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Vol. 331

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* RICKY OWEN
(SC 20127)

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

Syllabus

Pursuant to statute (§ 54-56b), a nolle prosequi may not be entered as to any count in an information if the accused objects and demands either a trial or a dismissal, unless the nolle is entered on a representation to the court by the prosecutor that, inter alia, a material witness has died, disappeared or become disabled.

The defendant, who had been charged with various crimes in connection with an alleged assault on J, his girlfriend, appealed from the trial court's denial of his motion to dismiss the charges after he objected to the prosecutor's entry of a nolle prosequi as to all of the charges. The prosecutor represented, in her memorandum in support of her motion seeking to enter the nolle, that J had returned to North Carolina, where she had lived prior to the alleged assault, J had called the victim's advocate and stated that she was experiencing bouts of depression and crying, the defendant's friend had contacted her to urge her not to testify against the defendant, and she still thought about the incident frequently and it bothered her a great deal. J had been scheduled to travel to Connecticut to testify at the defendant's trial, but, after a storm cancelled her planned transportation, she contacted the prosecutor to inform her that she would be unable to return to Connecticut to testify. During her conversation with the prosecutor, J requested help in finding counseling and indicated that she was afraid to testify and wanted to get on with her life. On the basis of these factual allegations, the prosecutor contended that J had become disabled for purposes of § 54-56b. At a hearing before the trial court on the prosecutor's motion, the prosecutor reiterated that she was relying on, inter alia, J's statements indicating that she was going through bouts of depression and crying. The defendant argued that J was unable to testify due to her fear of testifying, and that fear was not sufficient to constitute a disability for purposes of § 54-56b, that J had elected not to return to Connecticut, and that the prosecutor had chosen not to serve her with a material witness subpoena. The trial court observed that its role was not to receive evidence or to make a finding as to whether J was disabled, but to determine whether the prosecutor, in entering the nolle, was exercising her discretion in a manner that was clearly contrary to manifest public interest. In finding that the prosecutor was not abusing her discretion, the court relied on the facts that the prosecutor alleged during the hearing, viewed in light of the prosecutor's years of experience litigating domestic violence cases. The court thereupon accepted the entry of the nolle and denied the defendant's motion for dismissal, and the defendant appealed. *Held*

that the trial court properly relied on the prosecutor's representations to find that the prosecutor was not exercising her discretion in a manner clearly contrary to manifest public interest and, accordingly, properly allowed the nolle to enter; contrary to the defendant's representation of the record, the prosecutor did not rely solely on J's stated fear of testifying in asserting that J had become disabled for purposes of § 54-56b, but made various representations consistent with the position that J suffered from a disability that prevented her from being able to testify due to the emotional trauma she had experienced as a victim of domestic violence, including that J suffered from depression and needed counseling, and nothing in the record suggested that the prosecutor acted with an intent to harass the defendant or otherwise was acting in abuse of her discretion.

Argued November 6, 2018—officially released May 14, 2019

Procedural History

Substitute information charging the defendant, in the alternative, with the crimes of strangulation in the second degree, assault in the third degree and unlawful restraint in the first degree, and with the crimes of assault in the second degree, threatening in the second degree, interfering with an emergency call and unlawful restraint in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Holden, J.*, accepted the state's entry of a nolle prosequi in the case and denied the defendant's motion to dismiss, and the defendant appealed. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Judy Ann Stevens*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The issue presented in this appeal is whether the trial court properly determined that the prosecutor did not abuse her discretion in a manner clearly contrary to manifest public interest when she

entered a nolle prosequi on the basis that the state's material witness had become disabled for purposes of General Statutes § 54-56b.[1] The defendant, Ricky Owen, appeals from the decision of the trial court allowing the prosecutor to enter a nolle prosequi over his objection and denying his motion to dismiss the charges.[2] The defendant argues that the prosecutor's basis for entering the nolle—namely, that her key witness was "disabled" because her fear prevented her from being able to testify—was insufficient as a matter of law to establish that the witness was disabled for purposes of § 54-56b. The defendant therefore contends that the trial court improperly relied on its finding—that the witness was disabled for purposes of § 54-56b—to deny his motion to dismiss and to allow the nolle to enter over his objection. The state responds that the defendant's claim mischaracterizes the representations of the prosecutor at the time that the nolle entered. According to the state, rather than simply claiming that the witness was afraid to testify, the prosecutor represented to the court that the witness was disabled due to her compromised mental state—and that her statements of fear, among other things, demonstrated that compromised mental state. We agree with the state's characterization of the prosecutor's representations to the trial court. Our review of the record also reveals that, contrary to the defendant's claim on appeal, the trial court made no finding that the witness was—or was not—disabled. Instead, the court properly grounded its ruling on its

[1] General Statutes § 54-56b provides: "A nolle prosequi may not be entered as to any count in a complaint or information if the accused objects to the nolle prosequi and demands either a trial or dismissal, except with respect to prosecutions in which a nolle prosequi is entered upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary."

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

finding that, in entering the nolle, the prosecutor had not abused her discretion in a manner clearly contrary to manifest public interest. Accordingly, we affirm the decision of the trial court.

The record reveals the following relevant facts and procedural history. On May 31, 2016, the defendant was arrested in connection with an alleged assault on J,[3] his girlfriend. He was charged with, among other crimes, strangulation in the second degree in violation of General Statutes (Rev. to 2015) § 53a-64bb, assault in the second degree in violation of General Statutes § 53a-60 (a) (1), unlawful restraint in the second degree in violation of General Statutes § 53a-96 (a), threatening in the second degree in violation of General Statutes (Rev. to 2015) § 53a-62 (a) (1), and interfering with an emergency call in violation of General Statutes § 53a-183b (a). At the defendant's arraignment, the court issued a no contact protective order against the defendant as to J.

On January 10, 2017, the day that evidence in the defendant's trial was scheduled to begin, the prosecutor sought to enter a nolle prosequi. In her memorandum in support of her motion seeking to enter the nolle, the prosecutor represented that J was a material witness. The prosecutor also alleged that, on July 21, 2016, J, who was originally from North Carolina and had returned to live there following the incident, called the victim's advocate and stated that she was experiencing "bouts of depression" and crying. She also reported to the victim's advocate that a friend of the defendant had contacted her to urge her not to testify against the defendant. Although J consistently had stated that, despite her fears, she intended to return to Connecticut to testify, she also informed the victim's advocate that

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

she still thought about the incident and that it bothered her a great deal. J was scheduled to travel by bus to Connecticut on Friday, January 6, 2017, but the bus did not run that day due to a storm in North Carolina. On the evening of Sunday, January 8, 2017, J contacted the prosecutor to inform her that she would be unable to return to Connecticut to testify. During the course of that conversation, J requested help in finding counseling, indicated that she was afraid to testify and stated that she wanted to "get on with her life."

Relying on these factual allegations, the prosecutor contended in her memorandum that J had "become disabled" for purposes of § 54-56b. The prosecutor further argued that the issue before the court in determining whether to allow the nolle to enter was not whether J was disabled, but only whether, in entering the nolle, the prosecutor had abused her discretion in a manner contrary to public policy. See *State* v. *Lloyd*, 185 Conn. 199, 204, 440 A.2d 867 (1981).

The trial court heard argument on the prosecutor's motion. At the hearing on the motion, the prosecutor reiterated her reliance on, inter alia, J's statements indicating that J was going through bouts of depression and crying, that she needed counseling, was afraid, could not stop thinking about the incident and wanted to get on with her life. The prosecutor further represented that the state could not proceed without J's testimony and contended that J was disabled.[4] The prosecutor's statements in support of her representation that J was disabled demonstrate that she relied on multiple pieces of information to support her conclusion that J suffered from a disability due to the emotional trauma that she had experienced as a victim of domestic violence. Specifically, the prosecutor pointed not only to J's "fear," but also to her "depression" and "emotional issues."

[4] The defendant does not challenge on appeal the state's claim that J was a material witness.

Several other statements made by the prosecutor at the hearing further demonstrate that her representation that J was "disabled" relied on more than a vague assertion regarding J's fear of testifying. Acknowledging that she had been unable to find legal precedent supporting her claim that J's mental condition constituted a disability pursuant to § 54-56b, the prosecutor lamented the lack of such legal authority, stating that the "emotional tumult" often experienced by victims, combined with their fear of the ramifications of cooperating with the police and prosecutors, "literally makes them unable to come forward." With "supportive counseling," the prosecutor continued, victims may be able to overcome their fear of testifying. These statements demonstrate that, rather than representing that J chose not to testify because she was afraid, the prosecutor represented to the court that J was *unable* to testify due to a disability. The prosecutor urged the court to find that her determination to enter the nolle on the basis of J's disability was not an abuse of her discretion.

The defendant objected to the nolle and moved to dismiss the charges, focusing solely on one of the facts that the prosecutor had referenced in representing to the court that J had become disabled pursuant to § 54-56b—that J was unable to testify due to her fear. Fear alone, the defendant contended, is not sufficient to constitute a disability for purposes of § 54-56b. The defendant argued that J merely had elected not to return to Connecticut to testify and the prosecutor had chosen not to serve her with a material witness subpoena. The defendant did not respond to the prosecutor's representations that J was depressed and suffering from "emotional issues," and that she had requested help in finding counseling services.

The court issued its decision from the bench, beginning with the observation that its role was not to receive evidence or to make a finding as to whether J was dis-

abled, but only to determine whether, in entering the nolle, the prosecutor had exercised her discretion in a manner that was "clearly contrary to manifest public interest." *State* v. *Lloyd*, supra, 185 Conn. 204. In finding that the prosecutor had not abused her discretion, the court relied on the facts alleged by the prosecutor during the hearing, viewed in light of the prosecutor's seventeen years of experience litigating domestic violence cases. The court accordingly accepted the nolle prosequi and denied the defendant's motion for dismissal. This appeal followed.[5]

[5] Prior to oral argument, this court sua sponte ordered the parties to be prepared to address whether the appeal had become moot in light of the fact that, by November 6, 2018, when the case was argued to this court, more than thirteen months had passed since the underlying charges were nolled, and the functional equivalent of a dismissal had entered by operation of law. See General Statutes § 54-142a (c) (1) ("Whenever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased . . . ."); *Cislo* v. *Shelton*, 240 Conn. 590, 607–608, 692 A.2d 1255 (1997) (discussing dismissal by operation of law pursuant to § 54-142a).

At oral argument, the defendant contended that, as to the felony charges, the case is not moot because the statute of limitations will not run on those offenses until 2021. Moreover, the defendant argued, a dismissal after thirteen months pursuant to § 54-142a (c) (1) is one without prejudice as opposed to a dismissal pursuant to § 54-56b following a defendant's objection to the state's entry of a nolle, which is with prejudice.

We agree with the defendant that the appeal is not moot as to the felony charges of strangulation in the second degree in violation of General Statutes (Rev. to 2015) § 53a-64bb and assault in the second degree in violation of § 53a-60 (a) (1). The entry of a nolle plus the passage of thirteen months results in the functional equivalent of a dismissal without prejudice. See *State* v. *Smith*, 289 Conn. 598, 612, 960 A.2d 993 (2008); *Cislo* v. *Shelton*, supra, 240 Conn. 599. "Such a dismissal does not preclude the state from filing charges—even the same ones—at a later time, provided that the statute of limitations has not run." *State* v. *Smith*, supra, 612.

Because the statute of limitations had run as to the three misdemeanor charges—threatening in the second degree in violation of General Statutes (Rev. to 2015) § 53a-62 (a) (1), unlawful restraint in the second degree in violation of § 53a-96 (a) and interfering with an emergency call in violation of § 53a-183b (a), the appeal is moot as to those three charges.

Translated from Latin, the term "nolle prosequi" means "to be unwilling to prosecute." Webster's New International Dictionary (2d Ed. 1941) p. 1465; see also Black's Law Dictionary (10th Ed. 2014) p. 1210 ("not to wish to prosecute"). We have explained that "a nolle is, except when limited by statute or rule of practice . . . a unilateral act by a prosecutor, which ends the pending proceedings without an acquittal and without placing the defendant in jeopardy." (Citations omitted; internal quotation marks omitted.) *Cislo* v. *Shelton*, 240 Conn. 590, 599 n.9, 692 A.2d 1255 (1997). "Although the entry of a nolle prosequi results in the defendant's release from custody, he can . . . be tried again upon a new information and a new arrest." (Citation omitted.) *State* v. *Lloyd*, supra, 185 Conn. 201; see Practice Book § 39-31 ("The entry of a nolle prosequi terminates the prosecution and the defendant shall be released from custody. If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated.").

Section 54-56b strikes a balance between "the state's right to enter a nolle prosequi in a pending prosecution and the defendant's constitutional right to a speedy trial." *State* v. *Lloyd*, supra, 185 Conn. 200. "Until the enactment of General Statutes § 54-46 (now § 54-56b) in 1975, and the promulgation of Practice Book § 2137 [now § 39-30] in 1976,[6] the power to enter a nolle prosequi was discretionary with the state's attorney; neither the approval of the court nor the consent of the defendant was required." (Footnote added.) Id., 201. Pursuant

[6] Practice Book § 39-30 provides: "Where a prosecution is initiated by complaint or information, the defendant may object to the entering of a nolle prosequi at the time it is offered by the prosecuting authority and may demand either a trial or a dismissal, except when a nolle prosequi is entered upon a representation to the judicial authority by the prosecuting authority that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary."

to § 54-56b, that discretion is no longer without limit. As a general rule, a nolle may not enter over a defendant's objection and demand for a trial or dismissal. See General Statutes § 54-56b. Although there is an exception to that general rule when the prosecutor represents to the court that "a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary"; General Statutes § 54-56b; the prosecutor's exercise of discretion in entering the nolle is subject to review by the court for abuse of discretion. See *State* v. *Lloyd*, supra, 204. We emphasize, however, that once the prosecutor has represented that one of the exceptions applies, the trial court must allow the nolle to enter unless it concludes that the prosecutor has abused her discretion in arriving at that decision. As we have explained, "[t]he court *must* accept the entry of the nolle prosequi for the record *unless* it is persuaded that the prosecutor's exercise of discretion is clearly contrary to manifest public interest." (Emphasis added.) Id.

The level of judicial review of the exercise of prosecutorial discretion is a deferential one, akin to "the review of the exercise of judicial discretion . . . ." Id. In *Lloyd*, when this court first interpreted the effect of § 54-56b on the prosecutor's discretion to enter a nolle, we explained that, in determining whether a prosecutor's representations were sufficient to overcome a defendant's objection, the trial court "need not receive evidence, and thus makes no findings of fact, to determine the accuracy of the state's representations." Id. Our interpretation of § 54-56b did not suggest that the statute shifted power from the executive to the judiciary by allowing the judiciary to substitute its judgment for that of the executive.

The authorities that we relied on in *Lloyd* support the view that, rather than inviting courts to substitute

their judgment for that of the prosecutor, the limited purpose of § 54-56b was to protect defendants from abuses of prosecutorial discretion. One of the primary decisions on which we relied, *United States* v. *Cowan*, 524 F.2d 504 (5th Cir. 1975), cert. denied sub nom. *Woodruff* v. *United States*, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 795 (1976), explains the rationale underlying the deferential level of review applied to the prosecutor's entry of a nolle. In that case, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the federal District Court, which had denied the prosecutor's motion to dismiss pending criminal proceedings pursuant to rule 48 (a) of the Federal Rules of Criminal Procedure and, when the government refused to proceed, appointed special prosecutors. Id., 505. Rule 48 of the Federal Rules of Criminal Procedure provides in relevant part: "(a) The government may, *with leave of court*, dismiss an indictment, information or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. . . ." (Emphasis added.) The Fifth Circuit explained that the issue presented in the appeal was "the extent to which the phrase '[with] leave of court' in [r]ule 48 (a) limits or conditions the [common-law] power of the [government] to dismiss an indictment without leave of court." *United States* v. *Cowan*, supra, 505–506.

Similar to § 54-46b, rule 48 (a) of the Federal Rules of Criminal Procedure has modified the previous, absolute authority enjoyed by federal prosecutors to dismiss charges. The phrase "with leave of court" established a judicial check on that formerly absolute power. See id., 513. The court explained that the rule was not intended, however, "to confer on the [j]udiciary the power and authority to usurp or interfere with the good faith exercise of the [e]xecutive power to take care that the laws are faithfully executed. [Rule 48 (a)] was not

promulgated to shift absolute power from the [e]xecutive to the [j]udicial [b]ranch. Rather, it was intended as a power to check power. The [e]xecutive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest. In this way, the essential function of each branch is synchronized to achieve a balance that serves both practical and constitutional values." Id.; see also *United States* v. *Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (observing that role conferred on judiciary by rule 48 [a] of Federal Rules of Criminal Procedure was "role of guarding against abuse of prosecutorial discretion"). Like rule 48 (a), § 54-46b allows for a deferential review by the courts of a prosecutor's entry of a nolle, solely to protect against prosecutorial abuses of discretion.[7]

It is highly significant that a prosecutor is an officer of the court, who owes a duty of candor to the tribunal. See Rules of Professional Conduct 3.3. Due to their function, in fact, prosecutors are held to an even higher standard than other attorneys. We have observed that "[the prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn.

[7] We acknowledge that there are substantive differences between § 54-46b and rule 48 (a) of the Federal Rules of Criminal Procedure. This court relied in *Lloyd* on the authorities that interpreted rule 48 (a), however, merely for the general principles that underlie both rules to guide this court in balancing, on the one hand, the need to protect defendants against abuses of prosecutorial discretion, and, on the other hand, the recognition that the Judicial Branch should not interfere with a prosecutor's good faith exercise of prosecutorial discretion.

604, 612, 65 A.3d 503 (2013); see also A.B.A., Standards for Criminal Justice: Prosecution Function (4th Ed. 2015) standard 3-1.2 (b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and *by exercising discretion to not pursue criminal charges in appropriate circumstances*. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants." [Emphasis added.]), available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.

Our decision today should not be read to suggest that trial courts should function as "rubber stamps" for a prosecutor's decision to enter a nolle. Abuse of discretion review is precisely what it sounds like—upon a defendant's objection, § 54-56b requires a court to *review* the prosecutor's decision to enter a nolle for abuse of discretion, on the basis of the prosecutor's representations at the hearing. The mere fact that the court's review is a deferential one does not mean that, in every instance, a court must accept the nolle. A recent decision of the Appellate Court provides a helpful illustration. In *State* v. *Richard P.*, 179 Conn. App. 676, 678, 680, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018), the Appellate Court affirmed the judgment of dismissal rendered by the trial court after the state entered a nolle and the defendant objected. In that case, the defendant had been charged "with various offenses arising from his alleged physical and sexual abuse of his children." Id., 678. When the state entered a nolle,

it represented to the court that the children and their mother were " 'unavailable' " because they had moved to London, England. Id., 680. In response, the defendant moved to dismiss the charges, and, in support, submitted a letter from the mother, which the court reviewed, in which the mother expressed dissatisfaction with the manner in which the state had conducted its investigation and handled the case. Id. The mother closed the letter by requesting: " 'Please do not contact me again.' " Id., 680 n.3. The trial court granted the motion to dismiss on the basis that the prosecutor had not "sufficiently represented that a material witness had died, disappeared, or become disabled within the meaning of § 54-56b and Practice Book § 39-30 . . . ." Id., 681. On appeal, the state contended, inter alia, that the two children " 'had become disabled' " within the meaning of § 54-56b. Id. The state argued that the children had become "disabled" when their mother relocated them to England because, due to their age and location, they lacked the legal ability to return to Connecticut to testify. Id., 685. The Appellate Court rejected that argument and also rejected the state's expansion of the term "disabled" to extend beyond situations that involve a " '[g]ood faith disagreement about what constitutes disability' " pursuant to *Lloyd*. Id., 683 n.6, quoting *State* v. *Lloyd*, supra, 185 Conn. 205.

In the present case, in contrast to *State* v. *Richard P.*, supra, 179 Conn. App. 676, the prosecutor's representations fell within the range of a good faith disagreement regarding the meaning of "disabled" pursuant to § 54-56b. Accordingly, the trial court properly relied on those representations to find that the prosecutor was not abusing her discretion in a manner clearly contrary to manifest public interest. Contrary to the defendant's representation of the record, the prosecutor did not

rely solely on J's stated fear of testifying in asserting that J had "become disabled" for purposes of § 54-56b. Instead, as we explained in this opinion, the prosecutor made various representations consistent with the position that J suffered from a disability that prevented her from being able to testify.[8] Those representations included that J stated that she suffered from bouts of depression and crying, needed counseling, was afraid and could not stop thinking about the incident. Nothing in the record suggests that the prosecutor was acting with an intent to harass the defendant or otherwise acting in abuse of her discretion. Given the prosecutor's representations, the trial court properly deferred to the prosecutor's exercise of discretion and allowed the nolle to enter.

The decision of the trial court is affirmed.

In this opinion the other justices concurred.

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[8] The defendant's argument that the prosecutor abused her discretion by failing to attempt to overcome J's alleged disability by serving her with a material witness subpoena is unpersuasive. At the hearing, the prosecutor represented that she had concluded that, as of the time of trial, J was *unable* to testify due to her disability. Although a material witness subpoena is an appropriate measure for a prosecutor to take to overcome a witness' *unwillingness* to testify, a subpoena cannot overcome an *inability* to testify. The defendant's argument is implicitly premised on the primary argument that he advances on appeal—the defendant contends that J was not unable, but unwilling, to testify. As we explained in this opinion, however, it was not the task of the trial court—and it is certainly not the task of this court—to second guess the prosecutor's judgment that J was disabled.

For similar reasons, the defendant's argument that, as a matter of statutory interpretation, the prosecutor's representations were insufficient to support a finding by the trial court that J was disabled have no bearing on the resolution of this appeal. First, as we explained in this opinion, the defendant's argument incorrectly represents the record. The prosecutor did not rely solely on J's fear in representing that J suffered from a disability that prevented her from being able to testify. Second, the trial court properly made no finding as to whether J was actually disabled. It properly considered only whether the prosecutor had abused her discretion in entering the nolle.

JANET BRENNAN, EXECUTRIX (ESTATE OF THOMAS BRENNAN) *v.* CITY OF WATERBURY (SC 19937)

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

Syllabus

The substitute plaintiff, J, the executrix of the estate of T, her husband, appealed from the decision of the Compensation Review Board, which concluded, inter alia, that she was improperly substituted as the claimant because a claimant's estate cannot receive the claimant's vested but unpaid statutory (§ 7-433c) heart and hypertension benefits. T, who had been the fire chief for the defendant city of Waterbury, suffered a heart attack in 1991 during the course of his employment and filed a claim for heart and hypertension benefits. In 1993, the workers' compensation commissioner, having accepted the parties' stipulation that T had been diagnosed with hypertension and heart disease after his heart attack and that no evidence of such disease had been present prior to T's employment, issued a finding and award, in which the city was ordered to pay T all of the benefits to which he "is or may become entitled." The city and T thereafter negotiated in an attempt to reach an agreement on the payment of benefits, during which time T elected to take disability retirement. The city made certain payments to T pursuant to § 7-433c, but the city and T never entered into a full and final settlement of his claim for heart and hypertension benefits, and T died in 2006. In 2013, T's attorney sought to finalize T's permanent partial disability claim under § 7-433c and moved to substitute J, both in her capacity as executrix of T's estate and in her individual capacity, as claimants. The commissioner granted the motion insofar as J sought to be substituted as a claimant in her capacity as executrix of T's estate but denied the motion to substitute J in her individual capacity. The city appealed to the board from that decision, claiming, inter alia, that, pursuant to *Morgan* v. *East Haven* (208 Conn. 576), the estate was not a legally qualified recipient of heart and hypertension benefits. Subsequently, in 2015, the commissioner issued a finding and decision, in which it ordered the city to pay J, in her capacity as executrix of T's estate, benefits for 80 percent

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

permanent partial disability of T's heart pursuant to § 7-433c and the corresponding statutory provision (§ 31-308 [b]) of the Workers' Compensation Act, less any advance payments that had already been made. The city filed a separate appeal with the board from the commissioner's finding and decision, and the board consolidated the city's appeals. The board concluded that an estate was not a qualified recipient of vested but unpaid heart and hypertension benefits, vacated the decision making the estate the beneficiary, and remanded the case to the commissioner to decide the proper recipient of the benefits. The board, however, upheld the commissioner's central findings and ordered the commissioner, in addressing on remand the issue of the proper beneficiary, to address several issues that the city previously raised with respect to the availability and amount of benefits but that the commissioner had declined to address. On appeal from the board's decision, J, in her capacity as executrix, claims, inter alia, that T's disability benefits matured because the right to those benefits vested once the decedent reached maximum medical improvement in 1993, and, if the city had timely paid those benefits starting from that date, all compensation would have been paid to T before his death. The city claims that any benefits that it might be obligated to pay as a result of T's permanent disability had not matured, as they were not payable to him during his lifetime because his disability rating had not been conclusively established until after his death and he chose to negotiate for a lump sum payment during his lifetime rather than to obtain a final adjudication of the exact weekly compensation that the city would be obligated to pay. *Held*:

1. The city could not prevail on its claim that the appeal must be dismissed for lack of standing because it was filed by J in her individual capacity, as she was neither a party to the proceedings or aggrieved by the board's decision; although the appeal form reflected that J was the party filing the appeal, that entry did not indicate whether J filed the appeal in her representative or individual capacity, and this court resolved that ambiguity by reference to other filings, including the docketing statement, the name of the case on the appeal form, and J's brief, all of which indicated that the appeal was filed on behalf of J in her capacity as executrix of T's estate.
2. This court concluded that heart and hypertension benefits under § 7-433c may be paid to a claimant's estate if such unpaid benefits matured before the claimant's death, and, accordingly, the board's decision was reversed insofar as the board concluded that the commissioner improperly had granted the motion to substitute J in her capacity as executrix of T's estate as the claimant: contrary to the city's claim, the holding in *Morgan* was limited to the distribution of unmatured heart and hypertension benefits, which pass to dependents rather than to a claimant's estate, and there was nothing in *Morgan* that precluded this court from treating unpaid, matured heart and hypertension benefits in the same manner as unpaid, matured workers' compensation benefits, which traditionally

have belonged to a claimant's estate; moreover, the legislature's response to *Morgan*, which added a provision to § 7-433c that recognized a deceased employee's nondependent children as potential beneficiaries of unmatured benefits, did not serve to eliminate an employee's existing right to have his unpaid matured benefits pass to his estate but, rather, was intended to provide a new right by expanding the class of potential beneficiaries of unmatured benefits, the legislative history having clearly indicated an intent on the part of the legislature to apply the same rules of distribution for heart and hypertension benefits and workers' compensation benefits.

3. This court could not conclude, on the basis of the record before it, that the unpaid portion of T's benefits under § 7-433c for his 80 percent impairment to his heart function matured before his death, and the case was remanded to the commissioner to make additional findings in connection with this issue; this court determined that permanent disability benefits under § 7-433c mature only after the degree of permanent impairment has been established by an award or an agreement between the parties sufficient to establish a binding meeting of the minds, and consideration of the 1993 finding and award, the commissioner's 2015 finding and decision, as well as the absence of the parties' submission to the commissioner of a voluntary agreement regarding the degree of permanency for approval during T's lifetime, led this court to conclude that the record not only failed to establish that, prior to T's death, there was a meeting of the minds regarding the permanency of T's disability but that there was a clear implication to the contrary.

Argued September 10, 2018—officially released May 14, 2019

Procedural History

Consolidated appeals from the decisions of the Workers' Compensation Commissioner for the Fourth District granting the motion to substitute the claimant filed by Janet Brennan, executrix of the estate of Thomas Brennan, and awarding permanent partial disability benefits to the substitute plaintiff, brought to the Compensation Review Board, which reversed the commissioner's decisions and remanded the case for further proceedings, and the substitute plaintiff appealed. *Affirmed in part*; *reversed in part*; *decision directed in part*; *further proceedings*.

Richard O. LaBrecque, with whom were *Francis J. Grady* and, on the brief, *Marina L. Green*, for the appellant (substitute plaintiff).

Daniel J. Foster, with whom, on the brief, was *Linda T. Wihbey*, for the appellee (defendant).

Opinion

McDONALD, J. In this appeal, we consider whether heart and hypertension benefits under General Statutes § 7-433c for permanent disability properly are paid to a deceased claimant's estate if such benefits vested and were payable ("matured") during the claimant's lifetime but were not paid to the claimant before his death. In particular, we are asked to consider whether *Morgan* v. *East Haven*, 208 Conn. 576, 546 A.2d 243 (1988), and the legislative response to that decision, instead requires payment of such benefits to the claimant's dependents or nondependent children.

The plaintiff, Janet Brennan, executrix of the estate of Thomas Brennan (executrix), appeals from the decision of the Compensation Review Board concluding that the executrix improperly was substituted as party claimant because a claimant's estate cannot receive the claimant's vested but unpaid § 7-433c benefits. We hold that neither *Morgan* nor any other legal authority barred the substitution to the extent that the executrix sought payment of matured benefits. We conclude, however, that, on the record before this court, we cannot determine that the permanent disability benefits matured prior to the death of Thomas Brennan (decedent). Accordingly, we reverse the board's decision only as to its determination that the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner) to grant the motion to substitute the executrix as a party claimant was improper, but we affirm the decision in all other respects.

The record reveals the following undisputed facts and procedural history. In 1991, the decedent was employed by the defendant, the city of Waterbury (city), as its fire chief. During all relevant times, Janet Brennan[1] was

[1] We refer to Janet Brennan by name when addressing matters undertaken in her individual capacity and by her title as executrix when addressing matters undertaken in her capacity as fiduciary of the decedent's estate.

married to the decedent. After the decedent suffered a heart attack during the course of his employment in July, 1993, he promptly filed a claim for § 7-433c benefits. The Workers' Compensation Commissioner for the Fifth District thereafter accepted the parties' stipulation of facts, wherein they agreed that the decedent had been diagnosed with hypertension and heart disease after his heart attack and that no evidence of such disease had been present prior to the decedent's employment as fire chief.[2] In December, 1993, the fifth district commissioner issued a finding and award, which ordered the city to pay the decedent all of the benefits of § 7-433c to which he "is or may become entitled."

For several years after issuance of the 1993 finding and award, the decedent and the city attempted to reach an agreement on the payment of benefits.[3] While negotiations were ongoing, the decedent elected to take disability retirement in December, 1995. In connection with the disability pension hearing and the pending § 7-433c claim, the city obtained opinions from three medical experts assessing the extent of the decedent's disability. Two of those experts rated the permanent impairment relating to his heart condition at 50 percent, and the other expert rated it at 75 percent. The decedent

[2] For persons hired prior to July 1, 1996, § 7-433c "requires the payment of compensation to firemen and policemen who have successfully passed a physical examination which failed to reveal any evidence of hypertension or heart disease and who subsequently die or are disabled as a result of such conditions." *Plainville* v. *Travelers Indemnity Co.*, 178 Conn. 664, 670, 425 A.2d 131 (1979); see Public Acts 1996, No. 96-230, §§ 2 and 3, codified at § 7-433c (b) (rendering persons hired on or after July 1, 1996, ineligible for benefits under § 7-433c).

[3] Brennan testified that the decedent's goal in settling the claim was to obtain benefits in a lump sum in order to pay off a mortgage. In the unexecuted settlement agreement drafted by the decedent's attorney, which a cover letter explained was an effort to memorialize the agreed upon terms, the decedent would receive a lump sum of $400,000 in exchange for the waiver of his rights to pursue present and future claims arising from his condition, including a waiver of survivors' benefits.

obtained an opinion from his own physician, who assessed the permanent impairment at 80 percent. The city's retirement board authorized a disability pension.[4]

Thereafter, the city also made certain payments to the decedent pursuant to § 7-433c. In July, 1997, the city paid the decedent a lump sum, which the accompanying letter from the city's risk manager explained as "representing 115.4 weeks [of permanent partial disability benefits] from the [maximum medical improvement] date of [October 13, 1993] to [the decedent's] retirement date of [December 21, 1995] at his maximum [permanent partial disability] rate . . . . We can use this amount as an advance if a final settlement can be reached. In the event that one is not obtainable at this time, the balance of [the decedent's permanent partial disability] would be calculated pursuant to [the statutory cap under General Statutes §] 7-433b."[5] In June, 1999, the city paid the decedent an additional lump sum, which represented a "52 weeks advance [of permanent partial disability that was] calculated pursuant to [the statutory cap under §] 7-433b and utilized a counterpart's pay . . . ."

The city and the decedent, however, never entered into a full and final settlement of the heart and hypertension claim. The failure to do so may have been due to the city's ongoing financial difficulties, which, in 2001, resulted in the appointment of an oversight board to review and control the city's financial affairs. See Public Acts, Spec. Sess., June, 2001, No. 01-1.

[4] The retirement board authorized a 75 percent disability pension. The commissioner's subsequent decision did not reference that rating. See generally *Dzienkiewicz* v. *Dept. of Correction*, 291 Conn. 214, 217–18, 222–23, 967 A.2d 1183 (2009) (concluding that state medical examining board's decision awarding plaintiff disability retirement benefits was not binding evidentiary admission for purposes of workers' compensation proceeding and that commissioner did not abuse discretion in excluding it).

[5] Section 7-433b sets a cap on cumulative retirement benefits and disability benefits under § 7-433c.

In 2003, due to his deteriorating health, the decedent sought temporary total incapacity benefits. The city paid the decedent total incapacity benefits from February 19, 2003, until the decedent's death on April 20, 2006.[6]

It was not until 2013 that the decedent's attorney sought to finalize the decedent's permanent partial disability claim under § 7-433c. In connection with those proceedings, the decedent's treating physician, who had assigned an 80 percent disability rating in 1995, issued a postmortem opinion that the decedent's permanent disability rating should be increased to 90 percent. Subsequently, the decedent's attorney moved to substitute Brennan in her capacity as executrix of the decedent's estate and Brennan in her individual capacity as party claimants.[7]

The city objected to the substitutions, advancing two independent grounds with respect to the estate. First, it contended that Brennan, the decedent's sole heir and the beneficiary of a spousal pension, was improperly seeking to circumvent the city charter's pension offset, which would negate any § 7-433c benefits otherwise due to her. Second, it contended that, pursuant to *Morgan* v. *East Haven*, supra, 208 Conn. 576, the estate was not a legally qualified recipient of funds paid under § 7-433c. In reply, the decedent's counsel contended that the substitution was proper because the benefits had vested and matured during the decedent's lifetime and, as such, would pass to his estate. The commissioner

[6] Several conditions were listed on the death certificate as the cause of death, including the decedent's heart condition. There was no claim advanced that the decedent's death was caused by factors that entitled his dependents to survivors' benefits under General Statutes §§ 7-433c and 31-306.

[7] The request to substitute Brennan individually apparently was for the purpose of seeking permanent disability benefits, in addition to those owed to the estate, on the basis of the postmortem opinion increasing the decedent's disability rating.

granted the motion insofar as it permitted the estate to be substituted as a party, but he denied the motion as to Brennan individually. The commissioner cited General Statutes § 52-599 (b), which provides for the survival of actions and the continuation of actions by a decedent's executor, as authority for the substitution. The city filed an appeal from the decision granting the estate's substitution. While that appeal was pending, proceedings continued on the benefits claim.

In December, 2015, the commissioner issued a finding and decision, ordering the city to pay benefits for 80 percent permanent partial disability of the decedent's heart pursuant to General Statutes §§ 7-433c and 31-308 (b), less any advance payments made to date on permanent partial disability. In support of this decision, the commissioner found that the decedent had reached maximum medical improvement on October 13, 1993, and credited the 1995 opinion of the decedent's physician assigning the 80 percent permanency rating to the decedent's disability. The commissioner declined to credit the lesser ratings of the city's three medical experts or the greater postmortem rating of the decedent's physician. The commissioner concluded that the decedent's entitlement to permanent partial disability benefits had vested prior to his death. The commissioner specifically concluded, however, that benefits were "due and payable to Janet Brennan and not the estate of [the decedent] . . . ."

Both parties filed motions to correct and for an articulation. The commissioner denied the city's motions but granted the executrix' motions in part. Specifically, the executrix sought (1) an articulation as to the dates on which the decedent's entitlement to disability benefits "vested *and matured*"; (emphasis added); and (2) a correction making the disability benefits payable to the estate or, alternatively, an articulation as to why the benefits are properly payable to Brennan individually.

In response, the commissioner issued the following correction: "[Permanent partial disability] benefits vested as of the date of [maximum medical improvement] on October 13, 1993. [Permanent partial disability] benefits of 80 [percent] of the heart are payable to Janet Brennan, [e]xecutrix of the [e]state of [the decedent]." The city filed an appeal from the corrected finding and decision.

At the city's request, the board consolidated the appeal contesting the estate's substitution with the appeal contesting the corrected finding and decision. The board concluded that the case was controlled by *Morgan* v. *East Haven*, supra, 208 Conn. 576, which the board interpreted to hold that an estate is not a qualified recipient of vested but unpaid § 7-433c benefits. In reliance on *Morgan*, the board vacated the commissioner's decision granting the motion to substitute the executrix, vacated the corrected decision making the estate the beneficiary, and remanded the case to the commissioner to decide the proper recipient of the benefits. As to the benefits owed to any such recipient, the board affirmed the central findings of the commissioner's decision. However, the board ordered the commissioner, when considering on remand the proper beneficiary, also to address several issues previously raised by the city relating to the availability and amount of benefits that the commissioner had declined to address.[8] This appeal followed.[9]

[8] Specifically, the commissioner deemed it unnecessary to address the extent to which the statutory cap under § 7-433b applied and whether a credit for temporary total incapacity benefits paid applied, and failed to set the amount of a weekly benefit and the number of weeks of unpaid disability benefits that the city was obligated to pay.

[9] The executrix appealed from the decision of the board to the Appellate Court pursuant to General Statutes § 31-301b, and we thereafter transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. We note that, despite the board's remand, this court has jurisdiction under § 31-301b, which provides that "[a]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensa-

I

Before turning to the executrix' challenges to the board's decision, we must dispose of a jurisdictional issue raised by the city. See, e.g., *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 90–91, 971 A.2d 1 (2009). Specifically, the city contends that this appeal must be dismissed because it was filed by Brennan individually, who lacks standing to appeal as she neither was a party to the proceedings below nor is aggrieved by the board's decision. We disagree.

The city's jurisdictional claim rests on the fact that the appeal form reflects that "Janet Brennan" is identified as the party filing the appeal. However, this entry does not indicate whether Brennan filed the appeal in her representative or individual capacity. This court has explained that "the forms for appeals and amended appeals do not in any way implicate appellate subject matter jurisdiction. They are merely the formal, technical vehicles by which parties seek to invoke that jurisdiction. Compliance with them need not be perfect; *it is the substance that matters, not the form*." (Emphasis added.) *Pritchard* v. *Pritchard*, 281 Conn. 262, 275, 914 A.2d 1025 (2007). When there is an ambiguity as to the identity of the appellant, this court will look to other filings to resolve that ambiguity. See, e.g., *Celentano* v. *Rocque*, 282 Conn. 645, 647 n.1, 923 A.2d 709 (2007). The docketing statement, the name of the case cited on the appeal form, and the appellant's brief indicate that the appellant's intention was that the appeal was filed on behalf of "Janet Brennan, Executrix of the Estate of Thomas Brennan." Although these documents also refer to Brennan individually, the aforementioned references are sufficient to dispel any ambiguity as to

tion Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

whether a proper party has filed the appeal. See, e.g., id. (referring to briefs and docketing statement to discern proper identity of parties to appeal). Accordingly, we reject the city's request for dismissal of the appeal.

II

We now turn to the merits of the appeal. The executrix contends that the estate is the proper recipient of any unpaid permanent partial disability benefits owed by the city because those benefits matured during the decedent's lifetime. Had they been paid when due, according to the executrix, the entirety of the decedent's benefits would have been paid during his lifetime. The executrix further contends that *Morgan* v. *East Haven*, supra, 208 Conn. 576, on which the board relied, presents no legal impediment to awarding benefits to a claimant's estate because certain statutory language on which the case relied was repealed. Should this court conclude that *Morgan* was not implicitly legislatively overruled, she contends that *Morgan* should be either limited to its facts, which involved unmatured benefits, or overruled if applicable to vested, matured benefits.

The city disagrees with the executrix' characterization of the benefits as matured. It also defends the vitality and applicability of *Morgan*, and contends that awarding unpaid benefits to an estate would undermine legislative intent to provide compensation only to dependents.

We conclude that § 7-433c benefits properly may be paid to a claimant's estate, if such benefits matured before the claimant's death. However, we disagree that the record establishes that the disability benefits at issue in the present case matured prior to the decedent's death.

A

In considering whether an estate can be a proper recipient of § 7-433c benefits, we apply the well settled

standard of review applicable to administrative appeals. "Cases that present pure questions of law . . . invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 30, 144 A.3d 420 (2016). "[W]e do not defer to the [agency's] construction of a statute—a question of law—when . . . the [provisions] at issue previously have not been subjected to judicial scrutiny or when the [agency's] interpretation has not been time tested." (Internal quotation marks omitted.) *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 603, 893 A.2d 431 (2006).

The present case does not involve a time tested agency interpretation. Moreover, although § 7-433c was subject to prior judicial scrutiny in *Morgan*, the present case requires us to determine the scope of our holding in that case, as well as the effect of subsequent legislative action. We therefore apply plenary review and established rules of construction. See General Statutes § 1-2z; *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 270, 777 A.2d 645 (2001).

Section 7-433c (a) provides in relevant part: "[A] uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who . . . suffers . . . any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation . . . in the same amount and the same manner as that provided under chapter 568 [the Workers' Compensation Act, General Statutes § 31-275 et seq.] . . . ." Therefore, § 7-433c prescribes the conditions under which benefits are provided for this class of employees

and their dependents, but the Workers' Compensation Act dictates the substance of and the procedure for obtaining such benefits. See *Ciarlelli* v. *Hamden*, 299 Conn. 265, 276–77, 8 A.3d 1093 (2010); *Genesky* v. *East Lyme*, 275 Conn. 246, 252 n.9, 881 A.2d 114 (2005).

Because of this relationship, we must consider the substantive law governing the postmortem distribution of workers' compensation disability benefits at the time that § 7-433c was enacted.[10] Like § 7-433c, for many years, the Workers' Compensation Act had no provision addressing the distribution of compensation owed to a claimant but not paid prior to the claimant's death. Drawing on the purpose of the act and various provisions, this court filled that gap.

Since the earliest days of our workers' compensation law, compensation owed to a claimant but not paid before his death was distributed according to whether the benefit "accrued" or "matured"[11] during the claimant's lifetime. The established rule was that " '[w]hatever of compensation accrues in [the claimant's] lifetime and is unpaid becomes upon his decease an asset of his estate.' *Jackson* v. *Berlin Construction Co.*, 93 Conn. 155, 157, 105 A. 326 (1918)." *Greenwood* v. *Luby*, 105 Conn. 398, 400, 135 A. 578 (1926); accord *Finkelstone* v. *Bridgeport Brass Co.*, 144 Conn. 470, 472, 134 A.2d 74 (1957) (estate of deceased employee has "a right in or to an award . . . when a portion of

[10] See Public Acts 1971, No. 524, § 1 (repealing General Statutes § 7-433 and enacting § 7-433c); see also *Morgan* v. *East Haven*, supra, 208 Conn. 580–81 (describing predecessor heart and hypertension statutes).

[11] This court typically has used the terms "mature" and "accrue" interchangeably in this context to describe the time when an employee has an enforceable right to receive payment for workers' compensation benefits. See Black's Law Dictionary (6th Ed. 1990) p. 20 (accrue defined as "due and payable; vested . . . matured"); see also Black's Law Dictionary (8th Ed. 2004) p. 22 (defining "accrue" as "[t]o come into existence as an enforceable claim or right; to arise").

the compensation awarded or to be awarded the injured employee has accrued during his lifetime and remains unpaid at his death"); *Morganelli* v. *Derby*, 105 Conn. 545, 546, 135 A. 911 (1927) ("all [workers'] compensation accrued and matured during [the employee's] lifetime would belong to his estate"); see also 7 A. Larson, Larson's Workers' Compensation Law (2018) § 89.02 ("[a]ccrued but unpaid installments are, of course, an asset of the estate, like any other debt").

This rule applied both to temporary incapacity benefits, also known as "special" benefits, which continue only as long as there is an impairment of wage earning power, and to permanent disability benefits, also known as "specific" benefits, which are provided for a fixed period in relation to the degree of impairment of a body part. See *Forkas* v. *International Silver Co.*, 100 Conn. 417, 420–21, 123 A. 831 (1924) (distinguishing benefits).

In a seminal 1926 case involving permanent disability benefits, this court clarified that the act indicated an "intention to confine the employee's interest to such part of the award as has accrued within his lifetime, and as to such portion of the award as did not mature in the employee's lifetime there is no survivorship in his estate." *Bassett* v. *Stratford Lumber Co.*, 105 Conn. 297, 301, 135 A. 574 (1926); id., 305 (overruling in part *Forkas* v. *International Silver Co.*, supra, 100 Conn. 417, insofar as that case held that unmatured part of award also belonged to claimant's estate). The court reasoned that "the employee has no vested right to the unmatured compensation awarded, and hence it cannot pass to his personal representatives." *Bassett* v. *Stratford Lumber Co.*, supra, 300. Accordingly, it held that, "[i]n case of death the dependents alone have the right to the *unmatured* part of the award of compensation . . . ." (Emphasis added.) Id., 303–304.

It was against this backdrop that this court decided *Morgan* v. *East Haven*, supra, 208 Conn. 576, on which the board relied in the present case. In *Morgan*, the commissioner issued an award to the claimant for 585 weeks of permanent partial disability benefits under §§ 7-433c and 31-308. Id., 579. The claimant received benefits until his death, and, thereafter, his surviving spouse received benefits until her death, at which point 233 of the 585 weeks of benefits awarded had been paid. Id. When the claimant's wife died, there were two surviving adult children but no dependents. Id. The fiduciaries of the estates of the claimant and his wife applied for an execution upon the remaining benefits in order to pass those benefits to the claimant's adult children. Id. It was clear that these remaining benefits had not matured before the recipients' deaths because they were not yet due to be paid. Accordingly, the issue raised to this court was whether the original award made pursuant to § 7-433c, in its entirety, was an asset of the deceased recipients' estates. Id., 577–78. The fiduciaries contended that the benefits vested in the recipients because the award was for "specific" benefits, and, consequently, the right to such benefits passed as a liquidated sum to the estates. Id., 583–84.

The court rejected that claim. Id., 584–86. It cited the text of § 7-433c, which referred exclusively to the employee or that person's dependents, and concluded that " 'dependents' " could not be construed to include the estate of the recipient. Id., 582–83. It was in relation to the construction of that term that the court held that "the clear and unambiguous language of the statute requires a municipal employer to provide compensation only to police and fire personnel who suffer from hypertension and heart disease and their dependents, not to the estates of the deceased recipients." Id., 583.

Nonetheless, the court in *Morgan* went on to explain why the estates would not be entitled to the unpaid portion of the award under the theory advanced by the fiduciaries. Id. It rejected the proposition that the unpaid § 7-433c benefits had vested in the recipients because they were "specific" benefits, like permanent disability benefits under § 31-308. Id., 583–85. The court reasoned that disability benefits payable under § 7-433c are more akin to "special" benefits (compensating for incapacity to work) than to specific benefits because the preamble to § 7-433c then in effect provided "that the section was designed to protect against '*economic* loss resulting from disability.' " (Emphasis in original.) Id., 585; see General Statutes (Rev. to 1985) § 7-433c. The court then reasoned that, "[t]o conclude, as the plaintiffs contend, that the estate of a deceased recipient, who leaves no dependents under § 7-433c, is entitled to the sum of *unmatured* weekly payments carries the concept of 'economic loss' . . . beyond the legislative purpose in enacting that statute." (Emphasis added.) Id., 586.

The court further explained that, even if § 7-433c benefits could be viewed as akin to "specific" benefits, the estate still would not be entitled to the benefits. Id., 587. The court pointed to *Bassett* v. *Stratford Lumber Co.*, supra, 105 Conn. 305, "in which case we specifically held that any *unmatured* part of a weekly compensation scheme does not succeed to the estate of the employee."[12] (Emphasis added.) *Morgan* v. *East*

[12] The court's reference to *Bassett* provides important context for its earlier statement that § 7-433c does not require an employer to provide compensation to the estates of the deceased recipients; see *Morgan* v. *East Haven*, supra, 208 Conn. 583; the statement on which the board apparently relied in the present case. In *Bassett*, the court made essentially the same statement; see *Bassett* v. *Stratford Lumber Co.*, supra, 105 Conn. 300, but also affirmed that an estate may receive benefits that matured prior to the claimant's death. See id., 301.

Haven, supra, 208 Conn. 587. Notably, the court in *Morgan* went on to observe that there could have been a scenario under which the unpaid benefits properly would have been distributed to the recipients' estates. Observing that forty-six weeks of benefits had been commuted and paid in a lump sum to the claimant, the court opined: "Had the commuted payment been outstanding at the time of [the death of the claimant's wife], *there is little dispute that the outstanding balance of the commuted amount would be due and payable to the estate. At the time of commutation, that portion of compensation that was commuted became mature and, thus, immediately due and owing.*" (Emphasis added.) Id.

The foregoing discussion makes clear that the holding in *Morgan* was limited to the distribution of unmatured § 7-433c benefits, which pass to "dependents." In the present case, the executrix does not contend that the estate is entitled to unmatured benefits. Rather, her claim is that matured § 7-433c benefits due to a police or fire department employee pass to a claimant's estate. In other words, the executrix is contending that matured § 7-433c benefits would be treated in the same manner as matured workers' compensation benefits long have been treated.

We see nothing in *Morgan* to preclude the application of this workers' compensation principle to § 7-433c. See *King* v. *Sultar*, 253 Conn. 429, 448, 754 A.2d 782 (2000) ("*Morgan* does not stand for the proposition that § 7-433c benefits are never to be considered workers' compensation benefits"); see also, e.g., id., 433–34, 437–48 (treating § 7-433c benefits as workers' compensation benefits for purposes of allowing city to intervene as coplaintiff in recipient's medical negligence action in order to recover sums paid and obligated to be paid under § 7-433c); *Maciejewski* v. *West Hartford*, 194

Conn. 139, 150–51, 480 A.2d 519 (1984) (treating § 7-433c benefits as workers' compensation payments for purposes of establishing municipal pension benefits). Although *Morgan* recognized certain material distinctions between § 7-433c benefits and workers' compensation benefits, in that the former provides economic benefits under less stringent conditions than the latter; *Morgan* v. *East Haven*, supra, 208 Conn. 581; it also recognized that workers' compensation principles would have applied if the benefits had matured. Id., 587. Insofar as *Morgan* characterized § 7-433c benefits as more akin to "special" (i.e., incapacity) benefits under workers' compensation law; id., 586; our case law holds that matured incapacity benefits also pass to the claimant's estate.[13] See *Greenwood* v. *Luby*, supra, 105 Conn. 401–402; *Jackson* v. *Berlin Construction Co.*, supra, 93 Conn. 157. Therefore, we disagree with the board that *Morgan* prescribed a broad rule that an estate can never be a proper recipient of § 7-433c benefits.

We also see nothing in the legislature's response to *Morgan* that demonstrates an intent to overrule long settled precedent regarding matured but unpaid benefits. In 1989, the legislature enacted the following provision: "Any award for compensation made pursuant to this section shall be paid to the employee, or in the event of such employee's death, to his surviving spouse or, if he has no such spouse, to his dependents in equal shares *or, if he has no surviving spouse or dependents, to his children, in equal shares, regardless of their age*." (Emphasis added.) Public Acts 1989, No. 89-346 (P.A. 89-346); see also Public Acts 1993, No. 93-

[13] Given that we do not find *Morgan*'s characterization of § 7-433c benefits as economic (i.e., "special") dispositive, we need not address the executrix' argument regarding the legislature's repeal of the "economic loss" language in § 7-433c on which *Morgan* relied for that characterization. See Public Acts 1996, No. 96-231.

228, § 19 (adding language to make provision applicable if compensation is based on agreement rather than award), codified at General Statutes § 31-308 (d). Although this provision does not refer to the employee's estate, it is important to remember that, for many decades, the payment of matured benefits to the employee's estate was considered a payment of the *employee's* vested interest. See *Finkelstone* v. *Bridgeport Brass Co.*, supra, 144 Conn. 472; *Bassett* v. *Stratford Lumber Co.*, supra, 105 Conn. 300–301. The only beneficiary added to § 31-308 (d) that had not previously been recognized as a proper recipient of benefits is the employee's nondependent children. We therefore assume that this provision was not intended to take away employees' existing right to have their unpaid matured benefits pass to their estate but, rather, was intended to provide a new right by expanding the potential beneficiaries of unmatured benefits.

The legislative history of P.A. 89-346 confirms that the legislature did not intend to change the law except as necessary to rectify the holding in *Morgan* with respect to nondependent children. Explanations regarding the bill that became P.A. 89-346 indicate the legislature's intent to expand the existing class to whom *unmatured* benefits could pass to include nondependent children. See 32 H.R. Proc., Pt. 5, 1989 Sess., p. 1600, remarks of Representative Joseph A. Adamo (discussing bill as direct response to *Morgan*); 32 H.R. Proc., Pt. 17, 1989 Sess., pp. 5877–78, remarks of Representative Adamo (referring to "leftover" benefits); 32 S. Proc., Pt. 12, 1989 Sess., p. 3952, remarks of Senator James Maloney (referring to benefits that had not been "fully paid" out before worker died). Had the legislature intended to overrule seven decades of workers' compensation precedent, under which matured benefits passed to an employee's estate, presumably a sponsor

of the legislation would have made this fact known to the legislators voting on it.[14]

While the legislative response to *Morgan* gives no indication of an intent to overrule precedent other than the specific holding of *Morgan*, the legislative history does provide a clear indication of an intent to apply the same rules of distribution for § 7-433c benefits and workers' compensation benefits. One legislator asked whether the new provision expanding the class of beneficiaries also would apply to benefits provided through § 7-433c, or would apply only to those provided through the act. See 32 H.R. Proc., Pt. 17, 1989 Sess., pp. 5882–83, remarks of Representative Robert M. Ward. The bill's sponsor made clear that both benefits would be treated the same. See 32 H.R. Proc., Pt. 17, 1989 Sess., p. 5883, remarks of Representative Adamo. Thus, to whatever extent the board deemed it significant that *Morgan* characterized these benefits differently, this legislative

[14] The only reference to any prior case law, other than *Morgan*, came from one legislator who opined that the proposed bill would overrule *Bassett* v. *Stratford Lumber Co.*, supra, 105 Conn. 297. See 32 H.R. Proc., Pt. 17, 1989 Sess., p. 5884, remarks of Representative Robert M. Ward. This statement was correct, insofar as *Bassett* held that an employee's estate could not receive *unmatured* benefits whereas P.A. 89-346 would allow the employee's legal heirs, nondependent children, to receive such benefits. Insofar as the legislature declined to adopt a more expansive version of the bill that became P.A. 89-346, which would have permitted unmatured benefits to be paid to the employee's estate, rather than only to his dependents and adult children; see 32 H.R. Proc., Pt. 5, 1989 Sess., pp. 1600–1601, remarks of Representative Adams; 32 H.R. Proc., Pt. 17, 1989 Sess., pp. 5874–82, remarks of Representative Adams; see generally *Flouton* v. *Can, Inc.*, No. 4379, CRB 7-01-4 (March 13, 2002); we are not persuaded that this rejection has any bearing on the distribution of matured benefits. We note that the fiscal analysis for the proposed legislation, provided to legislators, only accounted for the possibility of increased costs arising from expanding the class of beneficiaries. See Office of Legislative Research, Fiscal Impact Statement, Substitute House Bill 7181, An Act Concerning the Payment of Certain Workers' Compensation Benefits (1989). Had the legislation been intended to change the law to preclude the payment of matured benefits to an employee's estate, presumably that analysis also would have accounted for some cost savings from that change.

history confirms that any such difference would not bear on distribution.

Finally, with regard to the city's argument that providing benefits to a claimant's estate would contravene the legislature's intent not to benefit nondependents, this court long ago rejected this very argument: "The trial court based its decision [denying the claim of the claimant's estate] upon the theory that the intent of the [act] is to provide compensation to the workman and upon his decease to his dependents. And that, if the estate of the workman received the compensation for his incapacity which had accrued before his decease, this would enrich his estate, and perhaps strangers, instead of benefiting his dependents, and so defeat a primary purpose of the act. This is an erroneous application of the true theory of our [act]. The compensation accrued before the workman deceased, his right to it had vested, hence it survived to his estate. Had he collected it, it would have been his in lieu of the wages which, but for his incapacity, he would have received. It is possible that the accrued compensation constituting this award may go to the relatives of the deceased workman who were not his dependents, but it is far more probable that it will help meet the expenses which his incapacity and his illness preceding his decease have entailed." *Greenwood* v. *Luby*, supra, 105 Conn. 401–402.

An interpretation of § 7-433c that allows matured benefits to pass to the estate rather than the claimant's dependents may better effectuate legislative intent. As the city emphasizes in the present case, § 7-433c benefits are subject to pension offsets and caps. The payment of matured benefits to the estate will allow for a more rational application of the pension offsets under § 7-433b. The estate stands in the shoes of the employee and receives no greater or lesser benefit than had the

employee been paid during his lifetime. It is precisely because the employee was entitled to receive the benefits during his lifetime that entitles the estate to the benefits.

In sum, we conclude that matured § 7-433c benefits—those that accrued during the claimant's lifetime—properly pass to the claimant's estate. The question that remains for our consideration is whether the benefits at issue in the present case had matured before the decedent's death.[15]

B

The executrix contends that the disability benefits matured because the right to those benefits vested once the decedent reached maximum medical improvement on October 13, 1993, and, had the city timely paid those benefits starting from that date, all compensation due would have been paid to the decedent before he began receiving temporary total disability benefits on February 19, 2003.[16] The executrix acknowledges that the decedent could have insisted on the payment of disability benefits. Nonetheless, she contends that, because of the city's economic distress and the decedent's desire for a lump sum payment to settle his entire claim, the decedent "did not pressure the city for weekly payments, but rather agreed to wait for the city to have enough money to settle the claim in full."

The city claims that any benefits that it might be obligated to pay as a result of the decedent's permanent

[15] The board did not address the executrix' claim that the benefits at issue had matured, presumably deeming that matter irrelevant in light of *Morgan*.

[16] "While we have held that the [act] prohibits concurrent payment of benefits for permanent partial disability and temporary total [incapacity] . . . it is clear that these two types of benefits compensate an employee for different types of loss . . . and that the payment of . . . § 31-307 temporary total [incapacity] benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future." (Citations omitted; internal quotation marks omitted.) *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 193, 8 A.3d 507 (2010).

disability had not matured because they were not payable to him during his lifetime. The city asserts that the 1993 award was not definite enough to impose on the city an obligation to begin payments to the decedent during his lifetime because (1) his disability rating was not conclusively established until after his death, and (2) he chose to negotiate for a lump sum payment during his lifetime rather than obtain a final adjudication of the exact weekly compensation that the city would be obligated to pay.

In response, the executrix contends that the amount of disability benefits due was certain, because the city and the decedent had reached a compromise disability rating of 77.5 percent in the course of their settlement negotiations. She further contends that, even if the statutory maximum (520 weeks of compensation) had been ordered, under any scenario, "[h]ad the city fulfilled its obligation to make weekly payments in light of its financial inability to settle the case, [the decedent's disability] benefits would have been paid in full [before his death]."

We conclude that, on the present record, we cannot state with certainty that the unpaid portion of the 80 percent permanent partial disability benefits necessarily matured before the decedent's death. Our uncertainty in this regard exists because the commissioner's decision does not include necessary findings on the critical issues, and we therefore leave open the possibility that the commissioner, on remand, may find that some portion of the benefits matured before the decedent's death.

"The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Balloli*

v. *New Haven Police Dept.*, 324 Conn. 14, 17, 151 A.3d 367 (2016). Resolution of the matter first presents a legal question—under what conditions do benefits mature. It then requires application of that law to the facts found by the commissioner.

Turning to the legal question, we note that our case law reflects that permanent disability benefits vest, or become due, when the claimant reaches maximum medical improvement.[17] See, e.g., *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 191, 8 A.3d 507 (2010); *McCurdy* v. *State*, 227 Conn. 261, 268, 630 A.2d 64 (1993); *Panico* v. *Sperry Engineering Co.*, 113 Conn. 707, 714, 156 A. 802 (1931), overruled in part on other grounds by *Osterlund* v. *State*, 129 Conn. 591, 597–600, 30 A.2d 393 (1943).

The significance of the date of maximum medical improvement, however, is twofold. The date of maximum medical improvement is the point at which the *permanency* of the condition and, hence, the *right* to permanent disability benefits, is established, and it is

[17] We note that this court occasionally has stated that the benefits did not "accrue" because there had been no determination whether, or the date upon which, the claimant reached maximum medical improvement. See *Finkelstone* v. *Bridgeport Brass Co.*, supra, 144 Conn. 472 ("[n]o part of the compensation awarded or to be awarded for the decedent's partial loss of use of his left leg had accrued when he died, for it had not yet been determined that his leg had reached the state of maximum improvement"); *Panico* v. *Sperry Engineering Co.*, 113 Conn. 707, 716, 156 A. 802 (1931) ("[t]he record does not disclose at what date the condition of the plaintiff's arm reached the stage of ultimate improvement and when, in consequence, the period of compensation for incapacity would have terminated and the right to specific indemnity for proportionate loss of use accrued"), overruled in part on other grounds by *Osterlund* v. *State*, 129 Conn. 591, 597–600, 30 A.2d 393 (1943). We do not read these references to accrual to mean that the decedent's benefits would have matured if that date had been established irrespective of whether the degree of permanent disability had been established. Rather, we construe such references as equivalent to vesting, in that the right to such benefits would be established when the date is fixed. An unfortunate feature of our workers' compensation jurisprudence is a lack of consistency in terminology.

also the point at which the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations (i.e., number of weeks of compensation owed). An employer's payment obligations, then, are not fixed until the establishment of entitlement to permanent disability benefits. General Statutes § 31-295 (c) provides in relevant part: "*If the employee is entitled to receive compensation for permanent disability to an injured member in accordance with the provisions of subsection (b) of section 31-308*, the compensation shall be paid to him beginning not later than thirty days following the date of the maximum improvement of the member or members and, if the compensation payments are not so paid, the employer shall, in addition to the compensation rate, pay interest at the rate of ten per cent per annum on such sum or sums from the date of maximum improvement. . . ." (Emphasis added.) This court has recognized that the condition precedent, entitlement to this benefit, "depends on both the establishment of a permanent disability and the extent of that disability . . . ."[18] *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 193; accord 1 A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 2.14.7, pp. 152–53 (explaining that, for § 31-295 to apply, "the worker must be 'entitled' to receive permanent partial impairment benefits," and benefits are not owed until degree of permanent impairment has been established by award or agreement); see also *Milewski* v. *Stratford*, No. 5483, CRB 4-09-7 (July 20, 2010) (discussing board precedent under which lack of definiteness as to material terms will impact employer's payment obligations and concluding that such material term was at issue in case at hand when disability

[18] Once the degree of permanency is established, benefits are owed retroactive to the date of maximum medical improvement. See, e.g., *Marone* v. *Waterbury*, 244 Conn. 1, 4, 707 A.2d 725 (1998); *Rinaldi* v. *Enfield*, 82 Conn. App. 505, 508–509, 844 A.2d 949 (2004).

rating had been substantially in dispute such that there was no meeting of minds); *Abrahamson* v. *Dept. of Public Works*, No. 5280, CRB 2-07-10 (February 26, 2009) (concluding that payment of interest pursuant to § 31-295 [c] is mandatory if conditions enumerated by provision are met, and that conditional language suggests "that the provision is implicated only after the issue of permanent partial disability is no longer the subject of litigation"); *Cappellino* v. *Cheshire*, 9 Conn. Workers' Comp. Rev. Op. 49, 50 (1991) (even though decedent reached maximum medical improvement on March 1, 1978, he was entitled to receive specific benefits "when the parties' [v]oluntary [a]greement for [30 percent] loss of use of the back was approved by the Fifth District July 3, 1978"). But see 1 A. Sevarino, supra, p. 152 (questioning whether payment obligations and penalties under § 31-295 [c] would apply based on oral agreement prior to issuance of actual voluntary agreement).

In light of this authority, we are compelled to conclude that permanent disability benefits mature only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds. For the reasons set forth subsequently in this opinion, we cannot conclude on the present record that the degree of permanency was fixed prior to the decedent's death. However, because this issue was not addressed by the commissioner, and the case is being remanded to the commissioner for further proceedings, we leave open the possibility that the commissioner may conclude that some portion of the benefits matured during the decedent's lifetime.[19] See, e.g., *Russo* v. *Waterbury*, 304 Conn. 710, 734, 41 A.3d 1033 (2012) (concluding that

[19] Although the executrix specifically asked for the commissioner to correct the decision to indicate both the date on which the benefits vested and the date on which they matured, the commissioner made no correction to add a finding as to the latter.

case should be remanded to trial court for further proceedings due to lack of findings on facts essential to court's legal conclusion regarding application of offset to disability pension); *Deschenes* v. *Transco, Inc.*, 288 Conn. 303, 304–306, 953 A.2d 13 (2008) (concluding that case should be remanded to commissioner for further proceedings due to lack of findings on facts essential to commissioner's legal conclusion regarding apportionment of permanent partial disability benefits).

We begin our explanation for this conclusion with the 1993 award. The 1993 award itself does not provide the necessary findings. That award reflects that the decedent had established a compensable condition under § 7-433c by way of a diagnosis of hypertension and heart disease during the course of his employment. The award did not find, however, that maximum medical improvement had been reached; nor did it adopt a permanency rating. It simply ordered the city to pay the decedent all of the benefits of § 7-433c to which he "is or may become entitled."

No voluntary agreement containing these terms was submitted to the commissioner for approval during the decedent's lifetime. There is a draft settlement agreement in the record, apparently drafted by the decedent's counsel, with an accompanying motion to open and set aside the 1993 award. The city did not sign those documents. In his 2015 decision, the commissioner expressly found that the parties did not reach a final settlement.

In that decision, the commissioner found that the decedent reached maximum medical improvement on October 13, 1993. Although the commissioner made no express finding as to whether there was a meeting of the minds on that matter before the decedent's death, the evidence in the record plainly reveals that to be the case. In a July, 1997 letter, the city acknowledged that

the decedent had a permanent impairment and had reached maximum medical improvement on October 13, 1993. But the degree of the permanency is not the subject of any finding or final agreement.

The record not only fails to establish that there was a meeting of the minds on the degree of permanency to be assigned to that disability, it provides a clear implication to the contrary. The executrix relies on a provision in the draft settlement agreement adopting a "compromise" disability rating of 77.5 percent, but the city did not draft the agreement, it did not sign the motion seeking to submit that agreement to the commissioner, and it did not state in any of its communications to the decedent (in the record) that it had agreed to that rating. Had the commissioner found that there was a meeting of the minds on this matter, he either would have adopted this rating or explained why he had rejected it. However, the commissioner did neither, and in fact made no reference to the purported compromise rating. Most significantly, the commissioner duly considered, but ultimately found unpersuasive, the opinions of the city's medical experts assigning lesser ratings of 50 percent and 75 percent. The commissioner's consideration of those ratings, as well as the executrix' higher rating that the commissioner ultimately adopted, is inconsistent with a finding that there had been a meeting of the minds as to permanency.[20]

We acknowledge that an argument could be made that there was a meeting of the minds that there was a permanent impairment of *at least* 50 percent. Although the executrix did not advance this argument, we see no impediment to the commissioner's consider-

[20] The commissioner's approach suggested that, even if the city had agreed to a compromise rating, it was not bound by that rating if the settlement was not finalized, and the city could have renegotiated a lower disability rating in exchange for reaching a full and final settlement after the oversight board was appointed.

ation of it after the case is remanded to the commissioner to resolve the open issues as to the proper beneficiary, benefit calculations, and setoffs. We note that this is an issue of first impression as to whether benefits could mature under such circumstance, and the board should be given an opportunity to weigh in on this matter should an appeal be necessary.

Similarly, we leave to the commissioner the executrix' argument that, in part because of the city's economic distress, the decedent "did not pressure the city for weekly payments, but rather agreed to wait for the city to have enough money to settle the claim in full." The commissioner made no findings relating to any such agreement or any such reliance argument. In the absence of such findings or clear evidence establishing such fact, the better course, in light of the pending remand, is to allow the commissioner, and the board if necessary, to consider this argument.

Accordingly, on the basis of the record before this court, we cannot conclude that the decedent's § 7-433c disability benefits for his 80 percent impairment to his heart function matured before his death. In accordance with the board's decision, the case will be remanded for further proceedings to decide the proper beneficiary of any benefits due.

The decision of the Compensation Review Board is reversed only as to its determination that the commissioner improperly granted the motion to substitute the executrix as a party claimant and the case is remanded to the board with direction to affirm the commissioner's decision granting that motion and to remand the case to the commissioner for further proceedings to determine the proper beneficiary and the amount of benefits due; the decision is affirmed in all other respects.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 331

STATE OF CONNECTICUT *v.* FRANCIS ANDERSON

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 569 (AC 40378), is denied.

Monte P. Radler, public defender, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided May 1, 2019

NORMAND CARON ET AL. *v.* CONNECTICUT PATHOLOGY GROUP, P.C.

The plaintiffs' petition for certification to appeal from the Appellate Court, 187 Conn. App. 555 (AC 40462), is denied.

Jonathon A. Cantor, in support of the petition.

James Biondo, in opposition.

Decided May 1, 2019

RICHARD ANNULLI *v.* COMMISSIONER OF CORRECTION

The petitioner Richard Annulli's petition for certification to appeal from the Appellate Court, 188 Conn. App. 902 (AC 40623), is denied.

Freesia Singngam Waldron, deputy assistant public defender, in support of the petition.

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

Decided May 1, 2019

DE ANN MAURICE *v.* CHESTER HOUSING ASSOCIATES LIMITED PARTNERSHIP ET AL.

The petition of the plaintiff in error for certification to appeal from the Appellate Court, 188 Conn. App. 21 (AC 41741), is denied.

Michael P. Carey, in support of the petition.

Decided May 1, 2019

SEAPORT CAPITAL PARTNERS, LLC *v.* SHERI SPEER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 41879) is dismissed.

Sheri Speer, self-represented, in support of the petition.

Decided May 1, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 189

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

NINA BUXENBAUM *v.* BRIAN S. JONES
(AC 40255)

Prescott, Bright and Norcott, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant and making certain orders regarding custody of the parties' two minor children and the parties' finances. *Held*:

1. The plaintiff could not prevail on her claim that the trial court failed to consider the best interests of her minor children in deciding custody, which she claimed was demonstrated by its alleged predetermination of that issue before the close of evidence in its preparation of a child support guidelines worksheet; the plaintiff failed to provide any legal authority that would suggest that a court is prohibited from working on the case pending before it until the close of evidence, and the fact that the trial court input data into a worksheet before the close of evidence did not evince a premature determination of the issues and merely demonstrated that it was considering and working on the case before it, as the court was well within its authority to take notes, research, and begin working on a decision during the trial, knowing that additional evidence might require changes in the work it already had done.
2. The plaintiff's claim that the trial court improperly failed to consider and rely on the defendant's earning capacity when it issued its financial orders was unavailing: the plaintiff's claim that the defendant should have been ordered to pay her alimony and child support based on his earning capacity was largely inconsistent with the position she took at trial, where she argued that neither party should be required to pay the other any type of support, and this court typically will not consider an argument raised on appeal that is contrary to the position taken by the party in the trial court; moreover, although a court can base its financial orders on the parties' earning capacities, it is not required to do so, and the court did not abuse its discretion in making its financial orders, as it crafted its financial orders taking all of the facts into consideration, including the requests of the plaintiff, and balanced the equities in the case, including a shared physical custody arrangement.
3. The plaintiff could not prevail on her claim that the trial court lacked evidentiary support for its findings on the court prepared worksheet as to the defendant's net weekly income; where, as here, the plaintiff had submitted her own guidelines worksheet to the court and asked the court to rely on her representation of the defendant's net income, the court calculated a net income of the parties that was even more favorable to the plaintiff than what she had proposed, and the court's alimony and support orders gave the plaintiff exactly what she had requested,

to permit the plaintiff to challenge the trial court's financial orders because they did not rely on evidence of the defendant's net income after the plaintiff asked the court to rely on her calculation of that income and the court entered the very orders the plaintiff requested, would have amounted to sanctioning a trial by ambuscade, which this court would not do, and in the specific factual and procedural context of this case, there was no error in the trial court's reliance on the net income information provided to it by the plaintiff.

Argued January 14—officially released May 14, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Winslow*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Logan A. Carducci, for the appellant (plaintiff).

Douglas J. Lewis, for the appellee (defendant).

Opinion

BRIGHT, J. The present appeal arises following the trial court's judgment dissolving the marriage of the plaintiff, Nina Buxenbaum, and the defendant, Brian S. Jones. On appeal, the plaintiff claims that the trial court (1) failed to consider the best interests of the children, as demonstrated by its predetermination of custody before the close of evidence, (2) failed to consider the defendant's earning capacity and, therefore, rendered logically inconsistent financial orders, and (3) lacked evidentiary support for its findings regarding the defendant's net weekly income. We affirm the judgment of the trial court.

The record reveals the following relevant facts, which were found by the trial court or are uncontested. The parties were married in 2007, and have two minor children. After approximately eight years of marriage, the

plaintiff sought a judgment dissolving the parties' marriage. In her complaint, she requested, inter alia, joint legal custody of the children, with primary physical custody vested in her. During the pendency of the dissolution, the parties shared physical and legal custody of their children, in what is called a 5-2-2-5 plan, with the plaintiff having physical custody of the children every Monday and Tuesday, the defendant having physical custody of the children every Wednesday and Thursday, and the parties alternating physical custody of the children every Friday through Sunday. On November 18, 2015, the court entered temporary orders requiring the plaintiff to pay child support to the defendant in the amount of $243 per week and alimony in the amount of $150 per week.

On September 27, 2016, the defendant filed a notice of bankruptcy with the court. On November 21, 2016, the parties entered into a pendente lite agreement, which the court accepted, terminating alimony and child support, and agreeing, on the basis of the parties' shared physical custody of the children, that neither party would be obligated to pay support.

On February 1, 2017, the plaintiff submitted her proposed orders, in which she requested: joint legal custody of the children, with primarily physical custody vested in her; a finding that the defendant's earning capacity is $140,000 or more, but a deviation from the guidelines on the basis of the defendant's self-employment and "the coordination of total family support," and an order that the defendant pay only $1 per year in child support until he finds gainful employment; a waiver of alimony by both parties; a transfer of the defendant's interest in the marital home to the plaintiff for the sale of the home by the plaintiff and use and possession of it by the defendant until February 28, 2017; and that each party retain their own retirement

accounts, bank accounts, and personal effects, including artwork.

On February 8, 2017, the defendant submitted a set of third amended proposed orders, requesting, inter alia, joint legal and shared physical custody of the children, a waiver of alimony by both parties, child support in accordance with the guidelines, exclusive possession of the marital home, a fair distribution of the parties' retirement accounts, and that each party retain their own bank accounts and personal property, but that the defendant be entitled to one half of the plaintiff's artwork produced during the marriage.

On February 22, 2017, following a trial, the court rendered a judgment of dissolution, in which it ordered: the parties shall share joint legal custody of the children, with no parent having the right to act unilaterally with respect to important decisions affecting the children, but, ultimately, the plaintiff has final say on treatment concerning the children's physical or emotional health; the parties shall share physical custody of the children under a 5-2-2-5 plan; neither party shall be responsible to pay child support to the other, but each party shall share the expenses of extracurricular activities, school supplies, and school trips; the plaintiff shall maintain the children on her medical and dental plans; unreimbursed medical and dental expenses shall be paid in accordance with the plan set forth by the court; and neither party shall be entitled to alimony. This appeal followed. Additional facts will be set forth as necessary.

"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 [evidence] presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence 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 . . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . 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. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 726, 197 A.3d 1000 (2018).

"Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Keusch* v. *Keusch*, 184 Conn. App. 822, 825–26, 195 A.3d 1136 (2018).

I

The plaintiff first claims that the court failed to consider the best interests of the children in deciding custody, as demonstrated by its alleged predetermination

of that issue before the close of evidence. The plaintiff argues that custody of the two minor children was a contested issue at trial, but that the court had prepared a child support guidelines worksheet (worksheet), dated February 10, 2017, "prior to the conclusion of the plaintiff's testimony and the close of evidence, based on a predetermination that the parties will *split custody*."[1] (Emphasis in original.) The defendant argues that the court began preparation of the worksheet before the close of evidence, that the plaintiff misrepresents the date on the worksheet, which was February 15, 2017,[2] and that the court gave that worksheet to the parties to review for accuracy before rendering judgment.[3] He argues that there is no evidence that the court predetermined custody, and, further, that the evidence demonstrates that the court weighed all the evidence, including the then current shared custody arrangement that the parties had been following, and it considered the best interests of the children. We conclude that the plaintiff's claim lacks merit.

[1] We note that the worksheet prepared by the court stated that it was based on a "split custody" determination. The court, however, did not order "split custody" in this case. Rather, the court ordered shared legal and physical custody. As defined in § 46b-215a-1 (24) of the Regulations of Connecticut State Agencies, "[s]plit custody" is "a situation in which there is more than one child in common and each parent is the custodial parent of at least one of the children." (Internal quotation marks omitted.) Rather, the court ordered in this case that the parties have "shared physical custody," which means "a situation in which the physical residence of the child is shared by the parents in a manner that ensures the child has substantially equal time and contact with both parents. An exactly equal sharing of physical care and control of the child is not required for a finding of shared physical custody." Regs., Conn. State Agencies § 46b-215a-1 (23).

[2] The date on the court's worksheet is February 15, 2017; the date on the court's data sheets is February 10, 2017.

[3] The defendant's attorney, who also was trial counsel, represented at oral argument before this court that the trial court had given each attorney a copy of this worksheet to review for accuracy. When asked whether that occurred on the record, he explained that it happened in chambers. We have no record to verify the accuracy of this statement and, therefore, do not consider it in our analysis.

"It is statutorily incumbent upon a court entering orders concerning custody or visitation . . . to be guided by the best interests of the child. . . . In reaching a decision as to what is in the best interests of a child, the court is vested with broad discretion and its ruling will be reversed only upon a showing that some legal principle or right has been violated or that the discretion has been abused." (Internal quotation marks omitted.) *D'Amato* v. *Hart-D'Amato*, 169 Conn. App. 669, 678, 152 A.3d 546 (2016). "The best interests of the child, the standard by which custody decisions are measured, does not permit . . . a predetermined weighing of evidence." *Yontef* v. *Yontef*, 185 Conn. 275, 282, 440 A.2d 899 (1981). A claim that the court predetermined the outcome of a contested issue implicates the court's impartiality. See *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 866–67, 112 A.3d 779 (2015) (court's predetermination of relocation issue implicated court's required impartiality and constituted plain error); *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 802, 96 A.3d 624 (2014) (allegation that court predetermined outcome of motion "implicate[d] the court's impartiality").

To obtain appellate review, a claim of judicial bias or lack of impartiality typically must be raised before the trial court. See *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 486, 144 A.3d 447 (2016) ("[I]t is well settled that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court . . . . Absent plain error, a claim of judicial bias cannot be reviewed on appeal unless preserved in the trial court." [Internal quotation marks omitted.]); *Jazlowiecki* v. *Cyr*, 4 Conn. App. 76, 78–79, 492 A.2d 516 (1985) (plaintiff claiming he became aware of judicial bias after court rendered decision should have preserved issue in motion to open and set aside judgment). Because of the seriousness of such an allegation, however, in the interest of justice, we may invoke our

authority to review "plain error" not properly preserved in the trial court. See *Cameron* v. *Cameron*, 187 Conn. 163, 168, 444 A.2d 915 (1982); Practice Book § 60-5.

In the present case, the record contains a worksheet prepared by the court, bearing the date February 15, 2017, and the time 5:06 p.m. The balance of the plaintiff's testimony in this case did not conclude until February 17, 2017.[4] The court uploaded this worksheet into the court file on February 22, 2017, the same day it issued its memorandum of decision in which it rendered judgment. The plaintiff alleges that this, alone, proves that the court predetermined custody. Because of the seriousness of the allegation, and because it is unclear to us whether the plaintiff was aware of this issue before the court entered judgment, we invoke our authority to review whether the court's action constituted plain error. We conclude that the plaintiff's claim lacks substantiation and wholly is without merit.

The court's worksheet sets forth the parties' gross and net incomes, which are quite similar to those set forth in the plaintiff's worksheet, and it determines the appropriate amount of child support on the basis of, what it called, a "split custody" determination. The court, however, ultimately, awarded shared legal and physical custody. See footnote 1 of this opinion. Nevertheless, the fact that the court input data into a worksheet before the close of evidence does not evince a premature determination of the issues. Certainly, the court was well within its authority to take notes, research, and begin working on a decision during the trial, knowing that additional evidence may require changes in the work it already had done. The fact that the court input data into a worksheet before the close of evidence merely demonstrates that the court was considering and working on the case that was before it. The plaintiff fails to provide any legal authorities that

[4] There was no testimony taken on February 16, 2017.

would suggest that a court is prohibited from working on the case pending before it until the close of evidence. This issue warrants no further review. The plaintiff has failed to demonstrate any error.

II

The plaintiff next claims that the trial court failed to consider and rely on the defendant's earning capacity when it issued its financial orders pursuant to General Statutes §§ 46b-81, 46b-82, and 46b-84, which caused it to render logically inconsistent financial orders.[5] Specifically, the plaintiff argues: "[T]he trial court inequitably

[5] General Statutes § 46b-81 provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect. . . .

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

General Statutes § 46b-82 (a) provides in relevant part: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

General Statutes § 46b-84 provides in relevant part: "(a) Upon or subsequent to the annulment or dissolution of any marriage or the entry of a

declined to award the plaintiff alimony or child support and awarded the defendant a portion of the plaintiff's retirement account despite its express findings that the defendant has a history of substantial earnings and possesses the education and skills to return to those earnings in the future." The defendant responds that "there was no basis in fact for the court to look to the earning capacity of either party in fashioning its financial orders. Both parties, at the time of trial, were employed and their earnings reported. The fact that the defendant was earning . . . less than what he had once earned is not the standard by which to look to his earning capacity. Bear in mind that the defendant, once terminated from his job [in March, 2014,] took on additional parenting responsibilities, and, at the time of trial, was under a court approved shared custody arrangement."[6] We agree with the defendant.

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards . . . on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn . . . .

decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . .

* * *

"(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child. . . ."

[6] The defendant also argues that the court neither found nor articulated the earning capacity of either party, and, if the plaintiff wanted such a finding, she should have requested that the court provide one.

"Factors that a court may consider in calculating a party's earning capacity include evidence of that party's previous earnings . . . [l]ifestyle and personal expenses . . . and whether the defendant has wilfully restricted his earning capacity to avoid support obligations, although we never have required a finding of bad faith before imputing income based on earning capacity." (Citations omitted; internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 634, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014); see also *Schmidt* v. *Schmidt*, 180 Conn. 184, 189–90, 429 A.2d 470 (1980) ("[i]t is especially appropriate for the trial court to base its award on earning capacity rather than actual earned income where . . . there is evidence before the court that the person to be charged has wilfully depleted his or her earnings with a view toward denying or limiting the amount of alimony to be paid to a former spouse").

"Dependent spouses frequently fear that the wage-earner spouse will voluntarily reduce or deplete his or her earnings in order to reduce or eliminate the alimony award, and in many cases such a concern is entirely justified. There is at least some protection against such a practice in that financial awards may sometimes be based upon earning capacity rather than on the party's actual earned income. In general an alimony award may be based on the payor spouse's earning capacity rather than on actual earned income where it appears that the payor willfully or voluntarily depleted earnings with a view toward denying or limiting alimony. Conversely, present income rather than claimed earning capacity may be used where there is no indication that the payor spouse had willfully depleted his earnings . . . . [A] parent's child-care responsibilities are a factor which [also] may affect earning capacity. . . . [The court, however, does not require a finding of] bad faith or willful depletion of earnings . . . before [basing its] orders on earning capacity." (Footnotes omitted.) A.

Rutkin, S. Oldham & K. Hogan, 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 33:11, pp. 55–56; see also id., § 38:21 (discussing use of earning capacity in child support determinations and reaching same conclusion as use in alimony determinations). The fact that a court may consider a party's earning capacity does not mean that it is required to do so. Whether to base its financial orders on the parties' actual net income or their earning capacities is left to the sound discretion of the trial court.

In the present case, the court specifically found that the parties married in 2007. The plaintiff had obtained a master's degree in painting from the Maryland Institute College of Art in 2001. In 2002, she began teaching at York College in New York, where she later became a tenured associate professor. She earns a salary of $96,185. The plaintiff also teaches for two weeks each summer at a program in Utah, where she earns $3300. The plaintiff's total gross weekly income is $1913.17. After deductions, her net income is $1177 per week. The court also found that the plaintiff does not aggressively market her drawings and paintings, but, rather, she sporadically receives income from the sale of her artwork; the last drawing she sold, resulted in a payment of $1600.[7] The court, however, declined to attribute income to the plaintiff's occasional sale of artwork.

The court also found that the plaintiff had $64,106 in her retirement account at the time of the parties' marriage. At the time of the dissolution, that account had grown to approximately $220,699, with the annuity portion containing $78,066, and the 401 (a) portion containing $142,633. The plaintiff has three outstanding loans from that account, with a combined outstanding balance of $9887.

[7] The court also explained that this was a point of contention between the parties because the defendant believed that the plaintiff could "achiev[e] fame" and earn considerably more money if she more aggressively marketed her work and made efforts to show her art at prestigious galleries.

As to the defendant, the court found that, at the time the parties married, the defendant worked at Lyra Research, where he earned approximately $60,000 annually. He also pursued a staging business, estimating he earned approximately $100,000 in that business. Following a layoff, the defendant worked at ORC International in New York, where he earned a base annual salary of $90,000, plus commissions. The defendant, at that time, also pursued a master's degree in marketing management from Harvard University. He graduated in 2010. In 2012, the defendant left ORC International and began employment with Pluris. His base salary was $150,000, with some incentives. After leaving Pluris in the summer of 2013, he was employed at Ogilvy, an advertising agency in New York, where he earned $180,000, but his position was eliminated in March, 2014.

The court further found that the defendant is an entrepreneur at heart, who wanted to open his own business. In 2014, using his savings and credit card loans, he began that quest by opening a juice bar. The defendant filed for Chapter 7 personal bankruptcy in September, 2016, and his debts were discharged in January, 2017. The defendant also closed the juice bar in January, 2017. The defendant then began a new business, KBC Ventures, LLC, doing business as Beyond Medical Solutions. He has an investor in his business, who is paying him $1200 per week plus expenses. He expects his income will increase in time. The defendant also has a tenant living in his home, who pays $100 per week in rent; he expects to increase the rent to $1000 per month once the tenant can afford the increase.

The court further found that the defendant had cashed out $90,755 of his retirement in 2015, and sold his stocks, realizing a gain of $4808. The only retirement money he has left is $3500 in an individual retirement account. The defendant owes the Internal Revenue Service $10,127 for the 2015 tax year, and, at the time of

judgment, he was in discussions with it concerning a payment plan. He also owes money to the state and federal government for the 2016 tax year.

The court stated that the guidelines provided for the plaintiff to pay $186 per week for child support and the defendant to pay $166 per week. The court ruled, however, that "[g]iven the shared physical custody and similarity of the parties' net incomes . . . [it would be] inappropriate for either party to pay basic child support to the other." In addition to considering the guidelines, the court also stated that it had considered "all the criteria in General Statutes §§ 46b-56, 46b-56c, 46b-62, 46b-81, 46b-82 and 46b-84 in light of the evidence presented." The court further found that the defendant had an advantage over the plaintiff in terms of "income earning capacity."

The court then stated that it was rendering orders, taking "into consideration all of the claims and requested orders of the parties," in a manner that it "deemed most equitable and workable in the eyes of the court." The court proceeded to set forth its specific orders. These orders included: neither party would pay alimony to the other; the defendant would be the sole owner of the marital home and would be responsible for the mortgage and bills associated therewith, and the plaintiff would be held harmless; the defendant would make every effort to remove the plaintiff from the promissory note and the mortgage, but if he failed to do so by December 31, 2017, he must list the home for sale at or below fair market value and must sell the residence expeditiously;[8] each party would keep his or her own vehicle, own bank accounts, and certificates of deposit; the plaintiff would continue to own all of her artwork;

[8] The plaintiff's attorney had argued to the trial court that her client had no objection to giving the defendant the opportunity to refinance or restructure the mortgage. The concern was in getting the plaintiff's name off of the obligation.

the defendant would continue to own the assets of his businesses; the defendant would keep his retirement account, which was valued at approximately $3500; the plaintiff would transfer to the defendant $30,000 from her 401 (a) account, which was valued at approximately $220,700, as of the dissolution; and the plaintiff would retain the balance of her 401 (a) account.

The plaintiff now claims that the court failed to take into consideration the earning capacity of the defendant when it issued its financial orders, including its support orders, and that the orders, therefore, were inconsistent with the court's findings that the defendant had a higher earning capacity than did the plaintiff. We are not persuaded.

First, we note that the plaintiff's claim is largely inconsistent with the position she took at trial. Despite her argument on appeal that the defendant should have been ordered to pay her alimony and child support based on his earning capacity, she argued to the trial court that neither party should be required to pay the other any type of support. In her February 1, 2017 proposed orders, she requested that the court deviate from the guidelines and order that the defendant pay $1 per year in child support, and she requested that both parties waive alimony. Additionally, during final argument before the trial court on February 17, 2017, the plaintiff's trial attorney argued in relevant part: "I don't believe that this is a case where support should be awarded. Regardless of what the parenting plan is, because they're under the child support guidelines, their income is substantially equal. If you take out the deductions for the taxes, the mortgage interest, and the taxes on the marital home, I think they're within 5 percent or 10 percent of each other. . . . So, I don't think this is a case that warrants any type of support payment." As set forth in part III of this opinion, we typically will not

consider an argument raised on appeal that is contrary to the position taken by the party in the trial court.

In addition, as noted previously, although a court can base its financial orders on the parties' earning capacities, it is not required to do so. In the present case, although the court found that the defendant had a higher "income earning capacity" than did the plaintiff, the court also found that the parties were in an equal position: "The parties are in equipoise as to age, health, station, estate, needs, vocational skills, education, employability, and opportunity . . . ." The record also reveals that the court carefully considered the status of the parties before the marriage, during the marriage, and at the time of trial, including the fact that the defendant is an entrepreneur at heart who wanted to pursue a career path different than the one that, in the past, had produced a higher income. Significantly, the plaintiff did not claim, nor did the court find, that the defendant's decision to change careers was done wilfully to restrict his earning capacity to avoid support obligations. Overall, the court crafted its financial orders taking all of the facts into consideration, including the requests of the plaintiff, and balanced the equities in the case, including a shared physical custody arrangement. We have examined the record in this case and are not persuaded that the court abused its discretion.

III

The plaintiff's final claim is that trial court lacked evidentiary support for its findings on the court prepared worksheet as to the defendant's net weekly income. She argues that the figures on the court's worksheet do not match the figures on the defendant's financial affidavit, and that there is no evidence in the record to support the tax calculations that the court used for the defendant.[9] The defendant argues that the court

[9] The defendant's February 2, 2017 financial affidavit showed a gross weekly income of $1300 but listed no deductions, whatsoever, for taxes.

gave the parties a copy of this worksheet before the close of evidence so that they could review it and make objections or suggestions to the court, and that they had none. During oral argument before this court, the panel asked the defendant's attorney, who also was trial counsel for the defendant, whether this was done on the record, and he responded in the negative. The plaintiff's appellate attorney was not the same attorney who represented her at trial, and she did not know whether the parties had been given a copy of the document upon which to comment. Because there is nothing in the record to substantiate the defendant's assertion, we are unable to conclude that the parties were given copies of the court's worksheet. Nevertheless, on the basis of the record before us, we are not persuaded by the plaintiff's claim.

"Pursuant to Practice Book § 25-30, each party is required to file certain statements during a dissolution or child support matter. The guidelines worksheet is based on net income; weekly gross income is listed on the first line on the worksheet, and the subsequent lines list various deductions, including federal income tax withheld and social security tax. . . . The guidelines are used by the court to determine a presumptive child support payment, which is to be deviated from only under extraordinary circumstances." (Citation omitted; footnote omitted.) *Golden* v. *Mandel*, 110 Conn. App. 376, 386, 955 A.2d 115 (2008). The plaintiff, relying on this court's decision in *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 730, 147 A.3d 188 (2016), argues that the trial court abused its discretion by basing its decision on income information on a worksheet as to which there was no evidentiary support.

In *Ferraro*, the trial court rendered a judgment of dissolution and issued financial orders, and the defendant thereafter filed a motion for reconsideration and

His previous financial affidavits, however, showed various deductions for taxes and health insurance, but were based on different sources of income.

reargument, claiming in relevant part that the court's findings as to his net income were inconsistent with the evidence. Id., 724–25. After the court summarily denied this motion, the defendant filed an appeal and a motion for articulation. Id., 726. The defendant requested, inter alia, that the trial court articulate "the evidential sources for the court's 'figures used for taxes and deductions' . . . ." Id. In responding to that request, the court stated in relevant part: " '[T]he court based all of its findings on evidence and testimony provided at trial, including the financial affidavits provided by the parties . . . and used family law software provided by the Judicial Branch' as sources for the figures on the worksheet for taxes and deductions . . . ." Id.

On appeal in *Ferraro*, this court stated that "[a]lthough the child support guidelines create a legal presumption as to the amount of child support payments . . . the figures going into that calculation on the worksheet must be based on some underlying evidence. . . . A court may not rely on a worksheet unless it is based on some underlying evidence." (Citation omitted; internal quotation marks omitted.) Id., 730. This court then noted that the figures used by the trial court did not match the figures provided by the defendant on his financial affidavit and that the trial court failed to articulate how it arrived at its figures. Id., 729. This court stated, "it appear[ed] that the court sua sponte made various assumptions regarding standard and itemized deductions, medical expenses and child credits"; id.; and that "there was no testimony or other evidence presented at trial with respect to alternate federal and state tax calculations, exemptions, deductions or credits." Id., 730.

This court went on to explain that the trial court had articulated that it had relied on evidence and testimony provided at the trial, but that "[t]he figures [used by the court] do not match [the evidence] and, although the court is free to credit or discredit some or all of a

witness' evidence . . . the court still must provide a basis for the determinations that it makes as supported by the underlying evidence." (Citation omitted.) Id., 731. This court also explained that the trial court was free to take judicial notice of certain facts, including tax tables, where appropriate, but that there was no indication in this case that the court had done so. Id., 732. On this basis, this court reversed the judgment as to the financial orders and remanded the case for a new hearing. Id., 734–35. We conclude that *Ferraro* is distinguishable from the present case.

In the present case, unlike in *Ferraro*, the plaintiff asked the court to rely on her representation of the defendant's net income. Furthermore, unlike in *Ferraro*, the court calculated a net income of the parties that was even more favorable to the plaintiff than what she had proposed. Finally, unlike in *Ferraro*, the court's alimony and support orders gave the plaintiff exactly what she had requested. In fact, the manner in which the information regarding net income was provided to, and used by, the court makes clear why the plaintiff's reliance on *Ferraro* is misplaced.

During the defendant's testimony on February 8, 2017, he explained that he recently had been receiving $1200 per week from an investor in his medical device business, which he began in January, 2017, and that he also was receiving $100 per week in rental income. In light of this testimony, the court asked the plaintiff's attorney if she was going to submit a substitute worksheet, to which she answered in the affirmative, stating that she first wanted to "flush out the testimony." The plaintiff later submitted this updated worksheet, which was dated February 13, 2017.

On that worksheet, the plaintiff listed her own gross income as $1912, and her net weekly income as $1258. She asserted that the defendant's gross weekly income was $1300, and she listed three deductions for him:

federal income tax of $108, social security tax of $170, and state income tax of $53.[10] The plaintiff's net weekly income calculation for the defendant was $969, and the difference in the parties' net weekly income, as set forth on the plaintiff's worksheet, was $289 per week. According to the plaintiff's worksheet, the parties' combined net weekly income was $2230, rounded to the nearest $10.

The court's worksheet listed the plaintiff's gross weekly income as $1913, and it calculated her net weekly income as $1177. The court listed the defendant's gross weekly income as $1300, and it also listed three deductions: federal income tax of $12, social security tax of $184, and state income tax of $54. The court's net weekly income calculation for the defendant was $1050. Accordingly, the court found that the defendant's net weekly income was $81 more than what the plaintiff had asserted on her worksheet, and the difference in the parties' net weekly income was $127, less than one half of the difference calculated by the plaintiff. The court found the combined weekly net income of the parties to be exactly the same as the plaintiff's calculation, namely $2230, rounded to the nearest $10. Because the parties were sharing physical custody of the children and their net incomes were similar, the court found that a deviation from the guidelines was in order, and it concluded that no support should be paid by either party, as had been the position of the plaintiff during closing argument.

The plaintiff's argument on appeal that there was no evidence or testimony with respect to the defendant's

[10] The plaintiff argues on appeal that there was no evidence or testimony with respect to the defendant's tax obligations. She, nevertheless, arrived at her own calculations, which, with the exception of federal income tax liability, nearly are identical to the court's calculations. She has not addressed her methodology in her brief.

tax obligations notwithstanding,[11] the record reveals that she submitted her own guidelines worksheet to the court, which contained calculations for the defendant's taxes. See footnote 10 of this opinion. Additionally, the record reveals that the plaintiff's attorney argued during closing argument before the trial court that the parties' net incomes were "within 5 percent or 10 percent of each other" and that this is not a case "that warrants any type of support payment."

Finally, although the plaintiff argues that this case is similar to *Ferraro*, the alleged discrepancy between the evidence and the figures used by the trial court was brought to the court's attention in *Ferraro* in a motion for reconsideration and reargument, which the court summarily denied. *Ferraro* v. *Ferraro*, supra, 168 Conn. App. 725–26. Additionally, the court then was requested to articulate the precise sources for the court's figures used to calculate the plaintiff's taxes and deductions, and it failed to do so adequately, stating only that it relied on the evidence. Id., 731. In the present case, any alleged discrepancy was not brought to the attention of the court, and, in fact, the court's worksheet was similar to the plaintiff's worksheet, and its support orders nearly mimicked those requested by both parties.

On appeal, the plaintiff's position apparently has changed. Whereas she asked the trial court to rely on

[11] We recognize that the defendant had started a new self-employment venture in January, 2017, for which he had an investor who was paying him $1200 per week. The defendant provided no information on his financial affidavit as to an estimate for federal and state taxes. Nevertheless, the defendant had submitted financial information in the form of financial affidavits and tax returns, based on other employment opportunities he had undertaken, that had both federal and state tax information, evincing varying tax rates and deductions, ranging from 19 percent to more than 30 percent.

In *Utz* v. *Utz*, 112 Conn. App. 631, 637, 963 A.2d 1049, cert. denied, 291 Conn. 908, 969 A.2d 173 (2009), this court briefly discussed the difficulty a trial court can encounter when calculating a net income if a party has various financial documents that evince different tax rates, in that case, ranging from 10 to 20 percent.

her representations of the parties' net income, and further asked the court to use that information to conclude that neither party should pay child support or alimony to the other, she now claims that the trial court should not have entered the financial orders that she requested because the court lacked evidence regarding the defendant's net income. We do not look favorably on the plaintiff's efforts to change positions on appeal. "As we have expressed on a number of occasions, we generally disfavor permitting an appellant to take one legal position at trial and then take a contradictory position on appeal." *Kirwan* v. *Kirwan*, supra, 185 Conn. App. 724 n.11. "[A] party cannot be permitted to adopt one position at trial and then . . . adopt a different position on appeal." *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 650, 144 A.3d 457, cert. denied, 323 Conn. 931, 150 A.3d 232 (2016). Similarly, this court has stated that "[o]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result. . . . To allow the [party] to seek reversal now that his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the [opposing party and the court] with that claim on appeal." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013). In this case, to permit the plaintiff to challenge the trial court's financial orders because they did not rely on evidence of the defendant's net income after the plaintiff asked the court to rely on her calculation of that income, and the court entered the very orders the plaintiff requested, would amount to sanctioning a trial by ambuscade, which we will not do.

"[A] court must base its child support and alimony orders on the available net income of the parties . . . . Whether . . . an order falls within this prescription must be analyzed on a case-by-case basis. Thus, while

our decisional law in this regard consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific. . . . [T]he trial court is not required to make specific reference to the criteria that it considered in making its decision." (Internal quotation marks omitted.) *Ray* v. *Ray*, 177 Conn. App. 544, 557, 173 A.3d 464 (2017). In the specific factual and procedural context of this case, we find no error in the trial court's reliance on the net income information provided to it by the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

WACHOVIA MORTGAGE, FSB *v.* PAWEL TOCZEK ET AL.
(AC 42225)

Alvord, Keller, Elgo, Bright and Moll, Js.

Syllabus

The plaintiff W Co. sought to foreclose a mortgage on certain real property owned by the defendant T. After T quitclaimed his interest in the property to A, the trial court granted A's motion to intervene as a defendant. Thereafter, F Co. was substituted as the plaintiff, and the trial court rendered a judgment of strict foreclosure in favor of F Co., from which A appealed to this court, which affirmed the judgment and remanded the case to the trial court for the purpose of setting new law days. Subsequently, the trial court granted F Co.'s motion to reset the law days in accordance with this court's remand order and set new law days, and A appealed to this court. Following the trial court's issuance of an order terminating the appellate stay for any subsequent appeals, this court dismissed A's appeal as frivolous and granted her motion for review of the trial court's order terminating the appellate stay but denied the relief requested therein. A then timely filed motions for reconsideration en banc of the dismissal of the appeal and the denial of relief from the termination of the appellate stay. While A's motions for reconsideration en banc were still pending before this court, the trial court granted F Co.'s motion to reset the law days and set the first law day for December 4, 2018. Thereafter, A appealed to this court challenging the trial court's order resetting the law days, this court denied her motions

for reconsideration en banc, and F Co. filed a motion to dismiss the appeal. A subsequently filed a motion to open the judgment of strict foreclosure and to extend the law days, which the trial court denied. The trial court thereafter denied A's motion to reargue, and A amended her appeal to challenge the denial of those motions. This court then ordered, sua sponte, the parties to file memoranda addressing the issue of whether the trial court's order resetting the law days should be summarily reversed as being in contravention of the appellate stay. Thereafter, F Co. filed a motion to dismiss the fourth appeal and the amended appeal as moot and the amended appeal as frivolous. *Held* that the trial court acted in contravention of the appellate stay when it granted F Co.'s motion to reset the law days and set the law days: pursuant to the binding authority of *RAL Management, Inc.* v. *Valley View Associates* (278 Conn. 672), our Supreme Court held that resetting law days while an appellate stay is in effect violates the stay and cannot be given any legal effect because doing so is an action to carry out or to enforce the judgment pending appeal, the record revealed that the appellate stay here was in effect on October 15, 2018, when the trial court granted F Co.'s motion and set the law days, and although the trial court had granted F Co.'s motion to terminate the appellate stay, A filed a timely motion for review on July 16, 2018, which continued the appellate stay, and, therefore, the trial court violated the stay when it reset the law days during the period of time when A's motion for reconsideration of this court's denial of the relief requested in her motion for review was still pending; moreover, F Co. could not prevail on its claim that because this court denied A's motion for reconsideration, the stay that had terminated when this court initially denied the relief requested in A's motion for review was never revived or brought back to life, as that claim ignored the plain language of the rule of practice (§ 71-6) that provides that any stay of proceedings remains in effect during the period of time for filing a motion for reconsideration and, if such a motion is filed, until it is denied, and it was clear pursuant to *RAL Management, Inc.*, that resetting the law days while the stay was pending was in contravention of the stay, regardless of whether this court ultimately granted the motion for reconsideration; accordingly, the motion to dismiss the appeal was denied and the judgment granting the F Co.'s motion to reset the law days and setting the law days could not stand, and the motion to dismiss the amended appeal as frivolous was granted.

Argued March 6—officially released May 14, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz, J.*, granted

the motion to intervene as a party defendant filed by Aleksandra Toczek; thereafter, Wells Fargo Bank, N.A., was substituted as the plaintiff; subsequently, the court rendered a judgment of strict foreclosure, from which the defendant Aleksandra Toczek appealed to this court, which dismissed the appeal; thereafter, the court, *Mintz*, *J.*, granted the substitute plaintiff's motion to open the judgment and to extend the law days and rendered a judgment of strict foreclosure, from which the defendant Aleksandra Toczek appealed to this court, which affirmed the judgment and remanded the case for the purpose of setting new law days; subsequently, the court, *Genuario*, *J.*, granted the substitute plaintiff's motion to reset the law days and set new law days, and the defendant Aleksandra Toczek appealed to this court; thereafter, the court, *Genuario*, *J.*, issued an order terminating the automatic appellate stay for any subsequent appeals; subsequently, this court dismissed the appeal and granted the motion for review filed by the defendant Aleksandra Toczek but denied the relief requested therein; thereafter, the defendant Aleksandra Toczek filed motions for reconsideration en banc; subsequently, the court, *Genuario*, *J.*, granted the substitute plaintiff's motion to reset the law days and set new law days, and the defendant Aleksandra Toczek appealed to this court; thereafter, this court denied the defendant Aleksandra Toczek motions for reconsideration en banc; subsequently, the substitute plaintiff filed a motion to dismiss the appeal; thereafter, the court, *Genuario*, *J.*, denied the motion to open the judgment and to extend the law days filed by the defendant Aleksandra Toczek; subsequently, the court, *Genuario*, *J.*, denied the motion to reargue filed by the defendant Aleksandra Toczek, and the defendant Aleksandra Toczek filed an amended appeal; thereafter, the substitute plaintiff filed a motion to dismiss the appeal and the amended appeal. *Reversed; further proceedings; motion to dismiss appeal denied; amended appeal dismissed.*

Aleksandra Toczek, self-represented, the appellant (intervening defendant).

David M. Bizar, with whom, on the memorandum, was *J. Patrick Kennedy*, for the appellee (substitute plaintiff).

Opinion

BRIGHT, J. In this foreclosure action, the self-represented defendant, Aleksandra Toczek,[1] appeals from the judgments of the trial court granting the motion of the plaintiff Wells Fargo Bank, N.A.,[2] to reset the law days and denying her motions to open the judgment of strict foreclosure and extend the law days and to reargue. On November 2, 2018, the plaintiff filed a motion to dismiss the appeal as frivolous. On February 14, 2019, the plaintiff filed a second motion to dismiss this appeal as moot and the amended appeal as moot and frivolous. That motion followed this court's order of February 4, 2019, in which we raised the question of whether the trial court's order resetting the law days should be summarily reversed as being in contravention of the appellate stay. After considering the parties' written submissions on that question and hearing oral argument on the matter, we conclude that, under binding authority from our Supreme Court, the trial court acted in contravention of the appellate stay when it reset the law days. We, therefore, deny the plaintiff's motion to dismiss the appeal and reverse the court's judgment granting the plaintiff's motion to reset the law days and setting the law days. We agree, however, that the defendant's amended appeal is frivolous and, therefore,

[1] The complaint named Pawel Toczek and National City Bank as the defendants. After Pawel Toczek quitclaimed his interest in the property to her, Aleksandra Toczek filed a motion to intervene, which the court granted. We refer in this opinion to Aleksandra Toczek as the defendant.

[2] Wachovia Mortgage, FSB (Wachovia), commenced this foreclosure action. In June, 2013, the court granted Wachovia's motion to substitute Wells Fargo Bank, N.A. (Wells Fargo), as the plaintiff after Wachovia merged into Wells Fargo. We refer in this opinion to Wells Fargo as the plaintiff.

grant the plaintiff's motion to dismiss the amended appeal.

The following procedural history is relevant to our analysis. In November, 2008, the original plaintiff, Wachovia Mortgage, FSB, filed this action seeking to foreclose a mortgage on real property located at 15 Kenilworth Drive West in Stamford. In February, 2014, the court, *Mintz*, *J.*, rendered a judgment of strict foreclosure. The defendant appealed to this court, which dismissed her appeal for lack of diligence.

The trial court then reentered the judgment of strict foreclosure in February, 2015. On appeal, this court affirmed the judgment and remanded the case to the trial court for the purpose of setting new law days. *Wachovia Bank*, *FSB* v. *Toczek*, 170 Conn. App. 904, 155 A.3d 830 (2017), cert. denied, 328 Conn. 914, 180 A.3d 961 (2018). The plaintiff filed a motion for order to reset the law days in accordance with this court's remand order, which the court, *Genuario*, *J.*, granted, setting the first law day for July 24, 2018.

On May 18, 2018, pursuant to Practice Book § 61-11 (d) and (e), the plaintiff filed a motion to terminate the automatic appellate stay in § 61-11 (a) prospectively for any subsequent appeals filed,[3] which the court granted. On July 10, 2018, the defendant filed a third appeal from the court's resetting the law days. On July 16, 2018, the defendant filed a timely motion for review of the order of the trial court terminating the appellate stay. The plaintiff thereafter filed a motion to dismiss the third appeal as frivolous.

[3] "It is axiomatic that, with limited exceptions, an appellate stay of execution arises from the time a judgment is rendered until the time to file an appeal has expired. Practice Book § 61-11 (a). If an appeal is filed, any appellate stay of execution in place during the pendency of the appeal period continues until there is a final disposition of the appeal or the stay is terminated. Practice Book § 61-11 (a) and (e)." *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 99, 172 A.3d 1263 (2017).

On September 6, 2018, a panel of this court granted the plaintiff's motion to dismiss the third appeal as frivolous and granted the defendant's motion for review but denied the relief requested therein. On Monday, September 17, 2018, the defendant filed timely motions for reconsideration en banc of the September 6, 2018 decisions dismissing the third appeal as frivolous and denying relief from the termination of the appellate stay. On October 31, 2018, this court en banc denied the defendant's motions for reconsideration of the dismissal of the third appeal and the defendant's motion for review.

On September 14, 2018, before the period for seeking reconsideration under Practice Book § 71-5 had expired, the plaintiff filed in the trial court a motion to reset the law days following this court's dismissal of the third appeal as frivolous. The defendant filed an objection, arguing that the trial court could not reset the law days during the pendency of her motions for reconsideration en banc of the dismissal of the third appeal and the prospective termination of the appellate stay. On October 15, 2018, while the defendant's motions for reconsideration en banc were still pending before this court, the trial court granted the plaintiff's motion to reset the law days and set the first law day for December 4, 2018. The defendant filed the present, and fourth, appeal on October 25, 2018, challenging the October 15, 2018 order of the trial court resetting the law days, and, thereafter, the plaintiff filed a motion to dismiss the appeal as frivolous.

On November 26, 2018, the defendant filed a motion to open the judgment of strict foreclosure and extend the law days, which the trial court denied. The defendant filed a motion to reargue, which the court denied. The defendant amended her fourth appeal to add the trial court's denial of her motions to open and to reargue. The plaintiff then filed a motion to dismiss the

original fourth appeal and the amended appeal as moot and the amended appeal as frivolous.

On February 4, 2019, this court issued the following order: "[T]he parties are hereby ordered, sua sponte, to file memoranda not to exceed ten pages, on or before February 14, 2019, to give reasons, if any, why the trial court's October 15, 2018 order resetting the law days should not be summarily reversed and the matter remanded to the trial court to set new law days, as the trial court's order was in contravention of the appellate stay in effect while the defendant Aleksandra Toczek's September 17, 2018 timely motion to reconsider the motion for review of the termination of stay was pending. See *RAL Management, Inc.* v. *Valley View Associates*, [278 Conn. 672, 682–85, 899 A.2d 586 (2006)]; Practice Book §§ 71-5 and 71-6." Both parties filed the requested memoranda, and we heard argument on the issue on March 6, 2019.

We set forth the following legal principles that guide our review. "Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506–507, 970 A.2d 578 (2009).

"Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property. . . . As the holder of equitable title, also called the equity of redemption, the mortgagor has the right to redeem the legal title on the performance of certain conditions contained within the mortgage instrument. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . .

"Generally, foreclosure means to cut off the equity of redemption, the equitable owner's right to redeem the property. . . . The equity of redemption can be cut off either by sale or by strict foreclosure. . . . In Connecticut, strict foreclosure is the rule, foreclosure by sale the exception." (Citations omitted; internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 322–23, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006). "Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. The qualified title which the plaintiff had previously held under his mortgage had become an absolute one. . . . In other words, if the defendant's equity of redemption was extinguished by the passing of the law days, we can afford no practical relief by reviewing the rulings of the trial court now challenged on appeal, as doing so would have no practical effect or alter the substantive rights of the parties." (Citations

omitted; internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 97, 172 A.3d 1263 (2017).

There is no question that the December 4, 2018 law day set by the court on October 15, 2018, passed without the defendant redeeming her interest in the property. Thus, unless the running of the law day was stayed, title to the property has passed to the plaintiff and the defendant's appeal from the judgment granting the motion to reset the law days is moot. There also is no question that an appellate stay was in effect on October 15, 2018, when the trial court set the new law day of December 4, 2018. Although the trial court granted the plaintiff's motion to terminate the appellate stay, the defendant filed a timely motion for review on July 16, 2018, which continued the appellate stay. See Practice Book § 61-14.[4] Following this court's denial of the relief requested in that motion, the defendant filed, on September 17, 2018, a timely motion for reconsideration en banc of the denial of the relief requested in her motion for review, and, therefore, an appellate stay was in effect when the trial court reset the law days on October 15, 2018. See Practice Book § 71-6.[5] This court

[4] Practice Book § 61-14 provides in relevant part: "The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Section 66-6. Execution of an order of the court terminating a stay of execution shall be stayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise. . . ."

[5] The plaintiff argues that pursuant to Practice Book § 61-14, any appellate stay ended when the court denied the defendant's motion for review. According to the plaintiff, because § 61-14 provides that a motion for review is a party's *sole* remedy from a trial court's decision terminating an appellate stay, a motion for reconsideration pursuant to Practice Book § 71-5, does not extend the stay. The plaintiff's argument is without merit. Practice Book § 71-6 expressly provides in relevant part that "[u]nless the chief justice or chief judge shall otherwise direct, *any* stay of proceedings which was in effect during the pendency of the appeal shall continue until the time for filing a motion for reconsideration has expired, and, if a motion is filed, until twenty days after its disposition, and, if it is granted, until the appeal is finally determined. . . ." (Emphasis added.) Because § 71-6 applies to any stay of proceedings, it necessarily applies to a stay under § 61-14.

denied the motion for reconsideration en banc on October 31, 2018, and notice issued that same day. The stay remained in effect for twenty days, until November 20, 2018. See Practice Book §§ 63-2 and 71-6.

The question, therefore, is whether the trial court's order resetting the law days violated the appellate stay. On the basis of our Supreme Court's decision in *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 672, we conclude that it did. In *RAL Management, Inc.*, the court addressed whether the opening of a judgment of strict foreclosure to reset the law days violated the appellate stay that was in effect. In particular, the court stated that the threshold issue in the case was "whether the trial court properly opened the judgment while the appellate stay was in effect merely to change the law days" and concluded "that such an action was improper . . . ." Id., 682. The court reasoned that "the law days are ineffective pending the stay because to treat them otherwise would carry out the judgment in violation of the stay. It necessarily follows, therefore, that if the law days have no legal effect and necessarily will lapse pending the appeal . . . any change to those dates pending the appeal similarly has no effect. Indeed, the rules of practice anticipate such a circumstance by providing specific authority for the trial court to set new law days if the court's judgment is affirmed on appeal. See Practice Book § 17-10." (Citation omitted; footnotes omitted.) *RAL Management, Inc.* v. *Valley View Associates*, supra, 683–84.

The plaintiff argues that *RAL Management, Inc.*, is inapplicable to this case for two reasons. First, the plaintiff correctly notes that in *RAL Management, Inc.*, this court granted the defendants' motion for reconsideration and vacated the trial court's order terminating the appellate stay. Thus, the law days set by the trial court

in *RAL Management, Inc.*, could not have any effect because of this court's order reimposing the stay. In fact, our Supreme Court in *RAL Management, Inc.*, noted that the trial court's order resetting the law days "could not be given effect, however, because the Appellate Court's order vacated that order, thus reviving the stay. Therefore, the trial court's action must be viewed as either a legal nullity or an action in contravention to the appellate stay barring actions to carry out or to enforce the judgment pending appeal." Id., 684–85. According to the plaintiff, this language should be read to mean that, had this court denied the motion for reconsideration, which happened in the present case, the action of the trial court resetting the law days would have been proper.

We disagree with the plaintiff's reading of *RAL Management, Inc.* This court's decision in that case vacating the trial court's termination of the appellate stay provided an additional reason why the law days set by the trial court were ineffective. The language used by our Supreme Court in *RAL Management, Inc.*, makes clear, however, that the court viewed the resetting of the law days itself, which occurred well before this court ruled on the motion for reconsideration, as violative of the appellate stay. The court reinforced this conclusion in a footnote that immediately follows the language relied on by the plaintiff in the present case. Regarding the actions of the trial court in resetting the law days, the court stated: "We surmise that the trial court did not act knowingly in violation of the stay. The record indicates that the defendants filed their motion for reconsideration of the Appellate Court's denial of their motion for review of the trial court's decision terminating the stay on the last day permitted for filing that motion. The plaintiff represented to this court that it had received a copy of the motion for reconsideration the following

business day, after the trial court had held the hearing on the motion to open the judgment, the same day the court granted the motion." Id., 685 n.12. Accordingly, the trial court violated the stay when it opened the judgment and reset the law days during the period of time when the defendants could still seek reconsideration of this court's denial of the motion for review. That is the exact scenario that confronts us in this case.

Second, the plaintiff argues that by stating in *RAL Management, Inc.*, that this court's decision vacating the trial court's termination of the stay had the effect of "reviving" the stay, our Supreme Court necessarily implied that the stay ceased to exist until this court brought it back to life. Consequently, the plaintiff argues that because in this case we denied the defendant's motion for reconsideration, we never revived or brought back to life the stay that terminated when we initially denied the relief requested in the defendant's motion for review. We are not persuaded. First, this argument ignores the plain language of Practice Book § 71-6, which provides that any stay of proceedings remains in effect during the period of time for filing a motion for reconsideration, and, if such a motion is filed, until it is denied. See footnote 5 of this opinion. Second, the plaintiff's reliance on this one word in the Supreme Court's opinion ignores all of the other language noted previously in this opinion, which clearly provides that resetting the law days while the stay was in effect was in contravention of the stay, regardless of whether this court ultimately granted the motion for reconsideration.

We agree that the actions that are prohibited during the appellate stay are only those that in some way execute or effectuate the judgment. See *Ruiz* v. *Victory Properties, LLC*, 180 Conn. App. 818, 832–33, 184 A.3d 1254 (2018) ("trial courts in this state continue to have the power to conduct proceedings and to act on motions

filed during the pendency of an appeal provided they take no action to enforce or carry out a judgment while an appellate stay is in effect"). Consequently, our Supreme Court repeatedly has held that the law days set in a judgment of strict foreclosure cannot be given any legal effect while the appellate stay is in effect. See, e.g., *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 347–48, 579 A.2d 1054 (1990), and cases cited therein. In *RAL Management, Inc.*, the court extended this principle to resetting law days while the appellate stay is in effect because doing so is an action to carry out or to enforce the judgment pending appeal. *RAL Management, Inc.*, v. *Valley View Associates*, supra, 278 Conn. 685. Applying this holding to the facts of this case, we conclude that the trial court's October 15, 2018 order resetting the law days was in contravention of the appellate stay then in place. Consequently, the judgment of the trial court is reversed. Furthermore, because we conclude that the trial court erred in resetting the law days while the appellate stay was in effect, we also deny the plaintiff's motion to dismiss this appeal but grant the motion to dismiss the amended appeal as frivolous. The case is remanded to the trial court for the setting of new law days now that (1) the defendant's third appeal has been finally disposed of, and (2) we have denied the defendant's motion for reconsideration en banc of our denial of relief on her motion to review the trial court's order prospectively terminating any future appellate stays in this matter.

The motion to dismiss the appeal is denied, the motion to dismiss the amended appeal as frivolous is granted and the judgment granting the plaintiff's motion to set new law days is reversed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

RANIA NAHLAWI *v.* MOHAMAD NAHLAWI
(AC 40793)

Lavine, Bright and Bear, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and issuing certain financial and child custody orders. The defendant claimed that the trial court improperly awarded periodic alimony to the plaintiff and ordered him to transfer certain real property to her, and that the court improperly entered a final child custody and visitation order in its judgment that referenced a pendente lite parenting plan that the parties had agreed on, but which had been superseded by a subsequent pendente lite parenting plan that the parties and a different trial court had intended would become the final order of the court. *Held* that the trial court erred in entering a final child custody and visitation order that incorporated the pendente lite parenting plan stipulation that had been superseded by the subsequent pendente lite parenting plan, as there was no dispute that the parties had agreed that the later parenting plan would be incorporated into the final judgment, and the plaintiff indicated that she would not object to a correction of that mistake; moreover, the defendant's claims that challenged the trial court's alimony and property orders were inadequately briefed and, thus, were not reviewable.

Argued March 4—officially released May 14, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, entered an order in accordance with the parties' pendente lite parenting plan stipulation; thereafter, the court, *Maureen M. Murphy, J.*, entered an order in accordance with the parties' pendente lite parenting plan stipulation; subsequently, the matter was tried to the court, *Sommer, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' pendente lite parenting plan stipulation, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

Roy W. Moss, for the appellant (defendant).

George J. Markley, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant, Mohamad Nahlawi, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Rania Nahlawi. On appeal, the defendant claims that the court erred in (1) awarding periodic alimony in the absence of any finding as to the actual amount of the parties' incomes, expenses and liabilities, or the value of their respective assets, (2) ordering the transfer of real property without any finding as to the actual value thereof, and (3) entering a final child custody and visitation order that referenced a pendente lite parenting plan stipulation that had been superseded by a subsequent pendente lite parenting plan stipulation that the parties and the court had intended would become the final order. The plaintiff concedes that the court's child custody and visitation order should have referred to the February 28, 2017 parenting plan stipulation rather than the December 8, 2016 stipulation that was referenced in the judgment. We reverse the judgment of the court with respect to the child custody and visitation order. We affirm the judgment in all other respects.

The defendant, in his brief before this court, presents no facts and virtually no legal analysis in support of his first two claims. With respect to the alimony claim, the defendant's entire analysis and argument is that "[t]he court made no findings as to the amount of income or value of the parties' assets. It should be noted [that] the court did not find any concealment or misrepresentation of income, assets, or other financial circumstances on the part of the defendant. The court has broad discretion only so long as it considers all relevant statutory criteria. . . . Under the foregoing circumstances, the award of periodic alimony was unsupported by the record, failed to adhere to the above comprehensive statutory criteria [in General Statutes § 46b-82], and therefore constituted an abuse of discre-

tion."[1] (Citation omitted.) His analysis of his real property claim is similarly limited.

It is well established that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("[c]laims are inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record" [internal quotation marks omitted]). Accordingly, we decline to address the defendant's first two claims on the ground that they are inadequately briefed.

The defendant next claims that the court erred in entering a final child custody and visitation order that referenced a pendente lite parenting plan stipulation that had been superseded by a subsequent pendente lite parenting plan stipulation that the parties and the court had intended would become the final order. The plaintiff concedes that the court incorrectly incorporated the earlier stipulation in its order, and indicated both in her brief and during oral argument before this court that she would not object to a correction of this mistake.

[1] In its memorandum of decision the court set forth the § 46b-82 factors and considered those factors in determining the amount and duration of the alimony.

In its memorandum of decision filed August 9, 2017, the court incorporated a parenting plan that had been agreed to by the parties and made an order of the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, on December 8, 2016. Pursuant to this plan, the parties were to share joint legal custody of the minor children who resided with the plaintiff, the defendant was to have visitation rights as arranged by the parties, and neither party was to take the children outside the state of Connecticut without the agreement of the other parent or an order of the court. Although the parties initially had agreed to that plan, there is no dispute that the parties subsequently agreed that the later parenting plan dated and made an order of the court, *Maureen M. Murphy, J.*, on February 28, 2017, would be incorporated into the final judgment. The court, however, incorrectly incorporated the earlier stipulation when rendering its final judgment.

The judgment is reversed only as to the child custody and visitation order and the case is remanded with direction to render judgment that incorporates the February 28, 2017 stipulation rather than the December 8, 2016 stipulation. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

COMMISSIONER OF TRANSPORTATION *v.* TERESA B. LAGOSZ ET AL.

(AC 40885)

Lavine, Moll and Bear, Js.

Syllabus

The defendant T appealed to the trial court, pursuant to statute (§ 13a-76), from the assessment of damages by the plaintiff, the Commissioner of Transportation, in connection with the taking, by condemnation, of certain of T's real property, on which her husband, J, operated a business. The plaintiff had deposited with the court $420,000 as compensation

for the taking of T's real property, but T claimed that the amount of compensation was inadequate. Thereafter, the parties met to mediate a settlement of the amount of the compensation to be paid to T for the taking. The plaintiff claimed that, during the third mediation session, the parties entered into an oral agreement in which T would receive a total of $600,000, less the $420,000 already paid by the plaintiff, as compensation for the taking of her real property. The plaintiff further claimed that the court spoke to T and J to ensure that they understood and accepted the terms of that agreement, and that the court then informed the plaintiff that T had agreed to those terms. Thereafter, T refused to sign the final version of the written settlement agreement, discharged her counsel, and elected to represent herself at the trial. The court held a hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.* (225 Conn. 804), to determine if the parties had reached an enforceable settlement agreement. Subsequently, the trial court rendered judgment finding that a settlement agreement was reached in the amount of $600,000, from which T appealed to this court. *Held*:

1. T could not prevail on her claim that the trial court, following the *Audubon* hearing, improperly enforced a purported settlement agreement because the agreement was not inclusive of the essential terms of the parties' agreement, namely, the relocation expenses for J's business; the issue of reimbursement expenses was not an essential term of the settlement agreement, as the only essential term of the agreement within the context of T's appeal from the plaintiff's assessment of damages pursuant to § 13a-76 was the amount of compensation to be paid to T for the taking of her real property, T did not dispute that the parties agreed to a sum of $600,000 as compensation for the taking of her real property, and compensation for business relocation expenses did not fall under the purview of § 13a-76.
2. T could not prevail on her claim that the testimony elicited during the *Audubon* hearing, including the testimony regarding relocation expenses for J's business, was unclear and ambiguous as to what the terms of the settlement agreement were and, as a result, the trial court's finding that an enforceable agreement was entered into was clearly erroneous: the testimony of T's former attorneys, the plaintiff's representatives, and J confirmed that the parties had agreed to a sum of $600,000 in compensation for the taking of T's real property, and although there was extensive testimony and discussion at the *Audubon* hearing regarding the relocation expenses of the business, those expenses were outside the scope of the § 13a-76 proceeding, which properly concerned only the issue of whether there was an agreed upon sum of $600,000 as compensation for the real property; accordingly, the trial court's findings of fact as to the terms of the settlement agreement were not clearly erroneous, and the court properly concluded that there was a legally enforceable settlement agreement between the parties in the amount of $600,000 as just compensation for the taking of T's real property.

Argued February 7—officially released May 14, 2019

Procedural History

Appeal from the plaintiff's assessment of damages filed in connection with the taking by condemnation of certain of the named defendant's real property, brought to the Superior Court in the judicial district of New Britain, where the court, *Abrams*, *J.*, rendered judgment in accordance with the parties' settlement agreement; thereafter, the court denied the named defendant's motion to reargue, and the named defendant appealed to this court. *Affirmed.*

Teresa B. Lagosz, self-represented, the appellant (named defendant).

Raul A. Rodriguez, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant Teresa B. Lagosz[1] appeals from the judgment of the trial court reassessing damages in the sum of $600,000 for the taking of her property by the plaintiff, the Commissioner of Transportation, on May 4, 2015, in connection with the improvement of the New Haven-Hartford-Springfield rail corridor. The defendant's primary claim on appeal is that the court improperly found and summarily enforced, after conducting a hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 626 A.2d 729 (1993) (*Audubon*), an oral settlement agreement in the amount of $600,000 as just compensation for the taking by eminent domain of the

[1] The other named defendants, Bank of America, Webster Bank, MERS, the Berlin Revenue Collector, and Richard P. Healey of Rome McGuigan, P.C., did not participate in this appeal. For clarity, we refer to Teresa Lagosz as the defendant.

defendant's real property. Specifically, the defendant claims that (1) the settlement agreement was not inclusive of all the essential terms of the parties' agreement and (2) the court's finding that an enforceable agreement existed was clearly erroneous because it was based on unclear and ambiguous testimony elicited at the *Audubon* hearing.[2] Conversely, the plaintiff claims that the court, after the *Audubon* hearing, correctly concluded that there was a settlement agreement in the

[2] The defendant also raises three additional claims in her principal appellate brief.

First, without citing to any relevant legal authority, the defendant argues that the trial court improperly ordered, sua sponte, an *Audubon* hearing in lieu of commencing a trial that was scheduled, "without evidence that the parties' terms for a stipulation [agreement] had been settled on." Because the defendant does not provide any relevant case law or legal analysis to support her assertion, we consider this claim to be inadequately briefed and, therefore, we decline to address her claim. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

Second, the defendant claims that she was deprived of her right to due process as a result of the *Audubon* hearing and the subsequent judgment of the court because she was entitled to a trial to determine just compensation for the taking of her property. Our law, however, is that no trial is necessary under the circumstances of this case: "To hold that a jury trial is a necessary predicate to enforcement of a settlement agreement would undermine the very purpose of the agreement." *Audubon*, supra, 225 Conn. 812. "When parties agree to settle a case, they are effectively contracting for the right to avoid a trial." (Emphasis omitted.) Id.

In *Bragg* v. *Weaver*, 251 U.S. 57, 59, 40 S. Ct. 62, 64 L. Ed. 135 (1919), the United States Supreme Court noted that "it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." In the present case, the defendant had an opportunity to be heard in the *Audubon* hearing and to offer evidence to the court in support of her positions, which occurred. "It is fundamental that property cannot be taken without procedural due process as guaranteed by the fourteenth amendment to the constitution of the United States and article first, § 10, of the constitution of Connecticut. . . . Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner . . . but does not mandate any specific form of proce-

amount of $600,000 that was just compensation for the taking of the defendant's real property. We agree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are undisputed or uncontested. On May 4, 2015, pursuant to General Statutes § 13b-36[3] and General Statutes (Rev. to 2015) § 13a-73,[4] the plaintiff took by eminent domain

dure; rather, it protects substantive rights." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Fermont Division* v. *Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979).

Third, the defendant also appears to claim that she was deprived of her right to due process because of a supposed lack of notice of the taking. To the extent that the defendant claims a defect in the taking itself, we note that "[i]f a condemnee wants to challenge the validity of the condemnation, he or she must bring a separate action for injunctive relief." *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 29, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005). As a result, we conclude that the defendant's claim that she was deprived of due process is without merit.

[3] General Statutes § 13b-36 (a) provides: "The commissioner may purchase or take and, in the name of the state, may acquire title in fee simple to, or any lesser estate, interest or right in, any land, buildings, equipment or facilities which the commissioner finds necessary for the operation or improvement of transportation services. The determination by the commissioner that such purchase or taking is necessary shall be conclusive. Such taking shall be in the manner prescribed in subsection (b) of section 13a-73 for the taking of land for state highways." Although subsection (c) of § 13b-36 was amended in 2018, that amendment has no bearing on this appeal. For purposes of clarity, we refer to the current revision of the statute.

[4] Subsections (a) and (b) of General Statutes (Rev. to 2015) § 13a-73 govern the taking of land for state highways and provide in relevant part: "(a) 'Real property,' as used in this section, includes land and buildings and any estate, interest or right in land.

"(b) The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or other improvement . . . and the owner of such land shall be paid by the state for all damages, and the state shall receive from such owner the amount or value of all benefits, resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The use of any site acquired . . . by condemnation shall conform to any zoning ordinance or development plan in effect for the area in which such site is located, provided the commissioner may be granted any variance or special exception as may be made pursuant to the zoning ordinances and regulations of the town in which any such site is to be acquired. The assessment of such damages and of such benefits

real property owned by the defendant located at 468 Norton Lane in Berlin. The real property consisted of approximately 11.64 acres, including all buildings, improvements and appurtenances thereon. The defendant's husband, Joseph Lagosz, also operated a business in one of the buildings on the real property. On the date of the taking, the plaintiff deposited with the court $420,000 in compensation for the taking.

On September 28, 2015, the defendant appealed to the court from the plaintiff's assessment of damages.

shall be made by the commissioner and filed by him with the clerk of the superior court for the judicial district in which the land affected is located. The commissioner shall give notice of such assessment to each person having an interest of record therein by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by the commissioner, the physical construction of such layout, alteration, extension, widening, maintenance storage area or garage, change of grade or other improvement may be made. If notice cannot be given to any person entitled thereto because his whereabouts or existence is unknown, notice may be given by publishing a notice at least twice in a newspaper published in the judicial district and having a daily or weekly circulation in the town in which the property affected is located. Any such published notice shall state that it is a notice to the last owner of record or his surviving spouse, heirs, administrators, assigns, representatives or creditors if he is deceased, and shall contain a brief description of the property taken. Notice shall also be given by mailing to each such person at his last-known address, by registered or certified mail, a copy of such notice. If, after a search of the land and probate records, the address of any interested party cannot be found, an affidavit stating such facts and reciting the steps taken to establish the address of any such person shall be filed with the clerk of the court and accepted in lieu of service of such notice by mailing the same to the last known address of such person. Upon filing an assessment with the clerk of the court, the commissioner shall forthwith sign and file for record with the town clerk of the town in which such real property is located a certificate setting forth the fact of such taking, a description of the real property so taken and the names and residences of the owners from whom it was taken. Upon the filing of such certificate, title to such real property in fee simple shall vest in the state of Connecticut, except that, if it is so specified in such certificate, a lesser estate, interest or right shall vest in the state. The commissioner shall permit the last owner of record of such real property upon which a residence is situated to remain in such residence, rent free, for a period of one hundred twenty days after the filing of such certificate."

See General Statutes § 13a-76.[5] In that appeal, she stated that she was "aggrieved by [the $420,000] assessment of damages because the same is inadequate." No other claims were set forth in her appeal.

On November 3, 2015, the plaintiff filed his answer denying that the assessment was inadequate. On November 6, 2015, a certificate of closed pleadings and a claim to the trial list were filed. The defendant subsequently was ordered to provide an appraisal of the real property to the plaintiff on or before April 1, 2016. The parties met on three occasions in June, 2016, in an attempt to mediate a settlement on the amount of the compensation to be paid to the defendant for the taking.

The plaintiff asserts that, during the third of those mediation sessions, the parties entered into an oral agreement in which the defendant would receive a total of $600,000, less the $420,000 already paid by the plaintiff, as compensation for the taking of her real property and, in turn, the defendant and her husband would vacate the property by August 15, 2016, without having to pay any postcondemnation use and occupancy charges.[6] The plaintiff further states that the court, during the third mediation session, spoke to the defendant and her husband to ensure that they understood and accepted the terms of that agreement. The court then informed the plaintiff that the defendant had agreed to those terms. After the reported settlement, the plaintiff and the defendant's counsel prepared drafts of a written settlement agreement memorializing the agreement reached through the mediation, but the defendant

[5] General Statutes § 13a-76 provides in relevant part: "Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may . . . apply to the superior court . . . for a reassessment of such damages or such benefits so far as the same affect such applicant. . . ."

[6] The defendant and her husband vacated the property on September 16, 2016, without having to pay any postcondemnation use and occupancy charges.

refused to sign the final version of the agreement, and the case was scheduled for trial.[7] The defendant subsequently discharged her counsel and elected to represent herself at the trial. Her former counsel filed a motion to withdraw and requested a status conference.

On July 21, 2017, the court, after the status conference, ordered, sua sponte, that an *Audubon* hearing take place to determine if the parties had reached an enforceable settlement agreement, and the court postponed any trial until after it made its determination. On August 14, 2017, the court commenced the *Audubon* hearing. The defendant, her husband, and the defendant's former attorneys were present at the hearing. During the hearing, the following colloquy between the court and Richard P. Healey, one of the defendant's former attorneys, occurred:

"The Court: Is it your position that there was no settlement agreement?

"[Attorney Healey]: No.

"The Court: Okay.

"[Attorney Healey]: No, not at all."

Attorney Healey's cocounsel, John Bradley, and the court had the following colloquy:

"[Attorney Bradley]: I definitely agree, Your Honor . . . that the settlement was for—they were going to pay an additional $180,000 over what they—

"The Court: In addition to the [$420,000] that was already on deposit.

"[Attorney Bradley]: Right. . . . So the essential terms, in my view, was the additional [$180,000], waiver of the use and occupancy [which occurred]."

[7] We note that "the fact that the settlement agreement was not reduced to writing or signed by the parties does not preclude it from binding the parties." *Nanni* v. *Dino Corp.*, 117 Conn. App. 61, 67, 978 A.2d 531 (2009).

Attorney Healey told the court that the only obligation of the defendant and her husband under the settlement agreement "was to vacate the [real] property at a date that was acceptable to the state; they have done that."

The court also stated the following:

"The Court: My memories have come flying back and comport with everyone's here; is that we did reach an agreement as to the money. The other stuff was a little—a little more amorphous, but the other stuff is off the table now.

"[Attorney Healey]: Right.

"The Court: I mean, that has been completed. The agreement was $600,000 . . . . I don't think I can reopen negotiations. The only thing I'm allowed to determine is whether there was a deal. And I'm being told there was a deal. I remember there was a deal."

The defendant's husband testified in the defendant's presence and on her behalf at the *Audubon* hearing. In response to a question by the court, he stated that the $600,000 in total payment for the real property was agreed to by the parties.

On August 14, 2017, after the *Audubon* hearing concluded, the court rendered judgment finding that a settlement agreement was reached in the amount of $600,000: "The court finds that a settlement was reached in this matter in the amount of $600,000. Any settlement funds as yet unpaid to the defendant are hereby ordered to be paid." On September 5, 2017, the defendant filed a motion to reargue, which was denied by the court on September 7, 2017. On September 27, 2017, the defendant filed the present appeal. Additional facts will be set forth as necessary.

Before we address the defendant's claims, we first set forth the applicable standard of review and relevant

legal principles. "Because the [defendant challenges] the trial court's legal conclusion that the agreement was summarily enforceable, we must determine whether that conclusion is legally and logically correct and whether [it finds] support in the facts set out in the [record]." (Internal quotation marks omitted.) *Kidder* v. *Read*, 150 Conn. App. 720, 733, 93 A.3d 599 (2014). Our standard of review of legal questions is plenary. See *State* v. *Hanisko*, 187 Conn. App. 237, 245, 202 A.3d 375 (2019).

In *Audubon*, our Supreme Court determined that a settlement agreement resolving the issues in a pending case may be enforced prior to and without the necessity of a trial: "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit. A court's authority to enforce a settlement by entry of judgment in the underlying action is especially clear where the settlement is reported to the court during the course of a trial or other significant courtroom proceedings.[8] . . .

[8] The rule also includes agreements reached outside of formal court proceedings, but during pending litigation before the court. See *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 499–501, 4 A.3d 288 (2010) (settlement agreement reached after mediation session through out-of-court letters and phone calls); see also *Matos* v. *Ortiz*, 166 Conn. App. 775, 806–807, 144 A.3d 425 (2016) ("In the majority of cases where settlement agreements have been summarily enforced pursuant to *Audubon*, the agreement at issue was either read directly into the record or otherwise reported to the court. In the cases where a settlement agreement was not directly presented to the court in full, it nevertheless was in some sense placed before the court during pending litigation." [Footnote omitted.]); *Tirreno* v. *The Hartford*, 161 Conn. App. 678, 681, 129 A.3d 735 (2015) (terms of oral settlement agreement memorialized outside of court in series of e-mails between parties and testified to by counsel).

"In *Janus Films, Inc.* v. *Miller*, [801 F.2d 578, 583 (2d Cir. 1986)], Judge Newman, writing for the majority of the Second Circuit Court of Appeals, noted the important policy behind a court's power to enforce summarily a settlement agreement: Due regard for the proper use of judicial resources requires that a trial judge proceed with entry of a settlement judgment after affording the parties an opportunity to be heard as to the precise content and wording of the judgment, rather than resume the trial and precipitate an additional lawsuit for breach of a settlement agreement. This authority should normally be exercised whenever settlements are announced in the midst of a trial.

"Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial. The asserted right not to go to trial can appropriately be based on a contract between the parties. . . . The essence of that right [cannot] be vindicated effectively after the trial has occurred. . . . To hold that a jury trial is a necessary predicate to enforcement of a settlement agreement would undermine the very purpose of the agreement." (Citations omitted; emphasis omitted; footnote added; internal quotation marks omitted.) *Audubon*, supra, 225 Conn. 811–12.

I

We first address the defendant's claim that the court, following the *Audubon* hearing, improperly enforced a purported settlement agreement because the agreement was not inclusive of the essential terms of the parties' agreement.[9] Specifically, the defendant argues that the settlement agreement did not include relocation

[9] We acknowledge that "[n]umerous Connecticut cases require definite agreement on the essential terms of an enforceable agreement." (Internal quotation marks omitted.) *Santos* v. *Massad-Zion Motor Sales Co.*, 160 Conn. App. 12, 19, 123 A.3d 883, cert. denied, 319 Conn. 959, 125 A.3d 1013 (2015).

expenses for her husband's business, which the defendant implicitly asserts is an essential term of the agreement.[10] We disagree.

In the present matter, the defendant stated at oral argument before this court that the only agreement reached between the parties was that the defendant would pay $600,000 as compensation for the taking of the home and the real property. Although the defendant primarily claims that the settlement agreement does not include reimbursement for expenses incurred to relocate her husband's business,[11] the business expense claims were beyond the scope of the eminent domain proceeding, and they were not barred from resolution in any appropriate forum even if the question of just compensation was resolved.[12] Pursuant to § 13a-76, the

[10] The defendant also claims that the settlement agreement did not address the issue of whether she and her husband could return to the property to retrieve plants that remained there. At the *Audubon* hearing, Attorney Healey testified that, although the parties had discussed the possibility of allowing the defendant to retrieve certain plants with the permission of the Department of Transportation after the defendant vacated the premises, it was outside the scope of the agreement. The defendant's husband testified that he and the defendant went to retrieve the plants in April, 2017, but that they were no longer there.

[11] At the *Audubon* hearing, Steven Degen, who worked for the Department of Transportation, testified that the defendant was entitled to reimbursement for the relocation of the business once a new location for the business was selected. Moreover, Bradley, one of the defendant's former attorneys, testified that relocation benefits were still available to the defendant and her husband if they sought them and that those benefits were outside the scope of the stipulation for judgment. All written drafts of the stipulation for judgment contained provisions that stated that the defendant was entitled to pursue moving and relocation expenses for her husband's business.

[12] "Under the state relocation act, businesses are eligible to receive compensation for relocation expenses and losses when they are forced to remove personal property as a result of the state's acquisition of real property. General Statutes § 8-268. If a business seeks to contest the amount of compensation offered by the state, the state relocation act requires an appeal to the acquiring agency; General Statutes § 8-278; followed by an administrative appeal to the Superior Court pursuant to the [Uniform Administrative Procedure Act]." *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 709–10, 894 A.2d 259 (2006).

Additionally, § 8-273-1 (a) of the Regulations of Connecticut State Agencies provides: "Any person aggrieved as to the provisions of Chapter 135 of the [General Statutes], as revised, should first request reconsideration by the

just compensation proceedings were limited to the reassessment of damages. "It is well established by our case law that the scope of a § 13a-76 proceeding is limited to a reassessment of the damages offered by the [C]ommissioner [of Transportation] for a taking." *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 29, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005). "It is fundamental that the state government or any properly designated agency thereof may take private property under its power of eminent domain, if the taking is for a public use and if just compensation is paid therefor. . . . The single objective of an eminent domain proceeding is to ensure that the property owner shall receive, and that the state shall only be required to pay, the just compensation which the fundamental law promises the owner for the property which the state has seen fit to take for public use." (Citations omitted; internal quotation marks omitted.) *Russo* v. *East Hartford*, 4 Conn. App. 271, 273–74, 493 A.2d 914 (1985). Moreover, this court has repeatedly "recognize[d] the limited scope of an appeal from a statement of compensation in an eminent domain proceeding . . . ." (Citation omitted.) Id., 274 n.2; see also *Albahary* v. *Bristol*, 276 Conn. 426, 435 n.6, 886 A.2d 802 (2005).

In the present case, the only essential term of the settlement agreement within the context of the defendant's appeal from the plaintiff's assessment of damages pursuant to § 13a-76 was the amount of compensation to be paid to the defendant for the taking of her real property. The defendant does not dispute that the parties agreed to a sum of $600,000 as compensation for the taking of her real property. Rather, the defendant

State agency of the decision initially received as to relocation assistance. If the person aggrieved is not satisfied by the decision rendered by the State agency upon reconsideration, he then may request a hearing before the Relocation Advisory Assistance Appeals Board."

takes issue with the compensation for business relocation expenses, which fall under the purview of General Statutes §§ 8-268 and 8-278, not § 13a-76. See footnote 12 of this opinion. Because the issue of reimbursement expenses is outside the scope of compensation for the taking of the real property, it is not an essential term of the agreement. Accordingly, we reject the defendant's claim.

II

The defendant next claims that the testimony elicited during the *Audubon* hearing was unclear and ambiguous as to what the terms of the agreement were and, as a result, the court's finding that an enforceable agreement was entered into was clearly erroneous. Specifically, the defendant appears to argue that the testimony regarding relocation expenses for the business was unclear and ambiguous and, therefore, the agreement was not enforceable. We disagree.

We begin our analysis with the applicable standard of review. "[T]o the extent that the defendant['s] claim implicates the court's factual findings, our review is limited to deciding whether such findings were clearly erroneous. . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Kidder* v. *Read*, supra, 150 Conn. App. 733.

The testimony of the defendant's former attorneys, the plaintiff's representatives, and the defendant's husband confirmed that the parties had agreed to a sum of $600,000 in compensation for the taking of the defendant's real property. Although there was extensive testimony and discussion at the *Audubon* hearing regarding

the relocation expenses of the business, those expenses were outside the scope of the § 13a-76 proceeding, which properly concerned only the issue of whether there was an agreed upon sum of $600,000 as compensation for the *real property*. See *Commissioner of Transportation* v. *Larobina*, supra, 92 Conn. App. 29.

On the basis of our review of the representations and admissions by the defendant's former attorneys and her husband and the statements of the plaintiff's representatives at the *Audubon* hearing concerning the $600,000 agreed to as just compensation, the court's findings of fact as to the terms of that agreement were not clearly erroneous. The court, applying those facts, properly concluded that there was a legally enforceable settlement agreement between the parties in the amount of $600,000 as just compensation for the taking of the defendant's real property.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL ARONOW *v.* FREEDOM OF INFORMATION COMMISSION
(AC 41297)

Alvord, Sheldon and Bishop, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his appeal from the final decision of the defendant Freedom of Information Commission. In connection with a whistleblower retaliation complaint he had filed against his former employer, a health center, the plaintiff had requested certain records from the health center under the Freedom of Information Act (act) (§ 1-200 et seq.). After a delay in receiving the records, the plaintiff filed a complaint in 2014 with the commission, which was dismissed for lack of jurisdiction on the ground it had not been timely filed. The plaintiff resubmitted his request for the records and filed a second complaint with the commission in 2015, alleging that the health center had violated the act by failing to promptly provide him with all of the documents he had requested. Thereafter,

the plaintiff appealed from the commission's decision regarding his 2014 complaint to the Superior Court, which dismissed the plaintiff's 2014 complaint as moot on the ground that a hearing in the 2015 complaint, in which he sought the same records, was pending before the commission. Subsequently, the commission granted the plaintiff's 2015 complaint in part and concluded that the health center had violated the act by failing to comply promptly with the plaintiff's records requests, and the plaintiff appealed to the Superior Court, which granted in part the commission's motion to dismiss the plaintiff's appeal as to his first and second claims and, after further considering the plaintiff's remaining claims, rendered judgment dismissing the plaintiff's appeal. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly concluded that he was not aggrieved by the commission's decision not to impose a civil penalty against the health center; although the plaintiff acknowledged that this court was bound by *Burton* v. *Freedom of Information Commission* (161 Conn. App. 654), which addressed the precise issue raised in this case and held that the plaintiff in that case was neither classically nor statutorily aggrieved by the commission's decision not to impose a civil penalty because the decision did not violate a legal interest of the plaintiff and there was no statutory authority that provided the plaintiff with standing to appeal to the trial court from the commission's failure to impose such a penalty, the plaintiff here attempted to distinguish *Burton*, but his claim was speculative and lacked an evidentiary foundation, and, therefore, the trial court did not err in granting the commission's motion to dismiss the plaintiff's civil penalty claim for lack of standing.
2. The trial court properly dismissed the plaintiff's claim that his 2014 complaint was improperly dismissed on the ground that he was not aggrieved because the issues raised in that complaint were addressed in his 2015 complaint, the underlying matter in which he ultimately prevailed; contrary to the plaintiff's assertion, the record indicated that the commission did take the relevant facts of his 2014 complaint into consideration when making its decision that the health center had violated the act, as the commission not only found that the plaintiff's requests for records were identical, but it explicitly took administrative notice of the findings of fact in the 2014 complaint that were relevant to its determination as to whether the health center had promptly complied, and, therefore, the plaintiff did not demonstrate how he was aggrieved.
3. The trial court erred in concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff had narrowed the scope of his request under the act with respect to paragraph eleven of his complaint; there was no basis for the commission's order narrowing the plaintiff's request for records as described in the commission's final decision, which was inconsistent with the record and contravened the general policy of openness expressed within the act, as the record revealed that the plaintiff had requested the health center to expedite the most time sensitive portion of his request without excluding the remainder of the records requested.

Argued February 6—officially released May 14, 2019

Procedural History

Appeal from the decision of the defendant, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston, J.*, granted in part the defendant's motion to dismiss; thereafter, the court, *Young, J.*, dismissed the plaintiff's appeal, from which the plaintiff appealed to this court. *Dismissed in part; reversed in part; judgment directed.*

Michael Aronow, self-represented, the appellant (plaintiff).

Kathleen K. Ross, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Opinion

BISHOP, J. The self-represented plaintiff, Michael Aronow,[1] appeals from the dismissal by the trial court of his appeal from the final decision of the defendant Freedom of Information Commission (commission). Although, after a hearing, the commission concluded that the University of Connecticut Health Center (health center)[2] had violated the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq., in regard to document requests made by the plaintiff, the plaintiff appealed to the trial court from the orders and subordinate findings made by the commission. On appeal from the judgment of the court dismissing his appeal from the commission, the plaintiff claims that the court erred in (1) concluding that he was not aggrieved by the commission's decision to decline to impose a civil penalty against the health center for the FOIA violation, (2) dismissing his claim that the commission improperly

[1] The plaintiff also represented himself before the trial court and the commission.

[2] The health center and its freedom of information officer are not parties to this action.

dismissed a previous FOIA complaint filed by the plaintiff regarding an earlier document request made to the health center, (3) concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff had narrowed the scope of his FOIA request, and (4) concluding that the commission did not abuse its discretion by affording the health center nine months to comply with its document production order.

We agree with the court's conclusions regarding the plaintiff's first and second claims, and, accordingly, affirm the judgment as to those claims. We conclude, however, that the trial court erred in concluding that there was substantial evidence to support the commission's finding that the plaintiff had narrowed the scope of his original FOIA request in regard to paragraph eleven of the commission's final decision.[3] Accordingly, the judgment is reversed in part, and the case is remanded to the trial court with direction to remand to the commission with direction to order that the health center comply expeditiously with the plaintiff's original request, as narrowed only by paragraph ten of the commission's final decision.

The following facts and procedural history are relevant to our resolution of this appeal. In his brief, the

[3] The record reflects that the commission's October 28, 2015 order afforded the health center an additional nine months to comply with the plaintiff's request as narrowed by paragraphs ten and eleven of its decision. Because we conclude that the commission incorrectly determined that the plaintiff had voluntarily narrowed his document request and we remand with direction that the commission formulate new orders for production, we need not reach the plaintiff's fourth claim that the commission gave the health center an unreasonable amount of time to comply with its document production order. In sum, as a consequence of this opinion, the issue of whether the commission abused its discretion by affording the health center an unreasonably long period of time to comply is moot. See, e.g., *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 256 n.4, 193 A.3d 520 (2018); *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 416 n.2, 3 A.3d 919 (2010).

plaintiff alleges that he "is an orthopaedic surgeon who formerly worked for [the health center], against whom he filed a whistleblower retaliation complaint before the Commission on Human Rights and Opportunities' Office of Public Hearings on November 14, 2012 (OPH/WBR No. 2012-208), which [has been] in the damages phase" since he received a favorable decision on liability. Additionally, on March 31, 2012, the plaintiff separated from the health center under disputed circumstances. In his whistleblower complaint against the health center pursuant to General Statutes § 4-61dd, the plaintiff alleged, inter alia, that the health center took retaliatory actions leading to his separation in response to certain actions he had previously taken that caused him to fall out of favor with health center supervisory personnel, such as his filing of a grievance.[4] These allegations are supported by proceedings from which we take judicial notice.[5]

On August 19, 2013, the plaintiff e-mailed a FOIA request to Scott Wetstone, a medical doctor employed

[4] While in the employ of the health center, the plaintiff filed a grievance with the Health Center Appeals Committee (committee) against his department head, in which he accused the department head of various acts of misconduct directed against the plaintiff and others. Once the committee heard the grievance, it forwarded its report to the Office of the Executive Vice President of Academic Affairs at the University of Connecticut. That report, in turn, was reviewed by Philip Austin, president emeritus of the university. Austin subsequently wrote a one page report on the matter. After the plaintiff's request for copies of the report was denied, he filed a complaint with the commission which, in turn, ordered that the copies be disseminated to him. On appeal, our Supreme Court affirmed the commission's decision. See *Lieberman* v. *Aronow*, 319 Conn 748, 751–53, 127 A.3d. 970 (2015).

[5] By order dated February 14, 2018, a hearing officer from the Office of Public Hearings issued a decision, after a bifurcated hearing, in favor of the plaintiff on the issues of liability and continued the hearing to a subsequent date for a hearing on damages. As of the date of oral argument in this appeal, the damages hearing by the Office of Public Hearings had not taken place. We take judicial notice of these proceedings in the Office of Public Hearings as permitted by law. See *Cannatelli* v. *Statewide Grievance Committee*, 186 Conn. App. 135, 136 n.1, 198 A.3d 716 (2018) (taking judicial notice of disciplinary proceeding despite fact that documents in proceeding not part of underlying record), cert. denied, 331 Conn. 903, 202 A. 3d 374 (2019).

by the health center who acted as its freedom of information (FOI) officer. The request was for production of all e-mails sent or received by Jay R. Lieberman, a medical doctor formerly employed by the health center, from July 1, 2009, to the date of the request; all Microsoft Word and PDF documents created or modified on Dr. Lieberman's health center computer from July 1, 2010, to the date of the request; and a list of all e-mails and documents that fell within this request but were exempt from disclosure, and reasons why they were exempt. On December 13, 2013, Dr. Wetstone e-mailed the plaintiff to notify him that the previous FOIA requests[6] that the plaintiff had made to the health center were "essentially completed" and that he would begin working on the plaintiff's August 19, 2013 request. Dr. Wetstone also suggested in this e-mail that, in light of the number and the nature of the documents he had requested and the fact that the plaintiff had already submitted an extensive discovery request to the health center in a separate matter, the plaintiff should narrow the scope of his request. The plaintiff subsequently agreed to exclude a number of categories of records from the scope of his request.

On March 17, 2014, the plaintiff filed a complaint with the commission; see *Aronow* v. *University of Connecticut Health Center*, Freedom of Information Commission, Docket No. FIC 2014-156 (February 4, 2015) (FIC 2014-156); alleging that he had not received the documents requested, and that there had been no activity regarding his request since December, 2013. On June 30, 2014, while that matter was pending, the plaintiff

[6] The plaintiff had made a number of additional FOIA requests to the health center. Specifically, in the three years from the plaintiff's departure from the health center until the hearing in *Aronow* v. *University of Connecticut Health Center*, Freedom of Information Commission, Docket No. FIC 2015-127 (October 28, 2015), Dr. Wetstone testified that the plaintiff had made twenty-seven requests to the health center.

sent an e-mail to Dr. Wetstone requesting that he expedite the release of certain requested documents that were relevant to the plaintiff's pending Health Center Appeals Committee (committee) appeal.[7] In July, 2014, the plaintiff and Dr. Wetstone exchanged further e-mails regarding the use of a Dropbox[8] account to provide the plaintiff with the documents that he had requested for his committee appeal. After having issues with obtaining the documents from the designated Dropbox folder, the plaintiff acknowledged the receipt of seventeen of the 139 requested documents that Dr. Wetstone had informed the plaintiff he was sending.

On December 16, 2014, over one year after acknowledging that he would begin working on the plaintiff's August 19, 2013 request, and several months after the plaintiff had filed his complaint in FIC 2014-156, Dr. Wetstone e-mailed the plaintiff the following message: "Per our discussion this morning, you have my personal commitment to get . . . the documents [at issue in FIC 2014-156] no later than the end of March 2015. . . . Later today, I will attempt to find the files that I initially put in the drop box last summer. I can't find them immediately and need to tend to other things right now."

On February 4, 2015, the commission adopted a final decision dismissing the plaintiff's FIC 2014-156 complaint for lack of jurisdiction on the ground that the complaint had not been timely filed pursuant to General Statutes § 1-206 (b) (1).[9] On that same day, the plaintiff

[7] See footnote 4 of this opinion.

[8] Dropbox is a "web-based file hosting service that uses cloud storage to enable users to store and share files with others across the Internet using file synchronization. When files are uploaded to Dropbox by a user, they automatically sync with another computer selected by the user, meaning that the files are transferred from one computer to another." (Internal quotation marks omitted.) *Frisco Medical Center, L.L.P.* v. *Bledsoe*, 147 F. Supp. 3d 646, 652 (E.D. Tex. 2015).

[9] General Statutes § 1-206 (b) (1) provides in relevant part that "[a]ny person denied the right to inspect or copy records under section 1-210 . . .

resubmitted to Dr. Wetstone the FOIA request that he had originally requested on August 19, 2013. On February 17, 2015, the plaintiff again filed a complaint with the commission; see *Aronow* v. *University of Connecticut Health Center*, Freedom of Information Commission, Docket No. FIC 2015-127 (October 28, 2015) (FIC 2015-127); alleging that the health center had violated the FOIA by failing to promptly provide him with all of the documents he had requested.

Subsequently, on March 17, 2015, the plaintiff filed an appeal from the commission's decision in FIC 2014-156 to the Superior Court. On June 18, 2015, the court dismissed that appeal as moot on the ground that the plaintiff's hearing in FIC 2015-127, in which he sought the same records, was pending before the commission. A hearing on FIC 2015-127 was held before a hearing officer on July 1, 2015. During the hearing, Dr. Wetstone testified regarding the factors that were crucial for determining how long it would take to comply with the plaintiff's particular FOIA request. Dr. Wetstone indicated that, at the time of the hearing, the health center had ten active requests from the plaintiff, nine of which would take a few months to resolve. He indicated, as well, that the plaintiff's February 4, 2015 request was "by far the largest" request he had encountered in his fifteen year history of handling FOIA requests. Additionally, Dr. Wetstone claimed that there was a possibility that multiple FOIA exemptions would apply to the requested documents and that each document needed to be reviewed to determine whether any of those exemptions applied. Dr. Wetstone also asserted that in

or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial . . . ." In the present case, the commission concluded that the plaintiff's March 17, 2014 complaint "was more than sixty days past the denial of the [plaintiff]'s request that is deemed to have occurred on December 20, 2013 . . . ."

addition to acting as the FOI officer for the health center, he had multiple other responsibilities that affected how long compliance with the plaintiff's request would take. Finally, Dr. Wetstone testified that many of the individuals employed by the health center who would be required to search for certain requested documents were also responsible for providing direct patient care or for educating medical students.

On October 1, 2015, the hearing officer issued a proposed final decision. On October 8, 2015, the health center provided the plaintiff with some of the documents he had requested together with a privilege log claiming exemptions as to certain other documents.

On October 28, 2015, the commission adopted the proposed final decision of the hearing officer. The commission found that the health center had violated General Statutes §§ 1-210 (a)[10] and 1-212 (a)[11] by failing to comply promptly with the plaintiff's records requests. In addition, the commission found that the plaintiff's February 4, 2015 request was identical to the August 19, 2013 request that had been at issue in FIC 2014-156, and took administrative notice of certain findings of fact in FIC 2014-156 that were relevant to the determination of whether the health center had violated the promptness requirement of the FOIA. In taking notice

[10] General Statutes § 1-210 (a) provides in relevant part that "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."

[11] General Statutes § 1-212 (a) provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy. . . ."

of FIC 2014-156, the commission determined that the plaintiff had agreed to exclude broadcast e-mails, journal articles, and research data from his records request (paragraph ten). The commission found, as well, that the plaintiff had asked Dr. Wetstone, on June 30, 2014, to release "whatever material [he had] collected to date as well as the subset of documents that meet [certain enumerated] search criteria . . . between July 1, 2010, and August 14, 2012," which included his name and variations of his name, the words "FOI," "HCAC," "grievance," and "Appeals Committee," and excluded e-mails sent to his own e-mail at the health center (paragraph eleven). (Internal quotation marks omitted.) The commission ordered that the health center promptly comply with the plaintiff's request, as narrowed by paragraphs ten and eleven of its decision, that the health center make a good faith effort to provide the plaintiff with the requested records on a rolling basis, and that the health center work diligently to comply fully within nine months of its decision. The commission also suggested that the plaintiff refrain from making further requests until the health center complied with the commission's order.

On December 9, 2015, the plaintiff appealed from the commission's decision to the Superior Court, claiming that the commission (1) improperly declined to impose civil penalties on the health center, despite the length of the delay and the fact that the commission had found the health center to have violated the promptness requirement of the act in relation to other requests made by the plaintiff; (2) improperly suggested that the plaintiff refrain from making further requests until the commission's order in FIC 2015-127 had been satisfied; (3) improperly allowed the health center nine additional months to comply with the plaintiff's request; (4) improperly found that the plaintiff had narrowed the scope of his request, as stated in paragraph eleven of

its decision; (5) erred when it did not provide any mechanism for an in camera review of documents for which the health center claimed exemptions on October 8, 2015, after the proposed decision had been released; and (6) erred when it dismissed his FIC 2014-156 complaint for lack of jurisdiction.

On October 25, 2016, the commission filed a motion to dismiss the plaintiff's appeal, contending that the plaintiff was not aggrieved by the commission's decision in his favor. The commission also moved to strike certain claims for relief if any portion of the appeal survived the motion to dismiss. On May 8, 2017, the court granted the commission's motion to dismiss as to the plaintiff's first and second claims, but denied the motion as to the plaintiff's third and fourth claims. Additionally, the court ordered the parties to brief whether it lacked jurisdiction to consider the plaintiff's fifth claim, and declined to review the commission's inadequately briefed motion to strike as to the plaintiff's sixth claim. In this decision, the court made clear that the commission's October 28, 2015 order was not stayed pending the disposition of the appeal. Following this decision, the plaintiff alleged that the health center notified him that it would begin complying with his request, as narrowed pursuant to the commission's order. The plaintiff also alleged that in June, 2017, the health center had sent him two compact discs (CDs) containing requested documents in partial compliance with the order.[12]

On January 5, 2018, after further considering the plaintiff's third, fourth, fifth, and sixth claims, the court dismissed the plaintiff's appeal. Specifically, the court

[12] During oral argument, the plaintiff further represented to this court that, since receiving the CDs in June, 2017, he has not received any additional documents from the health center. He also is uncertain of how many of the documents falling within the scope of the narrowed request he did not receive in the nine months following the court's order.

concluded that the commission had not abused its discretion in giving the health center nine months to comply with the plaintiff's records request because there was substantial evidence before the commission to support the reasonableness of its decision to order a rolling out of information over a nine month period of time. The court found, as well, that the plaintiff had agreed to narrow his request, as described in paragraph eleven of the commission's decision. The court concluded, as well, that because the commission did not have the opportunity to consider whether there should have been an in camera review of the allegedly exempt documents, the plaintiff had not exhausted his administrative remedies, and, thus, that claim was not ripe for the court's consideration.

Finally, the court addressed the plaintiff's claim regarding his FIC 2014-156 complaint, which involved his earlier records request to the health center. The court understood this claim to be an assertion that the plaintiff had relied on representations made by the commission that his FIC 2014-156 complaint would be considered at the hearing in FIC 2015-127 and that, because of that representation, he did not timely appeal the court's disposition of his appeal with regard to his FIC 2014-156 complaint. Specifically, the plaintiff's claim was understood to be an assertion that he was aggrieved by the dismissal of FIC 2014-156 because the issues in that earlier records request were not addressed in FIC 2015-127 and the plaintiff had not received the records he had sought in FIC 2014-156, which were the same records as those had had requested in FIC 2015-127, and that the commission should have considered the health center's delay in compliance as being substantially longer than it had found in its disposition of FIC 2015-127. The court concluded that the plaintiff's claim was without merit after finding that the issues that were the basis of the FIC 2014-156 complaint were,

in fact, addressed by the commission in FIC 2015-127. The court also concluded that there was no evidence in the record that the commission's finding of a shorter time period of delay was an abuse of discretion or affected the outcome of the proceeding. This appeal followed.[13] Additional facts will be set forth as necessary.

I

We first address the plaintiff's claim that the court erred in concluding that he was not aggrieved by the commission's decision not to impose a civil penalty against the health center. Specifically, the plaintiff claims that the court's granting of the commission's motion to dismiss this claim for lack of standing was improper because he was aggrieved by the health center's noncompliance with his FOIA requests and, therefore, had a direct interest in his attempt to have the commission impose a civil penalty on the health center. We are not persuaded.

[13] On appeal, although the plaintiff notes in his appellate brief the commission's suggestion that he refrain from filing additional FOIA requests until the health center complied with the commission's order, the plaintiff does not appear to argue that this suggestion was improper. In fact, the plaintiff concedes in his brief that the court reasonably concluded that the commission's order that he refrain from further requests until the request at issue is satisfied was nonbinding. Because the plaintiff does not appear to challenge the trial court's determination in this regard, we need not address this issue further.

Additionally, in his brief, the plaintiff's only references to his request for an in camera review of documents that the health center claimed to be exempt from disclosure consist of a summary of the trial court's decision and a statement of his belief that he will need to file a new FOIA request for an in camera review of the contested records. Lacking any analysis or argumentation, we deem this claim to be abandoned. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." [Internal quotation marks omitted.]); *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 856, 171 A.3d 525 (2017) (same).

We begin by setting forth the legal principles regarding motions to dismiss and standing. Because this claim "arises from a motion to dismiss, the question is whether the pleadings, if presumed true and construed in favor of the plaintiff, set forth sufficient facts to establish that the plaintiff had standing. . . . That question is one of law, over which our review is plenary." (Citation omitted.) *Burton* v. *Freedom of Information Commission*, 161 Conn. App. 654, 658, 129 A.3d 721 (2015), cert. denied, 321 Conn. 901, 136 A.3d 642 (2016). "It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has . . . some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of [a] direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Citations omitted; internal quotation marks omitted.) *Rose* v. *Freedom of Information Commission*, 221 Conn. 217, 223–24, 602 A.2d 1019 (1992).

"Standing may derive from either classical or statutory aggrievement. . . . Aggrievement is also expressly required by the statutes that govern a FOIA appeal. See

General Statutes § 1-206 (d) ('[a]ny party aggrieved by the decision of said commission may appeal therefrom, in accordance with the provisions of section 4-183' . . .); General Statutes § 4-183 (a) ('[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section' . . .)." (Citation omitted; emphasis omitted.) *Burton* v. *Freedom of Information Commission*, supra, 161 Conn. App. 659.

In *Burton*, this court addressed the precise issue raised in the case at hand, namely, whether a plaintiff had standing to challenge on appeal the commission's failure to impose a civil penalty as a remedy once the commission determined that a FOIA violation had occurred. See id., 662–67. This court concluded that the plaintiff in *Burton* was neither classically nor statutorily aggrieved by the commission's decision not to impose a civil penalty because the decision did not violate a legal interest of the plaintiff and there was no statutory authority that provided the plaintiff with standing to appeal to the trial court from the commission's failure to impose such a penalty. See id., 665–67. In reaching this conclusion, the panel in *Burton* relied in part on the language of § 1-206 (b) (2) to distinguish between forms of relief that a plaintiff could seek, such as injunctions, and discretionary tools that the commission may utilize, such as civil penalties. Id., 662–65.

The plaintiff acknowledges that *Burton* was binding on the trial court, but attempts to distinguish *Burton* from the present case by arguing that he was aggrieved by the commission's decision not to impose a civil penalty against the health center because that decision led to a subsequent denial of his right to receive records from the health center promptly pursuant to §§ 1-210 (a) and 1-212 (a). In making this claim, the plaintiff appears to argue that the commission's imposition of

a civil penalty to enforce compliance with its order would have deterred the health center from committing further FOIA violations. This argument, however, is speculative, as it lacks any evidentiary foundation. In short, there is no evidence in the record to support the plaintiff's contention that *Burton* is distinguishable from the present matter. Accordingly, we conclude that the court did not err in granting the commission's motion to dismiss the plaintiff's civil penalty claim for lack of standing.

II

The plaintiff next claims that the court erred in dismissing his claim that his FIC 2014-156 complaint was improperly dismissed on the basis that he was not aggrieved because the issues raised in that complaint were addressed in FIC 2015-127, the underlying matter in which he ultimately prevailed. The plaintiff claims that he did not appeal from the court's decision regarding his FIC 2014-156 complaint, because he relied to his detriment on the commission's guarantee during a hearing on that matter[14] that it would take his FIC 2014-156 complaint into consideration in making its decision

[14] In making this argument, the plaintiff relies on the following exchange that occurred between the court and the commission's counsel during the hearing:

"[The Court]: Right. How about [the plaintiff's] claim that the 2014 [case] is different than the 2015 case because it's more and more likely to result in an order of sanctions against the health center?

"[The Commission's Counsel]: Well—and I understand [the plaintiff]'s thinking in that regard but he is able when his case comes up, he is able to explain that it is a renewed complaint and the hearing officer who makes a recommendation to the commission will consider that. *It won't just look at the complaint in isolation.*

"[The Plaintiff] will be able to present evidence that this is, in fact, a renewed complaint that he had to file in order to come within the jurisdiction of the commission.

"[The Court]: But his claim is that the length of time that it's taken the health center to supply the records is longer in the 2014 case than in the 2015 case and therefore he is more likely to obtain sanctions.

"[The Commission's Counsel]: And again, he would be able to present that evidence at the hearing that this is a renewed complaint and his original

in regard to his later FIC 2015-127 complaint. The plaintiff asserts that he subsequently was aggrieved by the commission's failure in FIC 2015-127 to consider all of the relevant records from FIC 2014-156, as well as its decision in FIC 2015-127 to consider the February 4, 2015 request date in determining whether the health center had promptly complied, rather than the August 19, 2013 request date. We agree with the commission that the court properly dismissed this claim.

"Our resolution of this issue is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 164–65, 635 A.2d 783 (1993). "Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [administrative agency]." (Internal quotation marks omitted.) *Ottochian* v. *Freedom of Information Commission*, 221 Conn. 393, 397, 604 A.2d 351 (1992).

request was made over, I think it was [seventeen] months ago and the hearing officer and the commission will take that into consideration. *It won't view this new complaint, renewed complaint in isolation.* [*The plaintiff*] *will be able to present evidence that it was actually a renewed complaint.*" (Emphasis added.)

The plaintiff's argument appears to be that, because of representations made to him by counsel for the commission during the hearing concerning his appeal of FIC 2014-156, he did not appeal the court's disposition regarding his FIC 2014-156 complaint, and, as a result, the commission should be equitably estopped from later asserting any issues arising from his failure to appeal. We, however, agree with the court that the record reveals that the plaintiff's argument lacks merit.

Contrary to the plaintiff's assertion, the record indicates that the commission did take the relevant facts of FIC 2014-156 into consideration when making its decision that the health center had violated the FOIA. Not only did the commission find that the February 4, 2015 request was identical to the August 19, 2013 request, but, during the hearing in FIC 2015-127, the commission explicitly took administrative notice of the findings of fact in FIC 2014-156 that were relevant to its determination as to whether the health center had promptly complied. Because the commission actually did take the relevant facts of FIC 2014-156 into consideration in making its decision in FIC 2015-127, and the plaintiff's February 4, 2015 request is identical to his August 19, 2013 request, the plaintiff has not demonstrated how he was aggrieved by the statements of the commission's counsel or by the commission's reliance on the later request date in making its decision. Therefore, the plaintiff's claim is without merit, and, accordingly, we conclude that the court properly dismissed it.

III

The plaintiff next claims that the court erred in concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff had narrowed the scope of his FOIA request, as described in paragraph eleven of the commission's final decision. Specifically, the plaintiff claims that he

had not agreed to permanently narrow his FOIA request to limit it to only the records described in an e-mail communication with Dr. Wetstone, the health center's FOI officer. Rather, the plaintiff claims that he had requested the health center to expedite the most time sensitive portion of his request without excluding the remainder of the records requested. The record supports the plaintiff's claim in this regard.

The record reveals the following additional facts that are relevant to this claim. After receiving the plaintiff's modified FOIA request, Dr. Wetstone e-mailed the plaintiff the following on December 13, 2013: "As I have already described, this request is likely to take a considerable amount of time to complete given the number [of] documents involved, the nature of the documents . . . and my office's capacity to review these documents . . . . To any degree that you are willing to narrow the scope of this [FOIA] request, it might help expedite you receiving the documents you are seeking."

The plaintiff responded as follows: "As I stated before you may exempt [b]roadcast news [e-mails], journal articles, and research data. Since I do not know what else is in [Dr.] Lieberman's computer and [e-mail] I am welcome to other suggestions. If you are able to send me a list of documents on the computers and or [e-mails] I would be happy to omit the ones I think are irrelevant." The plaintiff subsequently filed his complaint in FIC 2014-156 on March 17, 2014, alleging that the health center had failed to provide any of the requested documents.

On June 30, 2014, the plaintiff sent the following e-mail to Dr. Wetstone: "Quite some time has passed since [my] FOIA request was made. As you are aware from one of your other responsibilities at the Health Center I have an appeal due on or about July 21, 2014 with respect to my HCAC grievance against Dr. Lieberman. There is likely material extremely relevant to my

. . . appeal in [my] FOIA request that I would hope to receive by July 14, 2014 if possible so I have time to evaluate the information and incorporate it into my appeal. Therefore, I am asking you to consider releasing to me by July 14, 2014 whatever material you have collected to date [as] well as the subset of documents that meet the following criteria: ('Mike' OR 'Aronow' or 'ARANOW' or 'Arano' OR 'HCAC' OR 'grievance' or 'Appeals Committee' OR 'FOI' OR 'FOIA' OR 'Freedom of Information') between July 1, 2010 and August 14, 2012 and excluding [e-mails] directly sent or [cc'd] to Aronow@nso.uchc.edu."

As previously discussed, on February 4, 2015, the same date that the plaintiff's complaint in FIC 2014-156 was dismissed, the plaintiff submitted a FOIA request identical to his August 19, 2013 request. On February 17, 2015, the plaintiff filed his complaint in FIC 2015-127. During the hearing in that matter, Dr. Wetstone testified that he had negotiated with the plaintiff a "dramatic reduction" to his original August 19, 2013 request, but that the plaintiff's February 4, 2015 request restored the original, prenegotiation request. Other than Dr. Wetstone's testimony in this regard, there was no documentary evidence reflecting that the plaintiff had narrowed the scope of his records request. Moreover, the plaintiff testified that there was an "implicit assumption . . . that the same restrictions [regarding his original request] would be in place [regarding his February 4, 2015 request]" and that he "was always willing to work with Dr. Wetstone to narrow [his request] in any way before, and the implicit assumption was that . . . [Dr. Wetstone] would give [him] the documents he already had . . . ." The hearing officer also asked the plaintiff if he was still willing to reduce the number of documents he was requesting, to which the plaintiff replied in the affirmative.

As with the plaintiff's second claim, our review of this claim is limited to "whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion." (Internal quotation marks omitted.) *Perkins* v. *Freedom of Information Commission*, supra, 228 Conn. 164. Also in our review, we are mindful that "[t]he [FOIA] expresses a strong legislative policy in favor of the open conduct of government and free public access to government records." *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980); see also *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 450, 545 A.2d 1064 (1988) ("general policy of openness expressed in the FOIA legislation"); *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 507, 46 A.3d 291 (2012) ("We note initially that public policy favors the disclosure of public records. . . . [A]ny exception to that rule [therefore] will be narrowly construed in light of the general policy of openness expressed in the [FOIA] . . . ." [Citation omitted; internal quotation marks omitted.]). In addition, "[t]he burden of proving the applicability of an exception to the FOIA rests upon the party claiming it." *Rose* v. *Freedom of Information Commission*, supra, 221 Conn. 232.

The present case rests on the interpretation of the plaintiff's June 30, 2014 e-mail and his subsequent representations to the health center and the commission. The commission argues that it reasonably interpreted the June 30, 2014 e-mail as an agreement by the plaintiff to narrow the scope of his request to a particular subset of documents, and that there is no evidence in the record to support the plaintiff's assertion that he did not intend to permanently narrow his request to that subset. The record does not support that conclusion.

In the June 30, 2014 e-mail, the plaintiff clearly stated that he needed material that was relevant to his pending

committee appeal. He also asked Dr. Wetstone to forward any documents that had been collected up to that date, including documents that were relevant to his committee appeal. The plaintiff also explicitly excluded e-mails that had been sent to his own e-mail address at the health center. The plaintiff, however, did not state in the e-mail that he was in any way limiting his original August 19, 2013 request, or that he was excluding the remainder of the documents related to that request. The only reasonable reading of the plaintiff's e-mail is that he was attempting to expedite the receipt of certain documents for his upcoming committee appeal. Nowhere in the plaintiff's response to Dr. Wetstone did he evince an intent to permanently alter the scope of his pending FOIA request.

Moreover, the commission's view that the June 30, 2014 e-mail constituted an agreement by the plaintiff to narrow the scope of his request appears to conflate that e-mail with the plaintiff's December 16, 2013 e-mail in which he explicitly agreed to exclude "broadcast [e-mails], journal articles, and research data" from his original August 19, 2013 request.[15] (Internal quotation marks omitted.) The plaintiff does not dispute that he agreed to exclude these documents, as well as the e-mails sent to his e-mail address at the health center. The plaintiff's testimony before the commission reflects his assumption that these were the same exclusions that would be in place in his February 4, 2015 request, and that this request would otherwise remain the same as his original request.

Not only is the commission's order narrowing the plaintiff's request as described in paragraph eleven of its final decision inconsistent with the record, but it also contravenes the general policy of openness expressed within the FOIA. See *Ottochian* v. *Freedom of Information Commission*, supra, 221 Conn. 398; *Tompkins* v.

[15] This is the same exclusion recognized by the commission in paragraph ten of its final decision in FIC 2015-127.

Freedom of Information Commission, supra, 136 Conn. App. 507. Our application of this general policy is not hindered where neither the health center nor the commission has asserted that the restrictions enunciated in paragraph eleven were due to exemptions pursuant to § 1-210 (b). In sum, we conclude that there was no basis for the commission's order narrowing the plaintiff's request, as described in paragraph eleven. Accordingly, we conclude that the trial court erred in concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff had narrowed the scope of his request with respect to paragraph eleven.[16]

The judgment is reversed in part with regard to the narrowing in scope of the plaintiff's document request and the case is remanded to the trial court with direction to remand to the commission to order that the health center comply with the plaintiff's original FOIA request, as narrowed only by paragraph ten of its final decision, in an expeditious manner. The portion of this appeal in regard to the plaintiff's fourth claim is dismissed, and the judgment is affirmed with respect to the plaintiff's remaining claims.

In this opinion the other judges concurred.

[16] Although we conclude that our resolution of the plaintiff's third claim renders his fourth claim moot; see footnote 3 of this opinion; on the basis of our review of the record, we do not understand the reasonableness of the commission's decision to afford the health center an additional nine months to comply with the plaintiff's records requests which, by then, were already long-standing, especially in light of the explicit promise made by Dr. Wetstone to complete the plaintiff's request by March, 2015. We also note the plaintiff's unrebutted assertion that the health center had failed to fully comply with the commission's October 28, 2015 order by the nine month deadline, which was not stayed following the trial court's May 8, 2017 decision on the commission's motion to dismiss. Under these circumstances, on remand we encourage the commission to put in place a procedure to adequately monitor and ensure the health center's compliance with the plaintiff's long-standing records requests.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 189

CITY OF MILFORD *v.* PAUL J. HICKS ET AL.
(AC 41894)

Prescott, Bright and Bear, Js.

Argued April 22—officially released May 14, 2019

Appeal by the defendant Stanley Hicks from the Superior Court in the judicial district of Ansonia-Milford, *Hon. John W. Moran*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the sole purpose of allowing the committee to file a motion for approval of the sale that occurred on July 7, 2018.

CARL P. *v.* DEPARTMENT OF CHILDREN AND FAMILIES ET AL.
(AC 41730)

Lavine, Keller and Elgo, Js.

Argued April 22—officially released May 14, 2019

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Hon. Henry S. Cohn*, judge trial referee.

Per Curiam. The judgment is affirmed.

FRANCIS ANDERSON *v.* DAN MALLOY ET AL.
(AC 40906)

Prescott, Bright and Bear, Js.

Argued April 22—officially released May 14, 2019

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

Per Curiam. The judgment is affirmed.

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court properly concluded that trial counsel did not render deficient performance by deciding not to present testimony from expert in forensic psychology regarding suggestive influence that may have been present in forensic interview of child victim of sexual assault; claim that petitioner's presentence investigation interview with probation officer was critical stage of criminal proceedings; claim that absence of trial counsel from petitioner's presentence investigation interview with probation officer constituted complete denial of sixth amendment right to effective assistance of counsel; claim that habeas court should have applied presumption of prejudice under United States *v.* Cronic *(466 U.S. 648) because of trial counsel's absence from petitioner's presentence investigation interview with probation officer.*

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Dissolution of marriage; whether trial court improperly entered final child custody and visitation order in dissolution judgment that referenced pendente lite parenting plan that had been superseded by subsequent pendente lite parenting plan that parties and different trial court had intended would become final order of court; reviewability of claims that trial court improperly awarded periodic alimony and ordered transfer of certain real property; failure to brief claims adequately.

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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

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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.

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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.

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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
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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* ACKEEM RILEY
(AC 40073)

Keller, Elgo and Bright, Js.

Syllabus

The defendant, who had been convicted of murder and several other crimes when he was seventeen years old, appealed to this court from the judgment of the trial court after it resentenced him to seventy years of imprisonment. The trial court initially had sentenced the defendant to 100 years of imprisonment in connection with a shooting incident. This court affirmed the judgment of the trial court, and the defendant appealed to our Supreme Court, which reversed this court's judgment as to the sentence. The Supreme Court directed that this court remand the case to the trial court for a new sentencing proceeding that conformed to the dictates of *Miller* v. *Alabama* (567 U.S. 460), which requires that the trial court give mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent of life imprisonment without parole. After this court remanded the case to the trial court, but before the defendant's resentencing hearing, the legislature enacted amendments (P.A. 15-84) to the statutes applicable to the sentencing of children convicted of certain felonies (§ 54-91g) and parole eligibility (§ 54-125a) to ensure that juveniles sentenced to more than ten years of imprisonment are eligible for parole, and to require that sentencing judges consider a juvenile's age and youth related mitigating factors before imposing sentence. At the defendant's resentencing hearing, the defendant was sentenced by the same judge who had presided over his trial and imposed the original sentence. On appeal to this court, the defendant claimed that the resentencing court improperly relied on the parole eligibility provisions of P.A. 15-84, and failed to disqualify itself in violation of statute (§ 51-183c), the rule of practice (§ 1-22 [a]) that requires disqualification when

the judicial authority previously tried the same matter and the judgment was reversed on appeal, the Code of Judicial Conduct (rule 2.11 [a] [1]), and the due process clauses of the fifth and fourteenth amendments to the United States constitution. *Held*:

1. The resentencing court did not abuse its discretion in denying the defendant's motion for recusal:

   a. Recusal was not required under § 51-183c, our Supreme Court previously having concluded that the legislature did not intend for § 51-183c to apply to a sentencing proceeding, and because the rules promulgated by the judges of the Superior Court cannot abridge, enlarge or modify any substantive right, Practice Book § 1-22 does not apply to a sentencing procedure, as that rule was intended to give effect to the mandate in § 51-183c, rather than provide for an independent ground for recusal.

   b. The defendant failed to satisfy his burden to show that disqualification of the judicial authority was required under rule 2.11 (a) (1) of the Code of Judicial Conduct, which was based on his claim that the resentencing court was biased in favor of justifying its initial 100 year sentence: the defendant's claim that the 100 year sentence had an anchoring effect that prevented the court from approaching the resentencing hearing with a fully open mind that would allow it to fully consider the factors required under *Miller* was based on speculation and conjecture, as the defendant did not explain why only the original sentencing judge would be susceptible to any anchoring effect, any judge who imposed the new sentence would know of the prior sentence, and the fact that a trial judge previously sentenced a defendant in a particular case where resentencing was ordered did not establish an appearance of bias or partiality; moreover, it was not apparent that the court's statements during the resentencing hearing indicated an interest in justifying the appropriateness of the original sentence, as the court repeatedly stated that it would consider the appropriate factors and impose sentence accordingly, it never expressed that it would not or could not consider the defendant's age as a mitigating factor, nor did it ever express an unwillingness to consider new information at resentencing, as required by *Miller*, and the defendant failed to demonstrate how the court's willingness to consider new information constituted actual bias or would lead a reasonable person to question the judge's impartiality on the basis of all the circumstances.

2. The resentencing court properly sentenced the defendant in accordance with the Supreme Court's remand order, the applicable statutory authorities and the constitutional principles contemplated in those authorities: the resentencing court was not required under the Supreme Court's remand order to find that the defendant was incorrigible, irreparably corrupt or irretrievably depraved before resentencing him, as the Supreme Court's discussion about a presumption against a life sentence without parole that must be overcome by evidence of unusual circumstances was rendered inapplicable by the enactment of P.A. 15-84, which

provided the defendant with the possibility of parole, and although the defendant claimed that pursuant to *Miller*, the Supreme Court's decision in his appeal and P.A. 15-84, there was a presumption against the imposition of a life sentence that could be imposed only after a finding that the juvenile was permanently incorrigible, irreparably corrupt or irretrievable depraved, the resentencing court was required to consider only how the scientific and psychological evidence described in § 54-91g (a) (1) counseled against such a sentence; moreover, there was no indication in the record that the resentencing court considered the seventy year sentence to be inappropriate but nevertheless imposed it because the defendant would be eligible for parole, as the court referred to the defendant's eligibility for parole, as was required pursuant to § 54-91g (c), it fully considered and made clear its duty and intention to apply the *Miller* factors, and to comply with § 54-91g and the Supreme Court's decision in the defendant's appeal, it considered the defendant's presentence investigation report, aspects of his upbringing and testimony from the defendant and his family members, and it discussed the defendant's age, the hallmark features of adolescence, the relevant science that distinguishes a child's development from that of an adult's and other mitigating factors, and balanced them with the circumstances of the crime at issue, and noted that the defendant had been involved in other incidents that resulted in the deaths and wounding of other persons.

Argued December 12, 2018—officially released May 14, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit murder and assault in the first degree, and with one count each of the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the trial court's judgment; thereafter, the defendant, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court with direction to reverse the trial court's judgment as to the defendant's sentence and to remand the case to the trial court for a new sentencing proceeding; subsequently, the court, *O'Keefe*, *J.*, denied the defendant's motion for recusal and, following a hearing, rendered judgment imposing

sentence, from which the defendant appealed to this court. *Affirmed.*

Michael W. Brown, assigned counsel, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy* state's attorney, and *John F. Fahey*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Ackeem Riley, appeals from the judgment of the trial court resentencing him following the decision of our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to reverse the judgment of the trial court with respect to the defendant's original sentence and to remand the case to the trial court for a new sentencing proceeding. See *State* v. *Riley*, 315 Conn. 637, 663, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). The defendant claims that the trial court (1) failed to disqualify itself from presiding over the resentencing proceeding, and (2) violated the rescript of *Riley*, ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him to seventy years of incarceration. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth by our Supreme Court, are relevant to this appeal. "In November, 2006, when the defendant was seventeen years old, he participated in a drive-by shooting into a crowd that left an innocent sixteen year old dead and two other innocent bystanders, ages thirteen and twenty-one, seriously injured. The defendant and his accomplice thought that someone responsible for a gang related shooting the

previous week was at the scene. The defendant's identity as one of the perpetrators was corroborated by his involvement in an incident two months after the crimes at issue in which a firearm was discharged that matched the weapon used in the 2006 shootings. A jury convicted the defendant of one count of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a). The murder conviction exposed the defendant to a potential sentence of twenty-five to sixty years imprisonment, with no possibility of parole. See General Statutes §§ 53a-35a (2), 53a-35b and 54-125a (b) (1) (E). The other convictions exposed him to sentences ranging from one year imprisonment to twenty years imprisonment." *State* v. *Riley*, supra, 315 Conn. 641–42. The trial court imposed a total effective sentence of 100 years of incarceration. Id., 642.

In his initial appeal to this court; *State* v. *Riley*, 140 Conn. App. 1, 58 A.3d 304 (2013), rev'd, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016); the defendant argued that his sentence and the procedure under which it was imposed violated his rights under the eighth and fourteenth amendments to the federal constitution. Id., 4, 10 and n.7. In particular, the defendant argued that the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which held that the eighth amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, rendered the manner in which his sentence was

imposed unconstitutional.[1] *State* v. *Riley*, supra, 9. This court rejected the defendant's contentions and affirmed the judgment of the trial court. Id., 21.

On appeal to our Supreme Court, the defendant argued that this court's decision was incorrect as a matter of law and fact. *State* v. *Riley*, supra, 315 Conn. 643–44. For reasons set forth in greater detail in part II of this opinion, our Supreme Court agreed with the defendant and reversed this court's judgment and remanded the case to this court with direction to reverse the judgment of the trial court only with respect to the defendant's sentence, and to remand the case to the trial court for a new sentencing proceeding consistent with its opinion. Id., 663.

On remand to the trial court, the defendant filed a motion for recusal dated June 24, 2016. The basis for most of his arguments stemmed primarily from the fact that the resentencing judge, *O'Keefe*, *J.*, was the same judge who had presided over his trial and had imposed

[1] In *Miller*, the Supreme Court made clear that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller* v. *Alabama*, supra, 567 U.S. 477–78.

Our Supreme Court has characterized *Miller* as standing for two propositions: "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." *State* v. *Riley*, supra, 315 Conn. 653. These age related considerations, as described in this footnote, have been colloquially referred to as the "*Miller* factors."

the original sentence. The defendant argued, for various reasons, that Practice Book § 1-22, General Statutes § 51-183c, rule 2.11 of the Code of Judicial Conduct, and the due process clause of the fourteenth amendment required recusal. On August 11, 2016, the court held a hearing on the motion for recusal and ultimately denied the motion after hearing the parties' arguments.

On November 2, 2016, the defendant appeared before the court for resentencing. At the hearing, the court addressed, among other things, the considerations set forth in our Supreme Court's decision in *Riley* and the relevant statutory provisions applicable to the defendant's sentencing. After a lengthy colloquy, the court resentenced the defendant to a total effective term of seventy years of incarceration, noting that he was eligible for parole. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendant first claims that the trial court erred by not granting his motion for recusal. In his view, the court was required to recuse itself pursuant to § 51-183c, Practice Book § 1-22, rule 2.11 of the Code of Judicial Conduct, and the due process clauses of the fifth and fourteenth amendments to the United States constitution. The state argues, inter alia, that neither our rules of practice nor our statutes prohibited the court from presiding over the defendant's resentencing proceeding. For the reasons discussed herein, we agree with the state.

A

We begin by first addressing whether § 51-183c and Practice Book § 1-22 required the court to recuse itself on remand following the reversal of the defendant's original sentence.

As a preliminary matter, we set forth the applicable standard of review. Although our review of whether a court properly denied a motion for recusal is based on the abuse of discretion standard; see *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017); the claims in the present case require us to determine whether § 51-183c and Practice Book § 1-22 required recusal in this situation, which presents a question of statutory interpretation. Therefore, our review is plenary. See *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 688, 41 A.3d 1013 (2012).

To begin, the defendant's argument that § 51-183c[2] required the court to recuse itself in this case is unpersuasive because it is easily foreclosed by our Supreme Court's decision in *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). In *Miranda*, our Supreme Court addressed a similar situation in which a defendant claimed that § 51-183c required that his case be "assigned to another trial judge for resentencing." Id., 131. After our Supreme Court analyzed the statute in relation to other pertinent authorities, it concluded that "the legislature did not intend for § 51-183c to apply to a sentencing procedure." Id., 132; see also *Daley* v. *J.B. Hunt Transport, Inc.*, 187 Conn. App. 587, 601 n.17, 203 A.3d 635 (2019) (explaining that sentencing hearing is proceeding "to which § 51-183c does not apply"). Although the defendant attempts to distinguish *Miranda* in various ways, none is persuasive.[3] To say more on the matter would be supererogatory.

[2] General Statutes § 51-183c provides: "No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case."

[3] We note that the defendant acknowledges in his appellate brief that the "Connecticut Supreme Court has previously held that [§ 51-183c] is not applicable to sentencing proceedings that are the result of a case being remanded for a new sentencing consistent with a reversal by a reviewing tribunal." Despite this, he argues tenuously that *Miranda* is distinguishable because that case was remanded to the trial court for resentencing pursuant

With that in mind, though, the defendant argues that Practice Book § 1-22 provides an independent basis for recusal separate from § 51-183c. In particular, he focuses on the specific language of the rule that provides that "[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein . . . because the judicial authority previously tried the same matter and . . . *the judgment was reversed on appeal*." (Emphasis added.) Practice Book § 1-22 (a). He argues that because a sentence imposed in a criminal case constitutes the judgment of conviction, and because the defendant's sentence was in fact reversed, the trial court that originally tried and sentenced him was required, on remand, to recuse itself for the resentencing hearing.

Despite the defendant's contention, our decision in *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 422, 142 A.3d 290 (2016), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018), undermines the defendant's claim. In *Barlow*, we addressed briefly the interplay between the two provisions. The petitioner in that case claimed that the habeas court improperly denied his motion for recusal, in which he relied on § 51-183c, Practice Book § 1-22 (a), and rule 2.11 (a) of the Code of Judicial Conduct. Id., 421. With respect to that claim, we stated that "[t]he mandate of § 51-183c, a subject of prior judicial interpretation, is plain and unambiguous. It provides in relevant part: 'No judge of any court who tried a case without a jury . . . in which the judgment is reversed by the Supreme Court, may again try

to the aggregate package theory, whereas the present case was remanded pursuant to *Miller*. He also appears to argue that because the defendant in *Miranda* "essentially sought an advisory opinion" from our Supreme Court, the rationale in *Miranda* should not be followed in the present case. These arguments lack merit.

the case. . . .' General Statutes § 51-183c." *Barlow* v. *Commissioner of Correction*, supra, 422. Significant to the present case, we explained that "[o]ur rules of practice *give effect* to this statutory right [in § 51-183c] by providing in relevant part: 'A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein . . . because the judicial authority previously tried the same matter and . . . the judgment was reversed on appeal. . . .' Practice Book § 1-22 (a)." (Emphasis added.) *Barlow* v. *Commissioner of Correction*, supra, 422.

Although the facts of *Barlow* differ from those in the present case, our discussion in that case makes clear that the specific language in Practice Book § 1-22 on which the defendant now relies is intended to "give effect" to the mandate in § 51-183c, rather than provide for an independent ground for recusal. See id. To adopt the defendant's position would yield a peculiar result where the judge would be required under the rules of practice to recuse himself from resentencing a defendant after the initial sentence he imposed was reversed, but he would not be required to do so under the statute that the rule was intended to effectuate. As we noted previously, our Supreme Court has concluded that "the legislature did not intend for § 51-183c to apply to a sentencing procedure." *State* v. *Miranda*, supra, 260 Conn. 132. Furthermore, because the rules promulgated by the judges of the Superior Court cannot "abridge, enlarge or modify any substantive right"; General Statutes § 51-14 (a); we conclude that the language in Practice Book § 1-22 (a), which requires disqualification when the "judicial authority previously tried the same matter and . . . the judgment was reversed on appeal," also does not apply to a sentencing procedure.

Accordingly, we conclude that recusal was not required under § 51-183c or Practice Book § 1-22. Thus, the defendant has not demonstrated an abuse of discretion on these grounds.

B

The defendant similarly argues that pursuant to rule 2.11 of the Code of Judicial Conduct, as referenced in Practice Book § 1-22, disqualification was required because the trial court's impartiality reasonably could be questioned. The defendant makes clear that his "claim is not that [the] sentencing court was specifically biased *against* the defendant. Rather, the defendant's claim is that the sentencing court was biased in favor of justifying its initial imposition of a harsh sentence against the defendant." (Emphasis in original.) In support of this contention, he argues, inter alia, that the court's original imposition of a 100 year sentence "had an 'anchoring effect' that prevented the sentencing court from approaching the resentencing hearing with a fully open mind that would allow the court to fully consider the factors required by the rescript from our Supreme Court," and that the court "had an apparent interest in justifying the appropriateness of the original sentence that the court imposed."

Pursuant to rule 2.11 (a) of the Code of Judicial Conduct, "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." In applying this rule, our Supreme Court has indicated that "[t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially

. . . the burden rests with the party urging disqualification to show that it is warranted. . . . Our review of the trial court's denial of a motion for disqualification is governed by an abuse of discretion standard." (Citation omitted; internal quotation marks omitted.) *State* v. *Milner*, supra, 325 Conn. 12.

We conclude that the defendant has not satisfied his burden. The defendant's contention that the so-called "anchoring effect" prevented the sentencing court from approaching resentencing with a fully open mind in order to fully consider the *Miller* factors is nothing more than the product of speculation and conjecture.[4] See *State* v. *Montini*, 52 Conn. App. 682, 695, 730 A.2d 76 (explaining that "[v]ague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse" [internal quotation marks omitted]), cert. denied, 249 Conn. 909, 733 A.2d 227 (1999). Although a few federal cases, as cited in the defendant's

[4] In support of his argument, the defendant relies on *United States* v. *Navarro*, 817 F.3d 494, 501–502 (7th Cir. 2016), which cites to *United States* v. *Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (discussing how "anchoring effects" influence judgments and noting that court "cannot be confident that judges who begin" at a higher guidelines range "would end up reaching the same 'appropriate' sentence they would have reached" if they started from lower guidelines range), and multiple articles about the so-called "anchoring effect." One of the cited articles explains that "[a]nchoring is a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.' Studies demonstrate 'that decisionmakers tend to focus their attention on the anchor value and to adjust insufficiently to account for new information.' Cognitive psychology teaches that the anchoring effect potentially impacts a huge range of judgments people make. . . . [R]epeated studies show that the 'anchor' produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random. When it comes to numbers, '[o]verwhelming psychological research demonstrates that people estimate or evaluate numbers by 'anchoring' on a preliminary number and then adjusting, usually inadequately, from the initial anchor." (Footnotes omitted.) M. Bennett, "Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw," 104 J. Crim. L. & Criminology 489, 495 (2014).

appellate brief, have given a cursory look at the social science on how human tendencies and biases may influence sentencing under the federal sentencing guidelines, this alone, without more, is insufficient to show that disqualification was warranted in the present case. Furthermore, the defendant does not explain why only the original sentencing judge would be susceptible to any anchoring effect. Any judge who imposed the new sentence would know of the same prior sentence, or "anchor."

The defendant also argues that a "reasonable person knowing the circumstances under which the case returned to the Superior Court for the resentencing might reasonably question the ability of the original sentencing judge to act impartially when he had already pronounced a 100 year sentence, [and] had already adjudged the defendant's culpability and lack of prospect for rehabilitation." This contention must also be rejected. As the state points out, the defendant's argument, if accepted, ultimately would prevent any original sentencing judge from conducting a resentencing hearing, regardless of whether resentencing occurs pursuant to *Miller*. The mere fact that a trial judge previously had sentenced a defendant in a particular case where resentencing is ordered does not in and of itself establish an appearance of bias or partiality. See *State* v. *Milner*, supra, 325 Conn. 12 ("law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially" [internal quotation marks omitted]).

Furthermore, the underpinnings for the defendant's argument that the "court had an apparent interest in justifying the appropriateness of the original sentence that the court imposed," which is based on, among other things, the various statements he made during the resentencing hearing, is not so apparent to us. In support of his argument, the defendant cites to *State*

v. *Solis-Diaz*, 187 Wn. 2d 535, 387 P.3d 703 (2017), in which the Supreme Court of Washington granted review of an intermediate appellate court decision that vacated the defendant's sentence for a second time but declined to disqualify the sentencing judge in that case from resentencing the defendant. Id., 536–37. The Supreme Court of Washington explained that the sixteen year old defendant was tried as an adult in connection with a drive-by shooting and was sentenced to "1,111 months, or 92.6 years, of imprisonment." Id., 537. After the original sentence was vacated by the intermediate court, the trial judge in the case resentenced the defendant to the same sentence of 92.6 years of incarceration. On appeal following the first resentencing, the intermediate court again vacated the sentence and remanded the case for resentencing, "holding that [the judge] erred in not considering an exceptional sentence below the standard range on the basis of [the defendant's] youth and to mitigate the consecutive sentences required under [Washington law]." Id., 539. The court "directed the trial court on resentencing to conduct a meaningful, individualized inquiry into whether either factor should mitigate the defendant's sentence in light of recent case law." Id. The intermediate court, however, declined to disqualify the judge from presiding over resentencing, noting that the defendant could move to disqualify the judge on remand. Id.

In addressing whether the trial judge should have been disqualified, the Supreme Court of Washington indicated that the record reflected that the judge exhibited "frustration and unhappiness at the [intermediate court's] requiring him to address anew whether [the defendant] should be considered for an exceptional downward sentence on the basis of his age or the multiple offense policy." Id., 541. The court further noted that the "judge's remarks at the first resentencing strongly suggest that, regardless of the information presented

in mitigation, he is committed to the original standard range sentence of 1,111 months. Concern about whether on remand [the judge] could exercise discretion and consider mitigating evidence with an open mind is heightened by the judge's statement that the length of the sentence he imposed has had a deterrent effect on incidents of gang-related gun violence in" the area where the crimes at issue had been committed. Id. The Supreme Court of Washington reversed the intermediate court's decision to the extent that it declined to disqualify the judge in the case. Id.

Although the defendant acknowledges that the facts of *Solis-Diaz* vary from the facts in the present case, he asserts that the logic underlying that decision applies here with similar force. We find this case to be readily distinguishable. On the basis of our review of the record, the trial court in this case never expressed that it would not or could not consider the defendant's age as a mitigating factor, nor did it ever express its unwillingness to consider the *Miller* factors or those required by statute during the resentencing. To the contrary, the court repeatedly stated that it would consider the appropriate factors and impose sentence accordingly.[5] The defendant has failed to sufficiently demonstrate how the court's willingness to consider new information at resentencing—i.e., the *Miller* factors—which were not required by law for consideration at the time of the

[5] For example, the court indicated that it was "going to resentence [the defendant] in accordance with the instructions of the state of Connecticut Supreme Court. I'm going to apply the *Miller* factors." During its colloquy, the court also indicated that it was "not here to argue the correctness of the wisdom of the cases that got us all here, [*Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller* v. *Alabama*, supra, 567 U.S. 460, *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)], and the state of Connecticut versus [the defendant]. I mean, those courts have spoken." The judge made clear that he was "a servant of the law" and accepted "the rulings from the next level."

original sentence (nor requested by the defendant to be considered at the original sentencing), constituted actual bias or would lead a reasonable person to question the judge's impartiality on the basis of all the circumstances.[6]

Accordingly, we conclude that court did not abuse its discretion in denying the defendant's motion for recusal pursuant to rule 2.11 (a) (1) of the Code of Judicial Conduct.

II

The defendant next claims that the trial court violated the rescript of our Supreme Court's decision in *Riley*,

[6] The defendant also argues in his appellate brief that the due process clauses of the fifth and fourteenth amendments to the United States constitution are another basis for recusal, but does not provide a separate analysis of this distinct aspect of his claim. Instead, he states: "Because the Code of Judicial Conduct's language related to the possibility of partiality is substantially similar to the United States Supreme Court's articulation of the test for whether recusal is required by the due process clauses of the United States Constitution, the defendant analyzes these two bases for recusal simultaneously . . . ."

Although there may be similarities between the two standards, a review of Supreme Court precedent suggests that they differ. See *Rippo* v. *Baker*, U.S. , 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017) ("[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge ha[s] no actual bias" [internal quotation marks omitted]); *Williams* v. *Pennsylvania*, U.S. , 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) ("[T]he Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." [Internal quotation marks omitted.]); *Withrow* v. *Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (recusal required when "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable").

We similarly conclude that the circumstances of this case, as we view them, simply do not rise to a due process violation under the Supreme Court's precedents because, objectively considered, they do not pose "such a risk of actual bias or prejudgment" as to require disqualification. (Internal quotation marks omitted.) *Caperton* v. *A. T. Massey Coal Co.*, 556 U.S. 868, 884, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him to a new effective life sentence of seventy years of incarceration. In particular, he contends that the trial court was required to find specifically that he was "incorrigible, irreparably corrupt, or irretrievably depraved" in order to overcome a presumption against life sentences for juveniles before it imposed its seventy year sentence. Additionally, he argues that the court failed to craft an appropriate new sentence for him because it improperly relied on the parole eligibility provisions of No. 15-84 of the 2015 Public Acts (P.A. 15-84), codified in relevant part at § 54-125a. We disagree.

We briefly set forth additional facts and procedural history necessary for the disposition of this claim. At the conclusion of the defendant's trial in 2009, the trial court imposed a total effective sentence of 100 years imprisonment. *State* v. *Riley*, supra, 315 Conn. 642. It was undisputed that the sentence imposed was the functional equivalent to life without the possibility of parole. Id. After the trial court first sentenced the defendant in this case, the United States Supreme Court issued its decision in *Miller*. Id., 643. On appeal to this court; *State* v. *Riley*, supra, 140 Conn. App. 1; the defendant argued that his sentence and the procedure under which it was imposed violated his rights under the eighth and fourteenth amendments to the federal constitution. Id., 4, 10 and n.7. This court rejected these contentions and concluded that *Miller* required only that a defendant be afforded the opportunity to present mitigating evidence, including evidence relating to his age, and that the court be permitted to impose a lesser sentence than life without parole after considering any such evidence. Id., 10, 14–16. This court also concluded that the trial court, in fact, had considered many of the factors identified

as relevant in *Miller* before it imposed the defendant's sentence.[7] Id., 19–20.

On appeal to our Supreme Court, the defendant argued that our decision was incorrect as a matter of law and fact. *State* v. *Riley*, supra, 315 Conn. 643–44. In particular, he argued that the sentencing procedure and the sentence itself failed to conform to the dictates of *Miller* and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). See *State* v. *Riley*, supra, 644.[8] In addressing his claim, our Supreme Court first summarized the United States Supreme Court's decisions in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham*, and *Miller*, which fundamentally altered the legal landscape for the sentencing of juvenile offenders to comport with the ban on cruel and unusual punishment under the eighth amendment to the federal constitution. See *State* v. *Riley*, supra, 645–52.

Our Supreme Court then discussed the import that *Miller* had on discretionary schemes like the one in Connecticut, and it characterized *Miller* as standing for two propositions: "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related

[7] Justice Borden dissented in the case. *State* v. *Riley*, supra, 140 Conn. App. 21 (*Borden*, *J.*, dissenting). He disagreed with each of the majority's determinations and concluded that the defendant was entitled to a new sentencing proceeding. Id., 23–40.

[8] We note that our Supreme Court declined to address the defendant's *Graham* claim. It noted that the "legislature has received a sentencing commission's recommendations for reforms to our juvenile sentencing scheme to respond to the dictates of *Graham* and *Miller*. Therefore, in deference to the legislature's authority over such matters and in light of the uncertainty of the defendant's sentence upon due consideration of the *Miller* factors, we conclude that it is premature to determine whether it would violate the eighth amendment to preclude any possibility of release when a juvenile offender receives a life sentence." *State* v. *Riley*, supra, 315 Conn. 641.

evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a [term of life imprisonment, or its equivalent, without parole]." Id., 653; see *State* v. *Delgado*, 323 Conn. 801, 806, 151 A.3d 345 (2016). The court determined that "the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate." *State* v. *Riley*, supra, 315 Conn. 653.

The court in *Riley* went on to recognize that *Miller* held that a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (Internal quotation marks omitted.) Id., 654, quoting *Miller* v. *Alabama*, supra, 567 U.S. 480. The court then concluded that this mandate logically would extend to a discretionary sentencing scheme. Id., 654. Additionally, our Supreme Court noted that the court in *Miller* "expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' . . . This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances. This presumption logically would extend to discretionary schemes that authorize such a sentence." (Citation omitted.) *State* v. *Riley*, supra, 315 Conn. 654–55.

Our Supreme Court further explained that "*Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole

on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court must consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence. *Miller* v. *Alabama*, supra, 567 U.S. 477. As the court in *Miller* explained, those features include: 'immaturity, impetuosity, and failure to appreciate risks and consequences'; the offender's 'family and home environment' and the offender's inability to extricate himself from that environment; 'the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him'; the offender's 'inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys'; and 'the possibility of rehabilitation . . . .'" (Emphasis omitted.) *State* v. *Riley*, supra, 315 Conn. 658.

Our Supreme Court then applied the dictates of *Miller* to the defendant's case. It concluded that "the record [did] not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to life imprisonment without parole." Id., 660. Accordingly, the court concluded that "the defendant [was] entitled to a new sentencing proceeding that conforms to the dictates of *Miller*. Both the defendant and the state are free to present additional evidence at this new proceeding." Id., 661. The rescript by the court stated: "The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court only with respect to the defendant's sentence and to remand the case to that court for a new sentencing proceeding consistent with this opinion." Id., 663.

Several months after this court remanded the case to the trial court for resentencing, but before the defendant's resentencing hearing, the legislature enacted P.A. 15-84. Section 1 of P.A. 15-84, codified at § 54-125a, ensures that all juveniles who are sentenced to more than ten years imprisonment are eligible for parole. Section 2 of P.A. 15-84, codified as amended at General Statutes § 54-91g, requires a sentencing judge to consider a juvenile's age and any youth related mitigating factors before imposing a sentence following a juvenile's conviction of any class A or class B felony.

On November 2, 2016, the defendant appeared before the trial court for a resentencing hearing pursuant to the rescript of our Supreme Court. During the hearing, the prosecutor argued, inter alia, that the defendant's actions were not the type of youthful impulsivity contemplated in the decisions by the United States Supreme Court or our Supreme Court that deserve leniency. The prosecutor, in describing the defendant's crimes, stated: "That's not impulsivity. That's just pure violence on the part of [the defendant]." The prosecutor proceeded to ask the court to sentence the defendant to 120 years of incarceration, which was also the request made at the defendant's original sentencing.

Defense counsel then addressed the court and highlighted the troubled upbringing the defendant faced. In particular, she described, inter alia, how the defendant, at a young age, was raised in and exposed to a community of violence. Defense counsel stated: "It was not a choice that [the defendant] made at age twelve to be taken by his mother, who was hiding from immigration and exposed to violence against her, violence on the street." In explaining that the defendant was seventeen years of age at the time he committed the crime in this case, defense counsel stated that it was an "unfortunately narrow understanding of the juvenile brain science to characterize impulsivity, failure to appreciate

consequences . . . in the way that it's been represented by the state." Counsel went on to state: "I think we've made an adequate presentation of what the brain science really shows in our submissions to the court and, of course, Your Honor read [the] materials [provided to the court by the court support services division of the Judicial Branch]."[9] Counsel then had the defendant, his aunt, and his cousin address the court.

After the parties concluded their arguments, the court went on to indicate, inter alia, that it was "going to resentence [the defendant] in accordance with the instructions of the state of Connecticut Supreme Court. I'm going to apply the *Miller* factors." From there, the court went on to discuss its awareness of the science that was discussed by the defendant's counsel. In particular, it recognized that "there are changes over time that make a difference in who we are when we're seventeen and who we are when we might be fifty or sixty-nine. So, because of his age, I will assume that [the defendant] was immature and impetuous, and had a diminished capacity to appreciate the risks and consequences of his actions when he was seventeen years old." The court also went on to address, inter alia, the defendant's family and home environment, his presentence investigation report, and the circumstances surrounding the crime. At the conclusion of its remarks, the court sentenced the defendant to a total effective term of seventy years of incarceration and made clear that, pursuant to the recently enacted P.A. 15-84, the defendant was eligible for parole before he reaches the age of fifty. This appeal followed.

[9] The defendant filed a sentencing memorandum to the court dated October 31, 2016, which provided, among other things, a section addressing the "The Mitigating Characteristics of the Juvenile Brain." In addition, attached to his memorandum, the defendant provided the court with a copy of the court support services division's compilation of reference materials relating to adolescent psychological and brain development, which are intended to assist courts in sentencing children. See General Statutes § 54-91g (d).

The defendant argues that the court violated the rescript of *Riley*, ignored important constitutional principles, and failed to comply with applicable mandatory statutory requirements when it resentenced him. He contends that the trial court was required to explicitly find that he was "incorrigible, irreparably corrupt, or irretrievably depraved" in order to overcome a presumption against life sentences for juveniles before it imposed its seventy year sentence. In particular, he argues that *Riley* interpreted *Miller* to include a presumption against the imposition of a life sentence on a juvenile defendant and argues that this presumption would need to be "overcome by evidence of unusual circumstances" in order for a sentencing court to impose a life sentence. (Internal quotation marks omitted.) He further argues that even if the presumption in *Riley* no longer applies due to a change in the legal landscape in this state, he posits that the language and legislative history of P.A. 15-84 clearly establish that a presumption against the imposition of a functional life sentence has been adopted by our legislature.

In response, the state argues that the defendant's claim fails because nothing in our law creates a presumption against a lengthy sentence with the possibility of parole or requires the trial court to find that a defendant is incorrigible, irreparably corrupt, or irretrievably depraved before imposing a seventy year sentence with the possibility of parole after thirty years. We agree with the state.

Addressing the defendant's claim necessarily requires us to interpret both the remand order in *Riley* and § 54-91g to determine whether the sentencing court properly resentenced the defendant. As such, our review is plenary. See *State* v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016) ("[d]etermining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's

mandate in light of that court's analysis" [internal quotation marks omitted]); *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 355, 63 A.3d 940 (2013) ("[t]he interpretation of a statute presents a question of law over which our review is plenary").

The defendant's argument that the sentencing court's seventy year sentence was improper because *Riley* created a presumption against a life sentence and could be overcome only if the court found that the defendant was "incorrigible, irreparably corrupt, or irretrievably depraved" is flawed in several respects.

First, at the time of the defendant's appeal before our Supreme Court, it was undisputed that with this original sentence, the "defendant ha[d] no possibility of parole before his natural life expire[d]." *State* v. *Riley*, supra, 315 Conn. 640. In addressing the import of *Miller* for discretionary sentencing schemes, our Supreme Court in *Riley* interpreted certain language in *Miller* to suggest "that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence *without parole* on a juvenile offender that must be overcome by evidence of unusual circumstances. This presumption logically would extend to discretionary schemes that authorize such a sentence." (Emphasis added.) Id., 655. Importantly, though, our Supreme Court's discussion referred to mandatory or discretionary *life without parole* sentences, not simply "life sentences" as the defendant asserts in this appeal.

The distinction between a sentence of life without parole and a sentence of life with the possibility of parole is an important one. Between the time at which our Supreme Court reversed the defendant's initial sentence and the time at which his new sentencing hearing was held, the legal landscape in Connecticut, once again, had changed with respect to juvenile sentencing. See General Statutes §§ 54-91g and 54-125a; see also

Montgomery v. *Louisiana*, U.S. , 136 S. Ct. 718, 732, 736, 193 L. Ed. 2d 599 (2016) (giving *Miller* retroactive effect and permitting state to remedy *Miller* violation by permitting juvenile homicide offenders to be considered for parole). Although the defendant did not have a possibility of parole when our Supreme Court rendered its decision in *Riley*, the legislature's enactment of P.A. 15-84 provided him, and those similarly situated, with that possibility.[10] Because *Riley*'s discussion about overcoming presumptions referred only to mandatory or discretionary life without parole sentences, the fact that the defendant no longer faced a life sentence without the opportunity of parole at the time of his resentencing rendered this aspect of *Riley* inapplicable to the defendant at the time of resentencing.

Our Supreme Court's decision in *State* v. *Delgado*, supra, 323 Conn. 801, sheds light on the effect that the enactment of P.A. 15-84 had post-*Riley*. In *Delgado*, the court was tasked with determining how the changes in juvenile sentencing law impacted individuals who were sentenced before the changes in juvenile sentencing occurred. Id., 802. The defendant in that case was sentenced in 1996 to sixty-five years of imprisonment without parole for crimes that he committed when he was

[10] General Statutes § 54-125a (f) (1) provides: "Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions."

sixteen years old. Id. Although he had become eligible for parole following the passage of P.A. 15-84, he filed a motion to correct his allegedly illegal sentence, claiming, inter alia, that he was entitled to be resentenced because the judge who sentenced him failed to consider youth related mitigating factors. Id., 805. After discussing its decisions in *Riley*, *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, U.S. , 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016), and the United States Supreme Court's decision in *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 718, our Supreme Court concluded that "[b]ecause *Miller* and *Riley* do not require a trial court to consider any particular mitigating factors associated with a juvenile's young age before imposing a sentence that includes an opportunity for parole, the defendant can no longer allege, after the passage of P.A. 15-84, that his sentence was imposed in an illegal manner on the ground that the trial court failed to take these factors into account." *State* v. *Delgado*, supra, 812. Accordingly, the resentencing court in the present case was not required under *Riley* to make any particular finding that the defendant was "incorrigible, irreparably corrupt, or irretrievably depraved" before resentencing him to a seventy year term of imprisonment when he was eligible for parole after thirty years.

The defendant next argues that even if the enactment of § 54-125a, which created a possibility of parole for him, made certain principles in *Riley* inapplicable to him, the language and legislative history of P.A. 15-84 clearly establish a presumption against the imposition of a functional life sentence. He avers that the practical effect of *Miller*, *Riley*, and our legislature's enactment of P.A. 15-84 was to "significantly limit a sentencing court's discretion when imposing a sentence on a juvenile." He again asserts that this "limitation creates a presumption against the imposition of a life sentence

on a juvenile defendant, and such exceedingly rare sentences can only be imposed after a specific finding that the juvenile being sentenced is permanently incorrigible, irreparably corrupt, or irretrievable depraved."

We turn our attention to the language of § 2 of P.A. 15-84, codified at § 54-91g,[11] which requires the trial court to consider certain factors before sentencing a juvenile convicted of a class A or B felony. Section 54-91g (a) provides in relevant part that a court shall "(1) [c]onsider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development," and shall "(2) [c]onsider,

[11] General Statutes § 54-91g provides: "(a) If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall: (1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and (2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

"(b) Notwithstanding the provisions of section 54-91a, no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony. Any presentence report prepared with respect to a child convicted of a class A or B felony shall address the factors set forth in subparagraphs (A) to (D), inclusive, of subdivision (1) of subsection (a) of this section.

"(c) Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a.

"(d) The Court Support Services Division of the Judicial Branch shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section."

if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence."

The plain and unambiguous language of the statute makes clear what a court must consider when sentencing a child convicted of an A or B felony. Although the defendant asserts that the statute creates a presumption against the imposition of a life sentence and requires a finding that the juvenile being sentenced is "permanently incorrigible, irreparably corrupt, or irretrievable depraved" in order to overcome that presumption, our review of the statute reveals no language to support the defendant's contention. Even if we assume, as do the parties, that the defendant's seventy year sentence in this case constitutes a "lengthy sentence under which it is likely [he] will die while incarcerated"; General Statutes § 54-91g (a) (2); the sentencing court was required to *consider* only "how the scientific and psychological evidence described in subdivision (1) of [§ 54-91g (a)] counsels against such a sentence." General Statutes § 54-91g (a) (2). The express language of the statute makes no reference to a presumption or a specific finding that the court was required to make in order to overcome that purported presumption.

Last, the defendant argues that the trial court also failed to craft an appropriate new sentence for him because it improperly relied on the parole eligibility provisions of § 1 of P.A. 15-84, codified at § 54-125a. In particular, he argues that the court failed to consider sufficiently the "*Miller* factors" in crafting a new sentence and, instead, relied "heavily upon the availability of a future parole opportunity for the defendant to lessen the sentencing court's responsibility to fully weigh the factors relevant to the defendant's youth at

the time of the crimes."[12] In essence, the defendant argues that the trial court imposed a sentence that it knew to be disproportionate because it knew that the defendant would be eligible for parole. We disagree.

A careful review of the record reveals that the court properly complied with our Supreme Court's decision in *Riley* and the requirements of § 54-91g. To begin, the court made clear at various times during the sentencing hearing its duty and intention to comply with our Supreme Court's decision in *Riley*. In particular, the court indicated that it was "going to resentence [the defendant] in accordance with the instructions of the State of Connecticut Supreme Court. I'm going to apply the *Miller* factors." During its colloquy, the court also indicated that it was "not here to argue the correctness or the wisdom of the cases that got us all here, *Roper*, *Graham*, *Miller*, *Montgomery* and the state of Connecticut versus [the defendant]. I mean, those courts have spoken." The court stated: "I'm a trial judge. I'm a servant of the law. I accept the rulings from the next level. I will note that *Graham*, *Miller* and *Montgomery*, I believe, all were decided after this case. There was no way that trial Judge O'Keefe here on Lafayette Street in [the geographical area number fourteen court in Hartford in] . . . 2009, had access to the logic and the reasoning of those cases."

The court went on to consider, among other things, the defendant's presentence investigation report, testi-

[12] In his appellate brief, the defendant often uses the phrase, "*Miller* factors," when discussing both the requirements pursuant to § 54-91g and our Supreme Court's holding in *Riley*. See footnote 1 of this opinion. Section 54-91g (a) (1), however, only requires consideration of "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development." The state makes clear that it does not concede that the statute requires consideration of every factor set forth in *Miller*. We need not decide, however, that issue in this case because, as we explain subsequently, it is clear from the record that the court considered each of the "*Miller* factors."

mony from the defendant and his family members, and other aspects of the defendant's upbringing. Particularly important to the present appeal, the court fully considered, despite the defendant's arguments to the contrary, the *Miller* factors and those factors required under § 54-91g. The court recognized that "because of [the defendant's] age at the time of the crime that he committed, [he] was different than [an] adult." The court went on to state: "I am aware of the science that now supports that view. That there are changes over time that make a difference in who we are when we're seventeen and who we are when we might be fifty or sixty-nine. So, because of his age, I will assume that he was immature and impetuous and had a diminished capacity to appreciate the risks and consequences of his actions when he was seventeen years old."

The court then went on to state, inter alia, that "[t]here's no evidence to the contrary that he wasn't immature, impetuous or did not have a diminished capacity to appreciate the risks and the consequences of his actions. None of this activity that he was engaged in over a long period of time makes sense at all. There really was no good motive for this."

In addition to recognizing and discussing the defendant's age, the hallmark features of adolescence, the relevant science distinguishing a child's development from that of an adult's, and other mitigating factors, the court also balanced them with the "horrific circumstances of the crime." The court made note that it was significant that the defendant had "been involved in the death of two people and the wounding of three or four others over a period of time, not just on a single day." The court noted that the crimes took place "over a period of months where [the defendant] had time to contemplate what he was doing, and the effect that it

would have on other people and other people's lives."[13] The court indicated that it had "no way to see into the future" or whether the defendant was "ever going to be rehabilitated."

As the defendant points out in his appellate brief, the court at various times did refer to his eligibility for parole. For instance, the court noted that "[o]ur legislature has addressed this, and no matter what sentence I give, as we all agree, as long as it's longer than fifty years, will result in a parole hearing, approximately thirty years." But the defendant's argument that the court's discussion of parole eligibility during the hearing was the "main focal point" of the court's sentencing decision and that the court failed to fully weigh the factors relevant to the defendant's youth at the time of the crimes, finds little support in the record and is contradicted by the express statements of the court. For example, at one point during the hearing, the court stated: "I get why I'm sentencing him. And I agree that

[13] The court's reference to these crimes that took place "over a period of months" was based, in part, on new information presented to the court by the prosecution. During the resentencing hearing, the prosecutor made clear to the court that there was new information before it that was not previously available to it at the time of the defendant's original sentencing. Namely, the prosecutor discussed other crimes, aside from the crimes in the present case, to which the defendant had pleaded guilty, to wit, a drive-by shooting that left a fifteen year old boy dead and, on a separate occasion, an incident where the defendant and others "proceeded to unload twenty-four rounds at close range," resulting in one man's "permanent paralyzation." The prosecutor stated: "Your Honor didn't have the benefit of knowing [this information] at the time you sentenced him to 100 years in this case. You do have the benefit now. Not only do you know that [the] other murder happened before this killing and was pending thereafter, but he subsequently pleaded guilty to that murder and to the assault."

During the court's colloquy, it went on to address, inter alia, the significance of the defendant's actions on these separate occasions. It stated: "The most significant factor in this sentencing is his involvement in the murder of Tray Davis on Garden Street on November 17, 2006. Other significant factors are his wounding of two other innocent people on a different day. Another factor is his murder on a third occasion. These events can't be ignored."

it's necessary. I'm not going to say I'm not going to sentence him because he has a chance for a parole hearing. I'm going to sentence him in accordance with *Miller* as instructed by [our Supreme Court]." Additionally, as previously discussed, the court thoroughly went through the factors relevant to the defendant's youth. It discussed, inter alia, the defendant's age, the hallmark features of adolescence as they pertained to the defendant, and noted that it had reviewed the science discussed in *Riley* and § 54-91g.

In addition, as the state points out, the court in fact was required by statute to inform the defendant of his parole eligibility. See General Statutes § 54-91g (c). Section 54-91g (c) provides: "Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a." Although the trial court did reference the defendant's eligibility of parole multiple times during its lengthy colloquy, we have found no indication in the record that the trial court considered the seventy year sentence to be inappropriate but nevertheless imposed it because the defendant would be eligible for parole.

On the basis of our review of the record, we conclude that the defendant properly was resentenced by the trial court in accordance with our Supreme Court's remand order in *Riley*, the applicable statutory authorities, and the constitutional principles contemplated in those authorities.

The judgment is affirmed.

In this opinion the other judges concurred.

KIERAN DAY ET AL. *v.* PERKINS PROPERTIES, LLC, ET AL.
(AC 41357)

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

Syllabus

The plaintiffs, owners of real property in the town of Ledyard, sought to recover damages for private nuisance from the defendant P Co. and its sole member, the defendant P. P Co. owned certain real property consisting of two contiguous parcels, one located in North Stonington and the other in Ledyard, that abut the plaintiffs' property. Both of the defendants' parcels are located in areas zoned for residential use that prohibit the commercial use of the property. In a prior action, P Co. had entered into a stipulated judgment with the town of Ledyard by which it was enjoined from operating a landscaping business or a similar commercial operation at its Ledyard property. The stipulated judgment further provided that pursuant to the town's zoning regulations, no commercial activity was permitted in areas zoned for residential use unless the activity constituted a permissible farming activity pursuant to the town's zoning regulations. Thereafter, the trial court in that action held P Co. in contempt for its noncompliance with the stipulated judgment. The plaintiffs subsequently commenced this action, alleging, in count two of their complaint, that the defendants' operation of a landscaping business on its Ledyard property constituted a nuisance per se because it violated the town's zoning regulations by reason of noise, safety, fumes and odors, and because the property was not zoned for commercial activity. Following a trial to the court, the trial court rendered judgment for the plaintiffs on count two, from which the defendants appealed to this court. *Held* that the trial court improperly concluded as a matter of law that the defendants' operation of a landscaping business on its Ledyard property constituted a nuisance per se; the defendants' operation of a landscaping business did not constitute a nuisance per se because it was not a use of land that, by its very nature, constitutes a nuisance at all times regardless of locality or circumstance, and the defendants' violation of a local ordinance, which formed the basis of the stipulated judgment and the court's finding of nuisance per se, was not, as a matter of law, sufficient in itself to constitute a nuisance per se, which exists where there is a condition that is a nuisance in any locality and under any circumstances, as local zoning regulations apply only to a specific locality, what constitutes a nuisance in one locality may not in another, and the allegations of the complaint limited the nuisance to the landscaping business on the defendants' property in Ledyard that was being operated in a residential zone.

Argued February 13–officially released May 14, 2019

Procedural History

Action to recover damages for, inter alia, private nuisance, and for other relief, brought to the Superior Court in the judicial district of New London, where the matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment in part for the plaintiffs; thereafter, the court granted the plaintiffs' motion for clarification and issued a certain order, and the defendants appealed to this court. *Reversed*; *judgment directed.*

Matthew G. Berger, for the appellants (defendants).

Michael S. Bonnano, for the appellees (plaintiffs).

Opinion

FLYNN, J. The defendants, Perkins Properties, LLC, and Mark J. Perkins, Jr., appeal from the judgment of the trial court rendered in favor of the plaintiffs, Kieran Day and Jennifer Day. The defendants claim that the court improperly determined that a nuisance per se existed solely on the basis of violations of local zoning regulations.[1] We agree that a violation of a local zoning ordinance in one town cannot be said to constitute a nuisance everywhere in the state of Connecticut as the nuisance per se doctrine requires and, accordingly, we reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant. The plaintiffs own real property located at 572 Lantern Hill Road in Ledyard. Perkins is the sole member of Perkins Properties, LLC, the owner of real property abutting the plaintiffs' property located at 576 Lantern Hill Road in Ledyard. The defendants'

[1] The defendants also claim that the court erred in enjoining them from direct vehicular access, including off road conveyances, between the defendants' adjoining Ledyard and North Stonington properties. The court found that the plaintiffs only proved the second count of their complaint alleging nuisance per se, and we reverse that judgment including any remedies awarded therein. Accordingly, we need not address the merits of this claim.

property is a contiguous parcel that also encompasses 586Z Lantern Hill Road in North Stonington. The defendants' Ledyard and North Stonington properties are separated by Whitford Brook, and both are located in residential R-80 zones that prohibit commercial use of real property.

In a separate action brought by the town of Ledyard and Joseph Larkin in his capacity as Ledyard's zoning enforcement officer against Perkins Properties, LLC, those parties entered into a stipulation on October 27, 2016. The written stipulation provided that Perkins Properties, LLC, was enjoined from operating a landscaping business, lawn care business, snow removal business, or other similar commercial operations at 576 Lantern Hill Road in Ledyard. It further provided that commercial activity and uses accessory to commercial activity were not permitted in residential zones pursuant to § 3.4 of the Ledyard Zoning Regulations, and that no building, structure, or any portion of the property shall be used for commercial activity or any purpose subordinate or incidental to commercial activity, including, but not limited to: vehicular or pedestrian access to commercial activity; employee parking for commercial activity; storage, maintenance, or repair of vehicles, equipment or machinery used in whole or in part in conducting commercial activity, except as permitted by paragraph 2 of the stipulation; assembly of employees of commercial activities other than farming or uses accessory to farming; storage of materials or products used in the course of the business of commercial activity, except as permitted by paragraph 2; and the storage of materials, products or by products generated in the course of business or commercial activity. The stipulation provided in paragraph 2 that activities that may constitute farming or a use accessory to farming under § 2.2 of the Ledyard Zoning Regulations may

be permitted. The stipulation provided that these exceptions are to be strictly and narrowly construed. The court, *Cosgrove J.*, entered judgment in accordance with the stipulation on December 1, 2016. Ledyard and Larkin moved for contempt because of noncompliance by Perkins Properties, LLC, with the December 1, 2016 judgment, and the court, *Cole-Chu*, *J.*, granted the motion.

The plaintiffs commenced the present action in 2015, and served their seven count fourth amended complaint in December, 2017. In the second count of that complaint, the plaintiffs alleged that the defendants' use of the Ledyard property for a landscaping business violated the Ledyard Zoning Regulations by reason of noise, safety, fumes and odors, and because commercial activity is prohibited in an R-80 zone. The plaintiffs sought injunctive relief and monetary damages.

Following a trial, the court found that the plaintiffs proved only the allegations in the second count of the complaint.[2] The court determined that there was a nuisance per se pursuant to the defendants' deliberate violation of the terms of the stipulated judgment, which enjoined the defendants, on the basis of the Ledyard Zoning Regulations, from conducting commercial activity and related accessory uses on the Ledyard property. The court determined that, although the defendants claimed to operate a nonconforming farm, the only agricultural activity that took place on the property was Perkins' ownership of an uncertain number of cows that were kept in various grazing spots. The court concluded that the activity at issue did not fall under the farming exception in the stipulated judgment, which permitted farming activity pursuant to the Ledyard Zoning Regulations. The court ordered that no nonfarming activity

[2] The court clarified its judgment to note that the second count, as opposed to the third count which alleged nuisance per se as to the North Stonington property, had been proven.

take place on the Ledyard property and that no direct vehicular access, including off road conveyances, be had between the defendants' adjoining Ledyard and North Stonington properties. This appeal followed.

The issue before us is whether the trial court properly determined that a certain use of land constituted a nuisance per se. "Although the existence of a [public or private] nuisance generally is a question of fact, for which we invoke a clearly erroneous standard of review . . . where the court makes legal conclusions or we are presented with questions of mixed law and fact, we employ a plenary standard of review . . . ." (Internal quotation marks omitted.) *Sinotte* v. *Waterbury*, 121 Conn. App. 420, 438, 995 A.2d 131, cert. denied, 297 Conn. 921, 996 A.2d 1192 (2010). Under our case law, the question as to what constitutes a nuisance per se is one of law for the court. See *Warren* v. *Bridgeport*, 129 Conn. 355, 360, 28 A.2d 1 (1942); *Beckwith* v. *Stratford*, 129 Conn. 506, 510, 29 A.2d 775 (1942). Accordingly, our review is plenary. See *Sinotte* v. *Waterbury*, supra, 438.

"A nuisance not originating in negligence is sometimes characterized as an absolute nuisance [or a nuisance per se]." (Internal quotation marks omitted.) *Warren* v. *Bridgeport*, supra, 129 Conn. 360. Significantly for the decision to be made in this appeal, a "nuisance per se . . . exists where there is a condition which is a nuisance in any locality and under any circumstances. . . . Such a nuisance as regards the use of land seldom, if ever, occurs; the same conditions may constitute a nuisance in one locality or under certain circumstances, and not in another locality or under other circumstances. To constitute a nuisance in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury but also

that the use is unreasonable or unlawful."[3] (Citation omitted.) *Beckwith* v. *Stratford*, supra, 129 Conn. 508. "Some things are unlawful or nuisances per se; others become so, only in respect to the time, place or manner of their performance." *Whitney* v. *Bartholomew*, 21 Conn. 213, 217 (1851).

A landscaping business is not a use of land that, by its very nature, constitutes a nuisance at all times regardless of locality or circumstance. First, we note that our case law most often has dealt with what is not a nuisance per se. See *Wood* v. *Wilton*, 156 Conn. 304, 310, 240 A.2d 904 (1968) (refuse disposal operation not nuisance per se but may be nuisance in fact as result of manner of operation); *Jack* v. *Torrant*, 136 Conn. 414, 421, 71 A.2d 705 (1950) (undertaking establishment not nuisance per se); *Murphy* v. *Ossola*, 124 Conn. 366, 371, 199 A. 648 (1938) (mere possession or use of dynamite caps not nuisance per se); *Udkin* v. *New Haven*, 80 Conn. 291, 294, 68 A. 253 (1907) (accumulated snow on walkway did not constitute nuisances per se); *Parker* v. *Union Woolen Co.*, 42 Conn. 399, 402 (1875) (use of steam whistle not nuisance per se); *Whitney* v. *Bartholomew*, supra, 21 Conn. 217 ("[t]he trade and occupation of carriage-making, or of a blacksmith, is a lawful and useful one; and a shop or building, erected for its exercise, is not a nuisance per se").

Second, the nature of the complaint and the court's findings limit any unreasonable use of the land to a specific locality and manner of performance. The allegations in the complaint limited the nuisance to a particular locality and stated, in essence, that the landscaping

[3] "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. . . . The law of private nuisance springs from the general principle that [i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor. . . . The essence of a private nuisance is an interference with the use and enjoyment of land." (Citations omitted; internal quotation marks omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 352, 788 A.2d 496 (2002).

business was pursued in an improper place, namely, in an R-80 zone in Ledyard. The Ledyard Zoning Regulations, by their very nature, applied only to property located in Ledyard. Furthermore, the terms of the stipulated judgment applied *only* to 576 Lantern Hill Road in Ledyard and specified that certain activities were prohibited to the extent the activities constituted commercial activity and not farming. The court noted these limitations in its decision, stating that "the Ledyard injunction applies to the Ledyard property, of course," and on that basis did not find a nuisance per se for the same commercial landscaping activity occurring on the North Stonington property. The court found for the defendants on count one of the complaint, which alleged that the landscaping business constituted a private nuisance on the basis of employee mustering, aggressive and threatening behavior by employees, and noise.

The violation of a local ordinance, which formed the basis of the stipulated judgment and the court's finding of nuisance per se, is not, as a matter of law, sufficient in itself to constitute a nuisance per se.[4] In certain cases, a court may interpret local zoning regulations along with other factors to determine whether a private nuisance exists. See *Cummings* v. *Tripp*, 204 Conn. 67, 79, 527 A.2d 230 (1987). It is axiomatic that local zoning regulations apply only to a specific locality, and "[w]hat constitutes a nuisance in one locality may not in another." *Jack* v. *Torrant*, supra, 136 Conn. 423. "[T]he mere violation of a municipal ordinance does not make the act in question a nuisance per se." 58 Am. Jur. 2d 581, Nuisances § 14 (2012). For the foregoing reasons,

[4] Additionally, we note that count two of the complaint was not an action to enforce a zoning regulation. See e.g., *Cummings* v. *Tripp*, 204 Conn. 67, 78–80, 527 A.2d 230 (1987) (right of property owners to seek injunction and damages for nuisance affecting enjoyment of their property is supplemental to right to seek injunctive relief from zoning authorities for violation of zoning ordinance).

we conclude that the court's finding of a nuisance per se on the basis of violations of a local zoning ordinance, which the defendants were enjoined from violating under the terms of a stipulated judgment, was improper as a matter of law.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the defendants.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FELIX A. IRIZARRY (AC 39394)

Alvord, Sheldon and Pellegrino, Js.

Syllabus

Convicted of the crimes of assault in the second degree and breach of the peace in the second degree in connection with his conduct in striking the victim several times with a golf club, causing the victim to suffer injuries that included a fractured jaw, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his conviction of assault in the second degree in violation of statute (§ 53a-60 [a] [1]) because the state did not establish that he caused the victim serious physical injury, as defined by statute (§ 53a-3 [4]). *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction of assault in the second degree was unavailing, as the jury reasonably could have concluded that the victim suffered physical injury that caused serious impairment of his health such that he suffered serious physical injury within the meaning of §§ 53a-3 (4) and 53a-60 (a) (1); the defendant struck the victim with a golf club at least three times, which caused the fracture of the victim's jaw and affected his consciousness, the victim testified that his jaw was still fractured almost two years after the attack, and the testimony at trial and the victim's medical records established that his injuries had a lasting effect on the functioning of his jaw and resulted in a material modification to his diet after the attack.
2. The defendant could not prevail on his claim that he was deprived of his constitutional right to a fair trial as a result of an improper statement made by the prosecutor during closing argument to the jury: although the prosecutor improperly argued that the victim's treating physician, R, had testified that the kind of blunt force trauma that the victim experienced could cause a serious brain injury, as the court had sustained the defendant's objection to R's testimony as to whether the blunt

force trauma experienced by the victim could lead to a concussion or brain damage, that impropriety was not so egregious that it deprived the defendant of a fair trial, as the prosecutor's comment was too remote to be harmful, it was not germane to whether the victim's broken jaw constituted a serious physical injury, and the court's instructions to the jury focused on the charge as presented in the information and reoriented the jury's focus to whether the broken jaw constituted a serious physical injury; moreover, the prosecutor's reference to the physician's testimony was an isolated comment that did not conform to a pattern of conduct that was repeated throughout the trial, and the court's instruction to the jury that argument and statements by attorneys during closing argument are not to be considered as evidence was sufficiently curative, and eliminated any danger that the prosecutor's comment might have misled the jury.

Argued January 17—officially released May 14, 2019

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts each of the crimes of assault in the second degree and breach of the peace in the second degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the first part of the information was tried to the jury before *D'Addabbo*, *J.*; verdict of guilty; thereafter, the second part of the information was tried to the court; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, assigned counsel, with whom, on the brief, was *Zachary E. Reiland*, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Evelyn Rojas*, assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Felix A. Irizarry, appeals from the judgment of conviction, rendered

against him following a jury trial on one count each of assault in the second degree in violation of General Statutes § 53a-60 (a) (1) and (2), and one count each of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1) and (2). On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction of second degree assault in violation of § 53a-60 (a) (1), and (2) prosecutorial improprieties during closing argument resulted in the violation of his right to a fair trial. We disagree and, accordingly, affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. On March 22, 2014, the victim, David Bennett, was standing in front of a neighborhood market in New Britain when he encountered the defendant exiting the market. After a short verbal exchange between them, the defendant retrieved a golf club from a vehicle parked on the opposite side of the street and began to chase the victim. During the course of his pursuit, the defendant struck the victim several times with the golf club, including once in the arm and once in the face, which resulted in the victim being knocked to the ground. While the victim was on the ground, the defendant continued to strike him with the club, hitting him at least once in the chest. An eyewitness called 911 and reported the incident. The defendant was later arrested when a truck matching the description of the vehicle that fled the scene of the assault was stopped by New Britain police. The defendant was found crouching in the rear cargo hold of the vehicle. A golf club was also found in the vehicle.

In a four count information, the defendant was charged with assault in the second degree in violation of § 53a-60 (a) (1),[1] assault in the second degree in

[1] General Statutes § 53a-60 (a) (1) provides that a person is guilty of assault in the second degree when, "[w]ith intent to cause serious physical injury to another person, the actor causes such injury to such person or to a third person . . . ."

violation of § 53a-60 (a) (2),[2] breach of the peace in the second degree in violation of § 53a-181 (a) (1), and breach of the peace in the second degree in violation of § 53a-181 (a) (2).[3] During the five day trial, the jury heard testimony with respect to the assault and the victim's injuries, which included an admission by the defendant that he struck the victim with a golf club. As a result of the assault, the victim experienced a momentary loss of consciousness and suffered a fractured jaw. Emergency medical responders found that the victim was bleeding from his left ear when they arrived at the scene.

The victim's treating physician, Paul Edward Russo, Jr., testified at trial that the victim sustained injuries to his left cheek, left jaw, right forearm and chest wall. Russo further testified that when the victim presented at the hospital emergency department, his arm was tender and swollen, with a visible contusion and skin avulsion, in addition to a contusion on the left side of the face. A computerized axial tomography scan revealed a nondisplaced fracture of the victim's lower jaw. Three sutures were necessary to close the wound on the victim's face. The victim was discharged from the hospital

Count one of the substitute long form information provides: "[The defendant], with intent to cause serious physical injury to another person, caused such injury to such person (to wit: fractured the mandible of [the victim]) in violation of [§] 53a-60 (a) (1) . . . ."

[2] General Statutes § 53a-60 (a) (2) provides that a person is guilty of assault in the second degree when, "with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

Count two of the substitute long form information provides: "[The defendant], with intent to cause physical injury to another person, caused such injury to such person by means of a dangerous instrument (to wit: [the defendant] struck [the victim] with a golf club) in violation of [§] 53a-60 (a) (2) . . . ."

[3] On appeal, the defendant does not challenge his conviction under § 53a-60 (a) (2) or under § 53a-181 (a) (1) or (2).

after he was treated with antibiotics and analgesics, with instructions that he restrict his diet to liquid puree. He was further instructed to follow-up at a maxillofacial clinic regarding his jaw injury. The victim testified that, as of the date of trial, his jaw still was not fully healed.

As part of his trial strategy, the defendant chose to testify in his own defense. Specifically, he testified that, although he did, in fact, strike the defendant, he did so in self-defense. Despite the defendant's testimony, the jury found the defendant guilty on all charges. On May 26, 2016, the defendant was sentenced to seven years of incarceration, followed by three years of special parole.[4] This appeal followed.

The defendant raises two claims on appeal. The defendant first claims that there was insufficient evidence to convict him of assault in the second degree under § 53a-60 (a) (1), in that the state did not establish that he caused "serious physical injury" to the victim, as defined by General Statutes § 53a-3 (4).[5] Second, the defendant claims that he was deprived of a fair trial because of prosecutorial improprieties during closing argument, in particular, the prosecutor's reference to and reliance on facts not in the record. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the evidence presented at trial was insufficient to establish, beyond a reasonable doubt, that he caused "serious physical injury" to the victim, as defined by § 53a-3 (4). We disagree.

[4] As to count one, the defendant was sentenced to seven years of incarceration, followed by three years of special parole. As to count two, the defendant was sentenced to seven years of incarceration, followed by three years of special parole, to run concurrent with the sentence imposed on count one.

[5] General Statutes § 53a-3 (4) provides: " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ."

"A person can be found guilty of assault in the second degree under . . . § 53a-60 [(a) (1)] only if he causes serious physical injury to another person." (Emphasis omitted.) *State* v. *McCulley*, 5 Conn. App. 612, 615, 501 A.2d 392 (1985). Section 53a-3 (4) defines "serious physical injury" as any "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ." "[S]erious physical injury" does not require a showing of permanency; *State* v. *Barretta*, 82 Conn. App. 684, 689, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); or "require expert medical testimony," so long as "there [is] . . . sufficient direct or circumstantial evidence or a combination of both presented to the jury from which it may find such injury." *State* v. *Rumore*, 28 Conn. App. 402, 414, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992). Whether an injury constitutes a "serious physical injury," for the purpose of § 53a-60 (a) (1), is a fact intensive inquiry and, therefore, is a question for the jury to determine. *State* v. *Ovechka*, 292 Conn. 533, 545–47, 975 A.2d 1 (2009).[6]

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict.

[6] In *Ovechka*, our Supreme Court considered what constituted a "serious physical injury" and concluded that, in the case before it, "temporary blindness, chemical conjunctivitis and chemical burns suffered by [the victim] constituted sufficient evidence of [s]erious physical injury under § 53a-3 (4) . . . ." (Internal quotation marks omitted.) *State* v. *Ovechka*, supra, 292 Conn. 547. In its discussion of the issue, the court noted that "[despite] the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins . . . we remain mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record . . . and that we must construe the evidence in the light most favorable to sustaining the verdict." (Citations omitted; internal quotation marks omitted.) Id., 546–47.

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 593–94, 72 A.3d 379 (2013).

At trial, the emergency medical services responder, the victim's emergency department treating physician, and the victim all testified as to the injuries sustained by the victim.[7] During the state's direct examination of the victim, the victim testified: "[The defendant] hit me in the jaw and it fractured my jaw. My whole jaw [was] dislocated." The victim further testified: "I stepped back in defense . . . trying to avoid being hit. He swung several times . . . [and] hit me several times. . . . [O]nce in the jaw, once in the rib cage, took a divot out of my wrist. I still have the mark there and *I still have the fractured jaw* . . . ." (Emphasis added.) The following exchange between the state and the victim took place:

"[The Prosecutor]: After he hit you in the jaw . . . [w]as that the point where you fell down?

"[The Witness]: That's when I fell to the ground.

* * *

[7] The emergency medical services responder who attended to the victim at the scene of the incident testified that "[the victim] sustained injury to his right forearm and injuries to the left side of his face," and that the victim "had a laceration to his right arm . . . and he had some blood coming from his left ear."

"[The Prosecutor]: When you fell down on the ground, did you lose consciousness . . . .

"[The Witness]: For a quick second . . . . When I got struck I fell to my knees . . . . I can say that I was . . . dazed, really dazed. . . .

"[The Prosecutor]: So, you weren't fully conscious but you were dazed.

"[The Witness]: I was dizzy . . . ."

On the last day of evidence, during the state's direct examination of Dr. Russo, the following exchange also occurred:

"[The Prosecutor]: [The victim] suffered a head contusion, correct?

"[The Witness]: Correct.

"[The Prosecutor]: Where in the head did he receive a head contusion?

"[The Witness]: The left face.

"[The Prosecutor]: The left face, and based on your training and your experience in your examination of [the victim], what, if anything, is a head contusion indicative of?

"[The Witness]: Blunt force injury to the head."

Russo further testified that, as a result of the blunt force injury, the victim suffered a nondisplaced fracture to the lower jaw and a facial laceration requiring three sutures. Medical records admitted into evidence indicated that the victim was directed to maintain a liquid puree diet after his discharge due to the injury to his lower jaw. See *State* v. *Lewis*, 146 Conn. App. 589, 608–609, 79 A.3d 102 (2013), cert. denied, 311 Conn. 904, 83 A.3d 605 (2014).

As discussed in *Ovechka*, "serious physical injury" may include a range of injuries and is a fact based inquiry for the jury to decide. In reaching its conclusion that "temporary blindness, chemical conjunctivitis and chemical burns suffered by [the victim] constituted sufficient evidence of [s]erious physical injury under § 53a-3 (4)"; (internal quotation marks omitted) *State* v. *Ovechka*, supra, 292 Conn. 547; our Supreme Court considered a number of its prior decisions in which it had upheld jury findings that "serious physical injury" had been inflicted. Compare *State* v. *Barretta*, supra, 82 Conn. App. 690 (upholding judgment of conviction where victim suffered extensive bruises and abrasions), with *State* v. *Sawicki*, 173 Conn. 389, 395, 377 A.2d 1103 (1977) (upholding judgment of conviction where victim suffered significant facial fractures). We believe that these cases are instructive with respect to the present case.

Here, the defendant struck the victim with the head of a golf club at least three times: once in the arm; once in the face, causing the fracture of the lower jaw and thereby affecting his consciousness; and once in the chest, after he had fallen to the ground. These blows caused the victim to suffer contusions, abrasions, and bleeding from his ear. Furthermore, almost two years after the attack, the victim testified that his jaw was still fractured. Although permanency is not a requirement of "serious physical injury," under the present circumstances, the lasting effects of the injuries on the victim are certainly relevant when considering the defendant's claim. Moreover, testimony and medical records admitted into evidence also established that the victim's injuries had a lasting effect on the functioning of his jaw and resulted in a material modification to his diet for a period after the attack. On the basis of the evidence in the record and the inferences that reasonably could

be drawn therefrom, construed in the light most favorable to sustaining the verdict, the jury reasonably could have concluded that victim suffered physical injury that caused "serious impairment of health," such that he suffered "serious physical injury" under §§ 53a-3 (4) and 53a-60 (a) (1). See *State* v. *Lewis*, supra, 146 Conn. App. 609. Accordingly, the defendant's claim must fail.

II

Next, the defendant claims that he was deprived of his constitutional right to a fair trial because the prosecutor committed certain acts of impropriety during closing argument by arguing facts not in evidence. Specifically, the defendant claims that the prosecutor's argument regarding Russo's testimony, which addressed whether the kind of blunt force trauma experienced by the victim *could* cause a serious brain injury, was improper.[8] We agree with the defendant that the prosecutor's argument with respect to Russo's testimony was improper. We agree with the state, however, that it did not deprive the defendant of his constitutional right to a fair trial.

The following standard of review informs our resolution of the defendant's claim. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial

[8] The defendant also claims that the prosecutor was guilty of certain improprieties during her rebuttal argument. Specifically, the defendant claims that the prosecutor argued that the victim had a permanent scar on his arm, as a result of being struck with the golf club, a fact that he claims was not in evidence. The record indicates that the victim testified at trial to the following: "[The defendant] hit me several times. . . . [O]nce in the jaw, once in the rib cage, took a divot out of my wrist. *I still have the mark there* and I still have the fractured jaw . . . ." (Emphasis added.) Given the nature of the foregoing testimony, namely, that the victim had a lasting mark on his arm almost two years after the altercation, we conclude that this statement during rebuttal argument was within the bounds of reasonable conduct. See *State* v. *Miller*, 128 Conn. App. 528, 535, 16 A.3d 1272, cert. denied, 301 Conn. 924, 22 A.3d 1279 (2011).

impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry."[9] (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). "[If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012).

Moreover, because the claimed prosecutorial improprieties occurred during closing arguments, we look to the following legal principles. "In determining whether such [an impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided

[9] "The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This assessment is made through application of the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)] . . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 111–12, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Miller*, 128 Conn. App. 528, 535, 16 A.3d 1272, cert. denied, 301 Conn. 924, 22 A.3d 1279 (2011). "Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 553–54, 78 A.3d 828 (2013). "In fulfilling his duties, a prosecutor must confine the arguments to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony that is not the subject of proper closing argument." (Citation omitted.) *State* v. *Copas*, 252 Conn. 318, 349, 746 A.2d 761 (2000).

At trial, during Russo's direct testimony, the state asked whether the type of injury sustained by the victim "*could* . . . lead to a concussion" or "could lead to a brain injury?" (Emphasis added.) Russo answered in the affirmative. Thereafter, defense counsel objected: "[Y]our Honor, this is based on speculation. The question was, *could it*—the previous question was *could it*. . . . [M]edical testimony has to be more certain than that." (Emphasis added.) The court sustained the objection, stating: "The area of examination is appropriate. The form of the question is not." After additional unsuccessful attempts at properly framing the question, the state ceased the line of inquiry.

Despite the foregoing, during the state's closing argument as to count two, the prosecutor argued: "Now, ask yourself, is a golf club a dangerous instrument? . . . [Is it] capable of causing death or serious physical injury? . . . The state submits to you that when you look at all the evidence, the injuries that the defendant caused [the victim] when he struck him with the golf club; [t]he fact that [the victim] had to get stitches to

his jaw, and the testimony of Dr. Russo that a force blunt blow to the head like the one that [the victim] received with the golf club *could cause a concussion or brain damage* . . . you could find beyond a reasonable doubt that . . . the defendant used . . . *a dangerous instrument* . . . .''[10] (Emphasis added.)

In response to the prosecutor's argument, defense counsel emphasized in his closing argument that ''[t]he evidence that the state referred to is not in this case. The evidence that this injury could have led to a concussion or brain damage, I suggest to you . . . [is] not in this case. I suggest to you that Dr. Russo gave you *no evidence* from which you could find *serious physical injury* in this case.''[11] (Emphasis added.)

After the conclusion of closing argument and after the jury had been excused for a short recess, defense counsel raised the following objection with the court: ''[T]he state's argument that . . . the jaw fracture could have led to a concussion and then brain damage, [which] was the subject of my objections during the case . . . I do not believe . . . is evidence in [the record].'' The court explained that it would address defense counsel's objection in the following way: ''In my instructions, I stress in the first part that the . . .

[10] When addressing the issue of whether the victim suffered a ''serious physical injury,'' as to count one, the prosecutor did not argue the excluded testimony. Rather, the prosecutor made the following statement to the jury: ''Now, what evidence do you have that the defendant caused [the victim] a serious impairment to his health? You have the testimony of Dr. Russo, who testified that [the victim's] jaw was fractured and that it required stitches. You also heard [the victim's] testimony that when he was struck in the face, he was in a lot of pain, and he was dazed, and he almost lost consciousness.''

[11] Defense counsel further advanced his theory of the case as to ''serious physical injury'' by arguing: ''Remember what the [emergency medical technician] said . . . . He said these injuries were minor, and Dr. Russo never said anything to contrary. . . . [I]f you've ever had a broken bone, you sort of know what the difference is between a nondisplaced and a displaced fracture.''

arguments of the attorneys are not evidence. If the evidence is different from what they believe the evidence is, they are to follow their own [recollection]. . . . So, your comments are noted, but you will see that I've addressed that situation." Thereafter, during the jury charge, the court provided a general charge explaining that argument is not evidence.[12]

The state contends that the prosecutor's argument simply urged the jury, on the basis of Russo's testimony, to draw a reasonable inference that a golf club, when swung at a person's head, could be considered a dangerous instrument that could cause serious injury. We find this claim unpersuasive under the present circumstances. It is true that, ordinarily or absent some compelling reason to the contrary, this may be a reasonable inference to draw. It is also true that, "[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 553–54.

Here, the state's argument went beyond merely encouraging the jury to draw an inference—it argued the very evidence that the court had excluded from the record. Although a prosecutor is free to advance conclusions reasonably supported by the evidence, he or she may not use closing argument to argue evidence that has been excluded by the court. See id., 554.

[12] The court instructed the jury: "In reaching your verdict, you should consider all the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. These include (1) the arguments and statements by the lawyers. The lawyers are not witnesses. What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence."

Because the court sustained defense counsel's objection to Russo's testimony as to whether the blunt force trauma experienced by the victim *could* lead to a concussion or brain damage, we agree with the defendant that the argument was improper. See *State* v. *Ross*, 151 Conn. App. 687, 698–99, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014). We conclude, however, that the improper argument was harmless.

In considering the defendant's claim that the prosecutor's improper argument deprived him of the constitutional right to a fair trial, we begin by noting that, during the court's charge to the jury, the court made the following statement: "[T]he defendant has been charged in an information. The information has been read to you at the beginning of the trial and will be with you during your deliberations. . . . Each count alleges a separate crime. It will be your duty to consider each count separately in deciding the guilt or not guilty of the defendant." The court continued by providing the jury with a description of each charge, as provided in the amended long form information. The court stated in relevant part: "Count one, assault in the [second] degree . . . [the defendant], with intent to cause serious physical injury to another person, caused such injury to such person, to wit, *fractured the mandible of* [the victim], in violation of § 53a-60 (a) (1) of the Connecticut General Statutes." (Emphasis added.)

We further note that the court, by focusing its instruction as to count one on the specific conduct alleged in the long form information, namely, that the defendant had violated § 53a-60 (a) (1) because he "fractured the mandible of [the victim]," in effect, isolated and, rendered irrelevant, the prosecutor's improper argument.[13] Although an alternative theory of "serious physical injury" relating to the victim's consciousness was advanced by the prosecutor, the subsequent instruction

[13] See footnote 1 of this opinion.

focusing on the charge as presented in the long form information was material with respect to the defendant's claim. As discussed previously in this opinion, our review of the record indicates that there was sufficient evidence presented at trial to support the conclusion that, as a result of the fractured mandible, the victim suffered a "serious physical injury." Here, because the court's instruction re-oriented the jury's focus to the issue of whether the victim's broken jaw constituted a "serious physical injury," and because the prosecutor's reference to the excluded testimony did not relate to whether the victim's broken jaw constituted a "serious physical injury," the state's improper argument was too remote, in the context of the present appeal, to be considered harmful.

Furthermore, the prosecutor's reference to Russo's testimony was an isolated instance that did not conform to a pattern of conduct repeated throughout the trial. Although the court declined to provide the jury with a specific instruction addressing the improper argument, the court did provide a general instruction emphasizing that argument is not evidence and that statements made during closing argument by the attorneys are not to be considered as evidence. Given the underlying facts of this case, the isolated nature of the prosecutor's argument, and the fact that the improper argument was not germane to the issue of whether the victim's broken jaw constituted a "serious physical injury," we conclude that the court's general instruction was sufficiently curative and eliminated any danger that the prosecutor's improper comment might mislead the jury.[14] Accordingly, we conclude that, despite the prosecutor's

[14] We further note that, instead of objecting at the time the argument was made, defense counsel delayed his objection and waited until his closing argument to address the impropriety, and did so in such a way that was tactically beneficial to the defendant. Said differently, by reframing the prosecutor's statement so that it cast doubt on count one, rather than on count two—the context in which the statement originally was made—defense counsel was able to use the prosecutor's remark to bolster the

improper statement during closing argument, the impropriety was not so egregious that it deprived the defendant of his constitutional right to a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF ANDREW S. KNOTT, ADMINISTRATOR (ESTATE OF LUCILLE KIRSCH)
(AC 41980)

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

Syllabus

The substitute plaintiff, the administrator of the estate of L, appealed to this court from the judgment of the trial court dismissing his appeal from the orders of the Probate Court denying the application to terminate the conservatorship of the estate of L and request for a waiver of fees filed by M, the conservator of L's estate and the original plaintiff to the probate appeal. The Probate Court had mailed notice of its orders to the parties on October 20, 2016. Prior to filing this appeal with the Superior Court on December 9, 2016, M filed an application for a waiver of fees in that court on December 1, 2016, which the trial court granted on December 5, 2016. Thereafter, the trial court rendered judgment dismissing the appeal for lack of subject matter jurisdiction on the ground that it was untimely pursuant to the statute (§ 45a-186 [a]) that requires an appeal from a Probate Court order to be filed in the Superior Court within forty-five days of when the order was mailed to the parties. On the substitute plaintiff's appeal to this court, *held* that the trial court improperly dismissed the probate appeal for lack of subject matter jurisdiction on the ground that it was untimely; although § 45a-186 (a) requires an appeal from an order of the Probate Court denying an application to terminate a conservatorship to be filed within forty-five days of when the order was mailed to the parties, pursuant to the applicable statute (45a-186c [b]), the filing of the application for a waiver of fees on December 1, 2016, tolled the time in which to commence the probate appeal until the court rendered judgment on the fee waiver application on December 5, 2016, which extended the time within which to file the appeal to December 9, 2016, the date on which M timely filed the probate appeal with the Superior Court.

Argued January 28–officially released May 14, 2019

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defendant's claim that there was insufficient evidence of "serious physical injury."

Procedural History

Appeal from the orders of the Probate Court for the district of Hamden-Bethany denying the application to terminate the conservatorship and request for a waiver of fees filed by the plaintiff William P. Meyerjack as conservator of the estate of the decedent, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle, J.*, granted the motion filed by Andrew S. Knott, administrator of the estate of the decedent, to be substituted as the plaintiff; thereafter, the matter was tried to the court; judgment dismissing the appeal, from which the substitute plaintiff appealed to this court. *Reversed*; *further proceedings*.

Andrew S. Knott, self-represented, with whom, on the brief, was *Robert J. Santoro*, for the appellant (substitute plaintiff).

Opinion

DiPENTIMA, C. J. The narrow question presented in this appeal asks us to determine whether the Superior Court improperly dismissed the probate appeal of the substitute plaintiff, Andrew S. Knott, administrator of the estate of Lucille S. Kirsch, as untimely. Specifically, the substitute plaintiff argues that his appeal was not untimely because an application for a waiver of fees (fee waiver) had been filed pursuant to General Statutes § 45a-186c,[1] which tolled the time limit set forth in Gen-

[1] General Statutes § 45a-186c (b) provides in relevant part: "If the appellant claims that such appellant cannot pay the costs of an appeal taken under section 45a-186, the appellant shall, within the time permitted for filing the appeal, file with the clerk of the court to which the appeal is to be taken an application for waiver of payment of such costs, including the requirement of bond, if any. . . . The filing of the application for the waiver of such costs shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered. . . ."

eral Statutes § 45a-186 (a).[2] We agree with the substitute plaintiff and, therefore, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On June 30, 2010, William P. Meyerjack was appointed conservator of the estate of Lucille S. Kirsch. On October 14, 2016, pursuant to General Statutes § 45a-660 (a) (2)[3] and § 33.17 of the Probate Court Rules,[4] William P. Meyerjack, conservator of the estate of Lucille S. Kirsch (Meyerjack),[5] filed an application to terminate the conservatorship of the estate of Lucille S. Kirsch and waive the requirement of a final financial account (application to terminate the conservatorship) with the Probate Court. On

[2] General Statutes § 45a-186 (a) provides in relevant part: "[A]ny person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive . . . appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such Probate Court is located, or, if the Probate Court is located in a probate district that is in more than one judicial district, by filing a complaint in a superior court that is located in a judicial district in which any portion of the probate district is located . . . ."

[3] General Statutes § 45a-660 (a) (2) provides in relevant part: "If the court finds upon hearing and after notice which the court prescribes that a conserved person has no assets of any kind remaining except for that amount allowed by subsection (c) of section 17b-80, the court may order that the conservatorship of the estate be terminated. . . ."

[4] Section 33.17 (a) of the Probate Court Rules provides in relevant part: "A conservator of the estate may petition the court to terminate the conservatorship of the estate and waive the requirement of a final financial report or account if the Department of Social Services has determined that the person under conservatorship is eligible for Medicaid under Title 19 of the Social Security Act. . . ."

[5] Although Meyerjack is designated as a defendant, along with several other parties who did not appear, he was in fact the original plaintiff in this probate appeal. His status was changed in the court's docket at some point during those proceedings. Accordingly, as his interests are not adverse to those of the substitute plaintiff, we do not refer to him as the defendant.

the same date, Meyerjack filed a request for a waiver of fees. Meyerjack's application to terminate the conservatorship and request for a waiver of fees were denied by the Probate Court, and notice of those decisions was mailed on October 20, 2016.

On December 1, 2016, prior to filing his appeal with the Superior Court pursuant to § 45a-186 (a), Meyerjack filed a fee waiver. The fee waiver was granted by the Superior Court on December 5, 2016, and the complaint[6] was filed on December 9, 2016. Shortly thereafter, while his appeal was pending in the Superior Court, Meyerjack filed a motion to cite in Lucille S. Kirsch, the conservatee, as a new party to the appeal. Although the Superior Court appears not to have acted on Meyerjack's motion, Kirsch filed an appearance on December 13, 2016, and, on December 21, 2016, filed an amended complaint[7] and amended writ of summons. At some point, following these multiple filings, Kirsch was added to the case caption as the designated plaintiff. On September 30, 2017, Kirsch died, and she was replaced with the substitute plaintiff on February 27, 2018.

Following oral argument on April 3, 2018, the Superior Court sua sponte dismissed the substitute plaintiff's appeal as untimely. In its order, dated July 25, 2018, the court found that the appeal was filed on December 9, 2016, which was more than forty-five days after the Probate Court mailed notice of its denials of Meyerjack's application to terminate the conservatorship and request for a waiver of fees. Accordingly, because the appeal was not filed within the deadline set forth in § 45a-186 (a), the court concluded that it lacked subject

[6] Meyerjack's original complaint alleged, inter alia, that the Probate Court violated his due process rights when it denied his application to terminate the conservatorship and request for a waiver of fees without providing him notice and a hearing.

[7] The amended complaint alleges the same reasons for appeal and seeks the same relief as the original complaint.

matter jurisdiction over the substitute plaintiff's appeal. The substitute plaintiff now appeals that decision to this court.

On appeal, the substitute plaintiff claims that the Superior Court improperly dismissed his appeal as untimely because the filing of the fee waiver tolled the time limit set forth in § 45a-186 (a).[8] We agree with the substitute plaintiff and, accordingly, reverse the judgment of the trial court dismissing his appeal as untimely.

[8] During oral argument to this court, the substitute plaintiff requested that, in resolving the merits of this appeal, we also address the legal effect that a trial court's decision to grant a fee waiver has on the commencement of a probate appeal. Pursuant to § 45a-186 (a), any person aggrieved by a decree or denial from a Probate Court may appeal to the Superior Court by filing a copy of the complaint in the judicial district in which the Probate Court is located. The substitute plaintiff contends that this service procedure fails to accommodate appeals in which a party seeks a fee waiver because, in those cases, the complaint cannot be filed until the fee waiver is granted. Accordingly, because the fee waiver must include a copy of the complaint and all other documents necessary to commencing the probate appeal, the substitute plaintiff proposes that we should deem an appeal filed for the purpose of § 45a-186 (a) once a fee waiver is granted. We do not agree.

Contrary to the substitute plaintiff's claim, our review of the relevant law reveals that there is no requirement that a party include a copy of his complaint when seeking a fee waiver pursuant to § 45a-186c. Rather, § 45a-186c requires a party to comply with the provisions set forth in Practice Book § 8-2, which in turn states that "[t]he application shall set forth the facts which are the basis of the claim for waiver and for payment by the state of any costs of service of process; a statement of the applicant's current income, expenses, assets and liabilities; pertinent records of employment, gross earnings, gross wages and all other income; and the specific fees and costs of service of process sought to be waived or paid by the state and the amount of each. The application and any representations shall be supported by an affidavit of the applicant to the truth of the facts recited." Practice Book § 8-2 (a). Accordingly, if this court were to deem a probate appeal commenced once a fee waiver is granted, a party could arguably commence an appeal without satisfying the procedural requirements in § 45a-186 (a). The role of the courts is not to rewrite statutes or graft exceptions onto the language existing therein; that is a function of the legislature. See *Asia A.* v. *Geoffrey M.*, 182 Conn. App. 22, 33, 188 A.3d 762 (2018). We, therefore, decline to hold that when a party files a fee waiver in a probate appeal, the appeal should be deemed commenced on the date the fee waiver is granted.

We begin our analysis of the substitute plaintiff's claim by setting forth our relevant standard of review. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 261–62, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012).

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations. . . . It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over

[it]. . . .'' (Internal quotation marks omitted.) *Burnell* v. *Chorches*, 173 Conn. App. 788, 793, 164 A.3d 806 (2017). Failure to comply with the relevant time limit set forth in § 45a-186 (a) ''deprives the Superior Court of subject matter jurisdiction and renders such an untimely appeal subject to dismissal.'' *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 67, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009).

Applying the foregoing principles to the present appeal, we conclude that the court improperly dismissed the substitute plaintiff's appeal as untimely. The time limit to appeal from a probate court's denial of an application to terminate a conservatorship brought pursuant to § 45a-660 is forty-five days from the date that notice of the denial is mailed. See General Statutes § 45a-186 (a). When an appellant files a fee waiver pursuant to § 45a-186c, the time limit set forth in § 45a-186 (a) is tolled until a judgment on the fee waiver is rendered. See General Statutes § 45a-186c (b). In the present matter, the trial court found that the notice was mailed by the Probate Court on October 20, 2016, and determined that the deadline to appeal expired on December 4, 2016. The court apparently did not consider the fact that prior to filing this appeal, Meyerjack filed a fee waiver on December 1, 2016, which was not granted until December 5, 2016. Pursuant to § 45a-186c, the time limit set forth in § 45a-186 (a) was tolled during this five day interim, and, Meyerjack had until December 9, 2016, in which to file his appeal. Therefore, because the time limit in which to file this appeal was tolled while Meyerjack's fee waiver was pending, the court wrongly concluded that this appeal was untimely and improperly dismissed the case for lack of subject matter jurisdiction.

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

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NOTICES OF CONNECTICUT STATE AGENCIES

CITY OF MILFORD

PUBLIC NOTICE

The City of Milford, Connecticut intends to apply to the State of Connecticut for a state certificate of affordable housing completion pursuant to Conn. Gen. Stat. § 8-30g and Conn. Agencies Regs § 8-30g-6. The application for state certificate of affordable housing completion, including all supporting materials, is available for public inspection and comment at the office of the City Clerk, City of Milford, Parsons Government Center, 70 West River Street, Milford, Connecticut. Written comments concerning this application or a petition for a public hearing may be submitted to Julie Nash, Director of Community Development, City of Milford, 70 West River Street, Milford, Connecticut on or before June 6, 2019.

Dated May 10, 2019 at Milford, Connecticut.

NOTICES

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
New Haven Judicial District
G.A. 23 in New Haven

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 121 Elm Street, New Haven, CT 06510

HOURS: 8:00 a.m. – 5:00 p.m.

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

PCN: 5184

CLOSING DATE: May 24, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

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

Application Procedure

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

1. Cover letter

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

3. Resume

4. Copy of law school transcript

5. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov, cc: DCJ.NewHaven@ct.gov.
All documents must be combined into a single pdf
Please include the PCN on the subject line
(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources, PCN 5184

Application packages must be received or postal stamped no later than the closing date
Applications received by facsimile will not be accepted
A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

Notice of Certification as Authorized House Counsel

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

Certified as of April 22, 2019:

Joshua S. Carter	GKN Aerospace
Yun Jung Choi	Stanley Black & Decker, Inc.
Rion J. Ramirez	Mashantucket Pequot Tribal Nation

Certified as of April 25, 2019:

Lindsey Krieger	Franchise World Headquarters, LLC

Certified as of April 26, 2019:

Aysel Agalarova	Interactive Brokers, LLC
Mary C. Basile-Miranda	Tracy-Locke, Inc.
Rachel L. Cain	Building & Land Technology
Briordy T. Meyers	Boehringer Ingelheim USA Corp.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Substitute Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that a substitute trustee was appointed on April 30, 2019, in Docket Number HHD-CV-19-6100274, A. Paul Spinella, a/k/a Agostino Paul Spinella (Juris# 371686) of Hartford, CT.

Attorney Peter White of North Branford, Connecticut, juris #425295 is appointed Trustee to take such steps as are necessary to protect the interests of the clients of Attorney Spinella, to inventory Attorney Spinella's files, to secure Attorney Spinella's clients' funds account and make accountings and reports to the Court, and to secure and review the office mail, all in accordance with § 2-64 et. Seq. of the Connecticut Practice Book.

David Sheridan
Presiding Judge