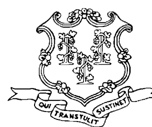
CONNECTICUT LAW JOURNAL



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IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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BOARD OF EDUCATION OF THE TOWN OF NEW MILFORD *v.* NEW MILFORD EDUCATION ASSOCIATION (SC 20140)

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

Syllabus

The plaintiff board of education sought to vacate an arbitration award in which the arbitrator found that the board had violated the terms of the parties' collective bargaining agreement by improperly extending the workday for teachers on multiple occasions during the 2015–2016 school year. While the parties were in the process of negotiating a new collective bargaining agreement, the board gave notice to the defendant union that it planned to eliminate certain shortened school days that previously had been used to allow for teacher development during normal workday hours. After reaching an impasse in their negotiations, the parties submitted to a three member interest arbitration panel last best offers on several issues, including those relating to the impact of the notice sent by the board and the number of evening meetings that teachers were required to attend. Regarding the impact of the notice, the board's last best offer suggested no new language in the collective bargaining agreement, whereas the union's last best offer referred to its response regarding evening meetings. With respect to the number of evening meetings, the board's and the union's last best offers both permitted six evening meetings each school year, but the union's last best offer provided, in addition, that teachers should be paid for additional programs beyond the normal workday. The interest arbitration panel awarded the board's last best offers on both issues, noting that a grievance or future negotiations would be the appropriate forum to resolve any disputes regarding additional events scheduled beyond the normal workday. Following interest arbitration, the board published a calendar for the 2015–2016 school year eliminating the shortened school days and scheduling various events beyond the normal workday. Thereafter, the union filed a grievance, claiming that the board improperly extended the normal workday and exceeded the permitted number of events outside the normal workday. The parties subsequently agreed to submit three questions to an arbitrator, namely, whether the grievance was arbitrable, whether the claims set forth in the grievance were barred under the doctrines of res judicata and collateral estoppel on the basis of the prior interest arbitration, and whether the board violated the collective bargaining agreement by directing teachers to attend certain events beyond the normal workday. The arbitrator subsequently issued an award, finding that the matter was arbitrable and ruling in favor of the union on the merits. The trial court subsequently denied the board's

application to vacate that award and granted the union's application to confirm, concluding that the board failed to demonstrate that the arbitrator had manifestly disregarded the law of res judicata and collateral estoppel and that, although the arbitrator lacked authority to determine the issue of arbitrability, the grievance was arbitrable. The board thereafter appealed from the trial court's judgment. *Held*:

1. The trial court correctly concluded that the arbitrator did not manifestly disregard the law of res judicata and collateral estoppel and, therefore, properly denied the board's application to vacate on those grounds: the board did not meet its burden of demonstrating that the arbitrator committed an obvious error when it concluded that the grievance was not barred by the doctrines of res judicata and collateral estoppel on the ground that the subject of the grievance was not addressed or resolved during the interest arbitration, as the interest arbitration panel decided only the language of the collective bargaining agreement by accepting the board's last best offers on the relevant issues, rather than deciding the issue of whether the board had violated the terms of that agreement, and the interest arbitration panel had explicitly acknowledged that disputes regarding events scheduled beyond the normal workday would need to be resolved through a grievance or future negotiations; moreover, the board did not meet its burden of demonstrating that the arbitrator ignored clearly applicable governing law, as a review of the arbitrator's award revealed that the arbitrator carefully considered the doctrines of collateral estoppel and res judicata, and, in any event, it was unclear whether the arbitrator was required to apply those doctrines in the absence of a provision in the collective bargaining agreement requiring arbitrators to follow prior arbitration decisions.
2. The board could not prevail on its claim that the trial court incorrectly concluded that the grievance was arbitrable under the terms of the parties' collective bargaining agreement: the issue of arbitrability was subject to judicial review, as there was nothing in the language of the collective bargaining agreement that clearly indicated an intent to submit that issue to the arbitrator's sole authority, and the board did not otherwise waive its right to judicial review of that issue merely by agreeing to include it in the grievance submission; moreover, the grievance was arbitrable because the collective bargaining agreement permitted, and the grievance in the present case involved, the arbitration of questions involving the interpretation or application of the agreement's express and specific provisions.

Argued October 18, 2018—officially released April 30, 2019

Procedural History

Application to vacate an arbitration award, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the defendant filed an application to confirm the award; thereafter, the case was tried to the court, *Hon. John W. Pickard*, judge trial

referee, who, exercising the powers of the Superior Court, rendered judgment denying the application to vacate and granting the application to confirm, from which the plaintiff appealed. *Affirmed.*

William R. Connon, with whom was *Zachary D. Schurin*, for the appellant (plaintiff).

Martin A. Gould, with whom was *Adrienne R. DeLucca*, for the appellee (defendant).

Rebecca E. Adams filed a brief for the Connecticut Association of Boards of Education as amicus curiae.

Opinion

MULLINS, J. The plaintiff, the Board of Education of the Town of New Milford (board), and the defendant, the New Milford Education Association (union), which represents the teachers employed by the board, are parties to a collective bargaining agreement (agreement) governing the terms and conditions of that employment. The dispute in this case arises from the union's claim that the teachers' normal work day was extended improperly by the board in the 2015–2016 school calendar.

Prior to issuing the 2015–2016 school calendar, and while negotiating the agreement for the 2015–2018 period, the board notified the union that it planned to eliminate abbreviated school days. The abbreviated school days previously had been used to provide for teacher development that would take place after students were dismissed but still during the teachers' normal work day. After bargaining to impasse on a number of issues, the parties submitted the issues still in dispute to an arbitration panel (interest arbitration). Following the interest arbitration, the board issued its calendar for the 2015–2016 school year, which the union alleged improperly extended the teacher work day on multiple occasions.

As a result, the union filed a grievance alleging that the board had violated the agreement by extending the teacher work day and scheduling an excessive number of open house and similar evening events (grievance arbitration). The grievance was heard before an arbitrator, who ultimately decided it in the union's favor. The board then filed an application to vacate the grievance arbitration award with the trial court, and, thereafter, the union filed an application to confirm that award. The trial court denied the board's application to vacate and granted the union's application to confirm.

The board now appeals from the judgment of the trial court.[1] The board asserts that the trial court incorrectly denied its application to vacate the award because the arbitrator (1) manifestly disregarded the law by concluding that the doctrines of collateral estoppel and res judicata did not apply to bar the union's grievance because the merits of the grievance were decided by the interest arbitration panel, and (2) incorrectly concluded that the union's grievance was arbitrable under the terms of the agreement. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts and procedural history. Prior to the 2015–2016 school year, the board had used abbreviated school days, in which the students would be dismissed early, to provide teacher professional development within the teachers' normal work day of seven hours and fifteen minutes. While the parties were negotiating the agreement for the 2015–2018 period, the board provided the following notice to the union: "Notice of nonmandatory subject of bargaining . . . the board will eliminate abbreviated student school days starting in 2015–2016. Bargaining unit work

[1] The board appealed to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

previously done on these abbreviated days will take place outside of student hours." Ultimately, during the negotiation of the agreement, the parties reached impasse on a number of issues. The parties submitted six issues for arbitration before a three member arbitration panel, pursuant to the Teacher Negotiation Act, General Statutes § 10-153a et seq., only two of which are at issue in this appeal.

The fifth issue submitted by the parties was entitled "Impact of Notice of NonMandatory Subject of Bargaining [Regarding] Elimination of Abbreviated School Days." On that issue, the interest arbitration panel awarded the last best offer of the board, which was "[n]o new language." The sixth issue submitted by the parties was entitled "Number of Evening Meetings." On that issue, the interest arbitration panel also awarded the board's last best offer, which provided that "[s]ix evening meetings each school year may be scheduled for [o]pen [h]ouse or similar programs with teacher attendance required." The interest arbitration award was issued on November 21, 2014.

In June, 2015, approximately seven months after the interest arbitration panel issued its award, the board released the 2015–2016 school calendar. In that calendar, there were six after school professional development days and ten after school and evening open house and other similar programs. Thereafter, in August, 2015, the union filed a grievance on the basis of the board's issuance of the 2015–2016 school calendar.

In its grievance, the union made two main claims: (1) "The 2015–2016 [s]chool [c]alendar includes six . . . after school [p]rofessional [d]evelopment [d]ays. These days are in addition to regular staff meetings and exceed the number of staff meeting[s] allowed per month. The scheduled times for the after school professional development extends the work day for teachers

beyond a 'reasonable amount of time.' The [b]oard failed to provide adequate notice to the [union] of the extended work day for teachers and failed to negotiate the impact of the additional extended days." And (2) "The 2015–2016 [s]chool [c]alendar includes ten . . . after school and evening '[o]pen [h]ouse and similar programs (e.g., curriculum presentations, parent-teacher conferences).' The . . . [a]greement allows the [b]oard to schedule six . . . such events per year. The [b]oard failed to provide adequate notice to the [union] of the extended work day for teachers and failed to negotiate the impact of the additional extended day[s]."

The grievance was ultimately heard before an arbitrator appointed by the American Arbitration Association. Specifically, the parties agreed to submit the following three issues to the arbitrator: (1) "Is the grievance arbitrable pursuant to [a]rticle XII, [§ 12.04 (B), of the agreement]?"[2] (2) "Are the essential elements of the common-law doctrine of claim preclusion (res judicata) and/or issue preclusion (collateral estoppel) present? If so, should the arbitrator apply one or both of those doctrines, and dismiss the case with prejudice?" And (3) "Did the [board] violate the . . . agreement when it directed teachers to attend professional development activities and parent conferences beyond the scheduled teacher work day on the following days in the 2015–2016

[2] Article XII, § 12.04 (B), of the agreement provides that "[n]o grievance will be submitted to arbitration and no grievance will be arbitrable, unless it actually involves the interpretation or application of an express and specific provision of this [a]greement. Further, the arbitrator will only have authority to determine whether the [b]oard violated an express and specific provision of this [a]greement and will not have authority to add to, detract from or modify any such provision of this [a]greement."

We note that there were certain technical changes to the designation of articles and sections within the agreement following interest arbitration between the parties. Citations to the agreement within this opinion use the designations set forth in the agreement covering the 2015–2018 period.

school year: September 9, September 16, October 14, October 21, November 16, November 18, March 21, March 23, April 13, May 4? If so, what shall the remedy be?"

At the grievance arbitration, the board contested the arbitrability of the matter. As grounds for its claim, the board asserted that the union's grievance (1) failed to identify a violation of an express provision of the agreement, and (2) was barred by the doctrines of collateral estoppel and res judicata because the matter of extending the teacher work day and any concomitant impact already had been raised and decided before the interest arbitration panel.

Subsequently, the grievance arbitrator issued a written award, finding the matter arbitrable and ruling in favor of the union on the merits. The board then filed an application to vacate the grievance arbitration award with the trial court, and, thereafter, the union filed an application to confirm. The trial court, also by way of a written memorandum of decision, denied the board's application to vacate and granted the union's application to confirm. The trial court concluded that (1) the board did not demonstrate that the arbitrator manifestly disregarded the law, and (2) although the arbitrator did not have authority to determine arbitrability, the grievance, nevertheless, was arbitrable. This appeal followed. See footnote 1 of this opinion.

I

On appeal, the board first claims that the trial court incorrectly denied its application to vacate the award pursuant to General Statutes § 52-418 (a) (4)[3] because

[3] General Statutes § 52-418 provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. Specifically, the board claims that the trial court should have determined that the arbitrator manifestly disregarded the law by concluding that the doctrines of collateral estoppel and res judicata did not preclude the union from arbitrating its grievance because the merits of the grievance were decided by the interest arbitration panel. In particular, the board asserts that the parties already had negotiated, and the interest arbitration panel already had decided, the issue of the impact of the elimination of abbreviated school days, and that the union's grievance was an attempt to relitigate that issue. We disagree.

"The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Parties to an arbitration may make a restricted or an unrestricted submission. . . .

"[U]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact. . . . A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. . . .

"Even in the case of an unrestricted submission, however, a reviewing court will vacate an award when an arbitrator has exceeded the power granted to [him or]

her by the parties' submission. . . . [A] claim that [an arbitrator has] exceeded [his or her] powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the [arbitrator] manifestly disregarded the law."[4] (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 249–51, 117 A.3d 470 (2015).

In the present case, the arbitrator was required to determine whether the board violated a particular section of the agreement. Accordingly, the submission was unrestricted. See, e.g., *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 111, 779 A.2d 737 (2001) ("this court consistently has concluded that submissions that require arbitrators to determine whether a party has violated a particular section of a collective bargaining agreement constituted unrestricted submissions"). The board claims, however, that the trial court should have concluded that the arbitrator manifestly disregarded the law by failing to apply the doctrines of collateral estoppel and res judicata to bar the union from arbitrating the grievance.[5] Consequently, we must determine whether the trial court properly concluded that the arbitrator did not manifestly disregard the law of collateral estoppel and res judicata.

[4] The trial court found that the board failed to make any substantive argument as to how the grievance arbitration award failed to conform to the submission of issues before the arbitrator. We also do not read the board's brief as raising any such claim. Therefore, our review is limited to whether there was a manifest disregard of the law.

[5] "[T]he doctrines of collateral estoppel and res judicata, commonly referred to as issue preclusion and claim preclusion, respectively, have been described as related ideas on a continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that has been determined in a prior suit." *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 57 n.16, 808 A.2d 1107 (2002).

"[T]his court [has] outlined the following burden of proof for claims that an arbitrator had issued a decision in manifest disregard of the law in violation of § 52-418 (a) (4) [as follows]: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and clearly applicable." *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 848 n.12, 6 A.3d 1142 (2010).

In order to place the board's claim in context, we set forth the ruling and reasoning of the arbitrator on whether the doctrines of collateral estoppel and res judicata barred the union's grievance. The arbitrator ruled as follows: "The interest arbitration award fails to meet the requirement of a final judgment necessary for the application of claim preclusion. The interest arbitration award did finally determine the terms of the [agreement] to be interpreted and applied pursuant to [the third question submitted by the parties in the grievance arbitration]. However, the [interest arbitration] panel did not do more [than that]. To the contrary, the [interest arbitration] panel made clear that its award would not preclude the adjudication of this grievance. The [interest arbitration] panel stated on issues five and six that the matter of additional time outside of the normal work day will be resolved through the grievance process or additional negotiations." The arbitrator further explained that "[t]he interest arbitration award also fails to meet the requirement of issue preclusion that the issue must have actually been litigated and necessarily determined in a prior judgment so as to bar their further assertion. Only the terms of the [agreement] were resolved in the interest arbitration, not the subject of this grievance as explained [previously]."

The arbitrator's decision convinces us that the trial court correctly concluded that the arbitrator did not manifestly disregard the law with respect to the application of res judicata and collateral estoppel. That conclusion is supported by the fact that the board has failed to establish any of the three requirements necessary to show a manifest disregard of the law. As we have explained previously in this opinion, the board must show that "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and clearly applicable." *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, supra, 298 Conn. 848 n.12. We examine each of these prongs in turn.

Starting with the first prong, we agree with the trial court that the grievance arbitrator did not commit an obvious error in concluding that the subject of the grievance was not addressed in the interest arbitration. The parties submitted six issues to the interest arbitration panel. The fifth issue was entitled "Impact of Notice of NonMandatory Subject of Bargaining [Regarding] Elimination of Abbreviated School Days." On that issue, the board's last best offer read as follows: "No new language." The union's last best offer read as follows: "The impact [regarding] [e]limination of [a]bbreviated [s]tudent [d]ays is addressed in [the response to the sixth issue]." The interest arbitration panel adopted the board's last best offer on the fifth issue, which was no new language. As a result of the decision of the interest arbitration panel, article VII, § 7.02, of the agreement, which is entitled "Normal Work Day," remained the same as it had been previously—i.e., the normal work day continued to be seven hours and fifteen minutes.

The sixth issue was entitled "Number of Evening Meetings." On that issue, the board's last best offer read as follows: "Six evening meetings each school year may be scheduled for [o]pen [h]ouse or similar programs with teacher attendance required." The union's last best offer read as follows: "Up to six . . . meetings each school year may be scheduled for [o]pen [h]ouse or similar programs with teacher attendance required. In the event the [s]uperintendent designates additional [o]pen [h]ouses or similar programs beyond the normal teacher workday teachers shall be compensated at the rate of $100 for each such additional [o]pen [h]ouse or similar program. No teacher shall be required to attend [o]pen [h]ouse and/or similar programs on consecutive evenings." On this issue, the interest arbitration panel also adopted the board's last best offer, which provided that six evening meetings per school year could be scheduled.

Accordingly, the interest arbitration award on the fifth issue resulted in the previously existing provisions defining a "[n]ormal [w]ork [d]ay" being incorporated into the agreement.[6] Those provisions provided that a

[6] Article VII, § 7.02, of the agreement provides: "Normal Work Day

"A. The starting and dismissal times of all schools shall be set forth in administrative regulations and published for any succeeding year by no later than four . . . weeks prior to the opening of school. The work day shall be seven . . . hours and fifteen . . . minutes. The time that has been added to the teacher work day as of July 1, 2003 may be student instructional time.

"B. Provided that a teacher has no professional commitment (such as assisting students after school, meeting the professional requirements of his or her position, participating in the activities deemed necessary to the maintenance and development of a good school) after notifying the office, he or she may leave the building ten . . . minutes before the end of the normal work day as defined in the administrative regulations of his or her particular school (the normal work day extends approximately thirty . . . minutes after student dismissal).

"C. In the event the Board of Education should alter the work day for teachers, the Board shall provide the Association with thirty . . . days advance notification and shall meet with the Association to negotiate the impact of such alteration. Such negotiations shall be subject to the provisions of [General Statutes §§ 10-153a through 10-153f]. This paragraph shall not be applicable to alterations in the work day which are otherwise covered by a specific provision of this [a]greement."

normal work day extends approximately thirty minutes after dismissal and that, if the board alters that work day, it must give notice thirty days in advance and negotiate the impact of the change. The interest arbitration award on the sixth issue provided that the board could schedule six evening meetings. Nothing in the language of the award by the interest arbitration panel, however, addresses additional time required of the teachers beyond their normal work day.

Indeed, the union's grievance does not challenge the provisions of the agreement defining the hours of the teachers' normal work day, which was decided by the interest arbitration panel. Rather, the union's grievance claims only that the 2015–2016 school calendar violates the express terms of the agreement by extending the work day and increasing the number of after school or evening meetings. This is the critical distinction between the two arbitrations—the interest arbitration decided the language of the agreement between the parties, whereas the grievance arbitration decided whether the board had violated the terms of the agreement. Specifically, the union claimed that the 2015–2016 school calendar included (1) six after school professional development days that extend the normal work day beyond "a reasonable amount of time," and (2) ten after school and evening programs that exceeded the maximum number of six open house and evening programs allowed by the agreement. Although these topics may relate to the interest arbitration award, neither of them definitively was decided by the interest arbitration panel.

Furthermore, we find it telling and significant that the interest arbitration panel itself seemed to acknowledge that the types of issues addressed in the union's grievance were not decided by the interest arbitration. During the interest arbitration, the union asserted that "[i]f the [s]uperintendent required teachers to stay beyond

their contractual work day, the request may be grieved or the [union] may demand to bargain the impact of such a request." (Internal quotation marks omitted.) In addressing this specific assertion, the interest arbitration panel stated in its decision that "[c]learly, this is an issue for the future."

With respect to the sixth issue submitted to the interest arbitration panel, the union asserted that "[t]he [b]oard's [o]ffer presents no such alternative [to meetings beyond the school day] and in the event additional time is needed outside of the regular work day it will either be resolved through the grievance process or additional negotiations." (Internal quotation marks omitted.) The interest arbitration panel recognized the union's claim and explained that, "[b]ased on the evidence before [it], that appears to be the appropriate place to resolve such an issue because resolution of meetings beyond the school day, excluding evening meetings, does not fall within the confines of the issue before us."

As the foregoing demonstrates, the interest arbitration panel did not address the subject of the union's grievance but, instead, recognized that those issues would need to be decided in the future. Indeed, as the arbitrator explained in the grievance award, "[t]he interest arbitration award did finally determine the terms of the [agreement] to be interpreted and applied . . . . [T]he [interest arbitration] panel did not do more [than that]." Accordingly, we cannot conclude that the trial court erred in confirming the grievance arbitration award insofar as the arbitrator found that the union's grievance was not litigated during, and resolved by, the interest arbitration.

The board also cites *In re Bloomfield Board of Education*, Conn. Board of Labor Relations Decision No. 2821 (July 3, 1990) pp. 4–5, in support of its position that

the subject of the grievance had been bargained about by the parties during the negotiations and decided in the subsequent interest arbitration. Specifically, the board asserts that when it notified the union that it planned to eliminate abbreviated school days, the impact of that elimination became a mandatory subject of bargaining between the parties. The board further asserts that the fact that it was a mandatory subject of bargaining between the parties is support for its position that the trial court should have concluded that the doctrines of collateral estoppel and res judicata bar the union's grievance. We disagree.

We acknowledge that this court and the state Board of Labor Relations have repeatedly explained that "boards of education have the right to determine educational policy and unilaterally implement such policy decisions, but where this implementation impinges in some substantial way upon a major term or condition of employment, there arises a duty to bargain the impact." (Internal quotation marks omitted.) *Board of Education* v. *State Board of Labor Relations*, 299 Conn. 63, 75 n.9, 7 A.3d 371 (2010); see also *West Hartford Education Assn.* v. *DeCourcy*, 162 Conn. 566, 586–87, 295 A.2d 526 (1972). Contrary to the board's position, however, simply having a duty to bargain does not mean we necessarily must infer both that such bargaining occurred and was decided by the interest arbitration panel. Indeed, the record reflects that the interest arbitration panel stated that it was not deciding this issue. At best, there was notice of the board's intent to elim-inate abbreviated school days, but nothing was decided regarding any time that would be required of the teachers beyond the normal work day. In fact, the interest arbitration panel astutely noted that without abbreviated school days, the issue of any additional time required of teachers beyond the normal work day was not before the panel and, thus, would need to be

addressed through additional negotiation or a grievance. Accordingly, the trial court correctly concluded that the board did not meet its burden of demonstrating that the arbitrator committed an obvious error by finding that the union's grievance was not barred by the doctrines of collateral estoppel and res judicata.

With regard to the second prong of the manifest disregard of the law test, the board also has failed to demonstrate that the arbitrator "appreciated the existence of a clearly governing legal principle but decided to ignore it . . . ." *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, supra, 298 Conn. 848 n.12. In the present case, a review of the arbitrator's decision reveals that he appreciated the existence of, and fully examined, the doctrines of collateral estoppel and res judicata. He did not ignore those doctrines. To the contrary, his decision reveals that he considered the doctrines in light of the facts of the present case and reached a reasoned determination that the union's grievance was not barred by the doctrines of collateral estoppel and res judicata.

The third and final requirement of the manifest disregard of the law test is for the board to show that "the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and clearly applicable." Id. The board has not met its burden with respect to this prong either. First and foremost, the arbitrator did not ignore the governing law. Second, this court previously has concluded that, "in the absence of a specific contract provision to the contrary, an arbitrator is not bound to follow prior arbitration decisions, even in cases in which the grievances at issue involve the same parties and interpretation of the same contract provisions. Although an arbitrator may find well reasoned prior awards to be a compelling influence on his or her decision-making process, the arbitrator need not give such awards preclusive effect. Rather, the arbitrator

should bring his or her own independent judgment to bear on the issue to be decided, using prior awards as the arbitrator sees fit, as it is the arbitrator's judgment for which the parties had bargained." *Stratford* v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 125, 728 A.2d 1063 (1999).

In the present case, the parties have not pointed to, and we have not uncovered, any specific provision of the agreement stating that the grievance arbitrator was bound to follow prior arbitration decisions. In the absence of such a provision, it is not at all clear that the grievance arbitrator was required to apply collateral estoppel and res judicata, even if the elements of those doctrines were satisfied. See id., 124–25. Therefore, the trial court correctly concluded that the board did not meet its burden of demonstrating that the arbitrator ignored governing law that was clearly applicable to the present case.

Accordingly, we conclude that the board cannot prevail on its claim in the present appeal relating to the doctrines of collateral estoppel and res judicata, and that, for all of the foregoing reasons, the trial court correctly denied the board's application to vacate the grievance arbitration award on those grounds.

II

The board also claims that the trial court improperly confirmed the grievance arbitration award because the arbitrator had incorrectly concluded that the grievance was arbitrable under the language of the agreement. Specifically, the board asserts that the agreement did not give the arbitrator authority to determine the question of arbitrability and that, on the merits, the grievance was not arbitrable under the terms of the agreement.

In addressing this claim, we first determine our standard of review. As we explained previously in this opinion, when reviewing a denial of an application to vacate under § 52-418 (a) (4), we generally reverse only if we

conclude that the arbitrator acted in manifest disregard of the law. However, when a party appeals from an arbitrator's "determination that the dispute was arbitrable, rather than from the award itself, we must examine more closely the question of our standard of review.

"[A party] can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, [it] has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute. . . . We recently noted that three distinct issues arise in cases such as the present one: (1) whether the parties agreed to arbitrate the underlying merits of the case, i.e., whether the matter is arbitrable; (2) who has the primary authority to decide that question—the arbitrator or the court; and (3) if the court has the primary authority to decide that question, whether the parties engaged in conduct that precludes judicial review of the arbitrator's decision on that matter. *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 709–10, 987 A.2d 348 (2010).

"In accordance with these principles, in determining our standard of review, we first examine who had the primary authority to resolve the question of arbitrability in the present case: the court or the arbitrators. It is well established that, absent the parties' contrary intent, it is the court that has the primary authority to determine whether a particular dispute is arbitrable, not the arbitrators. . . . Thus, courts generally review challenges to an arbitrator's determination of arbitrability de novo. . . .

"Because, however, [a]rbitration is a creature of contract parties may agree to arbitrate the question of arbitrability. . . . It is well established . . . that parties may agree to have questions concerning the arbitrability of their disputes decided by a separate arbitrator. . . .

In apportioning, between the court and the arbitrators, the responsibility for determining which disputes are arbitrable, the language of the contract controls . . . . When deciding whether a party has agreed that an arbitrator should have the sole authority to decide arbitrability, we must not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so. . . . In this manner the law treats silence or ambiguity about the question who (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question whether a particular [merits related] dispute is arbitrable because it is within the scope of a valid arbitration agreement . . . . In this state, the intention to have arbitrability solely determined by an arbitrator can be manifested by an express provision or through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *New Britain* v. *AFSCME, Council 4, Local 1186*, 304 Conn. 639, 646–48, 43 A.3d 143 (2012).

The arbitration provision at issue in the present case, which is set forth in article XII, § 12.04 (B), of the agreement, provides as follows: "No grievance will be submitted to arbitration and no grievance will be arbitrable, unless it actually involves the interpretation or application of an express and specific provision of this [a]greement. Further, the arbitrator will only have authority to determine whether the [b]oard violated an express and specific provision of this [a]greement and will not have authority to add to, detract from or modify any such provision of this [a]greement." This language clearly does not reflect an express intention to have the arbitrator decide all questions in dispute or all claims arising from the agreement. This language also falls far

short of the type of broad terms from which we will infer the parties' intent to have the arbitrator decide the question of arbitrability. See, e.g., *Liggett* v. *Torrington Building Co.*, 114 Conn. 425, 430, 158 A. 917 (1932) (language in contract that " '[a]ll questions in dispute and all claims arising out of said contract' " gave arbitrators authority to make determinations regarding "all questions of law and fact").

Rather, by providing that "the arbitrator will only have authority to determine whether the [b]oard violated an express and specific provision of this [a]greement," the arbitration provision limits the arbitrator's authority to resolving disputes about express provisions of the agreement, and does not extend that authority to the overall question of arbitrability. See, e.g., *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 304 Conn. 641, 649 (concluding that arbitration provision that read, " 'arbitration shall be used to redress all upgrades that have not been resolved in negotiations,' " limited the arbitrator's authority to the merits of the dispute and not to determining arbitrability). Thus, we cannot conclude that the arbitration provision in the agreement contained any expression of the parties' intent to submit the issue of arbitrability to the arbitrator's sole authority.

"Having determined that the parties did not clearly and unmistakably indicate in [their agreement or any documents submitted during the arbitration] an intention to waive judicial review of the question of arbitrability, we next turn to the third inquiry set forth in *Bacon Construction Co.*, which consists of two parts: preservation and waiver. *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710. A party preserves its right to judicial review of an arbitrator's conclusion regarding arbitrability by raising that issue before the arbitrator. Id. 'A party who [makes] such a challenge nonetheless may waive its right to judicial

review by agreeing to vest the arbitrator with authority to decide' whether the matter is arbitrable. Id. In order to obtain judicial review of the arbitrator's arbitrability determination, therefore, a party must both preserve its claim and refrain from activities that would, in essence, estop that party from asserting its claim at a later time." *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 304 Conn. 650. In the present case, it is undisputed that the parties raised the issue of arbitrability before the arbitrator. Accordingly, the parties preserved their right to judicial review of that matter.

The union asserts, however, that the board engaged in conduct that waived its right to judicial review of the issue of whether the arbitrator had authority to decide arbitrability. Specifically, the union claims that the board's agreement to submit the question of arbitrability to the arbitrator precludes the board from seeking judicial review of that issue. We disagree. In *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 304 Conn. 651–52, this court explained that when relevant documents do not "evidence any intention by the parties to submit the question of arbitrability to the arbitrators for their full and final decision on the matter," the parties have not waived their right to judicial review of the issue of arbitrability. See id. (contrasting agreements in which parties agreed for issue of arbitrability to "be heard and fully and finally determined by this arbitration" [internal quotation marks omitted]); cf. *Bacon Construction Co.* v. *Dept. of Public Works*, supra, 294 Conn. 710–11 (concluding that defendant waived right to judicial review of arbitrator's determination of arbitrability by agreeing, during course of arbitration, that certain " 'issues may be heard and fully and finally determined by [the] arbitration' ").

The submission to the arbitrator at issue in the present case did not contain any language indicating that the arbitrator would make the full and final decision

on the matter of arbitrability. The record also does not reflect that the parties had agreed, during the course of the arbitration, to have the arbitrator fully and finally decide the question of arbitrability. Thus, we reject the union's claim that, by merely submitting the question of arbitrability to the arbitrator, without more, the board waived its right to judicial review. Accordingly, the parties did not waive their right to judicial review of the question of arbitrability. Therefore, we review the question of whether the union's grievance was arbitrable under the terms of the agreement de novo. See *New Britain* v. *AFSCME, Council 4, Local 1186*, supra, 304 Conn. 651.

As we explained previously in this opinion, the arbitration provision of the agreement provides that "no grievance will be arbitrable, unless it actually involves the interpretation or application of an express and specific provision of this [a]greement." The union's grievance involves the interpretation and application of express provisions of the agreement—namely, article VII, § 7.02, of the agreement, which is entitled "Normal Work Day"; article VII, § 7.03, of the agreement, which is entitled "Staff Meetings"; and article VII, § 7.04, of the agreement, which is entitled "Open House." These are express and specific provisions of the agreement. Consequently, the grievance was arbitrable. Thus, although the arbitrator could not determine the question of arbitrability, nothing was amiss in the trial court's conclusion that, the grievance was, in fact, arbitrable.

Accordingly, we conclude that the trial court properly denied the board's application to vacate the grievance arbitration award and granted the union's application to confirm the grievance award.

The judgment is affirmed.

In this opinion the other justices concurred.

GENE NEWLAND *v.* COMMISSIONER OF CORRECTION (SC 19987)

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

Syllabus

Pursuant to *Wainwright* v. *Sykes* (433 U.S. 72), a petitioner raising a constitutional claim for the first time in a habeas proceeding generally must show both cause for the procedural default and prejudice for the habeas court to reach the merits of the claim.

The petitioner, who had been convicted of sexual assault in the first degree and risk of injury to a child, sought a writ of habeas corpus, claiming, inter alia, a violation of his constitutional right to counsel at his criminal trial. During certain pretrial hearings in his criminal case, the petitioner informed the trial court that he had applied for a public defender but had been deemed ineligible because he owned a house. The petitioner also informed the court that he had lost one of his jobs, that his house was in foreclosure, and that he could not afford private counsel. The trial court stated to the petitioner that eligibility for a public defender was determined independently of the court and suggested that the petitioner reapply for such services. The case subsequently was scheduled for trial, and, when the petitioner appeared for jury selection without representation, the trial court conducted a canvass to determine whether the petitioner was waiving his right to counsel. During that canvass, the petitioner indicated that he had again been deemed ineligible for a public defender because of his home ownership and that he continued to be unsuccessful in his effort to obtain private counsel. The trial court found that, under these circumstances, the petitioner had waived his right to counsel, but the court made no express finding that the petitioner had the means to hire an attorney or that he was dilatory in failing to do so. The petitioner represented himself at trial and did not appeal from the judgment of conviction. The petitioner subsequently filed the present habeas petition, claiming that the trial court's canvass was inadequate, that the trial court's finding of waiver was erroneous, and that the Division of Public Defender Services had improperly determined that he was ineligible for a public defender. In response, the respondent, the Commissioner of Correction, contended that the petitioner's claims were barred by procedural default because he had failed to seek statutory (§ 51-297 [g]) judicial review of the public defender eligibility determination or to appeal from the judgment of conviction. The habeas court rejected the respondent's claim of procedural default, concluding, inter alia, that the petitioner had demonstrated good cause for failing to raise

his claims in the underlying criminal proceeding and that prejudice resulting from the deprivation of counsel was presumed. The habeas court reviewed the merits of the petitioner's claims and rendered judgment granting the petition, from which the respondent appealed. *Held* that the habeas court correctly concluded that, for purposes of determining whether a habeas claim is barred by procedural default, prejudice is presumed when a petitioner is completely denied the right to counsel: in light of the importance of providing habeas relief from the unfairness that results from the complete deprivation of counsel and the well settled principle that prejudice is presumed in cases involving the denial of a defendant's constitutional right to counsel, a petitioner need not establish prejudice to overcome a claim of procedural default when he has established a complete denial of the right to counsel; accordingly, because the respondent did not challenge the habeas court's finding of good cause, and because prejudice was presumed under the circumstances of this case, the petitioner's claims were not procedurally defaulted.

Argued September 17, 2018—officially released April 30, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza, J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed. *Affirmed.*

Michael J. Proto, assistant state's attorney, with whom, on the brief, was *Anne F. Mahoney*, state's attorney, for the appellant (respondent).

Stephen A. Lebedevitch, assigned counsel, for the appellee (petitioner).

Opinion

MULLINS, J. This case returns to us for a second time. This time, the respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting the petition for a writ of habeas corpus filed by the petitioner, Gene Newland.[1] The principal

[1] We note that the habeas court granted the respondent's petition for certification to appeal. The respondent thereafter appealed to the Appellate Court, and we then transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

issue in this appeal is whether the petitioner, who was denied counsel at his criminal trial and failed to raise a claim related to that deprivation either at trial or on direct appeal, is required to demonstrate actual prejudice to overcome the respondent's claim of procedural default. We conclude that, for purposes of procedural default, after the petitioner has established good cause for failing to raise his claim that he was completely deprived of his right to counsel, prejudice is presumed. Thus, we affirm the judgment of the habeas court.

The facts are fully set forth in this court's decision in *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 667, 142 A.3d 1095 (2016). We provide the following facts and procedural history as a brief summary. In 2007, the petitioner was charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and one count of risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21 (a) (2) in connection with an incident that occurred in 2003. At his arraignment, a public defender appeared on the petitioner's behalf for bond purposes only.

At the next pretrial hearing, the petitioner appeared without counsel, and the assistant state's attorney informed the court that the petitioner had applied for a public defender but had been deemed ineligible. The trial court initially continued the case for six weeks to allow the petitioner to retain private counsel. At approximately twelve pretrial hearings over the next sixteen months, the petitioner continued to appear as a self-represented party. During one of these hearings, the petitioner informed the court that the Division of Public Defender Services (public defender's office) had deemed him ineligible for appointed counsel because of his ownership of the house in which his family lived. Nevertheless, he explained to the court that he was

having difficulty finding private counsel because he could not afford one.

In late 2008, the petitioner informed the court that he had lost one of his jobs and that his home was in foreclosure. He also asked the court if someone could assist him in preparing his case. At that point, the court suggested that the petitioner could reapply for a public defender if his financial situation had worsened. The petitioner later reapplied, but the public defender's office again deemed him ineligible because he still owned a home. At the following hearing, the court notified the petitioner that it would not put the case on the jury list until at least March, 2009, in order to allow the petitioner additional time to retain counsel.

In April, 2009, the petitioner appeared as a self-represented party to commence jury selection. The trial court conducted a colloquy to determine if the petitioner was waiving his right to counsel. The petitioner indicated that he had twice been rejected by the public defender's office and further explained that his efforts to obtain private counsel were unsuccessful because he could not afford the payment that counsel demanded. After this explanation, the court stated as follows: "So implicit in what you're telling me is you're waiving your right to have counsel represent you." The petitioner responded as follows: "At present, yes. Unfortunately, I have no other choice." Ultimately, the court found that, under these circumstances, the petitioner had waived his right to counsel. The trial court made no express finding as to whether the petitioner had the financial means to hire counsel or whether he was dilatory in failing to hire counsel. The court did not appoint standby counsel. The trial proceeded with the petitioner representing himself.

"Following a jury trial, the petitioner was found guilty of both the sexual assault and risk of injury counts.

The trial court rendered judgment in accordance with the verdict and imposed a total effective sentence of ten years imprisonment followed by eight years of special parole, with conditions including registration as a sexual offender. The petitioner did not appeal from the judgment of conviction.

"Thereafter, the petitioner, as a self-represented party, filed a petition for a writ of habeas corpus, alleging that he had wrongfully been denied counsel. The petitioner was referred to the public defender's office, which determined that the petitioner was indigent. Counsel filed an amended two count petition, claiming that the trial court had (1) inadequately canvassed the petitioner prior to finding that he had waived his right to counsel, and (2) incorrectly concluded that the petitioner knowingly, intelligently, and voluntarily waived his right to counsel. The amended petition alleged, inter alia, that the claims were not procedurally defaulted because cause and prejudice are presumed when a petitioner's right to counsel has been violated.

"The respondent thereafter filed a return asserting an affirmative defense of procedural default as to both counts, citing the petitioner's failure to raise these claims before the trial court and his failure to appeal from the judgment of conviction." *Newland* v. *Commissioner of Correction*, supra, 322 Conn. 671–72.

"The habeas court thereafter granted the petition, concluding that the petitioner's . . . right to counsel [under the sixth amendment to the United States constitution] had been violated. In support of its decision, the habeas court made the following findings. At the time of his trial, the petitioner was making between $300 and $350 per week. He had no available funds in any bank accounts. He owned a residential property that was subject to a mortgage in the amount of approximately $117,000 and that had a fair market value of

$168,000 prior to his 2007 arrest. As of July, 2008, and during the petitioner's criminal trial, the petitioner's property was subject to a foreclosure action based on his default on the mortgage. The petitioner had easily met the income eligibility requirements set by the Public Defender Services Commission for a serious felony charge and, therefore, was presumed to be eligible for services. The public defender's office erred in denying the petitioner's application on the basis of his property ownership because the equity was limited and not readily accessible, and because the property was subject to an ongoing foreclosure action.

"With respect to the respondent's affirmative defense, the habeas court concluded that a claim of public defender error was not procedurally defaulted." Id., 674.

The respondent appealed to the Appellate Court, which affirmed the judgment of the habeas court. See *Newland* v. *Commissioner of Correction*, 151 Conn. App. 134, 94 A.3d 676 (2014). The respondent, on the granting of certification, then appealed to this court, claiming, inter alia, that the issue of public defender error was not properly before the habeas court because the petitioner's operative petition alleged only claims of trial court error. This court agreed, concluding that "the habeas court ignored the pleadings and the petitioner's arguments during the habeas proceedings and redefined the petitioner's claims as alleging public defender error, and the Appellate Court improperly upheld the habeas court's conclusions that the petitioner's alleged claim of public defender error was not procedurally defaulted and that the erroneous ineligibility determination had resulted in a denial of his constitutional right to the assistance of counsel." *Newland* v. *Commissioner of Correction*, supra, 322 Conn. 685–86.

Accordingly, this court concluded as follows: "[W]e must reverse the judgment of the Appellate Court and

direct that court to remand the case to the habeas court for it to consider whether the petitioner's claims of trial court error, which he alleged in his original petition, are procedurally defaulted and, if they are not, to consider the claims on their merits. In addition, if counsel requests, the habeas court should consider allowing an amendment to the habeas petition to include a claim of public defender error, the issue the habeas court decided but the petitioner never alleged." Id., 686.

This brings us to the proceedings at issue in present appeal. On remand, the petitioner amended his petition to raise the following three claims: (1) "[t]he trial court inadequately canvassed the petitioner concerning a waiver of his right to counsel"; (2) "[t]he trial court erroneously found a knowing and intelligent waiver of that right"; and (3) officials from the public defender's office "mistakenly recommended that the petitioner was ineligible for public defender representation." The respondent alleged procedural default as to all of those claims on the basis of the petitioner's failure to appeal from his conviction and his failure to challenge the recommendation of the public defender's office before the trial court.

Following a hearing, the habeas court rejected the respondent's special defense that the petitioner's claims were barred by procedural default. Specifically, the habeas court found that the petitioner had established good cause for the failure to raise his claims regarding the denial of his right to counsel. The habeas court also concluded that the prejudice resulting from that deprivation was presumed. As to the merits of the petitioner's claims, the habeas court determined that staff at the public defender's office had "misadvised the court and the petitioner that the petitioner's application ought to be denied." The habeas court rendered judgment granting the habeas petition, vacated the petitioner's

conviction, and ordered a new trial. This appeal followed. See footnote 1 of this opinion.

In the present appeal, the respondent claims that the habeas court erred in failing to conclude that the petitioner's claims were not procedurally defaulted. The respondent concedes that there was good cause for the petitioner's failure to raise his claims but argues that the habeas court incorrectly determined that prejudice, for purposes of the cause and prejudice standard, can be presumed by the denial of counsel at trial. We disagree.

We begin with the applicable law and standard of review. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

In *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), "the Supreme Court held that a petitioner who raises a constitutional claim for the first time in a habeas proceeding must show: (1) cause for the procedural default, i.e., for the failure to raise the claim previously; and (2) prejudice resulting from the alleged constitutional violation. In the absence of such a showing, a court will not reach the merits of the claim. We adopted this standard for state habeas proceedings in *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991)." *Duperry* v. *Solnit*, 261 Conn. 309, 331–32, 803 A.2d 287 (2002). This court also has concluded "that the *Wainwright* cause and prejudice standard should be employed to determine the reviewability of habeas claims that were not properly pursued on direct appeal." *Jackson* v. *Com-*

missioner of Correction, 227 Conn. 124, 132, 629 A.2d 413 (1993).

In the present case, the respondent asserts that the petitioner's claims were barred by procedural default because the petitioner had the opportunity but failed to raise his claims on direct appeal and to challenge the determination of the public defender's office that he was ineligible for appointed counsel before the trial court pursuant to General Statutes § 51-297 (g)[2] and Practice Book § 37-6 (a).[3] We find this argument unavailing.

The habeas court found that the petitioner met his burden of demonstrating good cause for his failure to appeal the determination by the public defender's office that he was ineligible for appointed counsel. Specifically, the habeas court found that the petitioner had informed the trial court that he was denied public defender services because he owned a home. Thereafter, the petitioner informed the trial court that he had lost one of his jobs and his financial situation had worsened.[4]The petitioner then asked the trial court to assist him in preparing his defense. Despite the existence of § 51-297 (g), which authorizes defendants who have been deemed to be ineligible for appointed counsel by the public defender's office to appeal the decision

[2] General Statutes § 51-297 (g) provides: "If the Chief Public Defender or anyone serving under the Chief Public Defender determines that an individual is not eligible to receive the services of a public defender under this chapter, the individual may appeal the decision to the court before which the individual's case is pending."

[3] Practice Book § 37-6 (a) provides in relevant part: "If the public defender or his or her office determines that a defendant is not eligible to receive the services of a public defender, the defendant may appeal the public defender's decision to the judicial authority in accordance with General Statutes § 51-297 (g). . . ."

[4] Although the trial court did suggest that the petitioner reapply for public defender services, his second application was again denied because he owned a home.

to the court before which the individual's case is pending, the trial court responded as follows: "Well, I—I can't appoint—I can't tell somebody to do that for you. You either qualify for the public defender services or you don't, and that's a determination made by them independent of the court."

The habeas court found that the trial judge's response to the petitioner's request for assistance in securing counsel after the public defender's office had determined that he was not eligible for their services "to be critical as to the existence of good cause to excuse procedural default." The habeas court reasoned that "[t]he petitioner reasonably understood these comments to mean that the public defender's office had the *sole* authority, or at least the *final* word, on indigency determinations and whether counsel would be appointed. This matter was the petitioner's first criminal case. One cannot reasonably expect a [self-represented] defendant with no criminal court experience to suspect that the judge's statement . . . meant anything except that the public defender's decision was conclusive." (Emphasis in original.) Therefore, the habeas court concluded that "the petitioner has met his burden of proving, by a preponderance of the evidence, [that] he had good cause for failing to appeal under [General Statutes] § 51-297 (g) [and] Practice Book § 37-6 (a), based on presumed unavailability and futility."

We agree with the habeas court's reasoning and its conclusion as to the existence of good cause in the present case. As we noted, the respondent does not quarrel with the habeas court's ruling on good cause in the present appeal. Instead, the respondent asserts that the habeas court improperly concluded that prejudice is presumed from the denial of the petitioner's right to counsel at trial.

With respect to prejudice, the habeas court ruled that, under the second prong of *Wainwright*, "actual

prejudice is presumed when the petitioner's right to counsel is violated." (Internal quotation marks omitted.) In doing so, the habeas court relied on *Dennis* v. *Commissioner of Correction*, 134 Conn. App. 520, 536–37, 39 A.3d 799 (2012), for the proposition that "[a]ny conviction obtained after wrongful denial of legal assistance 'mandates reversal even if no particular prejudice is shown and even if there is overwhelming evidence of guilt.' " See *Dennis* v. *Commissioner of Correction*, supra, 536–37 (concluding that prejudice is presumed under procedural default when defendant denied right to counsel at trial).

The respondent asserts that the habeas court improperly failed to make the threshold determination of cause and prejudice required under *Wainwright* and instead erroneously proceeded to the substantive inquiry— namely, the petitioner's claim that he was improperly denied the right to counsel. The respondent asserts that, under *Wainwright*, prejudice is not presumed and, therefore, that the habeas court should have required the petitioner to demonstrate actual prejudice. The respondent finally asserts that the relevant case law only allows prejudice to be presumed from a denial of right to counsel in the substantive inquiry. We disagree.

It is well settled that when a defendant is denied the right to counsel, prejudice is established. In fact, "[w]hen a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' *Glasser* v. *United States*, [315 U.S. 60, 76, 62 S. Ct. 457, 86 L. Ed. 680 (1942)]. That, indeed, was the whole point of *Gideon* v. *Wainwright*, [372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)] overruling *Betts* v. *Brady*, [316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)]. Even before trial,

when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' *Hamilton* v. *Alabama*, [368 U.S. 52, 55, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)]; [see] *White* v. *Maryland*, [373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963)]." *Chapman* v. *California*, 386 U.S. 18, 43, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (Stewart, J., concurring); see also *United States* v. *Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1976), cert. denied, 444 U.S. 944, 100 S. Ct. 302, 62 L. Ed. 2d 311 (1979).

Indeed, this court has recognized that "it is well settled that if the decision by a trial court deprived a defendant of his constitutional right to counsel of choice, prejudice will be presumed." *State* v. *Peeler*, 265 Conn. 460, 475, 828 A.2d 1216 (2003), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004). Furthermore, this court has explained that "a per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." *State* v. *Mebane*, 204 Conn. 585, 595, 529 A.2d 680 (1987), cert. denied, 484 U.S. 1046, 108 S. Ct. 784, 98 L. Ed. 2d 870 (1988); see also *State* v. *Frye*, 224 Conn. 253, 262, 617 A.2d 1382 (1992) ("[t]he right to counsel is so basic that its violation mandates reversal even if no particular prejudice is shown and even if there is overwhelming evidence of guilt" [internal quotation marks omitted]).

Notwithstanding the foregoing law, the respondent asserts that the cases explaining the confines of the procedural default rule require that a petitioner demonstrate both cause and prejudice. Specifically, the respondent cites to *Engle* v. *Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982), for its conclusion that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before

obtaining relief." In explaining the rationale for requiring petitioners to establish both cause and prejudice, the United States Supreme Court explained that "writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." Id., 127–28. The United States Supreme Court further explained that "these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. . . . The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the [s]tate's ability to enforce its procedural rules. These considerations supported our . . . ruling [in *Wainwright*] that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice." (Footnote omitted.) Id., 128–29.

We agree with the respondent that the cause and prejudice standard is designed to limit the ability of petitioners to bring claims in a habeas action that they could have addressed in the trial court or on direct appeal because of the societal costs of habeas relief. Nevertheless, our review of the case law surrounding the adoption of the cause and prejudice standard reveals that the United States Supreme Court did not intend to limit the relief afforded to a petitioner who was completely denied his right to counsel. Indeed, the Supreme Court has explained that prejudice is presumed when counsel is completely denied. *Strickland*

v. *Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice"); *United States* v. *Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (prejudice is presumed when counsel is completely denied); see also *Shayesteh* v. *South Salt Lake*, 217 F.3d 1281, 1284 (10th Cir. 2000) ("where there has been a complete denial of the constitutional right to counsel . . . prejudice is presumed"), cert. denied, 531 U.S. 1171, 121 S. Ct. 1139, 148 L. Ed. 2d 1003 (2001).

In adopting the cause and prejudice standard in *Wainwright*, the United States Supreme Court explained that the cause and prejudice standard was to be applied in a manner that would not operate to prevent habeas relief for the claim "of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Wainwright* v. *Sykes*, supra, 433 U.S. 91. Furthermore, although this court and the United States Supreme Court have continued to follow the cause and prejudice standard and have, as the respondent asserts, continually reaffirmed that each of those components must be established "in the conjunctive," courts have crafted that standard in a manner that does not interfere with "the exercise of the habeas court's equitable discretion with respect to procedurally defaulted claims . . . ." (Internal quotation marks omitted.) *Murray* v. *Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Courts have explained that the cause and prejudice standard "will not prevent federal habeas courts from ensuring the 'fundamental fairness [that] is the central concern of the writ of habeas corpus.' " Id.

Stated succinctly, habeas relief is designed to address situations in which a miscarriage of justice would exist without such relief, and the cause and prejudice standard is not meant to thwart that interest. Rather, the

cause and prejudice standard is meant to balance the need for habeas relief with the societal costs of habeas relief. It is axiomatic that "the right to counsel is the foundation for our adversary system" and that its denial can never be harmless. *Martinez* v. *Ryan*, 566 U.S. 1, 12, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); see also *Scott* v. *Illinois*, 440 U.S. 367, 99 S. Ct. 115, 859 L. Ed. 2d 383 (1979) ("representation by counsel in a criminal proceeding is fundamental and essential to a fair trial" [internal quotation marks omitted]). Therefore, the protections afforded by the procedural default rule must be construed in light of the fundamental role of the right to counsel in ensuring a fair trial and the importance of providing habeas relief from the unfairness that results from the complete deprivation of counsel.[5] In light of these principles, we cannot conclude that a petitioner must establish prejudice to overcome a claim of procedural default when there has been a complete denial of counsel. As Justice McDonald recognized in his dissent in *Newland* v. *Commissioner of Correction*, supra, 322 Conn. 701–702, in arriving at this conclusion, we are joined by several other courts that have addressed this question. See *Robinson* v. *Ignacio*, 360 F.3d 1044, 1054–55 (9th Cir. 2004); *Shayesteh* v. *South Salt Lake*, supra, 217 F.3d 1284; *Guzman* v. *United States*, Docket No. C.A. 98-12086 (MLW), 2004 WL 3710110, *8–9 (D. Mass. June 4, 2004); *Coleman* v. *Ignacio*, 164 F.R.D. 679, 684 (D. Nev. 1996).

If we were to adopt the respondent's application of the cause and prejudice standard and require the petitioner to establish actual prejudice from the denial of the right to counsel in order to avoid procedural default,

[5] We note that our decision today is based on the petitioner's claim that he suffered a complete denial of counsel at his criminal trial. The issue of what a petitioner alleging ineffective assistance of counsel must demonstrate to satisfy the prejudice prong of the procedural default test is not before us. Therefore we express no opinion on that issue.

we would ignore well established case law recognizing that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, supra, 315 U.S. 76.

Accordingly, we conclude that the habeas court properly determined that, for purposes of determining whether a habeas claim is barred by procedural default, prejudice is presumed when the petitioner is completely denied his right to counsel.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

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STATE OF CONNECTICUT *v.* DESHAWN TYSON

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 879 (AC 40468), is denied.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

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

Decided April 17, 2019

WILLIAM BETTS *v.* COMMISSIONER OF CORRECTION

The petitioner William Betts' petition for certification to appeal from the Appellate Court, 188 Conn. App. 397 (AC 40587), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided April 17, 2019

BERNARD SMALLS *v.* COMMISSIONER OF CORRECTION

The petitioner Bernard Smalls' petition for certification to appeal from the Appellate Court, 188 Conn. App. 525 (AC 40751), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided April 17, 2019

JAMES A. MITCHELL *v.* STATE OF CONNECTICUT ET AL.

The petitioner James A. Mitchell's petition for certification to appeal from the Appellate Court, 188 Conn. App. 245 (AC 40927), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in denying the petitioner's late petition for certification to appeal?"

Dante R. Gallucci, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided April 17, 2019

USSBASY GARCIA *v.* ROBERT COHEN ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 188 Conn. App. 380 (AC 41079), is granted, limited to the following issues:

"1. Did the Appellate Court properly hold that the general verdict rule applies when a plaintiff's proposed jury interrogatories are rejected by the trial court and the plaintiff thereafter does not object when the case is submitted to the jury without jury interrogatories?

"2. Did the Appellate Court correctly conclude that the plaintiff did not claim on appeal that the trial court improperly failed to submit her interrogatories to the jury?"

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

John Serrano, in support of the petition.

Keith McCabe, in opposition.

Decided April 17, 2019

DREY ANDRADE *v.* LEGO SYSTEMS, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 188 Conn. App. 652 (AC 41322), is denied.

Vincent F. Sabatini, in support of the petition.

Victoria Woodin Chavey and *Collin O'Connor Udell*, in opposition.

Decided April 17, 2019

STATE OF CONNECTICUT *v.* DOVANTE GRAY-BROWN

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 446 (AC 41385), is denied.

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

Pamela S. Nagy, assistant public defender, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided April 17, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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BANK OF AMERICA, N.A. *v.* DAVID GROGINS, EXECUTOR (ESTATE OF ANNA S. GROGINS), ET AL. (AC 40325)

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

Syllabus

The plaintiff bank, B Co., sought to foreclose a mortgage on certain real property owned by the decedent. Prior to trial, the defendant D, the executor of the decedent's estate and trustee of the decedent's trust, was defaulted for failure to disclose a defense. Thereafter, the trial court granted B Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon. Subsequently, the trial court granted B Co.'s motion to substitute U Co. as the plaintiff. Thereafter, more than twenty days after notice of the underlying judgment, the defendants filed a motion to open the judgment alleging that there was good cause for the default because D had been ill during the pendency of the foreclosure proceedings, which had prevented him from properly defending the action, and that they had a good faith belief that a defense existed, namely, that the loan to the decedent had been made as part of a predatory lending program run by B. Co. Following an evidentiary hearing, the court denied the defendants' motion to open, concluding that the defendants had failed to present sufficient evidence to establish that there was good cause to open the judgment. The court further found that even if good cause had existed, the defendants had been negligent in failing to pursue any defenses that they believed they may have had. On the defendants' appeal to this court, *held* that the trial court did not abuse its discretion in denying the motion to open, the defendants having failed to demonstrate good cause that was not based wholly on the merits of the underlying judgment: at the evidentiary hearing, the defendants focused almost entirely on B Co.'s fraudulent behavior and predatory lending practices, and did not offer any evidence regarding D's alleged illness, which purportedly had prevented D from defending the foreclosure action, or any other evidence to explain their failure to disclose a defense prior to default, and the testimony of the defendants' former attorney provided no justification for their failure to investigate the circumstances of the subject loan prior to the judgment of strict foreclosure; moreover, although the statute (§ 49-15) governing the opening of judgments of strict foreclosure did not require the defendants to demonstrate that they were prevented from making their defenses by mistake, accident, or other reasonable cause, the trial court properly considered all of the evidence before it in determining that it was insufficient to justify opening the judgment, and the court's additional finding that the defendants' negligence had caused their failure to pursue a defense did not vitiate

its proper finding that they had failed to demonstrate good cause to open the judgment that was not based wholly on the merits of the judgment.

Argued December 6, 2018–officially released April 30, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Malcolm L. Grogins, trustee of the Susan Grogins Trust, et al. were defaulted for failure to appear; thereafter, the named defendant et al. were defaulted for failure to disclose a defense; subsequently, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, U.S. Bank Trust, N.A., was substituted as the plaintiff; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, denied the motion to open the judgment of strict foreclosure filed by the named defendant et al., and the named defendant et al. appealed to this court. *Affirmed.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellants (named defendant et al.).

Robert J. Wichowski, for the appellee (substitute plaintiff).

Opinion

DiPENTIMA, C. J. In this foreclosure action, the defendants, David Grogins, executor of the estate of Anna S. Grogins, and David Grogins and Malcolm L. Grogins, trustees of the Susan Grogins Trust,[1] appeal

[1] Bank of America, N.A., and State of Connecticut, Department of Revenue Services—subordinate lien holders to the mortgage from which this foreclosure action arises—were also named as defendants but are not parties to this appeal. Accordingly, we refer to David Grogins, executor of the estate of Anna S. Grogins, and David Grogins and Malcolm L. Grogins, trustees of the Susan Grogins Trust, as the defendants throughout this opinion and individually by name where necessary. Further, all references to David Grogins and Malcolm L. Grogins are to those individuals in their respective representative capacities unless indicated otherwise.

from the trial court's denial of their motion to open the judgment of strict foreclosure rendered in favor of the substitute plaintiff, U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust.[2] On appeal, the defendants argue that the court abused its discretion in denying their motion to open because the court improperly applied the procedural requirements set forth in General Statutes § 52-212[3] and, in so doing, erroneously found that there was no good cause to open the judgment of strict foreclosure. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On July 30, 2014, Bank of America, N.A., as the original plaintiff, commenced this action against the defendants. According to the allegations in the complaint, the decedent, Anna S. Grogins, "owed Countrywide Bank, FSB [Countrywide] $625,250, as evidenced by a promissory note for said sum," dated July 19, 2007. The note was secured by a mortgage on the premises known as 21 River Ridge Court in Stamford. The mortgagee was identified as Mortgage Electronic Registration, Inc., as nominee for Countrywide. On November 5, 2009, this mortgage was assigned to BAC Home Loan Servicing, LP (BAC), which Bank of America, N.A., subsequently acquired. Prior to Anna S. Grogins' death, the note and mortgage were in default for

[2] On January 4, 2016, the original plaintiff, Bank of America, N.A., filed a motion to substitute itself as the plaintiff in this action with U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust. The court, *Mintz, J.*, granted the motion on February 16, 2016.

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

nonpayment of the principal and interest due on October 1, 2010. Anna S. Grogins died on December 16, 2010. The complaint further alleged that David Grogins, executor, "may claim an interest in [the] premises by virtue of being the executor of the estate of Anna S. Grogins," and that David Grogins and Malcolm L. Grogins, trustees, were the current owners of record.

On April 8, 2015, Malcolm L. Grogins, State of Connecticut, Department of Revenue Services, and Bank of America, N.A., were defaulted for failure to appear. On April 27, 2015, the court, *Mintz, J.*, defaulted David Grogins for failure to disclose a defense and rendered judgment of strict foreclosure. The law day was set for July 28, 2015. On July 27, 2015, David Grogins filed for bankruptcy, which stayed the foreclosure proceedings.

Following the termination of the bankruptcy stay, the substitute plaintiff filed a motion to open the judgment, to make new findings, to reenter judgment after termination of the bankruptcy stay and to award additional attorney's fees and costs. Judge Mintz granted the substitute plaintiff's motion and set a new law day for June 28, 2016.

On June 13, 2016, the defendants filed a motion to open the judgment. The defendants' motion to open was an official court form, JD-CV-107, that cited General Statutes §§ 52-212, 52-212a, and 52-259c, and Practice Book §§ 17-4 and 17-43. Appended to the defendants' motion to open was an "explication" that alleged that David Grogins and Malcolm L. Grogins, as individuals, had occupied the residence subject to the foreclosure action since its purchase in the early 2000s. The explication also alleged that David Grogins had been sick intermittently during the pendency of the foreclosure action and that his illness, coupled with "the history of the loan," constituted "good cause for [why] the defaults [had] occurred . . . ." Further, the defendants asserted

that they had a good faith belief that a defense existed to the substitute plaintiff's complaint, specifically, that the subject loan "was part of the [HSSL (High Speed Swim Lane loan program)] at [Bank of America]."

On June 27, 2016, Judge Mintz heard oral argument on the defendants' motion to open and decided that the matter warranted a full hearing before Judge Tierney. Judge Mintz then sua sponte opened the judgment of strict foreclosure and set a new law day for July 19, 2016. Following a brief hearing on July 11, 2016, the court, *Hon. Kevin Tierney*, judge trial referee, sua sponte opened the judgment of strict foreclosure and set a new law day for August 2, 2016. Shortly thereafter, on July 29, 2016, Judge Tierney held an evidentiary hearing on the defendants' motion to open.

The hearing was held over a series of nonconsecutive days, starting on July 29, 2016, and ending on February 7, 2017. The defendants called several witnesses who testified to matters concerning alleged predatory lending practices and fraudulent behavior during the procurement of the original loan. The defendants did not present any evidence regarding the illness of David Grogins, which purportedly had prevented him from properly defending the foreclosure action, nor did they offer any other evidence to explain their failure to disclose a defense prior to default. Indeed, the attorney who represented David Grogins early on in these proceedings testified at the evidentiary hearing that he did not disclose a defense because, at the time, he had been unaware that any defenses existed.

In a memorandum of decision dated April 5, 2017, Judge Tierney denied the defendants' June 13, 2016 motion to open. In its decision, the court characterized the defendants' claims and arguments as a "[m]oving

[t]arget"[4] and concluded that they had failed to present sufficient evidence to support "any semblance of a defense" to the foreclosure action. Further, the court found that the evidence demonstrated that, even if a good defense existed, it was the defendants' own negligence that occasioned their failure to plead and pursue such a defense. This appeal followed.

On appeal, the defendants claim that the court erred in denying their motion to open by improperly applying § 52-212, which governs opening civil judgments of default and nonsuit, when it should have applied General Statutes § 49-15, which governs opening judgments of strict foreclosure.[5] As a result, the defendants argue, the court incorrectly considered their negligence in failing to plead their defenses in a timely fashion to be a dispositive reason for denying their motion to open. The defendants contend that in seeking to open a judgment of strict foreclosure pursuant to § 49-15, parties need not show that they were prevented from making their defense as a result of "mistake, accident or other reasonable cause," unlike as required by § 52-212. Accordingly, without conceding that they were negligent in failing to plead their defenses prior to default, the defendants submit that negligence is only one factor that the court should weigh in determining whether to exercise its equitable authority, and that the court's emphasis on the defendants' negligence undermines its

[4] In describing the defendants' claims with this phrase, the court cited the 1949 novel of the same name, "The Moving Target," written by author Ross Macdonald.

[5] General Statutes § 49-15 (a) (1) provides: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection."

determination that there was no good cause to open the judgment.[6] We are not persuaded.

Our review of a trial court's denial of a motion to open a judgment of strict foreclosure, which was filed more than twenty days after notice of the underlying judgment, is narrow.[7] "Generally, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. . . . In the context of an appeal from the denial of a motion to open judgment,

[6] The defendants' motion to open, according to the appended explication, was brought pursuant to Practice Book §§ 17-4 and 17-43 and "all JD-CV-107 criteria." Although the JD-CV-107 form cites several statutes, including § 52-212, it does not include any reference to § 49-15. Indeed, at no time during the evidentiary hearing or at any point prior to this appeal did the defendants argue that their motion to open was made pursuant to § 49-15. Irrespective of the defendants' failure to frame their motion clearly for the court, we address the merits of the defendants' claim.

In addressing the defendants' claim, we note that the substitute plaintiff argues that the defendants should be foreclosed from raising on appeal an error that they induced by failing to cite the correct statute in their motion to open. See *Snowdon* v. *Grillo*, 114 Conn. App. 131, 139, 968 A.2d 984 (2009) ("[T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional and induced constitutional error. . . . The invited error doctrine rests on principles of fairness, both to the trial court and to the opposing party." [Internal quotation marks omitted.]). We decline to apply the invited error doctrine in this case because it is evident from the court's decision that it understood § 49-15 to control with respect to a motion to open a judgment of strict foreclosure. The court nonetheless applied § 52-212 solely on the basis that the defendants failed to cite the proper statute in their motion or explication. Given the conscious disregard of controlling authority, this is not a circumstance that counsels us to apply the invited error doctrine to avoid unfairness to the trial court. See *Hodgate* v. *Ferraro*, 123 Conn. App. 443, 451–52, 3 A.3d 92 (2010) (invited error doctrine barred appellate review of plaintiff's claim that trial court should not have retroactively applied recent Supreme Court decision where plaintiff previously had argued to trial court that precedent should be applied).

[7] The judgment of strict foreclosure was rendered on April 27, 2015, and the defendants filed their motion to open on June 13, 2016.

[i]t is well established in our jurisprudence that [w]here an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Ruggiri*, 164 Conn. App. 479, 484, 137 A.3d 878 (2016). "Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal." (Citation omitted; internal quotation marks omitted.) *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 849, 158 A.3d 405 (2017).

The distinction between a motion to open filed pursuant to § 52-212 and one filed pursuant to § 49-15 was examined previously by our Supreme Court in *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 352–53, 579 A.2d 1054 (1990) (*Farmers*). There, the court explained that "[u]nlike . . . § 52-212, which provides for opening default judgments generally and requires a defaulted defendant to show that he had a good defense that he was prevented from making by mistake, accident or other reasonable cause, § 49-15 prescribes only four conditions for opening a judgment of strict foreclosure: (1) that the motion be in writing; (2) that the movant be a person having an interest in the property; (3) that the motion be acted upon before an encumbrancer has acquired title; and (4) that cause,

obviously good cause, be shown for opening the judgment." (Internal quotation marks omitted.) Id. The court further noted that "[g]ood cause for opening a foreclosure pursuant to § 49-15 . . . cannot rest entirely upon a showing that the original foreclosure judgment was erroneous. Otherwise that statute would serve merely as a device for extending the time to appeal from the judgment." Id., 356.

In accordance with *Farmers*, the defendants in this case were required to show good cause for opening the judgment that was not based wholly on the merits of the judgment. Having reviewed the record and the memorandum of decision, we cannot say that the trial court abused its discretion when it found that no good cause existed. As we stated previously, despite alleging in their motion to open that David Grogins failed to defend this action due to an intermittent illness, throughout the several days of testimony, little to no evidence was presented to support this claim. Further, David Grogins, in his capacity as executor and trustee, was represented by counsel when the default was entered against him, and, during the evidentiary hearing on the motion to open, his former attorney offered no justification for the decision not to investigate the circumstances surrounding the July 19, 2007 loan until after judgment of strict foreclosure had been rendered. See *USA Bank* v. *Schulz*, 143 Conn. App. 412, 419, 70 A.3d 164 (2013) ("defendant has no basis for claiming an abuse of discretion by the trial court in denying him relief that he could readily have sought, had he wished to, at a time when he was represented by competent counsel"). Although the court did note that the defendants were negligent in failing to pursue any defenses that they believed they may have had, the court also gave consideration to all the evidence presented and found that it was insufficient to justify opening the judgment. Thus, irrespective of the fact that the defendants, in seeking to open the

judgment of strict foreclosure, were not required to show that they were prevented by "mistake, accident or other reasonable cause from . . . making [their] defenses," as the court's application of § 52-212 suggested, the application of the wrong statute does not vitiate the court's finding that the defendants failed to show good cause, because that determination is independent of the other procedural requirements set forth in §§ 52-212 and 49-15. See *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 8, 127 A.3d 994 (2015). Accordingly, the trial court, having properly found that the defendants had failed to show good cause, did not abuse its discretion when it denied the defendants' motion to open the judgment of strict foreclosure pursuant to § 52-212.

The judgment is affirmed and the case is remanded for the purpose of setting a new law day.

In this opinion the other judges concurred.

CHARLOTTE MALPESO *v.* PASQUALE MALPESO (AC 41129)

Keller, Elgo and Moll, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting motions to modify filed by the defendant and entering modified financial orders. The dissolution judgment had incorporated the parties' separation agreement, which provided that the defendant would pay the plaintiff $20,000 per month in unallocated alimony and child support, and contained a clause that limited the circumstances under which alimony could be modified. In 2012, the defendant filed a motion to modify alimony and child support, alleging, inter alia, that he was paying the children's college expenses and that there had been a downturn in his financial circumstances. The plaintiff filed a motion for contempt, alleging, inter alia, that the defendant had failed to comply with the unallocated alimony and child support order from October, 2011 through June, 2012. The trial court granted the defendant's 2012 motion to modify,

converting the unallocated alimony and child support order into a periodic alimony order of $11,138 per month. The court also determined that the modification order would be retroactive but did not set forth clearly the effective date of the modification order. With respect to the motion for contempt, the court determined that the defendant was in wilful and intentional violation of the court orders, and it awarded the plaintiff attorney's fees and costs. The defendant appealed and the plaintiff cross appealed from those decisions to this court, which affirmed the trial court's finding of contempt but reversed the court's financial orders and award of attorney's fees and costs, and remanded the case for further proceedings. This court also concluded that the trial court abused its discretion by failing to enter a clear order as to the retroactivity of the modification order and directed the court, on remand, to resolve the issue of retroactivity after calculating the proper alimony award, if any. In 2014, the defendant filed another motion to modify alimony and child support, which was subsequently amended. The amended motion alleged, inter alia, that there had been a downturn in the defendant's financial circumstances and that his health had deteriorated significantly. In October, 2017, the trial court rendered judgment with respect to, inter alia, the defendant's 2012 and 2014 motions to modify. The court granted the 2012 motion to modify, reducing the defendant's alimony obligation to $7500 per month as of July, 2012, and it granted the 2014 motion to modify, as amended, reducing the defendant's alimony obligation to $4000 per month as of July, 2016. *Held*:

1. The plaintiff could not prevail on her claim that the trial court, in granting the 2012 motion to modify, erroneously determined that the defendant's payment of the children's college expenses constituted a substantial change in circumstances warranting modification of alimony, which was based on her claim that the parties' separation agreement required the defendant to pay the college expenses and contained no express provision permitting the modification of alimony on the basis of the defendant's payment of those expenses: that court did not determine that the defendant's payment of the college expenses alone constituted a substantial change in circumstances and, instead, concluded that the magnitude of the college and related expenses that the defendant had paid constituted a substantial change in circumstances, and although the separation agreement required the defendant to pay for the college expenses, it also provided that alimony was modifiable upon a trial court determining that a substantial change in circumstances had occurred; furthermore, the plaintiff's claim that the trial court failed to consider the entirety of the parties' financial circumstances in granting the 2012 motion to modify was unavailing, as the court concluded that, although the defendant's net monthly income increased in 2012 relative to the time of dissolution, the significant increase in the defendant's expenses and liabilities from the time of dissolution to 2012 constituted a substantial change in circumstances, and the court also set forth findings of

fact regarding the plaintiff's age, education, employment history, and employment status.

2. The plaintiff's claim that the trial court erroneously found that the defendant continued to suffer from cellulitis at the time of the proceedings on remand was unavailing: although the defendant's treating physician testified that the defendant currently did not suffer from cellulitis, but that the prior cellulitis had contributed in whole or in part to the disability of the defendant's right leg and that the defendant had a predisposition for recurrent cellulitis, the court's reference to the defendant's "current cellulitis" was not improper, as the court, in using that phrase, was discussing the lasting effects of the defendant's prior cellulitis, of which there was ample evidence in the record, and before referring to the defendant's current cellulitis, the court found that he was at risk for recurrent cellulitis, which belied the suggestion that the court found that he was suffering from an active bout of cellulitis at the time of the proceedings on remand; furthermore, the trial court did not improperly engage in speculation by considering the defendant's risk of developing future medical conditions, and it properly considered the parties' respective financial circumstances in adjudicating the 2014 motion to modify, as amended, as the court considered, inter alia, the defendant's gross monthly income, net monthly income, and monthly expenses in 2012 and in 2017, concluded that the defendant's reduction in income since 2012 and increased expenses, along with his significant health issues, constituted a substantial change in circumstances, and, with respect to the plaintiff, found, inter alia, that she had been unemployed since 2008 and had been living with her parents since January, 2017.
3. The trial court did not abused its discretion in modifying alimony retroactively under the circumstances of this case:

a. The plaintiff could not prevail on her claim that the trial court erred in prohibiting her from offering testimony that was relevant to the court's determination regarding whether to modify the defendant's alimony obligations retroactively, which was based on her claim that the court, by sustaining the objection of the defendant's counsel to the question directed to her concerning the effect of the defendant's contemptuous conduct, improperly denied her the opportunity to testify about the consequences of the defendant's contemptuous conduct and that such testimony would have provided the court with a stronger foundation on which to deny the defendant retroactive modification of his alimony obligations; even if the court abused its discretion by sustaining the objection raised by the defendant's counsel, the plaintiff failed to demonstrate that the alleged error was harmful, as she offered testimony regarding the consequences of the defendant's conduct after the court initially sustained the objection, and the court, in its memorandum of decision, expressly considered the plaintiff's argument that the defendant's conduct had harmed her.

b. The plaintiff's claim that the trial court erred in modifying the defendant's alimony obligations retroactively because the defendant had unclean hands was unavailing; that court, after setting forth the plaintiff's argument in opposition to the retroactive modification of alimony, acknowledged the defendant's arguments raised in support of modifying alimony retroactively, namely, that the plaintiff was in good health yet unemployed, that the plaintiff was eligible to receive reduced social security benefits, that the motions to modify were several years old, and that the defendant had overpaid the plaintiff, and the plaintiff cited to no appellate authority to support her contention that the finding of contempt against the defendant required the court to deny the retroactive modification of alimony.

Argued January 10—officially released April 30, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Dennis F. Harrigan*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Wenzel, J.*, sustained in part the plaintiff's objection to the defendant's motion for modification of child support, and the defendant appealed to this court, which reversed the judgment and remanded the case for further proceedings; subsequently, the court, *Schofield, J.*, granted the plaintiff's motion for contempt and granted the defendant's motion to modify child support and alimony, and the defendant appealed to this court; thereafter, the court, *Schofield, J.*, granted in part the plaintiff's motion for clarification and granted in part the defendant's motion to reargue, and the defendant filed an amended appeal and the plaintiff filed a separate appeal with this court; subsequently, this court consolidated the appeals, reversed the judgment in part, and remanded the case for further proceedings; thereafter, the court, *Diana, J.*, granted the defendant's motion for modification of child support, denied the defendant's amended motion to modify child support and alimony, granted the defendant's motion to modify child support and alimony,

granted the defendant's amended motion to modify child support and alimony, and granted certain other relief; subsequently, the court, *Diana*, *J.*, denied the plaintiff's motions to reargue, and the plaintiff appealed to this court. *Affirmed.*

Kevin F. Collins, with whom, on the brief, was *Ami Jayne Wilson*, for the appellant (plaintiff).

Barbara M. Schellenberg, with whom was *Richard L. Albrecht*, for the appellee (defendant).

Opinion

MOLL, J. In this postjudgment dissolution matter, the plaintiff, Charlotte Malpeso, appeals from the judgment of the trial court, rendered on remand from this court, granting motions to modify filed by the defendant, Pasquale Malpeso, and entering modified financial orders. On appeal, the plaintiff claims that: (1) the court erred in granting the defendant's motion to modify filed on January 25, 2012, because the court (a) improperly determined that the defendant's payment of the college expenses of the parties' children constituted a substantial change in circumstances warranting the modification of alimony and (b) failed to consider the totality of the parties' respective financial circumstances; (2) the court erred in granting the defendant's motion to modify filed on October 10, 2014, as amended, because the court (a) made a clearly erroneous factual finding regarding the defendant's health and engaged in speculation by considering the defendant's risk of developing future medical conditions, and (b) failed to consider the totality of the parties' respective financial circumstances; and (3) the court erred in modifying alimony retroactively.[1] We disagree and, accordingly, affirm the judgment of the trial court.

[1] For ease of discussion, we address the plaintiff's claims in a different order than they are set forth in her appellate brief.

The following facts and procedural history are relevant to our resolution of the appeal. "The plaintiff . . . married the defendant on August 23, 1986. On June 25, 2004, the marriage was dissolved. At that time, the parties had three minor children: a son, born in 1988; and twin daughters, born in 1993. The judgment of dissolution incorporated the parties' separation agreement (agreement) that provided, inter alia, that the defendant would pay the plaintiff $20,000 per month in unallocated alimony and child support.[2] The agreement also contained a clause limiting the circumstances in which the amount and term of alimony could be modified.[3] The judgment of dissolution was opened and modified once in December, 2005, to allow the defendant to purchase certain property from the plaintiff." (Footnotes in original.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 155–56, 138 A.3d 1069 (2016).

[2] "The agreement stated in relevant part: '3.1 During the lifetime of the [defendant] and until the death, remarriage or cohabitation of the [plaintiff], whichever event shall first occur, the [defendant] shall pay to the [plaintiff] as alimony, or separate maintenance for the support of the minor children the sum of $20,000 per month.' " *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 155 n.3, 138 A.3d 1069 (2016).

[3] "In its entirety, the clause provided: '3.2 The amount and term of alimony shall be modifiable only under the following circumstances:

" '(a) Upon a court of competent jurisdiction's determination that the [defendant] has become disabled as defined by the Social Security Administration or in the event that the economy of New York undergoes a substantial change as a result of a catastrophic event (such as 9/11).

" '(b) After July 1, 2012, upon a court of competent jurisdiction's determination that there has been a substantial change of circumstances as provided for in Connecticut General Statute[s] § 46b-84a.

" '(c) The parties contemplate that the [plaintiff] may obtain full or part-time employment either before or after entry of a decree of dissolution. Such employment shall not be deemed a substantial change in circumstances during the first eight years of the alimony term.

" '(d) Only under the circumstances set forth in this paragraph 3.3 shall the [defendant's] obligation to pay alimony pursuant to paragraph 3.1 be modifiable during the first eight years.'

"Paragraph 3.3 provided: 'The parties shall endeavor to negotiate child support if alimony terminates while any child or children are minors. If they are unable to agree, the amount of child support to be paid by the [defendant] shall be determined by a court of competent jurisdiction. Child support

In May, 2011, the defendant ceased complying with the $20,000 unallocated alimony and child support order (unallocated order). On May 25, 2011, the defendant filed a motion to modify child support on the basis that the parties' twin daughters would reach the age of majority in June, 2011, and graduate high school at the end of that school year (May, 2011 motion to modify). The plaintiff objected to the May, 2011 motion to modify. Subsequently, the defendant filed an amended motion to modify both alimony and child support, dated August 16, 2011, on the grounds that (1) the parties' twin daughters had reached the age of majority and had graduated from high school and (2) the economy of New York had "undergone a substantial change as a result of a catastrophic event" (August, 2011 amended motion to modify). On August 22, 2011, the trial court, *Wenzel, J.*, sustained in part the plaintiff's objection, ruling that because alimony and child support could be modified only pursuant to paragraph 3.2 of the agreement, the defendant's claim alleging a substantial change in the economy of New York was the sole proper ground for modification that the defendant had raised. On September 6, 2011, the defendant appealed from the August 22, 2011 ruling (2011 appeal).

On January 25, 2012, while the 2011 appeal was pending, the defendant filed another motion to modify alimony and child support (2012 motion to modify). In support of the 2012 motion to modify, the defendant alleged that (1) the parties' three children had reached the age of majority and were no longer residing with the plaintiff, (2) he was paying the children's college expenses,[4] and (3) there had been a downturn in his financial circumstances.

payments shall be retroactive to the last day on which alimony was paid.' " *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 155 n.4, 138 A.3d 1069 (2016).

[4] Paragraph 10.2 of the agreement provided: "The [defendant] shall be responsible for payment of the costs of undergraduate college and/or vocational educational expenses for the three minor children. For purposes of this subparagraph, said undergraduate college educational expenses shall

On June 14, 2012, the plaintiff filed a motion for contempt, alleging, inter alia, that the defendant had failed to comply with the unallocated order from October, 2011 through June, 2012 (2012 motion for contempt). The court, *Schofield, J.*, held multiple hearings between October and December, 2012, to address, inter alia, the defendant's 2012 motion to modify and the plaintiff's 2012 motion for contempt.

On February 19, 2013, this court published its decision resolving the 2011 appeal. See *Malpeso* v. *Malpeso*, 140 Conn. App. 783, 60 A.3d 380 (2013). Reversing the August 22, 2011 ruling of the trial court, this court held that the child support encompassed within the unallocated order was not subject to paragraph 3.2 of the agreement that limited only the modification of alimony. Id., 788–89.

Following this court's resolution of the 2011 appeal, Judge Schofield issued several decisions adjudicating, inter alia, the defendant's 2012 motion to modify and the plaintiff's 2012 motion for contempt.[5] In summary, the court granted the 2012 motion to modify, converting the unallocated order into a periodic alimony order of $11,138 per month, which the court calculated by reducing the unallocated order by $8862, the presumptive monthly amount of child support for three children under the child support and arrearage guidelines in effect in 2005. The court determined that the modification order would be retroactive; however, the court did not set forth clearly the effective date of the modification order. In addition, the court concluded

include, room, board, books, tuition, fees and a reasonable travel allowance to [and] from home. Said expenses shall also include college application fees and costs, the costs of SAT preparation courses and the costs of required pre-college tests."

[5] A comprehensive recitation of Judge Schofield's decisions, which is not necessary to repeat in this opinion, is set forth in *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 157–63.

that it lacked subject matter jurisdiction to consider the defendant's request to terminate alimony. With respect to the 2012 motion for contempt, the court determined that the defendant was in "wilful and intentional violation of the court orders." As relief, the court ordered the defendant to pay the attorney's fees and costs of the plaintiff in the amount of $41,016.18. Furthermore, after initially ordering the defendant to pay the plaintiff $440,000, the sum of the arrearage from October, 2011 through July, 2013, the court determined that the arrearage had to be recalculated; however, the court did not endeavor to recalculate the arrearage. In 2014, the defendant appealed and the plaintiff cross appealed from Judge Schofield's decisions (2014 appeal and cross appeal).

On October 10, 2014, the defendant filed another motion to modify alimony and child support (2014 motion to modify). In support of the 2014 motion to modify, the defendant alleged that (1) there had been a downturn in his financial circumstances and (2) the plaintiff had sold her residence for a considerable sum and had relocated to a less costly residence.

On May 3, 2016, this court published its decision resolving the 2014 appeal and cross appeal. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 151. First, this court concluded that the trial court applied the wrong legal standard in calculating the child support component of the unallocated order. Id., 163–74. After giving the trial court guidance regarding how to calculate the child support component of the unallocated order on remand, this court provided the following additional directions: "[T]o determine a new alimony order, after the correct child support amount is deducted from the [unallocated order], the court must subtract that amount from the total amount of [the unallocated order] . . . i.e., subtract the 2004 child support amount from $20,000. The difference represents the 2004 alimony award. Because

grounds for modification have been shown . . . the trial court is entitled to consider all the factors, as mandated by . . . [General Statutes §] 46b-82, available in determining the initial award. . . . Consequently, the court must now compare the newly determined 2004 alimony award against the parties' 2012 financial circumstances because the [2012 motion to modify] was before the court in 2012. Finally, because we do not know the impact of the college expenses on the court's analysis in developing a new alimony order on remand, we conclude that the financial mosaic as to alimony must be crafted anew. Accordingly, a new hearing is required to consider the financial issues pertaining to fashioning an alimony order, if any."[6] (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 171–74. Second, this court concluded that the trial court abused its discretion by failing to enter a clear order as to the retroactivity of the modification order and directed the court, on remand, to "resolve the issue of retroactivity" after calculating the proper alimony award, if any. Id., 174–78. Third, this court concluded that the trial court erroneously determined that it lacked subject matter jurisdiction to entertain the defendant's claim seeking to modify or terminate alimony. Id., 178–80. Finally, this court upheld the finding of contempt against the defendant for his noncompliance with the unallocated order but concluded that the trial court erred by failing to recalculate the amount of the arrearage owed in relation to the contempt finding and abused its discretion by awarding excessive attorney's fees and costs with respect to

[6] "The scope of that hearing is limited. As discussed, when the alimony order is determined from the [unallocated order], the court will need to consider the financial resources of the defendant. This necessarily implicates considering the impact of the college expenses on his ability to pay any new alimony award. . . . This evaluation, however, does not require the court to revisit the college expense order and modify it. Moreover, the limited scope of the hearing, in this case, does not require a court to reconsider long settled property distribution amongst the parties." (Citation omitted.) *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 174 n.22.

the 2012 motion for contempt. Id., 180–85. This court directed the trial court, on remand, to recalculate the arrearage. Id., 183. In sum, this court affirmed the trial court's finding of contempt, but we reversed the court's financial orders and award of attorney's fees and costs, and remanded the case for further proceedings. Id., 185.

On July 11, 2016, the defendant submitted a request to amend the 2014 motion to modify, which the court, *Colin, J.*, granted on August 1, 2016. In support of the 2014 motion to modify, as amended, the defendant alleged that (1) there had been a downturn in his financial circumstances, (2) the plaintiff sold her residence for a considerable sum and relocated to a less costly residence, and (3) his health had deteriorated significantly.

Following this court's remand in the 2014 appeal and cross appeal, the trial court, *Diana, J.*, held hearings from October 16 through 18, 2017, on the following motions: (1) the defendant's May, 2011 motion to modify; (2) the defendant's August, 2011 amended motion to modify; (3) the defendant's 2012 motion to modify; (4) the plaintiff's 2012 motion for contempt; and (5) the defendant's 2014 motion to modify, as amended. By way of a memorandum of decision issued on October 26, 2017, the court entered the following orders. First, the court unbundled the unallocated order, determining that the child support component amounted to \$3000 and the alimony component amounted to \$17,000. Second, the court granted the May, 2011 motion to modify, terminating the defendant's \$3000 monthly child support obligation as of June 30, 2011. Third, the court denied the August, 2011 amended motion to modify. Fourth, the court granted the 2012 motion to modify, reducing the defendant's alimony obligation to \$7500 per month as of July, 2012. Fifth, observing that Judge Schofield's finding of contempt against the defendant had been affirmed but that the associated award of

attorney's fees and costs had been vacated with directions on remand, the court ordered the defendant to pay $4680 in attorney's fees pursuant to General Statutes § 46b-87. Sixth, the court granted the 2014 motion to modify, as amended, reducing the defendant's alimony obligation to $4000 per month as of July, 2016. Finally, the court recalculated the alimony arrearage to be $628,000 and found that, as of October 18, 2017, the defendant had paid the plaintiff $618,627 of the balance due and owing. The court ordered the defendant to pay any payments due to the plaintiff by way of a monthly $1000 alimony payment, unless otherwise agreed to by the parties. The plaintiff moved for reargument of the court's judgment, which the court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the applicable standard of review governing our resolution of the plaintiff's claims. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases . . . . With respect to the factual predicates for modification of an alimony . . . award, our standard of review is clear. . . .

"Appellate review of a trial court's findings of fact is governed by 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. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; internal quotation marks omitted.) *Fulton* v. *Fulton*, 156 Conn. App. 739, 744–45, 116 A.3d 311 (2015).

I

We first address the plaintiff's claims regarding the granting of the defendant's 2012 motion to modify. Specifically, the plaintiff asserts that the court (1) improperly determined that the defendant's payment of the children's college expenses constituted a substantial change in circumstances warranting modification of alimony and (2) failed to consider the entirety of the parties' respective financial circumstances.[7] We disagree.

A

The plaintiff claims that the court erroneously determined that the defendant's payment of the children's

[7] The plaintiff raises two additional claims with respect to the 2012 motion to modify that require minimal discussion. First, the plaintiff asserts that, by granting the 2012 motion to modify and reducing her alimony award on the basis of the defendant's payment of the children's college expenses, the court in effect modified the educational support provision of the agreement and made the plaintiff liable for the college expenses. We find no merit in the plaintiff's constrained interpretation of the court's decision.

Second, the plaintiff contends that the defendant, rather than seeking modification of alimony, should have sought modification of the educational support order pursuant to General Statutes § 46b-56c (h) on the basis of his payment of the college expenses. We disagree. Pursuant to the agreement, the defendant was entitled to seek modification of alimony after July 1, 2012, predicated on a substantial change in circumstances. The plaintiff cites to no appellate authority, and we are aware of none, supporting her proposition that the defendant was obligated to seek modification of the educational support order, rather than alimony, on the ground that the college expenses were substantial.

college expenses constituted a substantial change in circumstances warranting modification of alimony. Specifically, the plaintiff asserts that the court's reduction of her alimony award on the ground that the defendant paid the college expenses was improper because the agreement required the defendant to pay the college expenses and contained no express provision permitting the modification of alimony on the basis of the defendant's payment of those expenses. We are not persuaded.

"[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony [or child support], the applicable provision of the statute is § 46b-86 (a),[8] which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Citation omitted; footnote altered; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 671–72, 81 A.3d 215 (2013).

[8] General Statutes (Rev. to 2011) § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ."

In granting the 2012 motion to modify, the court observed that, pursuant to the agreement, the defendant agreed to be "responsible for the costs of undergraduate college . . . for the three minor children." (Internal quotation marks omitted.) The court continued: "In the fall of 2011, the parties' twin daughters attended the University of Vermont and the George Washington University and, in 2012, their son attended Iona College. The parties do not dispute that these expenses, per child, ranged from $40,000 to $60,000 each year and that they were paid for by the defendant. The parties' daughters completed college in four years; their son went to college for a fifth year. In total, the defendant paid for thirteen years of college for the three children. Additionally, he paid for their associated expenses of attending college, which they charged on his credit card. . . . The defendant stated that, in just two years, his children charged a total of $130,000. The defendant also paid for tutors; in 2011, his son's tutor cost $87,500. In the [2012 motion to modify], the defendant asserted a substantial change in circumstances due in part to these college expenses. The defendant claimed . . . that college tuition increased 100 percent since the 2004 dissolution judgment. The magnitude of the college and related payments represents a substantial change in circumstances." Additionally, at the outset of its memorandum of decision, the court stated that it found the defendant's testimony to be credible.

The court did not determine that the defendant's payment of the college expenses alone constituted a substantial change in circumstances; instead, the court, citing the large sums that the defendant had expended in college expenses and the significant increase in the cost of tuition since the time of dissolution, concluded that the *magnitude* of the college and related expenses that the defendant had paid constituted a substantial change in circumstances. Although the agreement

required the defendant to pay for the college expenses, the agreement also provided that alimony was modifiable after July 1, 2012, upon a trial court determining that a substantial change in circumstances had occurred. As found by the trial court, the considerable cost of the college expenses paid by the defendant was a substantial change in circumstances, a finding we leave undisturbed, and, thus, the court did not err in relying on that ground to modify alimony.[9]

B

The plaintiff also thinly claims that the court failed to consider the entirety of the parties' financial circumstances in granting the 2012 motion to modify. We disagree.

In the 2012 motion to modify, the defendant alleged that there had been a downturn in his financial circumstances. With respect to that assertion, the court made the following findings. In 2012, the defendant's gross monthly income was approximately $90,000 and his net monthly income was approximately $60,000, constituting an increase of approximately $20,000 in the defendant's net monthly income relative to the time of dissolution. Moreover, in 2012, the defendant's monthly expenses totaled $66,000 and his unsecured liabilities totaled over $5,000,000, whereas at the time of dissolution the defendant's monthly expenses totaled $16,800 and his liabilities totaled $964,000. The $5,000,000 in

[9] The plaintiff also claims that, if the defendant's payment of the college expenses warranted a downward modification of alimony, then the court should have increased the plaintiff's alimony award once the defendant had satisfied his obligation to pay the college expenses. The court did not base its decision granting the 2012 motion to modify and reducing the plaintiff's alimony award on the magnitude of the children's college expenses alone; rather, the court also determined that the significant increase in the defendant's expenses and liabilities since the time of dissolution constituted a substantial change in circumstances warranting modification of alimony. Thus, the plaintiff's claim fails.

unsecured liabilities was comprised primarily of insurance refund claims. Beginning in 2007, several insurers determined that certain payments made to the defendant, who is a self-employed dentist specializing in dental reconstructive surgery, pursuant to his patients' insurance plans were not covered by the plans and, as a result, the insurers demanded a refund of those payments. Since 2015, this " 'clawback' " action has cost the defendant approximately $1,000,000. Moreover, there is a twenty count action pending against the defendant in New York, sounding in, inter alia, unjust enrichment in relation to the refund claims. The court concluded that the significant increase in the defendant's expenses and liabilities from the time of dissolution to 2012 constituted a substantial change in circumstances.

Additionally, in a prior section of its memorandum of decision setting forth additional findings of fact, the court found that the plaintiff was sixty-two years old, healthy, had a high school degree, studied art history in college for one and one-half years, worked as a flight attendant for ten years, had been unemployed since 2008 following her most recent job selling shoes at a boutique, and had lived with her parents since January, 2017.

At the outset of its memorandum of decision, the court stated that it had considered all of the evidence presented, it had taken judicial notice of the entire court file, and it had found the defendant's testimony credible. Upon our review of the record before us, we conclude that the court properly considered the parties' respective financial circumstances in adjudicating the 2012 motion to modify.

II

We next turn to the plaintiff's claims regarding the judgment of the court granting the defendant's 2014 motion to modify, as amended. Specifically, the plaintiff asserts that the court (1) erroneously found that the

defendant continued to suffer from cellulitis at the time of the proceedings on remand and improperly engaged in speculation by considering the defendant's risk of developing future medical conditions and (2) failed to consider the entirety of the parties' respective financial circumstances. These contentions are unavailing.

A

The plaintiff asserts that the court erroneously found that the defendant continued to suffer from cellulitis at the time of the proceedings on remand and improperly engaged in speculation by considering the defendant's risk of developing future medical conditions. We are not persuaded.

In his 2014 motion to modify, as amended, the defendant alleged, inter alia, that his health had deteriorated significantly. Specifically, he alleged that: he had been diagnosed with cancer; his prostate was removed in December, 2015, requiring him to be under close medical supervision and causing him to suffer from incontinence; and he suffered from cellulitis,[10] which required him to be hospitalized in 2015 and caused a permanent disability of his right leg.

During the proceedings on remand, the defendant testified that in May, 2015, he developed cellulitis in his right leg, causing him to miss approximately two months of work. He also testified that, although the cellulitis had dissipated after he had been treated with antibiotics, the cellulitis had caused partial numbness in his right leg and, as a result, he no longer drives or performs long surgeries that require him to stand for extended periods of time. Furthermore, the defendant testified that, as a result of the numbness in his leg, he slipped while performing surgery on one of his patients

[10] "Cellulitis is a bacterial skin infection that occurs in the subcutaneous tissue or the dermis, which results in inflammation." *Mulcahy* v. *Hartell*, 140 Conn. App. 444, 446 n.2, 59 A.3d 313 (2013); see also Stedman's Medical Dictionary (27th Ed. 2000) p. 317 (defining cellulitis as "[i]nflammation of subcutaneous, loose connective tissue").

and nicked the patient's nerve with a scalpel that he was holding. The patient subsequently instituted legal proceedings against him. In addition, Angelo Acquista, the defendant's treating physician whose deposition testimony was admitted into evidence in lieu of trial testimony, testified, inter alia, that the defendant currently did not suffer from cellulitis, but that the prior cellulitis had contributed in whole or in part to the disability of the defendant's right leg and that the defendant had a predisposition for recurrent cellulitis. Dr. Acquista also recommended that the defendant retire from his dental practice because his job required him to stand for long periods of time, which predisposed him to develop ailments, such as a pulmonary embolism,[11] which is a potentially life threatening condition.

Against this backdrop, the court made the following relevant findings with respect to the defendant's health. According to Dr. Acquista, the defendant is at risk for recurrent cellulitis. The defendant "is not only predisposed to recurrent cellulitis but is also experiencing the symptoms of his *current cellulitis*, including abnormal sensations such as swelling and pain, when he stands for a protracted period of time." (Emphasis added.) As a result of the numbness in his leg, the defendant slipped while performing surgery on one of his patients and hit the patient's nerve with a scalpel, which led to the patient commencing legal proceedings against him. The defendant no longer drives or performs long surgeries. Moreover, Dr. Acquista recommended that the defendant retire from his dental practice to avoid developing additional serious medical conditions. The court concluded that the defendant's significant health issues, among other things, constituted a substantial change in circumstances.

[11] A pulmonary embolism is a blood clot in the lung. *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 545 n.3, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013).

The plaintiff asserts that, in light of Dr. Acquista's testimony, the court's finding that the defendant had "current cellulitis" was clearly erroneous. In response, the defendant argues that, in using the phrase "current cellulitis," the court was discussing the lasting effects of the defendant's prior cellulitis, of which there is ample evidence in the record. We agree with the defendant. Although the court referenced the defendant's "current cellulitis," it is evident that the focus of the court's statement was the symptoms that the defendant continued to experience as a result of the prior cellulitis that had afflicted him in 2015. The defendant and Dr. Acquista provided sufficient testimony detailing the consequences of the prior cellulitis on the defendant's current health. In addition, before referring to the defendant's "current cellulitis," the court found that the defendant was at risk for *recurrent* cellulitis, which belies the suggestion that the court found that the defendant was suffering from an active bout of cellulitis at the time of the proceedings on remand.

We also reject the plaintiff's claim that the court improperly engaged in speculation and conjecture by considering the defendant's risk of developing future medical conditions. Although it is axiomatic that a finder of fact may not engage in speculation or conjecture; *Hammel* v. *Hammel*, 158 Conn. App. 827, 834, 120 A.3d 1259 (2015), citing *State* v. *Bharrat*, 129 Conn. App. 1, 15, 20 A.3d 9, cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011); the court's findings regarding the defendant's risk of developing future medical conditions, which the plaintiff does not challenge as clearly erroneous, are supported by the evidence in the record. In short, the court did not engage in speculation or conjecture; rather, the court, acting within its proper discretion, considered the defendant's undisputed risk of developing future health problems in concluding that

a substantial change in circumstances had occurred on the basis of the defendant's health.

B

The plaintiff also cursorily claims that the court, in granting the 2014 motion to modify, as amended, failed to consider the entirety of the parties' financial circumstances. We disagree.

In the 2014 motion to modify, as amended, the defendant alleged that there had been a downturn in his financial circumstances. With respect to that claim, the court found as follows. In 2017, the defendant's gross monthly income was $6636, his net monthly income was $5716, and his monthly expenses were $14,900. In 2016, his gross income was $465,000, which largely was comprised of delayed payments he received for prior work he had performed. Earlier in its memorandum of decision, the court had found that, in 2012, the defendant's gross monthly income was approximately $90,000, his net monthly income was approximately $60,000, and his monthly expenses were $66,000. In addition, the defendant's dental practice relies on referrals from other physicians. In the past, the defendant averaged between twenty to twenty-five referrals per month, whereas the defendant averaged between two to three referrals per month at the time of the proceedings on remand. The court concluded that the defendant's reduction in income since 2012 and increased expenses, along with his significant health issues, constituted a substantial change in circumstances. As set forth earlier in this opinion, with respect to the plaintiff, the court found, inter alia, that she had been unemployed since 2008 and had been living with her parents since January, 2017.

We reiterate that, at the outset of its memorandum of decision, the court stated that it had considered all of the evidence presented, it had taken judicial notice of the entire court file, and it had found the defendant's testimony credible. Upon our review of the record before

us, we conclude that the court properly considered the parties' respective financial circumstances in adjudicating the 2014 motion to modify, as amended.

III

Finally, we address the plaintiff's claim that, in granting the defendant's 2012 motion to modify and the defendant's 2014 motion to modify, as amended, the court erroneously modified the defendant's alimony obligations retroactively. Specifically, the plaintiff asserts that (1) the court improperly prohibited her from offering testimony relevant to the court's decision regarding whether to modify alimony retroactively, and (2) the defendant, by having been found in contempt for violating the unallocated order, had unclean hands and, thus, was not entitled to retroactive modification of alimony. We are not persuaded.

Pursuant to § 46b-86 (a), "[n]o order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50." "Although there is no bright line test for determining the date of retroactivity of child support [or alimony] payments, this court has set forth factors that may be considered. Specifically, in *Hane* [v. *Hane*, 158 Conn. App. 167, 176, 118 A.3d 685 (2015)], we expressly noted that a retroactive award may take into account the long time period between the date of filing a motion to modify, or . . . the contractual retroactive date, and the date that motion is heard . . . . The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes." (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, 172 Conn. App. 767, 780, 162 A.3d 32 (2017).

During the proceedings on remand, the plaintiff argued that, in the event that the court granted the defendant's motions seeking to modify alimony, the defendant was not entitled to retroactive modification of alimony. The plaintiff asserted that the defendant was appearing before the court with unclean hands stemming from his failure to comply with the unallocated order, which resulted in a finding of contempt against him, which this court affirmed. The plaintiff contended that the defendant's "self-help" measures had caused her harm, as she was dependent on the payments made by the defendant pursuant to the unallocated order. Accordingly, the plaintiff argued, it was inequitable to award the defendant retroactive modification of his alimony obligations.

In its memorandum of decision, the court stated in relevant part: "The plaintiff argues that the defendant's self-help measures should not be ignored because [they] caused her harm. Specifically, the defendant left the plaintiff with no income to cover her expenses, and, consequently, she was forced to live off her savings, which are now significantly depleted. The plaintiff is seeking to maintain the order of $20,000 per month from May, 2011 through October, 2017, minus payments made and adjusted by the unbundling of the unallocated order. The defendant argues that the plaintiff never returned to work and is in good health. The plaintiff is eligible to receive social security benefits, though at a reduced rate if taken now rather than waiting until she is eligible to receive full benefits. The defendant reminds the court that these motions were filed five and six years ago, and that the lack of financial relief has caused the defendant to overpay the plaintiff, as he believes he was entitled to a modification." The court proceeded to grant the defendant's 2012 motion to modify and 2014 motion to modify, as amended, and to enter modified alimony orders that were applied retroactively.

A

We first turn to the plaintiff's claim that the court erred in prohibiting her from offering testimony that was relevant to the court's determination regarding whether to modify the defendant's alimony obligations retroactively. This claim is unavailing.

"[T]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Additionally, before a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Porter* v. *Thrane*, 98 Conn. App. 336, 342–43, 908 A.2d 1137 (2006).

During the hearings held on remand, the plaintiff's counsel called the plaintiff to testify. During direct examination, the plaintiff's counsel asked the plaintiff to explain how the defendant's noncompliance with the unallocated order had "affect[ed]" her. The defendant's counsel objected, arguing that the plaintiff's counsel improperly was attempting to introduce evidence of the consequential damages of the defendant's contemptuous conduct, which was not germane to the motions before the court. In response, the plaintiff's counsel asserted that the alleged harm suffered by the plaintiff as a result of the defendant's cessation of payments pursuant to the unallocated order was critical for the court to consider in determining whether to modify alimony retroactively. Following a lengthy argument, the court sustained the objection. Notwithstanding the court's ruling, the plaintiff, absent objection, proceeded to testify that, since May, 2011, she had no sources of

income or support other than the defendant's payments under the unallocated order and that, once the defendant had stopped remitting those payments, she was forced to deplete her savings to satisfy her various financial liabilities.

The plaintiff asserts that the court, by sustaining the objection of the defendant's counsel to the question directed to her concerning the effect of the defendant's contemptuous conduct, improperly denied her the opportunity to testify about the consequences of the defendant's contemptuous conduct and that such testimony would have provided the court with a stronger foundation upon which to deny the defendant retroactive modification of his alimony obligations. Assuming, without deciding, that the court abused its discretion by sustaining the objection, the plaintiff has failed to demonstrate that the alleged error was harmful. Although the court initially sustained the objection raised by the defendant's counsel, the plaintiff subsequently offered testimony, absent objection, regarding the consequences of the defendant's conduct. In addition, in its memorandum of decision, the court expressly considered the plaintiff's argument that the defendant's conduct had harmed her. Thus, we reject the plaintiff's claim.

B

We next turn to the plaintiff's claim that the court erred in modifying the defendant's alimony obligations retroactively because the defendant had unclean hands as a result of his violation of the unallocated order, for which he was found in contempt. She asserts that, in light of the substantial damages that she suffered as a result of the defendant's contemptuous conduct, it was inequitable for the court to modify alimony retroactively while awarding her only $4680 in attorney's fees in relation to the 2012 motion for contempt.[12] We disagree.

[12] The plaintiff does not claim that the amount of attorney's fees awarded to her in relation to the 2012 motion for contempt was erroneous. We construe her claim on appeal to challenge only the retroactivity of the

In its memorandum of decision, after setting forth the plaintiff's argument in opposition to the retroactive modification of alimony, the court acknowledged the defendant's arguments raised in support of modifying alimony retroactively, namely, that the plaintiff was in good health yet unemployed, the plaintiff was eligible to receive reduced social security benefits, the motions to modify were several years old, and, on the basis of his belief that he was entitled to a modification of the unallocated order, the defendant had overpaid the plaintiff. The plaintiff cites to no appellate authority, and we are aware of none, to support her contention that the finding of contempt against the defendant *required* the court to deny the retroactive modification of alimony. We conclude that the court did not abuse its discretion in modifying alimony retroactively under the circumstances of this case.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

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modified alimony orders entered in relation to the defendant's 2012 motion to modify and the defendant's 2014 motion to modify, as amended.

[13] The plaintiff also appears to challenge the court's determination that the recalculated alimony arrearage totaled $628,000. Specifically, the plaintiff asserts that the court erroneously found that a $100,000 payment made by the defendant to her in November, 2011, brought the defendant current with respect to the arrearage owed at that time, arguing that she testified during the proceedings on remand that, following the $100,000 payment, there remained a $20,000 arrearage for which the court failed to account. We disagree. In its memorandum of decision, the court found that in November, 2011, the defendant paid the plaintiff $100,000, bringing him current with respect to the arrearage he owed through *September*, 2011. During the proceedings on remand, the plaintiff testified that, prior to the $100,000 payment, there was a $120,000 arrearage as of *October*, 2011. Thus, there is no conflict between the plaintiff's testimony and the court's finding.

EDWIN LEON, JR. *v.* COMMISSIONER OF CORRECTION (AC 41039)

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

Syllabus

The petitioner, who had been convicted of manslaughter in the first degree with a firearm and carrying a revolver without a permit in connection with the shooting death of the victim, sought a writ of habeas corpus. He claimed that he was deprived of the effective assistance of counsel when, without his knowledge or consent, trial counsel stated during closing argument to the jury that the petitioner bore some responsibility for the victim's death and that the petitioner had been reckless. The petitioner had fatally shot the victim when he put a loaded and cocked handgun to her throat after they had returned home from a night of drinking. The petitioner testified that he and the victim had been arguing and that he had pulled out the gun to calm the victim down, but that the gun discharged. The petitioner thereafter was charged with, inter alia, murder. His trial counsel argued to the jury that although the petitioner was responsible for the victim's death, the shooting was not intentional and might have been the result of the petitioner's reckless behavior, and that the jury should find the petitioner guilty of the lesser included offense of criminally negligent homicide. The petitioner alleged ineffective assistance of trial counsel in his amended petition for a writ of habeas corpus. The habeas court analyzed the claim under the test set forth in *Strickland* v. *Washington* (466 U.S. 668) for determining whether a petitioner received ineffective assistance. The court rendered judgment denying the habeas petition, concluding that under *Strickland*, the petitioner failed to prove both that his trial counsel's performance was deficient and that he was prejudiced by that deficient performance. The court determined that although trial counsel breached his professional duty to consult with the petitioner before arguing to the jury as he did, counsel's actions did not come within the scope of the exception under *United States* v. *Cronic* (466 U.S. 648), which relieves a habeas petitioner of having to demonstrate prejudice when his counsel entirely fails to function as an advocate and does not subject the state's case to meaningful adversarial testing. The habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed that trial counsel's statements to the jury violated his right to client autonomy under the sixth amendment and that the habeas court improperly determined that he had not been denied the effective assistance of counsel as a result thereof. *Held*:

1. This court declined to consider the petitioner's claim that his trial counsel's conduct violated his sixth amendment right to client autonomy; the petitioner's amended habeas petition did not explicitly or implicitly set forth a claim that his right to client autonomy was violated, all of the

alleged constitutional violations in the habeas petition fell within the ambit of the solitary legal claim that was alleged, which was that the petitioner was denied his constitutional right to the effective assistance of counsel, the habeas court conducted its analysis under *Strickland* and focused solely on the ineffective assistance claim and did not address the right to client autonomy claim, and that court's reasoning supported the interpretation that the petitioner did not plead a violation of the right to client autonomy.

2. The habeas court properly determined that the petitioner was not deprived of the right to the effective assistance of counsel:

a. The habeas court properly determined that *Strickland*, and not *Cronic*, applied and that the burden of demonstrating prejudice remained with the petitioner; the actions of the petitioner's trial counsel, which were reasonably calculated to further the petitioner's interest in avoiding a conviction of the more serious charge of murder, did not amount to nonrepresentation of the petitioner and, thus, warranted the application of *Strickland*, under which the petitioner bore the burden to prove that he was prejudiced as a result of any deficient performance by his counsel, and the habeas court properly concluded that trial counsel clearly attempted to perform his duties as the petitioner's legal advocate and that there had been no complete failure of representation.

b. The petitioner's claim that the habeas court improperly concluded that he was not prejudiced by his trial counsel's statements to the jury was unavailing, the petitioner having failed to establish a reasonable probability that the result of the trial would have been different had counsel not made the challenged comments; it was very unlikely that the jury would have reached a different verdict even if the petitioner's trial counsel had not made the challenged comments during closing argument, as there was no dispute that the petitioner shot the victim and caused her death, the question was whether the victim's death was the result of an accident or conduct that rendered the petitioner criminally liable, the trial court instructed the jury on the crime of murder and lesser included offenses, and the state presented significant evidence that supported the jury's verdict of guilty of the lesser included offense of reckless manslaughter in the first degree with a firearm.

Argued November 28, 2018—officially released April 30, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Mark Rademacher, assistant public defender, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Michael J. Proto*, assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The focus of the petitioner Edwin Leon, Jr.'s, appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus is on the conduct of his criminal trial counsel during closing argument. On appeal, the petitioner claims that (1) that conduct violated his right to client autonomy under the sixth amendment to the United States constitution, and (2) the habeas court improperly determined that the petitioner had not been denied the effective assistance of counsel by that conduct. We conclude that the former was not pleaded or decided by the habeas court and therefore is not properly before this court. With respect to the latter, the petitioner's claim of ineffective assistance of counsel fails, as he did not establish prejudice. Accordingly, we affirm the judgment of the habeas court.

Following a jury trial, the petitioner was convicted of manslaughter in the first degree with a firearm (reckless indifference) in violation of General Statutes §§ 53a-55 (a) (3) and 53a-55a, and carrying a revolver without a permit in violation of General Statutes § 29-35. In affirming the petitioner's conviction, this court set forth the following facts which the jury reasonably could have found. "The [petitioner] and the victim, Krisann Pouliot, had been in a romantic relationship for three years and lived in the home of Pouliot's mother in East Hartford. On May 19, 2012, after a night of drinking and arguing, the [petitioner] and Pouliot returned home where the [petitioner] fatally shot Pouliot in the neck.

The [petitioner] subsequently was arrested and charged in an amended long form information with murder in violation of General Statutes § 53a-54a and carrying a revolver without a permit in violation of § 29-35.

"A jury trial began on September 29, 2013, before the court, *Mullarkey, J.* The [petitioner] testified as to the following. On the night of the shooting, the [petitioner] and Pouliot drank a bottle of champagne before they left home for downtown Hartford at about 10 p.m. While downtown, the [petitioner] and Pouliot each consumed approximately four to five alcoholic beverages. The [petitioner] stated that when he went to downtown Hartford, he regularly carried a revolver due to incidents that had taken place there previously. The [petitioner] did not have a permit to carry a revolver. At some point while at various clubs in Hartford, the [petitioner] and Pouliot began to argue about the attention that the [petitioner] was paying to other women. Later that evening, the [petitioner] and Pouliot drove home, where the [petitioner] took the gun from the car and brought it upstairs. In their shared bedroom, the [petitioner] and Pouliot continued to argue with escalating intensity. At some point, the [petitioner] pushed Pouliot onto the bed, placed his left hand around her neck, and held his gun to her neck with his right hand. The [petitioner] stated that he pulled out his gun to calm [Pouliot] down. With his left hand still around Pouliot's neck, the gun discharged and the bullet entered Pouliot's neck and exited, severing a finger on the [petitioner's] left hand.

"According to the [petitioner], after shooting Pouliot, he held her for a few minutes as she gasped for breath. The [petitioner] then picked up the gun, put on a sweatshirt, and left the premises without reporting the incident to anyone. The [petitioner] walked to his mother's house, which took him approximately forty-five minutes, during which time he did not summon help for

Pouliot or alert anyone to the shooting. The [petitioner] testified that he never intended to shoot the gun and did not pull the trigger intentionally. After arriving at his mother's home, the [petitioner] told his mother, brother, and the mother of his child what had taken place, at which point the police were called. Matthew Martinelli, an East Hartford firefighter paramedic, testified that upon his arrival, it was immediately clear that Pouliot was not breathing and, after failing to detect a heartbeat, he determined that she was dead. . . .

"During defense counsel's closing argument to the jury, he stated: I suggest again that this was not intentional, and the circumstances surrounding this, I suggest, indicate that it wasn't intentional. I think he panicked after this happened. He should have gotten help immediately, but did not lawyer up, did not run, I mean, not run away, but he ran away from the scene, but he didn't try to run, he didn't flee the state, didn't do any of that, and told everybody who asked what happened. Stupid, maybe reckless, definitely stupid, in fact it's so stupid that I have trouble getting—wrapping my mind around that it was intentional. It was, you just—and the hammer back, carrying a weapon with the hammer back, he had no training, you heard him testify to that, no firearms training, obviously, because the first thing you're taught is, you don't do that, you don't carry a weapon with a round in the chamber, even.

"I'm asking that you consider when you are deliberating that there is a life that was lost and my client is responsible in some way, there's no question about that. The question is, responsible for what of the charges that you'll hear when the judge reads the charge. I suggest that this was an accident. It may have been reckless behavior, but it was not intentional. I'm suggesting that he certainly should be convicted on the gun and on criminally negligent homicide; there is a life lost, but again, in my mind this just does not appear,

does not sound like an intentional shooting." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Leon*, 159 Conn. App. 526, 528–31, 123 A.3d 136, cert. denied, 319 Conn. 949, 125 A.3d 529 (2015).

With respect to the homicide, the court instructed the jury on the crime of murder, and the lesser included offenses of manslaughter in the first degree with a firearm (intentional), manslaughter in the first degree with a firearm (reckless indifference) and criminally negligent homicide. Id., 531. The petitioner was found not guilty of the murder charge, and guilty of manslaughter in the first degree with a firearm (reckless indifference) and carrying a revolver without a permit. Id. Following the verdict, the court sentenced the petitioner to a total effective term of thirty-one years imprisonment. Id. This court affirmed the petitioner's conviction on direct appeal.[1] Id., 527–28.

On September 23, 2014, the self-represented petitioner commenced the present action by filing a petition for a writ of habeas corpus. On November 7, 2016, habeas counsel filed an amended petition alleging the single legal claim of ineffective assistance of trial counsel. The habeas court, *Sferrazza, J.*, conducted a two day trial on April 11 and 25, 2017. On October 4, 2017, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus.

[1] In his direct appeal, the petitioner claimed that "his counsel's decision to concede his client's guilt to the lesser included offenses during closing argument, without the [petitioner's] consent appearing on the record, violated the [petitioner's] right to plead not guilty, his right to testify, his right to have the state prove him guilty beyond a reasonable doubt and, finally, his right to have the effective assistance of counsel." *State* v. *Leon*, supra, 159 Conn. App. 531. This court emphasized that the petitioner's appellate claims were "predicated upon the . . . overarching claim of his counsel's ineffective assistance." Id. Accordingly, we affirmed the judgment on the basis of an insufficient evidentiary record. Id., 535–36.

The habeas court noted that in the amended petition, the petitioner had alleged that his criminal trial counsel, Attorneys Donald Freeman and Deron Freeman, had provided ineffective assistance. The basis for this allegation was Donald Freeman's concession, without the petitioner's knowledge or consent, during closing argument, that the petitioner bore some responsibility for the victim's death and that the petitioner had been reckless. The court reasoned that a lawyer's acknowledgment of the commission of some aspect of the state's allegations does not amount to ineffective assistance per se. Furthermore, in the absence of exceptional circumstances, the two part test of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applied to a claim of ineffective assistance of counsel.

The habeas court recognized that, in rare situations, a petitioner is not required to demonstrate prejudice resulting from a lawyer's deficient performance. "If the exceptional circumstances are present, then the holding of *United States* v. *Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), controls, and a habeas petitioner is relieved of the burden of proving that defense counsel's concessions actually prejudiced the petitioner."

The habeas court determined that the *Cronic* exception applies only when counsel entirely fails to function as an advocate and does not subject the state's case to meaningful adversarial testing. The court concluded that Donald Freeman's actions in the present case did not come within the scope of the *Cronic* exception and, therefore, the petitioner retained "his obligation to demonstrate defense counsel's deficient actions or inactions prejudiced him, as set forth under the second prong of the *Strickland* standard, before he can prevail."

The habeas court then applied the relevant legal principles to the facts of the present case. First, it set forth

the principal issue at the petitioner's criminal trial. "The incontrovertible evidence was that the petitioner's action in placing a loaded pistol against the victim's neck while engaged in a physical tussle resulted in her fatal shooting. The disputed issue was the petitioner's state of mind when he took that action."

Next, the habeas court considered the petitioner's argument that Donald Freeman had conceded his guilt without his consent. The court concluded that Donald Freeman had not informed the petitioner, prior to closing argument, of his intentions to state to the jury that the petitioner's actions of placing a loaded and cocked handgun to the victim's throat during a physical struggle was "definitely stupid and reckless." (Internal quotation marks omitted.) After reviewing the United States Supreme Court's opinion in *Florida* v. *Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the habeas court concluded: "The trial advocate's duty, then, is to communicate timely and clearly to the defendant the reasons leading the attorney to acknowledge some responsibility on the part of the client and the benefits expected to accrue from that action. Counsel must consult with a defendant and seriously consider the client's position on the strategy before embarking on the course, but the client's consent is not a prerequisite for such a concession.

"To be clear, the court determines that Attorney Donald Freeman breached the professional duty to consult with the petitioner and receive his input, if any, before arguing as he did . . . . However, that determination does not conclude analysis of the performance prong of the *Strickland* test. The court must also resolve the question of whether the petitioner has proved, by a preponderance of the evidence, that conceding that the petitioner's reckless behavior contributed causally to the victim's demise falls outside of the broad spectrum of reasonable representation. Of course, the prejudice

component of the *Strickland* criteria also remains to be determined." (Citation omitted.)

Ultimately, the court concluded that the petitioner had failed to sustain his burden of proving deficient performance by Donald Freeman. It also determined that the petitioner had failed to prove prejudice, the second prong of the *Strickland* test. Accordingly, the habeas court denied the petition for a writ of habeas corpus. Upon the habeas court's granting of the petition for certification to appeal, this appeal was filed. Additional facts will be set forth as necessary.[2]

I

The petitioner first claims that his defense counsel's conduct during closing argument of his criminal trial violated his right to client autonomy under the sixth amendment to the United States constitution. Specifically, he argues that his defense counsel was constitutionally obligated to honor his choice to defend against the criminal charges filed by the state and was not permitted to override the petitioner's decision. Furthermore, the petitioner contends that this issue rises to the level of structural error and therefore is not subject to harmless error analysis.[3] In his reply brief, the petitioner relies on *McCoy* v. *Louisiana*, U.S. , 138

[2] The respondent, the Commissioner of Correction, set forth an alternate ground for affirming the judgment of the habeas court. Specifically, he argues that the petitioner and the habeas court focused solely on the conduct of Attorney Donald Freeman. He further contends that the court never made a factual finding as to whether Attorney Deron Freeman ever consulted with the petitioner and obtained his consent to the strategy employed by Donald Freeman during closing argument. As a result of our conclusions in parts I and II of this opinion, we need not reach the respondent's alternative grounds for affirmance.

[3] The petitioner also claims that one of the habeas court's findings of fact was clearly erroneous. In its memorandum of decision, the habeas court stated: "[T]he petitioner testified that if Attorney [Donald] Freeman has discussed this type of concession [that occurred during closing argument] with him, he would have opposed that strategy. He avowed that he rejected a plea offer and chose to have a jury decide his fate. However, he also testified that he would have accepted a plea disposition involving a guilty

S. Ct. 1500, 200 L. Ed. 2d 821 (2018), which was released by the United States Supreme Court after he had filed his principal brief in the present case.

The respondent, the Commissioner of Correction, counters, inter alia, that "[t]he petitioner's attempt to cast his claim as one of client autonomy, rather than ineffective assistance, is a new invention on appeal which should not be entertained." Stated differently, the respondent argues that this court should not review the petitioner's client autonomy claim, as it was neither raised nor decided below, and, instead, we should limit our analysis to the claim of ineffective assistance of counsel, the sole issue presented to and decided by the habeas court. We agree with the respondent.

We begin our discussion with the following additional facts and detailed procedural history. The habeas petition initially filed by the self-represented petitioner specifically set forth a claim of ineffective assistance of counsel.[4] In the operative pleading, the amended petition filed by habeas trial counsel on November 7, 2016, the petitioner alleged a single claim of ineffective assistance of counsel.[5] In his pretrial brief, the petitioner

plea to manslaughter [in the] second degree. . . . It appears to the court that Attorney [Donald] Freeman's summation substantially comported with the petitioner's position." (Emphasis omitted.)

The petitioner argues that the court's finding regarding his willingness to accept a plea bargain was clearly erroneous. We need not reach this claim, given our conclusions in parts I and II of this opinion.

[4] The petitioner identified his claim of an illegal conviction as resulting from ineffective counsel. He further explained: "My lawyer was ineffective. He had a conflict. He argued to my jury that I was guilty of the offense I was convicted of. He never told me he was going to do that. I never agreed to my lawyer['s] tactic. I did not consent to it."

[5] Specifically, the amended petition for a writ of habeas corpus set forth the following: "*Trial counsel's acts and omissions*, as described below, *fell below the level of reasonable competence required of criminal defense lawyers within the State of Connecticut. But for counsel's actions and omissions, it is reasonably probable that the results of Petitioner's criminal matter would have been different* in that Petitioner would not have been convicted of the crimes described herein. As a result of the foregoing, Petitioner is illegally confined by the Respondent for the following reasons:

explained that his criminal trial counsel had employed a tactic that deprived him of certain rights, and by doing so, effectively denied him the right to effective assistance of counsel. In his posttrial brief, the petition again identified his claim as an ineffective assistance of counsel claim.[6]

In its October 4, 2017 memorandum of decision, the habeas court analyzed the petition as raising a claim of ineffective assistance of counsel against Donald Freeman and Deron Freeman. It applied the two-pronged test of *Strickland* v. *Washington*, supra, 466 U.S. 687, for determining whether the petitioner had received ineffective assistance of counsel. It did not independently consider whether the petitioner's right to client autonomy had been violated.

In the petitioner's principal brief to this court, he claimed, for the first time, that "[t]his is a case about a criminal defendant's constitutional right to make the basic decisions regarding the objectives of his defense, including his right to choose whether to admit guilt in order to get a lesser sentence or to defend against the [charges], seek an acquittal, and insist that the state

"a. Trial counsel conceded guilt without Petitioner's consent in violation of Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article first, § 8, of the Connecticut Constitution.

"b. Trial counsel's concession of guilt violated Petitioner's right to plead not guilty, to testify, to have the state prove him guilty beyond a reasonable doubt, and effectively denied him the right to assistance of counsel in his chosen plea of not guilty." (Emphasis added.)

[6] Specifically, the petitioner's posttrial brief contains the following statement: "The Petitioner, through counsel, amended the Petition on or around November 7, 2016, raising a claim of ineffective assistance against trial counsel for conceding guilt without the Petitioner's consent in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article first, § 8, of the Connecticut Constitution, ultimately violating the Petitioner's right to plead not guilty, to testify, to have the state prove him guilty beyond a reasonable doubt, and to pursue his chosen plea of not guilty."

prove his commission of the crime beyond a reasonable doubt." Later, he specifically argued that "[t]his case is not about the ineffective assistance of counsel or about whether an admission of guilt might sometimes be a reasonable strategy. *The client's autonomy, not the lawyer's competence, is at issue*." (Emphasis added.) As a result of this specific constitutional violation, he requested that this court order a new trial.

After the petitioner had filed his initial brief with this court, the United States Supreme Court issued its decision in *McCoy* v. *Louisiana*, supra, 138 S. Ct. 1500. In that case, the defendant, Robert McCoy, was charged with shooting and killing the mother, stepfather, and son of his estranged wife in Louisiana. Id., 1505–1506. A few days later, police in Idaho arrested the defendant and he subsequently was extradited to Louisiana. Id., 1506. A grand jury indicted the defendant on three counts of first degree murder, and the prosecutor provided notice of intent to seek capital punishment. Id. "[The defendant] pleaded not guilty. Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong." Id.

The defendant initially had been represented by assigned counsel, but after that relationship had broken down irretrievably, his parents hired Attorney Larry English to represent their son. Id. "English eventually concluded that the evidence against [the defendant] was overwhelming and that, absent a concession at the guilt stage that [the defendant] was the killer, a death sentence would be impossible to avoid at the penalty phase." Id. When, two weeks before the trial, English informed the defendant that he planned to concede that the defendant had committed the killings, the defendant was " 'furious' . . . ." Id. The defendant specifically instructed English to refrain from making that concession and to pursue an acquittal. Id.

The trial court refused the defendant's request to end English's representation and to obtain a different lawyer. Id. During his opening statement to the jury, English, over the defendant's protest, conceded that the defendant had committed the three murders. Id. During the defendant's testimony, he maintained his innocence; however, during closing argument and at the penalty phase English again conceded to the jury that the defendant had killed the three victims. Id., 1507. The Louisiana Supreme Court affirmed the defendant's conviction, concluding that "[t]he concession was permissible . . . because counsel reasonably believed that admitting guilt afforded [the defendant] the best chance to avoid a death sentence." Id.

The United States Supreme Court concluded that the decision to determine whether the assertion of innocence, rather than avoidance of capital punishment, was the objective of the defense, belonged to the client and not the attorney. Id., 1508. "If, after consultations with English concerning the management of the defense, [the defendant] disagreed with English's proposal to concede [that the defendant] committed three murders, it was not open to English to override [the defendant's] objection. English could not interfere with [the defendant's] telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that [the defendant's] mental state weighed against conviction." Id., 1509. Stated differently, "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." Id., 1510.

Next, the court distinguished the facts of *McCoy* from *Florida* v. *Nixon*, supra, 543 U.S. 175, because in *Nixon*, the client had been "generally unresponsive during discussions of trial strategy, and never verbally approved or protested counsel's proposed approach." (Internal

quotation marks omitted.) *McCoy* v. *Louisiana*, supra, 138 S. Ct. 1509. The court also determined that claims of a violation of a client's autonomy, pursuant to the sixth amendment, are distinct from and not within the analytical framework of *Strickland* v. *Washington*, supra, 466 U.S. 668, or *United States* v. *Cronic*, supra, 466 U.S. 648. *McCoy* v. *Louisiana*, supra, 1510–11. "Here . . . the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative." Id., 1511. Finally, the court concluded that a violation of a client's sixth amendment autonomy right is not subject to harmless error review and constituted structural error. Id.

In his brief, the respondent argued that the petitioner had raised a "new" claim, distinct from what had been presented to the habeas court. Specifically, he contended that the petitioner had raised an ineffective assistance of counsel claim at the habeas trial. The respondent maintains that it is contrary to our jurisprudence to permit the petitioner to change course for the appellate proceedings and allow him to present a claim that the petitioner's right of autonomy had been violated.[7] Finally, the respondent stated that "[t]he United States Supreme Court did not invent a new theory in *McCoy* v. *Louisiana*, [supra, 138 S. Ct. 1500] . . . . Rather, it applied prior holdings on the right of autonomy and agreed with academic writings and state court decisions that a defendant has a right not to have counsel concede guilt over his objection . . . and that a violation of this right is structural error . . . . This autonomy theory was thus available to the petitioner." (Citations omitted.) The petitioner relied on *McCoy* in his reply brief. We agree with the respondent.

[7] The respondent specifically argued: "Because the petitioner framed his claim as ineffective assistance of counsel, and asserted deficient performance and prejudice, he cannot now reinvent his claim as not about ineffective assistance." (Internal quotation marks omitted.)

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 167, 196 A.3d 1149, cert. denied, 330 Conn. 946, 196 A.3d 326 (2018); see also *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 780–81, 167 A.3d 952 (2017); *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 351, 27 A.3d 404 (2011), aff'd, 312 Conn. 345, 92 A.3d 944 (2014). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 166 Conn. App. 22, 32, 140 A.3d 414, cert. denied, 323 Conn. 905, 150 A.3d 679 (2016).

We have reviewed the November 7, 2016 amended petition for a writ of habeas corpus, the operative pleading in this case. The sole legal claim alleged therein is the ineffective assistance by the petitioner's criminal defense lawyers, Attorneys Donald and Deron Freeman. The amended petition further states that the ineffective assistance occurred due to (1) the concession of guilt without the petitioner's consent in violation of the fifth, sixth and fourteen amendments to the United States

constitution, and article first, § 8, of the Connecticut constitution, and (2) that the concession of guilt violated the petitioner's rights to plead not guilty, to testify, and to have the state prove him guilty beyond a reasonable doubt.

The amended petition for a writ of habeas corpus does not, explicitly or implicitly, set forth a claim that the petitioner's sixth amendment right to client autonomy was violated by the actions of criminal trial counsel. As the United States Supreme Court made clear in *McCoy* v. *Louisiana*, supra, 138 S. Ct. 1510–11, a claimed violation of the right to client autonomy is separate and distinct from one of ineffective assistance of counsel. Here, all of the alleged constitutional violations fell within the ambit of the solitary legal claim alleged in the operative pleading, that is, that the petitioner had been denied his constitutional right to the effective assistance of counsel. "[T]he interpretation of pleadings is always a question of law for the court . . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Footnote omitted; internal quotation marks omitted.) *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842, 878 A.2d 1088 (2005); see also Practice Book § 23-22.

Additionally, we note that in the habeas court's memorandum of decision, it focused its analysis solely on

the claim of ineffective assistance of counsel, and did not address the claim that the petitioner's right to client autonomy had been violated. The court conducted its legal analysis through the lens of the two prongs of *Strickland*, performance and prejudice. The habeas court's reasoning supports our interpretation that the petitioner did not plead a violation of the right to client autonomy.

"This court is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . and was ruled upon and decided by the court adversely to the [petitioner's] claim. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, supra, 185 Conn. App. 168–69; see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 126, 111 A.3d 829 (2015) (appellate review of claims not raised before habeas court would amount to ambuscade of that court); *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 369, 90 A.3d 368 (well established that appellate courts will not entertain claims not presented to habeas court but raised for first time on appeal), cert. denied, 314 Conn. 919, 100 A.3d 852 (2014). Put differently, "[h]aving not raised [an] issue before the habeas court, [a] petitioner is barred from raising it on appeal." (Internal quotation marks omitted.) *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 846 n.2, 171 A.3d 525 (2017).[8] For these reasons, we decline to consider the merits of the petitioner's claim that his sixth amendment right to client autonomy was violated in this case.

[8] We also note that in the petition for certification to appeal, the petitioner set forth the following issues: "1. Whether the court erred in finding that the Petitioner failed to prove ineffective assistance of counsel. 2. Whether the court erred in finding that there was no structural error or presumed prejudice. 3. Other such error or claims that arise out of a review of the transcripts and other records." Thus, the petitioner did not include a claim

II

The petitioner next claims that the habeas court improperly determined that he had not been denied the effective assistance of counsel. Specifically, he argues that the nature of the claimed deficient performance[9] warranted an application of the *Cronic* exception and, therefore, prejudice should have been presumed. In the alternative, he claims that he established prejudice, contrary to the conclusion of the habeas court. The respondent counters that the habeas court properly (1) concluded that the prejudice presumption of *Cronic* did not apply and (2) determined that the petitioner had failed to establish prejudice. We agree with the respondent.

Before addressing the specifics of the petitioner's claim, we identify the relevant legal principles and our standard of review. Criminal defendants have the constitutional right to the effective assistance of counsel at all critical states of criminal proceedings. *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 702, 177 A.3d 566 (2017); see also *Kellman* v. *Commissioner*

that his right to client autonomy had been violated in the petition for certification to appeal from the denial of his petition for a writ of habeas corpus.

[9] The habeas court determined that Attorney Donald Freeman had "breached the professional duty to consult with the petitioner and receive his input, if any, before arguing as he did [during closing argument]." Ultimately, the court concluded that the petitioner had failed to prove that Attorney Donald Freeman's conduct "fell below reasonable professional practice for defense lawyers." On appeal, the petitioner disagreed with this determination by the habeas court, arguing that Attorney Donald Freeman's performance had been deficient.

It is often stated that a habeas petitioner can prevail on a claim of ineffective assistance of counsel if he satisfies both the performance *and* the prejudice prongs of *Strickland*. See, e.g., *Francis* v. *Commissioner of Correction*, 182 Conn. App. 647, 652, 190 A.3d 985, cert. denied, 330 Conn. 903, 191 A.3d 1002 (2018); *Williams* v. *Commissioner of Correction*, 177 Conn. App. 321, 327, 175 A.3d 565, cert. denied, 327 Conn. 990, 175 A.3d 563 (2017). As a result of our conclusion in part II B of this opinion that the petitioner failed to demonstrate prejudice, we need not decide the performance issue. See *Williams* v. *Commissioner of Correction*, supra, 327.

of Correction, 178 Conn. App. 63, 69, 174 A.3d 206 (2017) (axiomatic that right to counsel is right to effective assistance of counsel).

"A claim of ineffective assistance of counsel as enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 668, consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Our Supreme Court has stated that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and that [j]udicial scrutiny of counsel's performance must be highly deferential. . . .

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . In making this determination, a court hearing an ineffectiveness claim [based on counsel's failure to investigate] must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . .

"A petitioner's claim will succeed only if both prongs are satisfied. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unworkable. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, supra, 178 Conn. App. 69–70.

In certain circumstances, however, a petitioner is relieved of the burden of proving prejudice. "In *United States* v. *Cronic*, [supra, 466 U.S. 659–60], which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a defendant at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so. Notably, the second scenario constitutes an actual breakdown of the adversarial process, which occurs when counsel completely fails to advocate on a defendant's behalf. . . .

"The United States Supreme Court has emphasized . . . how seldom circumstances arise that justify a court in presuming prejudice, and concomitantly, in forgoing particularized inquiry into whether a denial of counsel undermined the reliability of a judgment . . . ." (Citations omitted; internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 644–45, 153 A.3d 1264 (2017). Guided by these principles, we address the petitioner's specific claims in turn.

A

The petitioner first contends that the habeas court should have applied *Cronic* and presumed prejudice as a result of Donald Freeman's comments to the jury during closing argument. Specifically, he argues that "Freeman's admissions of [the] petitioner's guilt without consulting with [the] petitioner, who would have expressly directed counsel to the contrary, was a paradigm of a breakdown in the adversarial process under *Cronic*." The respondent counters that the habeas court properly determined that *Cronic*, and the corresponding presumption of prejudice, did not apply in the present case. We agree with the respondent.

Cronic established a narrow exception to the general two part *Strickland* test for determining whether a petitioner's constitutional right to the effective assistance of counsel has been violated. See *Smith* v. *Commissioner of Correction*, 89 Conn. App. 134, 137, 871 A.2d 1103, cert. denied, 275 Conn. 909, 882 A.2d 676 (2005). "*Cronic* instructed that a presumption of prejudice applies in certain limited circumstances when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel is so small that a presumption of prejudice is appropriate . . . . The court explained that no showing of prejudice is required when counsel is either totally absent or prevented from assisting the accused during a critical stage in the proceeding, when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing and when a defendant is denied the right of effective cross-examination. . . . The United States Court of Appeals for the Second Circuit has stated that [a]part from these rare instances . . . the *Strickland* two-part test of ineffectiveness generally applies. . . .

"The exception articulated in *Cronic* has become known as constructive denial of the assistance of counsel. . . . [C]ourts have been cautious in invoking *Cronic*'s dictum and its corresponding presumption of ineffectiveness. . . . [T]he [United States Court of Appeals for the] First Circuit has limited *Cronic*'s reach to extreme cases . . . the rare instance . . . and certain particularly egregious situations . . . . The United States Supreme Court recently emphasized just how infrequently the surrounding circumstances [will] justify a presumption of ineffectiveness . . . . *Florida* v. *Nixon*, [supra, 543 U.S. 175]." (Citations omitted; internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, supra, 89 Conn. App. 137–38.

The petitioner does not claim that he was denied counsel at a critical stage or that no competent attorney could have provided assistance in his circumstances; instead, he focuses his argument on the second *Cronic* scenario, that is, the petitioner's criminal trial counsel entirely failed to subject the state's case to meaningful adversarial testing. See, e.g., *Hutton* v. *Commissioner of Correction*, 102 Conn. App. 845, 855, 928 A.2d 549, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007); see also *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 555, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). "[C]ases have emphasized that the second *Cronic* exception is exceedingly narrow. . . . For it to apply, the attorney's failure must be complete. . . . [C]ourts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice." (Internal quotation marks omitted.) *State* v. *Hutton*, supra, 856.

Our Supreme Court has noted that in determining whether *Cronic* or *Strickland* applies in a particular case, courts have held "that specific errors in representation, for which counsel can provide some reasonable

explanation, are properly analyzed under *Strickland*. . . . Counsel's complete failure to advocate for a defendant, however, such that no explanation could possibly justify such conduct, warrants the application of *Cronic*. . . . In the spirit of *Bell* [v. *Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)], courts have drawn a distinction between maladroit performance and nonperformance . . . by applying *Cronic* in cases where counsel's conduct goes beyond bad, even deplorable assistance and constitutes no representation at all . . . . Put differently, in ineffective assistance of counsel claims, prejudice may be presumed when counsel wasn't really acting as a lawyer at all." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, supra, 319 Conn. 556.

In *Davis*, after the victim's family members spoke at the sentencing hearing following the petitioner's guilty plea, the prosecutor requested that the court sentence the petitioner to twenty-five years of incarceration, the maximum permitted under the plea. Id., 550–51. "Defense counsel immediately responded as follows: 'Your Honor, I agree with everything that everybody said so far, and I don't think there's anything left to say from my part." (Emphasis omitted; internal quotation marks omitted.) Id., 551.

The issue before our Supreme Court was whether defense counsel's complete agreement with the prosecutor's recommendation regarding the imposition of the maximum sentence, even though the plea agreement contained a provision allowing defense counsel to argue for a lesser sentence, required analysis under *Strickland* or *Cronic*. Id., 549–50. It determined that when defense counsel's agreement with the prosecution is reasonably calculated to further the interests of the defendant, courts apply *Strickland*. Id., 559. Stated differently, the relevant case law demonstrates "a willingness to apply *Cronic* when counsel agrees with the

prosecution in a way that cannot reasonably be deemed to be in a defendant's interest." Id., 560.

Our Supreme Court concluded that a complete breakdown of the adversarial process had occurred in *Davis*. Id., 561. It noted that counsel did not advocate for the petitioner at the sentencing hearing, but instead agreed with the state's recommendation that the court impose the maximum sentence. Id. As a result, "defense counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing . . . . Thus, we conclude that defense counsel's forfeiture of his right to argue for a lesser sentence to agree with the prosecutor's recommendation warrants application of *Cronic*." (Citations omitted; internal quotation marks omitted.) Id., 568.

The present case differs from *Davis*. Here, the actions of the petitioner's criminal trial counsel were reasonably calculated to further the petitioner's interest in avoiding a conviction of the more serious murder charge and did not amount to nonrepresentation of the petitioner. Thus, these facts and circumstances warrant an application of *Strickland*, and not *Cronic*. Accordingly, prejudice is not presumed, but rather the petitioner bore the burden of proving that he had been prejudiced as a result of any deficient performance by Donald Freeman. The habeas court properly concluded that Donald Freeman "clearly attempted to perform his duties as the petitioner's legal advocate throughout the petitioner's criminal trial. There was no complete failure of representation, as required under the *Cronic* doctrine . . . ." (Internal quotation marks omitted.)

This conclusion is consistent with the reasoning of our Supreme Court in *Davis* v. *Commissioner of Correction*, supra, 319 Conn. 555–68, as well as federal case law. See *United States* v. *Thomas*, 417 F.3d 1053, 1056–59 (9th Cir. 2005) (*Cronic* did not apply where

defense counsel's strategy was to concede guilt for one criminal charge without consultation or consent of defendant in order to enhance counsel's credibility for other counts where evidence was not as strong and punishment was significantly greater), cert. denied, 546 U.S. 1121, 126 S. Ct. 1095, 163 L. Ed. 2d 909 (2006); see also *Bell* v. *Cone*, supra, 535 U.S. 696–97 (defense attorney must entirely fail to test prosecutor's case for *Cronic* rule to apply). Thus, we conclude that the habeas court properly determined that *Strickland*, and not *Cronic*, applied in this case and that the burden of demonstrating prejudice remained with the petitioner.

B

Finally, the petitioner argues that the habeas court improperly concluded that he had not been prejudiced by Donald's Freeman's statements during closing argument. Specifically, he contends that the challenged comments to the jury eliminated any chance of the jury returning a not guilty verdict or a guilty verdict on the less serious offense of criminally negligent homicide. The respondent counters that the petitioner failed to demonstrate a reasonable probability that, but for Donald's Freeman's statements to the jury, the results of the criminal trial would have been different. We agree with the respondent.

We iterate that "[u]nder the two-pronged *Strickland* test, a defendant can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient, and (2) *the deficient performance resulted in actual prejudice. . . . To demonstrate actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors*." (Citations omitted; emphasis added.) *Davis* v. *Commissioner of Correction*, supra, 319 Conn. 555; see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 40,

188 A.3d 1 (2018), cert. denied sub nom. *Connecticut* v. *Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"[I]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 313 Conn. 360, 376–77, 98 A.3d 23 (2014), cert. denied sub nom. *Semple* v. *Anderson*, U.S. , 135 S. Ct. 1453, 191 L. Ed. 2d 403 (2015); see also *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 565, 138 A.3d 378 (petitioner must demonstrate reasonably likely result of proceeding would have been different), cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

In the present case, there was no dispute that the petitioner had shot the victim and caused her death. The question was whether her death had occurred as a result of an accident or conduct that rendered the petitioner criminally liable.[10] At the petitioner's criminal

[10] As the habeas court noted, "[t]he disputed issue was the petitioner's state of mind when he [engaged in a physical struggle with the victim and the gun discharged]."

trial, the court instructed the jury, inter alia, as to the crime of murder and the lesser included offenses of manslaughter in the first degree with a firearm (intentional), manslaughter in the first degree with a firearm (reckless indifference) and criminally negligent homicide. *State* v. *Leon*, supra, 159 Conn. App. 531. The jury found him guilty of manslaughter in the first degree with a firearm (reckless indifference) in violation of §§ 53a-55 (a) (3)[11] and 53a-55a.[12]

In addressing the prejudice prong, the habeas court stated: "Assuming, arguendo, that Attorney [Donald] Freeman's approach was deficient, the court concludes that such deficiency played no role in producing the jury's guilty verdict to [manslaughter in the first degree with a firearm in violation of §§ 53a-55 (a) (3) and 53a-55a]. Having reviewed all the evidence, the result procured by Attorney [Donald] Freeman's efforts appears surprisingly successful.

"The petitioner's avowal that he brandished his loaded pistol to 'calm' the agitated victim strikes the court as ludicrous. The medical examiner definitively located the muzzle of the handgun against the victim's skin when fired. The petitioner admitted to drinking and arguing with the victim when the disagreement turned violent. The petitioner abandoned the victim, still gasping for air, and sought no medical assistance for her. It is very unlikely that the jury would have

[11] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[12] General Statutes § 53a-55a (a) provides in relevant part: "A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ."

reached a verdict other than the one it returned based on this evidence."

The state presented significant evidence that the petitioner had violated §§ 53a-55 (a) (3) and 53a-55a. The elements of this crime are as follows: "[T]he statute on manslaughter in the first degree . . . provides in relevant part: A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. For the defendant to have been found guilty of this offense, the state had to prove beyond a reasonable doubt the following: (1) that the defendant engaged in conduct that created a grave risk of death; (2) that in doing so the defendant acted recklessly; (3) under circumstances evincing an extreme indifference to human life; and (4) the defendant caused the death of the victim. . . . Additionally, the state had to prove that the defendant had the general intent to engage in conduct that created a grave risk of death to another person under circumstances evincing extreme indifference to human life." (Internal quotation marks omitted.) *State* v. *Brown*, 118 Conn. App. 418, 423, 984 A.2d 86 (2009), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010); see also *State* v. *Tomlin*, 266 Conn. 608, 625, 835 A.2d 12 (2003) (setting forth elements of reckless manslaughter in first degree with firearm).

There was evidence that, on the night of the shooting, the petitioner and the victim consumed alcohol and argued while at various nightclubs in Hartford. *State* v. *Leon*, supra, 159 Conn. App. 529. After returning home, the argument continued as the two went upstairs to their shared bedroom. Id. There, the petitioner pushed the victim onto the bed, placed his hand around her neck and held the gun to her neck. Id. The petitioner claimed that he undertook these actions in an effort to

" 'calm' " the victim. Id. The gun discharged and a bullet entered and exited the victim's neck, also severing one of the petitioner's fingers. Id.

On the basis of this evidence, we agree with the habeas court that it was "very unlikely" that the jury would have reached a different verdict even if Donald Freeman had not made the challenged comments during closing argument. Simply stated, the petitioner failed to carry his burden of demonstrating that it was reasonably likely that the outcome of the trial would have been different. The evidence strongly supported the jury's verdict with respect to §§ 53a-55 (a) (3) and 53a-55a. See, e.g., *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 422, 202 A.3d 453, cert. denied, 331 Conn. 905, 202 A.3d 373 (2019). Because the petitioner has not persuaded this court of the reasonable probability that the result of the trial would have been different, we conclude that the habeas court properly determined that the petitioner was not deprived of the right to the effective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

MARTIN J. PRAISNER, JR. *v.* STATE OF CONNECTICUT
(AC 40784)

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

Syllabus

The plaintiff, a former member of a special police force maintained by the defendant state of Connecticut for one of its universities, sought, pursuant to statute ([Rev. to 2013] § 53-39a), indemnification from the state for economic losses that he allegedly incurred as a result of a federal criminal action filed against him in his official capacity. The state filed a motion to dismiss, claiming that the action was barred by sovereign immunity and, therefore, that the trial court lacked subject

matter jurisdiction. The trial court denied the motion to dismiss, concluding that the action was not barred by the doctrine of sovereign immunity because members of the university's special police force fell within a class of individuals, namely, members of a local police department, who are expressly authorized to bring an action against the state under § 53-39a. Thereafter, the state filed a motion for summary judgment, renewing its claim that the court lacked subject matter jurisdiction due to sovereign immunity, and the plaintiff filed a cross motion for summary judgment as to liability only. The trial court, relying on the law of the case doctrine, denied the state's motion and granted the plaintiff's motion. Following a hearing in damages, the court rendered judgment in favor of the plaintiff and awarded him certain damages. Subsequently, the trial court rendered a supplemental judgment in which it awarded the plaintiff attorney's fees and costs. On the state's amended appeal to this court, *held* that the trial court improperly concluded that the plaintiff's action was not barred by the doctrine of sovereign immunity, as that court incorrectly determined that the plaintiff, as a member of the university's special police force, was authorized to bring the action pursuant to § 53-39a: this court, after reviewing the unambiguous text of § 53-39a and its relationship to other statutes, concluded that the plaintiff failed to establish a reasonable basis on which to conclude that his claim for indemnification fell within the waiver of sovereign immunity contained in § 53-39a, as that statute, which identifies certain officers and other classes of persons with exacting precision, contains no reference to members of the university's special police force, which strongly suggested that they do not fall within the narrow scope of the statute, and, unlike § 53-39a, the statute ([Rev. to 2013] § 10a-142, as amended by No. 13-195, § 1, of the 2013 Public Acts), that provides for the establishment of special police forces for public universities of the state, by its plain language specifies particular duties, responsibilities and authority that members of those special police forces share with members of local police departments, thereby recognizing that those entities are distinct, which distinction is underscored by a number of other statutes in which the legislature has differentiated between them; moreover, because our Supreme Court has construed the term "local police department" as used in § 53-39a as implicating governmental, rather than sovereign, immunity, it was difficult to reconcile the plaintiff's undisputed status as a state employee with his contention that he qualified under § 53-39a as a member of a local police department, and common sense persuaded this court that the legislature did not intend state employees like the plaintiff to qualify as members of a local police department; furthermore, given that § 10a-142 (b) expressly identifies certain sections of the General Statutes as ones either applicable or inapplicable to members of such special police forces, but § 53-39a is not mentioned in any manner, if the legislature had intended § 53-39a to apply to members of the university's special police force, it easily could have included

that statute among those specifically identified in § 10a-142 (b), but it did not do so, and § 10a-142 (e) contains an indemnification provision that applies specifically to members of the university's special police force without reference to § 53-39a, which suggested that the legislature intended § 10a-142 (e) to govern the indemnification of such members.

Argued December 6, 2018—officially released April 30, 2019

Procedural History

Action for indemnification for economic losses allegedly incurred by the plaintiff as a result of a federal criminal action filed against him in his capacity as a police officer, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Richard M. Rittenband*, judge trial referee, denied the defendant's motion to dismiss; thereafter, the court, *Scholl, J.*, denied the defendant's motion for summary judgment and granted the plaintiff's motion for summary judgment as to liability; subsequently, after a hearing in damages, the court, *Pittman, J.*, rendered judgment for the plaintiff, from which the defendant appealed to this court; thereafter, the court, *Pittman, J.*, rendered a supplemental judgment awarding the plaintiff attorney's fees and costs, and the defendant filed an amended appeal. *Reversed*; *judgment directed.*

Emily V. Melendez, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellant (defendant).

Elliot B. Spector, with whom was *David C. Yale*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, the state of Connecticut, appeals from the judgment of the trial court denying its motion for summary judgment in this indemnification action brought by the plaintiff, Martin J. Praisner, Jr., pursuant to General Statutes (Rev. to 2013) § 53-39a.[1]

[1] Hereinafter, unless otherwise indicated, all references to § 53-39a in this opinion are to the 2013 revision of the statute.

On appeal, the state contends that the court improperly concluded that the action was not barred by the doctrine of sovereign immunity.[2] We agree and, accordingly, reverse the judgment of the trial court.

The facts are not in dispute. At all relevant times, the state maintained a special police force for Eastern Connecticut State University (university). The plaintiff was a member of that special police force and an employee of the state. While on duty on September 1, 2008, the plaintiff was involved in an incident in which he allegedly "deployed pepper spray against an intoxicated and violent prisoner in a converted Sheetrock coat closet, which was used as a holding cell, and failed to promptly decontaminate the prisoner." Weeks later, the plaintiff was placed on paid administrative leave by the university. He thereafter applied for a position with the state's Department of Correction (department) and was hired as a correction officer on August 15, 2009.

On December 1, 2009, the plaintiff was indicted by the federal government and charged with the crimes of conspiracy to violate an individual's civil rights in violation of 18 U.S.C. § 241 and deprivation of an individual's civil rights in violation of 18 U.S.C. § 242. Following his arrest, the plaintiff's employment with the department was terminated. After two federal trials that both resulted in hung juries, the United States District Court for the District of Connecticut on August 10, 2011, granted the government's motion to dismiss the indictment against the plaintiff.

The plaintiff subsequently demanded reimbursement from the state for economic losses that he allegedly

[2] The state alternatively claims that "[e]ven if sovereign immunity did not bar the plaintiff's suit . . . the award of damages [ultimately] determined by the trial court would still be erroneous . . . ." In light of our conclusion that the court lacked subject matter jurisdiction over the plaintiff's action, we do not consider the merits of that claim.

incurred as a result of his federal prosecution. When the state declined to do so, the plaintiff commenced the present action. His one count complaint sought indemnification pursuant to § 53-39a "for economic losses sustained . . . as a result of the aforesaid arrest and prosecution, including the payment of any legal fees incurred in pursuing these damages."[3]

In response, the state moved to dismiss the action for lack of subject matter jurisdiction. In the memorandum of law that accompanied that motion, the state acknowledged that § 53-39a "waives the [s]tate's immunity to liability and suit," but only with respect to "those individuals who fall within the designated classifications" set forth in that statute. The state then argued that (1) members of the university's special police force do not fall within the class of individuals who expressly are authorized to bring an action against the state pursuant to § 53-39a and (2) the complaint contained no allegation that the plaintiff had obtained permission from the Claims Commissioner to institute the action for monetary relief. See General Statutes § 4-160.[4] The plaintiff filed an objection to the motion to dismiss, to which the state filed a reply brief.

The court, *Hon. Richard M. Rittenband*, judge trial referee, heard argument from the parties on March 17, 2014. In an order issued later that day, the court concluded that a member of the university's special police force "falls under the category of a member of a local police department" as that term is used in § 53-39a. The

[3] The plaintiff's claimed damages included "lost overtime" with the university's special police force; "lost employment" and "lost overtime" with the department; "lost pension benefits and contributions"; "lost insurance, sick time and vacation time"; and "future lost earnings."

[4] "When sovereign immunity has *not* been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim." (Emphasis added; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 317, 828 A.2d 549 (2003).

court therefore denied the motion to dismiss. The state filed a motion to reargue that ruling, which the court denied.

The state then answered the complaint, and the plaintiff filed a certificate of closed pleadings, in which he requested a court trial. On January 13, 2017, the state filed a motion for summary judgment, renewing its claim that the court lacked subject matter jurisdiction due to sovereign immunity. Relying on the law of the case doctrine,[5] the court, *Scholl, J.*, denied that motion. The court at that time also granted the plaintiff's cross motion for summary judgment as to liability only. A hearing in damages followed, at the conclusion of which the court, *Pittman, J.*, rendered judgment in favor of the plaintiff "in the amount of $658,849 in lost earnings and benefits . . . ." Approximately one month later, the court rendered a supplemental judgment, in which it awarded the plaintiff $118,196.04 in attorney's fees and costs. This appeal followed.

On appeal, the state claims that the court improperly determined that the plaintiff, as a member of the university's special police force, was authorized to bring the present action in the Superior Court pursuant to § 53-39a. The state argues that because the plaintiff has not established that he falls clearly within any of the classifications of individuals specified therein, sovereign immunity bars his action for monetary relief. We agree.

[5] "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] 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." (Internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013).

At the outset, we note that "[t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Machado* v. *Taylor*, 326 Conn. 396, 403, 163 A.3d 558 (2017).

Our courts "have long recognized the validity of the common-law principle that the state cannot be sued without its consent . . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." (Citations omitted; internal quotation marks omitted.) *Horton* v. *Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977). Rooted in the recognition that subjecting "state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property," the doctrine of sovereign immunity shields the state "from unconsented to litigation, as well as unconsented to liability." (Internal quotation marks omitted.) *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 282, 105 A.3d 857 (2015).

In the present case, the plaintiff's action is one for monetary damages stemming from his criminal prosecution in federal court. To avoid dismissal, the allegations of his complaint, construed in their most favorable light, must establish either that his indemnification action falls clearly within a statutory waiver of sovereign immunity or that the Claims Commissioner had

authorized the action. See *Nelson* v. *Dettmer*, 305 Conn. 654, 661, 46 A.3d 916 (2012); *Babes* v. *Bennett*, 247 Conn. 256, 262, 721 A.2d 511 (1998). Fairly construed, the plaintiff's complaint alleges that, as a member of the university's special police force, he qualifies under the statutory waiver embodied in § 53-39a as a member of a local police department.[6] For its part, the state concedes that § 53-39a is an indemnification statute that constitutes an express legislative waiver of sovereign immunity.[7] The state nonetheless contends that members of the university's special police force do not fall within the narrow class of individuals specified therein.

The issue before us, then, is whether the legislature intended to include such members within the waiver of statutory immunity contained in § 53-39a. That issue presents a question of statutory interpretation, over which our review is plenary. See *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 416, 195 A.3d 664 (2018). The principles that govern such review are well established. "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

[6] The plaintiff has never alleged that he obtained the authorization of the Claims Commissioner to pursue this action for monetary damages. In addition, we emphasize that the plaintiff brought this indemnification action pursuant to § 53-39a, and not General Statutes (Rev. to 2013) § 10a-142 (a). As the plaintiff's counsel confirmed at oral argument on the motion to dismiss, "[h]is indemnification is solely under § 53-39a."

[7] In its principal appellate brief, the state acknowledges that "the statute at issue in this case—[§] 53-39a—is a statutory waiver of sovereign immunity" and that "§ 53-39a contains an express waiver of sovereign immunity . . . ." That position is consistent with the state's assertion in its memorandum of law on its motion to dismiss that § 53-39a "waives the [s]tate's immunity to liability and suit . . . ."

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 . . . ." (Internal quotation marks omitted.) Id.

We begin with the relevant statutory language. General Statutes (Rev. to 2013) § 53-39a provides: "Whenever, in any prosecution of an officer of the Division of State Police within the Department of Emergency Services and Public Protection, or a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or a local police department for a crime allegedly committed by such officer in the course of his duty as such, the charge is dismissed or the officer found not guilty, such officer shall be indemnified by his employing governmental unit for economic loss sustained by him as a result of such prosecution, including the payment of attorney's fees and costs incurred during the prosecution and the enforcement of this section. *Such officer may bring an action in the Superior Court against such employing governmental unit to enforce the provisions of this section.*" (Emphasis added.)

Section 53-39a delineates four classifications of individuals that expressly are authorized to bring an action

against the state: (1) officers of the Division of State Police within the Department of Emergency Services and Public Protection; (2) members of the Office of State Capitol Police; (3) any person appointed under § 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management; and (4) members of a local police department. Only the fourth class of individuals is at issue in this case.[8]

The term "local police department" is not defined in § 53-39a or elsewhere in the General Statutes. On appeal, the plaintiff notes that the commonly understood meaning of the term "local," as gleaned from dictionaries, is "relating to place" and "confined to a particular place." See, e.g., Webster's Third New International Dictionary (2002) p. 1327. The plaintiff thus argues that the term "local police department" encompasses the university's special police force, particularly because the General Statutes demarcate the jurisdiction of a special police force as confined to "the geographical limits of the property owned or under the control of" the educational institution. See General Statutes (Rev. 2013) § 10a-142 (a), as amended by No. 13-195, §1, of the 2013 Public Acts.[9] If that construction is correct, it necessarily would encompass persons appointed under

[8] In his complaint, the plaintiff alleges that his employment as a member of the university's special police force constituted membership in a local police department, thus bringing his action within the fourth class of individuals specified in § 53-39a. In denying the state's motion to dismiss, the court agreed with that contention.

[9] General Statutes § 10a-142 has been amended on multiple occasions, and now is codified as General Statutes § 10a-156b. Because the plaintiff commenced this action by service of process on July 19, 2013, the operative statute is General Statutes (Rev. to 2013) § 10a-142, as amended by No. 13-195, §1, of the 2013 Public Acts. Unless otherwise indicated, all references to § 10a-142 in this opinion are to that revision.

§ 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities. The fact that the legislature deemed it necessary to specifically and expressly provide indemnification to that class of persons undermines the plaintiff's broad reading of the term "local police department" in § 53-39a. Although § 53-39a identifies certain officers with exacting precision, it contains no reference whatsoever to members of the university's special police force, which strongly suggests that members of the university's special police force do not fall within the narrow confines of § 53-39a. See *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016).

The plaintiff also asserts that members of the university's special police force and members of a municipal police department "are for all intents and purposes identical" and "provide the same full range of services . . . ."[10] We disagree. Unlike § 53-39a, § 10a-142 expressly applies to members of the university's special police force. Titled "Special police forces," § 10a-142 provides for the establishment of special police forces for the public universities of this state, including the

[10] In its appellate brief, the plaintiff cites a litany of statutes generally pertaining to local police officers. As the plaintiff's counsel conceded at oral argument before this court, none of those statutes provides a definition of "local police" that includes members of a special police force, nor do those statutes expressly indicate their applicability thereto. Furthermore, none of those statutes pertains to indemnification, the subject of § 53-39a.

In addition, we note that several of the statutes relied on by the plaintiff pertain to training programs administered by the Police Officer Standards and Training Council. See General Statutes (Rev. to 2013) § 7-294a et seq. Significantly, General Statutes (Rev. to 2013) § 7-294a (9) defines "[p]olice officer" as "a sworn member of an organized local police department, an appointed constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, 29-18a or 29-19 *or any member of a law enforcement unit who performs police duties* . . . ." (Emphasis added.) That definition appears to encompass members of the university's special police force, as they are members of a law enforcement unit who perform police duties.

university. By its plain language, that statute specifies particular "duties, responsibilities and authority" that members of those special police forces share with members of a "local police department." General Statutes (Rev. to 2013) § 10a-142, as amended by No. 13-195, §1, of the 2013 Public Acts. In so doing, the statute recognizes that those special police forces and local police departments are distinct entities. That distinction also is underscored by other statutes in which the legislature has differentiated "special police forces" from "local police departments." See, e.g., General Statutes (Rev. to 2013) § 10a-55a (a) (mandating that "[t]he state police, local police departments and special police forces established pursuant to section 10a-142 shall cooperate with institutions of higher education in preparing [campus crime] reports"). Section 10a-142 further reflects the limited scope of the duties, responsibilities, and authority shared with members of a local police department. See General Statutes (Rev. to 2013) § 10a-142 (a), as amended by No. 13-195, §1, of the 2013 Public Acts ("[t]he members of each special police force shall have the same duties, responsibilities and authority *under sections 7-281, 14-8, 54-1f and 54-33a and title 53a* as members of a duly organized local police department" [emphasis added]). Had the legislature intended all of chapter 104 of the General Statutes,[11] for example, to apply to members of the university's special police force, it would not have so circumscribed the duties, responsibilities and authority specified in § 10a-142 (a).

In addition, § 10a-142 (b) provides in relevant part that members of the university's special police forces "shall . . . be state employees . . . ." See also General Statutes (Rev. to 2013) § 4-141 (in context of claims

[11] Titled "Municipal Police and Fire Protection," chapter 104 contains numerous sections that pertain to the duties, responsibilities and authority of local police.

against state, defining "state officers and employees" to include "every person elected or appointed to or employed in any office, position or post in the state government, whatever such person's title, classification or function") For that reason, the plaintiff understandably alleged in his complaint that he was "a state employee" as a result of his employment with the university's special police force. As a state employee, the plaintiff does not fall within the protections of "the governmental immunity applicable to municipalities"; *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 26, 664 A.2d 719 (1995); see also *Murphy* v. *Ives*, 151 Conn. 259, 264, 196 A.2d 596 (1963); nor has the plaintiff so argued. Because our Supreme Court has construed the term "local police department" as used in § 53-39a as one implicating governmental, rather than sovereign, immunity; see *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 87–88, 818 A.2d 758 (2003); it is difficult to reconcile the plaintiff's undisputed status as a state employee with his contention that he qualifies under § 53-39a as a member of a local police department.[12] Common sense further persuades us that the legislature did not intend state employees like the plaintiff to qualify as members of a local police department. See *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 171, 931 A.2d 890 (2007) ("[i]t is a fundamental principle of statutory construction that courts must

[12] In this regard, we note that the legislature in other statutes has utilized the term "local police" as a synonym for municipal law enforcement. See, e.g., General Statutes § 8-265mm (c) (1) (to be eligible for assistance under home purchasing assistance program "an applicant shall . . . [b]e a local police officer employed by a municipal police department on a full-time or part-time basis or a state police officer"); General Statutes § 29-1*l* (a) ("in the event of any incident involving numerous victims or casualties, the chief or superintendent of the local police department having jurisdiction over the municipality where such incident occurred or, where there is no organized local police department, the commanding officer of the state police troop having jurisdiction over such municipality may notify the Commissioner of Emergency Services and Public Protection of such incident").

interpret statutes using common sense"); *Trumbull* v. *State*, 206 Conn. 65, 80, 537 A.2d 431 (1988) ("[c]ommon sense . . . is a highly significant guide to statutory interpretation").

It also is significant that § 10a-142 (b) expressly identifies certain sections of the General Statutes as ones either applicable or inapplicable to members of such special police forces, but § 53-39a is not mentioned in any manner.[13] Had the legislature intended § 53-39a to apply to members of the university's special police force, it easily could have included that statute among those specifically identified in § 10a-142 (b), but it did not. The precedent of our Supreme Court instructs that "[u]nless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 492–93, 55 A.3d 251 (2012); see also *Feehan* v. *Marcone*, 331 Conn. 436, 472, A.3d (2019) ("[b]ecause [General Statutes] § 9-328 is contained in chapter 149 of the General Statutes, and therefore not in the chapters or sections listed in [General Statutes] § 9-372, the definition . . . contained in § 9-372 (7), by its own unambiguous terms, does not apply to § 9-328"). The legislature's failure to include § 53-39a among the statutes specified in § 10a-142 (b) is further evidence that it did not intend members of the university's special police force to fall within the narrow statutory waiver of sovereign immunity contained in § 53-39a. See *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 177, 9 A.3d 326 (2010).

[13] General Statutes (Rev. to 2013) § 10a-142 (b), as amended by No. 13-195, § 1, of the 2013 Public Acts, provides: "Members of said special police forces shall continue to be state employees and shall be subject to the provisions of chapter 67, and parts III and IV of this chapter. The provisions of part V of chapter 104 and section 7-433c shall not apply to such members."

Section 10a-142 also contains an indemnification provision that applies specifically to members of the university's special police force. It provides in relevant part: "The state shall protect and save harmless any member of the special police forces from financial loss and expense, including reasonable legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of the alleged deprivation by such member of any person's civil rights, which deprivation was not wanton, reckless or malicious, provided such member, at the time of such acts resulting in such alleged deprivation, was acting in the discharge of such member's duties or within the scope of such member's employment or under the direction of a superior officer." General Statutes (Rev. to 2013) § 10a-142 (e), as amended by No. 13-195, § 1, of the 2013 Public Acts.

The existence of a statute that specifically provides indemnification to members of special police forces without reference to § 53-39a suggests that the legislature intended § 10a-142 (e) to govern the indemnification of such members. As our Supreme Court has explained: "[W]e repeatedly have stated in seeking to ascertain legislative intent from more than one statutory pronouncement on a particular subject [that] specific terms in a statute covering a given subject matter will prevail over the more general language of the same or another statute that otherwise might be controlling. . . . This oft-stated principle reflects the fact that specific statutory language constitutes a more accurate representation of the legislature's purpose or intent than more general pronouncements concerning the same subject matter." (Citations omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 713–14, 802 A.2d 731 (2002). The presence of an indemnification provision that specifically pertains to the indemnification of members of the university's special police force counsels against an expansive reading of

the term "local police department" in § 53-39a to encompass the plaintiff's claim for indemnification in the present case. See *LaFrance* v. *Lodmell*, 322 Conn. 828, 837–38, 144 A.3d 373 (2016) (court must read statutes together when they relate to same subject matter because legislature presumed to create harmonious and consistent body of law).

Lastly, we are mindful of the particular context in which this issue arises. The plaintiff is a litigant seeking to secure monetary damages from the state. To do so, he must overcome the "strong presumption in favor of the state's immunity from liability or suit"; *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 387–88, 978 A.2d 49 (2009); by demonstrating that his claim clearly falls within the narrow scope of a statutory waiver. See, e.g., *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 452, 54 A.3d 1005 (2012) ("[t]he scope of [an] exception [to sovereign immunity] is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction" [internal quotation marks omitted]); *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 289, 21 A.3d 759 (2011) (statutory waiver of immunity must be narrowly construed and its scope must be confined strictly); *Dept. of Public Works* v. *ECAP Construction Co.*, 250 Conn. 553, 558, 737 A.2d 398 (1999) (party attempting to bring action under statutory waiver must come clearly within its provisions). On our review of the text of § 53-39a and its relationship to other statutes, we conclude that the plaintiff has not established a reasonable basis on which to conclude that his claim for indemnification falls within the statutory waiver of sovereign immunity contained in § 53-39a. As applied to the facts of this case, the statute is unambiguous, and we, therefore, do not consider extratextual evidence of its meaning. See *State* v. *Josephs*, 328 Conn. 21, 26, 176 A.3d 542 (2018).

The judgment is reversed and the case is remanded with direction to render judgment dismissing the action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

JOHN BREWER *v.* COMMISSIONER OF CORRECTION (AC 40984)

Alvord, Sheldon and Eveleigh, Js.*

Syllabus

The petitioner, who had been convicted of the crimes of murder and criminal possession of a firearm, filed a second petition for a writ of habeas corpus, claiming that he received ineffective assistance from B, the counsel who represented him with respect to his first habeas petition. The habeas court rendered judgment dismissing three counts of the second habeas petition and denying the petition as to the remaining count. On appeal, this court concluded that the habeas court improperly dismissed the claim of ineffective assistance of B in the second habeas petition and remanded the matter for further proceedings. While the appeal in the second habeas matter was pending, the petitioner filed a third petition for a writ of habeas corpus, claiming that his second habeas counsel rendered ineffective assistance. The third habeas petition and the matter on remand concerning the second habeas petition were consolidated. Following a trial, the habeas court rejected the petitioner's claim that B was ineffective in failing to claim that his trial counsel rendered ineffective assistance by failing to consult with a certain expert and to object to the admission of certain prior inconsistent statements. From the judgment rendered thereon, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that B did not render ineffective assistance in failing to claim in the petitioner's first habeas action that trial counsel rendered ineffective assistance by not consulting a forensic pathologist to reconstruct the crime scene to discredit certain eyewitness testimony; trial counsel investigated the possibility of a crime scene reconstruction by consulting with D, an expert criminalist, who told trial counsel that he could not perform such a reconstruction due to the nature of the evidence available, trial counsel was entitled to rely on D's representation that the crime scene could not be reconstructed

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

and was not required to search for another expert to perform a reconstruction, and because the testimony of the state's medical examiner at the petitioner's criminal trial was consistent with the testimony of the forensic pathologist that the petitioner presented at his habeas trial, the jury had before it the same evidence that presumably would have been revealed by an expert forensic pathologist.

2. The habeas court properly determined that B was not ineffective in failing to claim in the petitioner's first habeas corpus action that trial counsel was ineffective in failing to object to the admission of certain prior inconsistent statements from two witnesses; both trial counsel and B testified at the habeas trial that it was not necessary to object to the admission of evidence simply for the sake of objecting and that the evidence at issue must be viewed within the context of the entire case, trial counsel also testified that he did not object to the admission of the statements at issue because he considered the admission of them beneficial to the petitioner in that they highlighted the lack of credibility of the two witnesses, and the habeas court properly determined that trial counsel's decision not to object to their admission was a reasonable strategic decision based on his assessment that the statements were beneficial to the petitioner.

Argued January 8—officially released April 30, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak, J.*, dismissed the petition in part; thereafter, the remaining count of the petition was tried to the court; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court, which affirmed in part, reversed in part, and remanded the matter for further proceedings; thereafter, the court, *Sferrazza, J.*, granted the petitioner's motion to consolidate; subsequently, the matter was tried to the court, *Hon. John F. Mulcahy, Jr.*, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Daniel Fernandes Lage, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. Following the granting of his petition for certification to appeal, the petitioner, John Brewer, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus alleging ineffective assistance by his prior habeas counsel. On appeal, the petitioner claims that the habeas court erred in rejecting his claim that his prior habeas attorney rendered ineffective assistance by failing to allege that his criminal trial counsel rendered ineffective assistance by failing (1) to consult with a forensic pathologist to reconstruct the crime scene, and (2) to object to the admission into evidence of certain witness statements. We affirm the judgment of the habeas court.

The petitioner was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2001) § 53a-217, upon which he ultimately was sentenced to a total effective sentence of sixty years incarceration. His conviction was later affirmed by our Supreme Court on direct appeal. See *State* v. *Brewer*, 283 Conn. 352, 927 A.2d 825 (2007).

The Supreme Court set forth the following facts that reasonably could have been found by the jury. "In the early morning hours of December 29, 2001, the victim, Damian Ellis, was with his friends, Damian Wade and Arthur Hall, at the Athenian Diner in Waterbury (diner). The [petitioner] also was present at the diner with a group of friends that included Jason Greene, his brother, Michael Greene, and Gregory Hunter. The victim's group had a verbal altercation with the [petitioner] and Hunter that prompted the restaurant manager to

eject both groups of men from the diner. The two groups engaged in some additional verbal sparring and then separated once outside the diner.

"The [petitioner's] group entered a black Lexus sport utility vehicle, driven by Hunter, and was exiting the diner parking lot when Hunter stopped the car in front of the victim, who was standing outside the entrance to the diner. Either Hunter or the victim reinitiated the dispute, and Hunter subsequently exited the vehicle and approached the victim's group with a knife in his hand. The victim backed away from Hunter, down a ramp on the side of the diner, as the [petitioner] exited the vehicle and moved to the corner of the building near the ramp. The [petitioner] walked up to the victim and shot him twice with a nine millimeter Cobray M-11 semiautomatic pistol. One shot entered the victim's brain and likely killed him within five seconds.

"Following the shooting, the [petitioner] got back into the Lexus, which was now driven by Jason Greene, and the two men left the scene. The [petitioner] threw the gun out of the car's window and shortly thereafter exited the vehicle. Jason Greene later directed the police to the area in which the [petitioner] had discarded the murder weapon." Id., 353–54.

Following his conviction, the petitioner filed his first habeas corpus petition in 2006, in which he was represented by Attorney Walter Bansley III, alleging ineffective assistance of his trial counsel, Attorney John Cizik. The habeas court, *Fuger*, *J.*, denied his petition and his subsequent petition for certification to appeal. This court dismissed his appeal from the judgment of the habeas court. *Brewer* v. *Commissioner of Correction*, 133 Conn. App. 904, 34 A.3d 480, cert. denied, 304 Conn. 910, 39 A.3d 1121 (2012).

The petitioner filed a second habeas corpus action in April, 2010. His amended petition in that action, filed

on June 5, 2013, contained four counts, three of which were dismissed by the second habeas court, *Kwak, J.* The second habeas court denied the petition as to the one remaining count claiming ineffective assistance of appellate counsel on direct appeal. The petitioner appealed from the denial of the petition for certification to appeal, and this court dismissed in part and reversed in part the judgment of the second habeas court. *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 22–23, 130 A.3d 882 (2015). This court dismissed the appeal as to the petitioner's claims of ineffective assistance of trial counsel and prosecutorial impropriety, but concluded that the dismissal of his claim of ineffective assistance of prior habeas counsel was improper and, therefore, remanded that claim to the habeas court for further proceedings in accordance with law. Id. The petitioner did not challenge the denial of his claim of ineffective assistance of appellate counsel.

While the appeal from the second habeas court's judgment was pending, the petitioner filed a third habeas corpus petition alleging that his second habeas counsel, Attorney Vicki Hutchinson, rendered ineffective assistance. The third habeas corpus petition and the present matter, on remand from this court, were ordered consolidated by the court, *Sferrazza, J.*, upon motion of the petitioner's current habeas counsel.

On September 5, 2017, following a trial, the habeas court, *Hon. John F. Mulcahy, Jr.*, judge trial referee, filed a memorandum of decision rejecting the petitioner's claims that his first habeas counsel, Bansley, was ineffective in failing to claim in his first habeas action, that his criminal trial counsel, Cizik, rendered ineffective assistance by failing to consult with a forensic pathologist to reconstruct the crime scene, and failing to object to the admission of prior inconsistent statements

by Jason Greene and Michael Greene. The court subsequently granted the petitioner's petition for certification to appeal and this appeal followed.

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. [Id.,] 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . *Lozada* v. *Warden*, supra, 842–43. In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .

"It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 150–52, 196 A.3d 1149, cert. denied, 330 Conn. 946, 196 A.3d 326 (2018).

I

The petitioner first claims on appeal that the habeas court erred in concluding that Bansley did not render ineffective assistance by failing to allege in his first habeas action that Cizik's representation of him was ineffective because he failed to consult with a forensic pathologist to reconstruct the crime scene to discredit the state's case—more specifically, the eyewitness testimony of Gregory Hunter. We disagree.

In addressing this claim, the habeas court set forth the following summation of the evidence adduced at the petitioner's criminal trial. "Evidence presented indicated the shooting occurred on a down slanted ramp off (and to the side of) the stairs leading to and from the doorway of the diner. Hunter acknowledged that the argument inside the diner escalated to the point that his group (Hunter, [the] petitioner, and the two Greenes) and the victim's group (Ellis, AJ, and Damien Wade) were asked by the management to leave—'take it outside.' In his statement to the police, Hunter described the circumstances of the shooting, as follows: 'Once outside the argument got worse and we were yelling at each other. [Ellis] was yelling to me that me and my cousins were all snitches and I was yelling back at him that he was the snitch. We yelled at each other to go meet up at the hill to fight. Then me, the Greenes and [the petitioner] walked to the Lexus and got in and wanted to drive out to go up to Long Hill to fight [Ellis]. I was driving. We were driving up the driveway toward the street and near the entrance on the ramp area I saw [Ellis] and he was yelling at me . . . I got pissed so I stopped the Lexus by the ramp and got out. I walked up the stairs toward [Ellis]. We were face to face on the ramp and . . . [Ellis] was walking backwards down the ramp and I was walking towards him. I had a folding knife out and I was holding it while walking at him. Mike Greene and some other people were trying to hold me back and telling me to chill. I saw [the petitioner] get out of the passenger side of the Lexus walking toward the corner side of the diner and he was holding his gun. [The petitioner's] gun was on a strap that was on his shoulder. Me and [Ellis] were still yelling at each other and we were near the corner of the diner. I could see [the petitioner] walk up to [Ellis] and [the petitioner] shot him in the right side of the head and [Ellis] spun around and started falling backward and

[the petitioner] shot him again in the chest. I saw [the petitioner] run back into the Lexus and Jason [Greene] drove off. Me and Mike went across the street to the gas station and Mike saw some guy he knew and asked him for a ride and he gave us a ride to mother's house. Yesterday morning, [December 29, 2001], when the police came to talk to me I turned over to them the knife I had when I was arguing with [Ellis].'

"Hunter's trial testimony was substantially consistent with his statement to the police. Prior to his testimony, the medical examiner, Dr. Arkady Katsnelson, had testified and the postmortem report was put in evidence; as would be expected, given an obvious concern stemming from frontal entry wounds and right to left trajectories, Hunter was examined closely and extensively by both counsel concerning the positioning of himself and the petitioner at the time of the shooting. He testified on direct: By the time I pulled out my knife, the petitioner 'came from behind him [the victim] and shot him.' Hunter testified the victim was facing him. 'He [the petitioner] came . . . kind of like towards around from his back, like the right side of him.' When asked where he was standing when he heard the gunshots, he answered, 'on the ramp . . . with Ellis . . . looking toward' me. Hunter also stated he could see the gun in the petitioner's hand, a distinctive gun that he had seen the petitioner with earlier that evening.

"On cross, Hunter said that at the time of the first shot, the gun was not pressed up against the side of the victim's head; he estimated that the gun was 'about two or three feet away from [the victim] when first fired. When asked from which side of [the victim] the gun came into view, Hunter answered, '[l]ike towards . . . the back left side of him [the victim].' On redirect, Hunter testified that at the time the shot was fired, the petitioner would have been behind [the victim] to the left. On further examination, Hunter stated that the

first shot hit [the victim] in the head, [the victim] spun around, 'almost right in front of [the petitioner], but at that time, Mike Greene was . . . pulling me away and all I seen . . . was the back of . . . [the victim]' when I (Hunter) heard the second shot. Hunter was asked 'as you sit here now, is there any doubt in your mind that [the petitioner] was the one who held the gun and pulled the trigger that fired the shots into [the victim]?' The response was, 'No.'

"Dr. Katsnelson testified that the bullet to the head penetrated the victim's skull from right to left and exited from the rear of the head; the bullet tract is front to back, right to left, and slightly downward. . . . He testified that it is his opinion that there was only one shooter because the gunshot wounds are the same, right to left, and front to back, and the general direction of each bullet track is the same. He believes the two shots were fired within a short period of time because they are basically 'in the same directions to the head and to the chest cavity;' he cannot be more specific about the length of time between the two shots, but 'I can tell because the shots are in the same general directions . . . I believe there was an extremely short interval between the shots.' Dr. Katsnelson testified that the entry wound to the head was not a contact wound; the muzzle of the gun was not pressed against the victim's head. He believed the shooter was in front of the victim and 'the victim's right side was exposed to the gun.' Because there was evidence of gun powder stippling on the skin of the head, he believes the victim was shot from a distance of approximately, not exactly, up to six feet—'[i]n my opinion, it's approximately in the range of six feet.'. . .

"Dr. Katsnelson said he thought the shot to the head came from the front, but the shooter could have been on the side of the victim; it could have been from the side, from the front, but not from the back. And, the

victim's head could have been turned to the side; '[d]epends on the position of the head in this time when he was shot.' Dr. Katsnelson testified: 'I don't believe that somebody will see a gun [and] not try to turn the head or to move somewhere and he was even in the front of the shooter, probably the victim was trying to somehow instinctively . . . turn his head and received the bullet in the right side.' " (Footnotes omitted.)

At his habeas trial, the petitioner offered the testimony of Dr. Mark Taff, an expert in forensic pathology and crime scene reconstruction, to contradict Hunter's testimony that the petitioner had approached the victim from his rear left side before shooting him in the right side of the head. Taff testified, inter alia: "The bullet passed through the [victim's] head from a right to left direction. The bullet in the chest went from right to left. So, the person who is shooting the victim, assuming it's a freeze-frame position, is going to be most likely somewhere in front of the victim, somewhere to the victim's right." Taff expressed the view that the position of the shooter in front of the victim, slightly to the right, was essentially beyond dispute absent a person, or persons, of extraordinary dexterity.

The habeas court also heard testimony from Cizik, who testified that he considered the possibility of a crime scene reconstruction and, to that end, he consulted with Dr. Peter DeForest, who is a criminalist. At Cizik's request, DeForest examined all of the evidence, read all of the reports and looked at all of the photos in this case. DeForest told Cizik that he was unable to do a reconstruction of the crime scene because there was insufficient physical evidence in the case, and there were too many variables in the evidence that did exist, to do so. For example, the crime scene had not been immediately secured, so there no way to be certain if the shell casings were where they would have been when ejected from the gun, and there was no way to

determine where or how the victim fell. DeForest did, however, counsel Cizik on some of the areas to cross-examine the medical examiner, as well as the police officers who processed the evidence at the crime scene. Cizik testified that he did not think it was necessary to consult a forensic pathologist because DeForest advised him fully.

Bansley also testified at the petitioner's habeas trial. Bansley recalled reviewing the trial transcripts in this case and noticing inconsistencies between Hunter's testimony and the physical evidence as interpreted by Katsnelson. He testified that because of those inconsistencies, he conferred with a forensic pathologist, a doctor who he had used in other cases, and who was a former medical examiner in Connecticut. After reviewing the crime scene reports, the pathologist told Bansley that he could not be of any help because there were problems with the crime scene, specifically, as Bansley stated, "things being moved around." Based upon that response, Bansley did not pursue the claim further. Bansley also emphasized that such a claim was immaterial because the petitioner claimed that he was not present when the victim was shot and had proceeded to trial with an alibi defense.

On the basis of the foregoing testimony, and its review of the trial court record, the habeas court rejected the petitioner's claim that Cizik was ineffective in not consulting a forensic pathologist. The court held: "This court has the highest respect for both experts; both Dr. Katsnelson and Dr. Taff have impeccable credentials and years of experience in the field of forensic pathology. Each, according to the evidence, has performed thousands of autopsies. It certainly appears that Dr. Taff agreed with the medical examiner as to the likelihood of movement of victim and shooter while the murder unfolded; as his report states: 'Just the sight of a gun pointed at a human target is enough to trigger a rapid,

behavioral response in both the victim . . . and the shooter . . . which would change the spatial relationship between the actors.' It is the court's view that what took place on that ramp did not occur in particularly slow motion, or in any sort of a 'freeze-frame' manner. It is also the court's view that in the factual commission of the actual shooting, there are, necessarily, many variables regarding positioning.

"Dr. Taff postulated that an easy manner in which to reconstruct a shooting was to compare the victim to the sun at the center of the universe with the planets (shooters) orbiting around the victim. He testified that such [a] 'dynamic helps to understand all possible spatial relationships, distances, angles, heights, and movement of the individuals involved.' However, Dr. Taff observed that 'in contrast to solid planetary masses, human beings have articulated joints which are flexible and able to bend/change positions and alter body lengths.' Here, both bullets passed through the victim front to back and right to left; therefore, Dr. Taff testified, 'the person who is shooting the victim, *assuming it's freeze-frame position*, is going to be *most likely* somewhere in front of the victim, and somewhere to the victim's right.' . . .

"Seemingly predicated on an assumption of substantial immobility of shooter and victim, a courtroom demonstration with the doctor as the victim and counsel as the shooter was presented. This claimed demonstrative aid consisted of various scenarios, around four quadrants; in each, either party, the victim or the shooter, was presented as, or presumed to be, stationary. Such, in the court's view, was not particularly realistic considering the entire evidence, including Hunter's statement, his testimony, and the statements and testimony of others. The totality of the evidence does not readily lend itself to a brief series of still frames.

"It is clear from the evidence that when Hunter jumped out of the Lexus, tempers were flaring; he was armed with a knife and walking at [the victim], with the latter moving backward down the ramp toward the corner of the building. The victim was being pursued by an enraged Hunter, armed with a knife, and, whether known or unknown, someone approaching him from behind with a gun. At the same time, Damian Wade was between the victim and Hunter trying to keep the two apart; also, at the same time, Michael Greene was grabbing Hunter attempting to hold him back. The evidence indicates, indeed, much movement; as the respondent [the Commissioner of Correction] argues, even a minor bend, twist, crouch, or a slight turn could have significant impact on any opinion as to the precise position of the shooter or the victim when the first shot was fired. Thus, there exist innumerable imponderables. Such, in the court's view, offers reasonable confirmation to what Dr. DeForest related to trial counsel and to what habeas counsel's forensic pathologist opined: there was not enough physical evidence to do a meaningful reconstruction.

"What Dr. Taff's report and testimony do is highlight the obvious inconsistency between Dr. Katsnelson's findings and an isolated portion of Hunter's statement (and testimony) describing the actual shooting. But, that inconsistency was apparent from the very beginning and was addressed through examination of witnesses at trial, trial counsels' summations, and postverdict discussions by first habeas counsel with a forensic pathologist. At the criminal trial, the petitioner's counsel cross-examined Hunter on his version of the shooting and made reference to the inconsistent evidence in summation. The state certainly acknowledged the importance of the issue when, toward the end of its summation, it referred to 'the physics of this, how it all happens,' and offered a somewhat plausible

explanation. . . . Thus, the issue was neither overlooked nor ignored by counsel. As Attorney Bansley put it, an expert was not needed to know that there was a discrepancy between the Katsnelson findings and part of the Hunter account of the incident.

"From the inception of his representation of the petitioner, and throughout the case, trial counsel, Attorney Cizik, consulted and conferred with his expert, Dr. DeForest, who advised that a crime scene reconstruction was not feasible given the many variables and the dearth of physical evidence. Dr. DeForest remained on in a consulting capacity aiding trial counsel, through his experience and expertise, in the preparation of the case and the cross-examination of witnesses. Neither the evidence nor the record supports any finding of deficient performance on the part of trial counsel in not retaining the services of, or otherwise consulting with, a forensic pathologist relative to the anatomical positioning of shooter and victim.

"Furthermore, the petitioner's defense in the criminal case, from the very beginning, was grounded on an alibi, as is apparent from the credible testimony of trial and prior habeas counsel before this court, the petitioner's testimony before the jury, the petitioner's testimony [in his previous habeas trial], and the presentation of the petitioner's alibi witness at the criminal trial, David Whitney. It would seem that positioning evidence related to shooter and victim—who was standing where when the gun was fired—is of somewhat questionable materiality, even for impeachment purposes, when the petitioner claims he was not even there. . . .

"Based upon the foregoing, the court concludes that the petitioner has failed to show that Attorneys Cizik and Bansley rendered deficient representation in the criminal trial and the first habeas. Even if the court were to assume deficient performance has been proven, which it has not, the petitioner has not proven that

he was prejudiced by such deficient performance by undermining this court's confidence in the outcome of the criminal trial." (Emphasis added; footnotes omitted.)

On appeal, the petitioner claims that Bansley should have claimed, in his first habeas action, that Cizik's representation of him was ineffective because he should have consulted a forensic pathologist to reconstruct the crime scene to undermine Hunter's testimony. We disagree.

"As this court previously has observed, [a] trial attorney is entitled to rely reasonably on the opinion of an expert witness . . . and is not required to continue searching for a different expert. . . . Moreover, it is well established that when a criminal defense attorney consults with an expert in a relevant field who thereafter apprises counsel that he or she cannot provide favorable testimony, counsel is entitled to rely reasonably on [that] opinion . . . and [is] not required to continue searching for a different expert. . . . [T]he selection of an expert witness is a paradigmatic example of the type of strategic choic[e] that, when made after thorough investigation of [the] law and facts, is virtually unchallengeable." (Citations omitted; internal quotation marks omitted.) *Nicholson* v. *Commissioner of Correction*, 186 Conn. App. 398, 413–14, 199 A.3d 573 (2018), cert. denied, 330 Conn. 961, 199 A.3d 19 (2019).

Here, Cizik investigated the possibility of a crime scene reconstruction by consulting with DeForest, an expert criminalist. DeForest told Cizik that he could not perform such a reconstruction due to the nature of the evidence available. Cizik was entitled to rely on DeForest's representation that the crime scene could not be reconstructed, and was not required to search for another expert to perform a reconstruction. Moreover, the testimony of the state's medical examiner,

Katsnelson, was consistent with Taff's testimony, so the jury had before it the same evidence that presumably would have been revealed by a forensic pathologist such as Taff. We thus conclude that the habeas court properly concluded that Bansley did not render ineffective assistance in failing to claim in the petitioner's first habeas action that Cizik rendered ineffective assistance to the petitioner in not consulting a forensic pathologist.

II

The petitioner also claims that the habeas court erred in rejecting his claim that Bansley rendered ineffective assistance by failing to claim in the petitioner's first habeas action that Cizik was ineffective by failing to object at trial to the admission, as substantive evidence, of prior inconsistent statements of Jason Greene and Michael Greene. We disagree.

The habeas court set forth the following facts in its discussion of this claim. "Jason Greene gave two statements to Waterbury Police Detective Kennelly on December 29, 2001, within hours of the murder. The statements are inconsistent in a number of respects. The most glaring inconsistency concern[ed] his first statement reciting he saw the petitioner jump out of the Lexus and 'walk up to [the victim] point a gun at him and shoot him twice.' In the second statement he changes his recollection of the shooting as follows: '[W]e all walked back to the Lexus . . . Greg was driving . . . [the victim] was standing in the middle of the walkway and yelled something at us . . . Greg got out along with Michael and [the petitioner] . . . I watched Greg walked up the front stairs and down the walkway . . . [the petitioner] was walking down the driveway to the corner of the building . . . I got out of the rear seat and got in the driver's seat . . . Then I heard two shots behind me . . . looked back to see what was happening and [the petitioner] was getting into the front

passenger seat . . . I looked down and saw a gun in his hand . . . I asked [the petitioner] what was going on and he said "go, go, I shot that dude . . . .'" In his trial testimony, he denied ever telling the police that he saw the petitioner shoot [the victim]. Detective Kennelly testified, credibly, to the circumstance surrounding the taking of both statements.

"With respect to Michael Greene, he provided a statement on December 29, 2001, to Waterbury Police Sgt. Jannetty, also within hours of the murder, in which he said that at first he did not want to say anything about [the petitioner] shooting [the victim] 'because [the petitioner's] my cousin, and I didn't want to see him go to jail.' In the statement, Michael Greene gives the following account of what occurred: '[The victim] and Gregory kept arguing in the lobby . . . [the petitioner] also had some words with . . . [the victim] . . . he seemed to be sticking up for Gregory . . . [the victim] was saying he wanted to handle it all another day . . . [the petitioner] was saying "[Expletive] that, we ain't letten' this [expletive] ride" . . . We got in the Lexus . . . I looked in the backseat and saw the petitioner holding a gun . . . the gun he always carries . . . When we got up to the front of the diner by the ramp . . . [the victim] was saying something . . . Gregory jumped out of the driver's side to confront [the victim] . . . Me and [the petitioner] ran out of the Lexus and I grabbed Gregory from behind . . . [the petitioner] walked up to [the victim] from behind, said "[Expletive]," and held up the gun and shot him twice . . . [the victim] fell onto the ramp, and landed backwards on the side of the diner.' In his trial testimony, Michael Greene basically repudiates critical portions of his December 29, 2001 statement denying that he actually saw the petitioner shoot [the victim], and that he observed the petitioner with a gun. [Jannetty] testified, credibly, to the circumstance[s] surrounding the taking of both statements."

At the habeas trial, Cizik testified that he did not object to the substantive admission of the Greenes' statements because those statements undermined their credibility and "that could only be a good thing for the jury to see."

Bansley agreed with Cizik's strategic decision not to object to the admission of the statements of the Greenes, testifiying that "the more inconsistent statements that were presented in court, were more effective to the defense in showing that these individuals were untruthful and shouldn't be believed. I thought that was more important than objecting to it. I don't . . . personally . . . believe in objecting just because you can and just because you can win an objection. You've got to look beyond that and see whether the evidence actually hurts, and in this case I thought it was helpful because it impeached the credibility of the witnesses." Bansley further explained: "[W]hen I looked at the totality of the evidence and reviewed the transcripts, I thought it was more favorable that this evidence went in than not . . . [because] both of these individuals were present at the scene. Easily, you could have pointed fingers at them, so they had a reason to lie. On top of that, they're talking about the police making threats. Frankly, I thought the combination of all that brought a fair amount of reasonable doubt."[1]

The habeas court held: "Attorney Cizik, as an experienced criminal trial lawyer, was well aware of the evidentiary law on the substantive use of inconsistent statements under *State* v. *Whelan*, [200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986)]. He was also well aware that *Whelan* was not a 'blanket rule' . . . and of the trial

[1] Bansley also testified that the admission of the statements was irrelevant to the petitioner's defense at trial, which was that he was not even present when the victim was killed.

court's limited 'gate-keeping' function upon objection. [Cizik] testified, credibly, that he did not adhere to the concept of objecting for the sake of objecting, particularly where it appeared futile based on his assessment, and most especially when he believed the admission of the statements would benefit the defense by unveiling initial falsehoods and highlighting a [witness'] proclivity to fabricate. In the court's view, such was a prudential tactical determination on the part of counsel, and no evidence has been presented that, under these circumstances, the decision not to object rendered the representation, under the *Strickland* standard, 'outside the range of competence displayed by lawyers with ordinary training and skill in the criminal law,' nor has the petitioner shown the required prejudice." (Footnote omitted.)

On appeal, the petitioner claims that the habeas court erred in rejecting his claim that Bansley rendered ineffective assistance by failing to raise, in his first habeas action, the claim that Cizik's representation of him was deficient in failing to object to the statements at issue because that failure allowed "harmful evidence against [the petitioner to reach] the jury." We disagree.

As noted herein, our scrutiny of counsel's performance is highly deferential, and we must indulge a strong presumption that counsel's performance falls within a wide range of reasonable representation. See *Adkins* v. *Commissioner of Correction*, supra, 185 Conn. App. 151.

Both Cizik and Bansley testified that it is not necessary to object to the admission of evidence simply for the sake of objecting, and that the evidence at issue must be viewed within the context of the entire case. Cizik testified at the habeas trial that he did not object to the admission of the statements at issue because he considered the admission of those statements beneficial

to the petitioner. Bansley agreed with Cizik's assessment that the inconsistency of those statements was beneficial to the petitioner in that they highlighted the lack of credibility of the two witnesses. Even if there was a likelihood that the trial court would have sustained an objection to the admission of the statements, we agree with the habeas court that Cizik's decision not to object to their admission was a reasonable strategic decision based on his assessment that the statements were beneficial to the petitioner. We thus conclude that the habeas court properly determined that Bansley was not ineffective in failing to claim in the petitioner's first habeas corpus action that Cizik was ineffective in failing to object to the admission of the statements of Jason Greene and Michael Greene.

The judgment is affirmed.

In this opinion the other judges concurred.

LORI K. WINTHROP *v.* MATTHEW WINTHROP (AC 40622) (AC 40765)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying the plaintiff's postjudgment motion for contempt. The judgment of dissolution incorporated the parties' separation agreement, which required the defendant to pay the plaintiff a minimum of $3000 per month in unallocated alimony, with an additional amount owed based on the annual earnings of the defendant. The separation agreement further provided, inter alia, that a loan that the defendant had received from his employer, R Co., was to be forgiven by R Co., and the income imputed to the defendant and reflected on his W-2 form. Subsequently, the plaintiff filed a motion for contempt, which the court denied, but the court nonetheless agreed with the plaintiff that, for the purpose of calculating additional alimony, the defendant's earned income in 2016 was $168,765.91, the figure reflected on his W-2 form. The court found

that, in 2016, the defendant had failed to pay additional alimony as required by the separation agreement and ordered that he pay the plaintiff $3753.18. On appeal, the defendant claimed that the trial court improperly concluded that his earned income was the amount reflected on his W-2 form. Specifically, he claimed, inter alia, that the court, in calculating his earned income, should have excluded his noncash earnings, including amounts allocated in connection with his forgiven debt obligations to R Co., as such income never was actually available to him. The plaintiff cross appealed and claimed that the trial court incorrectly calculated the defendant's additional alimony payments. *Held*:

1. The trial court properly found that the defendant's earned income in 2016 was the amount reflected on his W-2 form and, thus, that he owed additional alimony pursuant to the parties' separation agreement: it was evident that the parties intended earned income to be the amount shown on the defendant's W-2 form, as the separation agreement provided that, upon written request from the plaintiff, the defendant was required to produce his paychecks and W-2 and/or 1099 forms reflecting earned income, and that reading was consistent with the definition of earned income as set forth in the applicable federal statute (26 U.S.C. § 32 [c] [2] [A] [i] and [ii]), which defines earned income as the gross earnings received as compensation from employment and the net earnings received from self-employment; moreover, the defendant could not prevail on his claim that, as a financial advisor who did not receive a salary or hourly wage from his employer but was compensated purely on a commission basis, he was for all practical purposes self-employed and, thus, his earned income should be his net earnings, i.e., his gross compensation minus his business related expenses, and not the figure shown on his W-2 form, as net earnings from self-employment for the purposes of 26 U.S.C. § 32 relate specifically to compensation from an individual's own business or distributions from a partnership of which the individual is a member, the defendant conceded that he was employed by R Co. and that he received his commission as compensation for services rendered as an employee, and the defendant received a W-2 form at the end of the year, which, pursuant to the applicable federal regulation (26 C.F.R. § 31.6051-1 [a]), is required when an employer deducts and withholds taxes from an employee; furthermore, the defendant's claim that the inclusion of his noncash earnings in his earned income was improper was unavailing, as the separation agreement clearly provided that the income imputed to the defendant in connection with his forgiven debt obligations to R Co. was to be included in his earned income for the purposes of calculating his additional alimony obligations, and any claim that that was not the intent of the parties in drafting their separation agreement was contradicted expressly by the unambiguous language provided therein.

2. The trial court incorrectly calculated the defendant's additional alimony payments because it failed to include 30 percent of his earned income in excess of $102,000 but less than $150,000; the parties' separation agreement was unambiguous and required the defendant, who earned $168,765.91 in 2016, to pay 30 percent of his earned income in excess of $102,000 but less than $150,000, and 20 percent of his earned income in excess of $150,000 but less than $200,000, and the trial court, which ordered the defendant to pay an additional $3753.18 in alimony representing 20 percent of the income that the defendant earned in excess of $150,000, improperly failed to include 30 percent of the income that the defendant earned in excess of $102,000 but less than $150,000, which is $14,400.

Argued January 16—officially released April 30, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Malone, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Tindill, J.*, denied the plaintiff's motion for contempt, and the defendant appealed to this court; subsequently, the court, *Tindill, J.*, denied the plaintiff's motion for clarification and the defendant's motion for reargument; thereafter, the plaintiff cross appealed to this court; subsequently, the court, *Tindill, J.*, denied the plaintiff's motion for articulation; thereafter, this court consolidated the appeals. *Reversed in part; judgment directed.*

Matthew Winthrop, self-represented, the appellant-appellee (defendant).

Barbara M. Schellenberg, for the appellee-appellant (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Matthew Winthrop, appeals, and the plaintiff, Lori K. Winthrop, cross appeals, from the order of the trial court denying the plaintiff's postjudgment motion for contempt. The

defendant claims that the trial court improperly found that his "earned income," for the purpose of calculating the amount of additional alimony that he owed the plaintiff in 2016, was the amount shown on his W-2 form. The plaintiff contends in her cross appeal that, although the court correctly determined that the defendant's earned income was the figure provided on his W-2 form, it failed to calculate the additional alimony owed in 2016 in accordance with the parties' separation agreement (agreement). We affirm the judgment as to the defendant's appeal and, as to the plaintiff's cross appeal, we reverse the judgment only with respect to the court's calculation of the alimony amount owed by the defendant in 2016.

The following undisputed facts and procedural history are relevant for the purposes of this appeal and cross appeal. The parties were married on November 27, 1996, and their marriage was dissolved on February 9, 2012. The judgment of dissolution incorporated the parties' agreement, which provides, in relevant part, that the defendant is to pay the plaintiff unallocated alimony until September 11, 2019, or until the plaintiff's death, remarriage, or cohabitation for more than three months, whichever event shall occur first. Pursuant to article 3.2 of the agreement, the defendant is required to pay the plaintiff a minimum of $3000 per month, with an additional amount owed based on the annual earnings of the defendant. Specifically, the agreement provides that the defendant is to pay additional alimony as follows: 30 percent of his earned income in excess of $102,000 and less than $150,000; 20 percent of his earned income in excess of $150,000 and less than $200,000; and 0 percent of his earned income in excess of $200,000. The agreement also states in article 3.4 that in any year in which the defendant does not pay the maximum annual alimony amount, he shall provide the

plaintiff, upon written request, with copies of his quarterly paychecks and his year-end W-2 or 1099 forms reflecting "earned income."

The agreement also addressed a $160,000 loan that the defendant had received from his employer, Royal Bank of Canada (Royal Bank), of which approximately $46,000 was unspent and in the defendant's possession. According to article 6.2 of the agreement, the entirety of the loan was to be forgiven by Royal Bank, and the income imputed to the defendant, over a series of years, and reflected on his W-2. Moreover, the agreement specified that this imputed income "shall be included in the computation of unallocated alimony . . . ."

On March 7, 2017, the plaintiff filed a postjudgment motion for contempt, which alleged that the defendant had "refused to voluntarily pay alimony based on [his] 2016 earnings and as stipulated in the divorce decree." On June 13, 2017, the court held an evidentiary hearing on the plaintiff's motion and received testimony from both parties. During the hearing, the plaintiff argued that, based on the defendant's 2016 W-2 form, his earned income was $168,765.91, which, thus, required him to pay additional alimony as outlined in the parties' agreement. In response, the defendant stipulated that although he did owe the plaintiff additional alimony, he calculated his earned income to be approximately $104,744. In reaching this figure, the defendant excluded his noncash earnings, including income that had been imputed to him in connection with his forgiven debt obligations to Royal Bank, and deducted from his cash earnings certain business and medical related expenses.

In an order dated June 18, 2017, the court denied the motion for contempt but nonetheless agreed with the plaintiff that, for the purpose of calculating additional alimony, the defendant's earned income was the figure reflected on his W-2 form, i.e., $168,765.91. The court,

therefore, found that the defendant had failed to pay additional alimony as required by the parties' agreement and ordered that he pay the plaintiff $3753.18 no later than August 25, 2017.[1] From this decision, both parties now appeal. Additional facts will be set forth as needed.

I

In his appeal, the defendant claims that the court improperly concluded that his earned income was the amount reflected on his W-2 form. Specifically, the defendant argues that the court, in calculating his earned income, should have (1) deducted from his cash earnings the business expenses provided on his 2016 tax return, as these costs were unreimbursed and necessary to the defendant's compensation as a commissioned salesman, and (2) excluded his noncash earnings, including amounts allocated in connection with his forgiven debt obligations to Royal Bank, as such income never was actually available to him. We do not agree.

We begin our analysis of the defendant's claim by setting forth our standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts." (Internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 821, 138 A.3d 935 (2016). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with

[1] On July 5, 2017, the plaintiff filed a motion for clarification, requesting that the court correct its order to comply with the provisions of the agreement. Specifically, the plaintiff argued that the court had failed to include in its calculation 30 percent of the defendant's earned income in excess of $102,000 but less than $150,000. The plaintiff's motion was denied without explanation on August 1, 2017.

the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable construction of the written words and that the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 322–23, 186 A.3d 771, cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018). "The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015).

Applying the foregoing principles to the present matter, we conclude that the term "earned income" as used in the parties' agreement is unambiguous. By the provisions of the agreement itself, it is evident that the parties intended "earned income" to be the amount shown on the defendant's W-2 form. As stated previously in this opinion, article 3.4 of the agreement provides that, upon written request from the plaintiff, the defendant is required to produce his paychecks and "W-2 and/or 1099's reflecting *earned income*." (Emphasis added.) The inclusion of this provision evinces a clear intent by the parties that the income provided on the defendant's W-2 is his "earned income" for the purpose of

ascertaining his additional alimony obligations. Moreover, this reading is consistent with the definition of "earned income" as set forth in 26 U.S.C. § 32 (c) (2) (A), which states: "The term 'earned income' means . . . (i) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the taxable year, plus (ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of section 1402 [a]), but such net earnings shall be determined with regard to the deduction allowed to the taxpayer by section 164 (f)." Pursuant to this definition, earned income is the gross earnings received as compensation from employment and the net earnings received from self-employment.[2]

To this second point, however, the defendant contends that, if we conclude the parties intended "earned income" to have the same definition as provided in 26 U.S.C. § 32, he is for all practical purposes "self-employed," and, thus, his earned income should be his net earnings, i.e., his gross compensation minus his business related expenses, and not the figure shown on his W-2. At oral argument before the trial court and this court, the defendant asserted that, as a financial advisor, he does not receive a salary or hourly wage from his employer but is compensated purely on a commission basis. As such, the defendant argued that it is

[2] In support of his claim that the term "earned income" is ambiguous, the defendant directs our attention to *Lagasse* v. *Lagasse*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-08-4013511-S (January 16, 2018), in which the term "gross earned income" as used in the parties' separation agreement was found to be ambiguous. Aside from the fact that this decision is not controlling on this court, our reading of *Lagasse* reveals that the court turned to the Internal Revenue Code for guidance but concluded that there was no specific definition of "gross earned income." See id. ("[T]he phrase 'gross earned income' . . . is not defined in the . . . separation agreement . . . or in the Internal Revenue Code. The terms 'gross income' and 'earned income' are defined in the Code, but the phrase 'gross earned income' does not appear anywhere in the statute.").

necessary for him to incur significant expenses throughout the year in an effort to maintain his skill and knowledge of the financial industry, as well as to market himself to prospective clients. In support of his position, the defendant has cited in his brief several Superior Court decisions in which business expense deductions were permitted in the calculation of alimony and child support obligations. See *Nedder* v. *Nedder*, Superior Court, judicial district of Middlesex, Docket No. FA-10-4019331-S (May 2, 2013) (court considered business expenses of husband, real estate agent, in determining appropriate alimony award); *Means* v. *Means*, Superior Court, judicial district of New London at Norwich, Docket No. CV-94-315846-S (May 22, 1996) (17 Conn. L. Rptr. 26, 27) (court deviated from child support guidelines to account for husband's business expenses despite fact that he was not self-employed). We find these cases to be inapposite and the defendant's overall argument unpersuasive.

Net earnings from self-employment for the purposes of 26 U.S.C. § 32 relate specifically to compensation from an individual's own business or distributions from a partnership of which the individual is a member. See 26 U.S.C. § 1402 (a) (2012). The defendant concedes that he is employed by Royal Bank and that he receives his commission as compensation for services rendered as an employee. Moreover, he receives a W-2 form at the end of the year, which pursuant to federal regulations is required when an employer deducts and withholds taxes from an employee. See 26 C.F.R. § 31.6051-1 (a) (2018). Although he may be permitted for the purposes of calculating his income tax liability for the calendar year to deduct the expenses that he incurs in connection with his employment, these deductions are nonetheless inconsequential in calculating his earned income, as defined by 26 U.S.C. § 32. Further to this point, the

cases cited by the defendant are distinguishable factually insofar as they involved the calculation of child support and alimony payments in circumstances where no separation agreement existed. Accordingly, we discern no merit in the defendant's position that he is self-employed for the purposes of determining his earned income under the agreement.

We now turn to the defendant's second claim that the inclusion of his noncash earnings in his earned income was improper. The defendant submits that it was not the intent of the parties to include imputed income in the calculation of additional alimony payments because such compensation is "phantom" and not actually available to him. Further, he contends that the loan he received from his employer was spent on marital expenses prior to the parties' divorce and, therefore, the financial burden of this debt should be shared equally. Following a careful review of the record, we conclude that article 6.2 of the agreement is dispositive of this issue.[3] Specifically, that provision clearly states that the income imputed to the defendant in connection with his forgiven debt obligations to Royal Bank is to be included in his earned income for the purposes of calculating his additional alimony obligations. Any claim that this was not the intent of the parties in drafting their agreement is contradicted expressly by the unambiguous language provided therein.

We conclude that, in light of the unambiguous language in the agreement, the trial court properly found that the defendant's earned income was $168,765.91 in

[3] The defendant also claims that the inclusion of the portion of his noncash earnings related to his domestic partner's medical benefits, totaling $7968, which he receives from his employer, is improper. We do not agree; such benefits fall within the definition of gross income as it is defined by 26 U.S.C. § 61 (a) and are not excludable under 26 U.S.C. § 106; therefore, the court properly included this amount in the calculation of the defendant's "earned income."

2016, and, thus, he owed additional alimony pursuant to the parties' agreement.

II

In her cross appeal, the plaintiff claims that the trial court incorrectly calculated the defendant's additional alimony payments because it failed to include 30 percent of his earned income in excess of $102,000 but less than $150,000. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court with respect to this finding and direct judgment consistent with this opinion.

In addressing this claim, we iterate our standard of review as to a trial court's interpretation of contractual terms. "If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, supra, 181 Conn. App. 322–23.

Applying this standard to the plaintiff's claim, we conclude that article 3.2 of the agreement, which provides the formula for calculating the defendant's additional alimony obligations, is unambiguous and requires the defendant to pay a percentage of all income earned in excess of $102,000. As indicated previously in this opinion, the agreement states that the defendant is to pay "30 [percent] of earned income in excess of $102,000 and less than [$150,000]"; "20 [percent] of earned income in excess of $150,000 and less than $200,000"; and "0 [percent] of earned income in excess of $200,000." In finding that the defendant earned $168,765.91, the court ordered the defendant to pay an additional $3753.18 in alimony, which represents 20

percent of the income that the defendant earned in excess of $150,000. The court failed to include, however, 30 percent of the income that the defendant earned in excess of $102,000 but less than $150,000, which is $14,400. We conclude, therefore, that because article 3.2 clearly sets forth a stepdown structure in which the defendant is required to pay the applicable percentage of any earned income he had in excess of $102,000, he was required to pay $14,400 in addition to the 20 percent of the income he had earned in excess of $150,000, which the court correctly calculated to be $3753.18.[4]

The judgment is reversed in part only as to the amount of additional alimony owed in 2016 and the case is remanded with direction to order the defendant to pay a total of $18,153.18 in additional alimony to the plaintiff; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DANIEL C. SEALE *v.* GEOQUEST, INC., ET AL.
(AC 41407)

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

Syllabus

The plaintiff sought to recover damages from the defendant G Co. for negligence and negligent misrepresentation in connection with G Co.'s remediation of soil contamination on certain real property purchased by the plaintiff. The matter was tried to the court, which concluded that G Co. had not breached its duty of care to the plaintiff and rendered judgment in favor of G Co. On the plaintiff's appeal to this court, *held* that the trial court's finding that G Co. had not breached its duty of care to the plaintiff was not clearly erroneous and was supported by the evidence in the record: there was testimony from three licensed environmental professionals indicating that G Co. had followed industry standards and had not violated any state or municipal regulations, that the property effectively had been remediated in that the contaminated soil that

[4] We note that, pursuant to the agreement, these amounts are in addition to the $3000 per month that the defendant was required to pay irrespective of his earned income in 2016.

remained on the property was in accordance with certain state agency remediation guidance documents, and that the plaintiff had incorrectly interpreted a soil remediation report prepared by G Co., and the trial court, as the sole arbiter of the credibility of those witnesses, determined the proper weight to be accorded to their specific testimony and bore the responsibility of resolving the conflicting testimony as to whether G Co., through the actions of its agent, had breached the duty of care regarding the remediation of the property; moreover, in the absence of a finding that G Co. breached its duty of care, G Co. did not make a misrepresentation of fact as to the conditions of the soil on the property.

Argued February 4–officially released April 30, 2019

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Dubay*, *J.*; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Alan R. Spirer, for the appellant (plaintiff).

Cullen W. Guilmartin, with whom, on the brief, was *Regen O'Malley*, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Daniel C. Seale, appeals from the judgment of the trial court, following a bench trial, rendered in favor of the defendant, GeoQuest, Inc.[1] The dispositive issue on appeal is whether the court properly determined that the defendant did not violate the standard of care. We affirm the judgment of the trial court.

[1] Although the summons and complaint identified "GeoQuest, Inc.," and "Jay Soltis" as defendants, the marshal's return of service indicates that only GeoQuest, Inc., had been served with a copy of the summons and complaint on April 18, 2016. Following the filing of the answer and special defenses, all references in the court filings and pleadings have identified GeoQuest, Inc., as the sole defendant. In its memorandum of decision, however, the trial court referred to GeoQuest, Inc., and Jay Solits as the defendants. In this opinion, we refer to GeoQuest, Inc., as the defendant.

In March, 2014, the plaintiff entered into a contract to purchase 11 Minute Man Hill in Westport from a third-party seller. Prior to the closing, the third-party seller had an underground storage tank removed from the property. The third-party seller learned that this storage tank had leaked and contaminated the soil on the property. The third-party seller engaged an excavation company to remove the tank and this company, in turn, hired the defendant to remediate the soil contamination.

On August 12, 2014, the defendant, acting through its employee Jay Soltis, a licensed environmental professional and the defendant's vice president of environmental services, arrived on the property to supervise the remediation. As part of this process, the defendant removed approximately forty-one tons of soil. On August 13, 2014, Soltis wrote a report and e-mailed it to the excavation company that day. The report provided, in relevant part, as follows: "Excavation to the north was limited due to structural concerns for the site home (per [Connecticut Department of Energy and Environmental Protection (CT DEEP)] [G]uidance, excavation is not required when the structural stability of a building may be compromised). *With the exception of the northern sidewall, excavation continued until no visible or olfactory indications of contamination remained in the soils. . . . Based on the results of the confirmation sampling program, the fuel oil release has been effectively remediated in site soil, and no further environmental investigation or remediation is warranted at this time.*" (Emphasis added.) Soltis attached the test results from the laboratory, which showed that the soil contamination was below the relevant detection level of 500 milligrams per kilogram. This report subsequently was provided to the plaintiff and his attorney.

In 2015, the plaintiff decided to sell the property after having demolished the home that had existed thereon. The purchaser, SIR Development, LLC, engaged a remediation contractor, EnviroShield, Inc., to determine whether any fuel contamination existed on the property. EnviroShield, Inc., estimated that between 300 and 400 tons of contaminated soil needed to be removed, and indicated that the source of this contamination was "beneath the former residence location."

The plaintiff then hired Mark A. Gottlieb, a licensed environmental professional, to further investigate the soil contamination at the property. Gottlieb supervised the remediation and issued a December 1, 2015 report indicating that approximately 130 tons of soil had been removed. The plaintiff had the property remediated at a cost of approximately $45,000.

In April, 2016, the plaintiff commenced this action. The plaintiff's complaint set forth two counts sounding in negligence and negligent misrepresentation. The court found that the plaintiff had failed to meet his burden of proof as to these causes of action. "The three licensed environmental professionals [who had testified at the trial, Gottlieb, Soltis, and Marc I. Casslar, the president of the defendant] unanimously agreed that the [defendant] did not violate any state or municipal rule or regulation. The contaminated soil left on site was in accordance with the CT DEEP Guidance. The court finds that the plaintiff failed to prove any breach of reasonable care on the part of the [defendant]." Accordingly, the court rendered judgment in favor of the defendant. This appeal followed.[2] Additional facts will be set forth as needed.

The dispositive issue in this appeal is whether the defendant breached its duty of care. In his appellate

[2] The trial court denied the plaintiff's March 20, 2018 motion for articulation. This court granted the plaintiff's subsequent motion for review of the denial of the motion for articulation but denied the relief requested therein.

brief, the plaintiff argues that the defendant's report indicated that the soil at the property had been " 'effectively remediated' " and that " 'no further environmental investigation or remediation is warranted at this time.' " He specifically contends that the defendant deviated from the standard of care for a licensed environmental professional by failing (1) to excavate to a sufficient depth to detect and remove accessible contaminated soil, (2) to take samples from the bottom of the excavation, (3) to include photographs and a site sketch in its report, (4) to specifically state in its report that contaminated soil remained on the property, and (5) to specifically state that further environmental investigation was warranted. The defendant counters that the court properly relied on the evidence to support its conclusion that the defendant had not breached its duty to the plaintiff. We agree with the defendant.[3]

As noted, the plaintiff's complaint set forth two causes of action: negligence[4] and negligent misrepresentation.[5] The court concluded that the defendant had not violated any state or municipal regulations and that the contaminated soil that remained on the property was in accordance with the CT DEEP Guidance. Therefore,

[3] As a result, we decline to consider the defendant's alternative grounds for affirming the judgment of the trial court, namely, that it did not owe a duty to the plaintiff and that it was not the cause in fact of the plaintiff's alleged damages.

[4] "A cause of action in negligence is comprised of four elements: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 649, 126 A.3d 569 (2015); see also *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328, 107 A.3d 381 (2015).

[5] "Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact, (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013); see also *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 193, 75 A.3d 68 (2013).

the court reasoned that the plaintiff had failed to prove that the defendant had breached a duty owed to the plaintiff as a result of its conclusion that the property effectively had been remediated and that no further investigation or remediation was warranted at that time. As a corollary, the court determined that the defendant had not made a misrepresentation of fact to the plaintiff that it knew, or should have known, was false.

The plaintiff argues that the court improperly found that the defendant had not breached its duty of care. The determination of a breach of duty is reserved for the trier of fact. *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 217, 905 A.2d 1135 (2006); see also *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191, 74 A.3d 1278 (2013); *Behlman* v. *Universal Travel Agency, Inc.*, 4 Conn. App. 688, 691, 496 A.2d 962 (1985).

"Because the . . . claim challenges the sufficiency of the evidence, which is based on the court's factual findings, the proper standard of review is whether, on the basis of the evidence, the court's finding . . . was clearly erroneous. . . . In other words, a court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficiency 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. . . . Moreover, we repeatedly have held that [i]n a [proceeding] tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . Where there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *Arroyo* v. *University of Connecticut Health Center*, 175 Conn.

App. 493, 513, 167 A.3d 1112, cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

In the present case, Gottlieb testified during cross-examination that Soltis' report indicated to him, as a licensed environmental professional, that the defendant had been aware of contaminated soil under the home. He further stated that the plaintiff incorrectly interpreted Soltis' report as stating that all the contaminated soil had been removed.[6] Gottlieb acknowledged that it would have been impossible for the defendant to ensure that the property was completely free of contaminated soil due to the presence of the home. Gottlieb could not identify any state or municipal law that the defendant had violated with respect to its work on the property. Finally, he conceded that even if the defendant had performed the remediation on the property in the exact manner that Gottlieb described, contaminated soil nevertheless would have been present under the foundation of the then-existing home.

Soltis testified that the defendant had been hired to assist in the remediation of the property in August, 2014. At that time, he was unaware of any plan to demolish the home then existing on the property, and Soltis testified that if the home had not been demolished, no additional remediation would have been necessary. He further opined that his report could not be read as asserting that no contaminated soil remained on the property. He stated that leaving the contaminated soil in the northern sidewall was permissible under the CT DEEP Guidance and that, pursuant to that document,

[6] Specifically, the following colloquy occurred between Gottlieb and the defendant's counsel:

"Q. If [the plaintiff] testified that he read the report as stating that no soil contamination was left behind, would you agree—would you disagree with [the plaintiff's] reading of the report?

"A. Yeah. [He] is not correct here. There was detectable contamination in the north wall sample."

the defendant had completed an effective remediation. Finally, he noted that the defendant's work on the property followed industry standards.

Casslar testified that the Soltis report complied with industry customs and that he found it to be accurate and intelligible. He further noted his disagreement with Gottlieb's report and testimony regarding the remediation of the property supervised by Soltis. Casslar also described several flaws contained in Gottlieb's report.

In the present case, the trial court acted as the sole arbiter of the credibility of the licensed environmental professionals and determined the proper weight to be accorded their specific testimony. *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 513. Furthermore, the court bore the responsibility of resolving the conflicting testimony as to whether the defendant, through the action of Soltis, had breached the duty of care regarding the remediation of the property. Id. We cannot say that the court's finding was clearly erroneous. Evidence existed in the record to support the finding that the defendant had not breached its duty of care, and after reviewing the record, this court is not left with the definite and firm conviction that a mistake has been committed.

The court concluded that the defendant had not breached its duty of care. Furthermore, in the absence of any such breach, the defendant did not make a misrepresentation of fact as to the conditions of the soil at the property. As a result, we conclude that the court properly rendered judgment in favor of the defendant.

The judgment is affirmed.

LIBERTY TRANSPORTATION, INC. *v.* MASSACHUSETTS BAY INSURANCE COMPANY (AC 41553)

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

Syllabus

The plaintiff sought to recover damages from the defendant insurance company for, inter alia, breach of contract in connection with lost rental income and damage to certain of its real property that was sustained during a hurricane. The defendant filed a motion to dismiss, asserting that the plaintiff lacked standing to bring its claim for lost rental income because it had sold the property to a third party and assigned the rights to the insurance proceeds to that third party pursuant to the terms of the real estate purchase agreement. The plaintiff claimed that it had standing and was entitled to the insurance proceeds because the damage occurred before it entered into the real estate purchase agreement with the third party and because it had retained an interest in the damaged rental units as a result of its decision to exercise a leaseback provision in that agreement. The trial court granted the defendant's motion to dismiss, concluding, inter alia, that the plaintiff lacked standing because, by virtue of the assignment, it had no legal interest in the insurance proceeds. The trial court thereafter rendered judgment for the defendant, from which the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion to dismiss and rendered judgment dismissing the plaintiff's complaint; because the trial court's memorandum of decision thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a proper statement of the facts and the applicable law on the issues.

Argued March 18—officially released April 30, 2019

Procedural History

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

Stuart G. Blackburn, with whom, on the brief, was *Paige B. Durno*, for the appellant (plaintiff).

Stephen O. Clancy, with whom, on the brief, was *Jessica A. R. Hamilton*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Liberty Transportation, Inc., appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Massachusetts Bay Insurance Company. The dispositive issue in the appeal is whether the court properly concluded that the plaintiff lacked standing to commence this action. We affirm the judgment of the trial court.

The plaintiff set forth the following allegations in its complaint. In August, 2011, the plaintiff owned property located at 11 High Street in Suffield, which the defendant insured for, inter alia, property damage, loss of income and fair rental value. On or about August 28, 2011, the property suffered wind and water damage during a hurricane. As a result, the plaintiff claimed to have sustained damages for lost income and lost fair rental value, and made an insurance claim to the defendant. The defendant declined to pay the plaintiff's claim. In August, 2013, the plaintiff commenced this action against the defendant. Its complaint set forth claims for breach of contract and breach of the implied covenant of good faith and fair dealing. It sought money damages, interest, attorney's fees, costs, and any other relief deemed appropriate by the court. The defendant filed an answer and raised several special defenses on January 8, 2016.

On September 6, 2017, the defendant filed a motion to dismiss pursuant to Practice Book § 10-30. Specifically, the defendant argued that the plaintiff lacked standing to bring its claim for lost rental income for two commercial units at the property because the plaintiff had sold the property to a third party on January

10, 2012,[1] and had assigned any insurance money for any damages existing at the time of the January, 2012 real estate closing.[2] Specifically, it stated: "[The] [p]laintiff's assignment of its rights to any potentially recoverable insurance proceeds to [the third party] unequivocally extinguished [the] [p]laintiff's corresponding right to recover those amounts. [The] [p]laintiff, therefore, lacks standing to maintain this action on its own behalf."

On October 6, 2017, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss. It argued that the loss of rental income occurred

[1] The defendant attached a copy of the real estate purchase agreement for 11 High Street in Suffield. Generally, "[w]hen a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . .

"[I]f the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining a jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citation omitted; internal quotation marks omitted.) *Caron* v. *Connecticut Pathology Group., P.C.*, 187 Conn. App. 555, 563–64, A.3d (2019); *Norris* v. *Trumbull*, 187 Conn. App. 201, 209–10, 201 A.3d 1137 (2019).

[2] Paragraph 12 of the real estate purchase agreement provides: "The [plaintiff] assumes all risk of loss or damage to the [property] until closing and the PURCHASER assumes same upon closing. If any damage to the [property] shall not be restored prior to closing PURCHASER shall be required to close title to the [property] and shall receive in an amount not to exceed the purchase price all insurance monies recovered and recoverable on account of such damage. In the event of damage or loss [the plaintiff] shall

before the formation of the real estate purchase agreement. The plaintiff further claimed it was "classically aggrieved in that it has a specific interest in the claimed insurance proceeds . . . [and] suffered a loss due to the breach of contract by the [defendant] and has standing to bring this action." It also contended that it had retained an interest in the damaged units as a result of its decision to exercise a leaseback provision as set forth in the real estate purchase agreement.[3]

On March 27, 2018, the court, *Shapiro*, *J.*, issued a memorandum of decision granting the defendant's motion to dismiss. It first addressed the defendant's argument that the plaintiff had assigned the rights to the insurance proceeds to the third party pursuant to the terms of the real estate purchase agreement. It specifically explained: "An assignment is a transfer of property or some other right from one person (the assignor) to another (the assignee), which confers a complete and present right in the subject matter to the assignee. . . . Succession by an assignee to exclusive ownership of all or part of the assignor's rights respecting the subject matter of the assignment, and a corresponding extinguishment of those rights in the assignor, is precisely the effect of a valid assignment." (Citations omitted; internal quotation marks omitted.) The court concluded that a valid assignment had occurred.

The court was not persuaded by the plaintiff's arguments that (1) it was entitled to the insurance proceeds

immediately notify PURCHASER thereof and furnish to PURCHASER a written statement of the amount of insurance, if any, payable on account thereof."

[3] Paragraph 17 of the real estate purchase agreement provides in relevant part: "Notwithstanding the transfer of title, if a closing is had the [plaintiff] shall be entitled at its election to lease back the apartment located in the front of the building above the barber shop as presently configured and the small first floor one room office identified as Suite 1 for a term of one year from closing . . . . At PURCHASERS election [the plaintiff] may lease either or both of said units for a further one year terms at an increased rental . . . ."

because the damage had occurred before it entered into the real estate purchase agreement with the third party and (2) the execution of the leaseback provision in the real estate purchase agreement established its interest in the property such that it had standing. The court also rejected the plaintiff's claim that a separate agreement with the defendant entitled the plaintiff to any insurance moneys. Indeed, the plaintiff had failed to provide the court with a copy of this alleged separate agreement. The court granted the defendant's motion, concluding that "the plaintiff lacks standing in the present case because, by virtue of the assignment, it has no legal interest in alleged insurance proceeds that are due and payable on account of damage to the [property]." This appeal followed.

We carefully have examined the record and the briefs and arguments of the parties, and conclude that the judgment of the trial court should be affirmed. Because the trial court's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the facts and the applicable law on the issues. *Liberty Transportation, Inc.* v. *Massachusetts Bay Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6044771-S (March 27, 2018) (reprinted at 189 Conn. App. 600, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Bassford* v. *Bassford*, 180 Conn. App. 331, 335, 183 A.3d 680 (2018); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

APPENDIX
LIBERTY TRANSPORTATION, INC. *v.* MASSACHUSETTS BAY INSURANCE COMPANY*

Superior Court, Judicial District of Hartford
File No. CV-13-6044771-S

Memorandum filed March 27, 2018

Proceedings

Memorandum of decision on defendant's motion to dismiss. *Motion granted.*

Stuart G. Blackburn, for the plaintiff.

Stephen O. Clancy and *Jessica A. R. Hamilton*, for the defendant.

Opinion

SHAPIRO, J. On January 22, 2018, in this insurance claim matter, the court heard oral argument concerning the defendant's motion to dismiss (# 123). After considering the parties' written submissions and arguments, the court issues this memorandum of decision.

I

BACKGROUND

The defendant, Massachusetts Bay Insurance Co., contends that the plaintiff, Liberty Transportation, Inc., lacks standing to pursue this matter, since it assigned its rights to recover any insurance proceeds to a third party. The plaintiff alleges that it is entitled to payments under an insurance policy issued by the defendant concerning a commercial building. It contends that the loss which is the subject of the action predated the purchase

* Affirmed. *Liberty Transportation, Inc.* v. *Massachusetts Bay Ins. Co.*, 189 Conn. App. 595, A.3d (2019).

agreement relied on by the defendant, and, in the agreement, the plaintiff retained the right to continue to use or rent the two units in the building which are the subject of the claim. Additional references to the background are set forth below.

II

DISCUSSION

A

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447–48, 165 A.3d 1137 (2017).

"[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss." *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 413, 35 A.3d 188 (2012). "[W]hether a party has standing, based upon a given set of facts, is a question of law for the court . . . and in this respect the labels placed on the allegations by the parties [are] not controlling." (Citation omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 348, 780 A.2d 98 (2001). "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction

should be indulged." (Internal quotation marks omitted.) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 226, 105 A.3d 210 (2014).

The defendant contends that the plaintiff made an assignment to Capital Three Development, LLC (Capital), of the plaintiff's right to the insurance proceeds pursuant to the real estate purchase agreement (Agreement) between the plaintiff and Capital.

"An assignment is a transfer of property or some other right from one person (the assignor) to another (the assignee), which confers a complete and present right in the subject matter to the assignee." (Internal quotation marks omitted.) *American First Federal, Inc.* v. *Gordon*, 173 Conn. App. 573, 582, 164 A.3d 776, cert. denied, 327 Conn. 909, 170 A.3d 681 (2017). "An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to rules of contract construction." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 227, 828 A.2d 64 (2003). As such, "[t]he assignment . . . remains valid and enforceable against both the assignor and the assignee." (Internal quotation marks omitted.) *Sunset Gold Realty, LLC* v. *Premier Building & Development, Inc.*, 133 Conn. App. 445, 453, 36 A.3d 243, cert. denied, 304 Conn. 912, 40 A.3d 319 (2012). "Succession by an assignee to exclusive ownership of all or part of the assignor's rights respecting the subject matter of the assignment, and a corresponding extinguishment of those rights in the assignor, is precisely the effect of a valid assignment." *Bouchard* v. *People's Bank*, 219 Conn. 465, 473, 594 A.2d 1 (1991).

An assignment is valid if two elements are satisfied. See *American First Federal, Inc.* v. *Gordon*, supra, 173 Conn. App. 583–84. The first element is that the assignor possessed "an intent to assign—that is, to [confer] a complete and present right in the subject matter to the

assignee." (Internal quotation marks omitted.) Id., 583. "The intent to assign may appear from the writing itself, or may be derived from another source, such as the acts of the assignor or the surrounding circumstances." (Internal quotation marks omitted.) Id., 583–84. "No words of art are required to constitute an assignment; any words that fairly indicate an intention to make the assignee owner of a claim are sufficient . . . ." (Internal quotation marks omitted.) *Sunset Gold Realty, LLC* v. *Premier Building & Development, Inc.*, supra, 133 Conn. App. 452–53. "In determining the intent of the parties to an assignment, all the facts and circumstances surrounding the transaction must be taken into consideration." (Internal quotation marks omitted.) *American First Federal, Inc.* v. *Gordon*, supra, 584. The second element of a valid assignment is "that the subject matter of the assignment be adequately identified." Id. The subject matter of an assignment is sufficiently identified if it is "described with such particularity as to render it capable of identification." (Internal quotation marks omitted.) *Dysart Corp.* v. *Seaboard Surety Co.*, 240 Conn. 10, 17, 688 A.2d 306 (1997).

In interpreting the Agreement, "[w]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 13, 938 A.2d 576 (2008). "When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . [When] there is definitive contract language, [however] the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain

and unambiguous is itself a question of law . . . ." *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 102–103, 84 A.3d 828 (2014).

The Agreement's language is unambiguous. It reflects that the plaintiff intended to assign its right to the insurance proceeds to Capital. Section 12 of the agreement provides: "[Liberty Transportation, Inc.] assumes all risk of loss or damage to the Premises until closing and [Capital] assumes same upon closing. *If any damage to the premises shall not be restored prior to closing [Capital] shall be required to close title to the premises and shall receive in an amount not to exceed the purchase price all insurance monies recovered or recoverable on account of such damage.* In the event of damage or loss [Liberty Transportation, Inc.] shall immediately notify [Capital] thereof and furnish to [Capital] a written statement of the amount of insurance, if any, payable on account thereof." (Emphasis added.)

The express and unambiguous language of § 12 evinces the fact that Capital—to the exclusion of the plaintiff—would solely possess the right to insurance proceeds that are "recovered or recoverable" on the basis of any unrestored damage to the premises. This fact compels the conclusion that the plaintiff intended to assign its right to such proceeds to Capital. Accordingly, the first element of a valid assignment is satisfied.

Moreover, the subject matter of the assignment between the plaintiff and Capital is adequately identified. As previously stated, § 12 of the agreement provides in relevant part: "If any damage to the premises shall not be restored prior to closing [Capital] shall be required to close title to the premises and shall receive in an amount not to exceed the purchase price all insurance monies recovered or recoverable on account of such damage." The unambiguous language of § 12 describes what is being transferred (the right to all insurance proceeds that are recovered or recoverable on the basis of any unrestored damage to the premises) and to whom it is being transferred (Capital). In light of these details, the subject matter of the assignment between the plaintiff and Capital is capable of identification. Accordingly, the second element of a valid assignment is satisfied.

In sum, the two elements of a valid assignment are satisfied in the present case because the express and unambiguous language of § 12 of the Agreement (1) compels the conclusion that the plaintiff intended to assign its right to the insurance proceeds to Capital, and (2) adequately identifies the subject matter of the assignment, the right to all insurance proceeds that are recovered or recoverable on the basis of any unrestored damage to the premises. Accordingly, the plaintiff validly assigned its right to such proceeds to Capital pursuant to agreement.

The plaintiff argues that it did not assign its right to the insurance proceeds because the property damage for which the insurance proceeds are sought occurred before the plaintiff and Capital entered into the Agreement, and § 12 of the Agreement does not cover property damage that occurred before the Agreement was executed.

As stated previously, § 12 of the Agreement provides in relevant part: "*If any damage to the premises* shall not be restored prior to closing [Capital] shall be required to close title to the premises and shall receive in an amount not to exceed the purchase price all insurance monies recovered or recoverable on account of such damage." (Emphasis added.) Section 12 does not expressly draw a distinction between unrestored damage to the premises that occurred before the execution of the Agreement, and such damage that occurred after the plaintiff and Capital entered into the Agreement. Moreover, the use of the word "any" to modify the phrase "damage to the premises" has the effect of broadening § 12 to cover unrestored damage to the premises, regardless of whether such damage occurred either before or after the Agreement was executed by the plaintiff and Capital. See *Salce* v. *Wolczek*, 314 Conn. 675, 686, 104 A.3d 694 (2014). Accordingly, the plaintiff's first argument is inconsistent with the plain language of § 12.

The plaintiff also asserts that the interest which the plaintiff retained in the property's rental units pursuant to § 17 of the Agreement provides the plaintiff with standing in the present case. Any property (leasehold) interest that the plaintiff retained in the rental units is separate and distinct from any contractual right that the plaintiff allegedly has in the insurance proceeds. In the present case, the plaintiff is seeking to vindicate its alleged contractual right in the insurance proceeds, not a purported property interest. Thus, the alleged interest

that the plaintiff retained in the property's rental units does not provide the plaintiff with standing in the present case.

The plaintiff also argues, without documentation, that there is evidence of a separate agreement between the plaintiff and Capital concerning the damage to the two units. The Agreement provides, in paragraph 18, that it may not be modified, except in writing, and signed by the parties thereto. In addition, it contains an integration clause, in paragraph 21, which states, "This agreement contains the entire contract between the parties hereto and no oral statements or promises and no understandings not embodied in this writing shall be valid or binding."

The statute of frauds, General Statutes § 52-550,[1] bars actions based on agreements pertaining to real property which are not in writing and signed by the party to be charged. See *Deutsche Bank Trust Co. Americas* v. *DeGennaro*, 149 Conn. App. 784, 788, 89 A.3d 969 (2014) (modification of written agreement must be in writing to satisfy statute of frauds).

The plaintiff's president's deposition testimony concerning an agreement involving a separate arrangement is unavailing. "The parol evidence rule is a substantive rule of contract law that prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated written contract." (Internal quotation marks omitted.) *Sims* v. *Honda Motor Co.*, 225 Conn. 401, 416, 623 A.2d 995 (1993). "[O]ne purpose of the parol evidence rule is to secure business stability." (Internal quotation marks omitted.) Id., 416–17. As stated above, no written, separate agreement has been provided to the court. Rather,

[1] General Statutes § 52-550 (a) provides in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property . . . ."

as stated above, the Agreement must be given effect according to its terms.

Thus, the plaintiff lacks standing in the present case because, by virtue of the assignment, it has no legal interest in alleged insurance proceeds that are due and payable on account of damage to the premises.

III

CONCLUSION

For the reasons stated above, the defendant's motion to dismiss is granted. It is so ordered.

MEMORANDUM DECISIONS

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CONNECTICUT LIGHT AND POWER COMPANY
v. RUTHANN C. WOLF
(AC 41348)

Keller, Bright and Beach, Js.

Argued April 10—officially released April 30, 2019

Defendant's appeal from the Superior Court in the judicial district of Tolland, *Cobb*, *J.; Farley*, *J.*

Per Curiam. The judgment is affirmed.

JUDITH BURG *v.* NORTHEAST SPECIALTY CORPORATION (AC 41903)

Alvord, Moll and Flynn, Js.

Argued April 10—officially released April 30, 2019

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

Per Curiam. The judgment is affirmed. The plaintiff's claims on appeal are inadequately briefed, and, thus, we decline to review them. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

BANK OF AMERICA, N.A. *v.* JEYASHANKERLAL LINKASAMY (AC 41069)

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

Argued April 8—officially released April 30, 2019

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Truglia, J.*

Per Curiam. The judgment is affirmed.

WILMINGTON TRUST COMPANY, TRUSTEE *v.* HERBERT H. BACHELDER, JR., ET AL. (AC 41380)

Keller, Prescott and Harper, Js.

Submitted on briefs April 9—officially released April 30, 2019

Appeal by the named defendant from the Superior Court in the judicial district of New London, *Hon. Joseph Q. Koletsky*, judge trial referee.

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

FRANCES BOYLE ET AL. *v.* APPLE HILL HOMEOWNERS ASSOCIATION, INC. (AC 41406)

Alvord, Moll and Flynn, Js.

Argued April 10—officially released April 30, 2019

Appeal by the plaintiff Arthur Boyle from the Superior Court in the judicial district of Hartford, *Hon. A. Susan Peck*, judge trial referee.

Per Curiam. The judgment is affirmed.

FURKAN KUDIA *v.* ASIF MALIK ET AL. (AC 41570)

Keller, Prescott and Harper, Js.

Submitted on briefs April 9—officially released April 30, 2019

Appeal by the named defendant from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. A. William Mottolese*, judge trial referee.

Per Curiam. The judgment is affirmed.

EZRA BENJAMIN *v.* COMMISSIONER OF CORRECTION (AC 41374)

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

Argued April 11—officially released April 30, 2019

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

Per Curiam. The appeal is dismissed.

ERNEST FRANCIS *v.* BOARD OF PARDONS AND PAROLES ET AL.
(AC 41394)

DiPentima, C. J., and Keller and Olear, Js.

Argued April 15—officially released April 30, 2019

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

Per Curiam. The judgment is affirmed.

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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.

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of electricity to end user for consumption, combined with measuring electric consumption with electric submeter.

Praisner *v.* State 540

Indemnification; subject matter jurisdiction; sovereign immunity; action pursuant to statute ([Rev. to 2013] § 53-39a) for indemnification from defendant state for economic losses that plaintiff allegedly incurred as result of federal criminal action filed against him in his capacity as member of certain special police force for state university; whether trial court improperly concluded that action was not barred by doctrine of sovereign immunity; whether trial court incorrectly determined that plaintiff, as member of state university's special police force, was authorized to bring action pursuant to § 53-39a, which expressly authorizes members of certain classes of individuals, including members of local police departments, to bring action against state under § 53-39a; whether plaintiff established reasonable basis on which to conclude that his claim for indemnification fell within narrow scope of waiver of sovereign immunity contained in § 53-39a.

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.

Seale *v.* GeoQuest, Inc. 587

Negligence; whether trial court's finding that defendant did not breach duty of care to plaintiff was clearly erroneous; credibility of witnesses.

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
Watson *v.* Zoning Board of Appeals 367
Zoning; application for permission to conduct customary home occupation from home office within residence; claim that trial court erred in concluding that plaintiff needed to prove home occupation was customary in addition to establishing compliance with specific standards set forth in town building zone regulations; claim that trial court erred in concluding that zoning board of appeals acted reasonably in denying plaintiff's application simply because home occupation was part of larger business that took place off-site.
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.
Wilmington Trust Co. *v.* Bachelder (Memorandum Decision) 904
Winthrop *v.* Winthrop 576
Dissolution of marriage; motion for contempt; whether trial court properly found that defendant's earned income in 2016 was amount reflected on his W-2 form and, thus, that he owed additional alimony pursuant to parties' separation agreement; claim that defendant, as financial advisor who did not receive salary or hourly wage from his employer but was compensated purely on commission basis, was for all practical purposes self-employed and, thus, his earned income should be his gross compensation minus his business related expenses, and not figure shown on his W-2 form; claim that inclusion of defendant's noncash earnings in his earned income was improper; whether trial court incorrectly calculated defendant's additional alimony payments.
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.

NOTICE

Public Hearing on Practice Book Revisions Being Considered by the Rules Committee of the Superior Court

On May 13, 2019, at 10:00 a.m., the Rules Committee of the Superior Court will conduct a public hearing in the Supreme Court courtroom in Hartford for the purpose of receiving comments concerning Practice Book revisions that are being considered by the Committee. The revisions proposed by the Rules Committee were printed in the April 23, 2019, issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Pursuant to subsection (c) of section 51-14 of the Connecticut General Statutes, the Supreme Court has designated the Rules Committee to conduct this public hearing also for the purpose of receiving comments on any proposed new rule or any change in an existing rule that any member of the public deems desirable.

Comments may be forwarded to the Rules Committee by email at Joseph.DelCiampo@jud.ct.gov or may be forwarded to the Rules Committee at the following address and should be received by May 9, 2019.

Rules Committee of the Superior Court
Attn: Joseph J. Del Ciampo, Counsel
P.O. Box 150474
Hartford, CT 06115-0474

Each speaker at the public hearing will be limited to five minutes. Anyone who believes that they cannot cover their remarks within that

time period may submit written comments to the Rules Committee. If written comments are submitted, ten copies should be provided.

Wheelchair access is located in the rear of the Supreme Court building, accessible from the staff parking lot between Lafayette and Oak Streets. There are a limited number of handicap parking spots in the gated staff lot, which is accessible from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please email the Rules Committee at Joseph.DelCiampo@jud.ct.gov before May 9, 2019.

Hon. Andrew J. McDonald
Chair, Rules Committee

NOTICES OF CONNECTICUT STATE AGENCIES

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-R: Updates to the Tuberculosis Limited Benefit Plan

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services.

Changes to Medicaid State Plan

Effective on or after May 1, 2019, SPA 19-R will amend Attachment 4.19-B of the Medicaid State Plan to revise the fee schedules for home health services and special services based on the 2019 HCPCS changes (additions, deletions and description changes) related to the tuberculosis limited benefit plan. These changes are necessary to remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

- HCPCS G0163 - Skilled Services By A Licensed Nurse (LPN or RN) for the observation and assessment of the patient's condition, each 15 minutes, will be ended dated effective April 30, 2019 on the home health agency fee schedule;
- The following HCPCS codes will replace HCPCS code G0163 to the home health agency fee schedule and added to the special services fee schedule, effective May 1, 2019:

HCPCS Code	Description	Rate
G0493	Skilled Services By A Licensed Nurse (LPN) for the observation and assessment of the patient's condition, each 15 minutes	$58.78
G0494	Skilled Services By A Registered Nurse (RN) for the observation and assessment of the patient's condition, each 15 minutes	$58.78

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate Medicaid expenditures by approximately $200 in State Fiscal Year (SFY) 2019 and $2,200 in SFY 2020.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates''. Then click on ''Medicaid State Plan Amendments''. The proposed SPA

may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-R: Updates to the Tuberculosis Limited Benefit Plan''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than May 15, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Renew the Personal Care Assistant Medicaid Waiver

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services intends to renew the Personal Care Assistant (PCA) waiver and proposes to add three additional services.

The services being added are agency based Personal Care Assistant (PCA), Mental Health Counseling and Adult Day Health. The addition of agency based PCA will offer a choice for participants between agency and self-directed services.

A complete text of the waiver amendment is available, at no cost, upon request to the Community Options Unit, Department of Social Services, 55 Farmington Ave., Hartford, Connecticut 06106; email: shirlee.stoute@ct.gov.

All written comments, questions and concerns regarding these amendments may be submitted within 30 days of the publication of this notice to the Department of Social Services, Community Options Unit, 55 Farmington Ave., Hartford or to Kathy.a.bruni@ct.gov.

State of Connecticut
Connecticut State Board of Examiners for Physical Therapists

Notice of Declaratory Ruling Proceeding

Pursuant to Conn. Gen. Stat. § 4-176, the Connecticut State Board of Examiners for Physical Therapists hereby gives notice of its intention to issue a declaratory ruling on the request for declaratory ruling filed by the Department of Public Health on the following issue:

1. **Is acupuncture, as defined in Section 20-206aa(3) of the General Statutes, within the scope of practice of a physical therapists?**
2. **Is dry needling*, provided that the practitioner is trained and competent to do so, within the scope of practice of a physical therapist as defined in Section 20-66(2) of the General Statutes?**

***For purposes of this declaratory ruling, ''dry needling'' may be defined as an intervention that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments.**

The Connecticut State Board of Examiners for Physical Therapists (''the Board'') has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

All persons seeking status to participate must petition the Board by May 31, 2019. All requests seeking status to participate in this matter shall be submitted in writing in accordance with § 4-176(d) of the Connecticut General Statutes and § 19a-9-26 through § 19a-9-28 of the Regulations of Connecticut State Agencies. All filings to be submitted to the Board shall be sent to the Department of Public Health, 410 Capitol Avenue MS#13PHO, P.O. Box 340308, Hartford, Connecticut, 06134-0308. It is anticipated that the Board will rule on petitions for status by June 25, 2019. A date for hearing will thereafter be scheduled by the Board.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing, and may also be utilized by the Connecticut State Board of Examiners for Physical Therapists, on a case by case basis, in future proceedings before it.

April 24, 2019

Mary Lou Sanders, MS, BSN
Chairperson
Connecticut State Board of Examiners
for Physical Therapists

NOTICES

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on March 18, 2019 in HHD-CV-17-6084248, Robert O. Wynne, Juris No. 404770, was be placed on interim suspension until further order of the court, effective immediately upon his reinstatement from the suspension imposed by this Court (Sheridan, J.) on November 5, 2018.

Attorney J. Mark Silhavy, Juris No. 101568, of 208 Brandy Hill Road, Vernon, Connecticut 06066, shall continue as Trustee to take such steps as are necessary to protect the interests of Respondent's clients, and to retain control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the Trustee in this regard.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Marshall K. Berger
Judge

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2019-1, April 18, 2019

Question Presented: **The petitioner asks whether the steps she has taken, in her capacity as Commissioner of the Department of Energy and Environmental Protection, to avoid conflicts of interest involving her husband, who is employed as the Vice President of Commercial, Industrial, and Institutional Programs for the Connecticut Green Bank, are sufficient to comply with the Code of Ethics for Public Officials.**

Brief Answer: **Based on the facts presented, we approve, with one caveat, the steps taken by the petitioner.**

At its February 28, 2019 special meeting, the Citizen's Ethics Advisory Board (Board) granted the petition for an advisory opinion submitted by Katie S. Dykes, Commissioner of the Department of Energy and Environmental Protection. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (Code).[1]

Background

The following facts, set forth in the petition for advisory opinion, are relevant to this opinion:

The petitioner was nominated by Governor Lamont in December 2018 to serve as Commissioner of the Department of Energy and Environmental Protection (DEEP), subject to confirmation by the Connecticut General Assembly in 2019.

Her husband, Michael ''Mackey'' Dykes, is employed by the Connecticut Green Bank (CGB), a quasi-public agency established under General Statutes § 16-245n ''for the purpose of developing programs to finance and otherwise support clean energy . . . investment in residential, municipal, small business, and larger commercial projects in the state.'' Specifically, he ''serves as Vice President, Commercial, Industrial, and Institutional Programs . . . for the CGB,'' where he is responsible for programs that ''extend to businesses, schools, hospitals, houses of worship, and other non-profits,'' and ''is tasked with designing, implementing, and overseeing new and existing clean energy financing programs for this sector, including the statewide Commercial Property Assessed Clean Energy (C-PACE) program.''

The CGB and DEEP engage in a variety of ways. For instance:

- The DEEP Commissioner ''is a statutorily designated member of the CGB Board of Directors,'' which (among other things) ''approves the CGB's annual Comprehensive Plan and budget; approves the CGB's financial programs and products . . . for all of the CGB's programs; and assesses the performance of CGB's officers.''

[1] General Statutes § 1-79 *et. seq.*

- ''The CGB is required to issue an annual report to the Governor's Office and DEEP,'' which ''report must include a description of the programs and activities undertaken during the reporting period . . . .''
- ''The CGB is working with DEEP and other state agencies to finance solar PV systems through power purchase agreements (PPAs) at their facilities. The CGB will provide private financing for these solar PV systems and will be a contractual counter-party with each state agency hosting a system, including DEEP.''
- ''DEEP is a member of the Energy Conservation Management Board or as it is commonly called, the Energy Efficiency Board (EE Board), which approves the Conservation and Load Management Plan . . . before transmitting it to the Commissioner of DEEP for final approval, modification or rejection.'' Once it is approved, ''the EE Board shall assist the utilities in implementing the plan and collaborate with the CGB to further the goals of the plan.''

Given those engagements, the petitioner has taken steps to avoid conflicts involving her husband. That is, she has ''delegated to Mary Sotos, Deputy Commissioner for Energy at DEEP, DEEP's *ex officio* position on the CGB Board of Directors,'' and has recused herself ''from all CGB personnel matters affecting [her] husband . . . and all budgetary approvals affecting the CGB's Commercial, Industrial and Institutional Program.'' Further, she has recused herself ''from involvement in all financial transactions between the CGB and DEEP that involve programs administered by [her] husband,'' including ''power purchase agreements with the CGB for solar PV facilities sited on DEEP-owned state properties.''

Moreover, the petitioner's husband—who, as a CGB employee, is eligible ''for merit compensation [that] is based on meeting specified performance goals established at the beginning of each fiscal year by the CGB President''—''will elect to earn no merit compensation'' for the ''two sub-goals . . . that could have a nexus to DEEP action.''

Analysis

First, the issue of jurisdiction. ''Persons generally subject to the Code . . . are described in the Code as either 'public officials' or 'State employees.' '' Advisory Opinion No. 82-5, Connecticut Law Journal, Vol. 43, No. 45, p. 7B (May 11, 1982). The Code defines ''Public official'' to include, among others, ''any person appointed to any office of the . . . executive branch of state government by the Governor, with or without the advice and consent of the General Assembly . . . .'' General Statutes § 1-79 (11). Here, the petitioner satisfies that definition—given that she was appointed by the Governor to serve as the Commissioner of DEEP, an executive-branch state agency—meaning that she is subject to the Code.

Indeed, the petitioner was subject to the Code in her prior state position as Chair of the Public Utilities Regulatory Authority (PURA), and she was, in fact, the subject of a prior advisory opinion, namely, Advisory Opinion No. 2017-1 (AO 2017-1), Connecticut Law Journal, Vol. 78, No. 31 (January 31, 2017). There, we addressed whether, and under what circumstances, the petitioner was permitted to take official action as PURA Chair on matters that could affect the financial interests of her husband, who was in the same CGB position as is he now, that of Vice President, Commercial, Industrial, and Institutional Programs. Because much of what we said there is relevant here, we borrow liberally from that opinion.

''The applicable Code sections regarding a state employee's [or public official's] conflict in the discharge of his duties or employment are [General Statutes] §§ 1-85 and 1-86 (a).'' Advisory Opinion No. 93-11, Connecticut Law Journal, Vol. 54, No. 48, p. 5C (June 1, 1993). The former defines and proscribes ''substantial'' conflicts of interests; the latter, ''potential'' conflicts of interests. We'll address each in turn.

Section 1-85 provides, in relevant part, that a public official has a ''substantial conflict''

> if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. . . . A public official . . . who has a substantial conflict may not take official action on the matter.[2]

Breaking § 1-85's language down, the Code's interpretive regulations explain that an individual has reason to so ''believe or expect,'' ''when there is a written contract, agreement, or other specific information available to the individual which would clearly indicate to a reasonable person that such a *direct* benefit or detriment would accrue or when the language of the . . . matter in question would so indicate.'' (Emphasis added.) Regs., Conn. State Agencies § 1-81-28 (c). Further, the term ''direct'' has been defined, by way of declaratory ruling, to mean ''absolute, immediate, or without intervening conditions.'' State Ethics Commission Declaratory Ruling 92-C. An example of such a ''direct'' financial impact would be ''a state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse . . . .'' Regs., Conn. State Agencies § 1-81-28 (a).

Here, then, to have a ''substantial'' conflict, the petitioner would have to have ''reason to believe or expect'' that, ''by reason of [her] official activity'' as DEEP Commissioner, there would be a direct, immediate monetary impact on herself, her husband, a dependent child, or a ''business with which [s]he is associated.'' And that would depend on whether there is a written contract, agreement, or other specific information available to her that would clearly indicate to a reasonable person that there would be such a financial impact. If so, the petitioner would have a ''substantial'' conflict and be barred by § 1-85 from taking official action on the matter.

There are no facts before us to suggest that the petitioner herself or a ''dependent child'' will be impacted monetarily by virtue of her official action at DEEP. Further, we've already concluded, in AO 2017-1, that the CGB—a ''Quasi-public agency,'' as defined in General Statutes § 1-79 (12)—''cannot be a 'business with which [the petitioner] is associated.' '' Connecticut Law Journal, Vol. 78, No. 31, supra, p. 5C. And because the CGB is not an ''associated'' business, the petitioner may take official action that would directly impact its monetary interests, without violating § 1-85, with one exception: if she has ''reason to believe or expect'' that, by virtue of such action, there would also be a direct monetary impact on her husband.

Moving on to § 1-86 (a), ''[e]ven if a particular situation does not pose a substantial conflict of interest . . . it may still pose a potential conflict of interest . . . .'' Advisory Opinion No. 94-5, Connecticut Law Journal, Vol. 55, No. 41, p. 3D-4D (April 12, 1994). Section 1-86 (a) provides, in relevant part, as follows:

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[2] There is an exception in § 1-85 to the general rule: An individual does not have a substantial conflict ''if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group.''

> Any public official . . . who, in the discharge of such official's . . . official duties, would be required to take an action that would affect a financial interest of such official . . . such official's . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . other than an interest of a de minimis nature, an interest that is not distinct from that of a substantial segment of the general public or an interest in substantial conflict with the performance of official duties as defined in section 1-85 has a potential conflict of interest. . . .

Unpacking that language, no ''potential'' conflict exists if the financial impact is de minimis (i.e., less than $100 per person per year) or is indistinct from that of a substantial segment of the general public (e.g., all taxpayers or homeowners). Regs. Conn. State Agencies § 1-81-30 (a) and (b). Further, ''[u]nlike a substantial conflict, there is no requirement that the financial impact be direct . . . . However, there still must be a reasonable expectation on the part of the individual that there will be some financial impact based on h[er] actions.'' Advisory Opinion No. 93-11, Connecticut Law Journal, Vol. 54, No. 48, supra, p. 5C-6C.

For example, in Advisory Opinion No. 99-18, the State Ethics Commission was asked whether the Secretary of the Office of Policy and Management (OPM) could rule on a property-revaluation waiver to be submitted by the city of Waterbury, where he was a homeowner. Connecticut Law Journal, Vol. 61, No. 5 (August 3, 1999). Absent a waiver, the city would lose almost $10 million in state aid, which (in the Commission's words) ''almost certainly'' would trigger an increase in the city's mill rate, followed by an increase in property taxes to the city, followed by an estimated $300 annual increase in the Secretary's property tax. Id., p. 11E. ''Clearly,'' said the Commission, ''the Secretary of OPM will be required to take an action which would affect his financial interest,'' and ''the interest is neither de minimis . . . nor is it shared by a 'substantial segment' of the general public . . . .'' Id., p. 12E. The Commission concluded, therefore, that the OPM Secretary had a potential conflict under § 1-86 (a). Id.

Applying § 1-86 (a) here, the sole focus, once again, is on the petitioner's husband, and the reason for it is this: The CGB (as noted earlier) is not an ''associated'' business, and there are no facts before us to suggest that either the petitioner herself or any of her other family members (parent, sibling, etc.) will be affected financially by virtue of her DEEP activity. As for her husband, the question is whether the petitioner would have a ''reasonable expectation'' that her official action as DEEP Commissioner would ''affect'' his financial interests in an amount exceeding $100. If so, the petitioner would have a ''potential'' conflict under § 1-86 (a).

How to proceed when faced with a ''potential'' conflict (as opposed to a ''substantial'' conflict, which always requires recusal) depends on whether the individual is a ''member of a state regulatory agency.'' That term is defined to include ''a member of any *commission, board, council, authority or other similar body* which is authorized by law to regulate, i.e., control, administer, or oversee, any profession, occupation, industry, activity, fund, endeavor or area of conduct.'' (Emphasis added.) Regs., Conn. State Agencies § 1-81-30 (c). DEEP is a ''department,'' rather than a commission, board, council, etc., meaning the petitioner is not a ''member of a state regulatory agency'' and is, therefore, subject to the following language in § 1-86 (a):

> If such official . . . is not a member of a state regulatory agency, such official . . . shall, in the case of either a substantial or potential conflict,

> prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the conflict and deliver a copy of the statement to such official's . . . immediate superior, if any, who shall assign the matter to another employee, *or if such official or employee has no immediate superior, such official or employee shall take such steps as the Office of State Ethics shall prescribe or advise*.

(Emphasis added.) As a department head, the petitioner has no immediate superior, meaning she is required—in the case of a substantial or potential conflict—to notify the Office of State Ethics and take whatever action it prescribes. See Advisory Opinion No. 99-18, Connecticut Law Journal, Vol. 61, No. 5, supra, p. 12E.

The petitioner not only has notified this office as to the potential conflicts involving her husband, but has proposed (indeed, has already taken) steps to avoid them. As for the most obvious source of potential conflicts—i.e., DEEP's *ex officio* position on the CGB's Board of Directors—she has delegated it to DEEP's Deputy Commissioner for Energy. Further, she has recused herself from certain CGB matters (and ordered the Deputy Commissioner not to discuss them with her), including personnel matters affecting her husband, budgetary approvals affecting the programs overseen by her husband, and decisional agenda items involving those programs. Moreover, with respect to DEEP activities, the petitioner has recused herself ''from involvement in all financial transactions between the CGB and DEEP that involve programs administered by [her] husband,'' including ''power purchase agreements with the CGB for solar PV facilities sited on DEEP-owned state properties.'' And on top of that, with respect to CGB's merit compensation plan—under which CGB employees may earn additional compensation based on achievement of certain performance goals—the petitioner's husband has elected to earn no merit compensation for the two sub-goals that could have a nexus to DEEP action.

We approve the steps taken by the petitioner (and her husband), with just one caveat: Whenever a subordinate of the petitioner acts in her stead because of a § 1-85 or § 1-86 (a) conflict involving her husband, the subordinate must notify the Office of State Ethics in writing of his or her actions. See Advisory Opinion No. 2004-14 (Amended), Connecticut Law Journal, Vol. 66, No. 23, p. 7E (December 7, 2004) (''[u]nder these unique circumstances, i.e., that the matter must be referred to someone subordinate to [the Secretary of the Office of Policy and Management], the deputy commissioner should notify the Ethics Commission in writing of his or her actions''). For example, if, in serving in DEEP's *ex officio* position on the CGB's Board of Directors, the Deputy Commissioner of Energy were to vote on a personnel matter that would affect the financial interests of the petitioner's husband, the Deputy Commissioner must notify this office in writing of her vote.

Before closing, we stress that if any unforeseen conflicts involving her husband should arise, or if there are any substantive changes to the mitigation steps discussed above, the petitioner should contact the Office of State Ethics for further advice.

Conclusion

Based on the facts presented, we approve, with the above-discussed caveat, the steps taken by the petitioner in her capacity as DEEP Commissioner to avoid ''substantial'' and ''potential'' conflicts of interest involving her husband.

By order of the Board,

Dated 4/18/19

/s/ Dena M. Castricone
Chairperson