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chance to rebut the state's view of the evidence, and that his theory of defense was to challenge the persuasiveness and reliability of the DNA evidence. He asserted that he was denied the right to final argument especially with respect to the prosecutor's rebuttal argument that he was the only person in Connecticut who could be a contributor to the DNA mixture and that defense counsel was not given an opportunity to correct the argument. The defendant claims that this was extraordinarily harmful because juries, lawyers, and judges have a difficult time interpreting probabilistic information. This claim was not raised at trial and, therefore, is not preserved. Moreover, the defendant claims that he did not have the chance to counter the prosecutor's argument in the context of his own theory that there were serious questions about the collection, preservation, and testing of the physical evidence that called Renstrom's testimony into question.

The defendant's contention that he is entitled to a new trial on the basis of the prosecutor's rebuttal argument is flawed for at least two reasons. If, as he argues on appeal, the prosecutor's argument that he was the only person in Connecticut who could have contributed to the DNA mixture is wrong, defense counsel could have objected to the argument at trial, but did not. Counsel, therefore, must not have thought that it misled the jury. Given the complexity of DNA evidence, a contemporaneous objection not only preserves the claimed impropriety for review but also provides the court an opportunity to take corrective action, if necessary. The failure to make such an objection is a factor to be considered when considering the claim of prosecutorial impropriety. See *State* v. *Brett B.*, supra, 186 Conn. App. 572.

As to his second contention that defense counsel could not counter the prosecutor's DNA argument, we note that at the conclusion of the first portion of her summation, the prosecutor, in so many words, told the jury that DNA was the key to the case. During his final

argument, defense counsel made clear to the jury all of the problems in the collection, preservation, and testing of the DNA evidence. The defendant, therefore, was not deprived of his right to final argument and to present his view of the DNA evidence. In fact, defense counsel anticipated and attempted to refute the prosecutor's rebuttal.

For the foregoing reasons, the defendant's claim of prosecutorial impropriety during final argument fails.

III

The defendant's final claim is that he is entitled to a new trial on the charge of home invasion because the second portion of the prosecutor's final argument misled the jury on the elements of the crime of home invasion, and that the misstatement was not harmless beyond a reasonable doubt. We disagree.

The defendant's claim is predicated on his representation, in his appellate brief, of a portion of the prosecutor's closing argument, to wit: "During closing argument, after quoting the substitute information, the state's attorney told the jury that 'basically, [the information] means that the defendant had to unlawfully enter the dwelling while a person was inside *with the intent to commit a sexual assault . . . .*' " (Emphasis in original.) He argues that the language misrepresented the law to the jury because it invited the jury to find him guilty even if it did not find beyond a reasonable doubt that he intended to commit a sexual assault by force at the time of entry. The defendant correctly states that prosecutors are not permitted to misstate the law because it invites a conviction unwarranted by the law and facts.[21] See *State* v. *Otto*, supra, 305 Conn. 77. "A

[21] The defendant also argues that all of the *Williams* factors except the frequency of the impropriety weigh in favor of reversal. See footnote 16 of this opinion; *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). He contends that reversal is warranted because the state's case was relatively weak and the court gave no curative instruction. Because we conclude that the prosecutor committed no impropriety in her final argument, we need not address the *Williams* factors. Again, we note that trial counsel did not object to the portion of the prosecutor's argument at issue in this claim and requested no curative instruction.

CONNECTICUT REPORTS

Vol. 331

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

TOWN OF GRISWOLD *v.* PASQUALE CAMPUTARO ET AL.
(SC 20061)

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

Syllabus

The proposed intervenors, L and R, appealed from the trial court's denial of their motions to intervene in a consolidated zoning appeal and zoning enforcement action brought by the plaintiff town against the defendants C and S Co. regarding the operation of an asphalt manufacturing facility near the properties of L and R. In 1994, the plaintiff's zoning commission issued an order directing C and S Co. to cease operating an asphalt manufacturing facility on their property. C and S Co. appealed from that order to the plaintiff's zoning board of appeals, which declined to consider the appeal. Thereafter, C and S Co. filed an appeal in the Superior Court. While the zoning appeal was pending, the town commenced a zoning enforcement action against C and S Co., seeking, inter alia, an injunction prohibiting them from operating the asphalt manufacturing facility on their property. The trial court thereafter consolidated the zoning appeal and the enforcement action, and, following C's death, granted the motion to substitute P, as executor of C's estate, as a defendant. In 1997, the parties settled their dispute and entered into a stipulated judgment, which was approved by the court. In 2015, after the town received complaints that the continued operation of the asphalt manufacturing facility violated the terms of the stipulated judgment, P filed a motion to cite in A Co., the operator of the asphalt manufacturing facility, as a defendant. The parties subsequently reached an agreement to modify the stipulated judgment and, on November 12, 2015, filed a joint motion to open and modify that judgment. The pending motions were scheduled to be heard at short calendar on November 23, 2015, and notice of the date of the short calendar was posted on the Judicial Branch website. Thereafter, counsel for the defendants filed a caseflow request, with the town's consent, seeking to add the motion to open and modify to the November 16, 2015 short calendar in order to expedite judicial approval of the modification to the stipulated judgment. The trial court granted the caseflow request and, at the November 16, 2015 short calendar, granted the motion to cite in A Co. as a defendant and the motion to open and modify the judgment. On November 23, 2015, the date on which those motions were originally scheduled to be heard, L appeared and filed a motion to intervene pursuant to the intervention provision of the Environmental Protection Act (§ 22a-19 [a] [1]) in order to raise claims of environmental harm. On December 9, 2015, R filed a motion to intervene pursuant to § 22a-19 (a) (1). The

trial court denied L's and R's motions to intervene on the ground that there was no proceeding pending before the court in which to intervene, as the case was resolved on November 16, 2015, when the court opened the judgment and accepted the parties' proposed modifications thereto. Subsequently, L and R appealed to the Appellate Court, which reversed the trial court's denial of their motions to intervene. The Appellate Court concluded that the trial court's expedited consideration of the motion to open and modify denied L and R their statutory right to intervene pursuant to § 22a-19 (a) (1), as well as their right to participate in the hearing on the stipulated settlement pursuant to the statute (§ 8-8 [n]) requiring that the trial court hold such a hearing. The Appellate Court also concluded that the trial court violated the rule of practice (§ 11-15) governing the timing of the assignment of short calendar matters by holding short calendar on the motion to open and modify less than five days after it was filed in accordance with the parties' caseflow request. On the granting of certification, the plaintiff, P and A Co. filed a joint appeal with this court from the judgment of the Appellate Court. *Held* that the Appellate Court properly reversed the trial court's denial of the motions to intervene filed by L and R: this court adopted the Appellate Court's thorough and well reasoned opinion as a proper statement of the issues and the applicable law concerning those issues, with the exception of the Appellate Court's analysis of Practice Book § 11-15; moreover, with respect to the Appellate Court's conclusion that the trial court's expedited consideration of the parties' motion to open and modify violated § 11-15, this court clarified that, although § 11-15 requires that no matter shall be assigned unless filed at least five days before the opening of court on short calendar day, that default rule is subject to the discretion of the judicial authority, which has broad discretion in matters of case management and generally may schedule a motion for a hearing less than five days before the opening of court on short calendar day provided that the parties and others who may have a legal interest in the proceeding are afforded fair notice and sufficient time to prepare, and, in the present case, that discretion was circumscribed by §§ 8-8 (n) and 22a-19 (a) (1), which required timely, accurate notice to nonparties seeking to exercise their statutory right to intervene and to raise environmental concerns in the context of settlements of administrative appeals.

Argued January 22—officially released May 21, 2019

Procedural History

Action for, inter alia, a temporary and permanent injunction prohibiting the defendants from operating an asphalt plant, and for other relief, brought to the Superior Court in the judicial district of New London and transferred to the Superior Court in the judicial district of New London at Norwich, where the court,

Hendel, *J.*, granted the defendants' motion to consolidate this action with an appeal filed by the defendants from a decision by the Zoning Board of Appeals of the Town of Griswold denying an appeal from a cease and desist order; thereafter, the court, *Booth*, *J.*, granted the defendants' motion to substitute Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, as a defendant; subsequently, the court, *Handy*, *J.*, rendered judgment in accordance with a stipulation of the parties; thereafter, the case was transferred to the Superior Court in the judicial district of New London; subsequently, the court, *Cosgrove*, *J.*, granted the defendants' motion to cite in American Industries, Inc., as a defendant and the parties' joint motion to open and modify the judgment; thereafter, the court, *Vacchelli*, *J.*, denied the motions to intervene filed by Kathryn B. Londé and Jeffrey Ryan, and the proposed intervenors appealed to the Appellate Court, *Lavine*, *Mullins* and *Mihalakos*, *Js.*, which reversed the trial court's denial of the motions to intervene and remanded the case for further proceedings, and the plaintiff and the defendant Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, et al., on the granting of certification, filed a joint appeal with this court. *Affirmed.*

Harry B. Heller, with whom, on the brief, was *Mark K. Branse*, for the appellants (plaintiff and defendant Pasquale Camputaro, Jr.).

Derek V. Oatis, for the appellees (proposed intervenors).

Opinion

PER CURIAM. This certified appeal arises from a consolidated zoning appeal and enforcement action relating to a manufacturing facility located in Jewett City, which had been subject to a long-standing stipulated judgment imposing various restrictions on its operation since 1997 (1997 stipulated judgment). After

a short calendar hearing held on November 16, 2015, the trial court opened and modified the 1997 stipulated judgment by agreement of the parties. The issue on appeal concerns the fact that the public had been informed that the parties' joint motion to open and modify the judgment would not be heard until one week later, at a short calendar hearing scheduled to occur on November 23, 2015. A landowner who resides near the manufacturing facility, Kathryn B. Londé, appeared at the publicly noticed short calendar hearing on November 23, 2015, intending to a file a motion to intervene pursuant to General Statutes § 22a-19[1] for the purpose of raising claims of environmental harm, only to learn that the hearing had occurred one week earlier and that the 1997 stipulated judgment already had been modified. Londé nonetheless filed her motion to intervene. On December 9, 2015, another proposed intervenor, Jeffrey Ryan, also filed a motion to intervene pursuant to § 22a-19, alleging environmental harm. The trial court denied the motions to intervene as untimely.

Londé and Ryan (proposed intervenors) appealed to the Appellate Court, which reversed the judgment of the trial court. *Griswold* v. *Camputaro*, 177 Conn. App. 779, 802, 173 A.3d 959 (2017). The Appellate Court concluded that the trial court's expedited consideration of the parties' joint motion to open and modify the 1997 stipulated judgment "violated our rules of practice," "violated the [proposed] intervenors' right to timely,

[1] General Statutes § 22a-19 (a) (1) provides: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

accurate notice," and denied the proposed intervenors "their statutory right[s] to intervene pursuant to § 22a-19 (a)" and to "participate in the hearing on the stipulated settlement" pursuant to General Statutes § 8-8 (n). (Emphasis in original.) Id., 796, 799. We affirm the judgment of the Appellate Court.

The record reflects the following relevant facts and procedural history. Pasquale Camputaro owned and operated an asphalt manufacturing facility, American Sand & Gravel, Inc., located at 630 Plainfield Road in Jewett City. On December 2, 1994, the Planning and Zoning Commission of the Town of Griswold issued a cease and desist order directing the original defendants —Pasquale Camputaro and American Sand & Gravel, Inc.[2]—to discontinue the use and operation of the property as an asphalt manufacturing facility. The original defendants moved to dismiss the cease and desist order, but their motion was denied. The original defendants subsequently filed an appeal with the Griswold Zoning Board of Appeals, which refused to consider the appeal for lack of jurisdiction. They then filed an appeal in the Superior Court (administrative appeal).

In the meantime, on January 10, 1995, the plaintiff, the town of Griswold (town), filed a complaint and request for injunctive relief against the original defendants, alleging that the operation of the property as an asphalt manufacturing facility violated the town's zoning regulations (zoning enforcement action). The original defendants responded that their use of the property predated the zoning regulations and, therefore, was a valid preexisting nonconforming use. The trial court consolidated the original defendants' administrative appeal with the town's zoning enforcement action.

In 1997, Camputaro died, and his son and executor of his estate, Pasquale Camputaro, Jr., was substituted

[2] We hereinafter refer to Pasquale Camputaro and American Sand & Gravel, Inc., as the original defendants.

as a defendant. Soon thereafter, the parties reached a settlement, and the 1997 stipulated judgment was approved by the court on August 4, 1997.

Approximately seventeen years later, the town began to receive complaints that the operation of the asphalt manufacturing facility violated the 1997 stipulated judgment. Although there had been no activity in the case since the entry of the 1997 stipulated judgment, Camputaro, Jr., moved on October 28, 2015 to cite in American Industries, Inc., which is the operator of the asphalt manufacturing facility, as an additional party because it "has been an integral party responsible for the compliance with" the 1997 stipulated judgment. Camputaro, Jr., also filed a second motion to substitute himself as a defendant for Pasquale Camputaro.

On November 12, 2015, the parties filed a joint motion to open and modify the 1997 stipulated judgment. As pertinent to this appeal, the proposed modified judgment included changes to "the restrictions on the operation" of the asphalt manufacturing facility "[i]n recognition of the fact that governmental projects now require that paving occur during nighttime hours . . . ." Most significantly, the modified judgment permitted the asphalt manufacturing facility more than twice the amount of "extra operating hours" per year.[3] The clerk of the court scheduled all pending motions in the case to be heard at a short calendar hearing on November 23, 2015, and notice thereof was posted on the Judicial Branch website.

Unbeknownst to the public, however, the hearing date was moved up to November 16, 2015, after the defendants filed a caseflow request, with the consent of the town, asking the trial court to add the motion

[3] The 1997 stipulated judgment limited the number of "extra operating hours" to fifty hours per year. The 2015 modified judgment increased the number of "extra operating hours" to 128 hours per year.

"to [the] Monday, November 16, 2015 short calendar in order to expedite judicial approval of a stipulated judgment modification." The trial court granted the defendants' caseflow request and, at the rescheduled November 16, 2015 short calendar hearing, granted (1) the motion to substitute Pasquale Camputaro, Jr., for Pasquale Camputaro, (2) the motion to cite in American Industries, Inc., as a defendant, and (3) the parties' joint motion to open and modify the 1997 stipulated judgment. The trial court ordered that, on or before December 17, 2015, "the complaint be amended to state facts showing the interest of the plaintiff." Moreover, because the new defendant, American Industries, Inc., had not yet been named in the complaint or served with process, the court also ordered that American Industries, Inc., be summoned to appear as a defendant on or before the second day following December 29, 2015. An amended complaint and a return of service were filed on December 1, 2015.

In the meantime, on November 23, 2015—the date on which the parties' joint motion to open and modify the judgment originally was scheduled to be heard—proposed intervenor Londé filed a verified motion to intervene pursuant to § 22a-19. Approximately sixteen days later, on December 9, 2015, proposed intervenor Ryan also filed a verified motion to intervene pursuant to § 22a-19. The proposed intervenors both averred that they each owned property less than one quarter of one mile from the defendants' asphalt manufacturing facility and "the activities conducted and proposed by [the] defendants . . . are reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state . . . ." Camputaro, Jr., American Industries, Inc., and the town objected and jointly argued that the motions to intervene should be denied because, among other reasons, "[t]here is no matter pending

before this court, and, therefore, no proceeding in which to intervene to raise environmental issues, if there are any," in light of the entry of the modified judgment on November 16, 2015. The trial court agreed with the parties that "[t]he case was resolved by a stipulated judgment on November 16, 2015," and, therefore, denied the motions to intervene.

The Appellate Court reversed the trial court's denial of the motions to intervene. See *Griswold* v. *Camputaro*, supra, 177 Conn. App. 802. The Appellate Court reasoned that the expedited consideration of the parties' joint motion to open and modify the judgment violated Practice Book § 11-15, which provides in relevant part that short calendar matters may not be "assigned unless filed *at least five days* before the opening of court on the short calendar day. . . ." (Emphasis added.) "By granting the defendants' request that the matter be written on the November 16, 2015 short calendar," only four days after the filing of the parties' joint motion to open and modify, the Appellate Court determined, the "[trial] court violated our rules of practice." *Griswold* v. *Camputaro*, supra, 177 Conn. App. 795.

The Appellate Court also held that the expedited consideration of the parties' joint motion to open and modify the judgment "violated the [proposed] intervenors' right to timely, *accurate* notice" of the proceedings. (Emphasis in original.) Id., 796. The Appellate Court pointed out that § 22a-19 provides prospective intervenors with "a right to intervene . . . for the purpose of raising environmental issues," but, despite this statutory right of intervention, "no notice" was provided that the joint motion to open and modify was "to be heard on November 16, 2015, rather than on November 23, 2015." Id., 797. "Without accurate notice of the date the motion to open and modify the stipulated judgment was to be heard, the [proposed] intervenors were deprived of the right to file motions to intervene in a pending

action." Id., 798. Therefore, the "the public nature of the hearing was not adequate for the purposes of § 22a-19 (a)." Id.

Lastly, the Appellate Court held that the "almost instantaneous" "opening and closing of the action" on the same day, with no notice to the public; id., 797–98; denied the proposed intervenors of "their statutory right[s] to intervene pursuant to § 22a-19 (a)"; id., 796; and to "participate in the hearing on the stipulated settlement" pursuant to § 8-8 (n). Id., 799. We granted the joint petition of Camputaro, Jr., American Industries, Inc., and the town for certification to appeal from the judgment of the Appellate Court. See *Griswold* v. *Camputaro*, 328 Conn. 904, 177 A.3d 1159 (2018).

We agree with the Appellate Court's thorough and well reasoned opinion and adopt it as our own, with one exception. We write separately to clarify that, although Practice Book § 11-15 provides that "[n]o [short calendar] matters shall be . . . assigned unless filed at least five days before the opening of court on the short calendar day," this default rule is subject to the discretion of the judicial authority. See Practice Book § 11-13 (a) ("[u]nless otherwise provided . . . by the judicial authority . . . all motions and objections to requests when practicable, and all issues of law must be placed on the short calendar list"). Practice Book § 11-13 (a) reflects the well established rule that the trial court has broad discretion in matters of case management, including the scheduling of short calendar motions. See, e.g., *Krevis* v. *Bridgeport*, 262 Conn. 813, 818–19, 817 A.2d 628 (2003) (noting that "[t]he case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases" and that trial courts have "wide latitude" to "manage cases" consistent with "judicial economy and justice"); *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 12, 961 A.2d

1016 (2009) (noting that trial court has "broad discretion" in "matters involving judicial economy, docket management [and control of] courtroom proceedings" [internal quotation marks omitted]). Thus, the trial court generally has broad discretion to schedule a short calendar motion for a hearing less than five days before the opening of court on the short calendar day, provided the expedited consideration of the motion affords the parties, and others who may have a legal interest in the proceeding, with "fair notice" and "sufficient time to prepare themselves upon the issue." (Internal quotation marks omitted.) *Byars* v. *FedEx Ground Package System, Inc.*, 101 Conn. App. 44, 49, 920 A.2d 352 (2007) (explaining purpose of five day rule in Practice Book § 11-15); see also *Udolf* v. *West Hartford Spirit Shop, Inc.*, 20 Conn. App. 733, 736, 570 A.2d 240 (1990) (noting that predecessor to Practice Book § 11-13 "allows for the expeditious, alternative, discretionary hearing of motions").

In the present case, however, the trial court's discretion to reschedule the short calendar hearing on the parties' joint motion to open and modify the 1997 judgment was circumscribed by §§ 8-8 (n) and 22a-19, which provide "environmental intervenors [with] standing to raise environmental concerns regarding settlements of administrative appeals" and permit such intervenors to "block the approval of settlements on that basis." (Internal quotation marks omitted.) *Griswold* v. *Camputaro*, supra, 177 Conn. App. 799. These statutes require "timely, *accurate* notice" to nonparty members of the general public who may wish to exercise their statutory right to intervene, including accurate notice of the date on which the proposed hearing is scheduled to occur. (Emphasis in original.) Id., 796. Here, the trial court's rescheduling of the statutorily mandated hearing in response to the defendants' caseflow request and its "almost instantaneous" opening and closing of the 1997

stipulated judgment are "hardly the sort of ['fair notice' or] 'hearing' our law contemplates." Id., 798. Accordingly, with the exception of the Appellate Court's analysis of Practice Book § 11-15, we adopt the Appellate Court's thorough and well reasoned opinion as a proper statement of the issues and the applicable law concerning those issues. See, e.g., *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 326 Conn. 55, 62, 161 A.3d 545 (2017); *Recall Total Information Management, Inc. v. Federal Ins. Co.*, 317 Conn. 46, 51, 115 A.3d 458 (2015).

The judgment of the Appellate Court is affirmed.

REDDING LIFE CARE, LLC *v.* TOWN OF REDDING (SC 20054)

Robinson, C. J., and Palmer, D'Auria, Ecker and Lavine, Js.

Syllabus

Pursuant to this court's decision in *State* v. *Curcio* (191 Conn. 27), an interlocutory court order or ruling may be immediately appealable if the order or ruling either terminates a separate and distinct proceeding, or so concludes the rights of the parties that further proceedings cannot affect them.

The plaintiff in error, S, filed a writ of error, seeking review of the trial court's denial of his motion for a protective order in connection with the issuance of a subpoena compelling him to appear at a deposition. S had appraised certain real property that was the subject of a tax appeal. The appraisals had been performed prior to and independently of the tax appeal, to which S was not a party. During the pendency of the tax appeal, the defendant in error, the town of Redding, which was defending the tax appeal, served S with a subpoena compelling him to appear at a deposition in Florida, where S resided at that time. S filed the motion for a protective order in the trial court, seeking to prohibit the taking of the deposition. In support of his motion, S contended that he had not been retained by either party in the tax appeal, did not have any relevant knowledge, and could not be compelled to testify as an expert because Connecticut law prohibited the compulsion of testimony from an unretained expert. In denying S's motion, the trial court ordered the deposition to proceed. After S filed his writ of error with this court, the town filed a motion to dismiss the writ of error for lack of subject

matter jurisdiction on the ground that the trial court's order was not a final judgment. This court then transferred the writ to the Appellate Court, which denied the town's motion to dismiss. The Appellate Court ultimately granted the writ of error, basing its decision on the creation of a new, qualified testimonial privilege for unretained expert witnesses. The Appellate Court remanded the case to the trial court with direction to vacate its order denying the motion for a protective order and for a determination as to whether S's proposed deposition testimony was barred under that privilege. The town thereafter filed a petition for certification to appeal from the Appellate Court's judgment, which this court granted. *Held*:

1. Contrary to S's claim, this court had subject matter jurisdiction to grant the town's petition for certification to appeal from the Appellate Court's judgment on the writ of error: subsections (a) and (b) of the statute (§ 51-199) governing the jurisdiction of this court clearly and explicitly grant to this court final and conclusive jurisdiction over writs of error, and, although the plain language of subsection (c) of § 51-199 expands the jurisdiction of the Appellate Court to include writs of error upon transfer from this court, no language in that subsection expressly divests this court of final jurisdiction over writs of error or remotely suggests that this court, upon transferring a writ of error to the Appellate Court, loses its authority to make the final determination concerning a writ of error; moreover, an appeal, for purposes of the statute (§ 51-197f) governing petitions for certification to appeal, clearly and unambiguously encompasses review of a lower court's decision that is tantamount to an appeal from a final judgment, and a judgment on a writ of error that has been transferred from this court to the Appellate Court is tantamount to an appeal, as the language in § 51-199 strongly indicates that the legislature did not intend for the Appellate Court to be the court of last resort with respect to the review of trial court orders that give rise to writs of error, and writs of error and appeals have many features in common, as both must be taken from final judgments, must conform to the appellate rules of practice, and are prosecuted, briefed and argued in the same manner; furthermore, although an appeal is the means by which a party may seek review of a final judgment and a writ of error is the means by which a nonparty may seek such review, there is no distinction between a writ of error and an appeal that justifies treating them differently for purposes of § 51-197f.
2. The Appellate Court lacked subject matter jurisdiction over the writ of error because writs of error may be brought only from final judgments and the trial court's interlocutory order directing the deposition of S to proceed did not constitute an appealable final judgment under *Curcio*: the trial court's discovery order did not terminate a separate and distinct proceeding because that order was not sufficiently definite, specific or comprehensive, as the court, in issuing its order, did not rule on any specific questions the parties would ask of S at the deposition, and,

insofar as those specific questions were unknown, it could not be determined whether any privilege would apply to S's prospective deposition testimony; moreover, S could not prevail on his claim that there could be no further proceedings before the trial court that could affect him, as he could be held in contempt by a Connecticut court for failing to comply with the subpoena because he sought a protective order from the Connecticut Superior Court and the discovery order was the byproduct of his having sought aid from the Connecticut court system, and requiring S to appeal from a contempt order did not violate justice or public policy but, rather, ensured that there would be a live controversy in which his legally protected interest has been adversely affected; accordingly, the Appellate Court's judgment was reversed and the case was remanded with direction to dismiss S's writ of error.

Argued November 14, 2018—officially released May 21, 2019

Procedural History

Writ of error from an order of the Superior Court in the judicial district of New Britain, *Schuman*, *J.*, denying a motion for a protective order filed by the plaintiff in error, brought to this court, which transferred the matter to the Appellate Court, *DiPentima*, *C. J.*, and *Prescott* and *Beach*, *Js.*; judgment granting the writ of error and remanding the case to the trial court for further proceedings, from which the defendant in error, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Elliott B. Pollack, with whom were *Michael J. Marafito* and, on the brief, *Johanna S. Katz*, for the defendant in error (town of Redding).

Proloy K. Das, with whom were *Robert E. Kaelin* and, on the brief, *Melissa A. Federico*, for the plaintiff in error (David R. Salinas).

James J. Healy filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Michael R. McPherson filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Roderick R. Williams, deputy corporation counsel, filed a brief for the city of New Haven as amicus curiae.

D'AURIA, J. In this certified appeal, we are asked to determine whether there exists either an absolute or qualified testimonial privilege for an unretained expert who previously has rendered an opinion relevant to the issues in a pending case. The defendant in error, the town of Redding (town), appeals from the judgment of the Appellate Court, which granted the writ of error filed by the plaintiff in error, David R. Salinas. In granting the writ, the Appellate Court vacated the trial court's order denying his motion for a protective order that sought to prohibit the town from taking his deposition and ordered the trial court to determine whether Salinas' testimony was privileged under the new, qualified unretained expert privilege that the Appellate Court announced. To reach this issue, however, this court must overcome two jurisdictional hurdles: (1) whether this court has jurisdiction to grant certification to appeal from the Appellate Court's determination of a writ of error, and (2) whether the trial court's ruling constituted an appealable final judgment. Although we determine that we have jurisdiction to grant certification, we nevertheless determine that there was no appealable final judgment.[1] Accordingly, we reverse the judgment of the Appellate Court and direct that court on remand to dismiss the writ of error for lack of a final judgment.

The following undisputed facts and procedural history are relevant to our review of these claims. In October, 2012, the town assessed real property owned by Redding Life Care, LLC (Redding Life). As a result of that assessment, Redding Life initiated an action against the town to challenge the assessed value of the property

[1] Because the writ of error should have been dismissed for lack of a final judgment, we do not reach and are not prepared to recognize whether a qualified unretained expert privilege exists. See part II A of this opinion.

(tax appeal). Prior to the initiation of that action, in 2010 and 2011, Salinas had completed two appraisals of that property on behalf of CapitalSource Bank (bank), a nonparty to the tax appeal, as part of the underwriting process for extending a loan to Redding Life in 2011. In July, 2014, after learning about and obtaining copies of these appraisals through the pretrial discovery process, the town filed a motion for a commission to depose Salinas, who resided in Florida. Redding Life and the bank objected. The trial court, *Hon. Arnold W. Aronson*, judge trial referee, granted the town's motion.

Subsequently, the town served Salinas with a subpoena compelling him to appear at a deposition scheduled for January, 2015, in Florida. Salinas filed a motion for a protective order in the Connecticut Superior Court seeking to prohibit the town from taking his deposition. He argued that he had not been retained in the tax appeal, did not have any relevant knowledge, and could not be compelled to testify as an expert because Connecticut law "prohibit[s] the compulsion of such unretained expert testimony." The town objected.

The court denied Salinas' motion and ordered the following: "The deposition shall proceed. The town shall pay the witness his fees and expenses as provided in Practice Book § 13-4 (c) (2). The town shall enter into any reasonable protective order proposed by the witness or the other parties designed to limit the use of the information obtained in the deposition to this case only." Salinas then filed a writ of error with this court seeking appellate review of the trial court's denial of his motion for a protective order. Salinas subsequently filed a motion seeking the following articulation: "Did the trial court conclude that . . . Salinas can be compelled under Connecticut law to provide expert witness testimony against his will? If so, what is the basis for that conclusion?" The court responded: "The answer to the first question is no. It was unnecessary to reach

that conclusion because [Salinas] had already authored appraisals that contained his opinions."

The town thereafter filed a motion to dismiss the writ of error for lack of subject matter jurisdiction, arguing that the trial court's discovery order did not constitute an appealable final judgment. This court transferred the matter to the Appellate Court pursuant to General Statutes § 51-199 (c), and that court denied the town's motion to dismiss. *Redding Life Care, LLC* v. *Redding*, 174 Conn. App. 193, 196, 165 A.3d 180 (2017).

The Appellate Court granted the writ of error and remanded the case to the trial court with direction to vacate the order denying the plaintiff in error's motion for a protective order. Id., 206. The Appellate Court based its decision on its creation of a new, qualified unretained expert privilege that it announced. Id., 205. In defining the parameters of this privilege, the Appellate Court explained that, on remand, the trial court "should, in determining whether to grant Salinas' motion for a protective order because his testimony is appropriately barred by the qualified unretained expert privilege, consider (1) whether, under the circumstances, he reasonably should have expected that, in the normal course of events, he would be called upon to provide opinion testimony in subsequent litigation; and (2) whether there exists a compelling need for his opinion testimony in this case. Additional considerations may be relevant to the analysis, including, for example, whether he was retained by a party with an eye to the present dispute." Id., 205–206.

The town filed a petition for certification to appeal, which we granted, limited to the following issues: "1. Does Connecticut recognize a qualified expert testimonial privilege in pretrial discovery (and at trial) permitting an unretained expert to withhold testimony regarding an opinion that the expert has previously

rendered and documented in a written report? 2. If Connecticut recognizes this privilege, what is its scope? 3. Does the Supreme Court have jurisdiction to grant certification to appeal from the Appellate Court's final determination of a writ of error?" *Redding Life Care, LLC* v. *Redding*, 327 Conn. 991, 992, 175 A.3d 1247 (2018). Following oral argument, however, this court requested that the parties file supplemental briefs on the issue the Appellate Court had previously passed upon: whether there was an appealable final judgment. Additional facts will be set forth as necessary.

I

Initially, we must resolve Salinas' challenge to this court's subject matter jurisdiction to grant certification to appeal from the Appellate Court's judgment on his writ of error, which was originally filed with this court but transferred to the Appellate Court pursuant to § 51-199 (c). We conclude that we have such jurisdiction.

Salinas argues that by transferring the case to the Appellate Court, this court lost jurisdiction over his writ of error. Specifically, he argues that, in the absence of a transfer of the writ of error back to this court, § 51-199 (c) provides no procedure by which this court may later review the Appellate Court's judgment on a transferred writ of error.[2] He further contends that even if this court retains jurisdiction over his transferred writ of error, it lacks jurisdiction to grant certification to appeal pursuant to General Statutes § 51-197f because that statute applies only to appeals, not writs of error. The town counters that, pursuant to § 51-199 (a), this court has "final and conclusive" jurisdiction over all

[2] Salinas suggests that this court may review the Appellate Court's decision on a transferred writ of error only if a party files a motion for reconsideration with the Appellate Court in tandem with a motion to transfer to this court, or by seeking certification to file a public interest appeal under General Statutes § 52-265a.

writs of error, even those transferred to the Appellate Court, and that we should interpret the term "appeal" in § 51-197f broadly to encompass the judgment of the Appellate Court on a transferred writ of error. We agree with the town.

"It is axiomatic that, except insofar as the constitution bestows upon this court jurisdiction to hear certain cases . . . the subject matter jurisdiction of the Appellate Court and of this court is governed by statute." (Internal quotation marks omitted.) *Banks* v. *Thomas*, 241 Conn. 569, 582, 698 A.2d 268 (1997); see also *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983) ("The right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met."). In the present case, whether this court may grant certification to appeal from a judgment of the Appellate Court on a transferred writ of error requires us to analyze the interplay between two statutes—§ 51-197f, regarding certification to appeal and § 51-199, regarding the Supreme Court's authority over writs of error.

"When construing a statute . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Callaghan* v. *Car Parts International, LLC*, 329 Conn. 564, 570–71, 188 A.3d 691 (2018). In determining whether the statutory language is plain and unambiguous, "words and phrases [must] be construed according to the commonly approved usage of the language . . . . General Statutes § 1-1 (a). We ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage." (Internal quotation marks omitted.)

State v. *Gelormino*, 291 Conn. 373, 380, 968 A.2d 379 (2009). Additionally, we must construe the statute in conformity with prior case law interpreting it. See *State* v. *Moreno-Hernandez*, 317 Conn. 292, 299, 118 A.3d 26 (2015) ("[i]n interpreting the [statutory] language . . . [we] are bound by our previous judicial interpretations of the language and the purpose of the statute" [internal quotation marks omitted]). If, however, after examining the ordinary meaning of the words used in the statute and considering their meaning in light of prior cases interpreting the statute, "the statutory text at issue is susceptible to more than one plausible interpretation, we may appropriately consider extratextual evidence." (Internal quotation marks omitted.) *Callaghan* v. *Car Parts International, LLC*, supra, 571.

First, we must determine whether this court loses jurisdiction over a transferred writ of error in the absence of a motion to transfer it back to this court after the Appellate Court has issued a decision on the writ of error and the matter no longer is pending before the Appellate Court. We conclude that we have not lost final jurisdiction.

Section 51-199 contains four subsections, only three of which are relevant to our analysis. Subsection (a) provides that "[t]he Supreme Court shall have *final and conclusive jurisdiction* of all matters brought before it according to law, and may carry into execution all its judgments and decrees and institute rules of practice and procedure as to matters before it." (Emphasis added.) Subsection (b) then specifies which matters must be brought directly to the Supreme Court according to law, including writs of error. See General Statutes § 51-199 (b) ("[t]he following matters shall be taken directly to the Supreme Court . . . writs of error"). This statutory provision codifies the historical and well established common-law rule that "this court [has] common-law jurisdiction over writs of error

. . . ." *State* v. *Skipwith*, 326 Conn. 512, 521, 165 A.3d 1211 (2017); see also *State* v. *Assuntino*, 173 Conn. 104, 110–12, 376 A.2d 1091 (1977) ("It is clear that the common-law writ of error was adopted by Connecticut as part of its own common law. No statute has expressly abrogated that law. . . . [T]he writ, at common law, lies to this court from a judgment of the Court of Common Pleas." [Citations omitted.]). Thus, when a writ of error is filed with this court—as this one was—subsections (a) and (b) of § 51-199 together clearly and explicitly grant this court "final and conclusive jurisdiction" over it.

Finally, subsection (c) of § 51-199 permits the Supreme Court to transfer "causes," including writs of error, from itself to the Appellate Court and, conversely, from the Appellate Court to itself: "The Supreme Court may transfer to itself a cause in the Appellate Court. . . . [T]he Supreme Court may transfer a cause or class of causes from itself . . . to the Appellate Court. The court to which a cause is transferred has jurisdiction." See *State* v. *Skipwith*, supra, 326 Conn. 515 n.3 (including writ of error as cause that may be transferred from Supreme Court to Appellate Court under § 51-199 [c]); *Maurice* v. *Chester Housing Associates Ltd. Partnership*, 188 Conn. App. 21, 24 n.5, 204 A.3d 71 (2019) (same). This plain and unambiguous language makes clear that subsection (c) expands the jurisdiction of the Appellate Court; it does not limit the jurisdiction of the Supreme Court.

Specifically, subsection (b) of § 51-199 requires that writs of error be brought directly to the Supreme Court, and, thus, the Appellate Court normally lacks jurisdiction over them. Subsection (c) of § 51-199, however, extends the Appellate Court's jurisdiction to hear and decide writs of error if the Supreme Court has transferred a writ of error to the Appellate Court. But even though the plain language of subsection (c) expressly

expands the jurisdiction of the Appellate Court to include writs of error upon transfer, no language expressly divests this court of the "final jurisdiction" over writs of error that subsection (a) of § 51-199 confers. See *Callaghan* v. *Car Parts International, LLC*, supra, 329 Conn. 571 (we must interpret text of statute itself in context of its relationship to other statutes); see also *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 778–79, 900 A.2d 1 (2006) (to extent that statute limits or deprives court of jurisdiction, legislature's intent to do so must be explicitly expressed). "[I]n the absence of any constitutional provision or statute depriving this court of its common-law jurisdiction over writs of error, this court has jurisdiction . . . ." *State* v. *Skipwith*, supra, 326 Conn. 521.[3] Nothing in subsection (c) remotely suggests that by transferring a writ of error to the Appellate Court, this court loses its authority to make the final determination over that writ of error.[4]

[3] Because we determine that in enacting subsection (c) of § 51-199, the legislature did not intend to limit this court's final jurisdiction over writs of error, "[w]e express no opinion here as to whether such a statute would pass muster under the state constitution." *State* v. *Skipwith*, supra, 326 Conn. 521 n.11.

[4] To the extent that § 51-199 is ambiguous, the legislative history of subsection (c) makes clear that the legislature did not intend to divest this court of final jurisdiction over writs of error. The public act that created subsection (c) was also the act by which the legislature implemented the constitutional amendment creating the then new Appellate Court. See Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (Spec. Sess. P.A. 83-29). During the legislative hearings on Spec. Sess. P.A. 83-29, it was made clear that the purpose for creating the Appellate Court was to lessen the burden of the Supreme Court's caseload, but that the Supreme Court retained jurisdiction to exercise discretion to decide which matters to hear. See 26 S. Proc., Pt. 16, 1983 Spec. Sess., p. 796, remarks of Senator Howard T. Owens, Jr. ("The State Supreme Court will retain jurisdiction in [c]lass A felonies, review the death sentences, election or primary disputes, matters involving substantial public interest and reprimands or censure of judges and [over] areas that they should reserve exclusive jurisdiction. In other matters, the matters will go to the Appellate Court or the Supreme Court who will exercise jurisdiction to keep them."); 26 H.R. Proc., Pt. 31, 1983 Spec. Sess., p. 267, remarks of Representative Richard D. Tulisano ("[the bill] also would enable and allow

Although it is clear that § 51-199 does not divest this court of final jurisdiction over transferred writs of error, the means by which a plaintiff in error or a defendant in error may seek review of the Appellate Court's judgment on a transferred writ of error is perhaps less clear. Section 51-199 itself provides no guidance.

Section 51-197f, however, governs petitions for certification to appeal: "Upon final determination of *any appeal* by the Appellate Court, there shall be no right to further review except the Supreme Court shall have the power to certify cases for its review upon petition by an aggrieved party or by the appellate panel which heard the matter." (Emphasis added.) Our General Statutes do not define the term "appeal." Turning to the dictionary definition of the term, we observe that "appeal" is defined broadly. See, e.g., Black's Law Dictionary (10th Ed. 2014) p. 117 (defining "appeal" as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal"); see also Ballentine's Law Dictionary (3d Ed. 1969) p. 82 (defining appeal as "[a]ny form of appellate review other than by one of the extraordinary writs").[5] This broad definition is not pre-

us to loosen up the backlog in the Supreme Court giving [it] an opportunity to address issues of statewide importance and develop statewide . . . interpretations of the law in giving detailed and deep analysis to those cases which are of importance to the general public").

[5] A writ of error is not an extraordinary writ. See Black's Law Dictionary, supra, p. 1845 (An "extraordinary writ" is defined as "[a] writ issued by a court exercising unusual or discretionary powers. Examples are certiorari, habeas corpus, mandamus, and prohibition."); *Ex parte Harding*, 219 U.S. 363, 376, 31 S. Ct. 324, 55 L. Ed. 252 (1911) (establishing that writs of error are different from extraordinary writs by holding that extraordinary writs were not available where appeal or writ of error would lie); 33 A.L.R.3d 448, 462 n.3, § 1 [a] (1970) (defining "appealability" as "the aptness or fitness of a case for review by ordinary appellate procedures, including appeal and writ of error but not including extraordinary writs such as certiorari, habeas corpus, mandamus and prohibition"); see also *Clark* v. *Ewing*, 196 S.W.2d 53, 55 (Tex. Civ. App. 1946) ("Neither the writ of prohibition nor any other extraordinary writ will be granted where there is an adequate remedy pro-

cise as to whether it includes writs of error. It is plausible, however, for this broad definition of the term "appeal," comprising any form of appellate review, to include writs of error, which clearly constitute a form of appellate review and are defined similarly as an appeal. See Ballentine's Law Dictionary, supra, p. 1380 (defining "writ of error" as "[a] commission by which the judges of one court are authorized to examine a record on which a judgment was given in another court, and affirm or reverse that judgment according to law"); see also *Chipman* v. *Waterbury*, 59 Conn. 496, 497, 22 A. 289 (1890) (same).

Additionally, although our rules of practice may use the term "appeal" to refer to appeals by parties from final judgments; see Practice Book § 61-1; when previously interpreting the scope of the term "appeal" in relation to § 51-197f, we have construed the term broadly and have held that this court may grant certification to appeal pursuant to § 51-197f to challenge orders for which appellate review would be "tantamount" to an appeal. See *In re Judicial Inquiry No. 2005-02*, 293 Conn. 247, 258, 977 A.2d 166 (2009). Thus, in light of the commonly approved usage of the term "appeal" and prior cases interpreting § 51-197f, the term "appeal" for purposes of § 51-197f clearly and unambiguously is broadly defined to encompass any review of a lower court's decision by a higher court that is "tantamount" to an appeal brought by a party from a final judgment. To determine whether a proceeding is tantamount to an appeal, this court has focused on whether the legislature intended this court or another court to be the court of last resort.

For example, in *In re Judicial Inquiry No. 2005-02*, supra, 293 Conn. 258–59, this court held that a petition

vided by law, such as an appeal or writ of error. Where these ordinary remedies are complete and adequate, it is consistently held that the extraordinary jurisdiction of an appellate court cannot be invoked.").

for review of a three judge panel determination regarding statutory authorization to disclose the state's application for a grand jury investigation under General Statutes § 54-47g was "tantamount to an 'appeal' within the meaning of § 51-197f." In reaching this holding, we recognized that the language of § 54-47g (a) contemplated an appeal from such a panel's ruling: " '[a]ny person aggrieved by an order of the panel shall have the right to appeal such order by filing a petition for review with the Appellate Court . . . .' " (Emphasis omitted.) Id., 259, quoting General Statutes § 54-47g (a). Although a petition for review perhaps does not fall under a narrow definition of the term "appeal," we concluded that the language in § 54-47g was "a strong indication that the legislature did not intend for the Appellate Court to be the court of last resort with respect to the review of grand jury panel orders." *In re Judicial Inquiry No. 2005-02*, supra, 259.

Analogously, although § 51-199 does not use the term "appeal" in relation to the mechanism by which this court may review the Appellate Court's judgment on a writ of error, a writ of error also is "tantamount to an appeal" for two reasons. First, like § 54-47g in *In re Judicial Inquiry No. 2005-02*, the language used in § 51-199 provides a strong indication that the legislature did not intend for the Appellate Court to be the court of last resort with respect to the review of trial court orders that give rise to writs of error. As discussed previously, although the Supreme Court may transfer writs of error to the Appellate Court, § 51-199 (a) specifically confers on the Supreme Court final and conclusive jurisdiction over writs of error. Nothing in subsection (c) of § 51-199 suggests that the legislature intended for the Supreme Court to lose this authority upon transferring a writ of error. Rather, we read the statutes as more logically manifesting a legislative intent for the Supreme Court to be the court of last resort in these

matters. Thus, as this court is the court of last resort in this state, it would be an illogical and bizarre result if the transfer of a writ of error to the Appellate Court divested this court of final jurisdiction in the absence of an express intent by the legislature to do so. See *Raftopol* v. *Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011) ("it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results" [internal quotation marks omitted]).[6]

Second, writs of error and appeals share many features in common. The writ of error was the predecessor to the appeal and, in many ways, was the first form of appeal: "Prior to the enactment of the appeals statute in 1882, chapter 50 of the 1882 Public Acts, there were no appeals as of right in this state. . . . The writ of error is the common-law method, and formerly the only method in this [s]tate, of carrying up a cause from an inferior to a higher court for the revision of questions of law." (Citations omitted; internal quotation marks omitted.) *Haylett* v. *Commission on Human Rights & Opportunities*, 207 Conn. 547, 550, 541 A.2d 494 (1988). "The appeal . . . simply performs the office of the old . . . writ of error . . . ." *Schlesinger* v. *Chapman*, 52 Conn. 271, 274 (1885). A writ of error is, thus, "the functional equivalent of an ordinary appeal." *Simms* v. *Warden*, 229 Conn. 178, 184, 640 A.2d 601 (1994).

[6] Notably, this court previously has granted certification to appeal from judgments of the Appellate Court on transferred writs of error pursuant to § 51-197f. See *State* v. *Skipwith*, supra, 326 Conn. 516; *Daniels* v. *Alander*, 268 Conn. 320, 321–22, 844 A.2d 182 (2004). The cases Salinas cites in support of his argument that a writ of error is not an appeal for purposes of § 51-197f are distinguishable in that they either do not involve a writ of error or another kind of order tantamount to an appeal; see *State* v. *Ayala*, 222 Conn. 331, 338–41, 610 A.2d 1162 (1992); or the statute governing the order at issue did not intend for the Supreme Court to be the court of last resort in that matter. See *Grieco* v. *Zoning Commission*, 226 Conn. 230, 231–33, 627 A.2d 432 (1993).

It is true that appeals and writs of error are procedurally distinct in how they are filed. Compare Practice Book §§ 63-1 and 63-3 with Practice Book §§ 72-1 through 72-4. Like appeals, however, writs of error must be taken from final judgments; Practice Book § 72-1 (a); and must conform to the rules of practice for appeals. See Practice Book § 72-4. After they have been filed, writs of error are therefore prosecuted, briefed, and argued in the same manner as appeals.

A primary distinction between appeals and writs of error is that writs of error fill a gap left by appeals by allowing nonparties aggrieved by a final judgment to obtain review. See *Bergeron* v. *Mackler*, 225 Conn. 391, 391–92 n.1, 623 A.2d 489 (1993) (noting aggrieved nonparty cannot appeal under General Statutes § 52-263 but must instead file writ of error to obtain review of final judgment); see also General Statutes § 52-263 (only party aggrieved by final judgment of Superior Court may appeal). Rather than setting writs of error apart from appeals, however, this distinction confirms their resemblance. A writ of error is the means by which a nonparty may seek review of a final judgment. An appeal is the means by which a party may seek review of a final judgment. There is no distinction between a writ of error and an appeal that justifies treating them differently for purposes of § 51-197f.

We therefore conclude that the Appellate Court's judgment on a transferred writ of error is tantamount to an appeal for purposes of § 51-197f. Accordingly, this court has jurisdiction to grant certification to appeal from the Appellate Court's judgment on Salinas' transferred writ of error.

II

Having determined that this court has jurisdiction to grant certification to appeal from the Appellate Court's judgment on a transferred writ of error, we turn to

whether, nevertheless, the Appellate Court lacked subject matter jurisdiction due to a lack of an appealable final judgment. We conclude that there was no final judgment, and, thus, the writ of error must be dismissed for lack of subject matter jurisdiction.

The town argues that the Appellate Court did not have subject matter jurisdiction over Salinas' writ of error because the trial court's interlocutory discovery order was not an appealable final judgment and did not satisfy either prong of the test set forth in *State* v. *Curcio*, supra, 191 Conn. 31,[7] for obtaining appellate review. See Practice Book § 72-1 (a) ("[w]rits of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Supreme Court"). Specifically, it argues that the trial court's denial of Salinas' motion for a protective order did not terminate a separate and distinct proceeding because the information sought will directly impact and is pertinent to the trial court's ability to resolve the underlying case. Additionally, relying on this court's decision in *Niro* v. *Niro*, 314 Conn. 62, 67–68, 100 A.3d 801 (2014), the town contends that there would be no irreparable harm to Salinas because he will be able to appeal from the trial court's order if he chooses to stand in contempt for violating it. Finally, the town argues that no public policy concerns in this case justify permitting Salinas to appeal from an interlocutory discovery order.

In response, Salinas argues that there was an appealable final judgment because the denial of his motion for a protective order terminated a separate and distinct proceeding. Specifically, he argues that (1) there was a clear and definite discovery order that constituted a

[7] Under *State* v. *Curcio*, supra, 191 Conn. 31, an interlocutory order or ruling may be immediately appealable if the order or ruling "(1) terminates a separate and distinct proceeding or (2) so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Niro* v. *Niro*, 314 Conn. 62, 68, 100 A.3d 801 (2014).

final and comprehensive ruling from which there can be no further proceedings before the trial court that affect him,[8] and (2) he is a nonparty who is not involved in the underlying lawsuit in any way. He further argues that the discovery order is not related to or intertwined with the underlying case because the trial court does not require the information sought to resolve the underlying case. In particular, he argues that his appraisal reports pertain to the value of the property in 2010 and 2011, whereas the underlying case centers on the value of the property in 2012. We disagree with Salinas that the trial court's ruling was immediately appealable.

The following additional facts are relevant to the resolution of this issue. During the course of pretrial discovery, the town obtained two appraisal reports commissioned by the bank and authored by Salinas containing his opinions regarding the value of the property as of October 6, 2010, and July 12, 2011. Because the expert appraisal report independently obtained by Redding Life contained property values drastically lower than the property values listed in Salinas' reports, the town sought to depose Salinas to understand the difference in values. The town filed a motion for a commission to take an out-of-state deposition of Salinas. In that motion, the town listed Salinas' qualifications as an appraiser, stated that he had appraised the property in 2010 and 2011 at values substantially in excess of the value stated by the town's assessor, and sought "to depose . . . Salinas with respect to his determination of [the] value[s] in these appraisals."

Although the trial court granted the motion over Salinas' objection, no deposition ever has taken place.

[8] Salinas argues only that there is a final judgment under the first prong of *Curcio*, i.e., that the discovery order terminated a separate and distinct proceeding. His arguments, however, combine and implicate both prongs of *Curcio*. Accordingly, to the extent possible, we have separated his arguments between the two prongs as appropriate.

There is therefore no record of what questions the town and Redding Life would have asked Salinas. Although it can be surmised from the town's motion for a commission that the town would have asked Salinas about the opinions contained in his reports, we do not know what specific questions would be posed; nor do we know what questions Redding Life, which also would be present at and participating in the deposition, would ask Salinas—questions regarding his preexisting opinions, questions regarding new opinions, or merely questions of fact as a fact based witness who had viewed the property in 2010 and 2011.[9]

With this factual context in mind, we turn to the legal principles that guide our analysis. "Practice Book § 72-1 (a) provides: 'Writs of error for errors in matters of law only may be brought from *a final judgment of the* [*S*]*uperior* [*C*]*ourt* to the [S]upreme [C]ourt in the following cases: (1) a decision binding on an aggrieved nonparty . . . and (4) as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the

[9] At a hearing before the trial court on the bank's objection to the town's notice of deposition, the town represented that at the deposition, it intended to have Salinas authenticate his reports and, beyond that, would ask questions concerning the reports and the property's market value, although counsel was not certain of the specific questions he would pose because he had not yet prepared for the deposition. Although both the town and Redding Life represented that Redding Life would cross-examine Salinas at the deposition, Redding Life could not specify the questions it intended to ask. It was after this hearing that the trial court ordered the deposition to proceed.

Similarly, at oral argument before this court, although counsel for the town stated that the town's primary purpose for deposing Salinas was to authenticate and provide a foundation for his reports, counsel also stated that the town wanted Salinas to answer any questions the parties had about the reports and to be available for cross-examination by Redding Life. Counsel for the town did not state on the record what specific questions he would ask Salinas but did explain that the town had questions regarding foundation, methodology, and the market value of the property. He conceded that Redding Life might pose questions that would challenge Salinas' opinions and go beyond questions necessary to authenticate the reports.

usages and principles of law.' . . . The lack of a final judgment deprives this court of subject matter jurisdiction over a writ of error." (Emphasis in original.) *McConnell* v. *McConnell*, 316 Conn. 504, 510, 113 A.3d 64 (2015). Generally, "an order issued upon a motion for discovery ordinarily is not appealable because it does not constitute a final judgment, at least in civil actions." *Abreu* v. *Leone*, 291 Conn. 332, 344, 968 A.2d 385 (2009). Typically, a nonparty must be found in contempt of a discovery order before it may appeal that ruling. See id., 346–47.

Nevertheless, appellate courts "may deem interlocutory orders or rulings," including discovery rulings, "to have the attributes of a final judgment if they fit within either of the two prongs of the test set forth in *State* v. *Curcio*, [supra, 191 Conn. 31]. . . . Under *Curcio* . . . interlocutory orders are immediately appealable if the order or ruling (1) terminates a separate and distinct proceeding or (2) so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Niro* v. *Niro*, supra, 314 Conn. 67–68.

In the present case, it is undisputed that the trial court's order denying Salinas' motion for a protective order was an interlocutory ruling that normally is not appealable. Accordingly, the Appellate Court had jurisdiction only if the order satisfies the first or second prong of *Curcio*. It satisfies neither.

A

Our case law regarding whether a discovery order may constitute an appealable final judgment under the first prong of *Curcio* has undergone considerable change in the last decade, which has created some confusion.[10] In *Abreu* v. *Leone*, supra, 291 Conn. 334,

[10] The lack of clarity in our case law might explain the Appellate Court's understandable reluctance to grant the town's motion to dismiss Salinas' writ of error. Salinas notes that no party has sought review of that decision.

the defendant, a minor child, filed a claim with the Claims Commissioner seeking permission to bring an action against the Department of Children and Families (department) for personal injuries inflicted by Geovanny M., the foster child of the plaintiff, Joseph Abreu. As part of that underlying action, to which Abreu was not a party, a notice of deposition and subpoena duces tecum were issued to Abreu. Id., 334–35. Abreu then filed an independent action seeking a protective order on the ground that, pursuant to General Statutes § 17a-28, he was prohibited from disclosing information about a foster child. Id., 335. The trial court allowed the deposition to go forward on the ground that the precise questions the parties would pose were unknown, and, thus, it was not clear if the defendant might seek other information that was not protected by § 17a-28. Id. At the deposition, when the parties disagreed about the scope of the trial court's order, counsel placed all disputed questions on the record and then sought clarification from the court. Id., 336. The trial court ordered that certain specific questions be answered. Id., 337. The department appealed from that order. Id., 337–38.

In determining whether there was a final judgment, this court in *Abreu* determined that the discovery order at issue fell within the first prong of *Curcio* because a separate and distinct proceeding had terminated. Id., 344–45. The reasoning for this holding was twofold. First, this court explained that "there are no further proceedings before the Superior Court involving [Abreu] because the questions have been propounded and the trial court unequivocally has ruled what must occur—certain identified questions must be answered.

This court, however, may raise the issue of subject matter jurisdiction at any time sua sponte. E.g., *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) ("subject matter jurisdiction . . . may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal").

. . . [I]t is known whether [Abreu] will refuse to answer the contested questions put to him by the defendant, and it is known whether the trial court will uphold the 'privilege' as to the questions." (Citation omitted; emphasis omitted.) Id., 345–46. Although Abreu could later be held in contempt and then appeal, "[b]ecause . . . the specific questions have been propounded and the trial court has ruled unequivocally what must occur, we can only regard the posture of the . . . case as the functional equivalent of that situation." Id., 347.

Second, this court explained that "although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there is a counterbalancing factor in this situation." (Citation omitted; internal quotation marks omitted.) Id. Specifically, "[r]equiring the postponement of an appeal of the order until [Abreu] . . . is forced to choose between being found in contempt for his good faith attempt to comply with § 17a-28 (b) and violating that statute, thereby subjecting himself to criminal sanctions, would discourage participation by otherwise willing foster parents and thus undermine the goals of that system. Either option also puts the foster child in jeopardy." Id., 348.

This court has since explained that our holding in *Abreu* established three guiding principles: "First, the court's focus in determining whether there is a final judgment [under the first prong of *Curcio*] is on the order immediately appealed, not [on] the underlying action that prompted the discovery dispute. . . . Second, determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly. . . . Third, although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates

against requiring a party to be held in contempt in order to bring an appeal from a discovery order." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 760–61, 48 A.3d 16 (2012).

Subsequently, and with these guiding principles in mind, this court in *Woodbury Knoll, LLC*, was faced with whether the denial of a motion to quash a subpoena duces tecum was an appealable final judgment. Id., 752–53. The defendants in error, who were the defendants in an underlying legal malpractice action, sought materials allegedly protected by the attorney-client privilege and work product doctrine from the plaintiff in error, a law firm that was a nonparty to the underlying action. Id. The trial court denied the motion to quash and later issued a thorough articulation as to which documents were discoverable and why, from which the plaintiff in error appealed. Id., 754–55. This court held that the discovery order satisfied the first prong of *Curcio*. Id., 757.

However, this court's reasoning in *Woodbury Knoll, LLC*, differed somewhat from its reasoning in *Abreu*. As in *Abreu*, the court held that the discovery order terminated a separate and distinct proceeding because there was "a clear and definite discovery order," where the specific "questions have been propounded and the trial court has unequivocally ruled . . . ." (Internal quotation marks omitted.) Id., 761. Unlike *Abreu*, the court also emphasized that the plaintiff in error was not a party to the underlying action. Id. For these two reasons "alone," the court in *Woodbury Knoll, LLC*, held that the first prong of *Curcio* was satisfied. Id., 762.[11]

Nonetheless, the court in *Woodbury Knoll, LLC*, went on to hold that "there [also were] compelling policy

[11] Although the plaintiff in error in *Abreu* also was a nonparty, this court's analysis in that case did not center on that fact.

reasons not to require [the plaintiff in error] to be subjected to a contempt ruling in order for it to obtain appellate review of the discovery order"; id.; because it would be unjust "to apply our final judgment jurisprudence in a manner that requires a nonparty attorney, in his or her role as an officer of the court, to disobey a court order as the sole means of raising a good faith challenge to a discovery order in order to satisfy his or her professional obligation to the client." Id., 766. In a footnote, the court noted that "policy concerns are not a factor under either prong of *Curcio*, and, accordingly, it would be inappropriate to rely on policy *alone* to justify allowing an appeal under *Curcio*." (Emphasis added.) Id., 762 n.10.

Even more recently, this court has clarified its holdings in *Abreu* and *Woodbury Knoll, LLC*. In *Niro* v. *Niro*, supra, 314 Conn. 62, the trial court in a marriage dissolution case ordered nonparties, the family members and business partners of the defendant, to produce specific business and personal financial records that were essential for the court to determine the state of the defendant's finances and to distribute equitably the marital assets. Id., 65–66. This court held that the trial court's order was not a final judgment under either prong of *Curcio*. Id., 67. In determining that the first prong was not satisfied, this court summarized the holding of *Woodbury Knoll, LLC*, as relying on the fact that there was a clear, definite, final and comprehensive order, and that the plaintiff was a nonparty not involved in the underlying lawsuit in any way. We explained in *Niro* that although the discovery order was directed at a nonparty, it was "intertwined with the underlying dissolution proceeding because the information subject to disclosure will contribute to the trial court's knowledge of [the defendant's] assets and its ability to perform its statutory duty of equitably distributing the marital estate." Id., 72. Thus, this court shifted its focus

from whether the nonparty was involved in the underlying action, an important consideration in *Woodbury Knoll, LLC*, to whether the information possessed by the nonparty was involved or intertwined with the underlying action.

This court therefore explained in *McConnell* v. *McConnell*, supra, 316 Conn. 504, that, in *Niro*, it had clarified its holding in *Woodbury Knoll, LLC*: "We have recently clarified . . . that the relevant discovery order [in *Woodbury Knoll, LLC*] was a final judgment under the first prong of *Curcio* and, therefore, could be challenged by way of a writ of error . . . not based solely on the fact that [the plaintiff in error] was a nonparty to the underlying action, but . . . also based on the fact that the discovery order . . . was not intertwined with the underlying proceeding. . . . [A] discovery order directed at a nonparty does not arise from a separate and distinct proceeding, but is intertwined with the underlying action when the information sought in the order is required by the finder of fact to resolve the issues raised in that action." (Citation omitted; internal quotation marks omitted.) Id., 512. In *McConnell*, this court held that the first prong of *Curcio* was not satisfied because the trial court's discovery order sought information that was not available any other way, as all other witnesses had invoked their fifth amendment right not to testify, and the order was directed at materials that were required by the trial court to resolve the issues that had been raised in the underlying probate appeal. Id., 512–13. Thus, the discovery order was inextricably intertwined with the underlying probate proceeding, to which the plaintiffs in error were not parties. Id., 513. Because the information was required by the fact finder to resolve the issues raised in the underlying case, the court ruled that there was no final judgment. Id.

In sum, in light of *Abreu*, *Woodbury Knoll, LLC*, *Niro* and *McConnell*, an interlocutory discovery order is an appealable final judgment under the first prong of *Curcio* only if the trial court has issued a clear and unequivocal order that is sufficiently definite, specific, and comprehensive concerning a discovery request served on a nonparty for information that is not required to resolve the underlying issue. In the present case, the order at issue does not satisfy the first prong of *Curcio* because there was no clear and unequivocal trial court order. Specifically, the trial court's discovery order was not sufficiently definite, specific, or comprehensive.

Unlike in *Abreu*, *Woodbury Knoll, LLC*, and *Niro*, in which the trial court ruled on the specific questions and documents at issue, in the present case, the specific questions that the parties would pose to Salinas are unknown. Although the town has stated that its primary purpose for deposing Salinas is to authenticate his reports, it also has conceded on numerous occasions that its questions would pertain to a broader subject matter—his reports in general and his opinions as to the value of the property more specifically. Redding Life has not stated on the record the nature or specifics of its potential questions. And Salinas has refused to testify at all, asserting that he has an absolute privilege from testifying. Although the court's articulation of its order specifically stated that Salinas could be deposed as to preexisting opinions, nothing in its order limits the questioning to this topic. Without knowing the precise questions that will be asked at the deposition, this court cannot determine whether any privilege, if one even exists, applies.

Even if we assume that Salinas has an absolute privilege not to testify regarding his unretained expert opinions, without speculating, we cannot determine on this record whether this privilege applies to all questions that may be asked at the deposition. No privilege exists

that would prohibit the town from deposing Salinas altogether, and Salinas does not argue for such an expansive privilege. For example, even an absolute privilege would not prevent the town and Redding Life from deposing Salinas as a fact witness or as a keeper of records to establish the admissibility of his reports as business records. See Conn. Code Evid. § 8-4. Although the town represented that it sought to depose Salinas about the value of the property as stated in his reports, some of its (or Redding Life's) questions may be purely fact based, concerning, for example, what the property looked like when Salinas viewed it. Such information may be used to justify a change in property value if the property has been altered since the time of Salinas' reports, without requiring Salinas to give an expert opinion.

Because the record does not contain the questions that would be posed to Salinas, it is unclear which, if any, questions would be privileged. There is no reason the parties—including Redding Life, which has not participated in this appeal—could not have done as the parties in *Abreu* did: attend a deposition and make a record of the specific questions that seek allegedly privileged information, and then request a further ruling from the trial court on particular questions. Instead, without such a record, Salinas essentially seeks an advisory opinion, requesting a decision regarding the existence of an unretained expert privilege in the event that privileged questions are posed to him at the deposition. We are not prepared to issue such an advisory opinion recognizing a new privilege for expert witnesses on this record. See, e.g., *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 419–20, 880 A.2d 882 (2005) ("[W]e have consistently held that we do not render advisory opinions. . . . [W]here the question presented is purely academic, we must refuse to entertain the appeal." [Internal quotation marks omitted.]);

McDonnell v. *Maher*, 3 Conn. App. 336, 339, 488 A.2d 461 (1985) ("[w]ithout an actual controversy, the case is a hypothetical tempest in an appellate teapot"). The requirement of a definite and comprehensive order under the first prong of *Curcio* is not merely a technical rule but, rather, enables this court to see the whole picture when reviewing an interlocutory order. In the absence of specificity, we are left in the dark, attempting to determine the scope of an exception, assuming one exists, when such an exception may not even apply to the case at hand.

Salinas responds that the present discovery order is analogous to, not distinguishable from, the discovery order in *Abreu* because no further proceedings involve him, as he cannot be held in contempt in Connecticut, and, thus, the discovery order terminated a separate and distinct proceeding. Although it is true that, in *Abreu*, this court noted that under the first prong of *Curcio*, further proceedings would not involve Abreu because the proceedings were the equivalent of contempt proceedings; *Abreu* v. *Leone*, 291 Conn. 347; it is clear from the evolution of our case law that, as applied to discovery orders, the first prong does not focus on whether further proceedings involve the nonparty deponent, but on whether further proceedings require the information possessed by the nonparty. See *McConnell* v. *McConnell*, supra, 316 Conn. 512; *Niro* v. *Niro*, supra, 314 Conn. 72. However, because we determine that there was no clear and unequivocal order, we need not determine whether the information at issue was required by the trial court to resolve the issues raised in the underlying action, as both are required to satisfy the first prong of *Curcio*. To the extent that Salinas is arguing that further proceedings do not and cannot affect him, such an argument is more appropriately considered under the second prong of *Curcio*. See part II B of this opinion (focusing specifi-

cally on whether Salinas' rights can be vindicated in the future through further proceedings); see also *Niro* v. *Niro*, supra, 67–69.

Accordingly, the discovery order at issue did not terminate a separate and distinct proceeding under the first prong of *Curcio* because there was no clear and unequivocal order.

B

Alternatively, Salinas contends that the discovery order was an appealable final judgment because no further proceedings before the trial court can affect him. This argument, if convincing, would permit him to bring a writ of error under the second prong of *Curcio*. We agree with the town, however, that there are further proceedings that could affect him. Specifically, Salinas may be held in contempt by the trial court for failing to comply with the discovery order, which then would constitute an appealable final judgment. See *Niro* v. *Niro*, supra, 314 Conn. 73 (nonparty may appeal from discovery order in future if held in contempt for violation of order).

Salinas argues that he could not be held in contempt by a Connecticut court because the subpoena was served on him in Florida for a deposition in Florida, and, thus, any action to enforce the subpoena or hold him in contempt for not complying with it would need to be brought in a Florida court. This argument fails to bring him within *Curcio*'s second prong for a variety of reasons.

First, it may be true that a Florida court would have been an appropriate place for Salinas to seek a protective order and for the town to initiate contempt proceedings. See Practice Book § 13-28 (e) and (f); see also *Cassinelli Bros. Construction Co.* v. *Gray*, Superior Court, judicial district of Stamford-Norwalk, Docket

No. CV-95-0142662-S (May 9, 1996) (16 Conn. L. Rptr. 629, 629) ("[a]lthough this court can issue a commission to take an out-of-state deposition . . . the New York court will have to issue a subpoena to compel attendance . . . [and] make any appropriate order in aid of taking such deposition" [internal quotation marks omitted]). Salinas, however, did not seek a protective order in Florida. Rather, he requested such an order from the Connecticut Superior Court. We presume that, having invoked the jurisdiction of the Connecticut court system, Salinas will comply with Connecticut's resolution of his challenge to the subpoena. If Salinas never had filed a motion for a protective order in the Connecticut Superior Court, the Connecticut courts most likely would not be able to hold Salinas in contempt for failing to comply with the subpoena. Because Salinas sought relief from the Connecticut court system, however, the trial court may enforce the resulting order, and Salinas may be held in contempt for violating it. See, e.g., *Noll* v. *Hartford Roman Catholic Diocesan Corp.*, Docket No. CV-02-4034702-S, 2008 WL 4635591, *7 (Conn. Super. September 26, 2008) ("This court has jurisdiction over the parties to enforce its orders and to compel parties to obey its rules. . . . [The defendant witness, who resided in Virginia] did not avail himself of the opportunity to seek a protective order in Virginia [but rather sought one in Connecticut].").[12]

After the trial court declined to issue the protective order, Salinas sought review from this court and our Appellate Court. We are willing to provide that review so long as he appeals from a final judgment under our law. Salinas, however, wants to have his cake and to

[12] Salinas' argument appears to implicate the court's personal jurisdiction over him. He has not, however, disputed personal jurisdiction. Thus, we do not address that issue. See *State* v. *Waz*, 240 Conn. 365, 371 n.11, 692 A.2d 1217 (1997) (declining to address implication by state, which was not briefed, that defendant may not have had standing to challenge police search of parcel that contained illegal drugs).

eat it, too. He seeks review from this court to obtain a protective order but also argues that the Connecticut courts have no power over him for purposes of contempt.

Second, although it is true that a Connecticut court could not enforce the subpoena at issue as a contempt sanction because it was issued by an out-of-state-authority to an out-of-state witness; see *Struckman* v. *Burns*, 205 Conn. 542, 552, 534 A.2d 888 (1987) ("the defendant does not have the power by subpoena to force an out-of-state witness to travel to Connecticut for trial"); that does not mean the court cannot hold Salinas in contempt for violating a discovery order that was the byproduct of his having sought aid from the Connecticut court system. See Practice Book § 1-13A (a) ("[a]ny person . . . misbehaving or disobeying any order of a judicial authority in the course of any judicial proceeding may be adjudicated in contempt and appropriately punished"). The court's power to impose sanctions for contempt is not limited to forcing a witness to testify. See *Wehrhane* v. *Peyton*, 134 Conn. 486, 496, 58 A.2d 698 (1948) (explaining that although certain orders, such as injunctions, may not be enforced against nonresidents, there are other "means of punishing a violator and that is to deny him any aid from courts of the state . . . until he has purged himself of the contempt"); see also *Evans* v. *General Motors Corp.*, 277 Conn. 496, 523, 893 A.2d 371 (2006) (court has discretion to determine which sanctions to impose for contempt); Practice Book § 1-21A (sanctions for civil contempt may include fines). Even if sanctions will be of no use or are unenforceable in Connecticut, a party is not prevented from moving for a finding of contempt. See *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 240–41, 905 A.2d 1165 (2006) (explaining that even if sanctions are not useful, party may still move for finding of contempt). Moreover, the question of enforcement of a Connecticut

order of contempt is not at issue for present purposes; the only issue is whether further proceedings could affect Salinas, and the answer to that question is yes, because contempt proceedings may be initiated against him.

Third, the case on which Salinas relies to establish that he cannot be held in contempt by a Connecticut court, *Lougee* v. *Grinnell*, 216 Conn. 483, 486–87, 582 A.2d 456 (1990), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999), is distinguishable. In *Lougee*, the underlying civil action was pending in Texas. Id., 484–85. The plaintiff in that underlying case applied to the Superior Court in Connecticut for a subpoena to force Virginius B. Lougee, a nonparty who lived in Connecticut, to appear at a deposition in Connecticut. Id., 485–86. Lougee moved to quash the subpoena and for a protective order in Connecticut Superior Court. Id., 486. The trial court denied Lougee's motion. Id. Lougee appealed, and this court held that there was an appealable final judgment under the first prong of *Curcio* because "the sole judicial proceeding instituted in Connecticut concerned the propriety of [the] deposition subpoena, a proceeding that will not result in a later judgment from which [Lougee could] then appeal." (Internal quotation marks omitted.) Id., 487.

Thus, *Lougee* did not involve, as the present case does, whether a nonresident, nonparty may be held in contempt for violating a discovery order for purposes of the second prong of *Curcio*. Rather, *Lougee* involved a discovery order that was the only portion of the underlying case pending in a Connecticut court. This court made no suggestion in *Lougee* that the reason why further proceedings would not affect Lougee was because the trial court was incapable of holding him in contempt. Rather, the focus of our decision in *Lougee* was that, because the discovery order was the sole

judicial proceeding instituted in Connecticut, the trial court's ruling terminated a separate and distinct proceeding under *Curcio*'s first prong. Id. Unlike the situation in *Lougee*, the discovery order in the present case is not the sole judicial proceeding instituted in Connecticut. Rather, the discovery order at issue is part of an underlying civil action instituted in Connecticut. Additionally, as explained in part II A of this opinion, the discovery order in the present case did not terminate a separate and distinct proceeding because it was not a clear and definite order, which distinguishes it from the discovery order in *Lougee*.

Finally, requiring Salinas to appeal from an order of contempt does not raise an important counterbalancing public policy in favor of permitting an interlocutory appeal. Such a result does not violate justice or public policy in the same way as requiring the foster parent in *Abreu* or the nonparty law firm in *Woodbury Knoll, LLC*, to choose between contempt and violating a law or ethical code. In the absence of an overriding, important public policy consideration, requiring Salinas to appeal from a finding of contempt ensures that there is an actual live controversy in which Salinas' legally protected interest has been adversely affected. See *Slimp* v. *Dept. of Liquor Control*, 239 Conn. 599, 609, 687 A.2d 123 (1996) ("courts and parties [should not be] vexed by suits brought to vindicate nonjusticiable interests and . . . judicial decisions which may affect the rights of others [should be] forged in hot controversy, with each view fairly and vigorously represented" [internal quotation marks omitted]). Once Salinas attends the deposition, objects on the record to specific questions, and a trial court decides which, if any, questions he must answer, the courts will be better positioned to determine not only whether an unretained expert privilege exists, but if such a privilege even applies in this

case. As the record now stands, Salinas is requesting this court to decide this issue in a vacuum.

Accordingly, the discovery order does not satisfy either prong of *Curcio* and thus does not constitute an appealable final judgment. Therefore, Salinas' writ of error must be dismissed for lack of subject matter jurisdiction.[13]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to dismiss the writ of error for lack of subject matter jurisdiction.

In this opinion the other justices concurred.

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[13] Our conclusion that the Appellate Court lacked subject matter jurisdiction over the writ of error because the underlying order from which the writ arose did not constitute a final judgment necessarily means that there was a lack of a final judgment when the writ originally was filed with this court. Thus, we could have dismissed the writ ourselves when it originally was filed with this court. Rather, this court transferred the writ of error and motion to dismiss that writ to the Appellate Court, pursuant to § 51-199 (c), which expressly permitted this court to transfer this "cause" to the Appellate Court and extended jurisdiction to the Appellate Court to decide the motion to dismiss. See *State* v. *McCahill*, 261 Conn. 492, 503, 811 A.2d 667 (2002) ("our transfer authority by way of § 51-199 [c] is not limited to a formal appeal, but encompasses causes"). In light of this transfer, we conclude that the appropriate course of action is to remand the case to the Appellate Court with direction to dismiss the appeal for lack of subject matter jurisdiction. See *State* v. *Saucier*, 283 Conn. 207, 221, 926 A.2d 633 (2007) ("in a certified appeal, the focus of our review is not the actions of the trial court, but . . . on the judgment of the Appellate Court" [citations omitted; internal quotation marks omitted]). Finally, because we determine that the Appellate Court lacked subject matter jurisdiction over the writ, we do not reach the issues raised in the first two certified questions, as the Appellate Court was without authority to determine that Connecticut recognizes an unretained expert privilege. See *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 315, 968 A.2d 396 (2009) ("[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction" [internal quotation marks omitted]).

ORDERS

CONNECTICUT REPORTS

VOL. 331

ELIZABETH CARSON, TRUSTEE *v.* ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA

The plaintiff's petition for certification to appeal from the Appellate Court, 184 Conn. App. 318 (AC 39217), is denied.

Michael J. Habib, in support of the petition.

Michael A. Valerio, in opposition.

Decided May 8, 2019

STATE OF CONNECTICUT *v.* CALVIN BENNETT

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 847 (AC 40443), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Linda F. Currie-Zeffiro, assistant state's attorney, in opposition.

Decided May 8, 2019

STATE OF CONNECTICUT *v.* BERNARD J. PELUSO

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 498 (AC 40998), is granted, limited to the following issues:

"1. Did the Appellate Court properly hold that the trial court did not abuse its discretion when it found that the state had demonstrated 'good cause' to amend the information after the commencement of trial, as required by Practice Book § 38-18?

"2. Did the Appellate Court properly hold that the defendant failed to demonstrate that the state's amendment to the information caused prejudice to his substantive rights, in violation of Practice Book § 38-18?"

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

James P. Sexton and *Megan L. Wade*, in support of the petition.

Decided May 8, 2019

ELLEN M. MANZO-ILL *v.* SAMUEL V. SCHOONMAKER III ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 188 Conn. App. 343 (AC 40447), is denied.

James H. Lee, in support of the petition.

Scott S. Centrella and *Timothy P. Moylan*, in opposition.

Decided May 8, 2019

WILLIAM PATTY ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WILTON ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 188 Conn. App. 115 (AC 40710), is denied.

Paul A. Sobel, in support of the petition.

Matthew C. Mason, *Barbara Schellenberg* and *Patricia C. Sullivan*, in opposition.

Decided May 8, 2019

STATE OF CONNECTICUT *v.* TIMOLYN DUNBAR

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 635 (AC 40924), is denied.

David B. Bachman, assigned counsel, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided May 8, 2019

JAMES THOMAS *v.* COMMISSIONER OF CORRECTION

The petitioner James Thomas' petition for certification to appeal from the Appellate Court, 188 Conn. App. 902 (AC 40940), is denied.

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

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

Decided May 8, 2019

STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF

The defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 119 (AC 41367), is granted, limited to the following issues:

"1. Did the Appellate Court properly determine, in *State* v. *Moore*, 180 Conn. App. 116, 182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595 (2018), that Public Acts 2015, No. 15-2, § 1 (P.A. 15-2), does not have retroactive effect?

"2. If the answer to the first certified question is 'no,' should this court overrule the retroactivity analysis contained in *State* v. *Kalil*, 314 Conn. 529, 552–57, 107 A.3d 343 (2014), and apply the amelioration doctrine to give retroactive effect to P.A. 15-2, § 1?"

James B. Streeto, senior assistant public defender, and *Emily H. Wagner*, assistant public defender, in support of the petition.

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided May 8, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 190

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STAMFORD HOSPITAL *v.* CHAIM SCHWARTZ ET AL.
(AC 40870)

Lavine, Prescott and Elgo, Js.

Syllabus

The plaintiff hospital brought an action, pursuant to statute (§ 46b-37 [b]), against the defendants, seeking to collect a debt for medical services that it had rendered to their minor child. The defendants each filed an amended answer denying the material allegations of the plaintiff's complaint, including that they were the child's parents, and pleaded fourteen special defenses, including accord and satisfaction. The matter was referred for trial to an attorney trial referee, who recommended judgment in favor of the plaintiff. In his memorandum of decision, the referee made extensive findings of fact, on the basis of which he concluded that the plaintiff had established that, under § 46b-37 (b), there was no legitimate basis for the defendants' failure to pay the moneys that they owed to the plaintiff for the medical services rendered to the child and that he was strained to accept any testimony from the defendants as truthful. With respect to the defendants' special defenses, the referee found them to be disingenuous and that the defendants had failed to establish the requirements of accord and satisfaction under the applicable statute (§ 42a-3-311). After the defendants filed an objection to the referee's memorandum of decision, the trial court held a hearing and, thereafter, rendered judgment in favor of the plaintiff. Subsequently, the plaintiff filed motions for a special finding of bad faith and for attorney's fees. In response, the court issued an order stating that it had found bad faith as a matter of law in its ruling regarding the special defense of accord and satisfaction and remanded the case to the referee for a finding of whether any other acts of the defendants were made in bad faith. The referee subsequently filed a supplemental memorandum of decision in which he found that all of the defendants' special defenses were pleaded and pursued in bad faith and that the defendants had used the judicial system as a means to avoid or delay paying their financial obligation to the plaintiff. After the defendants filed an objection to the referee's supplemental memorandum of decision, the trial court concluded with respect to the plaintiff's motion for a special finding of bad faith that the defendants' lack of credibility permeated the entire proceeding and that they acted in bad faith as to their special defenses. The court then granted the plaintiff's motion for attorney's fees on the basis of its finding of bad faith and awarded the plaintiff the full amount that it had requested. On the defendants' appeal to this court, *held* that the defendants could not prevail on any of their twenty-three claims on appeal, as none of those claims was meritorious, the record supported

the findings of the referee and the trial court that the defendants acted in bad faith, and the trial court's decision to award the plaintiff attorney's fees was legally and logically correct: most of the defendants' claims were not reviewable because the record was inadequate for review, or the claim was not preserved or adequately briefed or was inappropriate, as this court does not, sua sponte, look for reasons to reverse the judgment of the trial court, the record supported the findings of the referee and the trial court that the defendants are indebted to the plaintiff and that they exhibited bad faith throughout the litigation, and this was the rare case in which the arguments put forth were so preposterous, audacious and transparent, and the attempt to avoid payment so obvious, that a finding of bad faith was compelled; moreover, the referee acted well within his authority to find by a preponderance of the evidence that the defendants were untruthful, as credibility determinations are to be made by the finder of fact, who may accept all, some, or none of the testimony of a witness, and the defendants having testified that they were uncertain of the child's parentage despite the overwhelming contrary circumstantial evidence, their behavior in predicating their defense on such a denial was deeply offensive to the norms of civil society.

Argued February 4—officially released May 21, 2019

Procedural History

Action to collect a debt, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was referred to an attorney trial referee, who filed a finding of facts and recommended judgment for the plaintiff; thereafter, the trial court, *A. William Mottolese*, judge trial referee, rendered judgment for the plaintiff; subsequently, the attorney trial referee filed a supplemental memorandum of decision; thereafter, the court granted the plaintiff's motions for a special finding of bad faith and for attorney's fees and awarded the plaintiff attorney's fees, and the defendants appealed to this court. *Affirmed.*

Chaim T. Schwartz, self-represented, with whom, on the brief, was *Rena E. Gelb*, self-represented, the appellants (defendants).

Vimala Ruszkowski, with whom, on the brief, were *Eric J. Stockman* and *Simon I. Allentuch*, for the appellee (plaintiff).

Opinion

LAVINE, J. This appeal arises from the defendant parents' refusal to pay for medical care and treatment rendered to their minor child by the plaintiff hospital and the transparently disingenuous machinations they employed in an effort to avoid liability for the debt. We affirm the judgment of the trial court.

The self-represented defendants, Chaim Schwartz and Rena Gelb,[1] appeal from the judgment of the trial court rendered in favor of the plaintiff, Stamford Hospital. On appeal, the defendants have raised twenty-three claims challenging the underlying factual findings of the attorney trial referee (referee)[2] and the legal conclusions of the trial court. In response, the plaintiff argues that there are only two issues relevant to the appeal: were the defendants indebted to the plaintiff and did they exhibit bad faith in defense of the action. We agree with the plaintiff that the judgment should be affirmed.

The following facts, as found by the referee, the court's legal conclusions, and the procedural history are relevant to our resolution of the defendants' appeal. The plaintiff commenced the present action against the defendants on January 21, 2015. In count one of its two count complaint, the plaintiff alleged that, at the request of the defendants, it provided medical services to their minor child from March 5 to March 6, 2013. The child resided in the defendants' home, and, therefore, pursuant to General Statutes § 46b-37 (b),[3] the defendants are liable for the cost of the medical services rendered by the plaintiff. The plaintiff billed the defendants for

[1] In this opinion, we refer to the defendants individually by their respective surnames and collectively as the defendants, where appropriate.

[2] The referee was Attorney Anthony J. Medico.

[3] General Statutes § 46b-37 (b) provides in relevant part: "[I]t shall be the joint duty of each spouse to support his or her family, and both shall be liable for . . . (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents . . . ."

the services it provided to the child, the reasonable value of which was $14,051.99. Despite having made demand on the defendants for payment, a balance of $8076.25 remained due and owing, which the defendants have refused to pay.[4] In count two, the plaintiff realleged the allegations of count one and that Gelb had signed a patient authorization and agreement (authorization) in which she agreed to pay the plaintiff for the services it rendered to the child plus the costs of collection, including attorney's fees. Despite having made demand on Gelb, she refused to pay the balance of $8076.25. In its prayer for relief, the plaintiff sought money damages, reasonable attorney's fees and costs, and statutory prejudgment and postjudgment interest. On May 12, 2015, the defendants filed amended answers denying the material allegations of the complaint, including that the defendants were the child's parents, and each pleaded fourteen identical special defenses, including accord and satisfaction.

The parties tried the case to the referee pursuant to General Statutes § 52-549[5] and Practice Book § 23-53.[6] The referee issued a memorandum of decision on October 5, 2016, in which he found the following facts. On March 5, 2014, Gelb took the child to the hospital with

[4] The defendants' insurer paid the portion of the bill for which it was responsible.

[5] General Statutes § 52-549n provides in relevant part: "[T]he judges of the Superior Court may make such rules . . . to provide a procedure in accordance with which the court, in its discretion, may refer to a fact-finder for proceedings authorized pursuant to this chapter, any contract action pending in the Superior Court . . . in which only money damages are claimed and which is based on an express or implied promise to pay a definite sum, and in which the amount, legal interest or property in controversy is less than fifty thousand dollars exclusive of interest and costs. . . ."

[6] Practice Book § 23-53 provides in relevant part: "The court, on its own motion, may refer to a fact finder any contract action pending in the Superior Court . . . in which money damages only are claimed, which is based upon an express or implied promise to pay a definite sum, and in which the amount, legal interest or property in controversy is less than $50,000, exclusive of interest and costs. . . ."

symptoms of a stomach virus and because the child had had a seizure.[7] The child was admitted overnight during which time a series of tests were performed that resulted in costs of which $8076.25 remained due. The defendants contend that they are not responsible for the outstanding medical costs on the basis of theories such as accord and satisfaction, lack of notice, lack of need for the services rendered, fair and reasonable value of the services rendered, lack of disclosure of the risks and costs, and the parental liability for the costs of care for a minor child.

The referee found the testimony of the plaintiff's witnesses to be overwhelming with detail regarding the services rendered and their cost, including the medical and insurance review of the costs assessed to the defendants. According to Letitia Borras, a pediatrician, the medical treatment provided was necessary and performed as a standard course of action given the symptoms with which the child presented. The procedures were reviewed with Gelb, who did not object to them. According to Cecelia Rasines, the plaintiff's billing rates are audited and determined by the defendants' insurer and are compared with rates charged for similar treatment by other medical institutions. Nurse auditors audited the defendants' bill by comparing the billing rates and services rendered to the medical records and found the billing statement was accurate.[8]

[7] The record discloses that the child was transported to the hospital by ambulance.

[8] The child's medical chart was placed into evidence. By letter dated July 3, 2013, Maggie Zurita, a nurse and senior risk associate of the plaintiff, wrote to Schwartz stating in part: "This letter is in response to the concerns you outline in your letter of May 5, 2013 to the Accounts Receivable Department. . . .

"The care and treatment of your [child] has been reviewed by the Chair of Emergency Medicine, Chair of Pediatrics and the Director of Maternal Child Health. . . .

"In your case, our investigation shows that your bill was calculated correctly and in accordance with the contract you have with your insurance provider. The amount on your bill is the amount for which you are responsi-

The defendants both testified. When counsel for the plaintiff questioned Gelb about her responsibility to pay for the services rendered to her child, Gelb responded that she was not certain that she was the child's biological mother because, although she had given birth, she was not with the child constantly throughout her maternity stay. She, therefore, could not confirm that the child she took home was, in fact, the child to whom she had given birth. Thereafter, the referee questioned Gelb whether her prior testimony regarding her uncertainty as to whether she was the child's biological mother was truthful. The referee found that "Gelb admitted lying on the witness stand and committing perjury, stating that the minor child is in fact her biological child and that she only testified of her uncertainty as a method of assisting both of the defendants against the plaintiff's claims."

As to the child's medical care, Gelb testified that she had not consented to certain procedures before they were performed, but she admitted that the child's pediatrician explained the procedures to her, including the need for a computerized axial tomography scan given the child's seizures. Gelb agreed to the plan and signed an authorization for the medical procedures and agreed to be responsible for costs not paid by insurance. Gelb claimed that she signed the authorization while she was under duress in the plaintiff's emergency department. The plaintiff placed into evidence documents Gelb had signed for the services rendered to the child in the present matter and for the maternity services the plaintiff had provided to her when her children were born. Gelb admitted to having signed each of the documents that evidenced her acceptance of responsibility for the child.[9]

ble for the service(s) or procedure(s) you received, and reflects discounts your insurance provider has negotiated with us."

[9] The authorization provided in relevant part: "4. FINANCIAL AGREEMENT: The undersigned agrees, whether he/she signs as patient or as legal representative, that in consideration of the services to be rendered to the patient, he/she hereby individually obligates himself/herself to pay

Following some initial equivocation, Schwartz too admitted that he is the child's biological father and that he had no reason to believe that the child is not his. He recognized his responsibility to pay for the costs associated with the medical services provided to the child. Schwartz personally had applied for the insurance plan that was used to pay the plaintiff. He admitted that he was responsible for paying the insurance deductible and that he was aware of the amount of the deductible.

The defendants did not pay for the medical services rendered to the child because they claimed the services were not necessary. They sent a letter to the plaintiff disputing its bill and to the state Department of Public Health (department). Schwartz received a telephone call from someone at the department advising him that the department had performed a full investigation and " 'everything was found to be [okay].' " According to Schwartz, the present case was not the first billing dispute in which he has been involved. In other instances in which he did not pay, the matter remained in collection for a period of time, and then the business "simply [wrote] it off." He did not think that the present matter would result in litigation.

With respect to their special defense of accord and satisfaction, the defendants put three documents into evidence. The documents demonstrate that they had paid $112.48 toward the outstanding balance they owed the plaintiff. They sent the plaintiff a correspondence

the account of the Hospital and any physician or physician organization providing such services on a fee for service basis to the patient in accordance with the regular rates and terms of the Hospital and any such physician or physician organization. Should the account be referred to an attorney for collection, the undersigned shall pay reasonable attorney's fees and collection expenses. All delinquent accounts bear interest at the legal rate."

Paragraph 4 of the patient authorization and agreement that Gelb signed for the 2009 and 2011 child birth admissions state the same.

with the payment, stating that the amount was in full satisfaction of the outstanding balance. The defendants argued that by accepting the payment, the plaintiff forgave the remaining balance due under the law of accord and satisfaction.

The referee set out the relevant provisions of General Statutes § 42a-3-311 titled "Accord and satisfaction by use of instrument"[10] and analyzed the evidence. The plaintiff's billing statement indicated that payments were to be mailed to P.O. Box 120048, Stamford, and that correspondence regarding financial options was to be mailed to P.O. Box 9317, Stamford. The defendants mailed both their payment and correspondence regarding accord and satisfaction to the payment address at P.O. Box 120048. Rasines explained that payments mailed to P.O. Box 120048 do not go to the plaintiff, but, instead, go to a lock box at a Wells Fargo bank. None of the plaintiff's personnel, therefore, would have seen the payment or the defendants' correspondence. Furthermore, on May 12, 2015, more than ninety days after they had filed their original answers and special defenses, the defendants amended their answers and added special defenses of accord and satisfaction. According to Schwartz, the defendants purposely waited more than ninety days before amending their answers to include the accord and satisfaction special defenses, presumably to avoid giving the plaintiff notice

[10] General Statutes § 42a-3-311 provides in relevant part: "(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

"(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. . . ." See footnote 11 of this opinion.

of the defense and an opportunity to conform to § 42a-3-311 (c) (2).[11]

On the basis of his factual findings, the referee concluded that the plaintiff had established that there was no legitimate basis for the defendants to fail to pay the plaintiff the balance of the moneys owed for the services rendered to the child. The referee recognized that the trier of fact may accept or deny all or part of any testimony from a witness. He found that Gelb's perjured testimony and her subsequent admission of the same, degraded her testimony. The referee was "strained to accept any testimony provided by either defendant as truthful," as both of the defendants admitted to lies and deceitful actions under the guise of trial strategy or their lack of knowledge of trial procedure. As to the defendants' claim regarding the legitimacy and necessity of the medical services rendered to the child, the referee found that the defendants had failed to produce any admissible evidence that contradicted the plaintiff's evidence. The referee, therefore, found the defendants' defenses to be disingenuous.

According to the referee, the defendants also failed to establish the requirements of accord and satisfaction under § 42a-3-311. The ninety day requirement of § 42a-3-311 (c) (2) passed only by virtue of the defendants' purposefully deceitful tactics during the pleading stage of the litigation, and the defendants were perhaps calculated when they made the payment itself. The plaintiff's billing statement set forth two distinct addresses to be used for payments and communications. Because the defendants failed to send their communication to the

[11] General Statutes § 42a-3-311 (c) provides in relevant part: "Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies . . . (2) The claimant . . . proves that *within ninety days* after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. . . ." (Emphasis added.)

proper address, the plaintiff never received the alleged accord and satisfaction notice. The referee found that the plaintiff had established that, under § 46b-37 (b), no legitimate basis existed for the defendants' failure to pay the moneys they owed the plaintiff.

The referee considered the plaintiff's request for statutory prejudgment and postjudgment interest. General Statutes § 37-3a (b) provides: "In the case of debt arising out of services provided at a hospital, prejudgment and postjudgment interest shall be no more than five percent per year. The awarding of interest in such cases is discretionary." The plaintiff provided the defendants with a billing statement dated June 19, 2014, in the amount of $8076.25, and the defendants paid only $112.48 of that amount. A net balance of $7963.77 remains due and owing the plaintiff. Pursuant to § 37-3a (b), the balance of $7963.77 is subject to statutory prejudgment and postjudgment interest from June 19, 2014, until the balance is paid in full at a rate of 5 percent per year. The referee reserved the plaintiff's request for attorney's fees and costs to be heard by the trial court after a judgment was rendered on the substantive issue.

The defendants filed an objection to the referee's memorandum of decision, to which the plaintiff responded. The trial court held a hearing on the defendants' objection on January 4, 2017, and issued a memorandum of decision on January 19, 2017.

The court first addressed the defendants' challenge to the referee's jurisdiction. The defendants argued that when they incurred the debt, it was indefinite as to amount because neither defendant knew the cost of the plaintiff's services, and, therefore, the referee lacked jurisdiction to render a decision. The plaintiff countered that neither § 52-549n nor Practice Book § 23-58 requires a definite amount be included within the

agreement between the parties; all that is necessary is that the complaint seek a definite sum on the basis of the agreement.

The court explained that referees have jurisdiction over claims for unpaid hospital services. Section 52-549n confers jurisdiction to referees to act in a contract action when the Superior Court refers the matter to the referee pursuant to certain statutory criteria. A claim may be referred to a referee if the claim is predicated on a sum of money that is "capable of reduction to certainty." (Internal quotation marks omitted.) *Housing Authority* v. *Melvin*, 12 Conn. App. 711, 715, 533 A.2d 1231 (1987), cert. denied, 207 Conn. 804, 540 A.2d 74 (1988).

The court recognized that our Supreme Court has acknowledged the special nature of a contract between a medical provider and the parents of a minor child. "[W]hen a medical service provider renders necessary medical care to an injured minor, two contracts arise: the primary contract between the provider and the minor's parents; and an implied in law contract, between the provider and the minor himself. The primary contract between the provider and the parents is based on the parents' duty to pay for their children's necessary expenses, under both common law and statute. Such contracts, where not express, may be implied in fact and generally arise both from the parties' conduct and their reasonable expectations." (Footnotes omitted.) *Yale Diagnostic Radiology* v. *Estate of Fountain*, 267 Conn. 351, 359, 838 A.2d 179 (2004). The court, therefore, concluded that the referee had jurisdiction to adjudicate the present case.

The court noted the law controlling its review of the referee's decision. "Attorney [fact finders] are empowered to hear and decide issues of fact." (Internal quotation marks omitted.) *Beucler* v. *Lloyd*, 83 Conn. App.

731, 735, 851 A.2d 358 (2004), appeal dismissed, 273 Conn. 475, 870 A.2d 468 (2005). In a contract action, findings of fact should be overturned only when they are clearly erroneous. See *Pomarico* v. *Gary Construction, Inc.*, 5 Conn. App. 106, 112, 497 A.2d 70, cert. denied, 197 Conn. 816, 499 A.2d 1336 (1985). The court reviewed the record and found that the referee's numerous findings of fact were amply supported by the evidence and were not clearly erroneous, and that the principles of law that the referee applied to those facts were legally and logically correct.

As to credibility, the court noted the referee's findings with respect to the testimony of the witnesses and that the referee was strained to accept any testimony from the defendants as truthful. The court recognized that a finder of fact is the sole arbiter of the credibility of witnesses and the weight to afford their testimony. See, e.g., *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 462, 844 A.2d 836 (2004).

The court observed the defendants' exceptional acumen in researching the law and fashioning legal arguments, but found that they had "overlooked" Connecticut's presumption of legitimacy rule, which provides that a child born in wedlock is presumed to be the issue of the mother and her husband. See *Weidenbacher* v. *Duclos*, 234 Conn. 51, 63, 661 A.2d 988 (1995). Through their testimony, the defendants impermissibly had attempted to shift the burden of proof of the child's parentage to the plaintiff. The court, therefore, concluded that the referee had ample grounds to disbelieve the defendants' testimony.

Turning to the defendants' special defenses of accord and satisfaction, the court concluded that the referee correctly determined that the defendants' tender of a check in the amount of $112.48 accompanied by a correspondence stating that it was payment in full satisfaction of the plaintiff's invoice of $8076.25 was not an

accord and satisfaction for two reasons. First, the defendants intentionally sent the check and correspondence to an address that the plaintiff's billing statement specified was for payment, rather than to an address specified for correspondence. As a result, the plaintiff's personnel never saw the correspondence. Second, the defendants acted deceitfully when, during the pleading stage of the litigation, they waited more than ninety days as specified in § 42a-3-311 (c) (2) to raise the special defense of accord and satisfaction in their amended answers dated May 11, 2015. See footnote 11 of this opinion.

Given the referee's characterization of the defendants' conduct as deceitful, the court identified additional support for the referee's rejection of the defendants' accord and satisfaction defense. The threshold requirement of § 42a-3-311 is that the tender of the check must be made in good faith. Uniform Commercial Code comment (4) to the statute states: "Good faith in subsection (a) (i) is defined as not only honesty in fact, but also the observance of reasonable commercial standards and fair dealing." (Internal quotation marks omitted.) General Statutes Annotated § 42a-3-311, comment (4) (West 2009).[12] The amount the defendants tendered, $112.48, represents 1.39 percent of the debt they owed.

The court made the following observations regarding bad faith. In Connecticut bad faith is defined as the

[12] See *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 98 Conn. App. 784, 790, 912 A.2d 513 (2006), cert. denied, 281 Conn. 914, 916 A.2d 55 (2007), quoting General Statutes Annotated § 42a-3-311, comment (4) (West 2009); accord *IFC Credit Corp.* v. *Bulk Petroleum Corp.*, 403 F.3d 869, 874 (7th Cir. 2005) ("[o]rdinarily the good faith requirement is violated where there is no bona fide mutual dispute concerning consideration, or *the party tendering the payment affirmatively misleads the claimant*" [emphasis in original]).

absence of good faith.[13] "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, and not prompted by an honest mistake as to one's rights or duties, but by some interest or sinister motive. . . . Bad faith means more than mere negligence, it involves a dishonest purpose." (Citation omitted; internal quotation marks omitted.) *Habetz* v. *Condon*, 224 Conn. 231, 237, 618 A.2d 501 (1992). "It is the burden of the party asserting the lack of good faith to establish its existence and whether that burden has been satisfied in a particular case is a question of fact." (Internal quotation marks omitted.) *Kronberg Bros., Inc.* v. *Steele*, 72 Conn. App. 53, 63, 804 A.2d 239, cert. denied, 262 Conn. 912, 810 A.2d 277 (2002). "Courts do not generally find contracts unconscionable where the parties are businesspersons." *Emlee Equipment Leasing Corp.* v. *Waterbury Transmission, Inc.*, 31 Conn. App. 455, 464, 626 A.2d 307 (1993).

In the present case, the court stated that both of the defendants hold graduate business degrees and are commercially sophisticated. Regardless of the definition of bad faith, the court found that the defendants acted in bad faith in tendering $112.48 to the plaintiff and, therefore, are not entitled to the benefit of accord and satisfaction conferred by § 42a-3-311.

The court next addressed the defendants' claim that the authorization was invalid because it was an "unenforceable adhesion contract." The court again noted the controlling legal principle. The question of unconscionability is one of law to be decided by the court on the basis of all the facts and circumstances. *Iamartino* v. *Avallone*, 2 Conn. App. 119, 125, 477 A.2d 124,

[13] See *Habetz* v. *Condon*, 224 Conn. 231, 236–37, 618 A.2d 501 (1992) (standard definition of bad faith is absence of good faith); see also *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 98 n.14, 78 A.3d 860 (2013) (same).

cert. denied, 194 Conn. 802, 478 A.2d 1025 (1984). The court noted that "[t]he most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining process of ordinary contracts, and that they tend to involve a standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms . . . ." (Internal quotation marks omitted.) *Reardon* v. *Windswept Farm, LLC*, 280 Conn. 153, 162–63, 905 A.2d 1156 (2006). The classic definition of an unconscionable contract is one which no person not under delusion would make, and which no fair and honest person would accept. *Smith* v. *Mitsubishe Motors Credit of America, Inc.*, 247 Conn. 343, 349, 721 A.2d 1187 (1998). This definition is divided "into two aspects of unconscionability, one procedural and the other substantive, the first intended to prevent unfair surprise and the other intended to prevent oppression." Id.

The court explained that in Connecticut, the amount that a hospital may bill for a particular service is controlled by the "pricemaster," citing to chapters 368z and 368aa of the General Statutes. The rates that the plaintiff may have charged the defendants for the services rendered to their child were, thus, available for public inspection. General Statutes § 19a-681 (c) imposes a severe penalty on a hospital for deviation from the "pricemaster." The court concluded that, although it is arguable whether the authorization Gelb signed is procedurally unconscionable, the element of unfair surprise was not present because the pricemaster was publicly available. The pricemaster rates are based on a national database, and there are severe consequences for a hospital if it exceeds those rates. The defendants offered no evidence of comparable rates for the same services rendered at other hospitals. The court concluded, therefore, that there was no basis on which to find that the authorization was substantively unconscionable.

With respect to Schwartz' special defense that he was not a signatory to the authorization, the court next determined that Schwartz was liable under the authorization pursuant to § 46b-37, regardless of whether he signed the authorization. Section 46b-37 provides in relevant part: "(b) Notwithstanding the provisions of subsection (a) of this section, it shall be the joint duty of each spouse to support his or her family, and both shall be liable for: (1) The reasonable and necessary services of a physician or dentist; (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents . . . ." Accordingly, the court found that the plaintiff had proved that the defendants had breached the authorization as alleged in count two of the complaint.

In summary, the court stated that it had addressed the remainder of the defendants' fourteen special defenses implicitly in its foregoing analysis or the defenses were otherwise unmeritorious. It rendered judgment in favor of the plaintiff in the amount of $7963.77. The court thereafter found that it was fair and equitable to award the plaintiff prejudgment and postjudgment interest at the rate of 5 percent from June 19, 2014, the date the plaintiff provided the defendants with a billing statement.

With respect to attorney's fees, the court issued an order permitting the plaintiff to file an itemized affidavit of attorney's fees and the defendants to object, if they wished. Thereafter, the plaintiff filed a motion for a special finding that the denials and defenses pleaded by the defendants were without merit and not brought or asserted in good faith. See General Statutes § 52-226 (a). It also filed a motion for double costs and reasonable counsel fees pursuant to General Statutes § 52-245[14] and a motion for attorney's fees on the basis of

[14] The plaintiff contended that it was entitled to reasonable attorney's fees pursuant to the authorization and § 52-245 for the defendants' statement that they possessed a bona fide defense to each of the plaintiff's legal claims, when the statement was made without just cause.

the defendants' bad faith. It submitted the affidavit of Vimala B. Ruszkowski, its trial counsel, attesting to attorney's fees of $34,082.20 and costs of $2059.64. The defendants objected to each of the plaintiff's motions and request for attorney's fees.

The court responded to the plaintiff's motion seeking a finding of bad faith, on April 13, 2017, stating that it had found bad faith as a matter of law in its decision regarding the defendants' special defenses of accord and satisfaction, and remanded the case to the referee for a finding of whether any other acts of either or both defendants were made in bad faith and, if so, to identify those acts with particularity.[15] On May 30, 2017, the referee submitted a supplemental memorandum of decision.

The referee identified the special defenses asserted by the defendants and found that all of them were pleaded in bad faith. The referee iterated his findings regarding the defendants' credibility, which alone gave rise to an overall finding of bad faith. Nonetheless, the referee found that specific evidence of bad faith regarding the special defenses was more than abundant at trial so as to affirm his overall finding.

With respect to special defenses one, three, four, five, seven, nine, ten, and eleven,[16] the referee found that prior to the onset of the litigation, the plaintiff took

[15] The remand order was issued pursuant to *Maris* v. *McGrath*, 269 Conn. 834, 845, 850 A.2d 133 (2004) (to award attorney's fees there must be clear evidence that challenged actions are entirely without color and taken for improper purposes), and *Fattibene* v. *Kealey*, 18 Conn. App. 344, 359–60, 558 A.2d 677 (1989) (court's inherent authority to impose sanction of attorney's fees for bad faith pleading).

[16] In brief, the special defenses alleged, respectively, that the amount of the bill was unreasonably high, the plaintiff's agents failed to disclose pertinent information about the services rendered, the plaintiff's agents provided false or misleading information, prior to rendering services the plaintiff's agents did not disclose the amount it would charge for those services, the defendants cannot identify all of the services the plaintiff alleges were provided, the authorization is an unconscionable adhesion contract, because the plaintiff failed to disclose the amounts it would charge for the services provided

considerable measures to assist the defendants with their concerns regarding the bill, explaining how medical billing is calculated, and describing state oversight and regulations. The defendants were advised that the department had investigated the matter and found the bill to be accurate. The defendants presented no contrary evidence. The referee, therefore, concluded that the special defenses lacked merit and were not pleaded in good faith.

Special defenses two and six alleged, respectively, that the plaintiff's agents rendered one or more unnecessary and/or harmful services to the child for which the defendants should not be billed and that there was no proof that the plaintiff's agents performed the service for which it had billed. The referee found that there was abundant evidence that Gelb met with the child's pediatrician and discussed the treatment being provided. Gelb trusted the child's pediatrician and no physician has ever told Gelb that the care and treatment rendered to the child were unnecessary. Gelb never complained about the treatment prior to receiving the plaintiff's bill. The defendants, therefore, had no good faith basis to plead special defenses two and six, and as such, the referee found that the defenses were pursued in bad faith.

The referee further found that special defenses twelve, thirteen, and fourteen[17] were raised and pursued without any good faith basis. Both defendants were

prior to performing them, the court must determine the reasonable value of those services, and a contract requiring one or both defendants to pay in full for services rendered instead of requiring one or both of them to pay the plaintiff a reasonable amount for the services rendered is unconscionable. The referee did not address the special defense of accord and satisfaction, which was decided by the court.

[17] Special defenses twelve, thirteen and fourteen alleged, respectively, that Gelb was never billed for the services rendered and cannot be expected to pay for them, the authorization was not filed in court or provided to the defendants within the timeframe of Practice Book § 10-29 (a) and should not be admitted into evidence, and the plaintiff did not allege that Schwartz

aware of their financial responsibilities for the child. Gelb identified her signature on the authorization. Schwartz made the arrangements for his family's medical insurance and knew what portion of the bill insurance would pay and what portion he would have to pay. The defendants' testimony was in sharp contrast to the special defenses. The referee, therefore, decided that it was logical to conclude that the defendants had pursued the special defenses in bad faith.

According to the referee, there was no basis for the defendants to defend the plaintiff's claims, and they used the judicial system as a means to avoid, or at least to delay, paying their financial obligation. Schwartz audaciously testified that he never expected the plaintiff to pursue the matter in litigation, because he had avoided financial responsibilities in the past by using similar methods. The defendants went so far as to at least raise doubt about their biological relationship to the child in a failed attempt to avoid their financial responsibility. The referee concluded that such evidence made the determination of bad faith effortless and conclusive.

The defendants objected to the referee's supplemental memorandum of decision. The plaintiff replied, asking the court to overrule the defendants' objection and to order the defendants to pay attorney's fees. The court ruled on the defendants' objection on September 6, 2017, noting the referee's findings that the defendants had acted in bad faith, that they denied being the child's biological parents, and that they lacked credibility.

In adjudicating the plaintiff's § 52-226a motion, the court noted its inherent power to regulate the conduct of litigants whether they are members of the bar; see *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145

signed any contract with it, and, therefore, the second count should be dismissed against him.

Conn. 222, 231, 140 A.2d 863 (1958), or laypersons. See *Lederle* v. *Spivey*, 174 Conn. App. 592, 601, 166 A.3d 636, cert. granted on other grounds, 327 Conn. 954, 171 A.3d 1050 (2017). Connecticut courts, however, are to be "solicitous of [self-represented] litigants when it does not interfere with the rights of other parties . . . . [T]he right of self-representation [however] provides no attendant license not to comply with the relevant rules of procedural and substantive law." (Citation omitted; internal quotation marks omitted.) *Macricostas* v. *Kovacs*, 67 Conn. App. 130, 133, 787 A.2d 64 (2001).

Section 52-226a authorizes sanctions for certain conduct that offends the court's power to regulate the conduct of litigants. The statute creates an evidentiary dividend, which may be used in subsequent litigation. The court may exercise its power when self-represented litigants are commercially sophisticated as the defendants are in the present case. Gelb has a master of business administration degree from Columbia University and previously worked as a business planner and financial controller. Schwartz has a master of business administration degree from New York University. At the time of trial, he was the vice president for fair lending practices at a major banking institution.

On the basis of the referee's findings and its own independent examination of the record, the court concluded that the deficit in the defendants' credibility permeated the entire proceeding. The court characterized the defendants' testimony as "a study in prevarication, equivocation and obfuscation." (Internal quotation marks omitted.) The primary basis for the court's conclusion was the defendants' denial of parentage of the child.[18]

[18] The court quoted the following examination of Gelb by the plaintiff's counsel and the referee that demonstrates Gelb's denial of parentage, her equivocation, her justification for the denial, her statutory and contractual obligation to pay, and the scheme the defendants developed:

"[The Plaintiff's Counsel]: Good afternoon, Ms. Gelb. Isn't it true that you are the mother of [the child]?

"[Gelb]: I don't know. [The child] is the child that lives with me, but I was not with [the child] all the time in the hospital after I gave birth, so I'm not sure if [the child] is the child I gave birth to.

"[The Plaintiff's Counsel]: Okay, so you're stating here under affirmation, that you don't know whether you're the mother of [the child]?

"[Gelb]: Correct.

"[The Plaintiff's Counsel]: You gave birth to [the child], isn't it true that you gave birth to [the child] at Stamford Hospital in August, 2011?

"[Gelb]: I gave birth to a [child] at Stamford Hospital.

"[The Plaintiff's Counsel]: If you're uncertain that [the child] is your child, have you made any efforts to locate a child that could potentially be yours rather than [the child]?

"[Gelb]: No.

* * *

"[The Referee]: Okay. Are you saying you don't know because you are unaware as to whether the child is the subject matter of this litigation is actually yours?

"[Gelb]: Correct.

"[The Plaintiff's Counsel]: You called [the child] and acknowledge [the child] as that for all other purposes and all other situations, except this litigation. Correct?

"[Gelb]: Correct.

"[The Plaintiff's Counsel]: And you are doing that because you think if you cast some doubt on whether you are the parent of the [child], that will absolve your duty to pay for [the child]. Correct?

"[Gelb]: Correct."

The court then quoted the following examination of Schwartz by the plaintiff's counsel as to his past conduct, his outright denial of paternity, his equivocation, and the reason and justification for his denying that the child is biologically his:

"[Schwartz]: There were other providers that I owed, and I refused to pay them, and they stopped bothering me for collection because I disagreed with them. . . .

"[The Plaintiff's Counsel]: Mr. Schwartz, isn't it true that up until this point you denied knowledge under oath at your deposition and in court papers about whether you're the father of [the child]?

"[Schwartz]: I denied knowledge, but I explicitly stated that I believe that [the child] is [my child]. That I file tax returns claiming [the child] as a dependent, that [the child] is on my birth certificate. *That in all respects, aside from when I am under oath, that I claim that* [*the child is mine*]. . . . And my understanding in doing this, is that I—there is—there's nothing wrong with—ok.

"And my understanding in doing this is that there is a difference in court—and this may be completely wrong because I'm pro se—but in court, the standard is knowledge, not belief. Now that may not be true, and if it's not true, so then it doesn't matter. So then [the child] is [mine] if knowledge is belief. If the—if the standard is knowledge, then—then [the child] is not [mine] or —I'm sorry—[the child is] not—it's not that [the child] is not my

The court applied the two part bad faith test to determine whether the defendants' conduct constituted bad faith, thereby entitling the plaintiff to attorney's fees. See *Munro* v. *Munoz*, 146 Conn. App. 853, 860–61, 81 A.3d 252 (2013). The court set forth the applicable law. "[T]he trial court is obligated to find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith . . . and the court must set forth its factual findings with a high degree of specificity before awarding attorney's fees." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Lederle* v. *Spivey*, supra, 174 Conn. App. 598 n.2.

"To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, [our Supreme Court has] declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes. . . . and a high degree of specificity in the factual findings of [the] lower courts." (Internal quotation marks omitted.) *Maris* v. *McGrath*, 260 Conn. 834, 845, 850 A.2d 133 (2004).

"[T]he standard for colorability [which] varies depending on whether the claimant is an attorney or a party to the litigation. . . . If the claimant is an attorney, a clam is colorable if a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established. . . . If the claimant is a party to the litigation,

[child], I don't know if she is my [child], I never had a paternity test. Now, I also believe, and this may not be true, that it's—OK to cast doubt and to require the opposing party—to prove that [the child] is my [child], if the standard is knowledge.

"[The Plaintiff's Counsel]: Isn't it true that you have absolutely no evidence that would support the notion that [the child] is not your biological [child]?

"[Schwartz]: That's correct."

a claim is colorable, for purposes of the bad faith exception to the American rule, if a reasonable person, given his or her first hand knowledge of the underlying matter, could have concluded that the facts supporting the claim might have been established." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, supra, 174 Conn. App. 602.

"To determine whether the bad-faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) *Berzins* v. *Berzins*, 306 Conn. 651, 662, 51 A.3d 941 (2012).

With respect to the colorability prong, the court framed the issue as whether "the defendants' conduct in denying the parentage of their child while under oath in order to defeat legitimate claims made by the plaintiff for medical services rendered to their child constitute a colorable defense to the action? The answer depends upon whether a reasonable person, given his or her firsthand knowledge of the underlying matter could have concluded that the facts supporting the claim of nonparentage might have been established." The reasonable person test requires a determination of what "a reasonable person of honest intentions would know or believe under the facts of the case." *State* v. *Lenczyk*, 1 Conn. App. 270, 271, 470 A.2d 1240 (1984).

Because the defendants were the biological parents of the child, the court found that there was "no one in the world who could or would have known the underlying facts of parentage better than [they]." No reasonable person acting with honest intentions could have concluded that the child was not the defendants' child. The

defendants acted with a dishonest purpose when they denied paragraph 2 of count one of the complaint, which alleged that they were the child's parents. Their denial is even more "poignant" when it is viewed in the context of the common-law presumption of legitimacy that provides that a child born in wedlock is presumed to be the issue of the mother and her husband. See *Weidenbacher* v. *Duclos*, supra, 234 Conn. 63. Coupled with the presumption of legitimacy, § 46b-37 imposes statutory liability on the defendants for the necessary and reasonable medical services rendered to their child.

Connecticut courts historically have imposed sanctions on parties for untruthful pleading. A plea of general denial to material allegations of the complaint that the defendant knew to be true subjects a litigant to pay expenses incurred to establish the truth. See *Hatch* v. *Thompson*, 67 Conn. 74, 76, 34 A. 770 (1895). In *Jennings Co.* v. *DiGenova*, 107 Conn. 491, 494, 141 A. 866 (1928), our Supreme Court held that the defendant should have been charged with the plaintiff's reasonable expenses for untruthfully pleading "denial of a fact without reasonable cause." The rules of practice similarly address the subject. See Practice Book §§ 4-2 (b) and 10-5.[19]

The court found that the defendants' disavowal of their previous acknowledgement of the child's parentage to avoid a debt is counter to the accepted norms of a civilized world. The court noted that in a termination of parental rights case instituted by a child's father,

[19] Practice Book § 4-2 (b) provides in relevant part: "The signing of any pleading . . . shall constitute a certificate that the signer has read such document, that to the best of the signer's knowledge, information and belief there is good ground to support it, that it is not interposed for delay . . . ."

Practice Book § 10-5 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expense, to be taxed by the judicial authority, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ."

our Supreme Court denounced the practice, stating: "It would be anathema for our law to allow parents to terminate voluntarily their parental rights solely for the purpose of evading or relieving [themselves] of responsibility to pay child support." (Internal quotation marks omitted.) *In re Bruce R.*, 234 Conn. 194, 200, 662 A.2d 107 (1995). The trial court found that in the present case, the defendants had used the child's parentage as a way to avoid paying a legitimate charge for medical services rendered to the child for which they were legally obligated. The court thus concluded that the defendants' denial of parentage and the defense made at trial were without color because they constituted an oppressive tactic and were designed to achieve a dishonest purpose. The court determined that its finding was supported by clear evidence. See *Wildwood Associates, Ltd.* v. *Esposito*, 211 Conn. 36, 42 n.3, 557 A.2d 1241 (1989) (clear evidence same substantive standard as clear and convincing proof).

The trial court stated that, under § 52-226a,[20] a court need find only a single defense to be without merit and not asserted in good faith before the finding may be admitted in a vexatious defense case under General Statutes § 52-568.[21] The referee found that multiple defenses asserted by the defendants fell into the bad faith category. The defendants argued that a defense is

[20] General Statutes § 52-226a provides in relevant part: "In any civil action . . . tried to the court, and not more than fourteen days after judgment has been rendered, the prevailing party may file a written motion requesting the court to make a special finding to be incorporated in the judgment or made part of the record . . . that the action or a defense to the action was without merit and not brought or asserted in good faith. Any such finding by the court shall be admissible in any subsequent action brought pursuant to section 52-568."

[21] General Statutes § 52-568 provides in relevant part: "Any person who . . . asserts a defense to any civil action or complaint commenced and prosecuted by another . . . (2) without probably cause, and with a malicious intent unjustly to vex and trouble such other person shall pay him treble damages."

not asserted in bad faith and is colorable if it had been believed or were believable. The court rejected the argument.

By way of contrast, the court noted the defendants' first special defenses that the plaintiff's bill was unreasonably high, which reflected a mental state that is not uncommon to the average patient who receives a multipage, itemized bill with a surprisingly high total. The first special defense, therefore, was colorable. The defendants, however, failed to prove their defense that the plaintiff's charges were unreasonable. Reasonableness is a question of fact for the trier of fact. The court found that the plaintiff proved the reasonableness of its bill. See *Andrews* v. *Gorby*, 237 Conn. 12, 23, 675 A.2d 449 (1996) (reasonableness of compensation requested proved by preponderance of evidence).

In their second special defenses, the defendants pleaded that the services rendered by the plaintiff were unnecessary and/or harmful. The court concluded that there was no basis for the defendants to have pleaded such a special defense because there were no facts to support it.

In their fourth special defenses, the defendants pleaded that the plaintiff provided false or misleading information. The court found no facts to support the pleading or credible evidence to support the defendants' claim.

The defendants' fifth special defenses alleged that the plaintiff failed to disclose the amount it would charge for the services rendered to the child. Other than the statutory obligation to post its charges pursuant to § 19a-681 (a) as a "pricemaster" where it is available for public inspection at the Office of Health Care Access, the plaintiff was under no statutory or common-law duty to advise the defendants in advance of the amount of its charges. Under the circumstances, the court found that

there was no way that nondisclosure of unit prices or a lack of informed consent to the charges had any basis in fact and, therefore, could not have been established.

The court found the sixth special defenses, which alleged that the plaintiff had no proof that it performed the services for which it billed to the defendants, to be altogether implausible. Gelb testified that after the services were performed, she discussed the very services with the child's pediatrician, who reassured her that such services were appropriate under the circumstances. The defendants knew full well before the litigation began that the services billed had been rendered. The court concluded that such a defense would have been effective if it were true, but that in the present case it had no basis in fact and was not colorable.

The seventh special defenses asserted that the services rendered by the plaintiff could not be identified because the bill was "not written in plain English." The court found no factual support for such a defense, and the defendants presented no evidence of a statutory or regulatory requirement to that effect. Section 19a-681 governs the posting of hospital charges.[22] The plaintiff's billing statement identifies each service performed in language that an ordinary person with no medical training can understand. The court found it inconceivable given the extent of the defendants' formal educations that they were unable to identify the services rendered. The defense, therefore, was frivolous and without color.

The court previously had addressed the special defenses of accord and satisfaction but added that it is a well recognized defense. The defendants' use of it,

[22] General Statutes § 19a-681, titled "Definitions," provides in relevant part: "(a) For purposes of this section: (1) 'Detailed patient bill' means a patient billing statement that includes, in each line item, the hospital's current pricemaster code, a description of the charge and the billed amount; and (2) 'pricemaster' means a detailed schedule of hospital charges. . . ."

however, solely as an artifice of avoidance, was deceitful and without color when considered with the defendants' other mertiless defenses.

The twelfth special defenses alleged that Gelb had never received a bill for the services the plaintiff rendered to the child. The court found the special defense to be a falsehood. The defendants testified that they not only received the bill but also took affirmative action calculated to avoid paying all but a miniscule amount of the debt. The falsehood was perpetrated for no other purpose than to avoid paying the bill. The defense, therefore, was without color.

With regard to the defendants' fourteenth special defenses that Schwartz did not sign the authorization and, therefore, could not be held liable, the court concluded that it lacked any indicia of color. In view of the defendants' extraordinarily thorough research, the court found it incredible that they missed the most basic principle governing a parent's financial responsibility for a child. Section 46b-37 (2) imposes a legal obligation on a parent of a minor child while the child is residing in the family of its parents. See *Yale Diagnostic Radiology* v. *Estate of Fountain*, supra, 267 Conn. 361. Consequently, it is immaterial to Schwartz' liability whether he signed the authorization. Gelb testified that she recognized her responsibility to pay for the medical services rendered to the child because she is the child's parent. This defense becomes disingenuous when Schwartz asserts that he has no concomitant responsibility.

Having concluded that the referee's findings as to whether the defendants' special defenses were colorable were amply supported by the evidence, the court moved to the second prong of the test set out in *Maris* v. *McGrath*, supra, 269 Conn. 845, i.e., whether the defendants acted in bad faith.

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 433, 849 A.2d 382 (2004). The definition of bad faith in *Maris* is somewhat different: "To determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations or court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 847. In cases involving debt collection avoidance, a bankruptcy court looks to the totality of the circumstances and may consider a wide range of factors, including "the nature of the debt . . . the timing of the [bankruptcy] petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors." (Internal quotation marks omitted.) *In re Meyers*, 491 F.3d 120, 152 (3d Cir. 2007). The court determined that most of the factors applied to the defendants.

The court concluded that, under any definition, the defendants had acted in bad faith. Under the *De La Concha of Hartford, Inc.*, definition, the defendants' refusal to fulfill their contractual obligation was not prompted by an honest mistake as to their rights or duties. Rather, they carefully contrived a scheme

prompted by the dishonest purpose to avoid a financial obligation by lying under oath and asserting defenses that bear no indicia of color. The court agreed with the referee that the "defendants' prevarications and obfuscation permeated the entire trial and infiltrated their pleadings." The court, therefore, specifically found that the special defenses identified in its memorandum of decision were without merit and that they were not prompted by an honest mistake as to either the defendants' rights or duties.

The court turned to the plaintiff's request for attorney's fees. The defendants argued that the total attorney's fees that may be awarded to the plaintiff could not exceed 15 percent of the judgment pursuant to General Statutes § 42-150aa (b).[23] The court disagreed, concluding that the plaintiff's claim was not limited by statute, but was controlled by the common-law rule that the court may award attorney's fees for bad faith. The court reasoned that whenever there is an attorney's fee provision in a consumer party's contract, that provision is subject to § 42-150aa unless it is coupled with a distinctly different cause of action such as a breach of contract claim. A rule of statutory construction provides that "[n]o statute is to be construed as altering the common law, farther than its words import [and . . . a statute] is not to be construed as making any innovation upon the common law which it does not fairly express." (Internal quotation marks omitted.) *State* v. *Luzietti*, 230 Conn. 427 433, 646 A.2d 85 (1994).

In *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 69–72, 689 A.2d 1097 (1997), our Supreme Court construed the

[23] General Statutes § 42-150aa (b) provides: "If a lawsuit in which money damages are claimed is commenced by an attorney who is not a salaried employee of the holder of a contract or lease subject to the provisions of this section, such holder may receive or collect attorney's fees, if not otherwise prohibited by law, or not more than fifteen percent of the amount of any judgment which is entered."

scope of General Statutes § 42-150bb,[24] the sister statute of § 42-150aa, in determining that the statute did not limit a successful defendant in a consumer contract case to the 15 percent allowed in § 42-150aa. The court looked to the plain language of the statute and was persuaded that the phrase " 'the terms governing the size of the fee for the commercial party,' relates to the parties' contract, and not to § 42-150aa. Had the legislature intended to limit consumer awards of attorney's fees to 15 percent, it would have incorporated the provisions of § 42-150aa by expressly providing 'as provided in § 42-150aa.' Moreover, reading § 42-150bb in context, as we must, it is clear that the phrase, 'the terms governing the size of the fee for the commercial party,' relates to 'the contract or lease' as provided in the immediately preceding sentence in the statute." Id., 74.

The court in the present case, relying on its discussion of *Rizzo*, stated "from the language of subsection (b) of § 42-150aa, it is clear that the fee limitation was intended to apply to a consumer contract, which by our decisional law is imported into that contract, and not to bad faith conduct of a party which is an actionable wrong [that] exists independently of the contract." The court, therefore, concluded that it was free to award attorney's fees for bad faith conduct independent of the authorization and that it had a proper basis for extending the award to Schwartz.

The plaintiff's counsel filed an affidavit for attorney's fees seeking a total of $34,082.20. The affidavit is itemized, identifies each attorney who performed a service,

[24] General Statutes § 42-150bb provides in relevant part: "Whenever any contract . . . entered into . . . to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action . . . based upon the contract . . . . Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. . . ."

provides the attorney's respective hourly rate, describes the service, and assigns a time factor in hours and minutes, and the corresponding cost. The hourly rate for each attorney ranged from $175 to $265 per hour, with most entries at $185. The defendants objected to the fees on several grounds.

Schwartz disclaimed liability because (1) he was not contractually obligated to pay and (2) there is no statute that requires a spouse to pay another spouse's attorney's fees. The court referred to its prior explanation as to why Schwartz is responsible to pay for the child's medical care pursuant to the authorization signed by Gelb. As to the second reason, the court found it to be an attempt to distinguish Schwartz' statutory liability for the child's medical care from interspousal liability for attorney's fees for which there is no liability in the present context. The court found the argument to be disingenuous, as it purposefully overlooks parental responsibility fixed by statute.

The defendants also challenged the reasonableness of the attorney's fees requested. The court held an evidentiary hearing to permit the defendants to cross-examine the plaintiff's counsel and to offer evidence of their own that the attorney's fees were unreasonable. The defendants claimed that the attorney's fees exceeded the amount prayed for in the complaint, i.e., $15,000. The court explained that the plaintiff's classification of the case in its complaint as seeking less than $15,000 is designed for administrative purposes only and does not limit the amount of damages that can be recovered. See *Southington '84 Associates* v. *Silver Dollar Stores, Inc.*, 237 Conn. 758, 765, 678 A.2d 968 (1996). Moreover, Practice Book § 11-21 treats the award of attorney's fees separately from the complaint.[25] Id., 766.

[25] Practice Book § 11-21 provides in relevant part: "Motions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. . . . Nothing

The defendants also argued that the amount of attorney's fees sought was disproportionate to the amount in controversy. The court acknowledged that disproportionality of legal fees is one of the many factors that a court is required to consider in assessing whether an attorney's fee is reasonable. See Rules of Professional Conduct 1.5. Cases discussing the propriety of awarding disproportionate fees focus on the amount recovered in comparison to the amount claimed for fees. See, e.g., *Simms* v. *Chaisson*, 277 Conn. 319, 332–34, 890 A.2d 548 (2006). In the present case, the plaintiff recovered the entire amount claimed.

The court found the 241.6 hours of time the plaintiff's attorneys devoted to the present case to be disproportionate to the amount recovered by any ordinary assessment. Although the trial itself took less than two days, there were 248 entries in the docket, which was greatly disproportionate to the average activity in a similar case. The defendants complained that the plaintiff was represented by two attorneys at trial. The court stated that this was no ordinary collection matter, but one that was overburdened with "creative" defenses and objections, as well as excessive pleading, and that the self-represented defendants transformed a relatively straightforward collection case into a "pitched legal battle." See *Rana* v. *Terdjanian*, 136 Conn. App. 99, 117, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012). The court considered the foregoing factors in addition to those enumerated in rule 1.5 of the Rules of Professional Conduct.

"[When determining] reasonableness of requested attorney's fees . . . more than [a] trial court's mere general knowledge is required for an award of attorney's fees. . . . The burden of showing reasonableness rests on the party requesting the fees, and there is an undisputed requirement that the reasonableness of attorney's

in this section shall be deemed to affect an award of attorneys' fees assessed as a component of damages."

fees and costs must be proved by an appropriate evidentiary showing. . . . [T]here must be a clearly stated and described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee. . . . That factual predicate must include a statement of the fees requested and a description of services rendered." (Internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 118 Conn. App. 367, 371–72, 984 A.2d 1084 (2009). A party need not present expert testimony regarding attorney's fees. *William Raveis Real Estate, Inc.* v. *Zajaczakowski*, 172 Conn. App. 405, 424, 160 A.3d 363 (2017). The court properly may rely on a financial affidavit, as well as its own knowledge and involvement with the trial, to ascertain reasonable attorney's fees. Id.

The court applied the foregoing guidelines and found that the hourly rates of the plaintiff's counsel were reasonable and that the time expended was reasonably necessary. The court concluded that the plaintiff had met its burden of providing a factual predicate for the attorney's fees and awarded it the full amount requested against both defendants.

The defendants have raised twenty-three claims on appeal. On the basis of our thorough review of the record, we conclude that none of the claims is meritorious and most of them are not reviewable, as the record is inadequate for review, or the claim was not preserved or adequately briefed, or is inappropriate as this court does not, sua sponte, look for reasons to reverse the judgment of the trial court.

In conducting our examination of the record and the memoranda of decision written by the referee and trial court, we are mindful of the applicable legal principles and standards of review. "A reviewing authority may not substitute its findings for those of the trier of the facts. This principle applies no matter whether the reviewing authority is the Supreme Court . . . the

Appellate Court . . . or the Superior Court reviewing the findings of the . . . attorney trial referees. . . . This court has articulated that attorney trial referees and [fact finders] share the same function . . . whose determination of the facts is reviewable in accordance with well established procedures prior to the rendition of judgment by the court. . . .

"The factual findings of a[n] [attorney trial referee] on any issue are reversible only if they are clearly erroneous. . . . [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 692, 1 A.3d 157 (2010).

"Our standard of review concerning a trial court's findings of fact is well established. If the factual basis of the court's decision is challenged, our review includes determining whether the facts set out in the memorandum of decision are supported by the record or whether, in light of the evidence and pleadings in the whole record, those facts are clearly erroneous. . . . Further, a court's inference of fact is not reversible unless the inference was arrived at unreasonably." (Internal quotation marks omitted.) *Stein* v. *Tong*, 117 Conn. App. 19, 24, 979 A.2d 494 (2009).

"The trial court's legal conclusions are subject to plenary review. [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *Hartford Fire Ins. Co.* v. *Werner*, 91 Conn. App. 685, 687–88, 881 A.2d 1065, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005).

It is well established that appellate courts "review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

"Connecticut adheres to the American rule, which provides that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . When a contract expressly provides for the recovery of reasonable attorney's fees, an award under such a clause requires an evidentiary showing of reasonableness. . . . A trial court may rely on its own general knowledge of the trial itself to supply evidence support of an award of attorney's fees. . . . The amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion. . . . Sound discretion, by definition, means a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law . . . ." (Citation omitted; internal quotation marks omitted.) *LLP Mortgage, Ltd.* v. *Lynch*, supra, 122 Conn. App. 702.

On the basis of our extensive review of the record and examination of the well reasoned memoranda of decision of the referee and trial court, we conclude that the record supports their findings that the defendants are indebted to the plaintiff and that they exhibited bad faith throughout the litigation. This is the rare case in which the arguments put forth are so preposterous,

audacious, and transparent, and the attempt to avoid payment so obvious, that a finding of bad faith is compelled. Above all else, credibility determinations are to be made by the finder of fact who may accept all, some, or none of the testimony of a witness. See *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017). The referee acted well within his authority to find by a preponderance of the evidence that the defendants were untruthful. See *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 126, 981 A.2d 1068 (2009) (preponderance of evidence usual standard in civil case). The defendants testified that they were uncertain of the child's parentage despite the overwhelming contrary circumstantial evidence. Their behavior in predicating their defense on such a denial is deeply offensive to the norms of civil society. Accordingly, because the record supports the findings of the referee and the court that the defendants acted in bad faith, the court's decision to award attorney's fees is legally and logically correct. For the foregoing reasons, the defendants' appeal fails.

The judgment is affirmed.

In this opinion the other judges concurred.

GREGG FISK *v.* TOWN OF REDDING ET AL.
(AC 40216)

Sheldon, Elgo and Flynn, Js.*

Syllabus

The plaintiff, who had sustained injuries when he fell off of a municipal retaining wall, sought to recover damages for absolute public nuisance from the defendant town of Redding. He claimed that the town had created a nuisance by constructing the retaining wall without a fence on top of it, which thereby resulted in his fall and injuries. Following a trial, the jury returned a verdict in favor of the town, which the trial court accepted and recorded. Thereafter, the plaintiff filed a motion to

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

set aside the verdict, claiming that the jury's responses to the first and third interrogatories, in which it found that the wall was an inherently dangerous condition but was not an unreasonable or unlawful use of the land, were inconsistent. The trial court denied the motion and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

1. The trial court abused its discretion in denying the plaintiff's motion to set aside the verdict, as the jury's answers to the special interrogatories in the verdict form were inconsistent and could not be harmonized: the jury could not have determined that the alleged inherently dangerous condition, the retaining wall without a fence, was both inherently dangerous and not an unreasonable use of the land, as there was no scenario under which the jury reasonably could have determined, after concluding that the retaining wall without a fence was inherently dangerous, that the fact that the retaining wall lacked a fence served any utility to either the town or the community, or that a weighing of all relevant circumstances could make the use of the land for an unfenced wall that is inherently dangerous and lacks any utility, reasonable, and, thus, the jury's response to the first interrogatory, that the condition was inherently dangerous, was fatally inconsistent with its response to the third interrogatory, that the town's use of the land was not unreasonable; furthermore, the trial court did not attempt to harmonize the jury's inconsistent answers to interrogatories by ordering the jury to return to continue its deliberations and to consider its verdict in light of the obvious inconsistency.
2. The plaintiff could not prevail on his claim that the trial court erred in excluding evidence that following his accident, the town installed a fence, which was based on his claim that evidence of the remedial repair was admissible because the town did not voluntarily install the fence but, rather, did so at the direction of the Department of Transportation; under the applicable provision of the Connecticut Code of Evidence (§ 4-7 [a]), evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event, the reasons behind that rule make clear that voluntariness is not a factor, and although the plaintiff alleged that the evidence of the subsequent fence was relevant to the jury's determination of inherent danger and proximate cause, the evidence of remedial measures was inadmissible to prove the town's liability for nuisance.

(*One judge concurring in part and dissenting in part*)

Argued November 14, 2018—officially released May 21, 2019

Procedural History

Action to recover damages for public nuisance, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp, J.*, granted the named

defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict for the named defendant; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Reversed*; *new trial.*

A. Reynolds Gordon, with whom was *Frank A. DeNicola, Jr.*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellee (named defendant).

Opinion

FLYNN, J. The plaintiff, Gregg Fisk, appeals from the judgment of the trial court rendered on a jury verdict in favor of the defendant town of Redding.[1] On appeal, the plaintiff claims that the court erred in (1) denying his motion to set aside the verdict and (2) excluding evidence of subsequent remedial measures. We agree with the plaintiff's first claim but disagree with the second.

The record reveals the following facts. A retaining wall was constructed as part of the defendant's "Streetscape Project." The project was funded by federal and state grants, and the state Department of Transportation (department) supervised the construction. The department's design engineer supervisor approved the construction of a five foot retaining wall without a fence.[2] During the construction phase of the project,

[1] The complaint also named as defendants M. Rondano, Inc., and BL Companies, Inc. The court, *Radcliffe, J.*, granted the motion for summary judgment of BL Companies, Inc., which was affirmed on appeal. See *Fisk* v. *Redding*, 164 Conn. App. 647, 138 A.3d 410 (2016). The plaintiff withdrew his complaint as to M. Rondano, Inc. We will refer in this opinion to the town of Redding as the defendant.

[2] There was evidence that the Bridge Design Manual, which applies to retaining walls, provided that a protective fence is required if a retaining wall is greater than five feet, and subsequently was changed, unbeknownst to the project supervisors, to require any retaining wall exceeding four feet

field conditions existed that necessitated the height of the retaining wall to become taller than five feet, as the driveway below it sloped downward. A wooden barrier in the style of a Merritt Parkway guardrail was installed several feet in distance from the retaining wall with dense landscaping behind it.

The retaining wall was adjacent to the parking lot of the Lumberyard Pub. On the evening of August 26, 2011, at approximately 8:30 p.m., the plaintiff went to the Lumberyard Pub for dinner and drinks. The plaintiff left at approximately 2 a.m., after consuming approximately five beers. In order to reach Main Street by a shortcut, the plaintiff climbed over the guardrail and stepped off the retaining wall. While traversing the unfenced retaining wall, the plaintiff fell and injured his left leg and ankle in many places.

The plaintiff brought an action against the defendant sounding in absolute public nuisance and alleging that he was injured when he fell off an unfenced retaining wall that had a nearly six foot drop to Main Street below.[3] The defendant filed an answer and special defenses, alleging, inter alia, assumption of the risk and recklessness. Following trial, the jury returned a verdict for the defendant, which the court, *Kamp*, *J.*, accepted and recorded. Thereafter, the plaintiff filed a motion to set aside the verdict, and the court issued a memorandum of decision denying the motion. This appeal followed. Additional facts will be set forth as necessary.

to have a fence. There also was evidence that the wall, as built, complied with the Connecticut State Building Code.

[3] The plaintiff pleaded, inter alia, in his operative complaint: "The said wall, which was within the highway limits of Main Street . . . had a precipitous (approximately [six feet] straight down) drop at the border of the highway right-of-way with the driveway (some [six feet] below) serving [number] 2 Main Street. . . . Said precipitous drop had no protective fencing. . . . As such, the said construction was inherently dangerous and constituted an absolute nuisance. . . . Said wall was constructed upon public land and constituted a public nuisance." The plaintiff offered evidence that he suffered almost $250,000 in past medical bills and between $100,000 and $200,000 in future medical bills.

I

The plaintiff claims that the court erred when it denied his motion to set aside the verdict because the jury's answers to the special interrogatories in the verdict form were inconsistent. We agree.

The following additional facts are relevant to this claim. The court charged the jury, prior to deliberations, in part, as follows: "First, the plaintiff must prove that the retaining wall was inherently dangerous . . . that it had a natural tendency to create danger and to inflict injury upon person or property. It is the condition itself which must have a natural tendency to create danger and inflict injury. You, as the trier of fact, must consider all of the circumstances involved in determining whether . . . the condition in that particular location had a natural tendency to create danger and inflict injury. Second, the plaintiff must prove that the danger was a continuing one. . . . Third, the plaintiff must prove that the use of the land, in this case the retaining wall, was unreasonable or unlawful. In making a determination concerning the reasonableness of the use of the land, all the surrounding factors must be considered. Fourth, the plaintiff must prove that the condition interferes with a right common to the general public. . . . If you find that the plaintiff has proven the above elements of a public nuisance, next the plaintiff must prove that the nuisance was a proximate cause of the injuries suffered by [the plaintiff]." In explaining how to proceed with the verdict forms and jury interrogatories, the court stated: "[F]or example, you respond to question one. If you answer no, as the instructions indicate, you must return a verdict for the defendant, and you would fill out the defendant's verdict form and that would end your deliberations. If you answer number one yes, as the instructions indicate, then you go on to question two, and you answer that question. After question two, if you were to answer that question no, then you would return a verdict for the defendant using the defendant's

verdict form. If you answer yes, you continue to number three. And you continue through the process until you've reached your verdict either using one or the other of the verdict forms. You necessarily also have to complete the jury interrogatories at least completely or to where you stop if you answer a question no." The court did not further explicate interrogatories six and seven, which asked the jury to render special verdicts as to whether the defendant had proved its special defenses of recklessness and assumption of the risk.

Following the final charge of the court to the jury, the court submitted seven interrogatories to the jury, with the first and third as follows: "1. Has Plaintiff proven to you, by a preponderance of the evidence, that the condition complained of, the subject retaining wall was inherently dangerous in that it had a natural tendency to inflict injury on person or property? . . . 3. Has Plaintiff proven to you, by a preponderance of the evidence, that the Defendant's use of the land was unreasonable or unlawful?"[4] During deliberations, the jury presented the following question to the court: "If we are not all in agreement on questions one and two

[4] The court submitted the following interrogatories to the jury:

"1. Has Plaintiff proven to you, by a preponderance of the evidence, that the condition complained of, the subject retaining wall, was inherently dangerous in that it had a natural tendency to inflict injury on person or property? . . .

"[If your answer is 'NO,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'YES,' please proceed to questions #2.]

"2. Has Plaintiff proven to you, by a preponderance of the evidence, that the danger created was a continuing one? . . .

"[If your answer is 'NO,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'YES,' please proceed to questions #3.]

"3. Has Plaintiff proven to you, by a preponderance of the evidence, that the Defendant's use of the land was unreasonable or unlawful? . . .

"[If your answer is 'NO,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'YES,' please proceed to questions #4.]

"4. Has Plaintiff proven to you, by a preponderance of the evidence, that the existence of the nuisance interfered with a right common to the general public? . . .

but are on question three, are we able to rule in favor of the defendant?" (Emphasis omitted.) Thereafter, counsel discussed the issue with the court outside the presence of the jury, and the plaintiff's attorney stated: "If some of them are saying that the wall was . . . inherently dangerous and the danger was continuing, then that means that it has to be unreasonable." The court did not agree and stated that the "law requires that you, on behalf of your client, prove all four elements, and if you can't prove each element then there's a defendant's verdict." The plaintiff's counsel explained, "we don't abandon our position," to which the court responded, "of course you don't because you're going to write about this on appeal." The plaintiff's counsel specifically took an exception to "the omission of the words 'without a fence' after 'retaining wall' " in the court's charge to the jury. He also had preserved the issue in the plaintiff's request to charge, dated July 25, 2016, which suggested that the court charged the jury that "[t]he plaintiff must prove that the retaining wall without a fence had a natural tendency to create danger

"[If your answer is 'NO,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'YES,' please proceed to questions #5.]

"5. Has Plaintiff proven to you, by a preponderance of the evidence, that the existence of the nuisance was a proximate cause of the plaintiff's injuries and damages? . . .

"[If your answer is 'NO,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'YES,' please proceed to questions #6.]

"6. Has the Defendant proven to you, by a preponderance of the evidence, that Plaintiff's own reckless misconduct was a proximate cause of his injuries? . . .

"[If your answer is 'YES,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'NO,' please proceed to questions #7.]

"7. Has the Defendant proven to you, by a preponderance of the evidence, its defense of assumption of the risk? . . .

"[If your answer is 'YES,' you must return a verdict for the defendant by using the defendant's verdict form. If your answer is 'NO,' please proceed to the plaintiff's verdict form.]"

and to inflict injury upon person or property." (Internal quotation marks omitted.)

Following the colloquy with counsel, the court responded to the jury's question as follows: "Ladies and gentlemen, I instructed you on the law and you have my charge as a court exhibit. And the plaintiff has the burden of proof, as I indicated in my charge, to prove essentially four elements of an absolute public nuisance . . . . If the jury can unanimously . . . agree that the plaintiff has not proven one of those four elements and you can agree upon that, and in this case if it's number three and you so indicate on your jury verdict interrogatories and you check that unanimously in the negative, then you . . . can return a verdict in . . . favor of the defendant. But you must all unanimously agree that [the plaintiff] has not proven one element of the cause of action."

Following deliberations, the jury responded in the affirmative to jury interrogatories one and two and in the negative to the third jury interrogatory. The plaintiff moved to set aside the defendant's verdict, arguing that the jury's responses to the first and third interrogatories, in which it found that the wall was an inherently dangerous condition but was not an unreasonable or unlawful use of the land, were inconsistent. The court denied the motion, reasoning that the "jury's responses to the interrogatories were not inconsistent because there was evidence that allowed the jury to determine that, although the wall was unreasonably dangerous, it was not an unreasonable use of the land."

"The standard of review governing our review of a trial court's denial of a motion to set aside the verdict is well settled. The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that

there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 803, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015).

"When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt to harmonize the answers." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270, 280, 698 A.2d 838 (1997). The plaintiff pleaded that the nuisance was absolute. "[I]n order to prevail on a claim of nuisance, a plaintiff must prove that: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was [a] proximate cause of the [plaintiff's] injuries and damages. . . . [W]here absolute public nuisance is alleged, the plaintiff's burden includes two other elements of proof: (1) that the condition or conduct complained of interfered with a right common to the general public . . . and (2) that the alleged nuisance was absolute, that is, that the defendants' intentional conduct, rather than their negligence, caused the condition deemed to be a nuisance." (Citations omitted; internal quotation marks omitted.) *State* v. *Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987).

"Whether an interference is unreasonable in the public nuisance context depends . . . on (a) [w]hether the

conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by [law] . . . . The rights common to the general public can include, but certainly are not limited to, such things as the right to use a public park, highway, river or lake." (Internal quotation marks omitted.) *Kumah* v. *Brown*, supra, 160 Conn. App. 805. "The test of unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards."[5] (Internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 456, 736 A.2d 811 (1999), citing 4 Restatement, Torts § 826, comment (b) (1939). One of those factors is utility. "Reasonableness in the nuisance context weighs the utility of the interference with the public right against the degree or severity of the interference. See 4 Restatement (Second), Torts § 826, p. 119 (1979) ('[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct'); see also 58 Am. Jur. 2d 632–33, Nuisances § 79 (2012) ('the court must balance the gravity of the harm to the plaintiff against the utility of the defendant's conduct both to the defendant and to the community'). Such considerations are germane to deciding whether an interference with public safety is significant." *Kumah* v. *Brown*, supra, 806 n.6.

In *Kumah* v. *Brown*, supra, 160 Conn. App. 798, the plaintiff driver collided with a fire truck that had been positioned diagonally across Interstate 95 in response

[5] The focus in *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 449, 736 A.2d 811 (1999), was the utility of what the alleged creators of a private nuisance had made by their conduct rather than any contributory negligence on the part of the plaintiffs. The present case involves a claim of absolute nuisance to which contributory negligence is not a defense. See *Warren* v. *Bridgeport*, 129 Conn. 355, 360, 28 A.2d 1 (1942).

to a tractor trailer that had rolled over and was leaking diesel fuel. Id., 800–801. The plaintiff driver brought an action sounding in negligence and public nuisance. Id., 801. The plaintiffs argued on appeal that "the court erred in failing to set aside the jury's verdict because the jury's finding that the defendant was negligent was inconsistent with its express finding that the defendant's use of the land was not unreasonable." Id., 802. This court concluded that "[i]t does not follow that simply because the jury found, as to one or more of the alleged acts or omissions, that the defendant had breached its duty to act as an ordinarily prudent person, it then necessarily had to find that the defendant's use of the land was unreasonable in the circumstances." Id., 804. This court further concluded: "The jury could have found, for example, that a reasonably prudent town would have added more traffic cones or placed them differently, but that it was not unreasonable overall, given the emergency, for the town to interfere with the public's access to the highway generally by placing the fire truck in front of the disabled tractor trailer and generally guarding the scene. The interrogatories were not necessarily inconsistent; therefore, the court did not abuse its discretion in denying the plaintiffs' motion to set aside the verdict." (Footnote omitted.) Id., 806–807.

We are presented with the question of whether the jury's response to the first interrogatory, that the condition was inherently dangerous, is fatally inconsistent with its response to the third interrogatory, that the defendant's use of the land was not unreasonable.[6] In his complaint, the plaintiff alleged that the defendant constructed a retaining wall that had a precipitous drop of approximately six feet and was not fenced. The plaintiff claims that the wall was inherently dangerous, constituted a public nuisance, and that he injured himself

[6] The court instructed the jury to determine whether the condition in the particular location had a natural tendency to create danger and inflict injury.

when he fell off the retaining wall. The issue in this case, as it was tried and argued below, was not whether the defendant could build a wall, but whether it could erect an unfenced wall, without thereby creating a public nuisance. In analogous settings, such as highway defect or premises liability cases, where a particular defect must be proved, what must be established is not a condition that might give rise to the defect, but the existence of the very defect that caused the injury, such as a pothole in a highway or a broken stair on someone's premises. See, e.g., *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 49 A.3d 951 (2012). In the present case, the condition which the plaintiff claims to have constituted a nuisance was the retaining wall *without a fence*.

The court instructed the jury on the "reasonable use" element of public nuisance that it was to consider "all the surrounding factors." Although there was evidence of landscaping and a Merritt Parkway style barrier several feet from the approximately five foot tall wall, the jury nonetheless found the wall to be inherently dangerous. Evidence that the plaintiff was intoxicated, wore flip-flops, walked over the Merritt Parkway barrier and jumped off the wall, does not pertain to the question in the third interrogatory as to whether the *defendant's* use of the land was reasonable. "[T]he only practical distinction between an absolute nuisance and one grounded in negligence is that contributory negligence is not a defense to the former but may be as to the latter." (Internal quotation marks omitted.) *Quinnett* v. *Newman*, 213 Conn. 343, 349, 568 A.2d 786 (1990), overruled on other grounds by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003). That evidence might well pertain to the defendant's special defenses of recklessness and assumption of the risk, but the jury did not reach those issues. The issue of utility comes into play logically, not about whether the wall itself had

some use to hold back the earth, but whether there was any useful public purpose to erecting the wall without a fence atop it, which is the very defect that the plaintiff, in his complaint, supporting evidence, and argument to the jury, claims to have been the nuisance that proximately caused his injuries. In this case, as a matter of law, the jury could not have determined that the retaining wall without a fence was both inherently dangerous and not an unreasonable use of the land. A wall with or without a fence has the same capacity to hold back earth. The condition at issue is not the wall itself or the Streetscape Project, but the wall without a fence atop it. The inherently dangerous condition of the wall without a fence has no utility to stabilize soil. In *Kumah*, a jury reasonably could have found that the fire truck placed diagonally across an interstate was not an unreasonable use of the land given the utility of the fire truck in the emergency situation. See *Kumah* v. *Brown*, supra, 160 Conn. App. 806–807. In the present case, there is no scenario under which the jury reasonably could have determined, after concluding that the retaining wall without a fence was inherently dangerous, that the fact that the retaining wall lacked a fence served any utility to either the defendant or the community, or that a weighing of all relevant circumstances could make the use of the land for an unfenced wall that is inherently dangerous and lacks any utility, reasonable. Under the circumstances of this case, the jury's answers to interrogatories one and three are inconsistent. In *Bilodeau* v. *Bristol*, 38 Conn. App. 447, 455, 661 A.2d 1049, cert. denied, 235 Conn. 906, 665 A.2d 899 (1995), this court noted that in attempting to harmonize the jury's inconsistent answers to interrogatories, a court may, as dictated by caution, return the jury to consider its verdict in light of the obvious inconsistency. See also *Rendahl* v. *Peluso*, 173 Conn. App. 66, 95, 162 A.3d 1 (2017) ("[a] trial court may decline to accept a verdict and return

the jury to continue its deliberations when the verdict form or accompanying interrogatories, if any . . . are legally inconsistent"). The trial court did not do so in this instance. Because the jury's answers are inconsistent and cannot be harmonized, we conclude that the court abused its discretion in denying the plaintiff's motion to set aside the verdict. "A verdict that is inconsistent or ambiguous should be set aside." *Kregos* v. *Stone*, 88 Conn. App. 459, 470, 872 A.2d 901, cert. denied, 275 Conn. 901, 882 A.2d 672 (2005).

II

The plaintiff next claims that the court erred in excluding evidence that following the plaintiff's accident, the defendant installed a fence.[7] The plaintiff argues that evidence of the remedial repair is admissible because the defendant did not voluntarily install the fence but, rather, did so at the direction of the department. We disagree.

"The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 489, 958 A.2d 1195 (2008).

Section 4-7 (a) of the Connecticut Code of Evidence provides: "[E]vidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures." Section 4-7, "which is an exception to the general rule of

[7] Because of our conclusion with respect to the first issue, it is appropriate for us to give guidance on issues that are likely to recur upon retrial.

admissibility of relevant evidence . . . reflects the settled rule in this [s]tate that evidence of subsequent repairs is inadmissible to prove negligence or [as] an admission of negligence at the time of the accident. . . . [S]uch evidence is likely to be of relatively minor probative value. . . . A broad exclusionary rule prohibiting the use of such evidence to prove negligence [or culpable conduct] therefore fosters the public good by allowing tortfeasors to repair hazards without fear of having the repair used as proof of negligence, even though it requires the plaintiff to make a case without the use of evidence of the subsequent repairs. . . . [E]vidence of subsequent remedial measures may be introduced when the party seeking to introduce the evidence can demonstrate that it is not being used as evidence of negligence but is instead offered to prove another material issue." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 13–15, 60 A.3d 222 (2013).

The plaintiff stated in his brief that the evidence of the subsequent fence was relevant to the jury's determination of inherent danger and proximate cause. Section 4-7 of the Connecticut Code of Evidence, and the reasons behind the rule, make clear that voluntariness is not a factor, and that evidence of remedial measures is inadmissible to prove the defendant's liability for nuisance. Accordingly, we conclude that the court did not abuse its discretion in excluding evidence of the subsequent fence.

The judgment is reversed and the case is remanded for a new trial.

In this opinion SHELDON, J., concurred.

ELGO, J., concurring in part and dissenting in part. In ruling on a motion to set aside a verdict, the trial court is endowed with a broad legal discretion that

shall not be disturbed absent clear abuse. *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 776, 83 A.3d 576 (2014); see also *Ulbrich v. Groth*, 310 Conn. 375, 414, 78 A.3d 76 (2013) (every reasonable presumption must be given in favor of correctness of court's exercise of discretion to deny motion to set aside). In the present case, the plaintiff, Gregg Fisk, claims that the court abused that discretion due to the presence of allegedly inconsistent responses to certain interrogatories by the jury. Such a claim requires this court to attempt to harmonize the jury's answers while giving the evidence the most favorable construction that reasonably supports its verdict. *Norrie* v. *Heil Co.*, 203 Conn. 594, 606, 525 A.2d 1332 (1987). Guided by that standard, I would conclude that the trial court did not abuse its discretion in this case because the jury's responses to the interrogatories in question can be harmonized in accordance with established nuisance jurisprudence. I therefore respectfully dissent from the majority's conclusion to the contrary.

The standard of review governing the plaintiff's claim is well settled. In *Norrie* v. *Heil Co.*, supra, 203 Conn. 605–606, our Supreme Court articulated the standard of review applicable to a claim that the jury's responses to interrogatories are internally inconsistent with each other. It stated: "Our [review] is extremely limited. The trial court's refusal to set aside the verdict is entitled to great weight in our assessment of the claim that its decision is erroneous. . . . The evidence and record must be given the most favorable construction in support of the verdict which is reasonable. . . . It is not the function of a court to search the record for conflicting answers in order to take the case away from the jury on a theory that gives equal support to inconsistent and uncertain inferences. When a claim is made that the jury's answers to interrogatories in returning a verdict are inconsistent, the court has the duty to attempt

to harmonize the answers." (Citations omitted.) Id., 606; accord *Earlington* v. *Anastasi*, 293 Conn. 194, 203, 976 A.2d 689 (2009).

In this public nuisance action, the jury was presented with seven interrogatories. See footnote 4 of the majority opinion. Relevant to this appeal are its responses to the first and third interrogatories. The first interrogatory asked whether the plaintiff had proven "that the condition complained of, the subject retaining wall, was inherently dangerous in that it had a natural tendency to inflict injury on person or property"; the jury answered "Yes." The third interrogatory inquired whether the plaintiff had proven "that the Defendant's use of the land was unreasonable or unlawful"; the jury answered "No." In accordance with the court's instructions,[1] the jury, after answering that interrogatory in the negative, proceeded to return a verdict in favor of the defendant town of Redding.[2] On appeal, the plaintiff maintains that those responses are internally inconsistent with each other and "plainly contradictory." I do not agree.

The first interrogatory required the jury to determine whether the retaining wall *itself* was inherently dangerous. It is well established that an interrogatory presented to a jury must be read "in conjunction" with the instruction provided by the court. *Norrie* v. *Heil Co.*, supra, 203 Conn. 605. In its charge to the jury, the court instructed that "[i]t is the condition *itself* which must have a natural tendency to create danger and inflict injury." (Emphasis added.) Because under our law the jury is presumed to follow the court's instructions absent an indication to the contrary; *Wiseman* v. *Armstrong*, 295 Conn. 94, 113, 989 A.2d 1027 (2010); we

[1] In this appeal, the plaintiff has raised no claim with respect to the propriety of the court's instructions to the jury.

[2] The complaint named other defendants that are not involved in this appeal. References in this opinion to the defendant are to the town of Redding.

must presume that the jury in this case considered whether the retaining wall itself was inherently dangerous. The jury answered the query in the affirmative.

After making that initial finding, the jury also was required to determine whether the use of the land in question was unreasonable, insofar as it interfered with a right common to the general public.[3] See *State* v. *Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987); 4 Restatement (Second), Torts § 821B (1) (1979). Unlike the first interrogatory, which required the jury to determine whether the retaining wall *itself* was inherently dangerous, the inquiry under the third interrogatory required the jury to consider whether the use of the land on which the retaining wall was erected was unreasonable in light of the surrounding circumstances.[4] As this court has observed, in the public nuisance context, all of the surrounding factors must be considered to ascertain whether the use of land in a given instance constitutes an unreasonable interference with a public use. See *Kumah* v. *Brown*, 160 Conn. App. 798, 805–806 n.5 and n.6, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015).

That precept is well ingrained in our law. As our Supreme Court noted more than half a century ago,

[3] Although both the third interrogatory and the court's charge to the jury also referenced unlawfulness, there was no evidence presented at trial, nor any claim by the plaintiff, that the use of the land was unlawful. I therefore confine my review to the issue of reasonableness. See *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 449 n.4, 736 A.2d 811 (1999) ("the determinative portion of this element [of a nuisance action] was whether the use . . . was reasonable").

[4] For that reason, I reject the plaintiff's suggestion that a finding that the land in question was inherently dangerous precludes a finding by the jury that the defendant's use of the land in question was reasonable. The relevant inquiries under the first and third interrogatories are distinct and have been well established under our law for the better part of a century. See, e.g., *Beckwith* v. *Stratford*, 129 Conn. 506, 508, 29 A.2d 775 (1942) ("[t]o 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").

reasonableness must be determined in light of the particular "circumstances of the case."[5] *Wetstone* v. *Cantor*, 144 Conn. 77, 80, 127 A.2d 70 (1956); see also *Nicholson* v. *Connecticut Half-Way House, Inc.*, 153 Conn. 507, 510, 218 A.2d 383 (1966) ("[a] fair test of whether a proposed use constitutes a nuisance is the reasonableness of the use of the property in the particular locality under the circumstances of the case" [internal quotation marks omitted]). The precedent of this state's highest court thus instructs that "[u]nreasonableness cannot be determined in the abstract, but, rather, must be judged under the circumstances of the particular case." *Pestey* v. *Cushman*, 259 Conn. 345, 352–53, 788 A.2d 496 (2002); see also *Walsh* v. *Stonington Water Pollution Control Authority*, 250 Conn. 443, 457, 736 A.2d 811 (1999) (concluding that trial court properly instructed jury that it "must consider many factors in determining the reasonableness of use"); *Nair* v. *Thaw*, 156 Conn. 445, 452, 242 A.2d 757 (1968) (citing 4 Restatement, Torts § 826, comment [b] [1939], for proposition that "[d]etermining unreasonableness [in the nuisance context] is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards" [internal quotation marks omitted]); *Cyr* v. *Brookfield*, 153 Conn. 261, 266, 216 A.2d 198 (1965) (reasonableness measured "under all the circumstances").

Almost eighty years ago, our Supreme Court explained that "[w]hether . . . a particular condition upon property constitutes a [public] nuisance does not

[5] In *Peterson* v. *Oxford*, 189 Conn. 740, 745–46, 459 A.2d 100 (1983), our Supreme Court similarly described the application of a reasonableness standard as "a weighing analysis" that entails consideration of "all the relevant circumstances" and factors. See also *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995) ("[w]e have consistently held that reasonableness is a question of fact for the trier to determine based on all of the circumstances").

depend *merely upon the inherent nature of the condition*, but involves also a consideration of all relevant facts, such as its location, its adaptation to the beneficial operation of the property, the right of members of the public to go upon the land adjacent to it, and the use to which they would naturally put that land." (Emphasis added.) *Balaas* v. *Hartford*, 126 Conn. 510, 514, 12 A.2d 765 (1940). For that reason, the trial court in the present case properly instructed the jury with respect to the third interrogatory that "[i]n making a determination concerning the reasonableness of the use of the land, all the surrounding factors must be considered." See *Kumah* v. *Brown*, supra, 160 Conn. App. 806 n.6 ("[t]he jury . . . was properly instructed to consider all of the [surrounding] circumstances").

Accordingly, in considering the third interrogatory regarding the reasonableness of the defendant's use of the land, the jury was not confined to a review of the retaining wall in isolation. Rather, the jury was required to "take into account a multiplicity" of surrounding factors; *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 250 Conn. 457; including "both the general activity [on the land] and what is done about its consequences." (Internal quotation marks omitted.) Id., 459. In the present case, the jury had before it evidence of the necessity and, hence, utility, of the retaining wall, as it was constructed to replace an existing retaining wall and meant to preserve the public's right to traverse Main Street below, particularly pedestrians, bicyclists, and joggers. The jury also heard testimony that the retaining wall, as built, fully complied with the Connecticut State Building Code, which governs the construction of retaining walls in this state. The plaintiff does not suggest otherwise in this appeal.

The jury also was presented with an abundance of documentary and testimonial evidence, including several photographs of the land in question, indicating that

both a guardrail barrier and a dense landscaping buffer separated the retaining wall from the adjacent parking lot, from which it is undisputed that the plaintiff entered the land. In this regard, I reiterate that the applicable standard of review requires this court to view that evidence in the light most favorable to the verdict delivered by the jury and to make all reasonable inferences consistent therewith. *Norrie* v. *Heil Co.*, supra, 203 Conn. 606. James Fielding, who served as the project manager and oversaw construction of the retaining wall, testified at trial that installing a fence on the retaining wall "was never discussed" because the defendant "had the guardrail in place serving to protect vehicles and pedestrians." Beyond that, the plaintiff's own expert witness, forensic engineer Richard Ziegler, conceded at trial that the guardrail barrier was an effective means of keeping people out of the area between the retaining wall and the parking lot.[6]

The jury also heard uncontroverted testimony that, between May and August, 2011, the plaintiff frequently patronized the Lumberyard Pub, whose parking lot abuts the land in question, as often as twice a week. The plaintiff testified that, on *every* occasion prior to the events of August 27, 2011, he walked down the

[6] At trial, the following colloquy occurred:

"[The Defendant's Counsel]: The [existing] guardrail, it's made of heavy block wood; is that right?

"[Ziegler]: Yes.

"[The Defendant's Counsel]: And a structure like this one [that] we're looking at, certainly sends the message to people over here that they are not supposed to go over in that direction, doesn't it?

"[Ziegler]: Correct.

"[The Defendant's Counsel]: And . . . correct me if I'm wrong, but the guardrail is an effective means of keeping people from the parking lot over here from going into the area where the high parts of the wall are, correct?

"[Ziegler]: Yes.

"[The Defendant's Counsel]: That was your word, an effective means of keeping people from going in; correct?

"[Ziegler]: Yes."

paved parking lot to exit the Lumberyard Pub.[7] The plaintiff's own testimony supports the conclusion that the defendant's use of the land was objectively reasonable because the plaintiff's conduct on every other occasion he frequented the Lumberyard Pub[8] illustrates that he had recognized the defendant's use of the guardrail barrier and the landscaping buffer as signals to the public that they should not traverse the land in question.[9]

[7] The uncontroverted evidence before the jury established that, at all relevant times in 2011, the plaintiff lived one-half mile away from the land in question and knew that there was a drop in elevation from the top of the retaining wall. The evidence also indicates that the plaintiff was very familiar with the land in question. He previously had worked in that area of the town for seven years, at which time a timber retaining wall was present on that land. There is no indication in the record that the plaintiff ever attempted to traverse either the timber retaining wall or the replacement retaining wall at any time during those seven years or in 2011, apart from the early morning hours of August 27, 2011, when he was in an admittedly intoxicated condition. As the plaintiff acknowledged at trial, he "never once went over [the] retaining wall prior to that night . . . ."

Moreover, the plaintiff offered no evidence that *anyone* ever traversed the retaining wall prior to the events of August 27, 2011. In this regard, I believe the present case is strikingly similar to *Balaas* v. *Hartford*, supra, 126 Conn. 514, in which "[t]here [was] no finding that anyone had ever [previously used the land in question as the plaintiff did], that the place where the accident occurred had ever been used [in that manner], or that there was any reason for the defendant to anticipate such use by anyone."

[8] I fully agree with the majority that such evidence is not relevant to the question of the plaintiff's contributory negligence in this public nuisance case. Rather, I highlight such evidence because I believe it further substantiates a finding by the jury that the defendant took reasonable measures to alert pedestrians of ordinary prudence that the land in question was not to be traversed.

[9] In his operative complaint, the plaintiff alleged that the defendant had erected the retaining wall without any "protective fencing." In its answer, the defendant denied the truth of that allegation. As such, the factual question of whether any protective fencing existed was in dispute and one for the jury, as finder of fact, to ultimately decide. Because the jury was presented with ample documentary and testimonial evidence that both a guardrail barrier and a landscaping buffer separated the parking lot from the retaining wall, as well as testimony from the defendant's project manager that the guardrail barrier was installed "to protect vehicles and pedestrians," I believe the jury reasonably could conclude that protective fencing was, in fact, present on the land, insofar as fencing is defined as "a barrier intended to prevent . . . intrusion or to mark a boundary" and "something resembling a fence in appearance or function." See Webster's Third New International Dictionary (2002) p. 837. Such a finding is consistent with the verdict rendered by the jury in favor of the defendant.

Under Connecticut law, a nuisance claim requires consideration of not only the defendant's use of the land in erecting the retaining wall, but also "what [was] done about its consequences." (Internal quotation marks omitted.) *Walsh* v. *Stonington Water Pollution Control Authority*, supra, 250 Conn. 459. On the evidence presented at trial, the jury reasonably could determine that the defendant's installation of both the guardrail barrier and the landscaping buffer to separate the retaining wall from pedestrian access in the parking lot were protective measures aimed at mitigating any adverse consequences of an otherwise dangerous retaining wall.[10]

Such surrounding circumstances are highly relevant to the jury's consideration of the reasonableness of the defendant's use of the land in question. For example, in *Kumah* v. *Brown*, supra, 160 Conn. App. 800, 802, at issue was the reasonableness of a fire truck positioned diagonally across the middle and right travel lanes of a highway, which, the plaintiff alleged, created a public nuisance. In affirming the trial court's refusal to set aside the jury's verdict, this court addressed the reasonableness element of a public nuisance claim. In so doing, this court focused not only on the inherently dangerous condition, but also on the surrounding circumstances. The court emphasized that firefighters had activated "flashing lights" and had "placed cones as warnings to approaching traffic." Id., 800–801; see also id., 806 n.6 ("[t]he jury may well have decided . . . that the social utility of guarding the scene with, inter alia, flashing lights was great"). In light of those surrounding circumstances, this court concluded that the jury could have

[10] At oral argument before this court, Judge Sheldon noted two distinct ways that a property owner may deal with an inherently dangerous condition, stating: "One way is to get rid of the problem. That is, to actually fix it. The other way is to give adequate warning of it or to fence it off so that people don't go there." Both at trial and in this appeal, the defendant has maintained that the installation of the guardrail barrier accomplished the latter.

found that the use of the property "was not unreasonable overall . . . ." Id., 806.

In the present case, I likewise would conclude that the jury had an adequate evidentiary basis to conclude that the defendant's use of the land did not constitute an unreasonable interference with a right common to the general public when viewed in light of the surrounding circumstances.[11] The retaining wall, while inherently dangerous, was constructed in full compliance with the Connecticut State Building Code. The defendant installed both a guardrail barrier and a landscaping buffer to shield the retaining wall from the adjacent parking lot. The jury reasonably could infer, from the plaintiff's own testimony that he did not attempt to traverse the land in question during *any* of his numerous visits to the Lumberyard Pub prior to the night in question, that the guardrail and landscaping buffer provided an effective barrier from pedestrian traffic. Moreover, the plaintiff's own expert testified at trial that the guardrail, in particular, provided adequate notice and was an effective means of keeping people out of the area between the retaining wall and the parking lot. See footnote 6 of this opinion. The admitted efficacy of that barrier provides a basis on which the jury could conclude that, notwithstanding the inherent dangerousness of the retaining wall itself, the defendant's use of the land was not unreasonable in light of the surrounding circumstances.[12]

[11] The plaintiff has not specified, in either his appellate briefs or at oral argument before this court, precisely what "right common to the general public" is implicated here. Presumably, his claim is predicated on a right to freely traverse an area of land that historically—and at all times relevant to this case—has contained a retaining wall.

[12] I also would conclude that the plaintiff's reliance on *Bilodeau* v. *Bristol*, 38 Conn. App. 447, 661 A.2d 1049, cert. denied, 235 Conn. 906, 665 A.2d 899 (1995), is misplaced. Unlike the present case, *Bilodeau* did not involve internally inconsistent interrogatory answers by the jury but, rather, concerned "an apparent inconsistency between the jury's answer to one of the interrogatories submitted to it and the plaintiff's verdict." Id., 450. In that case, the jury could only return a plaintiff's verdict if it had "answered all

In reviewing a claim of internally inconsistent interrogatory answers, we are obligated to harmonize those answers to the extent practicable while giving the evidence the most favorable construction that supports the jury's ultimate verdict. See *Norrie* v. *Heil Co.*, supra, 203 Conn. 606. We are not permitted to search the record for conflicting answers in order to take the case away from the jury on a theory that gives equal support to inconsistent and uncertain inferences. Id. In its memorandum of decision denying the plaintiff's motion to set aside the verdict, the court specifically found that "there was sufficient evidence to permit the jury to make a factual determination regarding the reasonableness element and thereby render a verdict in favor of the defendant—the court finds that the jury's responses to [the] interrogatories are neither inconsistent nor contrary to the law." I believe that, having applied the appropriate legal standard given the evidence before the jury, the trial court did not abuse its discretion in

six interrogatories in the affirmative . . . ." Id., 455. After answering one of the six interrogatories in the negative, the jury nonetheless delivered a verdict in favor of the plaintiff, and the court thereafter directed a verdict in favor of the defendant. Id., 452–54.

On appeal, this court expressly stated that its ruling was predicated on the particular "circumstances of this case . . . ." Id., 456. This court emphasized that the trial court "did not expressly charge the jury that it must answer all of the interrogatories in the affirmative in order to find for the plaintiff. This failure further evidences the jury's unawareness or confusion regarding the relationship between the interrogatories and the verdict." Id., 453 n.5. The trial court's failure to so instruct the jury, coupled with the remedial mandate of General Statutes § 52-223, led this court to observe that "considering the fact that the trial court had not specifically instructed the jury that it needed to answer all of the interrogatories in the affirmative in order to return a plaintiff's verdict, caution dictated that the jury be so instructed and given an opportunity to make its verdict clear" before the court directed a verdict in favor of the defendant. Id., 455.

In the present case, by contrast, there is no claim that the jury's responses to the interrogatories are inconsistent with the verdict that it returned in favor of the defendant. Furthermore, the plaintiff has never claimed any impropriety in the instructions furnished by the trial court and has not briefed such a claim in this appeal. *Bilodeau*, therefore, has little relevance to the present case.

denying the plaintiff's motion to set aside the verdict of the jury. I therefore respectfully dissent from part I of the majority opinion.

RICHARD M. PATROWICZ ET AL. *v.* BARRY PELOQUIN (AC 40662)

Keller, Elgo and Moll, Js.

Syllabus

The plaintiffs, R and D, sought to recover damages from the defendant for, inter alia, breach of contract in connection with a series of eighteen loans that they had made to the defendant, who allegedly failed to pay on the loans. The defendant, who was self-represented throughout trial and on appeal, filed an answer and five special defenses, including that the action was barred by the statute of frauds (§ 52-550 [a] [6]), which requires any agreement for a loan in an amount exceeding $50,000 to be in writing and signed by the party to be charged. At trial, early on during the plaintiffs' case-in-chief, D had exited the courtroom after exchanging words with the defendant and did not return. After the plaintiffs rested their case, the defendant attempted to call D as a witness but she was not present in the courtroom and he had not subpoenaed her to testify. The defendant requested a continuance in order to subpoena D, which the trial court denied. Thereafter, the trial court rendered judgment in favor of the plaintiffs in the amount of $48,168.66 and denied the defendants' special defenses, from which the defendant appealed to this court. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's request for a continuance in order to subpoena D; in denying the defendant's continuance request, that court was mindful of its duty to effectively manage its caseflow and enforce the expectation that the trial, which was scheduled for only one day, would go forward as assigned, and given that the defendant had failed to subpoena D in the time leading up to trial despite having previously filed an application for the issuance of a subpoena for another witness in this case, that he did not request the continuance to subpoena D until the day of trial and after the plaintiffs had concluded their case-in-chief, and that he admitted that he did not have any other witnesses available to testify because he had not anticipated that the plaintiffs' case-in-chief would conclude as quickly as it did, the court reasonably could have concluded that the defendant's request for a continuance was a dilatory tactic intended to delay the trial, and its denial of the defendant's continuance request, therefore, was neither arbitrary nor unreasonable.
2. The defendant could not prevail on his claim that the trial court committed reversible error by permitting a material variance between the amount

of damages alleged in the complaint and the amount pursued at trial, without requiring the plaintiffs to file an amended complaint, which, he claimed, wrongly allowed the plaintiffs to evade the application of the statute of frauds by reducing the claimed contractual damages to an amount below the $50,000 threshold contained in § 52-550 (a) (6); that court properly found, on the basis of the eighteen loans that the plaintiffs had made to the defendant and the plaintiffs' reliance on the defendant's promise to repay those loans, that the plaintiffs had fully performed their contractual obligations, and because the doctrine of part performance precluded the application of the statute of frauds in this case, regardless of whether the loan in question exceeded the statutory threshold of $50,000, any variance in the claimed amount of damages was immaterial, and the defendant could not demonstrate reversible error on the part of the trial court in failing to compel the plaintiffs to file an amended complaint.

Argued January 23–officially released May 21, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Windham and tried to the court, *Boland, J.*; judgment for the plaintiffs, from which the defendant appealed to this court. *Affirmed.*

Barry L. Peloquin, self-represented, the appellant (defendant).

Ernest J. Cotnoir, for the appellees (plaintiffs).

Opinion

ELGO, J. In this breach of contract action, the self-represented defendant, Barry Peloquin, appeals from the judgment of the trial court rendered in favor of the plaintiffs, Richard M. Patrowicz and Deborah Patrowicz.[1] On appeal, the defendant challenges the court's (1) denial of his request for a continuance following the close of the plaintiffs' case-in-chief and (2) determinations with respect to his statute of frauds defense. We affirm the judgment of the trial court.

[1] For purposes of clarity, we refer to Richard M. Patrowicz and Deborah Patrowicz collectively as the plaintiffs and individually by first name.

In its memorandum of decision, the court found the following relevant facts. The plaintiffs are husband and wife, who jointly own a twenty-six acre parcel of land in Thompson. After retiring from a career as a millwright, Richard began operating a small forestry business on the property.

In 2012 or 2013, a mutual friend introduced the plaintiffs to the defendant. At that time, the defendant resided in the town of Pomfret, where zoning regulations prohibited the defendant from parking log trucks and other equipment on his residential property. The plaintiffs met with the defendant, and the parties subsequently reached an agreement, under which the defendant was permitted to store his commercial logging equipment on the plaintiffs' property.

As the court found, the plaintiffs learned "[i]n short order . . . that zoning compliance was not the defendant's only problem. His equipment was in need of repairs or replacement, and at times his cash flow was insufficient to afford payment of his monthly home mortgage and other bills. [The defendant] turned to the plaintiffs for assistance." The court further found that the plaintiffs subsequently made a series of loans to the defendant, all with the expectation of repayment.[2]

[2] In its memorandum of decision, the court detailed eighteen "advances" that the plaintiffs made to the defendant as follows:

Advance Number	Date	Amount	Purpose
1.	Oct. 7, 2013	$8000	Purchase of Ford F600 log truck
2.	Oct. 13, 2013	$8500	Purchase of stump grinder
3.	Nov. 18, 2013	$3315.69	Tires, etc.
4.	Dec. 5, 2013	$1500	Truck repair
5.	Dec. 12, 2013	$1740	Cash advance
6.	Dec. 30, 2013	$637.63	Repairs to log truck
7.	Dec. 31, 2013	$8500	Purchase of boom truck
8.	Mar. 13, 2014	$1740	Cash advance
9.	April 7, 2014	$612.50	Towing of truck
10.	June 24, 2014	$1710.22	Radiator repair
11.	July 15, 2014	$701.25	Repair of boom truck
12.	July 25, 2014	$3000	Cash advance
13.	July 26, 2014	$696.97	Repair manifold in truck

As Richard testified at trial, the plaintiffs entered into a "verbal agreement" with the defendant on the basis of his "guarantee" that he would fully repay those loans.

When the defendant failed to repay those loans, the plaintiffs commenced this breach of contract action in December, 2015.[3] In his answer, the defendant denied the material allegations of the plaintiffs' complaint, including the allegation that he had promised to repay the loans in question. The defendant also asserted five special defenses, only one of which is relevant to this appeal. In his second special defense, the defendant alleged that the breach of contract count was barred by the statute of frauds set forth in General Statutes § 52-550.[4] The defendant filed numerous motions with the trial court over the next thirteen months, including

14.	Aug. 4, 2014	$4423.14	Truck repairs
15.	Oct. 3, 2014	$763.55	Brake repair on pickup truck
16.	July 13, 2015	$318.75	Tires for pickup truck
17.	July 16, 2015	$2058.96	Transmission repair to automobile
18.	Aug. 7, 2015	$300	Repair manifold leak in pickup truck
	TOTAL	$48,518.66	

Those factual findings are substantiated by documentary and testimonial evidence in the record before us and, thus, are not clearly erroneous. See *Solairaj* v. *Mannarino Builders, Inc.*, 168 Conn. App. 1, 8–9, 143 A.3d 666 (2016). The defendant has not claimed otherwise in this appeal.

[3] The plaintiffs' complaint also contained counts alleging fraudulent misrepresentation and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. In their posttrial brief, the plaintiffs acknowledged that those two counts "may be deemed abandoned or withdrawn," and the court thereafter did not permit the plaintiffs to recover on either basis.

[4] General Statutes § 52-550 (a) provides: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged: (1) Upon any agreement to charge any executor or administrator, upon a special promise to answer damages out of his own property; (2) against any person upon any special promise to answer for the debt, default or miscarriage of another; (3) upon any agreement made upon consideration of marriage; (4) upon any agreement for the sale of real property or any interest in or concerning real property; (5) upon any agreement that is not to be performed within one year from the making thereof; or (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars."

a motion to dismiss, a motion for summary judgment, a motion for a default judgment, an "emergency motion for discovery," a motion to remove the plaintiffs' legal counsel, and a motion in limine, all of which were denied by the court.

A court trial was held on March 10, 2017. In their case-in-chief, the plaintiffs offered the testimony of Richard, who was subject to lengthy cross and recross-examination by the self-represented defendant.[5] In addition, the plaintiffs introduced, and the court admitted, into evidence various financial documents, including purchase receipts, credit card statements, and copies of cancelled checks from the plaintiffs made payable to and signed by the defendant. Also admitted into evidence was a promissory note executed on October 7, 2013, regarding the defendant's purchase of a log truck for $8000.[6]

The defendant's case-in-chief consisted of additional testimony from Richard and six documents that were admitted into evidence as full exhibits. In his cross-examination of Richard during the plaintiffs' case-in-chief and his direct examination of Richard as part of his defense, the defendant repeatedly attempted to offer contrasting statements of fact in response to Richard's

[5] As the court noted following the close of the plaintiffs' case-in-chief, Richard had "just testified for three hours." The defendant nonetheless called Richard to testify for approximately two more hours as part of his defense.

[6] That promissory note was signed by the parties and states: "I, [the defendant] am purchasing a 1983 Ford F600 log truck with a grappler boom (log loader) from [Richard] for $8000 as a private sale on [October 7, 2013] as is, in good condition. The following payment agreement is as follows: [The defendant] agrees to pay Richard $350 a month until said balance is satisfied. Per their agreement, if at any time [the defendant] should default on any given monthly payment, then it is up to Richard's discretion, he can discuss an option to cure. This agreement is now agreed upon now [and] herein between [the defendant] and Richard. Should something happen to Richard, then his wife [Deborah] will assume the responsibility of any unpaid balance from that time on." The last page of that document contains a notation indicating that the plaintiffs had received an initial payment of $350 on October 7, 2013.

testimony. Each time, the court advised the defendant that such statements were improper and clarified that the defendant was free to offer such evidence during his own testimony.[7] The defendant nonetheless declined to testify as a witness at trial. For that reason, when the defendant attempted to introduce his own affidavit into evidence during his case-in-chief, the court denied that request. As the court stated, "I'm not [going to] allow . . . your affidavit when you don't want to testify and be subject to cross-examination."

In its subsequent memorandum of decision, the court found the defendant in breach of contract, stating: "Although the defendant, who represented himself, denied virtually all the essential allegations of the complaint, he declined to testify. When he attempted (frequently) to offer evidence in his role as counsel, and not under oath, the court directed him to hold that information until he was sworn. At that time he could have expounded at length upon his version of the facts. He expressly declined to take advantage of that opportunity. Even to the extent that his arguments and objections could be credited, however, they did not undercut [Richard's] narrative of steady cash transfers to [the defendant] in varying amounts over a considerable period, without repayment. At best, they reflect a hazy suggestion on their recipient's part that all these transfers were a gift. In support of this contention [the defendant] offered no evidence whatsoever.

"This court had the opportunity to observe [Richard] throughout approximately five hours of testimony and

[7] For example, the court explained to the defendant that cross-examination was "not the time for you to get into an argument with [Richard] about the content of his testimony," and clarified that the defendant "can testify to the contrary" during his own case-in-chief. Later in the defendant's questioning of Richard, the court reminded the defendant that he was "again trying to testify" through his questions and stated that it would "welcome [the defendant's] testimony" as a witness and that the defendant would be permitted to "testify at length."

cross-examination. While he cannot be described as razor-sharp in his recollection, he is generally credible and, in the details to which he testified, there was substantial correspondence between his testimony and the [documents that the plaintiffs] submitted [into evidence]. The court finds that the plaintiffs have proven by a preponderance of the evidence that they made loans to the defendant totaling $48,518.66, of which he has repaid a mere $350. That leaves $48,168.66 due and owing." The court also rejected all five special defenses raised by the defendant. The court rendered judgment in favor of the plaintiffs in the amount of $48,168.66, and this appeal followed.

I

The defendant first claims that the court abused its discretion in denying his request for a continuance following the close of the plaintiffs' case-in-chief.[8] We disagree.

The following additional facts are relevant to the defendant's claim. Trial commenced on March 10, 2017, with the presentation of the plaintiffs' case-in-chief. Early in Richard's testimony on direct examination, the defendant objected; in so doing, he sought to offer evidence to rebut Richard's testimony.[9] As the court overruled that objection, a brief colloquy ensued:

"The Defendant: Excuse me? Did you just say—swear at me?

"[Deborah]: Yeah, I did.

[8] Although the defendant couches his claim in terms of his constitutional right to due process, "we will review the trial court's refusal to grant a continuance for an abuse of discretion." *State* v. *Godbolt*, 161 Conn. App. 367, 374 n.4, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).

[9] Richard had testified that the defendant made one payment of $350 on the promissory note admitted into evidence. In response, the defendant stated in relevant part: "I'm sorry. I would just like to object to that on behalf of the fact that I never made a payment on this agreement . . . ."

"The Court: All right.

"[Deborah]: I'm sorry.

"The Court: I'm going to—okay. [Deborah] is leaving the courtroom. That's probably going to solve the problem. I'll put on the record [that] there was an exchange of words between her and the defendant, but I think her leaving has resolved it."

The plaintiffs' counsel then continued his direct examination of Richard, followed by cross-examination by the defendant. There is no indication in the record before us that Deborah ever reentered the courtroom.

When Richard's testimony concluded, the plaintiffs rested their case-in-chief. The court at that time informed the defendant that "now it's your opportunity to testify or to call any other witnesses on your behalf." The defendant then stated that he wanted to call Deborah as his first witness. Noting that Deborah was not present in the courtroom, the court asked the defendant if he had served a subpoena on her. The defendant did not answer that query and instead argued that he was not required to do so under Connecticut law because Deborah was a party to the proceeding.[10] In response, the court explained that "she's a plaintiff, but she's not present so she's not required to be here unless you've

[10] The defendant renews that novel contention in this appeal, claiming that General Statutes § 52-178 "mandate[s] that a trial court must allow [the defendant] to take the vital testimony of the plaintiff [Deborah]" without a subpoena. He is mistaken. By its plain language, § 52-178 provides that "[a] party to a civil action . . . [m]ay compel any adverse party . . . to testify as a witness in his behalf, *in the same manner and subject to the same rules as other witnesses* . . . ." (Emphasis added.) That statute thus places "the adverse party in the same position as any other witness." *Mendez* v. *Dorman*, 151 Conn. 193, 196, 195 A.2d 561 (1963). Accordingly, while the defendant retained the right to subpoena Deborah like any other witness, § 52-178 does not obviate the requirement that he do so to compel her testimony at trial. The defendant has not provided any legal authority indicating otherwise.

subpoenaed her. . . . [Y]ou have the right . . . to have her under subpoena. But if you haven't issued a subpoena to her, she's not required to be here."

The defendant then requested a continuance to subpoena Deborah, which the court denied. The defendant nonetheless proceeded to argue that her testimony was "key to [his] case," without making any detailed proffer as to the nature of Deborah's expected testimony.[11] Contra *State* v. *Gauthier*, 140 Conn. App. 69, 73, 57 A.3d 849, cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013). The court again reminded the defendant that "[Deborah is] not here and you don't have any . . . way of compelling her to be here yet and I'm not recessing the trial to allow a subpoena to be sent out. . . . [M]aybe you've been taken by surprise, but it's not an unfair or illegal surprise. It's the kind of thing that attorneys would anticipate that if they want to have a person here who's a hostile witness, that they might have them under subpoena."

Undaunted, the defendant asked the court to explain why it would not permit him to seek a trial subpoena at that time. The court at that time reminded the defendant that the case had been scheduled for one day. When the defendant asked why the court was insistent on "holding [him] to one day," the court explained that it had "other business [that is] scheduled. Courts always have other business [that is] scheduled. . . . You don't make the schedule up at your convenience."

The court asked the defendant if any of the other witnesses named in his trial management report were present and ready to testify. When the defendant conceded that they were not, the court asked why they were

[11] At one point in the colloquy, the court asked the defendant if he had any knowledge that Deborah would offer any testimony that differed from that already provided by "her husband" earlier that day; the defendant conceded that he did not, stating that he was "not a mind reader . . . ."

not present, noting that "[i]t's trial day." The defendant responded: "Because I knew that [the plaintiffs' counsel] was going to put his trial on first—his case on first. . . . And I didn't think that we would get that far at this point to be honest with you." The court then asked the defendant if he could procure any of those witnesses in the next twenty minutes, and the following colloquy transpired:

"The Defendant: They weren't asked to answer to the complaint, Your Honor.

"The Court: So you're—you're trifling with me. You've listed them as witnesses, today is the trial date, it's 2 o'clock in the afternoon, and you're telling me none—

"The Defendant: Is there a point of law that I'm—

"The Court: —of them are available?

"The Defendant: —missing tremendously here?

"The Court: Pardon me?

"The Defendant: Is there a point of law that I'm just missing?

"The Court: [Yes.] The point of law is that when you have a trial, you come to court prepared to put the case on.

"The Defendant: I am.

"The Court: Oh, no, you're not. You've listed nine witnesses. One of them is present; the other eight are not. Are you ready to proceed? Can you get any of these people here in the next twenty minutes?

"The Defendant: I don't think so.

"The Court: Then I don't think you're ready to proceed."

The defendant then opined that it was unfair that the court was "prohibiting [him] from examining somebody that showed up earlier today . . . ." In response, the court stated: "I'm not prohibiting you. I'm telling . . . you [that] you haven't done what it takes to get that person here" by way of subpoena. To that, the defendant replied: "That's none of the court's business. That's not my problem." The court then stated: "It absolutely is my business when [she is] not present and you want to call her. [There is] no subpoena. I cannot force her to be here absent a subpoena that you've served on her."

The court again reminded the defendant that he was free to testify on his own behalf to contradict Richard's testimony, to which the defendant replied, "I'm not going to take the witness stand . . . if that's what you're asking." The defendant then called Richard as a witness, who was questioned for an additional two hours. When Richard's testimony concluded, the defendant rested his case. The plaintiffs' counsel then indicated that he had no rebuttal to present, and the evidence was closed.

On appeal, the defendant claims that the court improperly denied his request for a continuance of the trial in order to subpoena Deborah. "[T]he determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . . A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time

the request is denied. . . . In addition, we consistently have acknowledged that [o]ur role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives." (Citation omitted; internal quotation marks omitted.) *State* v. *Rivera*, 268 Conn. 351, 378, 844 A.2d 191 (2004); accord *State* v. *Campbell*, 328 Conn. 444, 473, 180 A.3d 882 (2018) (reviewing court must determine whether trial court's denial of continuance request was arbitrary or unreasonable).

In the present case, the defendant did not raise his request for a continuance of the trial in order to subpoena Deborah until after the plaintiffs had concluded their case-in-chief. It is well established that "[o]nce a trial has begun . . . a defendant's right to due process [does not entitle] him to a continuance upon demand." *State* v. *Hamilton*, 228 Conn. 234, 239, 636 A.2d 760 (1994). Rather, the appellate courts of this state are "especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of trial"; *Thode* v. *Thode*, 190 Conn. 694, 697, 462 A.2d 4 (1983); and "where the request for continuance comes after the plaintiff has rested his case." *Burke* v. *Ruggerio*, 24 Conn. App. 700, 706, 591 A.2d 453, cert. denied, 220 Conn. 903, 593 A.2d 967 (1991). The belated nature of the defendant's continuance request militates against a conclusion that the court abused its discretion in denying that request.

Furthermore, the aforementioned colloquy indicates that the court was mindful of its obligation to manage its caseflow when it denied the defendant's midtrial continuance request. As our Supreme Court has emphasized, "[i]n order to fulfill our responsibility of dispensing justice we in the judiciary must adopt an effective system of caseflow management. . . . [I]t is the responsibility of the court . . . when necessary, to enforce compliance with such standards. Our judicial

system cannot be controlled by the litigants . . . .'' (Internal quotation marks omitted.) *Miller* v. *Appellate Court*, 320 Conn. 759, 773, 136 A.3d 1198 (2016). For that reason, ''[j]udges must be firm and create the expectation that a case will go forward on the specific day that it is assigned.'' (Internal quotation marks omitted.) *Kervick* v. *Silver Hill Hospital*, 309 Conn. 688, 709 n.9, 72 A.3d 1044 (2013). The court expressly adhered to that maxim in denying the defendant's continuance request.

It also is significant that the case had been scheduled for one day of trial. At the outset of his case-in-chief, the defendant nonetheless acknowledged that he had no other witnesses available to testify and candidly confessed that he ''didn't think that we would get that far at this point to be honest with you.'' On that basis, the court reasonably could have construed the defendant's continuance request as dilatory in nature. See, e.g., *Great Country Bank* v. *Pastore*, 241 Conn. 423, 437, 696 A.2d 1254 (1997) (because ''the motion for a continuance was merely a dilatory tactic . . . the trial court acted well within its discretionary authority to deny the motion'').

In this regard, we note that the defendant, although self-represented, previously had filed an application for the issuance of a subpoena in this very case,[12] yet did not do so with respect to Deborah despite listing her as a witness on his trial management report.[13] The defendant's failure to subpoena Deborah in a timely manner

[12] The record indicates that the defendant, on April 12, 2016, filed an application for the issuance of a subpoena by a self-represented party, regarding the testimony of Attorney Brian S. Mead. In addition, the defendant appended to his appellate reply brief copies of two applications for the issuance of a subpoena by a self-represented party that he had filed years earlier in an unrelated action. See *National Truck Emergency Road Service, Inc.* v. *Peloquin*, Superior Court, judicial district of Windham, Docket No. CV-09-5005618-S (July 6, 2011).

[13] Although our courts are solicitous of self-represented parties, such parties nevertheless are ''bound by the same rules of evidence and procedure as those qualified to practice law.'' *Cersosimo* v. *Cersosimo*, 188 Conn. 385, 394, 449 A.2d 1026 (1982).

further informs our consideration of whether the court abused its discretion in denying his continuance request. See *State* v. *Cecil J.*, 99 Conn. App. 274, 293, 913 A.2d 505 (2007) ("[i]n light of the defendant's opportunity to subpoena [a potential witness] in the months before trial, the trial court properly denied the motion for a continuance as untimely"), aff'd, 291 Conn. 813, 970 A.2d 710 (2009).

In reviewing the propriety of the denial of a continuance request, this court must indulge every reasonable presumption in favor of that exercise of discretion. See *State* v. *Rivera*, supra, 268 Conn. 378. On the particular circumstances of this case, we cannot say that the court's denial of the defendant's midtrial request for a continuance in order to subpoena Deborah was either arbitrary or unreasonable. The court, therefore, did not abuse its discretion in denying that request.

II

The defendant also challenges the court's determinations with respect to his statute of frauds defense. More specifically, he contends that the court improperly permitted a material variance between the amount of contractual damages alleged in the plaintiffs' complaint and the amount pursued at trial and claimed by the plaintiffs in their posttrial brief.[14] That variance, the defendant argues, reflects a deliberate attempt by the plaintiffs to avoid the application of the statute of frauds by reducing the claimed contractual damages to an amount below the $50,000 threshold contained in § 52-550 (a) (6).[15]

[14] In paragraph nine of their complaint, the plaintiffs alleged that the defendant "has refused to pay $61,357 that he promised to pay the plaintiffs . . . ." In their posttrial brief, the plaintiffs alleged that the credible evidence presented at trial entitled them to a judgment on the breach of contract count in the amount of $48,168.66.

[15] The plaintiffs, by contrast, attribute that difference to their acknowledgement that although Richard had testified that there were additional loans made to the defendant beyond the eighteen found by the court, either "no documentary evidence was available or . . . [Richard] could not recall sufficient information to corroborate" those additional loans at trial.

The defendant thus submits that the court's failure to require the plaintiffs to file an amended complaint constitutes reversible error. We do not agree.

"Under Connecticut law, the statute of frauds operates as a special defense to a civil action." *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 69, 165 A.3d 193 (2017). Its function "is evidentiary, to prevent enforcement through fraud or perjury of contracts never in fact made." *Lynch* v. *Davis*, 181 Conn. 434, 440–41, 435 A.2d 977 (1980); see also *Heyman* v. *CBS, Inc.*, 178 Conn. 215, 221, 423 A.2d 887 (1979) ("the primary purpose of the statute [of frauds] is to provide reliable evidence of the existence and the terms of the contract").

At the same time, that special defense generally does not apply when a plaintiff demonstrates partial performance with contractual obligations. As this court has explained, "[t]he doctrine of part performance . . . is an exception to the statute of frauds. . . . This doctrine originated to prevent the statute of frauds from becoming an engine of fraud." (Citation omitted; internal quotation marks omitted.) *Red Buff Rita, Inc.* v. *Moutinho*, 151 Conn. App. 549, 554–55, 96 A.3d 581 (2014). "[T]he elements required for part performance are: (1) statements, acts or omissions that lead a party to act to his detriment in reliance on the contract; (2) knowledge or assent to the party's actions in reliance on the contract; and (3) acts that unmistakably point to the contract. . . . Under this test, two separate but related criteria are met that warrant precluding a party from asserting the statute of frauds. . . . First, part performance satisfies the evidentiary function of the statute of frauds by providing proof of the contract itself. . . . Second, the inducement of reliance on the oral agreement implicates the equitable principle underlying estoppel because repudiation of the contract by the other party would amount to the perpetration of a

fraud." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 295–96, 977 A.2d 189 (2009). Our review of a court's determination that a party has demonstrated part performance of a contract is governed by the clearly erroneous standard of review. See *Harley* v. *Indian Spring Land Co.*, 123 Conn. App. 800, 826–30, 3 A.3d 992 (2010).

In its memorandum of decision, the court found that the plaintiffs had made eighteen distinct loans to the defendant in accordance with the parties' agreement and in reliance on the defendant's promise of repayment. See footnote 2 of this opinion. Accordingly, the court found that the plaintiffs had demonstrated "full performance of the agreements benefitting the defendant, knowingly on his part, to the extent of $48,518.66 . . . ." The court thus held that "there is neither a factual nor a legal basis for holding that [the statute of frauds] defeats the plaintiffs' claims." The evidence adduced at trial by the plaintiffs substantiates that determination. For that reason, the court properly concluded that the doctrine of part performance precludes application of the statute of frauds in the present case.

Because the statute of frauds does not apply in the present case, the purported variance regarding the claimed amount of contractual damages is immaterial. See *Tedesco* v. *Stamford*, 215 Conn. 450, 461, 576 A.2d 1273 (1990) ("[o]nly material variances, those which disclose a departure from the allegations in some matter essential to the charge or claim, warrant the reversal of a judgment" [internal quotation marks omitted]). The defendant, therefore, cannot demonstrate reversible error on the part of the trial court in failing to compel the plaintiffs to file an amended complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

DIANE COLBY *v.* ARTHUR COLBY
(AC 41102)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved pursuant to a California dissolution judgment, appealed to this court from the judgment of the trial court denying his motion for relief from a 2007 stipulation of the parties that had been approved and adopted as an order by the California court. Pursuant to the stipulation, the parties agreed that the defendant owed the plaintiff $241,416 in past due child support payments plus interest. The stipulation also included an acknowledgement that the defendant was advised to seek legal counsel regarding the terms and execution of the stipulation but that he freely and voluntarily elected to represent himself. In an unrelated personal injury action brought by the defendant against the plaintiff, the parties entered into a settlement agreement pursuant to which the defendant acknowledged the debt that he owed to the plaintiff pursuant to the 2007 order and the defendant received $48,000, which was credited toward the satisfaction of that debt. In 2016, the plaintiff domesticated the 2007 order in Connecticut pursuant to statute (§ 46b-71) and filed, inter alia, a motion for contempt, alleging various arrearages. Thereafter, the defendant filed the subject motion for relief from the 2007 order on the grounds that the stipulation was the product of fraud and that he had signed it while under duress. Following a hearing, the trial court denied the motions for contempt and for relief from the 2007 order, and ordered the defendant to pay the stipulated amount plus accrued interest. In its memorandum of decision, the court detailed its application of California law to the defendant's claims and found that there a paucity of credible evidence that the defendant was under duress when he executed the stipulation, and that he failed to apply for the relief or protections offered by the applicable California provisions within the time limitations that California law provided. Thereafter, the court granted the defendant's motion to reargue and determined that the defendant owed the plaintiff $397,523.96, which consisted of $241,416 pursuant to the 2007 order minus the $48,000 settlement credit, plus postjudgment interest. On the defendant's appeal to this court, *held*:

1. The trial court did not abuse its discretion in denying the defendant's motion for relief from the 2007 order on the ground that he failed to timely seek relief under California law, as that court's finding that there was no extrinsic fraud was not clearly erroneous; the record revealed that the defendant did not present any evidence that the plaintiff prevented him from timely presenting a claim seeking relief from the stipulation due to alleged inaccuracies within it regarding the amount of the arrearage, that the stipulation advised the defendant to seek counsel

regarding its terms, but the defendant voluntarily elected not to do so, and that not only did the defendant fail to avail himself of the protections offered under California law following the entry of 2007 order, but he also, while represented by counsel, reiterated and acknowledged the arrearage that he owed to the plaintiff when he settled the personal injury case.

2. Contrary to the defendant's claim, the trial court properly calculated postjudgment interest; the 2007 order constituted a money judgment, which, under California law, bears statutory postjudgment interest on the principal and accrued interest, and, therefore, the court properly calculated postjudgment interest on the basis of the entire balance owed by the defendant.

Argued February 8—officially released May 21, 2019

Procedural History

Action to enforce a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Hartford, where the court, *Nastri*, *J.*, denied the defendant's motion for relief from a certain stipulation of the parties that had been approved and adopted as an order by the foreign court; thereafter, the court, *Nastri*, *J.*, granted the defendant's motion to reargue and modified the amount that the defendant owed to the plaintiff, and the defendant appealed to this court. *Affirmed.*

Patrick W. Boatman, with whom, on the brief, was *Erin E. Boatman*, for the appellant (defendant).

Diane Frances Colby, self-represented, the appellee (plaintiff) filed a brief.

Opinion

LAVINE, J. The defendant, Arthur Colby, appeals from the judgment of the trial court rendered after the plaintiff, Diane Colby, sought to enforce a California judgment pursuant to General Statutes § 46b-70 et seq.[1] On appeal, the defendant claims that the court improperly (1) denied him relief from the California judgment,

[1] General Statutes §§ 46b-70 through 46b-75 govern the enforcement of foreign matrimonial judgments. General Statutes § 46b-71 (a) provides: "Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment,

(2) declined to order the plaintiff to produce receipts in support of child support expenditures,[2] and (3) calculated postjudgment interest. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history underlie this appeal. The parties were married on February 23, 1980, and they have one child who was born in 1988. The marriage broke down, and they divorced. On April 19, 1996, the parties entered into a marital settlement agreement. On October 4, 1996, this agreement, which required the defendant to pay child and spousal support, was approved by and incorporated into a dissolution judgment in the California Superior Court. According to the judgment, the defendant was to pay $1080 per month to the plaintiff for child support until their child reached age nineteen, died, or was emancipated; to pay one half of child care costs, education expenses, and medical expenses; to pay a percentage of additional income he earned; and to maintain a life insurance policy. Additionally, the defendant was to pay the plaintiff spousal support of $120 per month.

The defendant sought a modification of the dissolution judgment due to a reduction in his income. On November 16, 2000, following a hearing, the dissolution judgment was modified by the California Superior Court. By the terms of the modification, the defendant

in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final, has not been modified, altered, amended, set aside or vacated and that the enforcement of such judgment has not been stayed or suspended, and such certificate shall set forth the full name and last-known address of the other party to such judgment and the name and address of the court in the foreign state which rendered such judgment.''

[2] The defendant argues that the trial court erred in denying him relief from the California judgment, in part, because it failed to engage in an analysis of the accuracy of the arrearage as stated in the judgment and to order the plaintiff to produce receipts in support thereof. We, therefore, address these claims together.

was to pay child support of $531 per month until February, 2001, when child support was reduced to $497 per month; to pay $150 per month toward the child support arrearage; and to pay one half of the child's tutoring expenses with the plaintiff providing receipts.

The defendant failed to abide by the terms of the modification, and, on April 25, 2007, the plaintiff filed an application in the California Superior Court for an assignment order and determination of arrearages, alleging that the defendant had not paid the full amount of child support; had not contributed to medical expenses, child care costs, or education costs; did not maintain a life insurance policy or reimburse the plaintiff for life insurance premiums that she paid on his behalf; and had not paid spousal support.

On July 12, 2007, the parties entered into a stipulation that was approved and adopted as an order of the California Superior Court (2007 judgment). Pursuant to the 2007 judgment, the parties agreed that the defendant owed the plaintiff a total of $241,416 in past due child support payments plus interest.[3] Included in the stipulation was an acknowledgement by the parties that the

[3] The parties agreed in relevant part:

"1. As of March 19, 2007, the [defendant] owes to [the plaintiff] a total of $241,416.00 in arrearages as follows:

"A. Spousal support arrearages: $10,440.00 principal, $7,178.00 interest, totaling $17,618.00.

"B. As of March 19, 2007, the [defendant] owes to the [plaintiff] the following child support arrearages:

"b. Base Child Support: $86,500.00 principal, $51,676.00 interest, totaling $138,176.00.

"c. Medical Support: $13,375.00 principal, $8,046.00 interest, totaling $21,421.00.

"d. Child Care Expenses: $9,454.00 principal, $8,077.00 interest, totaling $17,531.00.

"e. Remedial Education: $25,212.00 principal, $11,851.00 interest, totaling $37,063.00.

"f. Life Insurance Premiums: $6,300.00 principal, $3,307.00 interest, totaling $9,607.00.

"3. Interest on the foregoing child support amounts, as well as principal amounts, shall constitute child support and not spousal support or family support."

defendant was advised to seek legal counsel regarding the terms and execution of the stipulation, but that he "freely and voluntarily elected to represent himself . . . ." There were no further proceedings in the matter subsequent to the 2007 judgment.

In 2006, the plaintiff's dog bit the defendant's face, and he commenced a personal injury action against the plaintiff. The action was resolved by means of an August 27, 2009 settlement. Pursuant to the settlement, the defendant acknowledged the $241,416 debt he owed to the plaintiff pursuant to the 2007 judgment. When he entered into the settlement and signed the release, the defendant was represented by counsel who stated that he "fully explained the terms and conditions of the foregoing [r]elease . . . to [the defendant], that [the defendant] acknowledged . . . that he understands said [r]elease and the legal effects thereof, [and that counsel] believe[d] that [the defendant] understands the [r]elease and the legal effect of the [r]elease . . . ." Pursuant to the settlement agreement, the defendant received $48,000 in the form of credit toward the satisfaction of the 2007 judgment.

In March, 2016, the plaintiff filed the 2007 judgment in Connecticut pursuant to General Statutes § 46b-71. On April 7, 2016, she filed a motion for contempt, dated March 29, 2016, alleging various arrearages, and filed a motion to implead[4] on August 10, 2016. On August 15, 2016, the defendant filed a motion for relief from the 2007 judgment on the grounds of fraud and duress.[5]

[4] The plaintiff sought to implead the defendant's present wife, Jane Colby, and also sought to implead, on April 16, 2016, the defendant's mother, Laura Colby, who passed away before the court ruled on the motion.

[5] The defendant alleged in his motion that the stipulation "is the product of fraud and/or mistake as it does not comport with intervening orders which modified the [dissolution judgment and] as a result, the stipulation overstates the arrearages, includes support obligations which no longer apply . . . and does not give the defendant credit for cash payments he tendered to [the plaintiff] . . . ." Additionally, the defendant alleged that he signed the stipulation under duress, while he was unrepresented by

A hearing on the motions took place on December 9, 2016, and January 5, 6 and 31, 2017.

On August 2, 2017, the court denied the motions for contempt, to implead, and for relief, and ordered the defendant to pay the plaintiff $465,498.29 in installments with interest accruing at a rate of 10 percent. In its memorandum of decision, the court detailed its application of California law, including California Code of Civil Procedure § 473[6] and California Family Code § 2122,[7]

counsel, was recovering from dog bite injuries, and was in a state of fear as he alleged that the plaintiff's counsel stated that if he did not sign the stipulation that he would spend ninety days in jail. The trial court found that, when the defendant signed the stipulation, he was in a law office in Connecticut and was not in the presence of the plaintiff's counsel. It concluded that the defendant was not under duress, and the defendant does not challenge that finding on appeal. Rather, the defendant argues that the trial court failed to consider the other grounds he alleged.

[6] California Code of Civil Procedure § 473 (b) provides in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . ."

[7] California Family Code § 2122 provides: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: (a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud. (b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury. (c) Duress. An action or motion based upon duress shall be brought within two years after the date of entry of judgment. (d) Mental incapacity. An action or motion based on mental incapacity shall be brought within two years after the date of entry of judgment. (e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. An action or motion

to the defendant's claims and found that, not only was there a "paucity of credible evidence that the defendant was under duress when he executed the stipulation," but that the defendant failed to apply for the relief or protections offered by the California provisions within the time limitations that California law provided.

The defendant filed a motion to reargue on August 22, 2017, challenging the court's calculation of the arrearage amount. The court granted the defendant's motion and heard oral argument on October 26, 2017. On November 6, 2017, the court determined that the defendant was liable to the plaintiff in the amount of $397,523.96. This total consisted of $241,416 pursuant to the 2007 judgment, less a $48,000 credit from the dog bite settlement, plus postjudgment interest. The defendant appealed to this court.[8] Additional facts will be set forth as necessary.

Before addressing the merits of the plaintiff's claims, we set forth the standard for our review and relevant legal principles. "Foreign matrimonial judgments may be enforced, modified or otherwise dealt with in Connecticut pursuant to the provisions of General Statutes §§ 46b-70 through 46b-75. Section 46b-71 requires the filing of a certified copy of a foreign matrimonial judgment in the courts of this state where enforcement is sought and empowers the courts of this state to treat such a judgment in the same manner as any like judgment of a court of this state. . . . When modifying a foreign matrimonial judgment, a Connecticut court

based on mistake shall be brought within one year after the date of entry of judgment. (f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply."

[8] The plaintiff did not attend oral argument before this court. Therefore, this matter was considered on the basis of both parties' briefs, the defendant's oral argument, and the record.

must apply the substantive law of the foreign jurisdiction." (Citation omitted; internal quotation marks omitted.) *Lindo* v. *Lindo*, 48 Conn. App. 645, 649, 710 A.2d 1387 (1998).

Under California law, "[e]ither party [to a stipulation] may move the court to be relieved from the binding effect of a stipulation previously entered into, and it is within the sound discretion of the trial court whether or not such relief should be granted; in this regard the decision of the trial court will not be disturbed by an appellate court absent an abuse of discretion. . . . The grounds upon which the trial court may exercise its discretion [to grant relief from a stipulation] are that the stipulation was entered into as the result of fraud, misrepresentation, mistake of fact, or excusable neglect . . . that the facts have changed, or that there is some other special circumstance rendering it unjust to enforce the stipulation." (Citations omitted.) *People* v. *Trujillo*, 67 Cal. App. 3d 547, 554–55, 136 Cal. Rptr. 672 (1977).

"[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend

to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014).

I

The defendant claims that the court improperly (1) denied his request for relief from the 2007 judgment and (2) declined to order the plaintiff to produce receipts in support of the court's calculation of arrearage that was agreed to in the stipulation. In essence, the defendant argues that the court failed to engage in an analysis of the accuracy of the arrearage as agreed to in the stipulation, and, because the arrearage was inaccurate, the 2007 judgment should have been set aside due to extrinsic fraud. We disagree.

The court determined that, although there were protections available to the defendant under California Code of Civil Procedure § 473 and California Family Code § 2122,[9] the defendant failed to timely raise any

[9] The defendant makes the additional argument that the court erred in relying on California Code of Civil Procedure § 473 and California Family Code § 2122 instead of relying on California Family Code § 3691, which provides in relevant part: "The grounds and time limits for an action or motion to set aside a support order, or any part or parts thereof, are governed by this section and shall be one of the following: (a) Actual fraud. Where the defrauded party was kept in ignorance or in some other manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within six months after the date on which the complaining party discovered or reasonably should have discovered the fraud. (b) Perjury. An action or motion based on perjury shall be brought within six months after the date on which the complaining party discovered or reasonably should have discovered the perjury. . . ."

We reject this argument because we note that the language in California Family Code § 3691 is practically the same language used in California Family Code § 2122, with the only difference being that of the addition of the phrase: "other than his or her own lack of care or attention." As such, even supposing that the court should have, as the defendant argues, applied § 3691, the court's analysis would not have differed because the same time

claims regarding the stipulation. The court found that after the stipulation was adopted as an order of the court on July 12, 2007, there were no further proceedings in the matter. Further, the defendant failed to articulate why he could not have timely availed himself of the protections offered to him under California law. Rather, the defendant argues an exception to the time limitations due to extrinsic fraud, and faults the court for failing to make findings regarding whether equitable relief was warranted due to the claimed inaccuracies within the stipulation.

"Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. . . . Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed . . . . The essence of extrinsic fraud is one party's preventing the other from having his day in court."(Citations omitted; internal quotation marks omitted.) *Estate of McGuigan*, 83 Cal. App. 4th 639, 649–50, 99 Cal. Rptr. 2d 887 (2000).

The defendant did not present to the court any evidence that the plaintiff prevented him from timely presenting a claim seeking relief from the stipulation due to inaccuracies within it. Additionally, the stipulation itself advised the defendant to seek counsel regarding its terms, but the defendant voluntarily elected not to do so. Not only did the defendant fail to avail himself of the protections offered under California law after the 2007 judgment was entered, but he also, while represented by counsel, reiterated and acknowledged the

limitations appear within § 3691 and § 2122. Additionally, the court's factual finding that the defendant failed to avail himself of the protection offered by California law is unchallenged by the defendant.

arrearage he owed to the plaintiff when he settled the personal injury case in 2009. We conclude that the court's finding of no extrinsic fraud is not clearly erroneous and that the court did not abuse its discretion by denying relief to the defendant from the 2007 judgment on the ground of his failure to timely seek relief.

The defendant additionally takes issue with the expenses outlined within the stipulation and argues that the trial court improperly failed to engage in an analysis of the accuracy of the arrearage to which he agreed. Because we conclude that the court did not err in denying the defendant relief from the 2007 judgment, we need not address the defendant's argument that the terms within the 2007 judgment, which he willingly agreed to more than ten years before bringing a claim challenging the calculation of the arrearage, were inaccurate. For this same reason, the defendant's second claim, that the court erred in declining to order the plaintiff to produce receipts in support of the stipulation's arrearage calculation, also fails.

II

The defendant's final claim is that the court improperly calculated postjudgment interest. Specifically, the defendant argues that the court improperly applied interest to the total arrearage, which included accrued interest, rather than to the principal amount of the arrearage, and that he should not be responsible for the compounded interest. We disagree.

In calculating the postjudgment interest, the court properly determined that "[u]nder California law, interest continues to accrue on both the principal amount of the arrearages as well as the interest already accrued."

"[California] Code of Civil Procedure [§] 685.020 contains the basic rule for calculating postjudgment interest . . . . [I]nterest commences to accrue on a money judgment on the date of entry of the judgment. . . .

Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due.

"Further, [California] Code of Civil Procedure [§] 685.010, subdivision (a) establishes that [i]nterest accrues at the rate of 10 percent per annum on the principal amount of a money judgment *remaining unsatisfied*. . . .

"Delinquent child support payments accrue postjudgment interest under the rules applicable to installment judgments. Statutory interest on unpaid child support payments accrues as a matter of law as to each installment when each installment becomes due. . . . Accrued arrearages are treated like a money judgment for purposes of assessing statutory interest. Unless otherwise specified in the judgment, interest accrues as to each installment when each installment becomes due and continues to accrue for so long as the arrearage remains unpaid. . . . Because accrued arrearages are treated like money judgments, courts cannot retroactively modify or terminate the arrearages. . . . Interest accrues as a matter of law [on unpaid child support], and parents are charged with knowledge of the law." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Marriage of McClellan*, 130 Cal. App. 4th 247, 250–51, 30 Cal. Rptr. 3d 5 (2005).

"After [a judgment], postjudgment interest accrues on any unpaid principal *and* interest." (Emphasis in original.) *Brown* v. *California Unemployment Ins. Appeals Board*, 20 Cal. App. 5th 1107, 1119, 229 Cal. Rptr. 3d 710 (2018). "[I]t has generally been held that a judgment bears interest on the whole amount thereof, although such amount is made up partly of interest on the original obligation, and even though the interest is separately stated in the judgment. *This rule is not affected by statutes which prohibit the allowance of*

compound interest . . . ." (Emphasis added; internal quotation marks omitted.) *Big Bear Properties, Inc.* v. *Gherman*, 95 Cal. App. 3d 908, 915, 157 Cal. Rptr. 443 (1979). "Another common situation in which interest on interest is allowed is when prejudgment interest is incorporated in a judgment which then bears interest." *Westbrook* v. *Fairchild*, 7 Cal. App. 4th 889, 895, 9 Cal. Rptr. 2d 277 (1992).

In the present case, the 2007 judgment constituted a money judgment, which, under California law, bears statutory postjudgment interest on the principal and accrued interest. We, therefore, conclude that the court properly calculated postjudgment interest on the basis of the entire balance owed by the defendant from the amount agreed to in the stipulation.

The judgment is affirmed.

In this opinion the other judges concurred.

RAYMOND C. FERRARI *v.* JOHNSON AND JOHNSON, INC., ET AL.
(AC 41170)

Alvord, Sheldon and Pellegrino, Js.

Syllabus

The plaintiff brought this product liability action against the defendants, alleging that the defendants' product, a spinal system, was defective and that it caused him to sustain injuries. The plaintiff's surgeon, P, had used various components of the spinal system, which included titanium rods, in the fusion of the plaintiff's spine during a spinal surgery. Thereafter, the plaintiff underwent a second surgery that revealed a fracture of one of the titanium rods. The plaintiff claimed, inter alia, that the spinal system contained a design defect and that the written warnings in the product insert were not adequate when combined with the input and influence of the defendants' product representative, R, who had had discussions with P prior to the plaintiff's first surgery that were in the nature of technical assistance. The defendants filed a motion for summary judgment in which they claimed, inter alia, that because the plaintiff had failed to disclose an expert witness, he could not establish

that the product was defective, and that his failure to warn claim was barred by the learned intermediary doctrine. The trial court granted the motion for summary judgment and rendered judgment thereon, determining, inter alia, that under the modified consumer expectation test, the plaintiff could not, as a matter of law, maintain a breach of warranty or strict liability design claim against the defendants without expert testimony. *Held*:

1. The trial court properly rendered summary judgment for the defendants as to the plaintiff's design defect and breach of warranty claims, as the plaintiff could not prove, without the use of expert testimony, that the defendants' product was defective or that its alleged defect caused his injury: because the ordinary consumer expectation test was inapplicable, as this was not a res ipsa type case or one in which the injury was so bizarre or unusual that the jury would not need expert testimony, the modified consumer expectation test applied, and, therefore, the court correctly held that expert testimony was required to prove the product's defect; moreover, expert testimony was required to establish that the alleged defect caused the plaintiff's injury, as the spinal system at issue is a complex product that includes titanium rods that are implanted into a patient's spine and components that consist of fifteen screws, two rods and two transverse transconnectors.

2. The trial court properly rendered summary judgment for the defendants as to the plaintiff's failure to warn claim on the basis of the learned intermediary doctrine; the plaintiff, who acknowledged that the defendants' product was accompanied by adequate warnings in the product insert, did not present any evidence that R said or did anything inconsistent with the product's warnings, and, thus, failed to provide a sufficient evidentiary foundation to demonstrate the existence of a genuine issue of material fact.

Argued January 17—officially released May 21, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective product manufactured and sold by the defendants, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Andrew W. Skolnick, for the appellant (plaintiff).

W. Kennedy Simpson, pro hac vice, with whom was *Christopher J. Lynch*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Raymond C. Ferrari, appeals from the summary judgment rendered by the trial court in favor of the defendants, Johnson & Johnson, Inc., and Synthes, Inc. The plaintiff claims that the court erred by holding that (1) he cannot prove that the defendants' product was defective, or that the product's alleged defect caused the plaintiff's injury, without the use of expert testimony, and (2) the learned intermediary doctrine barred the plaintiff's failure to warn claim. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On August 17, 2012, the plaintiff underwent spinal surgery at Hartford Hospital. The procedure included a posterolateral fusion, in which the plaintiff's surgeon, Dr. Paul Schwartz, implanted various components of the defendants' product, the Synthes Matrix spinal system (product). This system included stabilizing titanium rods that were used in the fusion of the plaintiff's spine. The plaintiff's surgery required a junction of the new titanium hardware with a previously placed steel construct. On April 4, 2013, the plaintiff underwent a second surgery, which revealed a fracture of the left titanium rod at the junction of the new titanium instrumentation with the old steel construct.

On April 7, 2016, the plaintiff served a four count complaint on the defendants. The first two counts alleged product defect claims pursuant to the Connecticut Product Liability Act, General Statutes § 52-572m et seq. Specifically, the plaintiff set forth claims involv-

ing (1) a failure to warn defect[1] and (2) a design defect.[2] The third and fourth counts alleged breaches of express and implied warranties.

The deadline for the plaintiff to disclose any expert witnesses was January 15, 2017, pursuant to the parties' mutually agreed on scheduling order. The plaintiff failed to disclose any expert witnesses.[3]

On April 17, 2017, the defendants filed a motion for summary judgment, arguing that (1) the plaintiff had failed to disclose an expert witness, (2) the plaintiff could not establish that the product was defective, (3) comment (k) to § 402A of the Restatement (Second) of Torts barred the plaintiff's claims, (4) the learned intermediary doctrine barred the plaintiff's claims, and (5) the plaintiff could not establish causation. On July 10, 2017, the plaintiff filed an objection to the defendants' motion for summary judgment, claiming that a

[1] The plaintiff alleged that the defendants' product was sold "without proper or adequate warnings, labels and instructions regarding use in patients of the plaintiff's size and history of prior spinal fusions and instrumentalities," and "without proper or adequate warnings, labels and instructions regarding the junction of titanium hardware to stainless steel hardware."

[2] The plaintiff alleged that the defendants' product was "designed, fabricated, manufactured, tested, distributed, marketed and/or sold without adequate or proper precautions to prevent the failure and fracture of components once installed in patients," and that the defendants' product was "in [a] dangerous and defective condition at the time [it] left [Johnson & Johnson, Inc.'s] possession and control and [was] placed into the stream of commerce by [the defendants] with the expectation that [it] would reach users and consumers . . . without substantial change in [its] condition."

The trial court noted that "[t]he plaintiff does not clearly allege what product defect existed but rather recites various possibilities in his allegations . . . . The plaintiff's complaint is most clearly construed to allege a design defect." (Citation omitted.) The plaintiff does not claim otherwise on appeal. Therefore, like the trial court, we construe the plaintiff's complaint to allege strict liability failure to warn and design defect claims, and a breach of warranty claim.

[3] Moreover, the plaintiff did not request permission to file an untimely disclosure of an expert. Rather, the plaintiff was of the view, as he is on appeal, that an expert was not needed for him to prevail.

product defect can be inferred from the evidence without expert testimony and that genuine issues of material fact existed as to whether there were adequate warnings. A hearing on the defendants' motion for summary judgment was held on July 31, 2017.

The court issued its memorandum of decision on November 28, 2017, granting the defendants' motion for summary judgment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the plaintiff's claims, we set forth the applicable standard of review of a trial court's ruling on a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

"Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment." (Citation omitted; internal quotation marks omitted.)

Episcopal Church in the Diocese of Connecticut v. *Gauss*, 302 Conn. 408, 422, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012). "Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 222.

I

The plaintiff first claims that the trial court erred by holding that he cannot prove that the defendants' product was defective, or that the product's alleged defect caused the plaintiff's injury, without the use of expert testimony. In response, the defendants argue that expert testimony was required for the plaintiff to prevail on his claims, as a matter of law. We agree with the defendants.

The following additional facts and procedural history are relevant to our resolution of this claim. The defendants submitted numerous exhibits in support of their motion for summary judgment, including Dr. Schwartz' notes, the transcript of Dr. Schwartz' deposition, and a copy of the product insert that contained warnings with respect to the use of the defendants' product.

The product's insert explained that nonunion[4] could result from the product's use. The insert provided in relevant part: "These devices can break when subjected to the increased loading associated with delayed union

[4] At his deposition, Dr. Schwartz acknowledged that nonunion, also referred to as pseudoarthrosis, is the failure of a patient's bones to heal or fuse. He stated that nonunion is the primary reason that hardware either breaks or loosens. In their memorandum of law in support of their motion for summary judgment, the defendants stated that their expert, Dr. Nicholas Theodore, a neurosurgeon, would opine that the most likely cause of the breakage of the defendants' product, in this case, was chronic pseudoarthrosis, which was exacerbated by the plaintiff's smoking.

or nonunion. Internal fixation appliances are load-sharing devices which hold a fracture in alignment until healing occurs. If healing is delayed, or does not occur, the implant could eventually break due to metal fatigue. Loads produced by weight-bearing and activity levels will dictate the longevity of the implant. The patient should understand that stress on an implant can involve more than weight-bearing. In the absence of solid bony union, the weight of the limb alone, muscular forces associated with moving a limb, or repeated stresses of apparent relatively small magnitude, can result in the failure of the implant." (Emphasis omitted.)

In its memorandum of decision, the trial court concluded that, without expert testimony to establish the existence of a defect and the element of causation, the plaintiff could not, as a matter of law, maintain a breach of warranty claim or a strict liability design defect claim against the defendants. The court concluded that, under the modified consumer expectation test,[5] the plaintiff could not prove that the defendants' product was defective without the use of expert testimony. With respect to causation, the trial court determined that the product was of a complex design, and that "[e]xpert testimony is thus essential, because the claims will raise and address complex and highly technical concepts and questions, which are clearly beyond the everyday experiences of the ordinary consumer."

[5] "Under the modified consumer expectation test, the jury would weigh the product's risks and utility and then inquire, in light of those factors, whether a reasonable consumer would consider the product design unreasonably dangerous." (Internal quotation marks omitted.) *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 190, 136 A.3d 1232 (2016). Therefore, "[t]o establish the defect, [a] plaintiff's case require[s] expert testimony on [the product] design and manufacture, as well as the feasibility of an alternative design." Id., 203–204.

In its memorandum of decision, the trial court refers to the modified consumer expectation test as the risk-utility test. Courts use these terms interchangeably. See id.

We begin by setting forth the applicable standard of review and relevant legal principles that guide our analysis. "Our Supreme Court has described the essential elements of a strict products liability claim as follows: (1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in the condition." (Emphasis omitted; internal quotation marks omitted.) *Theodore* v. *Lifeline Systems Co.*, 173 Conn. App. 291, 308, 163 A.3d 654 (2017).

The plaintiff first argues that, with respect to whether the product was in a defective condition and was unreasonably dangerous to the consumer or user, the ordinary consumer expectation test was applicable and, therefore, he was not required to provide expert testimony to prove the product's defect.[6] We disagree.

[6] Although the plaintiff argues that the ordinary consumer expectation test applies to the circumstances of the present case, he also appears to set forth an argument, on appeal, under the malfunction theory as a basis for establishing strict liability. In his brief to this court, the plaintiff argues: "Design defects can be inferred from circumstantial evidence. Under appropriate circumstances, the evidence of malfunction is sufficient evidence of a defect."

"A product liability claim under the malfunction theory is distinct from an ordinary product liability claim." *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 622, 99 A.3d 1079 (2014). "The malfunction theory allows a plaintiff in a product liability action to rely on circumstantial evidence to support an inference that an unspecified defect attributable to a product seller was the most likely cause of a product malfunction *when other possible causes of the malfunction are absent*. . . . This theory does not fall squarely within either the ordinary or modified consumer expectation test, but to some extent overlaps with both tests." (Citation omitted; emphasis added; internal quotation marks omitted.) *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 321 Conn. 194–95 n.12.

The plaintiff in the present case, however, did not reference the malfunction theory in his pleadings, nor did he present any allegations relative to its elements. "To properly plead a product liability claim under the malfunction theory, the plaintiff was required to at least claim in the pleadings that some

Under the ordinary consumer expectation test, "[t]o be considered unreasonably dangerous, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (Internal quotation marks omitted.) *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 185, 136 A.3d 1232 (2016). "Expert testimony on product design is not needed to prove the product's defect . . . ." Id., 203.

In *Izzarelli*, however, our Supreme Court held that the modified consumer expectation test is our primary strict product liability test. Id., 194. The court explained the limited circumstances in which the ordinary consumer expectation test applied: "The ordinary consumer expectation test is reserved for cases in which the product failed to meet the ordinary consumer's *minimum* safety expectations, such as res ipsa type cases." (Emphasis in original.) Id. "In other words, the ordinary consumer expectation test would be appropriate when the incident causing injury is so bizarre or unusual that the jury would not need expert testimony to conclude that the product failed to meet the consumer's expectations." Id., 191; see *Potter* v. *Chicago Pneumatic Tool*

unspecified defect caused the plaintiff's harm *and* to allege facts tending to establish the malfunction theory's two basic elements, namely, that (1) the incident that caused the plaintiff's harm was of the kind that ordinarily does not occur in the absence of a product defect, and (2) any defect most likely existed at the time the product left the manufacturer's or seller's control and was not the result of the reasonably possible causes not attributable to the manufacturer or seller." (Emphasis added; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 623. "[T]he plaintiff was not required to plead a separate malfunction theory count in his complaint, but this does not relieve him of his burden of pleading facts to raise this theory in his complaint as part of his product liability claims." Id., 625. Although the plaintiff alleged an unspecified defect, he failed to allege facts to establish the malfunction theory's two basic elements. Because we conclude that the plaintiff did not raise the malfunction theory in the trial court prior to its rendering summary judgment, we decline to consider its application on appeal.

Co., 241 Conn. 199, 222, 694 A.2d 1319 (1997) (The court emphasized that it would "not require a plaintiff to present evidence relating to the product's risks and utility in every case. . . . There are certain kinds of accidents—even where fairly complex machinery is involved—[that] are *so bizarre* that the average juror, upon hearing the particulars, might reasonably think: Whatever the user may have expected from that contraption, it certainly wasn't that." [Emphasis added; internal quotation marks omitted.]).

The present case does not arise in any of the limited circumstances in which the ordinary consumer expectation test is applicable. This is not a "res ipsa type case" or a case in which the "injury is so bizarre or unusual that the jury would not need expert testimony . . . ."[7] *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, supra, 321 Conn. 191.

Accordingly, the modified consumer expectation test applies in the present case. "Under the modified consumer expectation test, the jury would weigh the product's risks and utility and then inquire, in light of those factors, whether a reasonable consumer would consider the product design unreasonably dangerous." (Internal quotation marks omitted.) Id., 190. Therefore, "[t]o establish the defect, the plaintiff's case required expert testimony on [the product] design and manufacture, as well as the feasibility of an alternative design." Id., 203–204; see *White* v. *Mazda Motor of America, Inc.*, 139 Conn. App. 39, 49, 54 A.3d 643 (2012) ("[a]lthough it is true that an ordinary consumer may, under certain circumstances, be able to form expectations as to the safety of a product . . . [our courts] nonetheless consistently have held that expert testimony is required when the question involved goes beyond the field of

[7] Rather, as the plaintiff concedes, nonunion was a possible cause of the fracture, apart from any product defect.

the ordinary knowledge and experience of judges or jurors" [citation omitted; internal quotation marks omitted]), aff'd, 313 Conn. 610, 99 A.3d 654 (2014). Thus, the trial court correctly held that expert testimony was required to prove the product's defect in the present case.

The plaintiff also argues that expert testimony was not required to prove that the alleged defect caused the injury for which compensation was sought. Specifically, he argues that expert testimony was not required to prove causation because "[t]here is no dispute that the defendants' product failed." We disagree.

"Proof that a defect in the product caused the injury in controversy is a prerequisite to recovery for product-caused injury in every products liability case, whether the action is grounded on negligence, breach of warranty, strict liability in tort . . . or a combination of such theories." (Internal quotation marks omitted.) *Theodore* v. *Lifeline Systems Co.*, supra, 173 Conn. App. 308. "When the causation issue involved goes beyond the field of ordinary knowledge and experience of judges and jurors, expert testimony is required." (Internal quotation marks omitted.) Id., 311.

The product at issue in the present case is a complex product: a spinal system which includes stabilizing titanium rods that are implanted into the patient's spine. The implanted product components consist of fifteen screws, two rods, and two transverse transconnectors.[8] Accordingly, we agree with the trial court's determination that expert testimony was required to establish causation.

For the foregoing reasons, we conclude that the trial court properly rendered summary judgment in favor of the defendants, with respect to the plaintiff's design

[8] Moreover, the plaintiff's failure to warn claim involves the risk associated with the mixing of dissimilar metals. See part II this opinion. This issue also goes beyond the field of ordinary knowledge and experience of jurors.

defect and breach of warranty claims, because the plaintiff could not prove that the defendants' product was defective, or that the product's alleged defect caused the plaintiff's injury, without the use of expert testimony.

II

The plaintiff next claims that genuine issues of material fact remained with respect to his failure to warn claim and, therefore, the learned intermediary doctrine did not bar this claim. Specifically, the plaintiff argues that, although the written warnings contained in the product insert were adequate, "[t]he factual circumstances of this case make the application of the learned intermediary doctrine inappropriate. The warnings were not adequate when combined with the input and influence of [the] defendants' product representative." We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. As previously noted, the plaintiff's surgery required a junction of the new titanium hardware with a previously placed steel construct. In addition, the plaintiff alleges that he weighed 267 pounds at the time of his first surgery.

The product was sold with a package insert containing several warnings about the risk of product failure and breakage. Specifically, the warnings provided that "factors such as the patient's weight . . . have an effect on the stresses to which the implant is subjected, and therefore on the life of the implant." The warnings additionally provided that "[d]issimilar metals in contact with each other can accelerate the corrosion process due to galvanic corrosion effects," and warn against "[m]ixing titanium . . . with stainless implant components . . . for metallurgical, mechanical and functional reasons."

In his complaint, with respect to his failure to warn claim, the plaintiff alleged that the defendants' products were sold "without proper or adequate warnings, labels and instructions regarding use in patients of the plaintiff's size and history of prior spinal fusions and instrumentalities," and "without proper or adequate warnings, labels and instructions regarding the junction of titanium hardware to stainless steel hardware . . . ."

In the plaintiff's objection to the defendants' motion for summary judgment, he argued that "[t]he warnings were not adequate when combined with the input and influence of the defendant's product representative." The plaintiff claimed that, prior to his first surgery, "Dr. Schwartz had discussions and consultations with Mike Rogers, who was and still is the defendants' local sales representative. Those discussions were in the nature of technical assistance, including the product to be used in the surgery and the properties thereof, including the size and type."

Similarly, at the hearing on the defendants' motion for summary judgment, the plaintiff's counsel argued: "[Dr. Schwartz] testified that ultimately it was his decision. My argument, Your Honor . . . is that he was nonetheless influenced; and the warnings were muted by virtue of the defendants' agent's involvement. And for that, that is a question of fact as to what extent he was influenced, to what extent the warnings were muted and weakened, and that is something that the trier of fact should decide."

In its memorandum of decision, the trial court concluded: "There is no testimony or other evidence that shows that the consultant had any impact on Dr. Schwartz' decisions regarding the plaintiff's surgery. Accordingly, there is no question of fact that the learned intermediary doctrine bars the plaintiff's failure to warn claim."

We begin by setting forth the applicable standard of review and relevant legal principles that guide our analysis. A product may be defective because of inadequate warnings or instructions. See *Hurley* v. *Heart Physicians, P.C.*, 278 Conn. 305, 315, 898 A.2d 777 (2006); *Giglio* v. *Connecticut Light & Power Co.*, 180 Conn. 230, 236, 429 A.2d 486 (1980) ("the failure to warn . . . is, of itself, a defect").

"According to the Restatement (Second) of Torts, certain products, by their very nature, cannot be made safe. See 2 Restatement (Second), [Torts § 402A, comment (k) (1965)]. Prescription drugs generally fall within the classification of unavoidably unsafe products. . . .

"Comment (k) to § 402A of the Restatement (Second) of Torts provides that some products are incapable of being made safe for their intended and ordinary use. Nevertheless, certain unavoidably unsafe products provide such benefits to society that their use is fully justified, notwithstanding the unavoidab[ly] high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. . . . [Id.] Comment (k) provides that a manufacturer of an unavoidably unsafe product should not . . . be held to strict liability for unfortunate consequences attending their use, merely because [it] has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. . . .

"A manufacturer of an unavoidably unsafe product can avoid strict liability if the product is properly prepared, and accompanied by proper directions and warning . . . . [Id.] Generally, a manufacturer's duty to warn of dangers associated with its products pertains

only to known dangers and runs to the ultimate user or consumer of those products. . . . The learned intermediary doctrine, which is supported by comment (k) to § 402A of the Restatement (Second) of Torts, is an exception to this general rule. . . .

"The learned intermediary doctrine provides that adequate warnings to prescribing physicians obviate the need for manufacturers of prescription products to warn ultimate consumers directly. The doctrine is based on the principle that prescribing physicians act as learned intermediaries between a manufacturer and consumer and, therefore, stand in the best position to evaluate a patient's needs and assess [the] risks and benefits of a particular course of treatment." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Breen* v. *Synthes-Stratec, Inc.*, 108 Conn. App. 105, 110–12, 947 A.2d 383 (2008). In *Breen*, this court concluded that, under Connecticut law, the learned intermediary doctrine is properly applied to cases involving prescription implantable medical devices. Id., 109.

The plaintiff admits that the defendants' product was accompanied by adequate warnings in the product insert. What the plaintiff claims is at issue, however, is whether, notwithstanding the written warnings, the defendants' product representative, by his oral communications to Dr. Schwartz, nullified the written warnings in the insert and rendered the warnings inadequate.

In *Hurley* v. *Heart Physicians, P.C.*, supra, 278 Conn. 305, our Supreme Court considered a similar argument. In *Hurley*, the plaintiffs appealed from the trial court's summary judgment rendered, on the basis of the learned intermediary doctrine, in favor of the defendant manufacturer on the plaintiffs' failure to warn product liability claims. Id., 307–308. Similar to the plaintiff in the

present case, the plaintiff parents in *Hurley* and their fourteen year old daughter who used the pacemaker at issue, admitted that the product was accompanied by adequate warnings in the product's manual. Id., 321. The plaintiffs' claim before the trial court was based on the assertion that the defendant's product representative had made statements to the daughter's treating physician that nullified the warnings that had been contained in the product's manual. Id., 307. The plaintiffs presented evidence from which a jury could have found that the defendant's sales consultant had made recommendations and taken actions in a manner inconsistent with the product's warnings.[9] The court concluded that "whether [the defendant's product representative's] actions were in derogation of the warnings in the technical manual was an issue of material fact sufficient to defeat the defendant's motion for summary judgment"; id., 323–24; and reversed the judgment of the trial court as to the plaintiffs' product liability claims.[10] Id., 326.

[9] At the product representative's deposition, he confirmed that he evaluated the defendant's product, which was the plaintiff's pacemaker, and indicated that the battery was low. *Hurley* v. *Heart Physicians, P.C.*, supra, 278 Conn. 309–10. He told the plaintiff's physician that the pacemaker's battery needed to be replaced as soon as possible. However, he also made a recommendation that he could lower the pacemaker rate to " 'buy . . . more time' " to replace the pacemaker's battery. Id., 311. In accordance with what he believed the position of the plaintiff mother to be on the matter, the product representative chose to adjust the pacemaker down from sixty paces per minute to forty. Id. The product's manual, however, provided that rates below forty paces per minute may be used for "diagnostic purposes," and "the manual [did] not provide that rates below forty paces per minute safely may be used for diagnostic purposes *after the indicator has signaled the end of battery life*." (Emphasis in original.) Id., 323.

[10] The court explained: "[A]lthough the manual provides that rates below forty paces per minute may be used for 'diagnostic purposes,' whether the discussion between [the product representative] and [the physician] and the adjustment actually made were consistent with that purpose when the electric replacement indicator on the . . . pacemaker signaled the need for immediate replacement *as in this case*, raised disputed factual issues meant for consideration by a fact finder at trial, not by a court deciding whether to render summary judgment." (Emphasis in original; footnote omitted.) *Hurley* v. *Heart Physicians, P.C.*, supra, 278 Conn. 322–23.

In the present case, however, the plaintiff failed to provide a sufficient evidentiary foundation to demonstrate the existence of a genuine issue of material fact. In *Hurley*, our Supreme Court noted: "If there exists an *undisputed* record demonstrating that [the defendant's product representative] did *nothing inconsistent* with the manual, then we would agree with the defendant that the trial court properly rendered judgment in its favor based on the learned intermediary doctrine." (Emphasis in original.) Id., 321. The plaintiff in the present case did not present any evidence that the defendants' representative said or did anything inconsistent with the product's warnings.[11] Accordingly, the trial court properly rendered summary judgment in favor of the defendants on the basis of the learned intermediary doctrine with respect to the plaintiff's failure to warn claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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[11] In support of his claim, the plaintiff points only to the testimony of Dr. Schwartz. Dr. Schwartz, during his deposition, stated that he consulted with the defendants' sales representative before the plaintiff's surgery, about screw size and length, and that the defendants' sales representative was available to be consulted during the plaintiff's surgery. This testimony does not support the plaintiff's bald assertion that the defendants' representative made statements which diluted the product's warnings. "Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014).

Moreover, the plaintiff focuses on Dr. Schwartz' use of the product despite the product's warnings regarding the risks associated with the patient's weight and the mixing of dissimilar metals. Dr. Schwartz, however, acknowledged that it was *his decision* to use the defendants' product. The plaintiff does not point to any statements or actions *by the defendants' product representative* that could have diluted the product's warning.

PENNY OUDHEUSDEN *v.* PETER OUDHEUSDEN (AC 41050)

Alvord, Keller and Eveleigh, 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 orders. The defendant claimed that the trial court improperly double counted a certain marital asset for purposes of property division and spousal support awards, and abused its discretion in failing to make equitable orders in the division of the marital estate. *Held*:

1. The trial court impermissibly double counted the value of the defendant's businesses for purposes of the property division and spousal support awards; that court, which awarded the plaintiff 50 percent of the fair market value of the defendant's businesses and $18,000 per month in lifetime alimony, failed to take into account that the defendant's annual gross income was included in the fair market value of his businesses, and because his businesses provided the stream of income with which he was to pay the monthly alimony award, the defendant was left without resources with which to comply with the court's orders and had no other assets available to satisfy all of the court-ordered payments.
2. The trial court abused its discretion in failing to make equitable orders in the division of the marital estate, as the court's financial awards were inequitable in that the court deprived the defendant of the means with which to comply with those orders when it awarded the plaintiff 50 percent of the value of the defendant's businesses, which provided his stream of income; moreover, the facts in evidence did not support the court's award of nonmodifiable, lifetime alimony to the plaintiff, the effect of which was to bar the defendant from seeking a modification even if he became seriously ill or the businesses failed to thrive or survive through no fault of his own, and which did not take into account his ability to generate the same amount of income as he grew older or contemplate his retirement, and the plaintiff's testimony at trial precluded the conclusion that her physical condition and age rendered her permanently incapable of earning any income from any type of employment, as it was evident from the plaintiff's testimony that she expected to secure some type of employment, even if the salary was less than what she would have liked it to be.

Argued February 14—officially released May 21, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, *Tindill, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Tindill, J.*, granted the defendant's motion for clarification. *Reversed in part*; *further proceedings*.

Yakov Pyetranker, for the appellant (defendant).

Scott T. Garosshen, with whom was *Kenneth J. Bartschi*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Peter Oudheusden, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Penny Oudheusden, and entering certain financial orders. On appeal, the defendant claims that the court (1) improperly double counted a marital asset[1] for purposes of the property division and spousal support awards, and (2) abused its discretion in failing to make equitable orders in the division of the marital estate. We agree and, accordingly, reverse in part the judgment of the trial court and remand the case for a new trial on all financial issues.

The record reveals the following facts, as found by the trial court[2] or undisputed, and procedural history. The parties were married on June 29, 1985, and have three adult children. On April 1, 2016, the plaintiff commenced the present action against the defendant seeking to dissolve their thirty year marriage on the ground of irretrievable breakdown. Following extensive discovery disputes, the dissolution trial took place over nine

[1] Impermissibly double counting an asset for purposes of property and support awards also is referred to as double dipping in this and other jurisdictions. See, e.g., *O'Brien* v. *O'Brien*, 320 Conn. 81, 120–21, 161 A.3d 1236 (2017).

[2] For purposes of this appeal, the defendant does not challenge the facts as found by the trial court.

days in April and May, 2017. The defendant was self-represented at the time of trial.[3] During the trial, the court heard testimony from the plaintiff, the defendant and each of their expert witnesses, and the court admitted 199 exhibits into evidence.

The plaintiff was born in Greenwich in 1961. The parties started dating in high school. Prior to their marriage in 1985, the plaintiff obtained an undergraduate degree in international marketing and a master's degree in education. She was employed as a teacher until 1988, when she left the workforce to raise their family. The parties agreed that the plaintiff would remain a full-time homemaker, and the defendant would provide the financial support for the family.

The defendant has a double major in English and computer science. He had worked at various companies during the earlier years of the marriage, which often resulted in the family moving from one location to another. In 1997, the defendant started his own business called Connecticut Computer & Consulting, Inc. At that time, the defendant was the sole employee of the corporation, which is a consulting practice with clients in the pharmaceutical industry. The defendant formed his second business, WriteResult, LLC, a limited liability company, in 2007. This company complements Connecticut Computer & Consulting, Inc., and provides services to the same or comparable clients. WriteResult, LLC, uses different computer technologies to collect patient data, and there is a heavy hardware component involved in its work. The defendant owns and manages both businesses, and he derives all of his income from his self-employment. The plaintiff always has been supportive of the defendant's business endeavors.

[3] During the trial, the defendant filed two written requests for a continuance in order to retain counsel to represent him during the remainder of the dissolution proceedings. The court denied both requests. The defendant is represented by counsel in this appeal.

The plaintiff testified that, during the course of the marriage, the defendant abused her emotionally and, at times, physically. The plaintiff also was troubled by the defendant's consumption of alcohol. Problems surfaced early in the marriage when the defendant told the plaintiff that their financial situation was dire, and he continued to voice his concerns about expenditures throughout the marriage. The plaintiff believed the defendant's statements because she trusted him, and she never sought documentation to verify their monetary problems. Creditors called frequently. She acknowledged that she had been aware from the beginning of the marriage until the time she initiated the dissolution proceedings that they had outstanding federal and state tax liabilities.

Nevertheless, the parties purchased a home in Greenwich for $1.5 million in 2002, and proceeded to engage contractors to perform improvements and renovations to the marital property. Their three children attended private and public schools before their college years. Following their secondary education, one son attended law school and one son attended medical school. Their daughter attended Dartmouth College. The parties were in total agreement when it came to sending their children to these educational institutions, and the defendant paid all of the substantial expenses from his earnings.

At the time of trial, the plaintiff was fifty-five years old and the defendant was fifty-eight years old. With respect to their health, the plaintiff had a little bit of trouble with her hearing, and she testified that she recently had ordered hearing aids. She also testified that she had been diagnosed with melanoma on the side of her nose in 2011, had it surgically removed, and was cancer free at that point. The defendant testified that he was in good health. He acknowledged that he considered himself an alcoholic, but he indicated that

he had not had a drink in nearly six months. With respect to employment, the plaintiff was not working and no longer had a current license to teach. The defendant had hoped to retire when he reached sixty-five years of age and, if possible, engage in some limited consulting work. He testified that the parties did not have a retirement account.

Aside from the two businesses, the only other significant marital property was the marital home in Greenwich. It had an appraised value of $1.7 million, but was encumbered by two mortgages and tax liens. The defendant ceased making payments on the first mortgage in October, 2015, and a foreclosure action was pending at the time of trial. The parties had significant debts. In addition to federal and state tax liabilities,[4] the plaintiff and the defendant, who previously had been represented by counsel in this action, owed substantial fees to their counsel and their experts.

The fair market value of the defendant's two businesses was a key issue in these proceedings. The plaintiff's expert, James R. Guberman, and the defendant's expert, Mark S. Gottlieb, provided extensive testimony as to the methodologies used and the conclusions reached as to valuation. The court credited Guberman's testimony that the combined fair market value of Connecticut Computer & Consulting, Inc., and WriteResult, LLC, was $904,000. The court further found that the defendant's gross annual income from these businesses was $550,000.

The parties submitted current financial affidavits and proposed orders to the court at the conclusion of the

[4] The defendant explained that he frequently deferred the payment of taxes by taking loans from the businesses rather than taking the earnings of the businesses as income. If taken as income, he stated that taxes would be payable at that time. If taken as a loan, he stated that the taxes would be deferred until the loan was repaid.

trial. During his cross-examination of Guberman, his closing argument, and in his proposed orders, the defendant cautioned the court against double counting the value of his businesses and his salary in dividing the marital estate and in awarding alimony. Additionally, the plaintiff's counsel, in his closing argument and in the plaintiff's proposed orders, acknowledged the danger of double counting an asset for purposes of the property division and support awards. In his closing argument, the plaintiff's counsel stated: "[A]nd I will concede this to [the defendant]. And this is reflected in paragraph 2.4 of article two of our proposed orders that were filed today.[5] Whatever value the court attributes to the business, the court has to, and should back out a reasonable salary for the officer and owner of the company.

"Because if the court is going to set a support order based on his income, it would not be fair and equitable to also ask that he pay an equitable distribution based on that as well.

"That would be double dipping. That was what [the defendant] was trying to get to when he was going through his examination. *Because that salary is—of the officer of the company—the owner of the company, is included in the overall valuation.* So that must be backed out." (Emphasis added; footnote added.)

The court issued its memorandum of decision on November 3, 2017. After concluding that the parties'

[5] Article II, paragraph 2.4 of the plaintiff's proposed orders provides: "BUSINESS ENTITIES: The [defendant] is the sole owner of two closely held business[es] [Connecticut Computer & Consulting, Inc.] and [WriteResult], LLC. The [defendant] shall retain one hundred percent (100%) of his ownership interest. The [defendant] shall pay the [plaintiff] sixty percent of the present value of $904,000.00, which *shall not include the value prescribed to the owner's stated income contained within the business valuation if the court sets a support order as proposed* the said business interest as a [nontaxable] property payment in two equal annual installments beginning July 1, 2017, and July 1, 2018." (Emphasis in original.)

marriage had broken down irretrievably, the court made, inter alia, the following "key findings": (1) The defendant was at fault for the irretrievable breakdown of the marriage;[6] (2) the defendant had been the sole financial support of the family since 1988, and the plaintiff had made significant, nonfinancial contributions to the family; (3) the self-employed defendant owned two businesses and had, for the past thirty-two years, intentionally concealed the exact nature of the businesses and marital finances from the plaintiff; (4) the defendant's gross annual income was $550,000; (5) the combined value of the defendant's two businesses was $904,000; (6) a lifetime periodic alimony award to the plaintiff was appropriate and necessary; (7) the defendant's failure to maintain the marital home and his failure to make mortgage payments since October 1, 2015, caused a loss of equity in the home in the amount of $162,339.89; and (8) the plaintiff's testimony was credible, while the defendant's testimony regarding his annual income, profit, cash flow, business and personal expenses was not credible.

In its memorandum of decision, the court entered orders regarding alimony, property distribution, and attorney's fees. The court awarded the plaintiff alimony in the amount of $18,000 per month, payable November 13, 2017, and every month thereafter, until the plaintiff's death, remarriage, cohabitation or civil union. The alimony award was nonmodifiable as to duration and amount. The defendant was responsible for all outstanding mortgage, insurance and taxes due and owing on the marital home. The defendant was further ordered to pay the plaintiff $221,677 no later than June 1, 2018, which represented 100 percent of the net equity in the marital home if the defendant had made the mortgage payments when due. With respect to the defendant's two businesses, he was to retain 100 percent ownership,

[6] The court did not provide its reasoning for this conclusion.

but was ordered to pay the plaintiff 50 percent of the fair market value, i.e., $452,000, no later than February 28, 2018. The defendant was responsible for all outstanding federal and state taxes, including interest and penalties, for the years 1985 through 2015, and the defendant was responsible for any tax liability for 2016. The court ordered the defendant to obtain and maintain, within forty-five business days of the court's decision, a ten year term life insurance policy naming the plaintiff as the sole beneficiary in the amount of $2 million.[7] Finally, the defendant was ordered to pay all of the plaintiff's legal, expert, and professional fees, which totaled $223,398. The fees were to be paid no later than December 31, 2017, or, alternatively, the defendant was to obtain a written, agreed upon installment plan with the named creditors no later than December 31, 2017.

The defendant appealed from the court's judgment on November 14, 2017.[8] On March 7, 2018, the defendant

[7] The record reveals no discussion of the impact of the defendant's admitted alcohol issue on his insurability.

[8] On January 5, 2018, the defendant moved ex parte for a stay of execution of the alimony award pending his appeal. In his motion, the defendant requested the court to stay temporarily his $18,000 per month alimony obligation and to order him to pay $9000 in monthly alimony instead. On January 11, 2018, the plaintiff moved to terminate the appellate stay as it pertained to the defendant's obligation to pay all outstanding mortgage, insurance, and taxes due on the marital home, and his obligation to pay all outstanding federal and state taxes. The court denied the defendant's ex parte motion on February 1, 2018, and ordered an evidentiary hearing.

With respect to the plaintiff's motion, the court entered an order on June 22, 2018, following an evidentiary hearing, requiring the parties to schedule a status conference. In that order, the court noted: "The court has reviewed the rules and the evidence submitted, and has considered the testimony and the closing argument of counsel. The court's review of applicable case law, and review of its November 3, 2017 memorandum of decision . . . has compelled the court to consider whether an error was made in its trial orders. Should the court discover an error, an amended memorandum of decision will be forthcoming." The record reflects that the court did not file an amended memorandum of decision.

On November 7, 2018, however, the court filed a corrected memorandum of decision regarding the defendant's January 5, 2018 motion for a stay of execution and the plaintiff's January 11, 2018 motion to terminate the appel-

filed a postjudgment motion for clarification. In his motion, he stated that the court had found his gross annual income to be $550,000. The defendant requested clarification as to the following: "Is the $550,000 amount the defendant's earning capacity? If so, is it his earning capacity at his two wholly owned companies, or what he can realistically be expected to earn elsewhere independent of said companies?" On April 3, 2018, the court granted the defendant's motion and responded to the request as follows: "The court's finding that the [d]efendant's annual gross income is $550,000, is not a finding of earning capacity, but of (gross) income from Connecticut Computer & Consulting, [Inc.], and WriteResult, LLC."

We begin our analysis of the defendant's claims by setting forth the standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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

late stay. The court denied the defendant's motion and granted the plaintiff's motion. The court concluded that it needed "to preserve the mosaic of its dissolution orders pending resolution of the appeal." In its consideration of potential prejudice to the defendant by its decision, the court noted: "In the event the defendant-appellant prevails on appeal—which is possible based on his argument that the court 'double-dipped,' by awarding 50 [percent] of his two solely owned companies and $18,000 of alimony [monthly] out of his remaining 50 [percent] share of the companies . . . he can obtain effective relief postappeal." (Footnote omitted.)

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 587–88, 187 A.3d 1184 (2018).

I

The defendant first claims that the court improperly double counted a marital asset for purposes of property division and spousal support awards. Specifically, the defendant argues that the court improperly awarded the plaintiff alimony from income that was generated by the defendant's two businesses and awarded her 50 percent of the value of those businesses. The plaintiff counters that "an impermissible double dip would have occurred here only if the trial court had given 100 [percent] ownership of the businesses to [the] [p]laintiff and then ordered [the] [d]efendant to pay alimony based on income from an asset he no longer had as a result of the transfer, making compliance infeasible." (Emphasis omitted.) We agree with the defendant that, under the circumstances of this case, the court effectively deprived the defendant of his ability to pay the $18,000 monthly alimony award to the plaintiff by also distributing to the plaintiff 50 percent of the value of his businesses from which he derives his income.

The general principle is that a court may not take an income producing asset into account in its property division and also award alimony based on that same income. See *Callahan* v. *Callahan*, 157 Conn. App. 78, 95, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015) and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015). The plaintiff claims that because the defendant retained 100 percent of the ownership in his two businesses, he still had an income stream from which to make the alimony payments. The plaintiff argues that the case of *O'Brien* v. *O'Brien*, 326 Conn. 81, 161 A.3d

1236 (2017), requires the transfer of the entire income producing asset to the party receiving support in order to constitute an impermissible double counting situation. The plaintiff cites the following language from *O'Brien* in support of this position: "A trial court's alimony award constitutes impermissible double dipping only if the court considers, as a source of the alimony payments, assets distributed to the party *receiving* the alimony." (Emphasis in original.) Id., 120. We do not read *O'Brien* as expansively as the plaintiff. To do so would lead to an unworkable and nonsensical result.

If we follow the plaintiff's interpretation of *O'Brien*, a court could award 99 percent of the income producing asset to the party receiving alimony and still not engage in impermissible double counting of marital assets. We conclude that *O'Brien* does not require the application of a bright line rule when a court double counts an income producing asset for purposes of property distribution and support awards. In marital dissolution cases, each situation is fact specific and the court, in formulating its orders, must take into account all of the assets in the marital estate as well as other statutory considerations. See General Statutes §§ 46b-81 and 46b-82. "The court must be free to shape its awards in a manner which it determines is fair and equitable under the circumstances." *Sweet* v. *Sweet*, 190 Conn. 657, 662, 462 A.2d 1031 (1983). For that reason, there can be no general prohibition against awarding alimony from an income producing asset that has been partially conveyed to the party receiving support if, for example, there are other assets available to fund alimony payments. Moreover, an actual conveyance of the interest in the income producing asset to the party receiving alimony is not required to constitute impermissible double counting if the paying party in practical effect has been deprived of the value of that asset.

In the present case, the court failed to take into account that the defendant's annual gross income, which the court determined to be $550,000, was included in the fair market value of the defendant's two businesses. As the court acknowledged in its April 3, 2018 clarification, its determination of the defendant's income flowed solely from the defendant's businesses and was not based on his earning capacity.[9] Nevertheless, the court awarded the plaintiff 50 percent of the $904,000 fair market value of the businesses and awarded the plaintiff $18,000 per month in lifetime alimony. These orders ignored the economic relationship between the value of the businesses and the defendant's ability to earn income. The defendant's businesses provided the only significant stream of income by which the defendant could meet his alimony and other court-ordered payment obligations.

The defendant was ordered to pay the first monthly alimony payment of $18,000 ten days after the issuance of the court's memorandum of decision and an amount equal to 50 percent of the value of the businesses, i.e., $452,000, four months thereafter. Moreover, the defendant was ordered to pay $221,677, which the court determined to be 100 percent of the net equity in the marital home, three months after paying 50 percent of the value of the businesses. Additionally, the defendant was solely responsible for all of the outstanding mortgage payments, insurance and taxes due and owing on the marital home since October, 2015, and he was responsible for all federal and state tax liabilities for the years 1985 through 2016. Finally, he was ordered to pay the

[9] "Earning capacity . . . 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 considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 518, 195 A.3d 458 (2018).

balance of all of the plaintiff's legal, expert, and professional fees, i.e., $223,398, within two months of the court's judgment or, in the alternative, to secure a written, agreed upon installment plan with the creditors of those fees within that time period.[10]

Because the defendant's businesses provided the stream of income with which the defendant was to pay the monthly alimony award and because the court awarded the plaintiff 50 percent of the value of those businesses, the defendant was left without resources with which to comply with the court's orders. He had no other assets available to satisfy all of the court-ordered payments. Given the circumstances of this case, we conclude that the court impermissibly double counted the value of the defendant's businesses for purposes of property division and spousal support awards.

II

The defendant next claims that the court abused its discretion in failing to make equitable orders in the division of the marital estate. Specifically, he argues that the plaintiff was awarded the entire net marital estate while the defendant was held responsible for all of the marital debts. The defendant claims that there was no finding of an intentional dissipation of marital assets and that the plaintiff and the family had benefitted from the decisions made throughout the marriage to defer tax liabilities, to pay for all of the children's educational expenses, and to otherwise provide for the lifestyle to which they had become accustomed. He further argues that the court's award of nonmodifiable,

[10] The defendant already had paid $35,000 toward the plaintiff's counsel and expert fees as per the January 17, 2017 order of the court, *Colin*, *J.*, and additionally had been ordered to pay $54,048 toward the plaintiff's legal, expert and professional fees by the court, *Tindill*, *J.*, on April 25, 2017.

lifetime alimony was not supported by the evidence at trial.

We agree that the court's financial awards were inequitable because, as previously discussed, the court deprived the defendant of the means with which to comply with those orders. We further conclude that the award of nonmodifiable, lifetime alimony was not supported by the facts as found by the court.[11]

Again, we are mindful of the court's broad discretion in dividing the marital estate in domestic relations matters. *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 516, 195 A.3d 458 (2018). Further, "there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria." (Internal quotation marks omitted.) *Kaczynski* v. *Kaczynski*, 124 Conn. App. 204, 213, 3 A.3d 1034 (2010). We also are mindful, however, of "the long settled principle that the defendant's ability to pay is a material consideration in formulating financial awards." (Internal quotation marks omitted.) *Pellow* v. *Pellow*, 113 Conn. App. 122, 129, 964 A.2d 1252 (2009).

Although the trial court stated that it had considered all of the statutory criteria and all of the evidence when it fashioned the financial awards, its final judgment indicates otherwise. It is true that the court was not required to establish a plan for the defendant that detailed the steps he had to take in order to comply with the court's financial orders. The court was required,

[11] We are remanding this case to the trial court for further proceedings on all financial issues because of impermissible double counting by the court for property division and support awards. We nevertheless are addressing the defendant's remaining claim because the types of issues involved herein may arise on remand. *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 119-20, 138 A.3d 297 (2016); see also *Edmond* v. *Foisey*, 111 Conn. App. 760, 773 n.14, 961 A.2d 441 (2008) (reviewing court may resolve claims that are not necessary for resolution of appeal but may arise during proceedings on remand).

however, to provide the defendant with the financial tools necessary to comply with its orders. See *Wood* v. *Wood*, 160 Conn. App. 708, 726, 125 A.3d 1040 (2015).

One of those orders was to pay the plaintiff alimony in the amount of $18,000 per month, beginning November 13, 2017, and each month thereafter on the thirteenth of the month, until the plaintiff's death, marriage, cohabitation, or civil union, whichever occured first. The alimony award was nonmodifiable as to duration and amount. The effect of this order was to bar the defendant from seeking a modification even if he became seriously ill or the businesses failed to thrive or survive through no fault of his own. The defendant was fifty-eight years old at the time of trial, and the court's order did not take into account his ability to generate the same amount of income as he grew older nor did it contemplate his retirement. The court justified this nonmodifiable, lifetime alimony order on the following basis: "The purpose of the [c]ourt's alimony award is to provide a measure of financial security to the [p]laintiff who has not worked outside of the marital home in nearly three decades, has $2,095 in retirement funds, and has significantly less ability to acquire income or assets in the future than does the [d]efendant. The [p]laintiff has limited earning potential. She is [fifty-five] years old, hearing-impaired, and a cancer survivor. The [p]laintiff earned a bachelor's degree in international marketing from Simmons College and a master's degree in teaching from the University of Bridgeport. She is no longer licensed to teach."

The plaintiff's own testimony at trial precluded the conclusion that her physical condition and age rendered her permanently incapable of earning any income from any type of employment. Although her teaching certificate was no longer valid, the court did not consider the

possibility that the plaintiff could seek recertification.[12] The plaintiff, although she testified that she had ordered hearing aids, acknowledged only that she had a little bit of trouble with her hearing. She did not testify that her hearing was so deficient that she was incapable of securing employment. Aside from her hearing issue and the removal of melanoma on her nose approximately six years prior to the trial, the plaintiff presented no other testimony that indicated she had health issues impacting her employability.

When the defendant cross-examined her at trial regarding her employment history, the plaintiff testified that she had been employed as a secretary following her graduation from college prior to securing a position as a teacher, that she had obtained a realtor's license, and that she had worked at the retail counter at a printing business. She acknowledged that she had not attempted to secure employment in any of those fields in recent years. Further, when she was asked if she believed that she would not be hired because of her age, she answered, "[n]o." The defendant then asked the plaintiff if she believed she would be employable if she had some skills training, and she answered, "[s]ure." When the court inquired how she intended to support herself, the plaintiff responded: "I am a little nervous because I'm fifty-five and, like, what career am I going to start. I don't have the skill set to, to go and make a ton of money. Like, I know I'm just going to get some, you know, like secretary job or . . . or I'm not going to make big money or anything. But I'm hoping that I get something so that I can just move on with my life and just be my own person."

[12] "[R]ehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-sufficiency." (Internal quotation marks omitted.) *Riccio* v. *Riccio*, 183 Conn. App. 823, 824 n.2, 194 A.3d 337 (2018).

It is evident from the plaintiff's testimony that she expected to secure some type of employment, even if the salary was less than she would have liked it to be. She did not testify that she was incapable of working due to her health or lack of education. To the contrary, she had plans to reenter the job market. Despite this testimony, the court, in essence, determined that she would not be able to secure any type of employment at any time in the future and awarded her nonmodifiable, lifetime alimony.

A finding of abuse of discretion in making financial awards in marital dissolution cases is very unusual. Nevertheless, we are compelled to conclude that this is one of those rare cases because the court effectively divested the defendant of any means with which to pay the court-ordered obligations.[13] Further, the facts in evidence did not support the court's award of nonmodifiable lifetime alimony. "The issues involving financial orders are entirely interwoven. The rendering of a judgment in a complicated dissolution case is a carefully

[13] We note that the court ordered the defendant to pay all of the plaintiff's legal, expert, and professional fees, but failed to make any finding that the plaintiff lacked the ability to pay her own fees. "Counsel fees are not to be awarded merely because the obligor has demonstrated an ability to pay. Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . In making its determination regarding attorney's fees, the court is directed by [General Statutes] § 46b-62 to consider the respective financial abilities of the parties. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so." (Internal quotation marks omitted.) *Pena* v. *Gladstone*, 168 Conn. App. 141, 152, 144 A.3d 1085 (2016).

In the present case, it would appear that the plaintiff had ample liquid funds as a result of the other orders in this case. Nevertheless, "[t]o award counsel fees to a spouse who had sufficient liquid assets would be justified, if the failure to do so would substantially undermine the other financial awards." (Internal quotation marks omitted.) Id., 152-53. The court failed to make any such determination when it ordered the defendant to pay the sum of $223,398 (in addition to $89,048 that he already had been ordered to pay under court orders), which represented the balance of all of the plaintiff's legal, expert, and professional fees.

crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Krafick* v. *Krafick*, 234 Conn. 783, 806, 663 A.2d 365 (1995). Accordingly, we must remand the matter to the trial court with direction to hold a new hearing as to all financial orders.

The judgment is reversed only with respect to the financial orders and the case is remanded for a new hearing on all financial issues; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

GAD LAVY *v.* MICHELE BROWN LAVY
(AC 40936)

Prescott, Elgo and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the postjudgment order of the trial court opening and reforming the dissolution judgment after the trial court found that the plaintiff's failure to disclose certain assets on his financial affidavit constituted material omissions that triggered certain remedial measures set forth in the parties' separation agreement. The separation agreement, which had been incorporated into the dissolution judgment, provided, inter alia, that in the event of a material omission in either party's financial affidavit, the other party had the right to open and reform the judgment, and would be entitled to receive 75 percent of the undisclosed asset's value, as measured at the time of dissolution, and reasonable legal fees from the other party. The trial court granted the defendant's motion to open and reform the dissolution judgment, in which she claimed that the plaintiff had failed to disclose a certain bank account and a condominium apartment that he owned in Jerusalem, Israel. The trial court ordered the plaintiff to pay the defendant 75 percent of the value of those assets at the time of the dissolution judgment, and awarded the defendant statutory (§ 37-3a [a]) prejudgment and postjudgment interest, as well as costs and reasonable attorney's fees. *Held*:

1. The trial court properly determined that the plaintiff's failure to disclose the bank account and Jerusalem property on his financial affidavit constituted material omissions in violation of the separation agreement:
   a. The plaintiff could not prevail on his claim that his failure to disclose the bank account and Jerusalem property did not constitute material

omissions because the defendant knew about them at the time of the dissolution judgment: the trial court made no findings that the defendant had knowledge of the undisclosed assets during the negotiation of the separation agreement or at the time the dissolution judgment was rendered, as the court was free to reject evidence that she knew of the assets, and the plaintiff did not identify any language in the separation agreement that would exempt a party from the duty to disclose an asset on a financial affidavit if the other party was aware of its existence; moreover, the court found that although the defendant had received conflicting and unverified reports at the time of the dissolution judgment that raised the possibility that the plaintiff owned undisclosed real property, it was not until later that she received more definitive proof of the existence of that property, the court credited her testimony that although she previously had opened the bank account in the plaintiff's name, she had nothing further to do with the account and was not aware as of the date of dissolution that it existed, and the duty of full disclosure was also necessary for the court to evaluate the reasonableness of the parties' agreement.

b. The plaintiff's claim that the trial court inflated the significance of the omitted assets by comparing their value to the total value of disclosed assets in the same asset category was unavailing; the court's discussion of the relative value of the assets did not render its determination that the plaintiff's nondisclosures were material omissions legally or logically incorrect or unsupported by the record, even if the court did not use the proper yardstick to measure the materiality of his omissions, the omission of assets valued at 1.5 percent of a $16 million marital estate was not de minimis or immaterial, and to suggest that the failure to disclose nearly $240,000 in assets would not have had great consequences to the separation agreement would be to suggest that the defendant would have been content to walk away from her equitable share of those assets.

c. The trial court's finding that the plaintiff knew about the omitted bank account was not clearly erroneous; there was evidence demonstrating that the plaintiff was aware at the time of the dissolution judgment that a savings account had been opened in his name, the plaintiff never sought to close the account, and even if he was not aware of the status of the account at the time of the dissolution or the balance of the funds in the account, he could have determined such information through due diligence and disclosed it on his financial affidavit.

2. The trial court properly awarded the defendant prejudgment interest; there was no merit to the plaintiff's assertion that he was denied reasonable notice and an opportunity to present a defense regarding the defendant's request for prejudgment interest, which was made in her posthearing brief, as the plaintiff had an opportunity to respond to that claim in his posthearing reply brief, and given the court's determination that the plaintiff was unjustified in failing to disclose assets, which resulted in a failure to distribute to the defendant at the time of the

dissolution her equitable share of those assets under the separation agreement, an award of prejudgment interest properly was within the discretion of the court.

3. The trial court did not violate the rule of practice (§ 61-11) that provides for an automatic appellate stay by awarding the defendant postjudgment interest after the plaintiff filed this appeal, as the court's decision could not reasonably be viewed as effectuating the judgment on appeal: although the plaintiff claimed that an award of interest under § 37-3a is part of the mechanism for the statutory (§ 52-350f) enforcement of a money judgment, the clause in § 52-350f that refers to statutory interest clarifies that interest awarded is included in the money judgment that may be enforced, and no language in § 52-350f, from which § 61-11 is derived, equates obtaining an award of interest with an action to enforce a money judgment, which § 52-350f expressly limits to the execution or foreclosure of a lien; moreover, the plaintiff was able to amend his appeal to challenge the additional award, the court's decision did not diminish or hamper his appellate rights with respect to the remainder of the judgment on the motion to open, and although the court's decision increased the damages the defendant would be entitled to collect, she cannot secure payment from the plaintiff by executing on the judgment until the appeal is disposed and the automatic stay has expired.

Argued January 9—officially released May 21, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Malone*, *J.*, denied the plaintiff's motion to strike and request to revise; subsequently, the court, *Emons*, *J.*, approved the stipulation of the parties to conduct certain discovery; thereafter, the court, *Heller*, *J.*, granted the defendant's motion to open and reform the judgment, and the plaintiff appealed to this court; subsequently, the court, *Heller*, *J.*, granted the defendant's motion for postjudgment interest, and the plaintiff filed an amended appeal. *Affirmed*.

Alexander J. Cuda, for the appellant (plaintiff).

Eric M. Higgins, with whom, on the brief, was *Sarah Gleason*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Gad Lavy, appeals from the judgment of the trial court granting the motion of the defendant, Michele Brown,[1] to open and reform the parties' marital dissolution judgment because the plaintiff failed to disclose on his financial affidavit two marital assets: a savings account with First Niagara Bank, N.A., formerly known as NewAlliance Bank (Niagara account), and real property located in the Middle East (Jerusalem property). The plaintiff later amended this appeal to challenge the court's subsequent decision to grant the defendant's motion for an award of postjudgment interest. On appeal, the plaintiff claims that the court improperly (1) found that his failure to disclose the Niagara account and Jerusalem property on his financial affidavit constituted material omissions that triggered remedial measures set forth in the parties' separation agreement, which was incorporated by reference into the judgment of dissolution, (2) awarded the defendant prejudgment interest despite her having requested such relief for the first time in her posthearing brief, and (3) awarded the defendant postjudgment interest during the pendency of the appeal, purportedly in violation of the automatic appellate stay. We reject the plaintiff's claims and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, which were found by the court or are uncontested, are relevant to our resolution of the plaintiff's claims. The court dissolved the parties' marriage on June 14, 2011, following an uncontested hearing. The judgment of dissolution incorporated by reference the parties' separation agreement. The parties attached to the separation agreement financial affidavits dated June 14, 2011.

[1] The defendant formerly was known as Michele Brown Lavy.

In article XXI, paragraph 21.1, of the separation agreement, the parties represented that their attached financial affidavits were true and accurate. They further stated that they had relied on the facts set forth in those financial affidavits in reaching the terms and financial arrangements set forth in the separation agreement. Paragraph 21.1 further provides: "Each party expressly represents that there has been no substantial change in circumstances to [either party] since the date of said affidavits and that said affidavits fully, fairly and accurately [sets] forth the existing assets, liabilities, and income of the parties. The parties expressly represent to each other that they do not own any other assets nor are any assets being held by a third party for the benefit of either [party], except those described and divided under the terms of this agreement and the parties' respective financial affidavits. Each party represents that he or she relied on the financial affidavits and voluntary disclosures and representations made by the other party in the course of this dissolution of marriage action for purposes of arriving at the terms of this agreement. The parties further acknowledge that each has a fiduciary duty to the other to make a full and fair disclosure of his or her financial circumstances, including all assets, to the other in connection with this proceeding. In the event of a material omission or misstatement by either party in his or her affidavit, the other party shall have the right to rescind this [a]greement and reopen and reform any judgment entered in the pending action incorporating the terms hereof." Article XXI of the separation agreement further provides that if either party made a material omission of an asset on his or her financial affidavit, the other party would be entitled to receive 75 percent of the undisclosed asset's value measured at the time of dissolution. The party who failed to disclose an asset also would be liable for the other party's "reasonable legal fees, expert fees, and court costs."

On August 9, 2011, the defendant filed a motion to open and reform the June 14, 2011 judgment of dissolution, invoking article XXI of the separation agreement. According to the defendant, the plaintiff had failed to disclose on his June 14, 2011 financial affidavit the existence of the Jerusalem property, which she described as a condominium apartment and storeroom. She also claimed there was a "likelihood beyond mere suspicion that the plaintiff has failed to disclose additional assets as yet unknown to the defendant" because his financial affidavit did not disclose any bank accounts in Israel or other means by which the plaintiff could pay the taxes and costs associated with owning the condominium. The defendant asked the court to open the dissolution judgment for the purpose of conducting limited discovery and, if necessary, to distribute any undisclosed property in accordance with the separation agreement, including awarding reasonable attorney's fees and costs.

In response to the defendant's motion to open, the plaintiff initially filed a motion to dismiss asserting insufficiency of process, which he later withdrew. He subsequently filed a motion to strike, challenging the legal sufficiency of the defendant's motion, and a request to revise. The court denied both motions. The defendant never filed a written opposition addressing the merits of the motion to open.

On December 14, 2011, the defendant amended her motion to open and reform the dissolution judgment, asserting that, since filing her initial motion, she had learned of additional grounds for granting the motion. Specifically, in addition to reasserting the allegations in her initial motion to open, the defendant asserted that the plaintiff had failed to disclose the existence of the Niagara account, which she described as a savings account that had been open for at least three years and,

thus, existed at the time the plaintiff submitted his June 14, 2011 financial affidavit.

The parties eventually executed a stipulation in which they agreed to have the court open the dissolution judgment for the limited purpose of conducting discovery. The stipulation expressly provided that it was "not an admission of any misrepresentation or fraud on the part of either party with respect to the representations made at the time of [j]udgment." The court approved the stipulation and made it an order of the court on November 5, 2012.

On June 15, 2016, the plaintiff filed a motion in which he asserted that the defendant had opened the Niagara account in the plaintiff's name, without his knowledge, using her own funds, and, thus, she had a duty to disclose the Niagara account on her financial affidavit. According to the plaintiff, the defendant's failure to disclose the existence of the account entitled him to an award of legal fees and costs under the terms of the separation agreement.

The court conducted an evidentiary hearing on the defendant's motion to open, as amended, on November 16 and 17, 2016. At that time, the court also considered the plaintiff's motion for an award of costs and attorney's fees. The parties submitted posthearing memoranda and reply memoranda. The court later granted a request by the defendant for additional oral argument, which it heard on April 11, 2017.

The court issued a memorandum of decision on August 7, 2017, granting the defendant's motion to open and reform the dissolution judgment. With respect to the Jerusalem property, the court found that the plaintiff's brother had conveyed the property to him for no consideration and that a title abstract reflecting the conveyance had been recorded in the Jerusalem land

registry on January 27, 1999.[2] The plaintiff remained the record owner of the Jerusalem property at the time of the dissolution judgment. Although the plaintiff testified that he had not included the Jerusalem property on his financial affidavit because he did not know he owned the property, the court did not find that testimony credible. Rather, the court credited the testimony of the defendant's real estate expert, Attorney Yoram Hacohen,[3] who opined that before a conveyance for no consideration could be recorded on the land records in Jerusalem, the grantee, in this case the plaintiff, would have been required to sign a number of legal documents.[4] The court found that the fair market value of the Jerusalem property, measured in United States dollars at the time of the dissolution judgment, was $146,379. The court further found that the plaintiff's failure to include the Jerusalem property on his June 14, 2011 financial affidavit was a material omission.[5]

The court made the following findings relative to the *defendant's* knowledge of the Jerusalem property at the time of the dissolution judgment. "The Jerusalem

[2] The court made the following findings with respect to the title abstract: "The title abstract reflects [the plaintiff's] Israeli identification number. The signatures on the title abstract are not dated. [The plaintiff] was in Israel in 1998, about six months before the title abstract was recorded. He was not in Israel on January 27, 1999, the date of recording."

[3] Hacohen did not testify at the hearing, but portions of his deposition testimony were read into the record.

[4] Specifically, Hacohen opined that a number of documents must be signed by the grantee in connection with a conveyance for no consideration in Israel, including an agreement between the parties, an affidavit, a transfer deed, and a tax declaration, before the conveyance is recorded. He further explained that conveyance taxes at a reduced rate are required to be paid on a sale of property for no consideration between relatives.

[5] The court noted that, in his financial affidavit, the plaintiff had disclosed the following real estate assets that he owned jointly with the defendant: the parties' marital residence in Westport, in which the parties had equity of $1,351,577; an apartment in Umbria, Italy, having an appraised value of $230,296; and an unimproved lot in Vieques, Puerto Rico, having an appraised value of $234,000.

property came to [the defendant's] attention as a result of her efforts to locate property that was owned by [the plaintiff] in Israel. . . . [I]n early 2011, she and her counsel in the dissolution action had retained an attorney in Israel to find out whether [the plaintiff] owned any property there. That attorney engaged a private investigator, who advised them that [the plaintiff] did not own any real property in Israel. Shortly before the uncontested dissolution hearing, however, [the defendant's] boyfriend, who was also a lawyer, hired a different attorney in Israel. That attorney reported that [the plaintiff] owned a condominium in Jerusalem and forwarded a copy of a document from the land records.

"Despite the conflicting, unverified reports that she had received regarding a possible asset belonging to [the plaintiff] that he had not disclosed, [the defendant] determined to proceed with the uncontested dissolution hearing on June 14, 2011. . . . [S]he did so because of the tremendous distrust and acrimony that existed between the parties at that time. She was afraid that if she did not go ahead with the uncontested divorce in June, 2011, that [the plaintiff] would deny her a get—a divorce under Jewish religious law—and thus prevent her from remarrying in the Jewish faith. She also believed that she would have recourse under article XXI of the June, 2011 separation agreement if she later established that [the plaintiff] owned property in Israel which was not reflected on his June 14, 2011 financial affidavit."

Regarding the Niagara account, the court found that the account was opened in July, 2008, with an initial deposit of $89,146.50. The balance of the Niagara account as of April 28, 2011, was $92,432.[6] The court

[6] In crafting its remedial orders, the court utilized $92,432 as the value of the Niagara account as of the date of dissolution on June 14, 2011. Neither party challenges that finding on appeal.

After the defendant filed the amended motion to open indicating that the plaintiff had failed to disclose the Niagara account, the plaintiff withdrew

further found that, although the plaintiff owned the Niagara account on the date of entry of the dissolution judgment, he failed to disclose that account on his financial affidavit, and this constituted a material omission under the separation agreement.[7] The plaintiff testified that, as with the Jerusalem property, he did not know that the account existed. The court, however, did not credit this assertion.

The court found that the defendant was the person who originally had funded the Niagara account with money from her office.[8] The defendant opened the Niagara account in the plaintiff's name, in trust for the parties' son. The plaintiff signed the original documents necessary to open the account in two places. The defendant never signed the account-opening documents, never deposited any additional money into the Niagara account after the initial deposit, and never made any withdrawals or had anything to do with the account after it was opened. Although the plaintiff's name appeared on the bank account statements, the defendant's office address was listed on the statement as the depositor's address rather than the plaintiff's office address. According to the defendant and her office manager, however, no statements were ever delivered to her office.

With respect to the receipt of banking statements and other correspondences relative to the Niagara

all of the funds from the account and closed it, transferring the money to another account.

[7] The plaintiff disclosed on his June 14, 2011 financial affidavit three savings accounts with a combined balance of $60,224 and two checking accounts with a combined balance of $119,695.

[8] The defendant, who was concerned about bank failures during the 2008 financial crisis, apparently had transferred money from her practice into several different bank accounts, keeping the amount deposited in each account below the maximum amount insured by the Federal Deposit Insurance Corporation.

account, the court made the following additional findings: "From July, 2008, when [the Niagara account] was opened, through the parties' divorce in June, 2011, [the defendant's] office was at 999 Summer Street, suite 302, and [the plaintiff's] office was two buildings away, at 1275 Summer Street, in Stamford. Counsel for [the defendant] suggested that [the Niagara account] statements and [other forms] were simply delivered to [the plaintiff] at his office on the same street. The plaintiff denied receiving [the Niagara account] statements or any [other forms] from the bank." The court did not expressly resolve the issue regarding the delivery and receipt of the bank statements, but credited the defendant's testimony that she was not aware that the Niagara account still existed as of the date of entry of the dissolution judgment, and that she first learned that it remained open when an escheat letter from the bank, addressed to the plaintiff, was mailed to her office address in November, 2011.

On the basis of its findings that the plaintiff had failed to disclose both the Jerusalem property and the Niagara account on his June 14, 2011 financial affidavits, and that the failure to disclose those assets qualified as material omissions under the terms of the separation agreement, the court ordered the plaintiff to pay the defendant an additional $179,109, which represented 75 percent of the value of the undisclosed assets at the time of the dissolution judgment. The court also awarded the defendant prejudgment interest from the date of the dissolution judgment at the annual rate of 5 percent or $55,141, for a total of $234,250. Moreover, the court determined that the defendant was entitled to costs and reasonable attorney's fees totaling $194,123.76. It denied the plaintiff's motion for attorney's fees and costs. The plaintiff filed a motion to reargue, which the court denied. The plaintiff filed the present appeal on October 11, 2017.

On August 16, 2017, the defendant filed a motion asking the court for an award of postjudgment interest. She later filed a memorandum of law in support of the motion. The plaintiff did not file a written objection or memorandum of law in opposition to the defendant's motion. The court heard argument on the defendant's motion on February 26, 2018. On June 11, 2018, the court issued a decision granting the defendant's motion and awarding postjudgment interest at an annual rate of 5 percent. The plaintiff amended the present appeal, challenging the postjudgment interest award. Because briefs already had been filed in the initial appeal, this court granted permission to file supplemental briefs addressing the issue in the amended appeal. See Practice Book § 61-9. Additional facts will be set forth as needed.

I

We begin with the plaintiff's claim that the court improperly found that he made material omissions on his financial affidavit in violation of the separation agreement by failing to disclose the Niagara account and Jerusalem property. The plaintiff essentially raises three arguments in support of this claim. First, he argues that, because the defendant knew about the Niagara account and the Jerusalem property at the time of the dissolution judgment, their nondisclosure on his financial affidavit would not have affected her decision-making process and, therefore, his failure to disclose those assets could not have constituted material omissions.[9]

[9] In addition, the plaintiff argues that the court improperly failed to consider whether the defendant's failure to disclose her alleged knowledge of the assets prior to dissolution was itself a violation of a duty to disclose. The plaintiff takes the position that the principles of full and frank disclosure that our Supreme Court espoused in *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991), which we will discuss in this opinion, should not be limited to disclosures on financial affidavits but also include a duty of overall honesty in negotiating a settlement agreement. According to the plaintiff, the defendant proceeded in bad faith because, rather than disclosing her knowledge of the Niagara account and Jerusalem property prior to

Second, he argues that his nondisclosure of the Niagara account and the Jerusalem property had no "real importance or cause[d] great consequences to the overall separation agreement of the parties" and that the court overvalued those assets in determining whether their nondisclosure constituted material omissions. Third, the plaintiff argues that the court should not have found that his failure to disclose the Niagara account was a material omission because there was no evidence that the plaintiff knew the Niagara account existed at the time of the divorce. We are not persuaded by these arguments and conclude that the court properly determined on the basis of the record presented that the plaintiff's failure to disclose the assets in question constituted material omissions.

The general standard of review applicable to a motion to open a judgment is well settled. "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . [O]ur review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial

judgment, she negotiated terms in the settlement agreement with the intention of invoking those terms to her advantage postjudgment. The plaintiff asserts that the current postjudgment litigation would have been unnecessary if the defendant had made inquiry about the undisclosed assets prior to the divorce judgment.

Because we conclude that the record does not support the factual underpinning of the plaintiff's argument—namely, that the defendant knew of the undisclosed assets prior to dissolution—we do not decide whether such knowledge would have imparted any affirmative duty on the part of the defendant to disclose her knowledge to the plaintiff or whether a breach of that purported duty would have had any bearing on the plaintiff's separate and distinct obligation under the separation agreement and rules of practice to disclose all material assets that he owned on his financial affidavit. We nevertheless note that, at least in the context of fraud allegations, our courts have abandoned any requirement that spouses have an obligation to investigate one another's finances in order to prevent fraud through nondisclosure, which arguably would also militate against recognizing a duty to disclose knowledge of the other spouse's assets. See id., 220.

court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 440, 93 A.3d 1076 (2014). In applying our abuse of discretion standard, "[t]he court's factual findings will not be disturbed unless there is either no support for them in the record, or, after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Rheaume* v. *Rheaume*, 156 Conn. App. 766, 774, 115 A.3d 1116 (2015). It bears repeating that "[j]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, we allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action. . . . Generally, we will not overturn a trial court's division of marital property unless [the court] misapplies, overlooks, or gives a wrong or improper effect to any test or consideration [that] it was [its] duty to regard." (Citation omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 122, 161 A.3d 1236 (2017). "[T]he weight to be given the evidence and the credibility of the witnesses are within the sole province of the trial court. . . . The trial court has the unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us." (Internal quotation marks omitted.) *McRae* v. *McRae*, 129 Conn. App. 171, 180, 20 A.3d 1255 (2011).

A

We first address the plaintiff's argument that his failure to disclose the Niagara account and Jerusalem property did not constitute "material omissions" as that phrase is used in paragraph 21.1 of the parties' separation agreement because the defendant knew about the existence of the undisclosed assets at the time of the dissolution judgment. According to the plaintiff, because the defendant knew about the undisclosed assets prior to the dissolution judgment, his failure to disclose those assets on his financial affidavit could not have affected her decision-making process with respect to the financial orders in the separation agreement. In other words, the plaintiff contends that the defendant's predissolution knowledge of the undisclosed assets rendered their omission from his financial affidavit immaterial. We are not persuaded.[10]

Our rules of practice require that "at the time a dissolution of marriage or civil union, legal separation or

[10] The parties do not dispute that paragraph 21.1 of their agreement provides that "[i]n the event of a *material omission* or misstatement by either party in his or her affidavit," the other party would be entitled to the relief specified in paragraph 21.2 of the separation agreement. (Emphasis added.) Courts often consult dictionaries in considering the plain and ordinary meanings of words used in separation agreements and other contracts. See *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 193, 112 A.3d 144 (2015). Something is "material" if it has "real importance or great consequences"; Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 765; and a "material omission" is defined in Black's Law Dictionary as "[a]n omission that significantly affects a person's decision-making." Black's Law Dictionary (10th Ed. 2014) p. 1261. The plaintiff does not argue that the terms of the separation agreement are ambiguous, nor has he directed our attention to anything in the record indicating that the court departed from the usual and ordinary meaning of the phrase "material omission." Rather than raising an issue of construction, the plaintiff challenges the court's application of the term "material omission" to the underlying facts. This presents a mixed question of law and fact. Accordingly, our review is limited to whether the court's determination that the plaintiff's nondisclosures were material omissions was legally and logically correct and supported by the evidence. See *Crews* v. *Crews*, 295 Conn. 153, 162–63, 989 A.2d 1060 (2010).

annulment action . . . is scheduled for a hearing, each party shall file . . . a sworn statement . . . of current income, expenses, assets and liabilities." Practice Book § 25-30. It is well settled that, in family relations matters, parties have an important and necessary obligation, both to the court and to each other, to be fulsome and honest regarding their financial disclosures because, in doing so, they help to reduce or eliminate the need for extensive financial discovery and the resulting inefficiencies and delays, "and will thereby help to preserve a greater measure of the . . . marital assets for the support of all of the family members." *Billington* v. *Billington*, 220 Conn. 212, 222, 595 A.2d 1377 (1991).

In *Billington*, the court emphasized the heightened duty that parties have for full and frank disclosure on financial affidavits submitted in dissolution actions, and concluded that imposing a requirement on the opposing party to discover nondisclosures or other violations would be inconsistent with that duty. The court noted: "A court is entitled to rely upon the truth and accuracy of sworn statements . . . and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the circumstances of their formerly private existence. . . . Thus, the requirement of diligence in discovering fraud is inconsistent with the requirement of full disclosure because it imposes on the innocent injured party the duty to discover that which the wrongdoer already is legally obligated to disclose." (Citations omitted; internal quotation marks omitted.) Id., 219–20.

Accordingly, it is the duty of the party who owns an asset to disclose it on his or her financial affidavit.

These same principles were incorporated by the parties into article XXI of their separation agreement, in which they expressly acknowledge that they each (1) owed "a fiduciary duty to the other to make a full and fair disclosure of his or her financial circumstances, including all assets, to the other in connection with this proceeding," and (2) "relied on the financial affidavits and voluntary disclosures and representations made by the other party in the course of this dissolution of marriage action for purposes of arriving at the terms of this agreement."

The plaintiff nevertheless argues on appeal that the defendant knew about the Jerusalem property and the Niagara account prior to the dissolution and that her knowledge rendered his nondisclosure of the assets on his financial affidavit far less significant. Her knowledge, he contends, made it unlikely that the nondisclosure affected her ability to negotiate the parties' settlement agreement, particularly with respect to ensuring that she received an equitable distribution of the marital assets.

The plaintiff's argument fails, however, because there are no findings by the court that the defendant had knowledge of the undisclosed assets during negotiation of the separation agreement let alone at the time the dissolution judgment was rendered. Whether the defendant had knowledge of the undisclosed assets prior to the dissolution judgment was a factual question for the trial court, and the court was free to reject evidence that the defendant knew of the assets.

With respect to the Jerusalem property, the court found only that the defendant had received "conflicting" and "unverified reports" that raised the possibility that the plaintiff had real property that he had not disclosed to the defendant. The court also credited the defendant's testimony that she agreed to the divorce despite

her suspicions because she was concerned that, given the acrimonious nature of the parties' relationship, if she delayed the divorce proceedings in order to investigate further, the plaintiff might deny her a "get,"[11] and that she knew she could take advantage of article XXI of the separation agreement if she was able later to establish that the plaintiff owned additional real property. Accordingly, the record supports only a conclusion that the defendant was aware at the time of dissolution of the *possibility* that the plaintiff owned undisclosed real property. It was not until later that the defendant received more definitive proof of the existence of the Jerusalem property.

As to the Niagara account, the court found that the defendant had opened the account in 2008 in the plaintiff's name. The court, however, credited the defendant's testimony that, after making the initial deposit, the defendant had nothing further to do with the account and specifically found that "[a]s of the date of entry of the dissolution judgment, [the defendant] was not aware that the First Niagara account still existed. She first learned that the First Niagara account remained open when an escheat letter from the bank arrived at her office in November, 2011," which was after the judgment of dissolution. The plaintiff has not challenged the court's factual findings and, therefore, any claim that the defendant had prior knowledge of the account is simply untenable.

The plaintiff has not directed us to any language in the parties' separation agreement to support his contention that a party would be exempt from the duty to disclose an asset on his or her financial affidavit if the other party was aware of the existence of the asset. Moreover, the duty of full disclosure of assets was not solely for

[11] A get is, "[u]nder Jewish law, a document signed by a rabbi to grant a divorce." Black's Law Dictionary (10th Ed. 2014) p. 803.

the benefit of the parties, but was also necessary for the court to evaluate the reasonableness of the parties' agreement and how much, if any, should be incorporated into the dissolution judgment. For all of these reasons, we reject the defendant's argument.

B

The plaintiff next argues that the undisclosed assets did not "have real importance or cause great consequences to the overall separation agreement of the parties." According to the plaintiff, the court improperly inflated the significance of the omissions by comparing their value to the total value of disclosed assets in the same asset category. The plaintiff argues that the court instead should have compared the value of the undisclosed assets against the value of the entire marital estate. The defendant responds that, regardless of the size of the estate, the nondisclosure of assets totaling $238,811 is a material omission. Although it is possible to imagine a marital estate so vast that the nondisclosure of over $200,000 in assets might be viewed as nominal or de minimis and thus render the omission immaterial, this certainly is not that case. Accordingly, we find the plaintiff's argument unpersuasive.

The court found that, at the time of the dissolution of marriage, the fair market value of the Jerusalem property was $146,379 and that the balance in the Niagara account was $92,432. Thus, the total value of the undisclosed assets was $238,811. The court found that if the plaintiff had disclosed the Jerusalem property on his financial affidavit it "would have represented approximately 7.5 percent of the total real estate assets disclosed . . . ." Similarly, the court found that if the plaintiff properly had disclosed the Niagara account on his financial affidavits, "it would have represented 34 percent of the total value of bank accounts that he reported at that time." The plaintiff maintains that by only comparing the value of the undisclosed assets to

the value of similar assets rather than to the value of the entire marital estate, which was approximately $16 million, the court inflated the significance of the undisclosed assets. Compared to the entire marital estate, the Jerusalem property and Niagara account together represented 1.5 percent, significantly less than the 7.5 percent and 34 percent calculations mentioned by the trial court.

Even if we agreed with the plaintiff that the court did not use the proper yardstick with which to measure the materiality of the omissions, we cannot conclude that the omission of assets valued at 1.5 percent of the marital estate was de minimis or immaterial. To suggest that the failure to disclose nearly $240,000 in assets would not have had great consequences to the overall separation agreement is to suggest that the defendant would have been content to walk away from her equitable share of those assets. We cannot reach that conclusion in the present case. The plaintiff does not challenge the trial court's valuation of the undisclosed assets, and we are not convinced that the trial court's discussion of the relative value of the assets rendered its overall determination that the plaintiff's nondisclosures were material omissions legally or logically incorrect or unsupported by the record.

C

Finally, the plaintiff argues that it was improper for the court to find that his failure to disclose the Niagara account was a material omission because there was no evidence that the plaintiff knew of the Niagara account's existence at the time of the divorce.[12] The gravamen of

[12] The defendant's motion to open was not premised on an allegation of common-law fraud but rather on the plaintiff's breach of his contractual duty under the separation agreement to disclose all assets, liabilities, and income. Although it is an element of fraud that a party make a statement that is both "untrue and *known to be so by its maker*"; (emphasis added; internal quotation marks omitted) *Sousa* v. *Sousa*, 173 Conn. App. 755, 765, 164 A.3d 702, cert. denied, 327 Conn. 906, 170 A.3d 2 (2017); the separation

the plaintiff's argument is that the court's finding that he had knowledge of the Niagara account, and thus had a duty to disclose it, is clearly erroneous because the defendant presented no evidence at the hearing establishing that bank account statements bearing his name were delivered to him rather than to the defendant's office to which they were addressed. We disagree that the court's finding was clearly erroneous.

Both the defendant and her office manager testified that no bank statements were delivered to her office, and the court credited that testimony. It is true, as the plaintiff contends, that this, by itself, is not direct evidence that the statements were in fact delivered to the plaintiff.[13] Nevertheless, the account-opening document was admitted into evidence and lists the plaintiff as the account owner. The document contains the plaintiff's signature in two places. One of the signatures authorized the bank to "open one or more deposit accounts, as required, for the person or entity listed as

agreement contains no equivalent scienter requirement applicable to determining whether one of the parties made a material omission from his or her financial affidavit. Rather, the parties' agreement places the burden of a failure to disclose, regardless of whether that failure is knowing, negligent or otherwise, upon the owner of the asset. In other words, under the terms of the separation agreement, an omission arguably need only be found "material," not knowingly made, in order to trigger the remedy of rescission and reformation of the financial orders. Nevertheless, because we determine that the court's finding that the plaintiff knew about the Niagara account was not clearly erroneous, we need not resolve this issue.

[13] The court noted in its memorandum of decision that the defendant's counsel suggested that the postal carrier may have delivered the statements to the plaintiff's office because his name was on the statements and his office was only two blocks away. The defendant, however, offered no admissible evidence that this had occurred, and the plaintiff is correct that arguments of counsel are not evidence. See *Lucas* v. *Lucas*, 88 Conn. App. 246, 260, 869 A.2d 239 (2005). What the plaintiff ignores, however, is the other evidence tending to demonstrate that the plaintiff was aware or should have been aware of the Niagara account. It is therefore unnecessary for us to resolve whether the court reasonably could have inferred from circumstantial evidence that the banking statements and other documents relating to the account were more likely than not delivered to the plaintiff.

the account owner on this card." The plaintiff acknowledges that the signatures are his. Accordingly, the plaintiff was aware at that time that a savings account was opened in his name, and he never sought to close the account. Even if he was not aware of the status of the account at the time of dissolution or the balance of the funds in the account, he could have, through the exercise of due diligence, determined such information and disclosed it on his financial affidavit. In sum, because there was evidence before the court to support its finding that the plaintiff knew about the Niagara account, the finding was not clearly erroneous.

II

The plaintiff next claims that the court improperly awarded the defendant statutory prejudgment interest because she requested prejudgment interest for the first time in her posthearing brief.[14] We disagree.

The following additional procedural history is relevant to this claim. In both her initial and amended motion to open, the defendant made the following request for relief: "the distribution of previously undisclosed property and an award to the defendant of her reasonable counsel fees and costs." She did not specifically request prejudgment interest at that time. In her posthearing brief, however, the defendant argued that she was entitled to prejudgment interest pursuant to General Statutes § 37-3a (a), which authorizes the court to award interest at a rate not to exceed 10 percent per year as damages for the unlawful retention of money.[15]

[14] The plaintiff does not argue on appeal that the court lacked the authority to award prejudgment interest or that the court awarded interest back to an incorrect date.

[15] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ."

Our Supreme Court has explained that "the primary purpose of § 37-3a . . . is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the

"The allowance of prejudgment interest as an element of damages is an equitable determination and a matter lying within the discretion of the trial court. . . . Before awarding interest, the trial court must ascertain whether [a party] has wrongfully detained money damages due [to another]. . . . Interest on such damages ordinarily begins to run from the time it is due and payable to the [party entitled to the damages]. . . . The determination of whether or not interest is to be recognized as a proper element of damage, is one to be made in view of the demands of justice rather than through the application of an arbitrary rule." (Internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 734–35, 687 A.2d 506 (1997).

"It is well established that interest need not be specially claimed in the demand for damages in order to recover." *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 36 n.39, 664 A.2d 719 (1995). In *Westport Taxi Service, Inc.*, our Supreme Court concluded that the plaintiff's claim for prejudgment interest properly was before the court because, although the plaintiff had not sought prejudgment interest in its complaint, it "clearly argued that it was entitled to prejudgment interest in its proposed posttrial findings of fact and conclusions of law, and in its posttrial memorandum of law." Id., 37. The Supreme Court further noted that the defendant had a meaningful opportunity to argue in its reply brief that prejudgment interest was not an appropriate remedy. Id.

use of their money." *Sosin* v. *Sosin*, 300 Conn. 205, 230, 14 A.3d 307 (2011). An award of interest under § 37-3a is discretionary; id., 228; and 10 percent is "the maximum rate of interest that a trial court, in its discretion, can award"; *Gianetti* v. *Meszoros*, 268 Conn. 424, 426, 844 A.2d 851 (2004); meaning the court, as in the present case, has the discretion to set a lower rate of interest. See *Sears, Roebuck & Co.* v. *Board of Tax Review*, 241 Conn. 749, 764–66, 699 A.2d 81 (1997).

Here, as in *Westport Taxi Service, Inc.*, the defendant raised her claim for prejudgment interest in her posthearing submission. The plaintiff had an opportunity to respond to that claim in his posthearing reply brief. Accordingly, we find no merit in the plaintiff's assertion that he was denied reasonable notice and an opportunity to present a defense regarding the request for prejudgment interest.

"[T]here is no statutory prohibition against awarding interest on a judgment in domestic relations cases . . . because the courts may fashion remedies that are appropriate and equitable . . . ." (Internal quotation marks omitted.) *Picton* v. *Picton*, 111 Conn. App. 143, 155, 958 A.2d 763 (2008), cert. denied, 290 Conn. 905, 962 A.2d 794 (2009). Given the court's determination that the plaintiff was unjustified in failing to disclose assets, which resulted in a failure to distribute to the defendant at the time of dissolution her equitable share of those assets under the separation agreement, an award of prejudgment interest properly was within the discretion of the court. Id., 155–56. Other than challenging the timing of the request, the plaintiff has raised no other claim regarding the court's exercise of its discretion to award prejudgment interest.

III

Finally, we turn to the plaintiff's claim that the court violated the automatic appellate stay by awarding the defendant postjudgment interest after this appeal had been filed. Specifically, the plaintiff argues that the court's adjudication of the defendant's motion for an award of postjudgment interest amounted to a "proceeding to enforce or carry out the judgment" on the motion to open and, thus, was in violation of the automatic appellate stay as set forth in Practice Book § 61-11.[16] We disagree.

[16] The plaintiff also claims that, because the award of postjudgment interest was premised on the damages awarded in the August 7, 2017 ruling on the motion to open, we should reverse the award of postjudgment interest

The following additional procedural history is relevant to this claim. On August 16, 2017, nine days after the court rendered judgment on the defendant's motion to open and reform the dissolution judgment, the defendant filed a motion asking the court for an award of postjudgment interest, citing General Statutes §§ 37-3a[17] and 52-350f.[18] The plaintiff did not file an objection to the motion. The plaintiff filed his appeal from the court's judgment granting the motion to open on October 11, 2017. On January 16, 2018, the defendant filed a memorandum of law in support of her motion for an award of postjudgment interest. In her memorandum, the defendant argued that an award of postjudgment interest was authorized by statute and could be made during the pendency of an appeal without violating the automatic appellate stay because its purpose was to protect the interest of the prevailing party rather than to enforce or carry out the underlying judgment.

The court heard argument on the motion for postjudgment interest on February 26, 2018. The defendant argued that the court had awarded prejudgment interest at a rate of 5 percent and that that interest should continue to accrue at the same rate postjudgment because the defendant continued to be deprived

on the basis of the claims challenging that decision. Because we rejected those claims in parts I and II of this opinion, we do not reach this additional claim.

[17] See footnote 15 of this opinion. Interest under § 37-3a, which is awarded as compensation for the detention of money, "may include either or both prejudgment and postjudgment interest." See *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn. 433, 442, 108 A.3d 228 (2015).

[18] General Statutes § 52-350f provides: "A money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section 52-352a, 52-352b, 52-352d or 52-361a, or any other provision of the general statutes or federal law. The money judgment may be enforced, by execution or by foreclosure of a real property lien, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) interest as provided by chapter 673 on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c."

of money that she was entitled to have received when her marriage was dissolved in 2011. The plaintiff took the position for the first time at oral argument that, because there was a pending appeal, any award of postjudgment interest at this time would be premature and in violation of the automatic stay. According to the plaintiff, the court was required to wait until the appeal was decided before adjudicating the defendant's motion.

On June 11, 2018, the court granted the defendant's motion and awarded postjudgment interest "at the rate of 5 percent per annum on the amounts that the plaintiff has been ordered to pay to the defendant from August 7, 2017, the date of the court's memorandum of decision." With respect to the automatic appellate stay, the court indicated that "the automatic stay does not bar a party from moving for interest on a judgment that is on appeal. While a party may not take action to collect a judgment while the automatic stay is in effect, nothing precludes a party from seeking an award of postjudgment interest while the appeal is pending." The plaintiff amended the appeal, challenging the court's decision to award postjudgment interest.

Ordinarily, we review a trial court's decision to award postjudgment interest for an abuse of discretion. See *Bower* v. *D'Onfro*, 45 Conn. App. 543, 550, 696 A.2d 1285 (1997). Here, however, the plaintiff's claim on appeal is that the court's award violated the automatic appellate stay, which raises a question of law over which our review is plenary. See *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 821, 191 A.3d 247 (2018).

Practice Book § 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to

file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . .'"

"In this state, the filing of an appeal does not divest the trial court of jurisdiction or authority to continue to act in the matter on appeal. To the contrary, our Supreme Court has clarified on numerous occasions that 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. . . . [In other words] [t]he automatic stay prohibits only those actions that would *execute*, *effectuate*, *or give legal effect* to all or part of a judgment challenged on appeal." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, *LLC*, 180 Conn. App. 818, 832–33, 184 A.3d 1254 (2018). The automatic appellate stay "merely denies [the successful litigant] the immediate fruits of his or her victory . . . in order to protect the full and unhampered exercise of the right to appellate review." (Citation omitted; internal quotation marks omitted.) *Preisner* v. *Aetna Casualty & Surety Co.*, 203 Conn. 407, 414, 525 A.2d 83 (1987).

The plaintiff's primary argument that the court's ruling violated the automatic stay provision of Practice Book § 61-11 derives from language in § 52-350f, which the defendant invoked in her motion seeking an award of postjudgment interest. The plaintiff notes that § 52-350f is titled "[e]nforcement of money judgment," and he highlights the following statutory language: "The money judgment may be *enforced*, by execution or by foreclosure of a real property lien, to the amount of the judgment with . . . interest as provided by chapter . . . 673 on the money judgment . . . ." (Emphasis added.) General Statutes § 52-350f. Section 37-3a is part of chapter 673 and, therefore, according to the plaintiff,

an award of interest is part of the mechanism for the enforcement of a judgment and should be automatically stayed pursuant to Practice Book § 61-11 (a). We disagree.

Although § 52-350f authorizes the enforcement of a money judgment by either execution or by foreclosure of a real property lien, the defendant's motion for an award of postjudgment interest did not seek to pursue either form of relief. The clause in § 52-350f referring to statutory interest modifies the term "money judgment," merely clarifying that any interest awarded is included in the money judgment that may be enforced. No language in § 52-350f equates obtaining an award of interest with an action to enforce a money judgment, which is expressly limited in the statute to execution or foreclosure of a lien.

We conclude that the court was not prohibited by the automatic appellate stay from ruling on the defendant's motion for postjudgment interest because its decision to grant the motion and to award the defendant an additional measure of damages cannot reasonably be viewed as effectuating the judgment on appeal. The plaintiff was able to amend the present appeal to challenge the additional award, and the decision in no way diminished or hampered his appellate rights with respect to the remainder of the court's judgment on the motion to open. Although the effect of the court's decision was to increase the damages the defendant would be entitled to collect if she successfully defended against the appeal, she nevertheless continues to be denied the fruits of her victory because she will be unable to secure payment from the plaintiff by executing on the judgment until the appeal is disposed and the automatic stay has expired.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN S. KAMINSKI *v.* DAVID POIROT
(AC 41586)

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

Syllabus

The plaintiff sought to recover damages from the defendant attorney for legal malpractice in connection with his representation of the plaintiff in a prior civil action in which the plaintiff, who was an incarcerated inmate at the time, sought to recover damages for personal injuries he suffered while being transported in a Department of Correction van. The plaintiff commenced the present action by service of process on November 9, 2017, alleging that the defendant had acted unprofessionally and committed two acts of legal malpractice in the underlying action, namely, by withdrawing the complaint against three of the defendants and by withdrawing from representing the plaintiff. The trial court granted a motion for summary judgment filed by the defendant, concluding that the plaintiff's action was barred by the three year statute of limitations (§ 52-577) applicable to tort claims, and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment, there having been no genuine issue as to any material fact that the legal malpractice action was commenced beyond the applicable three year statute of limitations; pursuant to § 52-577, the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs, and the record reflected that the alleged acts of malpractice—the defendant's withdrawal of the complaint against the three defendants in the underlying action and his withdrawal from representing the plaintiff—occurred more than three years prior to the plaintiff's commencement of this action on November 9, 2017.

Argued March 13–officially released May 21, 2019

Procedural History

Action to recover damages for legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Joseph H. Pellegrino*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John S. Kaminski, self-represented, the appellant (plaintiff).

David Poirot, self-represented, the appellee (defendant).

Opinion

ALVORD, J. The self-represented plaintiff, John S. Kaminski, appeals from the summary judgment rendered by the trial court in favor of the defendant, Attorney David Poirot. On appeal, the plaintiff claims that the court erroneously concluded that his legal malpractice action against the defendant was time barred pursuant to General Statutes § 52-577, the statute of limitations applicable to tort actions.[1] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. On June 8, 2012, the plaintiff was a passenger in a Department of Correction van driven by a correction officer. He was being transported to a medical facility for a magnetic resonance imaging (MRI) scan because of a lower back problem. At some point during the trip, the van's left rear tire blew out, and the van moved to the left hand side of the highway and struck a guardrail. The plaintiff, alleging that he suffered back and neck injuries as a result of the incident, commenced a negligence action as a self-represented party against three individual defendants employed by the Department of Correction (underlying action) on June 18, 2013. On January 28, 2014, the defendant attorney filed an appearance on the plaintiff's behalf.

On April 3, 2014, the defendant filed a motion to cite in the state of Connecticut as a defendant in the

[1] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

underlying action. On April 21, 2014, the court granted the motion, and the defendant summoned the state to appear and filed an amended complaint on May 7, 2014. On May 8, 2014, the defendant withdrew the complaint against all of the individual defendants, leaving the state as the sole defendant in the underlying action. On June 25, 2014, the defendant filed a motion for permission to withdraw his appearance, claiming that the attorney-client relationship had broken down. On July 1, 2014, the plaintiff filed an appearance in the underlying action as a self-represented party in lieu of the appearance of the defendant.

The plaintiff continued to represent himself in the underlying action. The case was tried to the court, *Swienton*, *J.* On November 29, 2016, the court issued a memorandum of decision in which it concluded that the record was "bereft of any evidence" demonstrating that the state breached any duty owed to the plaintiff. The court rendered judgment in favor of the state.

On November 9, 2017, the self-represented plaintiff commenced this action against the defendant claiming legal malpractice. From a very broad and liberal reading of his complaint, it appears that the plaintiff is alleging that the defendant was "unprofessional" when he withdrew as counsel for the plaintiff in the underlying action and that the defendant left the plaintiff with a very complex matter to litigate by changing the underlying action from a simple negligence action against individual state employees to a General Statutes § 52-556 action against the state. On December 8, 2017, the defendant filed an answer and special defense, alleging that the plaintiff's claim was barred by the statute of limitations, § 52-577. The plaintiff filed a reply to the special defense on December 21, 2017.

On February 5, 2018, the defendant filed a motion for summary judgment, accompanied by a memorandum

of law in support of his motion. The defendant argued that the plaintiff was alleging that the defendant's act of malpractice was withdrawing the underlying action as to the three individual defendants, which occurred on May 8, 2014. Because § 52-577 is a three year statute of limitations, the defendant claimed that the present action was required to be commenced by May 8, 2017. The defendant was served with the plaintiff's legal malpractice action on November 9, 2017, which is more than three years from the date of the alleged malpractice. Accordingly, the defendant claimed that the plaintiff's action was time barred and that he was entitled to judgment as a matter of law.

The plaintiff filed his objection to the defendant's motion for summary judgment on February 15, 2018. In the plaintiff's response, he claimed that the three year period did not commence until Judge Swienton had rendered judgment in favor of the state on November 29, 2016. Accordingly, the plaintiff's position was that he had until November 29, 2019, to file the legal malpractice claim against the defendant. Because the defendant was served on November 9, 2017, the plaintiff argued that he had commenced the action well within the requisite three year period and that the defendant's motion for summary judgment should be denied.

On March 26, 2018, the court heard argument on the defendant's motion for summary judgment. On April 5, 2018, the court issued its memorandum of decision. In granting the defendant's motion, the court determined that the plaintiff claimed that the defendant committed malpractice in withdrawing the complaint in the underlying action as to the individual state employees, which occurred on May 8, 2014. The court also noted that the defendant had filed a request to withdraw his appearance in the underlying case on June 25, 2014, and that the court had not acted on that request. Nevertheless, the court indicated that the plaintiff obviously had

agreed to the defendant's withdrawal because he had filed a pleading as a self-represented party on July 14, 2014, and continued thereafter to represent himself in the underlying action.[2] The court concluded that because it was undisputed that service of process in this action was not made until November 9, 2017, the action had been commenced "well beyond the three year statute of limitations [and] [t]he plaintiff has not filed any affidavit setting forth circumstances which would impede the normal application of § 52-577." This appeal followed.

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record. . . .

"Summary judgment may be granted where the claim is barred by the statute of limitations. . . . Actions for legal malpractice based on negligence are subject to

[2] Significantly, the plaintiff filed an appearance as a self-represented party in the underlying action on July 1, 2014, and that appearance was filed in lieu of the appearance filed by the defendant.

§ 52-577, the tort statute of limitations. . . . This court has determined that [§] 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs. . . . Moreover, our Supreme Court has stated that [i]n construing our general tort statute of limitations . . . § 52-577, which allows an action to be brought within three years from the date of the act or omission complained of . . . the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred. . . . The three year limitation period of § 52-577, therefore, begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury." (Citations omitted; internal quotation marks omitted.) *Cruz* v. *Schoenhorn*, 188 Conn. App. 208, 214–16, A.3d (2019).

Accordingly, "[w]hen conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 139, 965 A.2d 582 (2009). "Legal actions in Connecticut are commenced by service of process. . . . There is a presumption of truth in matters asserted in the officer's return." (Citation omitted; internal quotation marks omitted.) Id.

Although the plaintiff's complaint is somewhat unclear, and the plaintiff's argument before the trial court at the hearing on the defendant's motion for summary judgment similarly was somewhat confusing, we will assume from the plaintiff's oral argument before

this court that the acts of alleged malpractice are the defendant's decision to withdraw his representation of the plaintiff in the underlying action and the defendant's withdrawal of the complaint in the underlying action as to the three individual state employees. The court file in the underlying action reflects that the defendant filed his motion to withdraw his appearance on June 25, 2014. Although there was no court ruling on that motion, the plaintiff filed his appearance as a self-represented party, in lieu of the appearance filed by the defendant, on July 1, 2014. At that point, the defendant no longer represented the plaintiff in the underlying action. Accordingly, July 1, 2014, is the start date for the first alleged act of malpractice. The court file reflects that the defendant withdrew the complaint in the underlying action as to the individual defendants on May 8, 2014. Accordingly, May 8, 2014, is the start date for the second alleged act of malpractice.

The marshal's return of service provides that the defendant was served with process on November 9, 2017, which is more than three years from the date of either the first or the second alleged act of malpractice. We therefore conclude, as a matter of law, that the plaintiff's legal malpractice action against the defendant is time barred pursuant to § 52-577,[3] and, thus, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this judgment the other judges concurred.

[3] Because we conclude that the court properly rendered summary judgment in favor of the defendant on the ground that the plaintiff's legal malpractice claims against him were time barred pursuant to § 52-577, we need not reach the alternative grounds for affirmance raised by the defendant in his appellate brief.

U.S. BANK TRUST, N.A., TRUSTEE *v.* GARY M. GIBLEN ET AL.
(AC 40664)

Sheldon, Moll and Seeley, Js.*

Syllabus

The plaintiff, as trustee, sought to foreclose a mortgage on certain real property owned by the defendants G and A. Following the defendants' default for failure to appear, the trial court rendered a judgment of foreclosure by sale and appointed a committee of sale. The foreclosure sale subsequently was held, with a winning bid of $1,230,000. Thereafter, the committee filed a motion for approval of the sale, but prior to the hearing on the motion, the defendants filed for chapter 7 bankruptcy protection, triggering an automatic stay of the foreclosure proceedings. Following a show cause hearing, the Bankruptcy Court annulled the stay retroactive to the date that the defendants filed for bankruptcy protection to allow the committee to exercise all rights and remedies that it had under the applicable law. Thereafter, the committee filed a supplemental report and reclaimed the motion for approval of the sale. The defendants filed an objection to the motion for approval, challenging the approval of the sale on a number of grounds, as well as the amount of fees and expenses claimed by the committee. Following a hearing during which the defendants' specific objections were addressed, the trial court granted the committee's motion for approval of the sale, and the defendants appealed to this court, *held*:

1. The defendants could not prevail on their claim that the trial court's approval of the foreclosure sale was void ab initio because it exceeded the scope of the Bankruptcy Court's order annulling the bankruptcy stay; contrary to the defendants' claim that the Bankruptcy Court's order annulling the stay was intended only to permit the committee to recover fees and expenses, and not to pursue approval of the foreclosure sale, the clear purpose of the Bankruptcy Court's order of annulment was to allow the committee to pursue approval of the foreclosure sale.
2. The trial court did not abuse its discretion in granting the committee's motion for approval of the sale: the defendants' claim that certain irregularities with the motion for approval of the sale prevented them from realizing a substantial amount of equity in the subject property was not reviewable, as they did not raise the five claimed irregularities before the trial court, and, therefore, those claims were not properly before this court; moreover, although the approval of the sale extinguished the defendants' right to redeem their property and the loss of the right to

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

the equity in that property was injurious to them, the defendants failed to show any injury resulting specifically from any of the five claimed irregularities with the motion for approval of the sale.

Argued February 5—officially released May 21, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. were defaulted for failure to appear and the defendant JPMorgan Chase Bank et al. were defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, rendered a judgment of foreclosure by sale; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, granted in part, the committee's motion for approval of sale, deed, fees and expenses, and the named defendant et al. appealed to this court. *Affirmed.*

Christopher G. Brown, for the appellants (named defendant et al.).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

SHELDON, J. In this foreclosure action, the defendant mortgagors, Gary M. Giblen, also known as Gary Giblen, and Anna-Marie L. Giblen, also known as Anna-Marie Giblen,[1] appeal from the judgment of the trial court approving the sale of their mortgaged property, on the motion of the committee of sale (committee), following the court's rendering of a judgment of foreclosure by sale in favor of the plaintiff mortgagee, U.S.

[1] The complaint also named as defendants JPMorgan Chase Bank, the United States Internal Revenue Service, U.S. Equities Corp., Top O'Hill Road Association, and Connecticut Light and Power Company, doing business as Eversource Energy. With the exception of Gary Giblen and Anna-Marie Giblen, all of the defendants were defaulted for failure to plead. Any references to the defendants in this opinion are to Gary Giblen and Anna-Marie Giblen.

Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust. On appeal, the defendants claim that (1) the trial court's approval of the sale of the subject property was void ab initio because it exceeded the scope of the Bankruptcy Court's order annulling the automatic stay that was triggered by the defendants' filing for chapter 7 bankruptcy protection, and (2) the trial court abused its discretion in approving the sale of the subject property because there were "irregularities with the motion to approve the foreclosure sale" that were "injurious" to them. We affirm the judgment of the trial court.

The following procedural history is relevant to the defendants' claims on appeal. In March, 2016, the plaintiff commenced this action against the defendants to foreclose a mortgage on property owned by the defendants at 11 Top O'Hill Road in Darien. On May 20, 2016, the defendants were defaulted for failure to appear in the action. On May 23, 2016, the court rendered a judgment of foreclosure by sale. The court found that, as of that date, the defendants owed the plaintiff $584,801.05, and the fair market value of the subject property was $1,750,000. The court appointed a committee to sell the property at a public auction on June 30, 2016. On June 14, 2016, the defendants filed a motion to the open judgment and extend the sale date. The court granted the motion to open the judgment and set the new sale date as December 3, 2016. On November 22, 2016, the defendants filed a second motion to open the judgment and extend the sale date, which was denied. The foreclosure sale was held on December 3, 2016, with a winning bid of $1,230,000. On December 7, 2016, the committee filed a motion for approval of the sale.

On December 18, 2016, prior to the hearing on the committee's motion for approval of the sale, the defendants filed for chapter 7 bankruptcy protection, triggering an automatic stay of the foreclosure proceedings

pursuant to 11 U.S.C. § 362 (a) (2012). On March 7, 2017, the committee appeared before the Bankruptcy Court and informed it that a foreclosure sale of the subject property had been conducted on December 3, 2016. Because neither the foreclosure action nor the sale had been disclosed by the defendants, the Bankruptcy Court issued an order to appear and show cause to the defendants, their bankruptcy attorney, and the bankruptcy trustee. On March 23, 2017, an evidentiary hearing was held on the order to show cause to determine, inter alia, "why . . . [a]n order should not enter terminating, annulling, modifying, and/or conditioning relief from the automatic stay pursuant to 11 U.S.C. § 362 (d) (1), 11 U.S.C. § 362 (d) (2) and/or 11 U.S.C. 362 (d) (4), to allow the Committee to continue to prosecute and complete the Foreclosure Action, including to complete the pre-petition foreclosure sale conducted on December 3, 2016." Following the show cause hearing, the Bankruptcy Court annulled the stay, retroactive to December 18, 2016, the date on which the defendants filed for bankruptcy protection.

On March 30, 2017, the committee filed a supplemental report with the trial court and reclaimed her motion for approval of the committee sale. On April 17, 2017, the defendants filed an objection to the motion for approval, arguing that (1) the appraised value of the subject property was substantially higher than the successful bid at the foreclosure auction because an interior appraisal of the property, which the court had ordered, had not been performed, (2) the committee had failed to advertise the sale in the newspaper two times, as the court had ordered, and (3) the committee had failed to ensure that the sign that she had posted on the property, pursuant to the court's order, remained there until the date of the sale. The defendants also

challenged the amount of fees and expenses claimed by the committee.[2]

On May 9, 2017, the trial court ordered that a hearing on the motion for approval of the committee sale be held on July 6, 2017, to address the following limited issues: "(1) lack of interior inspection; (2) lack of a second sale advertisement; and (3) the intentional removal of the sale sign by the defendant[s]." On July 7, 2017, the trial court granted the committee's motion for approval of the sale.[3] This appeal followed. Additional facts will be set forth as necessary.

I

The defendants first claim that the trial court's approval of the committee sale of the subject property was void ab initio because it exceeded the scope of the Bankruptcy Court's order annulling the bankruptcy stay. Specifically, the defendants claim that the Bankruptcy Court's order annulling the stay was intended only to permit the committee to recover fees and expenses, not to pursue approval of the December 3, 2016 foreclosure sale. We disagree.

"It is true that acts taken in violation of the automatic stay are generally deemed void and without effect. . . . Nonetheless, [11 U.S.C.] § 362 (d) expressly grants bankruptcy courts the option, in fashioning appropriate relief, of 'annulling' the automatic stay, in addition to

[2] On April 19, 2017, the plaintiff also filed an objection to the motion for approval of the sale, requesting an additional six months to work with the defendants to market and sell the property on their own. The court denied that motion, and the plaintiff has not challenged that ruling on appeal.

[3] At the hearing on the motion for approval of the sale, the court specifically asked the parties whether there was any "stay . . . in effect by any matter pending in any jurisdiction" and, more specifically, asked for the parties' confirmation that there was "[n]o stay for the bankruptcy proceeding that would prevent this matter from going forward." The defendants, through counsel, confirmed that there was no such stay in effect.

merely 'terminating' it. The word 'annulling' in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay which has retroactive effect; otherwise its inclusion, next to 'terminating', would be superfluous. As is stated in 2 Collier's Bankruptcy Manual ¶ 362.06 (3d Ed.1983): 'In addition to the obvious power to terminate the stay, [§ 362 (d)] also gives the bankruptcy court the power to annul the stay. The difference between the two is that an order annulling the stay could operate retroactively to the date of the filing of the petition which gave rise to the stay, and thus validate actions taken by the party at a time when he may have been unaware of the existence of the stay. On the other hand, an order terminating the stay would be operative only from the date of its entry.'

"To similar effect is the advisory committee's note accompanying former Bankruptcy Rule 601 (c), a predecessor to § 362 (d), which explains the role of annullment as follows: 'This rule consists with the view that . . . an act or proceeding [against property in the bankruptcy court's custody taken in violation of the automatic stay] is void, but subdivision (c) recognizes that in appropriate cases the court may annul the stay so as to validate action taken during the pendency of the stay.' Accordingly . . . § 362 (d) permits bankruptcy courts, in appropriately limited circumstances, to grant retroactive relief from the automatic stay." *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984).

Here, following the evidentiary hearing, the Bankruptcy Court found that "[n]o party has shown cause as to why an Order should not enter terminating, annulling, modifying, and/or conditioning relief from the automatic stay pursuant to 11 U.S.C. § 362 (d) (1), 11 U.S.C. § 362 (d) (2) and/or 11 U.S.C. § 362 (d) (4), to allow the Committee to continue to prosecute and complete the

Foreclosure Action, including to complete the pre-petition foreclosure sale conducted on December 3, 2016. . . .

"The testimony, evidence, and information presented at the show cause hearing supports a finding under 11 U.S.C. § 362 (d) (1) that cause exists to annul the automatic stay provisions of 11 U.S.C. § 362 (a) to December 18, 2016, the date of the filing of the [defendants'] case, to allow the Committee to take whatever actions are necessary and appropriate under applicable law in connection with the pending Foreclosure Action . . . ."

On the basis of those findings, the Bankruptcy Court ordered, inter alia: "Pursuant to 11 U.S.C. § 362 (d) (1), the automatic stay provided by 11 U.S.C. § 362 (a) is annulled for cause to December 18, 2016, the date of the filing of the [defendants'] case, to allow the Committee to exercise all rights or remedies it may have under applicable law . . . ."

The defendants contend that the Bankruptcy Court's order was not intended to allow the committee to pursue approval of the foreclosure sale. "The construction of a judgment is a question of law for the court. . . . We review such questions of law de novo. . . . As a general rule, judgments are construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 436–37, 175 A.3d 601 (2017).

We reject the defendants' contention that the sole purpose of the Bankruptcy Court's annulment of the

automatic stay was to permit the committee to recover fees and expenses. The court's intent is clearly expressed in its order, in which it specifically stated that the defendants failed to show cause as to why relief from the automatic stay should not be granted "to allow the [c]ommittee to continue to prosecute and complete the [f]oreclosure [a]ction, including *to complete the pre-petition foreclosure sale conducted on December 3, 2016*." (Emphasis added.) The court unambiguously found cause to annul the stay "to allow the [c]ommittee to take whatever actions are necessary and appropriate under applicable law with the pending [f]oreclosure [a]ction" and, accordingly, annulled the stay "to allow the [c]ommittee to exercise all rights and remedies it may have under applicable law . . . ." The clear purpose of the Bankruptcy Court's order of annulment was to allow the committee to pursue approval of the foreclosure sale. Accordingly, the defendants' argument to the contrary must be rejected.

II

The defendants also claim that the trial court abused its discretion in approving the sale of the subject property because there were "irregularities" with the motion for approval of the foreclosure sale that were "injurious" to them. We are not persuaded.

Following the evidentiary hearing on the committee's motion for approval of the sale and the defendants' objection thereto, the court issued its ruling from the bench. The court addressed in detail the defendants' arguments in opposition to the approval of the sale, namely, the lack of an interior appraisal of their property and the committee's failure to comply with the court's orders to advertise the foreclosure auction twice in the newspaper and to ensure that a sign be posted on the property from no later than November 13, 2016, until the date of the sale. The court found that, although

its orders that an interior appraisal of the subject property be performed, that the sale be advertised twice in the newspaper, and that a sign be posted on the property until the sale date, had not been complied with, the defendants had not suffered any damage as a result of such failures to comply. It thus approved the sale of the property for the winning bid of $1,230,000.

"[T]he applicable standard of review applied to a court's approval of a committee sale is the abuse of discretion standard. . . . [A]n action of foreclosure is peculiarly equitable and . . . the court exercises discretion in ensuring that justice be done. . . . In approving the committee sale, [t]he court must exercise its discretion and equitable powers with fairness not only to the foreclosing mortgagee, but also to . . . the owners [of the foreclosed property]. . . . Most importantly, the court possesses the authority to refuse to confirm sales upon equitable grounds where [the sales are] found to be unfair or the price bid was inadequate." (Citation omitted; internal quotation marks omitted.) *Rockville Bank* v. *Victory Outreach Ministries, Inc.*, 125 Conn. App. 1, 9–10, 6 A.3d 177 (2010).

"[W]hen a court order respecting the conduct of a judicial sale is not complied with the court should scrutinize the transaction very carefully to assure itself that the sale has been conducted fairly and impartially and, if any irregularity has occurred, that no interested party has been injured by it. If any likelihood of injury is shown it would be an abuse of discretion for the trial court to approve the sale." (Emphasis omitted; internal quotation marks omitted.) *First National Bank of Chicago* v. *Maynard*, 75 Conn. App. 355, 358–59, 815 A.2d 1244, cert. denied, 263 Conn. 914, 821 A.2d 768 (2003).

On appeal, the defendants do not challenge the factual or legal bases on which the trial court relied in

rejecting their arguments in opposition to the committee's motion for approval of the sale. Rather, they now claim that other irregularities with the motion prevented them "from realizing any of the substantial equity" they had in their property. Specifically, the defendants claim that the following irregularities prevented them from realizing a substantial amount of equity in their property: both they and the plaintiff objected to the approval of the sale; the successful bidders admitted that they were prejudiced by the delay in approving the sale; the successful bidders filed their motion for return of the deposit because of the bankruptcy, but withdrew it before the Bankruptcy Court granted relief from the stay; the successful bidders had no standing to support the sale because they were not parties to the action; and the committee exceeded its role in advocating for approval of the sale. Because the defendants did not assert these claims before the trial court, such claims are not properly before us now. See *Saye* v. *Howe*, 92 Conn. App. 638, 642, 886 A.2d 1239 (2005).

Moreover, we are not persuaded by the defendants' claim that the alleged irregularities "led to the approval of the sale, which blocked [them] from realizing any of the substantial equity they had in their home." To be sure, the approval of the sale extinguished the defendants' right to redeem their property, and the loss of the right to the equity in that property was injurious to the defendants.[4] As previously noted, however, in order to recover, the defendants must show "injury to [themselves] *resulting from the irregularity complained of*."

[4] It is noteworthy that at the time of the judgment of foreclosure by sale, the subject property was encumbered by liens held by multiple entities, most notably a lien by the Internal Revenue Service (IRS) in an amount exceeding $100,000,000. Assuming, as they contended before the Bankruptcy Court, that the IRS liens are invalid, the defendants, whose debt to the plaintiff was $569,000, stood to realize a substantial amount of equity on the court's approval of the sale for $1,230,000.

(Emphasis added; internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Burgos*, 227 Conn. 116, 121, 629 A.2d 410 (1993). The defendants have failed to do so. The defendants have not shown any injury resulting specifically from any of the five claimed irregularities with the motion for approval of the sale. We thus cannot conclude that the court abused its discretion in granting the committee's motion for approval of the sale.

The judgment is affirmed.

In this opinion the other judges concurred.

WELLS FARGO BANK, N.A. *v.* JAMES R. FITZPATRICK ET AL.
(AC 41113)

Keller, Elgo and Bright, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants J and M. In May, 2009, the plaintiff sent the defendants a letter notifying them that their loan was in default and advising them of the amount required to cure the default and its intent to accelerate the balance due if the default was not cured. When the default was not cured, the plaintiff commenced a foreclosure action, in which the law firm B Co. filed an appearance on behalf of the defendants. After that action was dismissed for dormancy in May, 2014, H Co., the law firm acting as counsel for the plaintiff, sent a letter to B Co. in June, 2014, instead of the property address, notifying them that the defendants' loan was in default. The defendants failed to cure the default and the plaintiff commenced a second foreclosure action in September, 2014. B Co. again entered an appearance on behalf of the defendants. Following a trial, the court denied a motion to dismiss filed by the defendants, in which they alleged that the plaintiff had failed to establish a notice of default against the defendants, which is a condition precedent to the foreclosure. The trial court considered the 2009 letter and the 2014 letter jointly as substantively affording the defendants the requisite notice. The trial court then concluded that the plaintiff was entitled to a judgment of foreclosure by sale, and that although the defendants had proven their special defense of unclean hands, they failed to prove their special defenses of laches and failure to mitigate damages. On the defendants' appeal to this court, *held*:

1. The defendants' claim that the plaintiff had failed to provide them with proper notice as required by the mortgage deed was unavailing; the trial court properly determined that the 2009 and 2014 letters together substantially complied with the notice requirements of the mortgage deed, as counsel for the defendants conceded at trial that the contents of the 2014 letter satisfied the notice requirements of the mortgage, the defendants did not dispute that they received the 2014 letter, they claimed no prejudice from the manner in which they received it, and they had received the 2009 letter prior to the first foreclosure action in which they had actively participated, and, therefore, it was indisputable that they had actual notice of their default and the possibility that they faced a foreclosure action when the second action was commenced.
2. The trial court's finding that the defendants did not prove their special defense of laches was not clearly erroneous; the defendant did not submit any evidence from which the court could have found that they were prejudiced by any alleged delay of the plaintiff in pursuing the foreclosure action, and the trial court reduced the interest that accrued while the first foreclosure action was pending, which equitably addressed any delay in the first foreclosure action.

Argued December 12, 2018—officially released May 21, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's motion to cite in Carbone Financing Services, LLC, as a party defendant; thereafter, the named defendant et al. were defaulted for failure to plead; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the motion filed by the named defendant et al. to open the default; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion to dismiss the counterclaim filed by the named defendant et al.; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, denied the motion to dismiss filed by the named defendant et al. and granted in part the plaintiff's motion for a judgment of strict foreclosure and rendered a judgment of foreclosure by sale, from which the named defendant et al. appealed to this court. *Affirmed.*

Bryan L. LeClerc, for the appellants (defendants).

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

Opinion

ELGO, J. The defendants, James R. Fitzpatrick and Marsha A. Fitzpatrick,[1] appeal from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, Wells Fargo Bank, N.A. On appeal, the defendants claim that the court improperly (1) denied their motion to dismiss and rendered judgment of foreclosure by sale because the plaintiff did not comply with the terms of the note and mortgage, namely, compliance with the notice requirements, and (2) concluded that the defendants had not proved their special defense of laches. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the present appeal. On January 31, 2003, the defendants executed and delivered a promissory note payable to World Savings Bank, FSB, in the original principal amount of $315,000. The loan was secured by a mortgage deed on the property. The mortgage deed was executed and delivered on January 31, 2003. Effective December 31, 2007, World Savings Bank, FSB, was renamed Wachovia Mortgage, FSB (Wachovia).

The defendants have been in default on the note and mortgage deed since March 1, 2009. On May 13, 2009, Wachovia sent a letter to the defendants at the property address by first class mail and certified mail, notifying

[1] For convenience, we refer to James R. Fitzpatrick and Marsha A. Fitzpatrick as the defendants in this opinion. We note that the operative complaint also named the United States of America Internal Revenue Service; Manny Rodrigues; Homeward Residential, Inc., formerly known as American Home Mortgage Servicing, Inc., formerly known as Option One Mortgage Corporation; Ford Motor Credit Company, LLC, formerly known as Ford Motor Credit Company; Capital One Bank; and Carbone Financing Services, LLC, as defendants in this action.

them that the loan was in default and advising them of the amount required to cure the default and its intent to accelerate if the default was not cured (2009 letter). When the defendants failed to cure the default, Wachovia elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage deed securing the note. Wachovia commenced a foreclosure action against the defendants on July 27, 2009 (first foreclosure action). Berchem Moses, P.C. (Berchem Moses),[2] filed an appearance on behalf of the defendants on August 4, 2009. Effective November 1, 2009, Wachovia converted to a national bank with the name Wells Fargo Bank Southwest, National Association, and merged with and into the plaintiff.[3] The first foreclosure action was in foreclosure mediation for approximately two years; the mediation period was terminated by the court on September 29, 2011. The first foreclosure action subsequently was dismissed for dormancy on May 8, 2014.

On June 19, 2014, the law firm formerly known as Hunt Leibert Jacobson, P.C., acting in its capacity as counsel to the plaintiff, sent a letter by certified mail, return receipt requested, to Berchem Moses notifying them, inter alia, that the note was in default (2014 letter). The 2014 letter listed the plaintiff as the creditor, the loan number, and the property address and stated, in relevant part: "Dear BERCHEM MOSES & DEVLIN PC: We are writing to you as counsel for BERCHEM MOSES & DEVLIN PC, MARSHA A FITZPATRICK*. Please be advised that this office represents WELLS FARGO BANK, N.A., who is the holder of a certain Note (the 'Note') and Open-End Mortgage (the 'Mortgage') made by you originally in favor of WORLD SAVINGS BANK, FSB dated January 31, 2003 in the original principal amount of $315,000.00. This is to advise you that the

[2] At the time that the first foreclosure action was commenced, Berchem Moses, P.C., was known as Berchem Moses & Devlin, P.C.

[3] The plaintiff filed a motion to substitute a party plaintiff on December 15, 2009, which was granted by the court on January 4, 2010.

above-referenced Note and Mortgage is in DEFAULT because installments of principal and interest have not been paid when due. The amount of payments and other charges due is $218,906.08 as of July 19, 2014 (Please see attached itemization). If the full amount needed to bring the loan current has not been paid on/or before said date, WELLS FARGO BANK, N.A. will declare all sums secured by the mortgage immediately due and payable (technically called acceleration) without further demand." A memo sent with the 2014 letter to Berchem Moses provided in relevant part: "Pursuant to the language in the mortgage deed you signed, the Lender is required to advise you that you have the right to reinstate after acceleration and the right to assert in court the non-existence of a default or any other defense of Borrower to acceleration and foreclosure and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of sums secured by the Mortgage without further demand and may invoke any of the remedies permitted by Applicable Law."

The defendants failed to cure the default and the plaintiff elected to accelerate the balance due on the note, to declare the note due in full, and to institute foreclosure of the mortgage deed securing the note. The plaintiff then commenced the present foreclosure action against the defendants on September 26, 2014. On October 21, 2014, Berchem Moses entered an appearance on behalf of the defendants. On September 16, 2016, the plaintiff's motion to default the defendants for failure to plead was granted. On that same date, the defendants filed a motion to open the default and filed their answer with three special defenses and a counterclaim.[4] The defendants' motion to open the default was granted on September 28, 2016.

[4] The defendants alleged the special defenses of (1) unclean hands, (2) laches, and (3) failure to mitigate damages. In their counterclaim, the defendants sought a discharge of the mortgage pursuant to General Statutes § 49-

The action was tried to the court on July 18, 2017. At the close of the plaintiff's case, the defendants moved to dismiss the case "based upon the plaintiff's failure to establish a prima facie case, specifically their failure to establish a notice of default against the defendants, which is a condition precedent to the foreclosure." After a recess, the court denied the defendants' motion to dismiss. The court, relying on *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, 110 Conn. App. 367, 955 A.2d 544, cert. denied, 289 Conn. 956, 961 A.2d 420 (2008), considered the 2009 letter and the 2014 letter jointly as substantively affording the defendants the requisite notice in paragraph twenty-two of the mortgage deed. The court further noted the absence of any prejudice to the defendants, and that the 2014 letter was sent to the defendants' counsel within approximately thirty days of the dismissal of the first foreclosure case. In its memorandum of decision, the court concluded that the plaintiff was entitled to a judgment of foreclosure by sale against the defendants. The court also concluded that the defendants had proven their first special defense of unclean hands,[5] but failed to prove their second and third special defenses of laches and failure to mitigate damages. This appeal followed. Additional facts will be set forth as necessary.

I

The defendants first claim that the plaintiff failed to provide them with proper notice as required by paragraphs fifteen and twenty-two of the mortgage deed.

13. In a memorandum of decision dated June 20, 2017, that counterclaim was dismissed by the court. The defendants have not challenged on appeal the dismissal of their counterclaim.

[5] Specifically, the court determined that the defendants were entitled to an interest credit for proving their first special defense of unclean hands in the amount of $46,004. The court determined that there were 868 days of unexplained delay by the plaintiff in pursuing the first foreclosure action and that the per diem interest on the unpaid principal balance amounted to $53 per day. The court multiplied the per diem interest by the 868 days of the unexplained delay to calculate the defendants' interest credit. The propriety of that determination is not at issue in this appeal.

Specifically, the defendants argue that the contents of the 2014 letter should not be considered by the court because it was sent to Berchem Moses instead of the property address and further contend that the 2009 letter considered alone does not constitute sufficient notice.[6] In the alternative, the defendants argue that the 2009 letter and 2014 letter together do not constitute sufficient notice.

In response, the plaintiff contends that, "by admitting the adequacy of [the] notice in their answer to the complaint and by failing to file a special defense," the defendants have waived their right to challenge the sufficiency of the notice. The plaintiff argues that the defendants admitted that the notice was adequate in their answer when they did not specifically deny paragraph six of the complaint, which states: "The plaintiff has provided written notice in accordance with the note and mortgage to the defendant(s) of the default under the note and mortgage, but said defendant(s) have failed and neglected to cure the default. The plaintiff has elected to accelerate the balance due on said note, to declare said note to be due in full and to foreclose the mortgage securing said note." In response, the defendants answered: "The allegations of paragraph 6 are admitted to the extent that the plaintiff declared the

[6] In particular, the defendants argue that the 2009 letter was inadequate because it did not comply with subsection (c) of the notice provision, which states that the notice shall specify "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured . . . ." The defendants also argue that the 2009 letter was inadequate because it did not comply with subsection (d), which states that the notice shall provide "that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and foreclosure or sale of the Property." In light of the fact that the defendants concede that the 2014 letter was substantively adequate; see footnote 7 of this opinion; and our conclusion that the 2009 letter and 2014 letter together substantially complied with the mortgage deed's notice provisions, we need not address the defendant's arguments as to the deficiencies of the 2009 letter.

note in default and elected to accelerate the balance due, declared the note to [be] due in full and commenced a foreclosure of the mortgage. The defendants deny that monies are owed to the plaintiff." The plaintiff asks us to read this as a judicially binding admission by the defendants that the plaintiff had provided them with compliant notice under the note and mortgage deed. Although we decline to read the defendants' answer so broadly, we note that the defendants in their answer did not deny that they had received the 2014 letter sent to Berchem Moses. Indeed, the defendants have never advanced that argument and, instead, contend that the 2014 letter was improper notice because it was not sent to the property address.[7]

We begin by noting that "[i]t is well established that [n]otices of default and acceleration are controlled by the mortgage documents. Construction of a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally,

[7] The plaintiff also argues that the defendants waived their right to challenge the notice provided by the two letters because they failed to file a special defense. The plaintiff asserts that our decision in *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, supra, 110 Conn. App. 367, "shows [that the] [d]efendants were required to plead lack of notice or its inadequacy as a special defense . . . ." In that case, this court noted in a footnote that the defendant asserted a failure to comply with the mortgage's notice requirement as a special defense before the trial court. Id., 369 n.2. The plaintiff misconstrues the observation made by this court in *Goduto*. Nothing about that decision implies that the defendant in that case was required to file a special defense in order to challenge the adequacy of the notice provided by the plaintiff. Further, because the plaintiff's obligation to provide notice is a condition precedent to the foreclosure action and a part of a prima facie case; see *Deutsche Bank National Trust Co. v. Bliss*, 159 Conn. App. 483, 495, 124 A.3d 890 ("[a] plaintiff establishes its prima facie case in a mortgage foreclosure action by demonstrating by a preponderance of the evidence that it is the owner of the note, that the defendant mortgagor has defaulted on the note, and that conditions precedent to foreclosure have been satisfied"), cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016); we decline to hold that a defendant must plead lack of notice or insufficient notice as a special defense in order to challenge that condition precedent.

and to deeds particularly. The primary rule of construction is to ascertain the intention of the parties. This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of their transactions. . . . A promissory note and a mortgage deed are deemed parts of one transaction and must be construed together as such. . . .

"In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Moreover, the words [in the deed] are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended. . . .

"A promissory note is nothing more than a written contract for the payment of money, and, as such, contract law applies. . . . In construing a contract, the controlling factor is normally the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . Where . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . .

"Notice provisions in mortgage documents usually require default notices to contain specific information, which serves a very clear and specific purpose; it informs mortgagors of their rights so that they may act to protect them. Therefore, when the terms of the note and mortgage require notice of default, proper notice is a condition precedent to an action for foreclosure. . . . Consequently, we must determine whether such a condition precedent was satisfied in the present case." (Citations omitted; internal quotation marks omitted.)

Emigrant Mortgage Co. v. *D'Agostino*, 94 Conn. App. 793, 798–800, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

Paragraphs twenty-two and fifteen of the mortgage deed contain the relevant notice provisions in the present case. Paragraph twenty-two states in relevant part: "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and foreclosure or sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in court the non-existence of a default or any other defense of Borrower to acceleration and foreclosure or sale." Paragraph fifteen of the mortgage deed provides in relevant part: "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender."

Although they challenged the manner in which the 2014 letter was sent, the defendants conceded before the trial court that the contents of the 2014 letter provide "everything specifically required by the mortgage."[8]

[8] In their appellate brief, the defendants challenge only one aspect of the contents of the 2014 letter, and the plaintiff argues that the defendants have waived their ability to raise that challenge. We agree. At oral argument before the trial court, counsel for the defendants acknowledged the deficiencies of the contents of the 2009 letter but specifically stated that the 2014 letter's

Accordingly, we will not entertain on appeal their claim that the 2014 letter was substantively inadequate. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." [Internal quotation marks omitted.]).

The defendants principally rely on this court's decision in *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 186 A.3d 708 (2018), to support their position that, because the 2014 letter was not sent to them at the property address as required by paragraph fifteen of the mortgage, "there is no evidence of actual delivery as required to set forth a prima facie case." In *Aurora*, the defendants claimed that they *did not receive* the single notice of default letter sent by the plaintiff via certified mail, return receipt requested, and the plaintiff did not offer evidence to confirm actual

contents followed the provisions of the mortgage's notice requirements: "And if you look at [the 2009 letter], this is not a default letter. One can call it a default letter, as the witness did. However, the last paragraph on the first page said it is our intent to declare your loan past due and payable immediately if the above-mentioned breach is not remedied. And it gives some options: let's have a face-to-face meeting; you can contact Connecticut Housing Finance Authority. It talks about what their future intent is. It is nowhere close to being the actual default letter as required by the mortgage itself and as was sent in [the 2014 letter], which is clearly a default letter *which follows the provisions of the mortgage itself* with the notifications required, the amounts, the periods, *everything specifically required by the mortgage*. That is a condition precedent; they have not met it." (Emphasis added.) Furthermore, after counsel for the plaintiff argued that the 2014 letter should be considered by the court, that the two letters together constituted substantial compliance, and that, "on its face, the [2014] letter is clearly compliant," the court began to go through the contents of the 2014 letter to see if it complied with the mortgage's notice requirements, and counsel for the defendants responded not by discussing any deficiency in the contents of the 2014 letter, but by again arguing that the letter was not addressed to the borrower as required by the note.

delivery of the letter.[9] Id., 252–53. As this court noted: "The plain intent of the notification requirements . . . of the mortgage deed is to provide notice of a default to a [mortgagor] prior to the commencement of a foreclosure proceeding." Id., 272. Because the defendants claimed that they did not receive the noncompliant notice of default letter and there was no evidence that they did so, this court determined that the plaintiff in that case failed to satisfy the contractual condition precedent to foreclosure. Id., 276. The present case is materially different. Unlike the defendants in *Aurora*, the defendants in the present case do not argue that they did not receive notice of the default and the possibility that they faced a foreclosure action. In the present case, the defendants had actual notice of the default and the possibility that they faced a foreclosure because they had been through the first foreclosure action and admittedly received the 2009 letter before the first foreclosure action was commenced against them.

This court has applied the doctrine of substantial compliance to contract notice provisions. See *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, supra, 110 Conn. App. 373 (mortgage notice provision required plaintiff to afford defendants thirty days notice to cure default); *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 624–25, 902 A.2d 24 (2006) (condominium association bylaws required written notice within thirty days of decision); *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 714–15, 807 A.2d 968 (mortgage notice provision required plaintiff to inform defendants that they may assert in court nonexistence of default or other defense), cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). In *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, supra, 376, this court affirmed the trial court's judgment "on

[9] Paragraph fifteen of the mortgage in *Aurora Loan Services, LLC* v. *Condron*, supra, 181 Conn. App. 263–64, like paragraph fifteen of the mortgage in the present case, specified that a presumption of receipt would exist when notice is sent to the borrowers by first class mail.

the alternate ground that by sending a second notice letter, the plaintiff substantially complied with the notice requirements in the defendant's mortgage." It concluded that "the two notices [of default], read jointly, substantially afforded the debtor the requisite notice." Id., 368. This court explained that "[i]n deciding whether proper notice was given, we . . . look primarily to the actual notice received rather than asking whether there has been a punctilious adherence to formality . . . . Although generally contracts should be enforced as written, we will not require mechanistic compliance with the letter of notice provisions if the particular circumstances of a case show that the actual notice received resulted in no prejudice and fairly apprised the noticed party of its contractual rights." (Citation omitted; internal quotation marks omitted.) Id., 375.

In the present case, counsel for the defendants conceded at trial that the 2014 letter satisfied the notice requirements in paragraph twenty-two of the mortgage. The defendants do not dispute that they received the 2014 letter and they claim no prejudice from the manner in which they received it. In addition, they had received the 2009 letter prior to the first foreclosure action and had actively participated in it. Consequently, it is indisputable that they had actual notice of their default and the possibility that they faced a foreclosure action when the second action was commenced. Accordingly, we conclude that the trial court properly determined that, pursuant to this court's decision in *Goduto*, the two letters together substantially complied with the mortgage deed's notice requirements.

II

The defendants also claim that the court improperly failed to find that they had proven their special defense of laches. In response, the plaintiff argues that the defendants failed to meet their burden of proving laches. We agree with the plaintiff.

"The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law. . . . We must defer to the court's findings of fact unless they are clearly erroneous. . . .

"The defense of laches, if proven, bars a plaintiff from seeking equitable relief . . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . *The burden is on the party alleging laches to establish that defense*. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the [opposing party] . . . as where, for example, the [opposing party] is led to change his position with respect to the matter in question." (Emphasis added; internal quotation marks omitted.) *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 737, 3 A.3d 957 (2010).

The defendants argue that they are entitled to a finding of laches because "the plaintiff has allowed a period of over nine years to pass in this foreclosure action. During that time it has failed to pursue this matter with due diligence, and has failed to comply with the specific terms of the note and mortgage regarding the alleged default." The defendants, however, have failed to assert, before the trial court or on appeal, how they have been prejudiced. Indeed, no evidence was submitted on which the court could have found that the defendants suffered any prejudice and, in fact, the court reduced the interest that accrued while the first foreclosure action was pending, which equitably addressed any delay in the first foreclosure action. See footnote 5 of this opinion. The only evidence presented by the defendants in this action consisted of their request that

the court take judicial notice of the first foreclosure action. Accordingly, because the defendants did not submit any evidence from which the court could have found that they were prejudiced, we conclude that the court's finding that the defendants did not prove their special defense of laches was not clearly erroneous. See *Wolyniec* v. *Wolyniec*, 188 Conn. App. 53, 68, 203 A.3d 1269 (2019) ("[a]lthough the court made no express findings of fact with respect to laches . . . [a]fter examining the record in the present case, we conclude that no evidence was admitted from which the court could have found that the plaintiff was prejudiced by the defendant's delay in filing her motion for contempt" [internal quotation marks omitted]); *Carpender* v. *Sigel*, 142 Conn. App. 379, 387, 67 A.3d 1011 (2013) ("In the present case, no evidence was admitted on which the court could have found that the plaintiff was prejudiced . . . . Accordingly, the court improperly concluded that the defendants' claim . . . was barred by laches.").

The judgment is affirmed.

In this opinion the other judges concurred.

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Practice Book Revisions
To the Rules of Appellate Procedure
Being Considered by the
Justices of the Supreme Court and
Judges of the Appellate Court

Including Commentaries to Proposals
May 21, 2019

NOTICE

Public Hearing on Practice Book Revisions To the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On June 20, 2019, at 10 a.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom in Hartford for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure that are being considered by the Justices and Judges as well as any proposed new rule or any change in an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules follow this notice and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Comments may be forwarded to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or may be forwarded to the co-chairs at the following address and should be received by June 14, 2019.

Co-Chairs of the Advisory Committee on Appellate Rules
Attn: Attorney Jill Begemann
Connecticut Appellate Court
75 Elm Street
Hartford, CT 06106

Each speaker at the public hearing will be limited to five minutes. Anyone who believes that they cannot cover their remarks within that time period may submit written comments to the Committee. If written comments are submitted, ten copies should be provided.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail Carl Cicchetti at Carl.Cicchetti@connapp.jud.ct.gov before June 14, 2019.

Hon. Richard N. Palmer
Hon. Alexandra D. DiPentima
Co-Chairs, Advisory Committee on Appellate Rules

INTRODUCTION

The following are amendments to the Rules of Appellate Procedure that are being considered by the Justices of the Supreme Court and Judges of the Appellate Court. These amendments are indicated by brackets for deletions and underlined text for added language.

Sec. 61-7. Joint and Consolidated Appeals

(a) (1) Two or more plaintiffs or defendants in the same case may appeal jointly or severally. Separate cases heard together and involving at least one common party may as of right be appealed jointly, provided all the trial court docket numbers are shown on the appeal form (JD-SC-033).

(2) Prior to the filing of an appeal, the trial court, on motion of any party or on its own motion, may order that a joint appeal be filed in any situation not covered by the preceding paragraph.

(3) In the case of a joint appeal, only one entry fee is required. The appellant filing the appeal shall pay the entry fee. **[**and any**]** When additional appellants are represented by other counsel or are self-represented, a single **[**shall file a signed**]** joint appeal consent form (JD-SC-035) signed by all joint appellants shall be filed on the same business day the appeal is filed**[** within ten days of the filing of the appeal**]**.

(b) (1) The Supreme Court, on motion of any party or on its own motion, may order that appeals pending in the Supreme Court be consolidated.

(2) When an appeal pending in the Supreme Court involves the same cause of action, transaction or occurrence as an appeal pending in the Appellate Court, the Supreme Court may, on motion of any party or on its own motion, order that the appeals be consolidated in the Supreme Court. The court may order consolidation at any time before the assignment of the appeals for hearing.

(3) The Appellate Court, on motion of any party or on its own motion, may order that appeals pending in the Appellate Court be consolidated.

(4) There shall be no refund of fees if appeals are consolidated.

(c) Whenever appeals are jointly filed or are consolidated, all appellants shall file a single, consolidated brief and appendix. All appellees shall file a single, consolidated brief or, if applicable, a single, consolidated brief and appendix. If the parties cannot agree upon the contents of the brief and appendix, or if the issues to be briefed are not common to the joint parties, any party may file a motion for permission to file a separate brief and appendix.

COMMENTARY: The purpose of this proposed amendment is to require that a joint appeal consent form be filed on the same business day that the appeal is filed.

Sec. 61-11. Stay of Execution in Noncriminal Cases

(a) **Automatic stay of execution**

Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. If the case goes to judgment on appeal, any stay thereafter shall be in accordance with Section 71-6 (motions for reconsideration), Section 84-3 (petitions for certification by the Connecticut Supreme Court), and Section 71-7 (petitions for certiorari by the United States Supreme Court).

(b) **Matters in which no automatic stay is available under this rule**

Under this section, there shall be no automatic stay in actions concerning attorneys pursuant to chapter 2 of these rules, in juvenile matters brought pursuant to chapters 26 through 35a, or in any administrative appeal except as otherwise provided in this subsection.

Unless a court shall otherwise order, any stay that was in effect during the pendency of any administrative appeal in the trial court shall continue until the filing of an appeal or the expiration of the appeal period, or any new appeal period, as provided in Section 63-1. If an appeal is filed, any further stay shall be sought pursuant to Section 61-12.

For purposes of this rule, ''administrative appeal'' means an appeal filed from a final judgment of the trial court or the Compensation Review Board rendered in an appeal from a decision of any officer, board, commission, or agency of the state or of any political subdivision thereof. In addition to appeals filed pursuant to the Uniform Administrative Procedure Act, ''administrative appeal'' includes, among other matters, zoning appeals, teacher tenure appeals, tax appeals and unemployment compensation appeals.

(c) **Stays in family matters and cases involving orders of civil protection, and appeals from decisions of the Superior Court in family support magistrate matters**

Unless otherwise ordered, no automatic stay shall apply to orders of relief from physical abuse pursuant to General Statutes § 46b-15,

to orders of civil protection pursuant to General Statutes § 46b-16a, to orders for exclusive possession of a residence pursuant to General Statutes § [§] 46b-81 or § 46b-83 or to orders of periodic alimony, support, custody or visitation in family matters brought pursuant to chapter 25, or to any decision of the Superior Court in an appeal of a final determination of a support order by a family support magistrate brought pursuant to chapter 25a, or to any later modification of such orders. The automatic orders set forth in Section 25-5 (b) (1), (2), (3), (5) and (7) shall remain in effect during any appeal period and, if an appeal is filed, until the final determination of the cause unless terminated, modified or amended further by order of a judicial authority upon motion of either party.

Any party may file a motion to terminate or impose a stay in matters covered by this subsection, either before or after judgment is rendered, based upon the existence or expectation of an appeal. Such a motion shall be filed in accordance with the procedures in subsection (e) of this rule or Section 61-12. The judge hearing such motion may terminate or impose a stay of any order, pending appeal, as appropriate, after considering (1) the needs and interests of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not entered or is terminated; (3) if the appeal is from a judgment of dissolution, the need to preserve, pending appeal, the mosaic of orders established in the judgment; (4) the need to preserve the rights of the party taking the appeal to obtain effective relief if the appeal is successful; (5) the effect, if any, of

the automatic orders under Section 25-5 on any of the foregoing considerations; and (6) any other factors affecting the equities of the parties.

The judge who entered the order in a family matter from which an appeal lies may terminate any stay in that matter upon motion of a party as provided in this subsection or sua sponte, after considering the factors set forth in this subsection or if the judge is of the opinion that an extension of time to appeal is sought or the appeal is filed only for delay. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

(d) **Termination of stay**

In all cases not governed by subsection (c), termination of a stay may be sought in accordance with subsection (e) of this rule. If the judge who tried the case is of the opinion that (1) an extension to appeal is sought, or the appeal is filed, only for delay or (2) the due administration of justice so requires, the judge may at any time, upon motion or sua sponte, order that the stay be terminated. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

(e) **Motions to terminate stay**

A motion to terminate a stay of execution filed before judgment is entered shall be filed with the trial court, and the judge who tried or presided over the matter may rule upon the motion when judgment is entered. If such a motion is filed after judgment but before an appeal is filed, the motion shall be filed with the clerk of the trial court and may be ruled upon by the trial judge thereafter. After an appeal is

filed, such a motion shall be filed with the appellate clerk and shall be forwarded by the appellate clerk to the trial judge for a decision. If the judge who tried or presided over the case is unavailable, the motion shall be forwarded to the clerk of the trial court in which the case was tried, who shall assign the motion for a hearing and decision to any judge of the Superior Court.

Upon hearing and consideration of the motion, the trial court shall file with the clerk of the trial court its written or oral memorandum of decision that shall include the factual and legal basis therefor. If oral, the decision shall be transcribed by the court reporter and signed by the trial court. If an appeal has not been filed, the clerk shall enter the decision on the trial court docket and shall send notice of the decision to counsel of record. If an appeal has been filed, the clerk of the trial court shall enter the decision on the trial court docket and send notice of the decision to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record.

(f) **Motions to request stay**

Requests for a stay pending appeal where there is no automatic stay shall be governed by Section 61-12.

(For stays of execution in criminal cases, see Section 61-13; for stays in death penalty cases, see Section 61-15.)

(g) **Strict foreclosure—motion rendering ineffective a judgment of strict foreclosure**

In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's

denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. Such affidavit shall recite the specific facts relied on in support of the moving party's claim of good cause. If, notwithstanding the submission of such an affidavit of good cause, the plaintiff contends that there is no good cause to stay the court's judgment of strict foreclosure pending resolution of the appeal, the plaintiff may seek termination of the automatic stay by filing a motion requesting such relief accompanied by an affidavit stating the basis for the plaintiff's claim. In the event such a motion to terminate stay is filed, it shall be set down for argument and the taking of evidence, if necessary, on the second short calendar next following the filing of the motion. There shall be no automatic appellate stay in the event that the court grants the motion to terminate the stay and, if necessary, sets new law dates. There shall be no automatic stay pending a motion for review of an order terminating a stay under this subsection.

(h) **Foreclosure by sale—motion rendering ineffective a judgment of foreclosure by sale**

In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without

an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period.

COMMENTARY: The purpose of this proposed amendment is to eliminate automatic appellate stays in cases involving orders of civil protection.

Sec. 63-7. Waiver of Fees, Costs and Security—Criminal Cases

Any defendant in a criminal case who is indigent and desires to appeal**[**, and has not previously been determined to be indigent,**]** may, within the time provided by the rules for taking an appeal, make written application to the trial court for relief from payment of fees, costs and expenses. The application must be under oath and recite, or it must be accompanied by an affidavit reciting, the grounds upon which the applicant proposes to appeal and the facts concerning the applicant's financial status.

The application must be sent to the public defender's office for investigation. The judicial authority shall assign the request for waiver of fees, costs and expenses for hearing within twenty days after filing, and the trial counsel, the trial public defender's office to which the application had been sent for investigation and the chief of legal services of the public defender's office shall be notified in writing by the clerk's office of the date of such hearing.

The judicial authority shall act promptly on the application following the hearing. Upon determination by the judicial authority that a defendant in a criminal case is indigent, the trial court may (1) waive payment by the defendant of fees specified by statute and of taxable costs, (2) order that the necessary expenses of prosecuting the appeal be paid

by the state, and (3) appoint appellate counsel and permit the withdrawal of the trial attorney's appearance provided the judicial authority is satisfied that that attorney has cooperated fully with appellate counsel in the preparation of the defendant's appeal as set forth in Section 43-33.

When the judicial authority has appointed an attorney in private practice to represent the defendant upon appeal, the attorney shall obtain the approval of the judicial authority who presided at the trial before incurring any expense in excess of $100, including the expense of obtaining a transcript of the necessary proceedings or testimony. The judicial authority shall authorize a transcript at state expense only of the portions of proceedings or testimony which may be pertinent to the issues on appeal.

The sole remedy of any defendant desiring the court to review an order concerning the waiver of fees, costs and security or the appointment of counsel shall be by motion for review under Section 66-6.

COMMENTARY: The purpose of this proposed amendment is to make the language of this section consistent with Section 43-33.

Sec. 63-10. Preargument Conferences

The chief justice or the chief judge or a designee may, in cases deemed appropriate, direct that conferences of the parties be scheduled in advance of oral argument. All civil cases are eligible for preargument conferences except habeas corpus appeals, appeals involving juvenile matters, including child protection appeals as defined in Section 79a-1, summary process appeals, foreclosure appeals, and

appeals from the suspension of a motor vehicle license due to operating under the influence of liquor or drugs. **[**A party in an exempt case may file a request for a preargument conference with the appellate clerk explaining why the case should not be exempt.**]** In any exempt case, all parties appearing and participating in the appeal may file a joint request for a preargument conference. The chief justice may designate a judge trial referee or senior judge to preside at a conference. The scheduling of or attendance at a preargument conference shall not affect the duty of the parties to adhere to the times set for the filing of briefs. Failure of counsel to attend a preargument conference may result in the imposition of sanctions under Section 85-2. Unless other arrangements have been approved in advance by the conference judge, parties shall be present at the conference site and available for consultation. When a party against whom a claim is made is insured, an insurance adjuster for such insurance company shall be available by telephone at the time of such preargument conference unless the conference judge, in his or her discretion, requires the attendance of the adjuster at the conference. The conference proceedings shall not be brought to the attention of the court by the presiding officer or any of the parties unless the conference results in a final disposition of the appeal.

The following matters may be considered:

(1) Possibility of settlement;

(2) Simplification of issues;

(3) Amendments to the preliminary statement of issues;

(4) Transfer to the Supreme Court;

(5) Timetable for the filing of briefs;

(6) En banc review; and

(7) Such other matters as the conference judge shall consider appropriate.

All matters scheduled for a preargument conference before a judge trial referee are referred to that official by the chief court administrator pursuant to General Statutes § 52-434a, which vests judge trial referees with the same powers and jurisdiction as Superior Court judges and senior judges, including the power to implement settlements by opening and modifying judgments.

COMMENTARY: The purpose of this proposed amendment is to exempt appeals in foreclosure cases from the preargument conference program. The proposed amendment permits parties in an exempt case to request a preargument conference if all the parties appearing and participating in the appeal agree.

Sec. 70-4. Time Allowed for Oral Argument; Who May Argue

Unless the court grants a request for additional time made before oral argument begins, argument of any case shall not exceed one-half hour on each side. The time allowed may be apportioned among counsel on the same side of a case as they may choose. The court may terminate the argument whenever in its judgment further argument is unnecessary.

Prior to the date assigned for hearing, counsel of record may file a request with the appellate clerk to allow more than one counsel to present oral argument for one party to the appeal.

In cases in which there is a firm appearance, or in which there are multiple appearances for the same party, if an attorney from the appearing firm or who already has an appearance wishes to argue the appeal but is not identified as the arguing attorney on the brief, the attorney who will be arguing the appeal shall file a letter notifying the court of the change as soon as possible prior to argument.

No argument shall be allowed any party who has not filed a brief or who has not joined in the brief of another party.

COMMENTARY: The purpose of this proposed amendment is to require that counsel arguing the appeal notify the court of any change to arguing counsel as soon as possible prior to argument.

Sec. 72-1. Writs of Error; In General

(a) Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the **[**Supreme Court**]** Appellate Court in the following cases: (1) a decision binding on an aggrieved nonparty; (2) a summary decision of criminal contempt; (3) a denial of transfer of a small claims action to the regular docket; and (4) as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

(b) No writ of error may be brought in any civil or criminal proceeding for the correction of any error where (1) the error might have been reviewed by process of appeal, or by way of certification, or (2) the parties, by failure timely to seek a transfer or otherwise, have consented to have the case determined by a court or tribunal from whose judgment there is no right of appeal or opportunity for certification.

COMMENTARY: The Judicial Branch has proposed an amendment to General Statutes § 51-199 (b) (10), which requires that writs of error be filed directly in the Supreme Court, to require that such writs be filed in the Appellate Court. It is intended that this proposed amendment to Section 72-1 will go into effect on the effective date of the statutory amendment.

Sec. 72-3. Applicable Procedure

(a) The writ of error, if in proper form, shall be allowed and signed by a judge or clerk of the court in which the judgment or decree was rendered. The writ of error shall be presented for signature within twenty days of the date notice of the judgment or decision complained of is given but shall be signed by the judge or clerk even if not presented in a timely manner. Failure without cause to present the writ of error in a timely manner may be a ground for dismissal of the writ of error by the court having appellate jurisdiction**[** Supreme Court**]**.

(b) The writ of error shall be served and returned as other civil process, except that the writ of error shall be served at least ten days before the return day and shall be returned to the appellate clerk at least one day before the return day. The return days **[**of the Supreme Court**]** are any Tuesday not less than twelve nor more than thirty days after the writ of error is signed by a judge or clerk of the court.

(c) The writ of error shall be deemed filed the day it is properly returned to the appellate clerk. The plaintiff in error shall return the writ of error to the appellate clerk by (1) complying with Sections 60-7 or 60-8 by paying the required fee, submitting a signed application for waiver of fees and the order of the trial court granting the fee

waiver, or certifying that no fees are required; (2) submitting the matter in accordance with the provisions of Section 63-3; and (3) submitting the allowed and signed writ of error and the signed marshal's return to the appellate clerk.

(d) An electronically filed writ of error will be docketed upon the submission of the matter in accordance with Section 63-3 but will be rejected upon review by the appellate clerk if the plaintiff in error fails to comply with Section 60-7 or to submit an allowed and signed writ of error and the signed marshal's return on the same business day the matter is submitted in accordance with the provisions of Section 63-3. The writ of error may also be returned upon review by the appellate clerk for noncompliance with the Rules of Appellate Procedure. The appellate clerk shall forthwith give notice to all parties of the filing of the writ of error.

(e) If the writ of error is brought against a judge of the Superior Court to contest a summary decision of criminal contempt by that judge, the defendant in error shall be the Superior Court. In all other writs of error, the writ of error shall bear the caption of the underlying action in which the judgment or decision was rendered. All parties to the underlying action shall be served in accordance with chapter 8 of these rules.

(f) Within twenty days after filing the writ of error, the plaintiff in error shall file with the appellate clerk such documents as are necessary to present the claims of error made in the writ of error, including pertinent pleadings, memoranda of decision and judgment file, accom-

panied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

(g) In the event a transcript is necessary, the plaintiff in error shall follow the procedure set forth in Sections 63-8 and 63-8A.

(h) Within ten days of the filing by the plaintiff in error of the documents referred to in subsections (f) and (g) of this rule, the defendant in error may file such additional documents as are necessary to defend the action, accompanied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

(i) Answers or other pleas shall not be filed in response to any writ of error.

COMMENTARY: The Judicial Branch has proposed an amendment to General Statutes § 51-199 (b) (10), which requires that writs of error be filed directly in the Supreme Court, to require that such writs be filed in the Appellate Court. It is intended that this proposed amendment to Section 72-3 will go into effect on the effective date of the statutory amendment.

Sec. 77-1. Petition for Review Seeking Expedited Review of an Order concerning Court Closure, or an Order That Seals or Limits the Disclosure of Files, Affidavits, Documents or Other Material

(a) Except as provided in subsection (b), any person affected by a court order which prohibits the public or any person from attending any session of court, or any order that seals or limits the disclosure of files, affidavits, documents or other material on file with the court

or filed in connection with a court proceeding, may seek review of such order by filing a petition for review with the Appellate Court within seventy-two hours after the issuance of the order. The petition shall fully comply with Sections 66-2 and 66-3. The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the Appellate Court. An appendix containing the information or complaint, the answer, all motions pertaining to the matter, the opinion or orders of the trial court sought to be reviewed, a list of all parties with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris number of their counsel, the names of all judges who participated in the case, and a transcript order acknowledgment form (JD-ES-38), shall be filed with the petition for review.

Any person filing a petition for review pursuant to this rule shall deliver a copy of the petition and appendix to (1) all parties to the case and (2) any nonparty who sought the closure order or order sealing or limiting disclosure in compliance with the provisions of Section 62-7 on the same day as the petition is filed. Any party or nonparty who sought such order may file a response to the petition for review within ninety-six hours after the filing of the petition for review. Failure to file a response shall not preclude the party or nonparty who sought the order under review from participating in the hearing on the petition. Within one business day of the receipt of the transcript and the certificate of completion provided for by Section 63-8 (c), the person filing the petition for review shall file the transcript and the certificate of completion with the Appellate Court.

The filing of any petition for review of a court order which prohibits the public or any person from attending any session of court shall stay the order until the final determination of the review. The filing of any petition for review of an order that seals or limits the disclosure of files, affidavits, documents or other material on file with the court shall not stay the order during the review.

After the receipt of the transcript and the response to the petition, if any, the Appellate Court shall hold an expedited hearing on any petition for review. The appellate clerk will notify the petitioner, the parties and any nonparties who sought the closure order or order sealing or limiting disclosure of files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding of the date and time of the hearing. After such hearing the Appellate Court may affirm, modify or vacate the order reviewed.

(b) This section shall not apply to court orders concerning any session of court conducted pursuant to General Statutes § **[**§ **]** 46b-11, § 46b-49, § 46b-122, § 54-76h**[**, and any order issued pursuant to a rule that seals or limits the disclosure of any affidavit in support of an arrest warrant,**]** or any other provision of the General Statutes under which the court is authorized to close proceedings. This section also shall not apply to any order issued pursuant to General Statutes § 46b-11 or § 54-33c or any other provision of the General Statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents or materials and any order issued pursuant to a court rule that seals or limits the disclosure of any affidavit in support of an arrest warrant.

COMMENTARY: The purpose of this proposed amendment is to clarify this rule and make it consistent with the exceptions set forth in General Statutes § 51-164x.

Sec. 81-2. Form of Petition

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.

(2) A statement of the basis for certification identifying the specific reasons why the Appellate Court should allow the extraordinary relief of certification. These reasons may include but are not limited to the following:

(A) The court below has decided a question of substance not theretofore determined by the Supreme Court or the Appellate Court or has decided it in a way probably not in accord with applicable decisions of the Supreme Court or the Appellate Court.

(B) The decision under review is in conflict with other decisions of the court below.

(C) The court below has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by any other court, as to call for an exercise of the Appellate Court's supervision.

(D) A question of great public importance is involved.

(3) A summary of the case containing the facts material to the consideration of the questions presented, reciting the disposition of

the matter in the trial court, and describing specifically how the trial court decided the questions presented for review in the petition.

(4) A concise argument amplifying the reasons relied upon to support the petition. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix containing a table of contents, the operative complaint, all briefs filed by all parties, the opinion or order of the trial court sought to be reviewed, a copy of the order on any motion which would stay or extend the time period for filing the petition, and a list of all parties to the appeal in the trial court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their counsel. The appendix shall be paginated separately from the petition with consecutively numbered pages preceded by the letter "A."

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two typefaces, of 12 point or larger size, are approved for use in petitions: arial and univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The purpose of this proposed amendment is to require that a table of contents be included in an appendix filed with a petition for certification to appeal to the Appellate Court.

Sec. 84-5. Form of Petition

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The Supreme Court will ordinarily consider only those questions squarely raised, subject to any limitation in the order granting certification.

(2) A statement of the basis for certification identifying the specific reasons, including but not limited to those enumerated in Section 84-2, why the Supreme Court should allow the extraordinary relief of certification.

(3) A summary of the case containing the facts material to the consideration of the questions presented, reciting the disposition of the matter in the Appellate Court, and describing specifically how the Appellate Court decided the questions presented for review in the petition.

(4) A concise argument amplifying the reasons relied upon to support the petition. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix, which shall be paginated separately from the petition with consecutively numbered pages preceded by the letter ''A,'' containing:

(A) a table of contents,

[A**]**(B) the opinion or order of the Appellate Court sought to be reviewed,

[B**]**(C) if the opinion or order of the Appellate Court was per curiam or a summary affirmance or dismissal, a copy of the trial court's memorandum of decision that was entered in connection with the claim raised by the petitioner before the Appellate Court, or, if no memorandum was filed, a copy of the trial court's ruling on the matter,

[C**]**(D) a copy of the order on any motion which would stay or extend the time period for filing the petition,

[D**]**(E) a list of all parties to the appeal in the Appellate Court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their trial and appellate counsel.

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two typefaces, of 12 point or larger size, are approved for use in petitions: arial and univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The purpose of this proposed amendment is to require that a table of contents be included in an appendix filed with a petition for certification to appeal to the Supreme Court, and to require appellate counsel to include a copy of the trial court's memorandum of decision with any petition for certification when the Appellate Court opinion from which certification is sought is a per curiam opinion.

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Transition Plan

In January 2014, the Centers for Medicaid and Medicare Services (CMS) announced a requirement for states to review and evaluate current home and community based settings (HCBS), including residential and nonresidential settings, and to demonstrate how Department of Social Services (Department) waivers comply with the new federal HCBS requirements that went into effect March 17, 2014. §§ 42 CFR 441.301(c)(4)-(5). CMS posted additional guidance to help states assess compliance and remediate areas that are not fully in compliance. The Department is seeking comments on the transition plan outlined in this notice.

The Department has reviewed all of Connecticut's Medicaid waiver programs for compliance with the federal HCBS requirements and submitted an initial plan to CMS. The initial plan was approved by CMS in November of 2016. The amendment to the plan was submitted to CMS for review and approval in the fall of 2018. CMS raised additional questions which are addressed in the amendment to the transition plan. Those questions focused primarily around the Assisted Living Services provided under CT's waiver programs. The updated version is available now for public comment and will be submitted to CMS for final approval after the comment period has closed. The plan includes the following information:

- A summary of site visits completed;
- An assessment of compliance of our current settings;
- An inventory of remedial actions taken;
- A summary of how each setting meets or does not meet the federal HCBS requirements;
- A list of site specific remedial actions;
- A plan and process for bringing all HCBS into compliance;
- A plan for monitoring settings on an ongoing basis; and
- Identifying settings that have been submitted to CMS for *f*heightened review

The plan may be found at:

https://portal.ct.gov/-/media/Departments-and-Agencies/DSS/Health-and-Home-Care/Community-Options/Final-TransitionPlan-with-Appendices-5-14-19.pdf

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

All written comments regarding the plan may be submitted by June 23, 2019 to the Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford or to Kathy.a.bruni@ct.gov.

DEPARTMENT OF SOCIAL SERVICES
OFFICE OF EARLY CHILDHOOD

Notice of Proposed Medicaid Waiver

Renewal of Selective Provider Contracting Waiver Pursuant to Section 1915(b)(4) of the Social Security Act for Early Intervention Services (EIS) Pursuant to Early and Periodic Screening, Diagnostic and Treatment (EPSDT) Qualified Program Waiver

The State of Connecticut Department of Social Services (DSS), which is Connecticut's single state Medicaid agency and the State of Connecticut Office of Early Childhood (OEC), which administers the Connecticut Birth to Three System, including this waiver, provide notice that DSS proposes to submit the following Medicaid waiver renewal application to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Description of the Waiver Renewal

Effective October 1, 2019, the above-referenced waiver renewal enables the state to continue limiting the number of qualified EIS providers in each municipality. This waiver renewal continues the same policy as in effect under the current waiver and does not affect Medicaid coverage or payment for EIS, which are described separately in the Medicaid State Plan.

OEC administers Connecticut's Birth to Three System, which is Connecticut's statewide program to provide EIS in accordance with Part C of the Individuals with Disabilities Education Act (IDEA), 42 U.S.C. §§ 1431 to 1444, inclusive, and 34 C.F.R. Part 303. This waiver enables OEC to continue operating the Birth to Three System using a competitive procurement for Birth to Three programs, which are entities that provide EIS, including EIS pursuant to EPSDT for Medicaid members. As part of this process, OEC conducts a competitive procurement and limits the number of qualifying providers in each municipality to ensure that there is sufficient access to services for all members, while also ensuring that each provider has sufficient caseloads to maintain efficiency, expertise, and high quality services.

Fiscal Information

This waiver renewal does not affect payments to providers of EIS. By continuing to limit the number of providers, the waiver is anticipated to reduce administrative expenditures for the state (compared to if no waiver were in effect).

Obtaining Waiver Renewal Language and Submitting Public Comments

The proposed waiver renewal is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed waiver renewal may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the waiver renewal from DSS or to send comments about the waiver renewal, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''Waiver Renewal – Selective Provider Contracting – EIS Pursuant to EPSDT''.

Anyone may send DSS written comments about this waiver renewal. Written comments must be received by DSS at the above contact information no later than June 20, 2019.

NOTICES

Notice of Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that a trustee was appointed on May 9, 2019, in Docket Number HHD-CV-19-6110801-S for the late Attorney Anthony E. DeCrosta.

Attorney Fatima T. Lobo of Manchester, Connecticut, juris #404654 is appointed Trustee to take such steps as are necessary to protect the interests of the clients of the late Attorney DeCrosta, to inventory files, to secure 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

Notice of Disciplinary Order

DOCKET NO: NNH-CV19-6090311-S. DISCIPLINARY COUNSEL VS. COHEN, JEFFREY, B. SUPERIOR COURT JUDICIAL DISTRICT OF NEW HAVEN, MAY 13, 2019.

ORDER: Pursuant to Practice Book § 2-54, notice is hereby given that on May 13, 2019, in the matter of Office of Chief Disciplinary Counsel v Cohen, Jeffrey B., NNH-CV-19-6090311-S, Jeffrey B. Cohen (juris number 421909) of Hamden, Connecticut was suspended from the practice of law in Connecticut for a period of 30 days, effectively immediately. The respondent shall be automatically reinstated on June 12, 2019, without need of a hearing. The respondent shall comply with all terms and conditions of Practice Book Section 2-47B, regarding Restrictions on the Activities of Deactivated Attorneys, during the term of his suspension. No trustee is appointed. The respondent shall not deposit funds into or withdraw funds from his Bank of America IOLTA Account.

The Court (Abrams, J)
5/13/2019

Notice of Disbarment of Attorney

Pursuant to Practice Book Sec. 2-54, notice is hereby given that on May 14, 2019 in docket number HHB-CV-19-6052208-S, Jodi Zils Gagne, juris number 420423, of Bristol, Connecticut, was disbarred from the practice of law for Twelve (12) years.

Notice is given that Attorney Margaret M. Hayes, of Bristol, Connecticut, is appointed trustee to protect the interests of the clients of Jodi Zils Gagne.

The Court (Dewey, J.)

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on May 9, 2019, in Docket Number HHD-CV-19-610633-S David V. Chomick (juris# 428595) of Glastonbury, CT was found to have engaged in misconduct.

As to the First Count:

1. David V. Chomick is suspended from the practice of law for a period of 20 days, commencing on June 1, 2019.
2. Attorney Linda Hadley, Juris No. 302693, of Farmington, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

As to the Second Count:

1. David V. Chomick is suspended from the practice of law for a period of 25 days, commencing immediately upon the conclusion of the suspension imposed as to the First Count herein.
2. Attorney Linda Hadley, Juris No. 302693, of Farmington, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Marshall Berger
Judge