that this action be dismissed at this point for the purpose of the plaintiff taking an appeal . . . ."

On June 19, 2017, Judge Peck issued a comprehensive order on the defendants' motion for judgment: "The court hereby orders a nonsuit as to the plaintiff for failure to comply with three previous orders of the court concerning discovery in this case. The discovery in question was specifically identified in the defendants' motion to compel (#122). Two such orders (#145.86 [*Hon. Constance L. Epstein*, judge trial referee,] and #152.86 [*Hon. A. Susan Peck*, judge trial referee]), contained deadlines of 5/2/17 and 5/30/17, respectively. The discovery subject of the motion to compel was originally authorized by a third order of the court issued on 4/12/17 (#149.86 [*Noble, J.*]).[2] On 1/20/2017, a jury trial in this case, which was scheduled to commence evidence on 1/18/2017 before Judge Shapiro, was postponed after several jurors asked to be excused. In

[2] Judge Noble's order actually was issued at a hearing held on March 16, 2017. His April 12, 2017 order was a denial of the plaintiff's motion to reargue that ruling.

connection with the postponement of that trial, the court (*Sheridan, J.*) issued an order which stated in pertinent part: 'Between now and the commencement of jury selection, no additional pretrial motions, pretrial discovery, or designation of additional witnesses or additional exhibits for trial will be permitted, without the prior permission of the court based on a showing of good cause.' See docket entry #137. Since 1/20/17, despite a notice by Judge Sheridan that no further continuances of the trial date would be permitted absent compelling circumstances, the trial of this 2013 case has been rescheduled numerous times. After a hearing held on 4/12/17,[3] Judge Noble granted such permission to defendants to obtain additional discovery in the form of medical record production.

"Jury selection is presently scheduled to recommence on June 20, 2017. Plaintiff's counsel has represented that for personal health reasons, Attorney Harvey Levine is not able to perform as trial counsel. In addition, some of the trial delay since February has been due to acknowledged health reasons personal to Attorney Jennifer Levine. Health issues, notwithstanding, both Attorney Harvey Levine and Attorney Jennifer Levine have recently submitted pleadings in this case and have appeared jointly at the hearings that have been held concerning the issue of discovery compliance. In contrast to the legitimate reasons communicated by both counsel relating to trial scheduling, there has been no legitimate or acceptable reason presented for the wilful and repeated failure of plaintiff's counsel to comply with the discovery orders of this court. Counsel continue to challenge the order of Judge Noble issued on 4/12/17,[4] whereby he authorized the defendants' request to obtain additional document production or medical authorizations in this case, despite the fact that

[3] See footnote 2 of this opinion.

[4] See footnote 2 of this opinion.

that no motion to reargue or reconsider that decision was filed.[5] In addition, as previously noted, plaintiff's counsel have also chosen to ignore the subsequent orders of Judges Epstein and Peck. Instead, they insistently seek to harken back to a prior order of Judge Shapiro issued in January, 2017, just prior to the commencement of the evidence then scheduled in this case and ultimately postponed due to juror unavailability. The plaintiff, albeit through her counsel, cannot selectively and unreasonably cling to an earlier order of one judge under circumstances then existing and choose to ignore the subsequent orders of three different judges under changed circumstances. Although this court has been reluctant to impose the sanction of nonsuit until this juncture, based on counsel's persistent, wilful disregard for the lawful orders of this court, the undersigned is left with no viable alternative. A fine would not do justice to what constitutes 'deliberate, contumacious . . . [and] unwarranted disregard for the court's authority . . . .' *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 51, 134 A.3d 643 (2016). This affront to the court, made on behalf of the plaintiff, has been both unjustified and unnecessary to preserve the rights of the plaintiff to prosecute her case to a successful conclusion. Plaintiff's counsel has not even attempted [to] articulate any particular prejudice that the plaintiff will suffer in connection with the production of the documents in question. Rather, counsel argues that the production of this information is not relevant to the plaintiff's claim, an improper objection to the broad mandate afforded requests for discovery. See Practice Book § 13-2. In fact, in a response to the defendants' motion, the plaintiff concedes that the document production in question relates to medical provider records apparently disclosed in her pretrial memo. See docket

[5] The plaintiff did file a motion to reargue Judge Noble's decision on April 5, 2017, which the court denied on April 12, 2017.

entry #159. For all the foregoing reasons, the court can find no reasonable alternative to vindicate the court's authority other than to issue this order of nonsuit." (Footnotes added.) This appeal followed.

I

The plaintiff's first issue on appeal is that Judge Noble improperly raised and considered a prior ruling of Judge Shapiro without affording her a fair opportunity to respond. Specifically, she argues that Judge Noble's ruling was an abuse of discretion because "the plaintiff did not have a fair opportunity to respond to the potential reconsideration of the defendants' motion to compel because she lacked notice that Judge Noble intended to use the hearing on the plaintiff's motion for continuance as an opportunity to address Judge Shapiro's denial of the defendants' motion to reconsider. . . . Indeed, had the plaintiff known that Judge Noble would act sua sponte in considering Judge Shapiro's denial of the motion to reconsider, she would have attempted to familiarize Judge Noble with the entire procedural history of the case, including the two days of oral arguments spent before Judge Shapiro and Judge Shapiro's extensive ruling on this issue." (Citation omitted.)

The plaintiff's first claim essentially attacks Judge Noble's ruling that allowed the defendants to engage in further discovery on two grounds: (1) the rulings of Judge Shapiro and Judge Sheridan constituted the law of the case, and (2) the plaintiff was denied her due process rights because she did not know Judge Noble intended to revisit the defendants' request for additional discovery, and, therefore, she had not been prepared at that time to argue fully the matter. We are not persuaded.

Simply put, Judge Noble's ruling was a case management decision. The parties appeared before him on March 16, 2017, for scheduled jury selection. At that

time, the plaintiff's counsel presented the court with a physician's note indicating that she was temporarily unable to perform her duties at trial. The plaintiff's counsel requested a six to eight week continuance. Judge Noble clearly was aware of the filings in the case because he asked the defendants' counsel whether he had filed a motion to reargue Judge Shapiro's ruling denying further discovery.[6] Given that Judge Noble was willing to accommodate the plaintiff's request for yet another postponement of the trial, it was not an abuse of discretion to permit additional discovery because of the change in circumstances.

"We review case management decisions for abuse of discretion, giving [trial] courts wide latitude. . . . A party adversely affected by a [trial] court's case management decision thus bears a formidable burden in seeking reversal. . . . A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions because it is in a much better position to determine the effect that a particular procedure will have on both parties. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Citations omitted; internal quotation marks omitted.) *Krevis* v. *Bridgeport*, 262 Conn. 813, 818–19, 817 A.2d 628 (2003).

Nevertheless, the plaintiff argues that Judge Shapiro had more familiarity with the case and that his rulings denying additional discovery had never been vacated. In essence, the plaintiff is arguing that Judge Shapiro's prior rulings were the law of the case that were binding

[6] No one has claimed that Judge Noble did not have access to the court file at the time he made his rulings.

on all subsequent judges. Assuming arguendo that the law of the case doctrine is applicable here,[7] the plaintiff's claim fails for the following reasons.

The law of the case doctrine provides that when "a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, *in the absence of some new or overriding circumstance*." (Emphasis added.) *Breen* v. *Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982). "The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked." (Internal quotation marks omitted.) *McCarthy* v. *McCarthy*, 55 Conn. App. 326, 332, 752 A.2d 1093 (1999), cert. denied, 252 Conn. 923, 752 A.2d 1081 (2000). "A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 130–31, 788 A.2d 83 (2002).

Judge Noble emphasized in his rulings that the circumstances had changed since Judge Shapiro's prior rulings. The plaintiff had just requested a six to eight week continuance for medical reasons.[8] The court was

[7] There is some question as to whether the law of the case doctrine applies to rulings on matters left to the court's discretion. See *McCarthy* v. *McCarthy*, 55 Conn. App. 326, 333–34, 752 A.2d 1093 (1999), cert. denied, 252 Conn. 923, 752 A.2d 1081 (2000).

[8] The plaintiff stresses that her request for a continuance was based on the "plaintiff's counsel's need for accommodation for severe medical complications . . . which constituted a protected disability under state and federal law." Judge Noble did not say that her request for a continuance was not a legitimate request. Even if her condition was a protected disability, she

willing to grant that request, but, in its discretion, decided that the defendants now could pursue further discovery because of the trial delay: "Given the fact that we have now another six to eight weeks to go, [the defendants' counsel] has an opportunity to conduct further discovery." This ruling was not an abuse of the court's discretion. "Abuse is not present if discretion is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and [it is] directed by the reason and conscience of the judge to a just result. . . . And [sound discretion] requires a knowledge and understanding of the material circumstances surrounding the matter . . . ." (Internal quotation marks omitted.) *Krevis* v. *Bridgeport*, supra, 262 Conn. 819.

With respect to the plaintiff's argument that Judge Noble violated her due process rights by reconsidering, sua sponte, the defendants' prior request to obtain additional discovery, we note that the discovery issue was raised at a hearing necessitated by the plaintiff's motion to continue the trial for an additional six to eight weeks. It is not surprising that, given the lengthy postponement, the judge presiding over the trial would raise and decide other issues impacted by such a delay. The defendants' ongoing requests to obtain certain specified records, although previously determined to be untimely and made without prior permission by the court as required by Judge Sheridan's ruling, now could be seen as reasonable in light of this change in circumstances. If the plaintiff believed that she was not prepared to argue this issue, she could have requested a recess to review the file and prepare her arguments. She made no such request, instead accusing the court of penalizing her for the requested continuance.

nevertheless was asking to delay the trial for six to eight weeks. It was reasonable for the court to conclude that the length of the postponement of trial constituted a change in circumstances.

Moreover, there is no indication as to what the plaintiff would have argued if she had had advance notice and the opportunity to be heard on the defendants' request to engage in further discovery. She states in her appellate brief that she would have "attempted to familiarize Judge Noble with the entire procedural history of the case, including the two days of oral arguments spent before Judge Shapiro and Judge Shapiro's extensive ruling on this issue." The plaintiff assumes, without any evidence in the record to support it, that Judge Noble had not reviewed the file or was unfamiliar with the prior rulings of the court. There is no foundation for this assumption, and we will not presume that the court acted without knowledge of the contents of the file. Accordingly, we conclude that the plaintiff's due process rights were not violated by the sua sponte ruling of Judge Noble.

II

The plaintiff next claims that her failure to comply with discovery orders did not warrant the rendering of a judgment of nonsuit by Judge Peck. Specifically, she argues: "The trial court abused its discretion in entering a judgment of nonsuit against the plaintiff. In this case, the plaintiff deliberately chose to seek appellate review of the discovery order by failing to comply with the order and by appealing from the subsequent judgment of nonsuit. The plaintiff's conduct, considered in its entirety, does not evince a continuing pattern of violations that warranted the judgment of nonsuit against the plaintiff." We conclude that Judge Peck did not abuse her discretion by ordering a judgment of nonsuit.

"In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met.

"First, the order to be complied with must be reasonably clear. In this connection, however, we also state

that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo.

"Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review.

"Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001). "[D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the

other party and the court. . . . The reasoning of *Millbrook Owners Assn.*, [*Inc.*, applies] equally to nonsuits and dismissals." (Citation omitted; internal quotation marks omitted.) *Blinkoff* v. *O & G Industries, Inc.*, 89 Conn. App. 251, 257–58, 873 A.2d 1009, cert. denied, 275 Conn. 907, 882 A.2d 668 (2005).

In the present case, Judge Peck rendered a judgment of nonsuit against the plaintiff for her "failure to comply with three previous orders of the court concerning discovery . . . ." Over the plaintiff's objection, Judge Noble authorized the defendants to engage in further discovery at the March 16, 2017 hearing on the plaintiff's request for an extended continuance of the trial. Judge Noble denied the plaintiff's motion to reargue that decision on April 12, 2017. Judge Epstein subsequently ruled on the defendants' motion for an order of compliance and ordered the plaintiff to comply with all outstanding discovery requests for medical records and billings by May 2, 2017. When the plaintiff failed to comply with Judge Epstein's order, the defendants moved for judgment in their favor. Judge Peck, following a hearing on May 15, 2017, denied the defendants' motion without prejudice. In her order issued that same day, Judge Peck cautioned the plaintiff by stating that the orders of Judge Noble and Judge Epstein now constituted "the law of the case." Judge Peck ordered the plaintiff to produce certain identified medical records or to provide authorizations to the defendants' counsel to obtain those records directly from the medical providers no later than May 30, 2017. When the plaintiff failed to comply with Judge Peck's May 15, 2017 order, the defendants again filed a motion for judgment in their favor. The plaintiff filed a reply to that motion, claiming the information sought was irrelevant and requesting that the court dismiss her action "for the purpose of the plaintiff taking an appeal . . . ."

In rendering the judgment of nonsuit, Judge Peck cited applicable case law relating to the sanction of nonsuit or dismissal. She recognized that a court should be reluctant to impose such a sanction, but she concluded that the plaintiff had evidenced "persistent, wilful disregard for the lawful orders of this court" and that the court was "left with no viable alternative." Judge Peck stated that a fine "would not do justice to what constitutes deliberate, contumacious . . . [and] unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) As further support for her decision to render a judgment of nonsuit, Judge Peck noted that the plaintiff unreasonably clung to the prior order of Judge Shapiro and chose to disregard the subsequent orders of three different judges under changed circumstances. Moreover, according to the court, the plaintiff had not even attempted to articulate any particular prejudice that she would suffer by producing the documents in question.

In considering the plaintiff's claim that the judgment of nonsuit was an improper sanction for her failure to comply with the previously referenced court orders, we first note that the orders of Judge Noble, Judge Epstein and Judge Peck, regarding the discovery requested by the defendants, were "reasonably clear." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17. Second, it is also undisputed that the plaintiff repeatedly failed to comply with those court orders. Finally, under the circumstances as set forth in detail in Judge Peck's judgment of nonsuit, we cannot conclude that the court abused its discretion in imposing this sanction. We are convinced that the trial court properly considered all of the relevant factors in ordering the nonsuit.

The plaintiff was adamant in her position that the orders of Judge Shapiro and Judge Sheridan were the law of the case and that the subsequent orders of Judge

Noble, Judge Epstein and Judge Peck were improper and invalid. Although she chose not to comply in order to have an appealable judgment of nonsuit rendered against her,[9] she did so at the risk of having her claims fail on appeal. As discussed previously in this opinion, Judge Noble's sua sponte decision to allow the defendants to engage in further discovery was reasonable and proper given the change in circumstances. The plaintiff has not challenged Judge Epstein's order and Judge Peck's May 15, 2017 order as being unreasonable, except for the fact that they were based on Judge Noble's authorization to the defendants to engage in further discovery. The plaintiff disregarded the three court orders at her peril. "[A] party has a duty to obey a court order even if the order is later held to have been unwarranted." *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 230 Conn. 641, 658 n.20, 646 A.2d 133 (1994).

For all of the foregoing reasons, we conclude that the plaintiff's claim that the court abused its discretion in rendering the judgment of nonsuit fails.

III

The plaintiff's final claim is that Judge Peck improperly declined to consider the plaintiff's motion for an order of sanctions against the defendants' counsel prior to rendering the judgment of nonsuit. Specifically, she argues that "no circumstances existed that justified such a refusal. Thus, the trial court lacked the authority to refuse to consider the plaintiff's motion."

As with the plaintiff's first claim, the court's decision as to the order of considering pending motions is one of case management. "Deference is afforded to the trial court in making case management decisions because

[9] In her "reply" to the defendants' motion for judgment, the plaintiff requested that Judge Peck dismiss her action. She now, however, claims on appeal that the rendering of the judgment of nonsuit for failure to comply with the three discovery orders was an abuse of discretion.

it is in a much better position to determine the effect that a particular procedure will have on both parties." *Krevis* v. *Bridgeport*, supra, 262 Conn. 819. The plaintiff cites no relevant authority that would have required Judge Peck to consider the plaintiff's motion first. Accordingly, we conclude that the court did not abuse its discretion in ruling on the defendants' motion for judgment prior to considering the plaintiff's motion for an order of sanctions against the defendants' counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

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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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Personal injury; whether plaintiff's due process rights were violated when trial court reconsidered, sua sponte, ruling of prior trial court and permitted defendants to engage in further discovery; whether trial court abused its discretion in rendering judgment of nonsuit against plaintiff for failing to comply with three previous court orders concerning discovery; whether trial court abused its discretion when it ruled on defendants' motion for judgment of nonsuit prior to considering plaintiff's motion for order of sanctions against defendants' counsel.

Lively *v.* Commissioner of Correction (Memorandum Decision) 901

Marino *v.* Statewide Grievance Committee. 7

Attorney discipline; appeal to trial court from decision of reviewing committee of defendant Statewide Grievance Committee finding that plaintiff violated rule 4.4 (a) of Rules of Professional Conduct; whether trial court's decision that 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.

Mountain *v.* Mountain 228

Dissolution of marriage; whether trial court erred in denying postjudgment motion for modification of unallocated alimony and child support obligation; whether trial court erred in finding that there had been no substantial change in circumstances to support modification of unallocated alimony and child support obligation; reviewability of claim that trial court erred in finding that plaintiff failed to prove that he was no longer able to meet financial obligations to defendant by borrowing money from his current wife.

PMC Property Group, Inc. *v.* Public Utilities Regulatory Authority 268

Administrative appeal; appeal from trial court's judgment affirming in part decision of defendant Public Utilities Regulatory Authority, which found that plaintiffs had engaged in unauthorized submetering of electricity and imposed sanctions; claim that trial court erred in deferring to authority's definition of electric submetering because authority previously had not established what constitutes electric submetering and, thus, its definition was not time-tested; whether trial court properly determined that, due to technical nature of definition, it was appropriate to defer to authority's definition of submetering; claim that trial court erred in concluding that heating and air conditioning system fell within authority's definition of submetering because definition of submetering in authority's previous decision was applicable only to submetering in context of public gas utilities and, thus, was not applicable to electric submetering; claim that fundamental component of electric submetering is furnishing of electric service by nonutility such that electric service is physical delivery through wires of electricity to end user for consumption, combined with measuring electric consumption with electric submeter.

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.

Silano *v.* Cooney 235

Defamation per se; libel per se; slander per se; whether trial court properly rendered judgment in favor of defendant business owner on plaintiff's claims of slander per se and libel per se; claim that trial court applied law incorrectly when it concluded that harassment in second degree in violation of statute (§ 53a-183) did not involve moral turpitude; whether trial court's finding that business owner's statements to police were not defamatory because they were true was clearly erroneous.

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.

State *v.* Euclides L. 151

Risk of injury to child; claim that trial court improperly failed to instruct jury that it should acquit defendant if it concluded that his use of force in caring for his daughter was accident; whether trial court's charge to jury was legally correct and adequately instructed jury on issue of accident; whether separate accident

charge was required; whether trial court's general intent instruction adequately addressed issue of accident.
State *v.* Grasso 186
Manslaughter in first degree with firearm; whether state failed to disprove beyond reasonable doubt claim that defendant acted in self-defense when she shot victim; whether evidence supported finding that defendant's use of deadly physical force was premature; unpreserved claim that defendant's rights to due process and to effective assistance of counsel were violated when trial court denied jury's request to rehear closing arguments of prosecutor and defense counsel; claim that defendant waived claim when defense counsel failed to object to court's proposed response to request of jury and affirmatively stated that he did not object to it.
State *v.* Mukhtaar 144
Murder; motion to correct illegal sentence; whether court properly concluded that it lacked jurisdiction to consider issues raised in motion to correct illegal sentence; whether claims raised by defendant in motion to correct addressed pretrial proceedings and criminal trial and did not attack sentencing proceeding itself.
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
Williams *v.* State 172
Negligence; claim that trial court framed issue of case too narrowly and improperly failed to consider all instances of negligence alleged in complaint; reviewability of claim that trial court improperly failed to consider certain statutes, state highway safety regulations, and standards in ruling on complaint.
Yuille *v.* Parnoff 124
Conversion; statutory theft; alleged misappropriation of funds held in escrow pending resolution of parties' dispute over attorney's fees; claim that trial court abused its discretion by ordering defendant to commence trial after allowing his attorney to withdraw, without affording him time to obtain new counsel; claim that verdict in favor of plaintiff on counts of conversion and statutory theft was irreconcilably inconsistent with verdict in favor defendant on count alleging breach of fiduciary duty; claim that trial court improperly declined to submit special defense of waiver to jury.

STATE ELECTIONS ENFORCEMENT COMMISSION

State Elections Enforcement Commission advisory opinions are published herein pursuant to General Statutes Section 9-7b (14) and are printed exactly as submitted to the Commission on Official Legal Publications.

DECLARATORY RULING 2019-02:

The Use of Campaign Funds to Offset Candidate's Childcare Costs

On October 19, 2018, the State Elections Enforcement Commission (the ''Commission'') received a request for a Declaratory Ruling by Caitlin Clarkson Pereira, a candidate for state representative during the 2018 election cycle, as to whether public grant funds that her candidate committee received to run for office through Connecticut's clean elections program, the Citizens' Election Program (''CEP''), could be used to cover childcare costs while she was campaigning. The Petitioner had asked this question of Commission staff during the election cycle and, in Opinion of Counsel 2018-05: *Use of Public Funds to Offset Candidate's Child Care Costs*, issued on August 9, 2018, was told that such costs were not permissible for CEP candidates to pay out of clean elections grant monies.

In her Declaratory Ruling request, the Petitioner argues that the opinion of counsel misinterpreted the laws and regulations and asks that the Commission reconsider the result.

At its regular meeting on November 14, 2018, the Commission voted to initiate a declaratory ruling proceeding responsive to this Petition and the Commission now issues the following guidance.

Executive Summary

Campaign funds generally may be spent to pay for childcare costs incurred by a candidate as a result of campaigning as long as such payments are (1) a direct result of campaign activity which would not exist irrespective of the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.

However, for candidates participating in the CEP who have been approved to receive grant monies from the CEF (''Citizens' Election Fund''), CEP regulations come into effect and these are much stricter with respect to the expenditure of monies. Childcare costs are not currently a permissible expense for a committee that has been approved to receive a grant.

I. Applicable Law

In general, for expenditures to be considered permissible, they must be made for the lawful purpose of the committee, and, for a candidate committee, the lawful purpose means ''the promoting of the nomination or election of the candidate who established the committee.'' General Statutes § 9-607 (g).

General Statutes § 9-607 (g) (4) further states:

> [E]xpenditures for ''personal use'' include expenditures to defray normal living expenses for the candidate, the immediate family of the candidate or any other

> individual and expenditures for the personal benefit of the candidate or any other individual as defined in [General Statutes § 9-607 (g) (2)]. ***No goods, services, funds and contributions received by any committee under this chapter shall be used or be made available for the personal use of any candidate or any other individual.*** No candidate, committee, or any other individual shall use such goods, services, funds or contributions for any purpose other than campaign purposes permitted by this chapter.

(Emphasis added.)

For candidates who have been approved to receive a grant from the CEF, however, the rules are stricter than what is laid out in General Statutes § 9-607 (g) alone. CEP grant recipients must additionally abide by a set of regulations, including Regs. Conn. State Agencies § 9-706-1 (a), which state:

> ***All funds in the depository account of the participating candidate's qualified candidate committee***,[1] including grants and other matching funds distributed from the Citizens' Election Fund, qualifying contributions and personal funds, shall be used ***only for campaign-related expenditures made to directly further*** the participating candidate's nomination for election or election to the office specified in the participating candidate's affidavit certifying the candidate's intent to abide by Citizens' Election Program requirements.

(Emphasis added.)

The CEP regulations further provide:

> (b) In addition to the requirements set out in section 9-706-1 of the Regulations of Connecticut State Agencies, participating candidates and the treasurers of such participating candidates shall comply with the following citizens' election program requirements. Participating candidates and the treasurers of such participating candidates shall ***not*** spend funds in the participating candidate's depository account for the following:
>
> 1. ***Personal use***, as described in section 9-607(g)(4) of the Connecticut General Statutes; [and]
>
> 2. The ***participating candidate's personal support or expenses***, such as for personal appearance or the candidate's household day-to-day food items, supplies, merchandise, mortgage, rent, utilities, clothing or attire, ***even if such personal items*** (such as the participating candidate's residence, or business suits) ***are used for campaign related purposes***; . . . .

Regs. Conn. State Agencies § 9-706-2 (b) (Emphasis added.)

[1] A ''qualified candidate committee'' is defined as:

> A candidate committee (A) established to aid or promote the success of any candidate for nomination or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, Secretary of the State, state senator or state representative, and (B) ***approved by the commission to receive a grant from the Citizens' Election Fund*** under section 9-706.§

General Statutes § 9-700 (12) (emphasis added).

II. Commission Staff's Advice in Opinion of Counsel 2018-05

In Opinion of Counsel 2018-05, Commission staff cited the above and referenced other scenarios in which it has been asked about the limits on personal use under the Program:

> We have been asked, for example, whether public funds could be used to cover part of the mortgage payments for a family member's house that was used as campaign headquarters, to cover a portion of the candidate's personal cell phone bill since it was used to make calls to campaign staff and voters, and to pay for the candidate's clothing which was purchased with campaign engagements in mind. We have looked at whether public funds could be spent to replace the tires of a car that suffered wear and tear crisscrossing the state during a campaign. We have been asked whether CEP funds could be used to pay for a candidate's flight to Amsterdam in order to attend a conference the subject of which was part of his campaign platform and would result in pictures he could use in mailers.

Staff explained that while it was sympathetic to these requests and understood the argument that the personal items were being used for campaign-related purposes, it was concerned with the regulations mandating that funds were not to be spent on items that are personal in nature, *even if campaign-related*, since the regulations specifically state that grant funds were to be used ''only for campaign-related expenditures made ***to directly further***'' the candidate's nomination for election or election to the specified office. Regs., Conn. State Agencies § 9-706-1 (a) (emphasis added). Under the regulations, ***even if personal items are used for campaign related purposes,*** costs for personal support or expenses may not be paid out of grant monies. Because of these regulations, staff opined that CEP grant monies should not be used to pay for a participating candidate's childcare costs.

III. Commission's Prior Decisions & Other Precedent

The Commission has considered the spending of campaign funds for personal use to be a serious issue. In one matter it assessed a fine equivalent to twice the amount of what a CEP candidate committee paid for clothing and other personal items in violation of the personal use statutes and CEP regulations. *See In re Audit Report for Friends of Gerry Garcia*, File No. 2012-072. The purchase of clothing outside of the CEP has also been found to be personal use. For example, in *In the Matter of a Complaint by John Bysko, et al.*, Old Lyme, File No. 2004-170, the Commission found a violation of the prohibition against personal use after an exploratory committee used funds to pay for the candidate's shoes and clothing. In another case, *In the Matter of a Complaint by Adam Gutcheon*, Windsor, File No. 2002-192, the Commission ordered the respondent candidate to forfeit the equivalent of what his committee had spent on clothing out of campaign funds. *See also In the Matter of Complaints by Tom Kelly*, Bridgeport, File Nos. 2011-090 & 097 (finding that political committee's reimbursements to chairperson for telephone, computer, and internet access bills, without any records substantiating relation to committee, violated personal use prohibition); *In the Matter of Government Action Fund (GAF PAC)*, File No. 2008-003 (concluding that a political committee's payment of chairman senator's personal cell phone bill and his personal credit card without adequate documentation, as well as payments for him to attend legislative conferences, raised personal use concerns).

Over forty years ago, the Commission did, however, address the permissibility of paying for childcare with privately raised campaign funds. In 1976, the Commission issued an advisory opinion that found the cost of care for a dependent to be part of traveling expenses and therefore a permissible expenditure. *See* Advisory

Opinion 1976-23: *Cost of Care for Dependents*. The Commission considered the fact that the statutes permit a campaign funds to be used to pay for the candidate's expenses for postage, telegrams, telephoning, stationery, expressage, traveling, meals and lodging provided that the candidate adequately documented the expenses. The Commission then reasoned that freeing a candidate to travel by paying for his or her childcare was as necessary as procuring a bus ticket or renting a car since ''if such care were not purchased, the candidate, presumably, would not be able to travel to attend whatever campaign functions were required, as surely as if the candidate could not purchase a ticket on public transportation.'' *Id.*

We also looked to other jurisdictions with clean elections programs that provide grant monies. Of the ten that provided responses to Commission staff's survey, four of them – Massachusetts, West Virginia, Oakland, CA, and Tucson, AZ – would not allow campaign funds to be used for childcare. Two jurisdictions – Maryland and Minnesota[2] – allow public funds to be spent on childcare costs. Three jurisdictions have not opined on the subject – Maine, Michigan, and Seattle, WA. New York City's program has the most comprehensively articulated approach – allowing for privately raised funds to be used when certain conditions are met but prohibiting the use of matching grant monies given by the state.[3]

IV. Analysis

While the Petitioner's request was limited to the use of clean election grant monies, the Commission will take this opportunity to point out that it is not retracting its 1976 advisory opinion and that it would be a permissible expenditure of *privately*

[2] Minnesota has a specific statute that recognizes the cost of childcare for a candidate's children while campaigning as a legitimate expenditure, whether public or general campaign funds are used. *See* Minn. Stat. § 10A.01, subd. 26 (11).

[3] Prior to 2018, New York City's matching funds program had a specific statutory provision that prohibited the use of campaign funds to cover childcare costs. Section 3-702 (21) (b) of the administrative code of the City of New York had provided: ''Campaign funds shall not be converted by any person to a personal use which is unrelated to a political campaign. Expenditures not in furtherance of a political campaign for elective office include the following: . . . (6) Tuition payments and childcare costs; . . . .''

After a series of hearings in 2018, the New York City legislature passed legislation on October 31, 2018 to permit campaign funds to be used for certain childcare expenses provided specified criteria had been met. Specifically, the language modified subdivision 21 of section 3-702 to permit campaign funds to be spent on:

> 13. Childcare services, provided that: (i) the candidate has received an approved statement of campaign childcare eligibility, pursuant to subdivision 23 of this section, demonstrating that such services are for a child or children under thirteen years of age for whom the candidate is a primary caregiver and that either the need for such services would not exist but for the campaign or the candidate has experienced a significant loss of salary or wage earnings that would not have occurred but for the campaign; and (ii) that expenditures for such services may only be incurred during the calendar year of the election, and the year immediately preceding the calendar year of the election, and may not be incurred after such election is held.

The legislation further provides that such childcare expenses are exempted from the expenditure limit for the first $20,000 spent in the election year. Notably, the legislation only applies to ***non-public*** campaign funds and only during the calendar year of the election and the immediately preceding year.

See A Local Law to Amend the Administrative Code of the City of New York, in Relation to Permitting the Use of Campaign Funds for Certain Childcare Expenses, File No. 0899-2018.

raised campaign funds to cover the costs of childcare incurred by a candidate while campaigning as long as such payments are: (1) a direct result of campaign activity which would not exist but for the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.[4]

As far as whether campaign funds may be used to cover a candidate's childcare costs while campaigning, the Commission confirms its staff's advice that under the current law and regulations, once a committee is approved to receive CEP grant funds, its campaign funds – whether public grant monies or unspent qualifying contributions – may not be used to pay for such expenses. The regulations that come into play once a campaign has been approved for a grant state that all expenditures must ''directly further'' the candidate's campaign and ''even if'' personal items are used for campaign related purposes, costs for personal support or expenses may not be paid out of grant monies.

The Commission reminds candidates that these regulations only come into play once the candidate committee has been approved to receive a grant. As such, the candidate committee of a candidate intending to participate in the CEP may pay for the candidate's childcare expenses with potentially qualifying contributions raised to demonstrate adequate public support in connection with the grant application, provided the three criteria listed above have been met. This may occur up until the committee is approved for a grant.

Although the Citizens' Election Program is not a silver bullet for all election disparities, in candidates or results, it is worth pointing out that Connecticut's monetary competitiveness in state elections—which is, roughly speaking, where the lesser the difference in spending between opponents equates to greater competitiveness—has made notable strides since the advent of the Program. In 2004, the year before the Citizens' Election Program was signed into law, Connecticut had ranked 23rd in the nation for monetary competitiveness.[5] In 2008, the first full run of the Program for the General Assembly, Connecticut's ranking jumped to sixth. The state has ranked in the top four in monetary competitiveness in every election cycle since 2010, when the Program was in full force at both the statewide and General Assembly levels. In fact, in the last election cycle for which is data is available, 2016, Connecticut ranked second in the nation. As national experts have noted: ''Clearly, Connecticut's public funding program had a robust effect on making legislative general elections more financially competitive. Indeed, the data has repeatedly demonstrated that, since the 2008 adoption of the public funding program,

[4] When a committee anticipates it will pay someone over $100 for services, it is required to have a written agreement in place which lays out the nature and duration of the fee arrangement and describes the scope of the work to be performed before any work is begun, and is also required to maintain records documenting the actual work performed or services rendered. *See* Regs., Conn. State Agencies § 9-607-1. In this particular case, where personal use concerns are raised even if the payment is well below $100, the Commission still urges some base level documentation of the childcare services being provided at all amounts, such as the dates and hours worked, the associated fee, and the campaign activity that necessitated the childcare.

[5] FollowTheMoney.org, https://www.followthemoney.org/tools/ci (last visited March 29, 2019).

Connecticut has consistently had some of the highest rates of monetarily competitive races anywhere in the country.''[6]

The Commission is receptive to the policy concerns expressed by the Petitioner and commenters, and the laudable goal of increasing the opportunities for parents of young children to more easily participate in state elections. Similar discussions may be had about campaign spending that involve other circumstances in the candidate's life, such as income (e.g. having to forgo employment hours in order to campaign), care for non-child dependents (e.g. elder care), and other foreseeable and hard to foresee variations on the present question. These questions involve core issues concerning not only the purpose of this state's landmark public financing program but also the use of the public fisc. The answers to these questions may involve more than a simple ''yes'' or ''no'' but instead may be a balancing of concerns resulting in limits on the amount or timing of funds that may be spent and documentation requirements. This is the approach taken with respect to many of the permissible expenditures that form the basis for Connecticut's clean financing program.

Answering these questions should allow input from all stakeholders and would be ideally suited to a legislative public hearing. This is the approach used with New York City's public financing program. Public hearings and multiple drafts of the bill resulted in a carefully reasoned and clear approach to the issue. New York City chose to set limits by allowing the use of privately raised money but not public funds and by allowing such payments only during the two years prior to the election. They also required some additional documentation, addressed who could be a caregiver and provided that childcare provided for free or at a discount would not be deemed an in-kind contribution. *See* Council of City of NY Intro No. 0899-2018, Permitting the Use of Campaign Funds for Certain Childcare Expenses (October 23, 2018). New York City limited the exception to care for children under 13 and did not address care for other dependents. While that may or not be Connecticut's approach, those would all be options for thoughtful discussion.

The Commission and its staff are committed to further researching these issues and working with the legislature, should it choose, to craft the best possible solution for the people of Connecticut.

V. Conclusion

Privately raised campaign funds may generally be spent to pay for childcare costs incurred by a candidate as a result of campaigning as long as such payments are (1) a direct result of campaign activity which would not exist but for of the candidate's campaign; (2) reasonable and customary for the services rendered; and (3) properly documented by the campaign.

For candidates participating in the CEP, campaign funds may be spent on such costs up until the campaign has been approved to receive a clean elections grant from the CEF. Once a committee is approved for a grant, monies may not be spent on childcare. A change in legislation or regulation would be needed to alter this

[6] Pete Quist, *Connecticut Public Funding and Election Competition*, https://www.followthemoney.org/research/blog/connecticut-public-funding-and-election-competition (last visited March 29, 2019); *see also* J T Stepleton, *Competitiveness Index*, https://www.followthemoney.org/research/blog/competitiveness-index (last visited March 29, 2019) (''The role of money in the competitiveness of American elections has been addressed time and again. However, many observers fail to fully comprehend the extent to which candidates are either burdened by monetary disadvantages or bolstered by a fundraising edge. . . .Monetary competitiveness is more prevalent in some states, especially those with public financing programs.'').

outcome. Commission staff stand ready to work with the Petitioner to assist in this effort.

This constitutes a declaratory ruling pursuant to General Statutes § 4-176. A declaratory ruling has the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of General Statutes § 4-183, pursuant to General Statutes § 4-176 (h). Notice has been given to all persons who have requested notice of declaratory rulings on this subject matter.

Adopted this __rd day of April, 2019 at Hartford, Connecticut by a vote of the Commission.

Anthony J. Castagno, Chairman

NOTICE OF EXTENSION OF OPEN SEASON FOR SCUP

Pursuant to Conn. Gen. Stat. § 26-25, the Commissioner of Energy and Environmental Protection (''the Commissioner'') is providing notice of a season extension for scup (*Stenotomus chrysops* or porgy), which shall be effective from the date that this notice is published in the Connecticut Law Journal.

In support of this notice the Commissioner finds that the sport fishing harvest for scup will fail to meet the harvest level for efficient management without an extension to the open season as noted below.

For scup (porgy), the season shall be *open* year-round (no closed season) from the date this notice is published in the Connecticut Law Journal until further notice.

For further information, contact the Department of Energy and Environmental Protection's Marine Fisheries Program by email at deep.marine.fisheries@ct.gov or by telephone at 860-434-6043 Monday through Friday, 8:30am – 4:30 pm.

NOTICES

Bar Examining Committee

At its meeting on April 5, 2019, the Connecticut Bar Examining Committee voted to amend Article VI-9 of its Regulations regarding inquiries into the mental health of applicants and the protocol for inquiries into the health diagnosis or drug or alcohol dependence of applicants.

Jessica F. Kallipolites
Administrative Director
Connecticut Bar Examining Committee

ARTICLE VI

GUIDELINES FOR ASSESSMENT OF CHARACTER AND FITNESS

. . . .

~~**Art. VI-9.**MENTAL HEALTH INQUIRY.~~

~~The Committees questions address recent mental health and chemical or psychological dependency matters. The purpose of these questions is to determine the current fitness of an applicant to practice law. Each applicant is considered on an individual basis. The mere fact of treatment for mental health problems or chemical or psychological dependency is not, in and of itself, a basis on which an applicant is ordinarily denied admission to the Connecticut bar. The Connecticut Bar Examining Committee regularly recommends licensing of individuals who have demonstrated personal responsibility and maturity in dealing with mental health and chemical or psychological dependency issues. The Committee encourages applicants who may benefit from treatment to seek it. As indicated in the Rules, all proceedings conducted pursuant to the Rules and Regulations are confidential.~~

~~On occasion a license may be denied when an applicant's ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or when an applicant demonstrates a lack of candor by his or her responses. Protection of the public that will receive legal services underlies the licensing responsibilities assigned to the Committee. Furthermore, each applicant is responsible for demonstrating that he or she possesses the qualifications necessary to practice law. Your response may include information as to why, in your opinion or that of your treatment provider, your condition will not affect your ability to practice law in a competent and professional manner.~~

~~The Connecticut Bar Examining Committee does not, by its questions, seek information that is characterized as situational counseling, such as stress counseling, domestic counseling, and grief counseling. Generally, the Committee does not view these types of counseling as germane to the issue of whether an applicant is qualified to practice law.~~

Art. VI-9. PROTOCOL FOR INQUIRY INTO HEALTH DIAGNOSIS OR DRUG OR ALCOHOL DEPENDENCE.

(a) Basis for Inquiry into Health Diagnosis or Drug or Alcohol Dependence. Any inquiry about a health diagnosis, drug or alcohol dependence, or treatment for either can occur only if it appears that the applicant has engaged in conduct that calls into question the person's good moral character and/or fitness to practice law and (1) the health diagnosis, drug or alcohol dependence, or treatment information was disclosed voluntarily to explain the conduct or as a voluntary response to any question on the application or follow-up inquiry by the Committee or (2) the Committee learns from a third-party source that the health diagnosis, drug or alcohol dependence, or treatment was raised as an explanation for the conduct.

(b) Scope of Inquiry into Health Diagnosis or Drug or Alcohol Dependence. When a basis for an inquiry by the Committee has been established, any such inquiry must be narrowly, reasonably, and individually tailored and adhere to the following:

(1) The first inquiry will be to request statements from the applicant;

(2) Following completion of the above inquiry, additional statements may be requested from treatment providers if reasonably deemed necessary by the Committee. The statements of the treatment providers shall be accorded appropriate weight; and

(3) In those cases in which the statements from the applicant and treatment providers do not resolve reasonable concerns about the applicant's good moral character and/or fitness to practice law, the Committee may seek medical or treatment records by way of narrowly tailored requests in preparation for an Independent Medical Evaluation.

(c) Any testimony or records from medical or other treatment providers may be admitted into evidence at a formal hearing and transmitted with the record on review to the court. Records and testimony regarding the applicant's fitness shall otherwise be kept confidential in all respects.