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CONNECTICUT REPORTS

Vol. 331

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MARJORIE ASHMORE, ADMINISTRATRIX (ESTATE OF WILLIAM ASHMORE), ET AL. *v.* HARTFORD HOSPITAL ET AL.
(SC 20052)

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

Syllabus

Pursuant to this court's prior case law, *Hopson* v. *St. Mary's Hospital* (176 Conn. 485), one spouse may bring a claim for loss of consortium arising from a personal injury to the other spouse caused by a third party, and such a claim may include recovery for both the loss of household services performed by the injured spouse and for the loss of affection, society, companionship and sexual relations.

The plaintiff sought to recover damages, individually and on behalf of the estate of her deceased husband, W, for W's allegedly wrongful death and for the plaintiff's loss of consortium in connection with the defendant hospital's medical malpractice. After routine elective surgery at the hospital, W experienced a postoperative condition to which, the plaintiff contended, hospital staff did not adequately respond. As a result of the hospital staff's allegedly inadequate response, W suffered oxygen deprivation so severe that he had to be placed on life support. Several days later, the plaintiff made the decision to withdraw life support, and W died shortly thereafter. Following a trial, the jury returned a verdict for the plaintiff, awarding W's estate approximately $75,000 in economic damages and $1.2 million in noneconomic damages for his wrongful death, and awarding the plaintiff $4.5 million in damages for her loss of consortium. Subsequently, the defendant filed a motion seeking a remittitur of the loss of consortium award. The trial court denied the defendant's motion and rendered judgment in accordance with the jury verdict, and the defendant appealed, claiming that, in the absence of exceptional or unusual circumstances that are not applicable in the present case, a loss of consortium award in a wrongful death action should not substantially exceed the corresponding wrongful death award to the directly injured spouse. *Held*:

1. This court declined the defendant's invitation to adopt a plenary standard of appellate review of a trial court's decision to grant or deny a motion for remittitur and to overrule prior case law establishing that such

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

decisions are reviewed according to the deferential abuse of discretion standard: the legislature's use of the language "excessive as a matter of law" in the statutes (§§ 52-216a and 52-228c) that respectively authorize trial courts to order remittitur in cases involving excessive verdicts and when a jury's award of noneconomic damages in a negligence action against a health care provider is determined to be excessive, did not evince a legislative intent to abrogate the common law and to prescribe a de novo standard of review of remittitur decisions; moreover, the fact that this court has continued to apply the abuse of discretion standard of review to remittitur decisions for years since the enactment of §§ 52-216a and 52-228c, with the acquiescence of the legislature, provided further support for the continued application of that standard of review.

2. A loss of consortium award in a wrongful death action presumptively should not be substantially greater than the noneconomic damages portion of the wrongful death award itself, and, because the trial court did not have the guidance of this court's decision in the present case and, therefore, did not apply this presumption, and the jury could not reasonably have found, on the basis of the evidence presented, that the circumstances justified a substantially greater loss of consortium award, this court remanded the case for reconsideration of the defendant's motion for remittitur: this court determined that there is a presumption that a direct injury to one spouse is no less harmful than the concomitant loss of consortium suffered by the other spouse, insofar as the directly injured spouse ordinarily will experience more or less comparable losses of physical and emotional affection, in addition to suffering all of the direct effects of the injury itself, but that presumption may be overcome by evidence that the marriage was unequal in terms of the amount of support or satisfaction that one spouse derived from the other, and, to uphold a loss of consortium award that is substantially greater than the award of noneconomic damages to the directly injured spouse, a reviewing court must be able to point to evidence that explains or justifies the unusual disparity; moreover, there was insufficient evidence in the present case from which the jury could have determined either that the plaintiff's loss of W's household services was so atypical or that W met the plaintiff's needs for romance, affection, companionship and intimacy to such a degree as to justify a loss of consortium award much greater than the underlying wrongful death award; furthermore, the plaintiff's decision to terminate life support, although traumatic, was not the sort of harm that fell within the ambit of loss of consortium and, therefore, could not justify the sizable disparity between the loss of consortium award and the underlying wrongful death award.

(*One justice concurring separately*)

Argued May 4, 2018—officially released June 4, 2019

Procedural History

Action to recover damages for, inter alia, medical malpractice, brought to the Superior Court in the judicial district of Waterbury, where the complaint was withdrawn as to the defendant Hartford Healthcare Corporation; thereafter, the case was tried to a jury before *Roraback*, *J.*; verdict for the plaintiffs; subsequently, the court, *Roraback*, *J.*, denied the named defendant's motion for remittitur and rendered judgment in accordance with the verdict, and the named defendant appealed. *Reversed*; *further proceedings*.

John L. Cordani, *Jr.*, with whom was *Isabella M. Squicciarini*, for the appellant (named defendant).

James J. Healy, with whom was *Eric P. Smith*, for the appellees (plaintiffs).

Christopher P. Kriesen and *Lorinda S. Coon*, and *Geraldine Macaisa* and *Chelsea Sousa*, certified legal interns, filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Alinor C. Sterling, *Jeffrey Wisner*, *Matthew Blumenthal*, *Julie V. Pinette* and *Karen K. Clark* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

PALMER, J. In this wrongful death action alleging medical malpractice, the named defendant, Hartford Hospital,[1] appeals from the judgment of the trial court, which denied a motion for remittitur after a jury awarded $1.2 million in noneconomic damages to the named plaintiff, Marjorie Ashmore, as the adminis-

[1] Although Hartford Healthcare Corporation also was named as a defendant, the complaint subsequently was withdrawn as to Hartford Healthcare Corporation. Hereinafter, we refer to Hartford Hospital as the defendant.

tratrix of the estate of the decedent,[2] her late husband William Ashmore, and $4.5 million to the plaintiff for her own loss of spousal consortium. The defendant contends that, in the absence of exceptional or unusual circumstances that are not applicable in this case, a loss of consortium award ordinarily should not substantially exceed the corresponding wrongful death award to the directly injured spouse. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of this appeal. In 2011, the decedent visited the defendant hospital for routine elective heart surgery. The surgery was completed successfully and without complication. During the procedure, the surgeon connected standard epicardial pacing electrodes to the decedent's heart to assist with heart rate and rhythm management in the event that he should experience any postoperative complications. In the case of an abnormal rhythm, such wires can be quickly and easily connected to a system that provides a small electrical stimulation to return the heartbeat to its normal rhythm.

The decedent initially recovered well, but, during the second night at the hospital following the operation, he began to experience atrial fibrillation, a common postoperative condition. Over the course of the next hour, his heart rate dropped precipitously, he displayed various signs of serious distress, and alarms repeatedly sounded. Although this was precisely the condition for which the epicardial wires had been installed, hospital staff failed to connect the wires or to contact the decedent's surgeon until after the decedent had experienced cardiac arrest. Hospital staff ultimately were able to

[2] Marjorie Ashmore also brought the present action in her individual capacity. Hereinafter, all references to the plaintiff are to Marjorie Ashmore in her individual capacity seeking loss of consortium damages.

restart his heart using electrical shock, but the lack of a heartbeat for seventeen minutes resulted in oxygen deprivation so severe that the decedent had to be placed on life support. He never regained consciousness. Several days later, with no reasonable possibility that her husband of forty-five years would recover, the plaintiff was forced to make the agonizing decision to terminate the decedent's life support. He died moments later.

The plaintiff filed the present action, alleging wrongful death in her capacity as executor of the decedent's estate, and loss of spousal consortium in her individual capacity. The case was tried to a jury, which returned a verdict for the plaintiff. The jury found that the negligence of the defendant's employees was the proximate cause of the decedent's death and awarded the decedent's estate approximately $75,000 in economic damages and $1.2 million in noneconomic damages. The jury also awarded the plaintiff $4.5 million in damages for loss of consortium.

The defendant then filed a motion seeking a remittitur of the loss of consortium award pursuant to General Statutes §§ 52-216a and 52-228c, and Practice Book § 16-35. The trial court denied the motion and rendered judgment in accordance with the jury verdict. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional facts will be set forth as necessary.

I

As an initial matter, we address the parties' disagreement as to the standard that governs appellate review of a trial court's decision to grant or deny a motion for remittitur. The plaintiff, relying on cases such as *Munn* v. *Hotchkiss School*, 326 Conn. 540, 574, 165 A.3d 1167 (2017), and *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 706, 41 A.3d 1013 (2012), contends that binding prece-

dent establishes, and our recent cases reaffirm, that a trial court's decision to grant or deny remittitur is reviewed according to a deferential abuse of discretion standard. The defendant invites us to overrule those cases and to adopt a plenary standard of review or, failing that, to review de novo the decision of the trial court in the present case insofar as that decision was predicated on an incorrect legal determination. We decline the defendant's invitation to overrule *Munn*, *Patino*, and their many progenitors.

A

As we explained in *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 32 A.3d 318 (2011), the standards that govern appellate review of a trial court's granting or denial of a motion for remittitur must be understood in light of the underlying legal standards that govern remittitur itself. See id., 280, 284–85. We frequently have stated that, "[i]n determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test [that] must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has awarded damages that] are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, supra, 326 Conn. 575–76. "Accordingly, we consistently have held that a court should exercise its authority to order a remittitur rarely—only in the most exceptional

of circumstances . . . and [when] the court can articulate very clear, definite and satisfactory reasons . . . for such interference." (Citation omitted; internal quotation marks omitted.) Id., 575.

Also relevant to our review is § 52-216a, which provides the general statutory authority for remittitur. That statute provides in relevant part that, "[i]f the court at the conclusion of the trial concludes that the verdict is *excessive as a matter of law*, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. . . ." (Emphasis added.) General Statutes § 52-216a.

With respect to appellate review, in *Saleh*, we explained that "our review of the trial court's decision [to grant or deny remittitur] requires careful balancing." *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 285. "[T]he decision whether to reduce a jury verdict because it is excessive as a matter of law . . . rests solely within the discretion of the trial court. . . . [T]he same general principles apply to a trial court's decision to order a remittitur. [Consequently], the proper standard of review . . . is that of an abuse of discretion. . . . [T]he ruling of the trial court . . . is entitled to great weight and every reasonable presumption should be given in favor of its correctness." (Citation omitted; internal quotation marks omitted.) Id., 281–82. The chief rationale that has been articulated in support of this deferential standard of review is that the trial court, having observed the trial and evaluated the testimony firsthand, is better positioned than a reviewing court to assess both the aptness of the award and whether the jury may have been motivated by improper sympathy, partiality, or prejudice. See, e.g., *Munn* v. *Hotchkiss School*, supra, 326 Conn. 577; W. Maltbie, Connecticut Appellate Procedure (2d Ed. 1957) § 187, pp. 230–31; W. Maltbie, supra, § 197, pp. 244–45.

Even under this deferential standard of review, however, we have not shied away from ordering remittitur when the record failed to support the jury's award of damages. Indeed, "[t]his court has a long history of ordering plaintiffs to accept a remittitur or [to] submit to a new trial." *Earlington* v. *Anastasi*, 293 Conn. 194, 208, 976 A.2d 689 (2009); see also *Doroszka* v. *Lavine*, 111 Conn. 575, 579, 150 A. 692 (1930) ("[a]s early as [1838], and frequently since, we have ordered a new trial unless the plaintiff would remit a part of the verdict"); W. Maltbie, supra, § 200, p. 248 ("[t]he [S]upreme [C]ourt often orders a new trial unless the plaintiff remits a certain amount of the damages").

B

The defendant does not dispute that we have, in most instances, reviewed decisions to grant or deny remittitur according to this deferential standard of review. Nevertheless, the defendant emphasizes that the legislature has determined that remittitur should be granted only when a verdict is deemed to be "excessive as a matter of law"; General Statutes § 52-216a; accord General Statutes § 52-228c;[3] and argues that appellate courts typically review legal determinations de novo rather than for an abuse of discretion. The defendant also draws our attention to Justice McDonald's concurrence in *Munn*, which highlighted the need for clarification of existing remittitur standards. See *Munn* v.

[3] General Statutes § 52-228c provides in relevant part: "Whenever in a civil action to recover damages resulting from personal injury or wrongful death, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, the jury renders a verdict specifying noneconomic damages . . . in an amount exceeding one million dollars, the court shall review the evidence presented to the jury to determine if the amount of noneconomic damages specified in the verdict is excessive as a matter of law in that it so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption. If the court so concludes, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. . . ."

Hotchkiss School, supra, 326 Conn. 584–88 (*McDonald*, *J.*, concurring). The defendant therefore invites us to revisit and overrule *Munn* and our other decisions concerning remittitur.

For the following reasons, we reject the defendant's argument that the use of the phrase "excessive as a matter of law" in §§ 52-216a and 52-228c evinces a legislative intent to abrogate the common law and to prescribe a de novo standard of review of remittitur decisions. First, the defendant's argument reflects a misunderstanding of the concept of a "matter of law" or "question of law," as those expressions are used in the context of appellate review. This court is authorized to find facts only under a few limited circumstances in which we have original jurisdiction, such as in cases challenging the reapportionment of state electoral districts; see Conn. Const. amend. XXVI (d); and challenges to the rulings of election officials in connection with certain federal elections. See General Statutes § 9-323. In all other matters, our authority is limited to the correction of alleged legal errors. See, e.g., General Statutes § 52-263; *Morgan* v. *Morgan*, 104 Conn. 412, 417–18, 133 A. 249 (1926). What this means is that, in the run-of-the-mill civil or criminal appeal, *all* of the questions that we resolve are, strictly speaking, questions of law. See W. Maltbie, supra, § 8, p. 9; E. Prescott, Connecticut Appellate Practice and Procedure (5th Ed. 2016) § 8-3:1.1, pp. 461–62. This is true even with respect to more fact bound claims, such as sufficiency of the evidence challenges and challenges to the trial court's discretionary rulings, which are subject to highly deferential appellate review.[4] In fact, there are numerous contexts, aside from remittitur, in which we have stated either that we will review for abuse of discretion a determina-

[4] Although we frequently state, as a form of shorthand, that we review questions of law de novo, it would be more accurate to say that we review de novo *pure* questions of law, as well as certain mixed questions involving the application of legal rules or principles to factual circumstances.

tion that a trial court made as a matter of law or that we are unable to say, as a matter of law, that a trial court abused its discretion in a certain regard.[5] Accordingly, the statutory reference to "a matter of law" does not, in and of itself, necessitate a plenary standard of review.

Indeed, long before the enactment of § 52-216a, this court explained that, although the question of whether an award of damages is excessive is one of law, we will review a trial court's determination thereof only for an abuse of discretion. E.g., *Nash* v. *Hunt*, 166 Conn. 418, 428–29, 352 A.2d 773 (1974); see *Gorczyca* v. *New York, New Haven & Hartford Railroad Co.*, 141 Conn. 701, 703, 109 A.2d 589 (1954); see also *Mansfield* v. *New Haven*, 174 Conn. 373, 375, 387 A.2d 699 (1978) ("[i]t cannot be held, as a matter of law, that the jury's award does not fall within the necessarily uncertain limits of just damages or that the court abused its discretion in refusing to set aside the verdict as inadequate"). Accordingly, because § 52-216a merely codified the preexisting common-law standards; see, e.g., *Wichers* v. *Hatch*, 252 Conn. 174, 187, 745 A.2d 789 (2000); there is no reason to conclude, on the basis of the statutory text, that the legislature intended to modify the established standard of review. See, e.g., *Matthiessen* v. *Vanech*, 266 Conn. 822, 838, 836 A.2d 394 (2003)

[5] See, e.g., *Edmands* v. *CUNO, Inc.*, 277 Conn. 425, 435–36, 892 A.2d 938 (2006) (decision to submit to jury claim alleging violation of Connecticut Franchise Act); *Rogers* v. *Board of Education*, 252 Conn. 753, 755, 772, 749 A.2d 1173 (2000) (agency decision upholding termination of teacher's contract); *Young* v. *Data Switch Corp.*, 231 Conn. 95, 100–104, 646 A.2d 852 (1994) (decision to set aside plaintiff's verdict when plaintiff had ratified challenged contract); *El Idrissi* v. *El Idrissi*, 173 Conn. 295, 300–301, 377 A.2d 330 (1977) (denial of visitation rights); *State* v. *Carr*, 172 Conn. 458, 464–65, 374 A.2d 1107 (1977) (evidentiary ruling); *Soybel Drug Co.* v. *Soybel*, 159 Conn. 603, 603, 267 A.2d 442 (1970) (granting of injunction); *Satter* v. *Satter*, 153 Conn. 230, 232, 215 A.2d 415 (1965) (granting of petition to dissolve marriage); *Grievance Committee* v. *Nevas*, 139 Conn. 660, 666–67, 96 A.2d 802 (1953) (refusal to discipline attorney); *Burley* v. *Davis*, 132 Conn. 631, 635, 46 A.2d 417 (1946) (denial of permission to amend complaint).

("[although] the legislature's authority to abrogate the common law is undeniable, we will not lightly impute such an intent to the legislature" [internal quotation marks omitted]).

Moreover, the fact that this court has continued to apply the traditional standard of review to remittitur decisions for more than thirty-five years since the enactment of § 52-216a, with the acquiescence of the legislature, provides further support for the conclusion that the statute was not intended to impose a de novo standard of appellate review. "[I]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determination, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." (Internal quotation marks omitted.) *Spiotti* v. *Wolcott*, 326 Conn. 190, 201–202, 163 A.3d 46 (2017).

The argument of legislative acquiescence is especially compelling with respect to the remittitur statutes. The legislature amended § 52-216a in 1982 to include the "excessive as a matter of law" language. Public Acts

1982, No. 82-406, § 3 (P.A. 82-406). Over the following two decades, this court decided numerous cases in which we continued to deferentially review additur and remittitur decisions governed by § 52-216a. See, e.g., *Gladu* v. *Sousa*, 252 Conn. 190, 191–93, 745 A.2d 798 (2000); *Wichers* v. *Hatch*, supra, 252 Conn. 181; *Meaney* v. *Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 513, 735 A.2d 813 (1999); *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 167, 681 A.2d 293 (1996); *Bartholomew* v. *Schweizer*, 217 Conn. 671, 687, 587 A.2d 1014 (1991); *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 557, 562 A.2d 1100 (1989). At no time did the legislature amend the statute to clarify that remittitur decisions made pursuant to § 52-216a were to be afforded plenary review on appeal. Moreover, in 2005, when the legislature enacted § 52-228c; see Public Acts 2005, No. 05-275, § 10; it again used the "excessive as a matter of law" language to characterize the standard that governs remittitur decisions, in that case in the medical malpractice context. If the legislature, presumably aware of this court's remittitur jurisprudence; see, e.g., *Efstathiadis* v. *Holder*, 317 Conn. 482, 492, 119 A.3d 522 (2015); had wanted to ensure that remittitur decisions made pursuant to § 52-228c would be reviewed de novo, it could have expressly so required. See, e.g., General Statutes § 45a-100 (*l*) (mandating de novo review by Superior Court of federal firearms disability determination by Probate Court). Instead, legislators indicated that their intent was merely to codify the common-law standards that courts had long applied in the remittitur context. See 48 H.R. Proc., Pt. 31, 2005 Sess., pp. 9458, 9504–9505, remarks of Representative Michael P. Lawlor. In view of this history, and given the strong policy arguments in favor of affording deference to the trial court's determination as to whether a damages award is so excessive as to suggest that the jury was motivated by sympathy, partiality, or prejudice; see *Bartholomew* v. *Schweizer*, supra, 217 Conn.

687; we decline the defendant's invitation to overrule our recent remittitur decisions.[6]

[6] To the extent that it is relevant, the legislative history of the 1982 amendment to § 52-216a presents something of a mixed bag. On the one hand, there is reason to believe that the legislature inserted the "excessive as a matter of law" language primarily to ensure that the amended statute satisfied the constitutional standards set forth in our previous decisions. In March, 1982, this court decided *Seals* v. *Hickey*, 186 Conn. 337, 441 A.2d 604 (1982), in which we reviewed the constitutionality of § 52-216a. See id., 341–55. At that time, the statute provided in relevant part: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action, shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of such cause of action . . . *except the court at the conclusion of the trial may deduct from the verdict any amount of money received by any party to such action pursuant to such agreement* not to sue or such release of claim. . . ." (Emphasis added.) General Statutes (Rev. to 1981) § 52-216a. In *Seals*, this court concluded, among other things, that (1) the highlighted language afforded the trial court unfettered and standardless discretion to reduce or to decline to reduce a damages award against one tortfeasor when a joint tortfeasor has made payments to a plaintiff pursuant to a release of claim or other agreement; see *Seals* v. *Hickey*, supra, 352–53; and (2) such discretion impermissibly intruded on the constitutional role of the jury, in part because the statute empowered the trial court to reduce the verdict without offering the plaintiff the option of a new trial. Id., 353. *Seals* also emphasized that the due process clause of the federal constitution requires that the trial court's discretion be cabined such that a jury verdict may be reduced only when it is deemed to be "excessive as a matter of law," as that phrase had been defined in our previous cases. (Emphasis omitted.) Id., 348.

The following month, in April, 1982, in response to this court's decision in *Seals*; see *Peck* v. *Jacquemin*, 196 Conn. 53, 59, 67, 491 A.2d 1043 (1985); the legislature attached to an unrelated education bill an amendment to § 52-216a. See P.A. 82-406, § 3. The amendment eliminated the language that was deemed unconstitutional in *Seals* and replaced it with the following two sentences: "If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. If the court concludes that the verdict is inadequate as a matter of law, it shall order an additur, and upon failure of the party so ordered to add the amount ordered by the court, it shall set aside the verdict and order a new trial." P.A. 82-406, § 3, codified at General Statutes (Rev. to 1983) § 52-216a. In light of this history, the most reasonable interpretation of the statute is that the legislature amended it simply to address the specific constitutional defects that had been identified in *Seals* rather than to modify the well established standard of review of remittitur decisions, and that the "excessive as a matter of law" language was added merely to comport with *Seals* and to leave no doubt that the discretion of the trial court to reduce jury verdicts is not unfettered and standardless.

On the other hand, during the House debates, a cosponsor of the legislation indicated that, in his opinion, the addition of the "matter of law" language

As we explain more fully in part II of this opinion, however, we do agree with the defendant that the present appeal turns largely on a purely legal question, namely, whether a loss of consortium award in a wrongful death action presumptively should not be substantially greater than the noneconomic damages awarded for the wrongful death itself. Our review of that question is unquestionably plenary. See, e.g., *Poole* v. *Waterbury*, 266 Conn. 68, 82, 831 A.2d 211 (2003); *Wichers* v. *Hatch*, supra, 252 Conn. 181–82; see also W. Maltbie, supra, § 188, p. 231 (it is legal error when trial court decides motion to set aside verdict on basis of misconception of law).

II

We turn next to the substance of the defendant's claim. For the reasons set forth hereinafter, we agree with the defendant that a spousal loss of consortium award in a wrongful death action presumptively should not be substantially greater than the wrongful death award[7] itself. We also agree with the defendant that, even when the evidence is considered in the light most

was intended to eliminate the discretionary aspects of the trial court's decision to grant or deny remittitur. 25 H.R. Proc., Pt. 19, 1982 Sess., pp. 6178, remarks of Representative Alfred J. Onorato. His only explanation for that comment was that the amendment would bring Connecticut law in line with the law of other states and federal courts. Id. Our research reveals, however, that many jurisdictions afforded their trial courts rather broad discretion in these matters at that time, and also that no single standard governing remittitur has prevailed outside of Connecticut. See, e.g., S. Cravens, "The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law," 42 Loy. L.A. L. Rev. 247, 250 (2008); I. Sann, "Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives," 38 Case W. Res. L. Rev. 157, 183 (1988). Research presented in the brief of amicus curiae Connecticut Trial Lawyers Association bears out those conclusions. Accordingly, we do not find in the legislative history any guidance sufficiently clear to overcome a decades long and nearly unbroken tradition of reviewing remittitur decisions for an abuse of discretion. Of course, if the legislature wishes to alter or otherwise reconsider that standard, as Justice McDonald has suggested; see *Munn* v. *Hotchkiss School*, supra, 326 Conn. 580 (*McDonald*, *J.*, concurring); it is free to do so.

[7] For purposes of this discussion, unless otherwise noted, all references to wrongful death awards and loss of consortium awards should be understood to refer only to noneconomic damages awards.

favorable to sustaining the verdict and the trial court's denial of remittitur, this is not among those unusual cases in which a substantially greater loss of consortium award may be justified.

A

We begin by briefly reviewing the history of and modern rules governing loss of spousal consortium claims. "The loss of consortium action had its genesis in early Roman [l]aw, when the paterfamilias, or head of the household, had an action for violence committed against his wife, children or slaves on the theory they were so identified with him that the wrong was to himself. By the [t]hirteenth [c]entury, the common law had adopted the idea in part, altering it to a damage[s] action for loss of services of the servant because of violence. By the early [s]eventeenth [c]entury in England, since the station of a wife under early common law was that of a valuable servant of the husband who could not sue in her own name, the action was extended to include the loss of her domestic services. Over the years, emphasis shifted away from loss of services toward a recognition of the intangible elements of domestic relations, such as companionship and affection." *Taylor* v. *Beard*, 104 S.W.3d 507, 508–509 (Tenn. 2003).

It was not until 1950, more than one century after a majority of states had enacted married women's property acts, that the first American court held that, in view of the modern legal equality of wife and husband in the marital relationship, a woman was permitted to bring a claim against a tortfeasor for the negligent deprivation of her husband's consortium. *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir.) (overruled in part on other grounds by *Smither & Co.* v. *Coles*, 242 F.2d 220 [D.C. Cir.], cert. denied, 354 U.S. 914, 77 S. Ct. 1299, 1 L. Ed. 2d 1429 [1957]), cert. denied, 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624 (1950); *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 489, 408 A.2d 260

(1979); see also T. Demetrio, "Loss of Consortium: A Continuing Evolution," Trial, September, 2000, pp. 42–43. While most jurisdictions quickly followed suit and allowed wives as well as husbands to bring spousal consortium actions, Connecticut was one of a handful of states that initially followed a completely different approach. See *Hopson* v. *St. Mary's Hospital*, supra, 490. In *Marri* v. *Stamford Street Railroad Co.*, 84 Conn. 9, 78 A. 582 (1911), this court recognized that the equal rights of men and women under modern marital law meant that either both genders must be able to maintain an action for loss of consortium or neither may. See id., 22. Reasoning that the action for loss of consortium not only originated in but also was inextricably tied to an obsolete socio-legal paradigm under which only the husband could claim a right to spousal services, this court concluded that the reasons that once justified the rule had ceased to exist and, therefore, that an action for loss of consortium would no longer lie for either spouse. Id., 22–24.

It was not until 1979, in *Hopson*, that we reversed course, overruled *Marri*, and held that either husband or wife (deprived spouse) may bring a claim for loss of consortium arising from a personal injury to the other spouse (impaired spouse) caused by the alleged negligence of a third person (tortfeasor). *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494–96. Two aspects of our decision in *Hopson* are especially noteworthy for purposes of this appeal.

First, we acknowledged in *Hopson* that there was a risk that recognizing a cause of action for loss of spousal consortium that was divorced from the traditional marital paradigm under which it had originated could lead to "double recover[ies]" and other "improper verdicts" grounded in the "remote and indirect nature of the consortium injury . . . ." Id., 491, 494; see also J. Lippman, "The Breakdown of Consortium," 30 Colum. L. Rev. 651, 654 (1930). To mitigate such concerns, we

emphasized that "proper instructions to the jury and *close scrutiny of . . . verdicts*" were warranted. (Emphasis added.) *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494. Accordingly, even though we apply a deferential standard of review to ordinary remittitur decisions; see part I B of this opinion; it is clear that awards that appear to be outliers or to lack evidentiary support merit particularly careful review.[8] See *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 590, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974) ("appellate tribunals have amply demonstrated their ability to control excessive [loss of consortium] awards"); see also *Champagne* v. *Raybestos-Manhattan, Inc.*, supra, 212 Conn. 551–52, 557–58 (in light of scant evidence to support loss of consortium claim, $320,000 award was excessive as matter of law in that it shocked court's sense of justice, and trial court abused its discretion in declining to set aside verdict).

Second, in *Hopson*, this court retained the traditional taxonomy of loss of consortium damages. We recognized that recovery is possible both for loss of the household services performed by the impaired spouse and for the various "intangible" or "sentimental" blessings of marriage, including sexual relations, affection, society, companionship, and moral support. (Internal quotation marks omitted.) *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 487–88, 494. We explained that a deprived spouse may recover under each such category

[8] We note that closer scrutiny is also warranted in the present case because it involves an award of noneconomic damages in excess of $1 million arising from medical malpractice. The text and the legislative history of § 52-228c suggest that legislators were of the view that such awards are permissible only in exceptional cases, such as when a young, stay-at-home mother sustains injuries that, while not resulting in significant economic damages, can be expected to seriously impair her family's ability to function and flourish. See, e.g., 48 H.R. Proc., supra, pp. 9458, 9520–22, remarks of Representative Lawlor; see also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 19, 2005 Sess., p. 5838, written testimony of Professor Neil Vidmar (stating that outlier medical malpractice awards frequently are reduced upon appellate review).

of damages, as long as the jury is properly instructed as to its availability in a particular case. See id., 494. At the same time, however, we acknowledged that the different types of damages never have been uniformly defined; id., 488; and also that, at least with respect to the modern institution of marriage, these various elements of consortium all merge into a "conceptualistic unity"; (internal quotation marks omitted) id., 492; which can make it difficult to assess loss of consortium damages. Id., 493. Accordingly, neither in *Hopson* nor in our subsequent loss of consortium cases have we attempted either to catalog or to clearly define the range of potential loss of consortium damages.

Finally, we note that, with respect to the period of time over which loss of consortium damages may accrue, "[a]t common law, a spouse's right to recover damages for loss of consortium was strictly limited to the period of the marriage itself. Once the injured person died from his injuries, the right of his spouse to recover damages for loss of consortium as a result of those injuries was cut off, in the sense that no damages could be awarded for any of her postmortem losses. . . . With the enactment of General Statutes § 52-555a, however, the bar to recovering damages for postmortem loss of consortium was abrogated. . . . Under [that] statute, the surviving spouse of an injured person who dies as a result of tortiously inflicted injuries can now recover damages from the tortfeasor for any loss of consortium she has suffered or will probably suffer as a direct and proximate result of her spouse's wrongful death. Logically, the only temporal limitation [on] the surviving spouse's right to recover damages for postmortem loss of consortium is the period of time in which the plaintiff and her deceased spouse would probably have continued to live together as a married couple, enjoying each other's companionship, society and support, were it not for the defendant's tortious conduct." (Citations omitted.) *Blake* v. *Neurological*

Specialists, P.C., Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X02-CV-94-0155265-S (May 9, 2003). In the present case, the jury reasonably could have found that, but for the defendant's negligence, the decedent would have lived as long as fifteen additional years. Accordingly, both the wrongful death and the loss of consortium awards may be presumed to span a fifteen year period.

B

In the present case, the defendant does not deny that the plaintiff, following the sudden and tragic loss of her husband of forty-five years, suffered a substantial loss of consortium. Rather, the challenge is to the *disparity* between the $1.2 million wrongful death award to the decedent's estate and the $4.5 million loss of consortium award that the jury awarded to the plaintiff. It is the defendant's position that this disparity, which implies that the plaintiff's loss of her spouse was $3.3 million, or 275 percent, more devastating than was his complete and total loss of all of life's enjoyments, is fundamentally irrational and must, therefore, have been the result of improper sympathy, partiality, or prejudice.

To explain why this result is irrational, the defendant posits that happy marriages are all alike, insofar as the companionship, support, intimacy, and love shared by a husband and wife[9] normally are equivalent from the perspective of both parties. A necessary correlate of that postulate, in the defendant's view, is that a loss of consortium award ordinarily should be no greater than the corresponding wrongful death award of which it is derivative. The decedent spouse presumptively suffers the same deprivations as does the deprived spouse—a total loss of marital affection, companionship, and sexual congress—all of which presumably are encom-

[9] All of the principles and analysis contained in this opinion apply with equal force to same-sex married couples. See *Mueller* v. *Tepler*, 312 Conn. 631, 649, 95 A.3d 1011 (2014). We use the generic phrase "husband and wife" merely for convenience.

passed within the wrongful death award under the auspices of the loss of life's enjoyments. But the wrongful death award also should compensate the decedent's estate for the decedent's loss of all of life's *other*, nonmarital enjoyments, as well as for any pain and suffering and other noneconomic damages resulting from the fatal injury. Thus, the defendant argues, a rational jury's loss of consortium award ordinarily will be lower than its noneconomic damages award to the decedent's estate.

We question whether matrimonial bliss necessarily involves such parities, either as a matter of definition or of experience. One could imagine a successful marriage that nevertheless is asymmetrical in one respect or another. Still, we need not fully embrace an Anna Karenina model of marriage[10] to recognize that rarely does a jury award—let alone an appellate tribunal uphold—a loss of consortium award that is multiples greater than the underlying award compensating the impaired spouse. See *Kingman* v. *Dillard's, Inc.*, 721 F.3d 613, 615, 620 (8th Cir. 2013); see also *Arpin* v. *United States*, 521 F.3d 769, 771, 777 (7th Cir. 2008) (remanding to District Court to reevaluate $7 million loss of consortium award in light of typical ratio of loss of consortium to wrongful death awards); *Wochek* v. *Foley*, 193 Conn. 582, 587, 477 A.2d 1015 (1984) ("[a]lthough other cases are not determinative of the proper amount of damages in this case, they do offer some guidance in determining the range of those necessarily flexible limits of fair and reasonable compensation by which the amount of the verdict must be tested" [internal quotation marks omitted]); see generally J. Isham, annot., "Excessiveness and Adequacy of Damages Awarded for Noneconomic Loss Caused by Personal Injury or Death of Spouse," 61 A.L.R.4th 309 (1988 and Supp. 2018) (citing cases).

[10] See L. Tolstoy, Anna Karenina (R. Pevear & L. Volokhonsky trans., Penguin Books 2000) p. 1 ("[a]ll happy families are alike; each unhappy family is unhappy in its own way").

And, in fairness, the defendant does not ask us to adopt a rigid, bright-line rule to the effect that a loss of consortium award never can exceed the compensation for the underlying spousal injury. Rather, the proposal is simply that we apply a presumption that a direct injury to one spouse is no less harmful, everything considered, than the concomitant loss of consortium suffered by the deprived spouse, insofar as the impaired spouse ordinarily will experience more or less comparable losses of physical and emotional affection, in addition to being the one who suffers all of the direct effects of the injury itself. That presumption can be overcome, however, by evidence that the marriage was an unequal one, in which the deprived spouse relied more heavily on the support of or derived far more satisfaction than the impaired spouse, or that the impaired spouse somehow had less to lose. See, e.g., *Kingman* v. *Dillard's, Inc.*, supra, 721 F.3d 621.

That rule, which strikes us as eminently reasonable, has been applied by courts both in Connecticut and in other jurisdictions. See, e.g., *Kingman* v. *Dillard's, Inc.*, supra, 721 F.3d 615, 620 (concluding that loss of consortium award that was more than five times greater than award to impaired spouse was disproportionate, and observing that "it would be a highly unusual case in which the consortium award exceeded the damages award to the principal plaintiff" [internal quotation marks omitted]); *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 376, 783 A.2d 36 ("the derivative spouse may not recover more than the injured spouse"), cert. denied, 258 Conn. 938, 786 A.2d 426 (2001); *Blake* v. *Neurological Specialists, P.C.*, supra, Superior Court, Docket No. X02-CV-94-0155265-S (remitting $2 million loss of consortium award in absence of any evidence that surviving spouse derived more satisfaction from marriage than decedent spouse had derived from all of life's pleasures); see also *Wheat* v. *United States*, 860 F.2d 1256,

1261 (5th Cir. 1988) (concluding that loss of spousal consortium award of $1.8 million was "grossly disproportionate" to $3 million wrongful death award, notwithstanding that deprived husband had to endure wife's painful four year battle with undiagnosed, untreated cancer); *Rascop* v. *Nationwide Carriers*, 281 N.W.2d 170, 173 (Minn. 1979) (reasonableness of loss of consortium award must be assessed in light of damages awarded to impaired spouse); M. McLaughlin, "Wife's Damages for Loss of Consortium," 10 Am. Jur. Proof of Facts 3d 97, 153, § 35 (1990) ("there should be some reasonable relationship between the size of a verdict awarded in a consortium action and the amount recovered by the [impaired] spouse"); 2 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2006) § 8.9, pp. 661–62 (observing that most incidents of marriage are equally valuable to both spouses). This rule also is consistent with our observation in *Champagne* v. *Raybestos-Manhattan, Inc.*, supra, 212 Conn. 556, that a derivative action such as one for loss of consortium cannot afford greater relief than would be permitted under the predicate action. Notably, in *Champagne*, we held that a loss of consortium award that was more than twice as large as the corresponding wrongful death award was excessive, although we did not expressly rely on the rule that we have articulated in the present case. Id., 558; see id., 516–18.

In adopting this rule, we recognize that loss of consortium damages, by their nature, defy any precise mathematical computation. See *Shegog* v. *Zabrecky*, 36 Conn. App. 737, 752, 654 A.2d 771, cert. denied, 232 Conn. 922, 656 A.2d 670 (1995). Still, an award of noneconomic damages to the impaired spouse, awarded at the same time, by the same finder of fact, provides a natural and meaningful benchmark by which we may evaluate the reasonableness of the corresponding loss

of consortium award.[11] When the latter is substantially greater than the former, a suspicion naturally arises that the loss of consortium award was the product of sympathy or partiality toward the deprived spouse or prejudice against the defendant. To uphold such an award, a reviewing court must be able to point to evidence that explains or justifies the unusual disparity. Cf. *Arpin* v. *United States*, supra, 521 F.3d 776–77.

C

Because the trial court in the present case did not have the benefit of the guidance that we have provided herein and, therefore, did not apply this presumption, on review, we simply consider whether there was sufficient evidence pursuant to which a reasonable jury could have found that such a disparity was justified. The evidence of the plaintiff's loss of consortium, although certainly sufficient to warrant a significant award, was relatively scant. Such evidence was limited to brief and largely conclusory testimony by the plaintiff herself and by her daughter, Sherri Capaldo, regarding the plaintiff's relationship with the decedent.

As we noted, loss of consortium damages may be broadly segmented into household services and the more intangible or sentimental aspects of a marriage. See, e.g., 3 Restatement (Second), Torts § 693 (1), p. 495 (1977). With respect to household services, the plaintiff and Capaldo testified that the decedent performed all of the repairs on their home, maintained the boat that they kept at their vacation cottage, and made annual improvements to the cottage, such as adding a hearth, fireplace, and bar. The plaintiff also indicated that the decedent was able to fix the refrigerator and stove, and was skilled at mechanical, plumbing, electrical, concrete, and wood work, but that she "took care of the

[11] If a party so requests, it would be appropriate to instruct the jury regarding this presumption.

house." She further testified that, following the decedent's death, she had to plow the snow. Beyond that, there was no evidence by which the jury could have assessed and quantified what specific chores and household services the decedent performed, how much time he spent performing such chores, the financial or replacement value of his contributions, or the burden that the plaintiff now faces in having either to perform the chores herself or to hire someone else to perform them. It has been suggested that, to recover for such losses, "the [deprived spouse] must demonstrate the reasonable cost of hiring help to perform those household services formerly contributed by [the impaired spouse]. It is not enough to merely state that the [impaired spouse's] services have been diminished . . . ." (Footnote omitted.) M. McLaughlin, supra, 10 Am. Jur. Proof of Facts 3d 125, § 14; see also id., 126 (market value of lost services may be proved by expert testimony). In the present case, no evidence was presented from which the jury could have concluded that the plaintiff's loss was somehow atypical, let alone to support a multimillion dollar verdict that was well in excess of the underlying wrongful death award.

Turning next to the intangible, sentimental side of the ledger, we note that no evidence was presented at trial regarding several of the most fundamental aspects of married life. For example, several courts have indicated that a predominant element of a loss of spousal consortium claim is the diminution or loss of the sexual relationship and/or physical affection. See, e.g., *Ossenfort* v. *Associated Milk Producers, Inc.*, 254 N.W.2d 672, 685 (Minn. 1977); J. Isham, supra, 61 A.L.R.4th 324, § 2 [j]. In this case, no evidence was presented that the plaintiff and the decedent had maintained a sexual relationship or continued to engage in any form of physical affection.

Nor was there any specific evidence as to how, if at all, the decedent helped to meet the plaintiff's emotional needs or to provide her with affection, moral support, or other forms of emotional consortium. Again, the scant evidence that was presented at trial is primarily limited to conclusory testimony, such as that the decedent loved being around his family and that, after a nearly fifty year relationship, the plaintiff's life without him was "very difficult" and "very lonely . . . ."

When the plaintiff did open a broader window into her life with her late husband, her testimony raised more questions than it answered, calling into question not only the couple's intimacy but also the quantity, if not the quality, of the time they spent together. There was extensive testimony, for example, suggesting that the decedent had been a workaholic. The plaintiff testified that the garage where he worked "meant everything to [him]," that he worked seven days per week and rarely took family vacations, and that, most days, he rose early, went straight to work, worked until between 8 and 11 p.m., and then, upon returning home, often proceeded to eat, shower, and go to bed. When asked to list the decedent's two or three favorite places to spend his time, the plaintiff responded "Two or three? . . . The garage, the cottage . . . [and] home."

Capaldo's testimony was consistent with that of the plaintiff. She indicated that her father had been a very hard worker who spent a lot of time at the garage and was constantly tinkering or working on projects, even when on vacation at the family cottage.[12]

When asked about the decedent's hobbies, the plaintiff indicated that he enjoyed attending car shows with

[12] We note that the trial court, in denying the motion for remittitur, relied on the fact that "[t]he couple spent much of their free time together . . . ." It is unclear on what basis the trial court made this finding, as it does not appear to have direct support in the record.

his friends, cutting wood, and snow and jet skiing. Although the jury might reasonably have understood her testimony to mean that she had joined the decedent in his boating and jet skiing activities and had once accompanied him to an auto race, the plaintiff testified that she was not a snow skier, and there was no indication that she attended the car shows, chopped wood with him, or shared in his other projects and pastimes.

Finally, there was undisputed evidence that the decedent was a quiet, private man who did not often express his feelings and did not confide in his wife with respect to important personal issues, such as his health problems. In fact, the plaintiff was not aware of several of the medical conditions from which the decedent suffered, or of the various medications that he was taking for those conditions.

In short, although there is no reason to doubt that the plaintiff and the decedent enjoyed a long, happy life together, and that his loss left her feeling lonely and isolated, the record is largely devoid of any specific evidence from which the jury reasonably could have determined that the decedent met her needs for romance, affection, companionship, and intimacy to such a degree as to justify an award for consortium so much greater than her husband's compensatory award.[13] We perceive nothing in the record that indicates that the plaintiff was so uniquely dependent on the decedent, or derived so much joy from his presence, that her loss of his consortium was nearly four times

[13] We note that, although the defendant has not challenged the overall size of the $4.5 million loss of consortium award, in very few instances have loss of consortium awards of this magnitude been sustained. See, e.g., *Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778, 785 (5th Cir. 1983); J. Isham, supra, 61 A.L.R.4th 330–31, 348, §§ 3 and 14; see also T. Demetrio, supra, p. 45 ("large [loss of consortium] verdicts are rare").

as devastating as his complete loss of life and all of its pleasures.[14]

D

The plaintiff's primary response to the defendant's arguments on appeal is that the jury reasonably could have found that the fifteen years of suffering that she will endure as a result of the loss of the decedent's consortium far exceeds his loss of all of life's enjoyments during that same period of time because she lost various things that he did not.[15] The plaintiff points specifically to four harms that, although arising from or relating to the loss of the decedent's consortium, are purportedly unique to her: loss of the household services that the decedent provided; loss of his companionship; loss of his financial support; and the emotional suffering the plaintiff experienced upon observing his tragic final days and then having to make the heart wrenching decision to terminate his life support. The defendant responds that each of these losses either overlaps with the losses for which the decedent's estate was compensated or is not encompassed within loss of consortium damages and, therefore, was not properly part of the jury's calculations.[16] We consider each alleged harm in turn.

1

With respect to the services performed by the decedent, we already have observed that, although the dece-

[14] The jury was specifically instructed, with respect to the wrongful death award, that it could award damages to compensate the decedent's estate for the destruction of the decedent's capacity to enjoy life's activities, "including family, work, recreation and other aspects of life."

[15] The plaintiff does not deny, however, that the decedent lost many things that she did not; nor does she attempt to weigh the value or diminish the severity of those losses.

[16] The defendant also contends that certain of these arguments are not preserved and, therefore, are not properly before this court. In light of our resolution of the appeal, we need not resolve those claims.

dent undoubtedly performed various household repair and maintenance services, the plaintiff presented no evidence on the basis of which the jury could have quantified the value of those services. There certainly was no basis for concluding that the annual costs associated with maintaining and repairing the couple's home and their vacation cottage, or the noneconomic value to the plaintiff in having the decedent reliably perform those tasks, amounted to more than a tiny fraction of the $4.5 million loss of consortium award.

Equally important, the undisputed testimony was that the decedent did not consider repairs and home improvement projects to be chores. Rather, his daughter testified that he was a man who loved tinkering with things and always needed to be busy working on projects and helping others. Indeed, in his closing argument to the jury, the plaintiff's counsel emphasized how the decedent "lost his work, his family garage, all the creation, all the problem solving, the building, the rebuilding, the restoring, the fixing, the helping others, the pride, the sense of satisfaction and accomplishment." Accordingly, we must assume that much of the value of the household services that the plaintiff lost also would have counted as losses from the decedent's perspective, in that he lost the opportunity to engage in one of his favorite leisure activities while serving his family. There is no basis, then, for concluding that lost household services account for the substantial differential between the loss of consortium and wrongful death awards in this case.

2

Much the same can be said of companionship. Although companionship undoubtedly is a core aspect of marital consortium, and although the plaintiff's permanent loss of her life partner justifies a sizable award of damages, there is no evidence in the record that

would support a loss of consortium award that is multiples greater than the corresponding wrongful death award. All of the time the decedent spent together with the plaintiff she likewise spent with him, and there is nothing to suggest that he was any more affectionate or supportive than was she.

In order to explain why the plaintiff's loss of the decedent was somehow much worse than his loss of his wife, the plaintiff appears to make the philosophical argument that it is better to be dead, and presumably unable to miss one's spouse, than to remain alive and to suffer the pangs of loss. Although common experience would seem to belie the plaintiff's theory, we need not grapple with such metaphysical questions in the present case because the plaintiff never claimed at trial that her relationship with the decedent was an unequal one or that his losses were somehow minimized because he is now in a better place. Quite the contrary; in his closing argument, the plaintiff's counsel focused his discussion of damages almost exclusively on the harms suffered by the *decedent*. In cataloging the decedent's losses, counsel began by emphasizing that the decedent "lost his family; he lost [his wife] . . . ." Primarily, though, counsel focused on the fact that the decedent had suffered the ultimate deprivation: loss of his life. "[T]he biggest loss of all," he informed the jury, "[is] the loss of a human life. . . . [T]he loss of life is massive." Counsel repeatedly asked the jury to award wrongful death damages in the neighborhood of $5.5 to $5.7 million because the decedent had lost his life rather than merely suffer a disabling injury. Counsel even rhetorically asked the jury, "[h]ow much would you give up for the loss of your life? What's that worth? It's substantial."

In explaining the magnitude of the decedent's loss, counsel particularly sought to focus the jury's attention on all of life's countless small pleasures that the dece-

dent had lost, beyond his family, his work, his home, and his leisure time: "[H]e lost so much more than that. He lost all the things that you and I take for granted every single day. The smell of coffee in the morning, putting on your favorite pair of blue jeans, what it feels like when your dog curls up next to you at night and watches [television] with you, anticipating what the holidays are [going to] feel like, the feeling that you get when somebody you know takes the time to wish you happy birthday on your birthday. He missed hearing, thank you for helping me, thank you for solving my problem; no one else has been able to do that. The pride, the satisfaction, all of those pleasures that come from family relationships, relationships with friends, teaching others, learning from others, experiencing new things, experiencing old things, again, loving others and being loved by others. He lost the opportunity to experience all things, physical, spiritual, mental and emotional, that our culture and the world . . . provide for him."

By contrast, counsel's sole reference to the plaintiff's loss of the decedent's consortium was the following: "Whatever amount you decide to compensate [the plaintiff] for the pain and the loneliness and all of her personal losses from being without her husband for the next nine and [one-half] years, I'll leave that to you . . . ." The plaintiff having tried the case in this manner, we find little to commend her theory on appeal that her losses were somehow more profound than those of the decedent.[17]

[17] We further observe in this respect that, during his closing argument, the plaintiff's counsel repeatedly opined that an award of between $5.5 and $5.7 million would represent fair compensation for the *decedent's* injuries. The trial court then instructed the jury that "[a]ny damages awarded in this case relating to the harm suffered by [the decedent] would go to the estate and not simply to [the plaintiff]. Any damages awarded on [the plaintiff's] loss of consortium claim will be awarded directly to her." Ultimately, the jury awarded $5.7 million in damages, consistent with counsel's request but allotted the majority of that sum directly to the plaintiff rather than to the decedent's estate.

The plaintiff next argues that a greater loss of consortium award was necessary to compensate her for the loss of the decedent's financial support. As a general matter, we agree with the defendant that, when a person injured by another's negligence loses the capacity to financially support his or her family, compensation for that loss should be awarded directly to the impaired spouse and—to avoid double recovery—not to the deprived spouse bringing a derivative consortium claim. See, e.g., 3 Restatement (Second), supra, § 693, comment (f), p. 497; W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 125, p. 933; J. Litwin, annot., "Measure and Elements of Damages in Wife's Action for Loss of Consortium," 74 A.L.R.3d 805, 813, § 5 (1976); see also 32 H.R. Proc., Pt. 14, 1989 Sess., p. 4862, remarks of Representative Jay B. Levin (statutory loss of consortium claim in wrongful death action is for noneconomic damages). In the present case, the plaintiff neither sought nor established that the decedent suffered any financial losses, other than medical expenses.

The plaintiff's argument appears to be that the present case is unique insofar as the only way to preserve

We cannot speculate as to the jury's rationale for allocating the awards as it did. See *Champagne* v. *Raybestos-Manhattan, Inc.*, supra, 212 Conn. 537. We merely note that, if the trial court were to determine on remand either that the jury misunderstood the court's instructions or that damages meant to compensate for the decedent's injuries had been reallocated as loss of consortium damages to ensure that they were awarded to the plaintiff, that would provide an independent basis for remitting the outsized loss of consortium award. Because the issue of additur is not before us, we express no opinion as to whether the estate, should it file a motion for additur on remand, might be entitled to a corresponding additur under those circumstances. See Practice Book § 16-35 (judicial authority may, for good reason, extend time for filing motion for additur). Nevertheless, we note that the fact that a loss of consortium award presumptively should not overshadow the corresponding wrongful death award does not imply that remittitur of the former, rather than or in tandem with additur of the latter, is necessarily the appropriate remedy.

the sale equity in the decedent's automotive repair business was for the plaintiff to shutter her own greenhouse businesses and temporarily manage the repair garage until various environmental issues had been resolved and a sale could be completed. Even if we were to assume, for the sake of argument, that those circumstances justify compensating the plaintiff, rather than the decedent's estate, for any financial losses resulting from his death, her argument would fail for at least two additional reasons.

First, the jury was never charged that loss of consortium encompasses financial losses. Rather, the court defined the claim as follows: "Loss of [c]onsortium is a suit by a spouse for the loss of affection, dependence and companionship . . . . The term 'consortium' encompasses the services of the spouse and the variety of intangible relations which exist between spouses, including affection, society, companionship and physical intimacies . . . ." Accordingly, there is no reason to believe that the jury's $4.5 million loss of consortium award included financial damages.

Second, no evidence was presented at trial pursuant to which the jury could have quantified the plaintiff's financial losses. There was no evidence as to how much income she lost as a result of having to close her greenhouses; nor was there evidence establishing how long the repair garage was likely to require her presence. Although it is true that the more intangible types of loss of consortium damages are not readily quantified; see, e.g., *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494; M. McLaughlin, supra, 10 Am. Jur. Proof of Facts 3d 126, § 15; financial losses are compensable only to the extent that they are supported by evidence and are not speculative. See, e.g., *Earlington* v. *Anastasi*, supra, 293 Conn. 207–208; cf. *Hawkins* v. *Garford Trucking Co.*, 96 Conn. 337, 341, 114 A. 94 (1921). Accordingly, we reject the plaintiff's argument that the

deprivation of the decedent's financial support justifies a loss of consortium award that far exceeds the $1.2 million wrongful death award.

4

Finally, the plaintiff contends that the disproportionate loss of consortium award was justified by virtue of the fact that she experienced and will continue to experience suffering relating to the loss of her husband in general and, specifically, from having to make the painful choice to terminate his life support. The trial court appears to have embraced this argument in denying the defendant's motion for remittitur. The court justified its decision by explaining that "[the decedent's] unexpected death brought to a painful and tragic end a union [that] had endured [one] half century. Their last days together were defined by the difficult decisions [the plaintiff] had to make in connection with the termination of life support . . . ."

a

As we previously discussed, there is no doubt that the plaintiff may recover for the loss of the decedent's companionship. To the extent that a meaningful distinction can be drawn, we also agree with the plaintiff that she may recover not only for the deprivation of the happiness and other positive feelings that she would have derived from the decedent's company, but also for having to endure the sadness, loneliness, and other negative feelings that his loss evoked. See *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 493 (loss of consortium encompasses mental and emotional anguish); J. Isham, supra, 61 A.L.R.4th 328–29, § 2 [n] (same). As we further explained, however, we reject the plaintiff's argument that, because deceased individuals are presumably no longer able to experience either happiness or sadness, such losses accrue only to her side of the ledger. That is not how the case was argued to the jury,

and we are not aware of any court that has recognized that the suffering of those who survive may be more tragic than the complete loss of life itself. Accordingly, although we in no way minimize the plaintiff's anguish over the tragic and sudden loss of the decedent, we are not persuaded that her suffering justifies an award that is multiples greater than the underlying wrongful death award.

b

A different question is posed by the fact that it fell to the plaintiff to make the heart wrenching decision to remove the decedent from life support and allow him to die. At trial, the plaintiff described this choice as "unimaginable" and "probably the worst decision any human being could make for another human being." It apparently was the view of the trial court that, although the jury was never expressly instructed that it could consider the hospital experience and life support decision when awarding damages, the resulting trauma that the plaintiff experienced did legitimately enter into the jury's calculations. The defendant contends, and we agree, that, although the outer boundaries of lost consortium may be uncertain, the cause of action is not so expansive as to encompass harms of this sort. We reach this conclusion for two reasons.

First, the trauma associated with having to make a difficult, end of life decision for a loved one is a harm that differs in kind from the types of injuries traditionally associated with loss of consortium. At common law, the principal marital rights of the husband and, by extension, the core components of a loss of consortium claim, were (1) the household services of the wife, and (2) her sexual relations. See, e.g., E. Holbrook, "The Change in the Meaning of Consortium," 22 Mich. L. Rev. 1, 2 (1923); J. Lippman, supra, 30 Colum. L. Rev. 652–53. During the early 1900s, the concept was expanded in

America to include the loss of a spouse's love, affection, and companionship, as well. See, e.g., T. Demetrio, supra, p. 42; see also J. Lippman, supra, 662. We are not aware of any published case, however, in which a traumatic decision or end of life experience of the type at issue in the present case has been deemed to constitute a loss of spousal consortium.[18]

The reason for this, presumably, is that all of the harms traditionally associated with loss of spousal consortium involve the actual loss of some benefit or component of the marital relationship. The deprived spouse is denied the impaired spouse's services, sexual partnership, companionship, and/or emotional support over a significant period of time. Such losses may *evoke* emotional suffering, and the intensity and duration of that suffering may be factors in assessing the scope of the injury, but, at its core, the compensable injury is the prolonged deprivation itself.

Although the plaintiff's decision to terminate life support played a tragic and unavoidable role in the loss of the decedent, it is not that loss that is now at issue. The defendant acknowledges that the plaintiff is entitled to compensation for the permanent loss of all of the decedent's services and support, but merely observes that her losses are no greater than his own. The question we must resolve, however, concerns the plaintiff's need to make a sudden, emotionally wrenching decision, and the trauma that she presumably experienced as a result. It is difficult to characterize that decision as a loss of consortium, insofar as it did not involve the deprivation of any of the benefits or blessings of marriage. Rather,

[18] We note that one legal source purports to offer a comprehensive list of the various factors that may be considered in connection with a loss of spousal consortium claim. See M. McLaughlin, supra, 10 Am. Jur. Proof of Facts 3d 158–61, § 39. Although numerous types of mental anguish and emotional strain are identified, none is even remotely akin to the harm claimed in the present case. See generally id., 159–61.

we agree with the defendant that the experience is more properly classified under the rubric of extreme emotional distress. Cf. *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 571, 580–92, 113 A.3d 932 (2015) (clarifying elements of bystander emotional distress claim).

At least two cases support the conclusion that having to terminate the decedent's life support, while undoubtedly traumatizing, is not the sort of harm that falls within the ambit of loss of consortium and, therefore, cannot justify the sizable disparity between the two awards in this case. See *Santa* v. *United States*, 252 F. Supp. 615 (D.P.R. 1966); *O'Connell* v. *Bridgeport Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-99-0362525-S (May 17, 2000). In each case, recovery was sought for emotional suffering relating to end of life issues. Although loss of consortium damages were deemed to be available, the suffering relating to end of life care was authorized under a distinct legal theory. See *Santa* v. *United States*, supra, 619–22 (plaintiff wife had valid claim under state mental anguish law, rather than as loss of consortium, arising from ordeal in which husband died as wife tried unsuccessfully to have him hospitalized); *O'Connell* v. *Bridgeport Hospital*, supra (depriving wife of opportunity to make decision regarding removal of husband's life support deemed evidence of negligent infliction of emotional distress, whereas inability to be present with husband during his final hours deemed loss of consortium). Legal scholars have likewise treated bystander distress as distinct from the types of harm that comprise loss of consortium. See, e.g., L. Raisty, "Bystander Distress and Loss of Consortium: An Examination of the Relationship Requirements in Light of *Romer* v. *Evans*," 65 Fordham L. Rev. 2647, 2649–57 (1997).

Second, and relatedly, our bystander distress cases, while allowing a family member to recover for the

extreme emotional distress experienced upon perceiving an injury inflicted by gross medical negligence; see *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 580–81; have closely cabined the circumstances under which such recovery is available. See id. Of the various conditions that we established in *Squeo*, three are of particular importance for the present case. First, relying on *Clohessy* v. *Bachelor*, 237 Conn. 31, 52, 675 A.2d 852 (1996), we reiterated that recovery for bystander emotional distress is available only when "the bystander's emotional distress is caused by the contemporaneous sensory perception of the event or conduct that causes the accident or injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the primary victim's condition or location . . . ." *Squeo* v. *Norwalk Hospital Assn.*, supra, 582. Second, expounding on *Clohessy*, we determined that "a bystander cause of action will lie only when the bystander's psychological injuries are both severe and debilitating, such that they warrant a psychiatric diagnosis or otherwise substantially impair the bystander's ability to cope with life's daily routines and demands." Id., 585. Third, we held that, in the medical malpractice context, bystander recovery is available "only when the injuries result from gross negligence such that it would be readily apparent to a lay observer." Id., 560. "This additional element reflect[ed] [this court's] determination that bystander claims should be available in the medical malpractice context only under extremely limited circumstances." Id.

In the present case, the plaintiff did not assert a claim for bystander emotional distress, and there was no finding either by the jury or by the trial court that any of these conditions were satisfied. On the record before us, it is by no means clear—indeed, it appears unlikely—that the plaintiff could establish that (1) the defendant's conduct in failing to connect the decedent's epicardial

pacing electrodes constituted the sort of gross negligence of which a layperson would have been aware, (2) the plaintiff perceived the injury to the decedent more or less contemporaneously with the infliction of that injury, or (3) the plaintiff suffered severe and debilitating emotional distress as a result. As the cited cases indicate, the anguish and trauma that the plaintiff experienced upon discovering her husband's condition and having to terminate his life support are quintessential bystander emotional distress injuries. If we were to allow a plaintiff to recover for those injuries under the distinct rubric of loss of consortium, under circumstances in which she is unable to satisfy our carefully crafted standards for bringing a bystander liability claim, then those standards would cease to serve a meaningful function, and the delicate balance that was struck when we recognized a limited cause of action for bystander distress in the medical malpractice context would be upended. This we decline to do.

For the aforementioned reasons, we conclude that the jury could not reasonably have found on this record that the plaintiff's lost consortium was substantially more damaging than the decedent's loss of life and all of its enjoyments. We therefore remand the case to the trial court for reconsideration of the defendant's motion for remittitur in accordance with the foregoing principles. See footnote 17 of this opinion.

The denial of the motion for remittitur of the loss of consortium award is reversed and the case is remanded for reconsideration of that motion in accordance with this opinion.

In this opinion the other justices concurred.

McDONALD, J., concurring. In *Munn* v. *Hotchkiss School*, 326 Conn. 540, 569–79, 165 A.3d 1167 (2017), this court determined that the trial court had not abused

its discretion in denying a motion for remittitur of a damages award of approximately $41.5 million, $31.5 million of which were noneconomic damages. I wrote separately in that case to express my concern that our remittitur jurisprudence is internally inconsistent and fails to provide clear guidance as to the point at which a verdict should be deemed excessive. See id., 579–88 (*McDonald*, *J.*, concurring). I emphasized that the lack of objective guideposts for the review of noneconomic damages presented a particularly vexing problem and suggested that the legislature would be best suited to remedy this concern. As of yet, the legislature has taken no remedial action, leaving this court to fill the void.

The present case is a prime example of how objective guideposts result in more logical, consistent outcomes. By adopting the common sense presumption that a loss of consortium award ordinarily should not substantially exceed the corresponding wrongful death award to the directly injured spouse, this court was able to limit its review to considering whether the evidence demonstrated exceptional or unusual circumstances to justify a loss of consortium award almost four times as great as the wrongful death award. After we applied this standard, the result was clear.

I join the majority opinion but write separately to note that, under the current state of our law, the unpredictability of noneconomic damages awards will continue to exist in other circumstances. It appears that the *abuse of discretion* standard of review that we utilize to consider whether a trial court's order as to whether a verdict is *excessive as a matter of law* will remain a legal oxymoron in our jurisprudence unless and until the legislature clarifies its intent in General Statutes § 52-216a. Without restating it here, I continue to maintain my view on the subject as articulated in *Munn*.

ORDERS

CONNECTICUT REPORTS

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STEVEN K. STANLEY *v.* ADAM B. SCOTT

The plaintiff's petition for certification to appeal from the Appellate Court, 188 Conn. App. 901 (AC 41645), is denied.

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

Steven K. Stanley, self-represented, in support of the petition.

Decided May 22, 2019

JUDDSON LIVELY *v.* COMMISSIONER OF CORRECTION

The petitioner Juddson Lively's petition for certification to appeal from the Appellate Court, 189 Conn. App. 901 (AC 40802), is denied.

Kinga A. Kostaniak, assigned counsel, in support of the petition.

Decided May 22, 2019

MARGARITA O. *v.* FERNANDO I.

The defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 448 (AC 42118), is denied.

Fernando I., self-represented, in support of the petition.

Decided May 22, 2019

ROUNDPOINT MORTGAGE SERVICING CORPORATION *v.* LEO RICHLOFF, JR., ET AL.

The defendant Jeffrey S. Richloff's petition for certification to appeal from the Appellate Court (AC 42261) is denied.

Jeffrey S. Richloff, self-represented, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided May 22, 2019

THE MONEY SOURCE, INC. *v.* RYAN KILBRIDE ET AL.

The defendant Bobbi Ann Kilbride's petition for certification to appeal from the Appellate Court (AC 42339) is denied.

Bobbi Ann Kilbride, self-represented, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided May 22, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 190

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DAELTE ST. DENIS-LIMA *v.* THOMAS J. ST. DENIS
(AC 40675)

Alvord, Prescott and Flynn, Js.

Syllabus

The plaintiff, who brought a second action in this state seeking to dissolve her marriage to the defendant, appealed to this court from the judgment of the trial court granting the defendant's motion to dismiss the dissolution action. A previous action filed by the plaintiff to dissolve the parties' marriage had been dismissed by the trial court for want of subject matter jurisdiction because the plaintiff and the defendant had testified that they were residents of Brazil. Three months after the defendant filed his motion to dismiss in this second action, the parties' marriage was dissolved by a court of competent jurisdiction in Brazil, where a dissolution proceeding between the parties had been pending for more than one year. At the hearing on the defendant's motion to dismiss, the plaintiff requested an evidentiary hearing and offered to the court a purported official document, which was interlineated with writing, to support her claim that the proceedings in Brazil had been stayed and were not yet final. The court granted the plaintiff three weeks to proffer a noninterlineated copy of the document and a certified translation thereof. The trial court thereafter concluded that the certified copies of the dissolution proceedings from Brazil that the plaintiff subsequently proffered implicated the principle of comity. The court determined, inter alia, that the decree of the court in Brazil had been made final, that the plaintiff's appeal from that decree had been dismissed, that both parties had submitted themselves to the court in Brazil and had been represented by counsel throughout the proceedings, that support orders had been issued and that the parties had been awarded joint custody of their minor children. The court also determined that although the parties continued to litigate other issues in Brazil, those issues did not affect the finality of the Brazilian decree dissolving the marriage. On the plaintiff's appeal to this court, *held*:

1. The trial court did not abuse its discretion in ruling on the defendant's motion to dismiss the plaintiff's dissolution action without first holding an evidentiary hearing; the plaintiff did not establish a disputed jurisdictional fact that would have required an evidentiary hearing, as the certified and officially translated Brazilian document that she submitted to the court showed that a divorce decree had been rendered, that an order had been issued to amend the marriage registry, that there had been a decision denying interlocutory relief on appeal, that the enforcement of the decision was ordered and registered, and that a request to suspend the effect of the order had been denied.

2. The trial court's determination that there was a final judgment of dissolution in Brazil was not clearly erroneous and was supported by evidence in the record; that court reviewed documents that had been submitted by both parties, which included the Brazilian case overview submitted by the plaintiff, that established the existence of a final divorce decree in Brazil.

3. The trial court did not abuse its discretion in affording comity to the dissolution judgment that was rendered by the Brazilian court: the defendant's domicile for the applicable time frame had been litigated and determined in the plaintiff's previously dismissed dissolution action, as the defendant had averred that his residence and primary abode was in Brazil, and, therefore, because the defendant's domicile is and has been Brazil, the Brazilian judgment properly could be recognized under the principle of comity; moreover, both parties had submitted to the jurisdiction of the Brazilian court and had a fair opportunity to be heard, and basic principles of due process had been applied, and the Brazilian judgment was not contrary to the public policy of Connecticut, as support orders had been issued, and the parties had been awarded joint custody and certain parenting rights while they continued to litigate auxiliary matters.

Argued October 10, 2018—officially released June 4, 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. Michael E. Shay*, judge trial referee, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, issued a rectification of the record. *Affirmed.*

Brittany Bussola Paz, for the appellant (plaintiff).

Heather M. Brown-Olsen, for the appellee (defendant).

Opinion

FLYNN, J. The plaintiff, Daelte St. Denis-Lima, appeals from the judgment of the trial court, rendered following the court's granting of the motion to dismiss that had been filed by the defendant, Thomas J. St. Denis. The plaintiff claims that (1) the court improperly

denied her request for an evidentiary hearing on the issue of subject matter jurisdiction, (2) the court's finding of a final judgment of dissolution in the country of Brazil was clearly erroneous, and, alternatively (3) even if Brazil issued a final judgment of dissolution, that judgment should not be recognized under the principle of comity. We disagree with the plaintiff's claims and affirm the judgment of the court.

The following facts are relevant on appeal. The parties were married on October 20, 2004, in Lenox, Massachusetts. They are parents of two minor children. A previous action for dissolution of marriage had been filed by the plaintiff in the judicial district of Fairfield, which was dismissed by the court on May 19, 2015, for want of subject matter jurisdiction because both the plaintiff and the defendant had testified that they were residents of Brazil; thus, neither party then satisfied the residency requirement of General Statutes § 46b-44 (a)[1] sufficient to confer jurisdiction on the Connecticut Superior Court. See *St. Denis-Lima* v. *St. Denis*, Docket No. FA-14-4048088, 2015 LEXIS 1174 (Conn. Super. May 19, 2015). The plaintiff commenced the operative dissolution of marriage action on December 30, 2015, claiming that "[o]ne of the parties to the marriage has been a resident of the state of Connecticut for at least twelve months next preceding the date of the filing of the complaint or next [preceding] the date of the decree, or one of the parties was domiciled in this state at the time of the marriage and returned to [this] state with the intention of permanently remaining before the filing

[1] General Statutes § 46b-44 (a) provides in pertinent part that "[a] complaint for dissolution of a marriage . . . may be filed at any time after either party has established residency in this state."

Subsection (c) of § 46b-44 provides in relevant part that "[a] decree dissolving a marriage . . . may be entered if . . . [o]ne of the parties to the marriage has been a resident of this state for at least the twelve months next preceding the date of the filing of the complaint or next preceding the date of the decree . . . ."

of the complaint." On February 16, 2016, the defendant filed a motion to dismiss the plaintiff's dissolution action on six grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; and (6) comity law precluding the action in Connecticut.

On May 16, 2016, while the defendant's motion to dismiss was pending in the present case, the marriage of the parties was dissolved by a decree of divorce entered by a court of competent jurisdiction in Brazil, as a prior dissolution proceeding had been pending there since February, 2015. This decree was registered in Brazil as a final decree on July 6, 2016. On April 10, 2017, the defendant in this case, Thomas J. St. Denis,[2] registered with the court[3] a copy of that same final decree from Brazil. The registered decree contained a decision issued by a Brazilian court on May 16, 2016, which concludes with a decree that "the divorce of the couple Thomas Joseph St. Denis and Daelte Lima St. Denis so it reach its full legal effects." A status conference was held before the court on March 6, 2017, in which the plaintiff and her trial counsel, Attorney Allen A. Currier, were present. At the status conference, the plaintiff's counsel acknowledged that the defendant's counsel had filed affidavits stating that the parties' marriage already had been dissolved by a decree in Brazil. Despite not filing a counteraffidavit, the plaintiff's counsel, nevertheless, represented to the court that the conclusions in the affidavit were in dispute. Neither party requested an evidentiary hearing at that time.

On April 21, 2017, the court heard oral argument on the defendant's motion to dismiss, but it declined the

[2] We note for clarity that Thomas J. St. Denis was the plaintiff in the aforementioned proceedings in Brazil, but is the defendant in this Connecticut case.

[3] The decree was registered with the court under Docket No. FA-17-4030378-S.

plaintiff's request for an evidentiary hearing made on that day, wherein the plaintiff intended to proffer an expert witness, the plaintiff's lawyer in the Brazilian dissolution proceedings, who would contest the validity of the documents submitted by the defendant and claim that the parties already were divorced in Brazil. The following colloquy occurred on April 21, 2017, between the court and the plaintiff's counsel regarding his request for an evidentiary hearing:

"The Court: . . . I mean, this is obviously a late disclosure of what would purport to be an expert witness.

"[The Plaintiff's Counsel]: Yes, Your Honor, I—I received this document a week ago. And I knew I had to—I understood—I reviewed it myself, I—I found serious problems with it. And so we—

"The Court: Well, I don't know what you're alluding to.

"[The Plaintiff's Counsel]: Well, that there isn't really a final judgment in Brazil. And that—that two different actions down in Brazil are being taken together. There is no divorce decree, then—in Brazil . . . . And I can—I can offer evidence of that with testimony from a lawyer in Brazil that we brought up here who is the lawyer in that case, part of the firm in that case. And in order for the court to extend comity, there are a couple of things that must occur—

"The Court: Well, wait a minute, let's—let's—just—everybody, let's—first of all, the lawyer—a lawyer in the case is not an unbiased witness. An expert is a person who is—brought into the case to inform the court on—on issues that are beyond the normal experience of the court . . . not a person who . . . represents one of the parties. . . .

"[The Plaintiff's Counsel]: Your Honor, that may be so, but within this—this short period of time this was FedExed to me less than a week ago. Within that short

period of time that I had to react, we—we didn't, first of all, know until a—a day ago we'd be able to bring somebody up from Brazil. And somebody who was knowledgeable with the documents. . . .

"The Court: Well, wait a minute, [counsel], correct me if I'm wrong, but you know, I've—I have a copy that—that I—that had been sitting in my office. I have a copy that's been sitting on my—on my file cabinet since February 15th of 2016, which is the motion to dismiss. So, it strikes me as a little bit disingenuous, I guess to use a more mellifluous phrase, that—that you suddenly—this is suddenly going to be an issue. The—the nub of this issue is, is there a valid legal process that the parties have submitted themselves to in Brazil. . . . [T]he question of whether or not this court is going to entertain an action to dissolve a marriage that may or may not have been already dissolved, then, that's . . . the fundamental issue. . . . And that's been on the . . . table, you know, certainly before I got involved in this. And . . . as I said, we're now, in April of 2017, and this has been on my . . . file cabinet . . . for well over a year. So, that . . . just doesn't wash. . . . So, this—the issue has always been, you know, what's going on in Brazil. And was—was there, you know, a valid decree."

After this colloquy, the plaintiff's counsel offered to the court a document to support the proposition that the proceedings in Brazil had been stayed and were not yet final. The defendant's counsel objected to the introduction of this document because the purported official document was interlineated with writing. The court acknowledged that this document went to the weight of the evidence and granted the plaintiff three weeks to proffer a noninterlineated copy of the document and a certified translation. Additionally, the court afforded the defendant one month to submit evidence responding to that document.

Thereafter, on June 13, 2017, the court granted the defendant's motion to dismiss, concluding that the certified copies of the dissolution proceedings from Brazil by and between the parties implicated the principle of comity. Furthermore, the court noted that (1) the evidence submitted supported the finding that the marriage of the parties was dissolved by a decree of the court in Brazil on May 16, 2016, and that the decree was made final by an order of the court by way of the registration of the decree on July 6, 2016; (2) the plaintiff's appeal from the decree was dismissed; (3) both parties submitted themselves to the court in Brazil and were represented by counsel throughout the proceedings; (4) as part of the decree, the parties were awarded joint custody and certain parenting rights, and support orders were issued; and (5) although the parties continue to litigate, inter alia, alimony, property, custody, and visitation issues in Brazil, those issues did not affect the finality of the Brazilian decree dissolving the marriage. This appeal followed.

I

The plaintiff first claims that the court improperly denied her an opportunity for an evidentiary hearing regarding the existence of a final judgment of dissolution in Brazil.[4] She argues that the defendant did not

[4] In her brief, the plaintiff cites *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as the proper test to determine whether an evidentiary hearing was required. *Mathews*, however, pertains to whether there is a constitutional right to an evidentiary hearing under the due process clause of the fifth amendment to the United States constitution. See, e.g., *In re Yasiel R.* 317 Conn. 773, 780–81, 120 A.3d 1188 (2015). A constitutional claim, however, was unpreserved for appellate review because the plaintiff failed to raise such a claim before the trial court. "We review unpreserved constitutional claims pursuant to [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)], under which a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

move to dismiss the present case on the ground that the marriage had been dissolved until April 20, 2017,[5] and, therefore, she was not afforded adequate time to respond to this issue. The defendant argues that the court did not err in denying the plaintiff's last minute proffer of an undisclosed expert witness. The defendant asserts that the plaintiff had ample notice from the time she acknowledged the existence of the affidavits of foreign judgment at the March 6, 2017 status conference to request an evidentiary hearing. We are not persuaded by the plaintiff's argument.

We begin by setting forth the standard of review and applicable law. The central question in this case is whether the court properly denied the plaintiff's request for an evidentiary hearing on the issue of the Brazilian divorce decree. We review the denial of a request for an evidentiary hearing under the abuse of discretion standard. *State* v. *Barnwell*, 102 Conn. App. 255, 263, 925 A.2d 1106 (2007); see also *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 461 n.22, 27 A.3d 1, cert.

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 723 n.23, 200 A.3d 1118 (2019); *In re Yasiel R.*, supra, 781 (modifying *Golding*'s third prong); see also *State* v. *Elson*, 311 Conn. 726, 730, 91 A.3d 862 (2014) (overruling the requirement that a party must affirmatively request *Golding* review in its main brief in order to receive appellate review of unpreserved constitutional claims). The plaintiff's attempt to have her unpreserved constitutional claim reviewed on appeal fails on the third prong of *Golding*. This is because no constitutional violation exists. As we indicated in setting forth the underlying facts, it is clear that neither party requested an evidentiary hearing until the plaintiff's attempt to proffer a purported expert witness at the hearing on the motion to dismiss. At this point, the court allowed the plaintiff to submit evidence to establish a disputed jurisdictional fact. For the reasons set forth in part I of this opinion, this evidence did not establish a disputed jurisdictional fact, and thus the plaintiff was not entitled to an evidentiary hearing.

[5] We note that the defendant's motion to dismiss filed February 16, 2016, included the ground of preclusion of the plaintiff's action by virtue of comity law. We also note that the marriage was dissolved on May 16, 2016, and the decree was registered with the Connecticut Superior Court on April 10, 2017.

denied, 303 Conn. 915, 33 A.3d 739 (2011). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Citation omitted; internal quotation marks omitted.) *Rivera* v. *St. Francis Hospital & Medical Center*, 55 Conn. App. 460, 463–64, 738 A.2d 1151 (1999).

The plaintiff, in her reply brief, raises the argument that, because there are jurisdictional facts in dispute in this case, an evidentiary hearing was necessary even if not requested. The plaintiff cites *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 977 A.2d 636 (2009), in which our Supreme Court held that "where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Internal quotation marks omitted.) Id., 348. We agree with the plaintiff's legal premise. Nevertheless, we disagree that there is, in fact, an actual dispute regarding a fact necessary to determine jurisdiction.

The threshold jurisdictional question in this case is whether a final divorce decree, issued in Brazil, dissolving the marriage of the parties, existed prior to the April 21, 2017 hearing. This inquiry implicates the issue of subject matter jurisdiction, because "there can be no divorce where there is no existing marital relation . . . ." *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689, 691, 92 A. 684 (1914). The hearing on the defendant's motion

to dismiss on April 21, 2017, addressed this precise issue. The court afforded the plaintiff three weeks to proffer evidence to show that there was no final dissolution judgment in Brazil. The plaintiff appears to have submitted a certified and officially translated Brazilian document that provides an overview of the case file from the Brazilian dissolution proceedings.[6] The plaintiff claims that because the document concludes with the sentence "[p]roceedings stayed while a decision is made on the separate record," she had established that no final divorce decree was issued in Brazil. This is misleading. The bulk of the language in the document offered by the plaintiff establishes that a final decree had been rendered on May 16, 2016, and that it was given full effect.

The relevant portion of the document reads: "The case file contains a decision issued on May 16, 2016, on pp. 197/200, whereby the divorce is decreed and an order is issued to amend the marriage registry once the judgment becomes final. Further, defendant was given the opportunity to see the record and the challenge to the answer, and service of process upon the parties was ordered for them to specify which evidence they intended to produce, under penalty of summary judgment. Lastly, after the term for submitting answer expired, the judge ordered the prosecution office to be heard. An interlocutory appeal was filed, as per document on pp. 214/240. The decision denying relief on the interlocutory appeal can be found on pp. 242–247. On p. 248 the enforcement of the decision on pp. 197/200 was ordered, since the interlocutory relief on the interlocutory appeal was denied. The order to amend the marriage registry was issued and can be found on p.

[6] The court in its memorandum of decision referred to this document as "exhibit #2," which was not part of the court file. On January 14, 2019, this court issued a rectification order to account for this document. The trial court complied with the rectification order on February 1, 2019. The document referred to as exhibit #2 is an English translation of what appears to be a summary of the record from the divorce proceedings in Brazil.

276, along with the notice of registration of judgment on p. 277. On p. 281, a stay of the action was ordered by the filing of the petition and documents on pp. 249/261, and personal service of process upon the plaintiff was ordered, for the plaintiff to appoint new counsel, under the penalty of dismissal of the case. The request to suspend the effect of the order on pp. 197/200 was denied. The interlocutory appeal was rejected, as per report of the case, opinion and conclusion of pp. 288/304. An order to enforce the 2nd paragraph of the decision on p. 281 is found on p. 305, decision enforced on p. 306. Current status: waiting for the order to be returned, proceedings stayed while a decision is made on the separate record."

Under *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 371, 996 A.2d 1195 (2010), "it is the plaintiff's burden both to request an evidentiary hearing and to present evidence that establishes disputed factual allegations in support of an evidentiary hearing, and [if] the plaintiff failed to do either, the court [may] properly [decide] the motion on the basis of the pleadings and affidavits." The plaintiff has failed to carry this burden in the present case.

In the present case, the plaintiff made a request for an evidentiary hearing at the hearing on the defendant's motion to dismiss. Although the court denied the request as untimely, it afforded the plaintiff three weeks to present countervailing evidence to establish a disputed jurisdictional fact. The plaintiff submitted the aforementioned Brazilian document, which was considered by the court. The document offered by the plaintiff, when read in its totality, shows (1) that the divorce was decreed on May 16, 2016; (2) an order was issued to amend the marriage registry once the judgment became final; (3) an appeal was filed and there was a decision denying interlocutory relief on appeal; (4) the enforcement of the decision was ordered and registered; (5) the order to amend the marriage registry was issued;

and (6) the request to suspend the effect of the order was denied. Although separate proceedings may remain open to determine tangential matters, there is no genuine dispute that a judgment of dissolution was rendered in Brazil and given full effect. An order was issued to amend the marriage registry once the judgment became final. The order to amend the marriage registry was issued. Therefore, the plaintiff has not established a disputed jurisdictional fact that would have required an evidentiary hearing. Accordingly, we conclude the court did not abuse its discretion in ruling on the motion to dismiss without first holding an evidentiary hearing.

II

The plaintiff next claims that, on the basis of the state of the record and the documents presented to the court, the court's decision that there is a final judgment of dissolution in Brazil is clearly erroneous. "Our review of the factual findings of the trial court is limited to a determination of whether they are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings." (Citation omitted; internal quotation marks omitted.) *Nichols* v. *Oxford*, 182 Conn. App. 674, 679–80, 191 A.3d 219, cert. denied, 330 Conn. 912, 193 A.3d 560 (2018).

The court's determination that there was a final judgment of dissolution rendered in Brazil was supported by evidence in the record. After the April 21, 2017 hearing on the motion to dismiss, the court afforded the plaintiff three weeks to present countervailing evidence showing that Brazil had not rendered a final judgment

of dissolution. In making its determination, the court reviewed memoranda of law, affidavits, exhibits, and other pleadings. As a result, the court found "[t]hat the evidence, in particular the third supplemental affidavit of [the defendant] in support of his motion to dismiss, dated June 5, 2017 (exhibit #3), together with attached exhibits, supports a finding that the marriage of the parties was dissolved by a decree of court in Brazil . . . ." The court also considered the aforementioned Brazilian case overview submitted by the plaintiff, which indicated that a divorce decree had been issued. Documents submitted by both the plaintiff and the defendant establish the existence of a final divorce decree in Brazil. The court's determination, therefore, is supported by the record, and this court is not left with a definite and firm conviction that a mistake has been committed. See *Nichols* v. *Oxford*, supra, 182 Conn. App. 679–80. Accordingly, the plaintiff has not carried her burden on appeal to show that the court's finding that a final judgment of dissolution previously had been rendered in Brazil was clearly erroneous.

III

The plaintiff's last claim on appeal is that, even if the Brazilian court did render a final judgment of dissolution, that judgment, nonetheless, should not be recognized. The plaintiff asserts two reasons in support of this claim. First, she contends that the defendant was not a good faith domiciliary of Brazil. Second, she contends that the domestic relations laws of Brazil are significantly different from those of Connecticut, and, thus, the recognition of the judgment would be contrary to the public policy of Connecticut. We are not persuaded.

We begin our analysis with the applicable law and standard of review. "A valid divorce judgment is a judgment in rem and is binding on all the world as to the existence of a status which is the subject of the action,

that is, the status of being unmarried upon the adjudication of divorce. . . . Courts of the United States [however] are not required by federal law to give full force and effect to a judgment granted in a foreign nation . . . . On the other hand, judgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand. . . . There are a number of exceptions, however, to a court's application of the principle of comity, most notably, lack of jurisdiction and denial of due process of law. . . .

"With regard to whether a court has jurisdiction, [t]he traditional requisite for subject matter jurisdiction in matrimonial proceedings has been domicil[e] . . . . Regardless of its validity in the nation awarding it, the courts of this country will not generally recognize a judgment of divorce rendered by the courts of a foreign nation as valid to terminate the existence of a marriage unless, by the standards of the jurisdiction in which recognition is sought, at least one of the spouses was a good faith domiciliary in the foreign nation at the time the decree was rendered. . . .

"To constitute domicil[e], the residence at the place chosen for the domicil[e] must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil[e] of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with the present intention of making it his home . . . . [T]his intention must be to make a home in fact, and not an intention to acquire a domicil[e]. . . . Moreover, [a] person may have . . . only one domicil[e] at any one time. . . . [A] former domicil[e] persists until a new one is acquired . . . . Therefore proof of the

acquisition of a new domicil[e] of choice is not complete without evidence of an abandonment of the old. . . . [O]ur review of a question of subject matter jurisdiction is a matter of law over which our review is plenary . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Juma* v. *Aomo*, 143 Conn. App. 51, 56–60, 68 A.3d 148 (2013).

In the present case, the defendant's domicile for the time frame of September 19, 2013 through September 18, 2014, was litigated and determined in the plaintiff's previously dismissed dissolution action. See *St. Denis-Lima* v. *St. Denis*, supra, 2015 Conn. Super. LEXIS 1174, *3–4 (noting defendant had resided in Brazil during relevant time frame and both parties were involved in domestic proceedings pending in Brazil). The defendant in his affidavit stated, ''[m]y residence and primary abode is in Brazil.'' Because one's domicile persists until a new domicile is acquired, the defendant's domicile is and has been Brazil. Therefore, the Brazilian judgment properly may be recognized under the principle of comity.

We next address the plaintiff's argument that the Brazilian judgment of dissolution should not be recognized as a matter of public policy. The court recognized the Brazilian dissolution decree under the principle of comity. ''[C]omity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons under the protection of its laws. . . . [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to

secure an impartial administration of justice . . . the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." (Citation omitted; internal quotation marks omitted.) *Zitkene* v. *Zitkus*, 140 Conn. App. 856, 865–66, 60 A.3d 322 (2013).

This court has subjected public policy challenges to the recognition of foreign dissolution judgments to the abuse of discretion standard of review. Id., 871. The gravamen of the plaintiff's public policy argument is that Brazilian law permits dissolution judgments to be rendered without orders on alimony, property division, and child support. She argues that this is contrary to Connecticut's public policy that these matters must be addressed at the time the judgment is rendered. The plaintiff cites a series of Connecticut statutes that give the court authority to order the division of property, alimony, and child support at the time the dissolution judgment is rendered. See generally General Statutes §§ 46b-81, 46b-82 and 46b-56.

The plaintiff's argument is without merit. The plaintiff's concerns that the dissolution decree in Brazil did not issue certain orders at the time of dissolution are mitigated, if not completely removed, by the fact that support orders had been issued and the parties were awarded joint custody and certain parenting rights while the parties continue to litigate auxiliary matters. In ruling on the defendant's motion to dismiss, the court engaged in the comity analysis under *Zitkene* v. *Zitkus*, supra, 140 Conn. App. 865–66. As a result of this analysis, the court noted that recognizing the Brazilian divorce decree was proper in this case because both parties had submitted to the jurisdiction of the Brazilian court and had a fair opportunity to be heard, and the basic principles of due process were applied. Given this, we conclude that the court did not abuse its discre-

tion in affording comity to the judgment rendered by the Brazilian court.

The judgment is affirmed.

In this opinion the other judges concurred.

FLAGSTAR BANK, FSB *v.* CHRISTINE KEPPLE ET AL. (AC 41185)

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

Syllabus

The plaintiff bank, F Co., sought to foreclose a mortgage on certain real property owned by the defendants, M and C. In its complaint, F Co. alleged, inter alia, that the defendants originally had executed a note in favor of A Co. and a mortgage in favor of M Co. as nominee for A Co., that F Co. was the owner of the subject note and mortgage by virtue of an assignment of the mortgage, and that the note was in default for nonpayment. After the defendants were defaulted for failure to disclose a defense, they filed a motion to dismiss, claiming that F Co. lacked standing to bring the action because I Co., and not F Co., owned the underlying debt. In support of their motion, the defendants filed an affidavit by M, as well as a document produced by M Co., which identified I Co. as the investor. F Co. responded by arguing that it had standing as the holder of the note. The court denied the defendants' motion to dismiss, concluding that F Co., which had produced a copy of the note endorsed by A Co. to F Co., established a prima facie case for foreclosure against the defendants and, thus, had standing to commence the action. After the parties unsuccessfully participated in a foreclosure mediation program for approximately two years, the plaintiff filed a motion for a judgment of strict foreclosure. The defendants originally objected to that motion but withdrew their objection at the hearing on the motion. Subsequently, the court concluded that the plaintiff was the holder of the note and mortgage, and rendered judgment of foreclosure by sale, from which the defendants appealed to this court. *Held* that the defendants could not prevail on their claim that the trial court lacked jurisdiction as a result of F Co.'s lack of standing, as they failed to rebut the presumption that F Co., as the holder of the note, was the rightful owner of the underlying debt: the defendants withdrew their objection to F Co.'s motion for a judgment of strict foreclosure, and at the hearing on that motion, or any other time, they did not present the court with the compilation of evidence regarding F Co.'s alleged lack of standing on which they relied on appeal to rebut the presumption that F Co. was the owner of the underlying debt, and because the defendants failed to seek an evidentiary hearing to proffer their compilation of evidence on

which they relied on appeal, which purportedly demonstrated F Co.'s lack of standing, the plaintiff was deprived of the ability to present evidence demonstrating, in the event the presumption was rebutted, that the owner had vested it with the right to receive the money secured by the note, and the trial court was deprived of the ability to consider the evidence, rule on its admissibility and make findings as to whether the defendants rebutted the presumption enjoyed by F Co.; moreover, with respect to the compilation of evidence on which the defendants relied on appeal, the trial court previously had determined that certain statements in M's affidavit and the attached exhibits constituted inadmissible hearsay, which the defendants did not challenge on appeal, certain statements made in the foreclosure mediator's report and in letters attached to M's affidavit were of questionable probative value, and a statement of the trial court that it appeared that I Co. was the owner of the note did not constitute a finding of fact in light of the trial court's repeated decisions indicating that the defendants had not presented sufficient evidence to rebut the presumption that F Co., as the holder of the note, was the owner of the debt.

Argued February 4–officially released June 4, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendants were defaulted for failure to disclose a defense; thereafter, the court, *Cosgrove*, *J.*, denied the defendants' motion to dismiss and motion for an order to produce certain documentation; subsequently, the court granted the defendants' motion for a stay; thereafter, the defendants filed counterclaims; subsequently, the court granted the plaintiff's motion to lift the stay; thereafter, the court, *Nazzaro*, *J.*, granted the plaintiff's motion to strike the defendants' counterclaims; subsequently, the court, *Cosgrove*, *J.*, rendered judgment of foreclosure by sale, from which the defendants appealed to this court. *Affirmed.*

Albert L.J. Speziali, with whom, on the brief, were *Paul M. Geraghty* and *Mark R. Kepple*, self-represented, for the appellants (defendants).

Scott H. Bernstein, for the appellee (plaintiff).

Opinion

MOLL, J. The defendants, Christine Kepple and Mark Kepple,[1] appeal from the judgment of foreclosure by sale rendered in favor of the plaintiff, Flagstar Bank, FSB. On appeal, the defendants claim that the trial court lacked subject matter jurisdiction over this action as a result of the plaintiff's alleged lack of standing. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the defendants' claim on appeal. The plaintiff filed this action in February, 2011, seeking to foreclose a residential mortgage on property located at 140 Elm Street in Stonington. According to the complaint, on November 19, 2004, Mark Kepple executed a promissory note payable to the order of Atlantis Mortgage Co., Inc., in the amount of $322,700. To secure the note, the defendants executed a mortgage on the property in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Atlantis Mortgage Co., Inc. The complaint alleged that the plaintiff was the owner of the note and mortgage by virtue of an assignment of the mortgage dated February 3, 2011. The complaint further alleged that the note was in default and that the plaintiff was exercising its option to declare the entire balance on the note due and payable. On October 23, 2017, the court rendered a judgment of foreclosure by sale. The court thereafter denied the defendants' motion to reconsider, and the defendants filed the present appeal.

[1] Bank of America N.A., Westerly Hospital, and the United States of America also were named as defendants in the foreclosure action. Bank of America N.A. and Westerly Hospital, which were defaulted for failure to appear in the trial court, have not appealed from the judgment of foreclosure or participated in the present appeal. The plaintiff withdrew this action as to the United States of America in the trial court. Accordingly, we refer to Christine Kepple and Mark Kepple as the defendants in this opinion.

On appeal, the defendants claim that the trial court lacked subject matter jurisdiction over this action because of the plaintiff's alleged lack of standing. Specifically, the defendants argue that (1) the plaintiff merely was the holder of the note and not the owner of the debt, and (2) the evidence in the record, taken as a whole, rebutted the presumption that the plaintiff, as the holder of the note, was the owner of the debt.[2] We disagree.

At the outset, we note that "[t]he issue of standing implicates [the] court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the burden of establishing standing." (Citation omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 142, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, [the standard of] review is plenary." (Internal quotation marks omitted.) Id. "In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be

[2] The defendants also argue that the plaintiff failed to produce any evidence that it was authorized by Federal Home Loan Bank of Indianapolis, as the purported owner of the debt, to prosecute the action. In light of our conclusion that the defendants failed to rebut the presumption that the plaintiff was the owner of the debt, we need not address this issue.

raised at any time." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 145, 125 A.3d 262 (2015).

The following additional facts are necessary for the resolution of the defendants' claim. On March 14, 2012, the plaintiff filed a motion for default for failure to disclose a defense, which the court, *Martin, J.*, granted on March 26, 2012. On April 3, 2012, Mark Kepple filed (1) an appearance as a self-represented party in lieu of the appearance filed by his initial attorney and (2) a motion for inclusion in the foreclosure mediation program. On August 13, 2012, Attorney Paulann Hosler Sheets filed an appearance for the defendants in addition to the self-represented appearance filed by Mark Kepple. The defendants then filed a motion to open the default, an answer, and a motion to dismiss, claiming that the plaintiff lacked standing to prosecute the action because it did not own the underlying debt.

In support of the motion to dismiss, the defendants filed an affidavit of Mark Kepple with accompanying exhibits. In the affidavit, Mark Kepple stated facts in support of the defendants' claim that Federal Home Loan Bank of Indianapolis was the owner of the mortgage and that the plaintiff lacked standing to bring this action.[3] The defendants also submitted a document produced by Mortgage Electronic Registration Systems,

[3] Specifically, Mark Kepple stated that since April, 2011, he had pursued an application for a loan modification and that, after being told by the plaintiff that his application was complete, he was told that certain documents were stale and needed to be updated. According to the affidavit, on March 2, 2012, the plaintiff informed Mark Kepple that it was unable to proceed with his application, as he had not returned some of the missing documents, and that it deemed the application withdrawn. Mark Kepple immediately contacted the plaintiff about the mistake and was informed that his application was, in fact, complete and had been referred to the underwriting department.

Mark Kepple also stated that on July 31, 2012, he called the plaintiff's loss mitigation department, as he had been doing on a monthly basis, and spoke to an individual who informed him that he would have a decision on his application within thirty days. On August 6, 2012, however, Mark Kepple

Inc., indicating that Federal Home Loan Bank of Indianapolis was the "investor." At a hearing on the defendants' motion to dismiss on September 7, 2012, the defendants argued that the owner of the underlying debt was Federal Home Loan Bank of Indianapolis and not the plaintiff.[4] The plaintiff responded by arguing that it had standing to bring the foreclosure action as the holder of the note.[5] The plaintiff also argued that the affidavit submitted in support of the motion to dismiss contained inadmissible hearsay.

In a memorandum of decision dated September 21, 2012, the court, *Cosgrove*, *J.*, denied the defendants' motion to dismiss, concluding that the plaintiff had standing to commence the action. In its decision, the court noted that the plaintiff had produced a copy of the note, endorsed by Atlantis Mortgage Co., Inc., to the plaintiff, and established a prima facie case for foreclosure against the defendants. With regard to Mark Kepple's affidavit, the court stated: "Absent some exception to the hearsay rule, which is not present here, the statements of third parties contained within Mark

received a letter from the plaintiff dated July 25, 2012, informing him that his loan modification application had been denied because it did " 'not fulfill investor requirements/guidelines.' " Upon inquiry with the plaintiff's loss mitigation department, Mark Kepple spoke with a different individual, who informed him that the investor of the loan was Federal Home Loan Bank of Indianapolis. According to the affidavit, Mark Kepple then called Federal Home Loan Bank of Indianapolis and spoke with Mark Holt in the mortgage purchasing department, who confirmed that Federal Home Loan Bank of Indianapolis was the investor and had bought the note.

[4] The defendants filed an amended affidavit of Mark Kepple, with the permission of the court, following oral argument on the defendants' motion to dismiss.

[5] The transcript reveals the following colloquy:

"The Court: There's a—let me just hear on that simple issue. Is it your position that the plaintiff, Flagstar, [FSB] is the owner of the note as of the date that this action was commenced in February of 2011?

"[The Plaintiff's Counsel]: Our position is that Flagstar, [FSB] as the commencement of this action, because of assignment they're the—they have the right to enforce the debt, and as the holder of the negotiable interest, we have every right to initiate this foreclosure proceeding."

Kepple's affidavit constitute hearsay and cannot be considered by the court for the truth of the matters contained therein. Even if considered . . . Kepple's statement would not, alone, rebut the presumption created by possession of the note in this case. In viewing the remainder of the available evidence, the court finds that the defendants failed to rebut the presumption that the plaintiff owns the underlying debt, and thus the plaintiff has standing to commence the present foreclosure action."

On October 2, 2012, the court denied the defendants' motion to open the default and granted the defendants' motion to participate in the foreclosure mediation program. The parties participated in the foreclosure mediation program from October, 2012 through August, 2014. The final foreclosure mediation took place on August 6, 2014. The foreclosure mediator's report from that mediation stated in part that "[t]he parties have been in mediation since [October 26, 2012] and the same issues are brought up at every mediation without resolution."

Following the denial of the defendants' motion to dismiss, and after almost two years in the foreclosure mediation program, the defendants continued to raise the plaintiff's alleged lack of standing in various proceedings over the next several years. On August 21, 2014, the defendants filed a petition for reinclusion in the foreclosure mediation program and a motion to order the plaintiff to produce documentation of a purported investor restriction. In the latter motion, the defendants contended that the plaintiff repeatedly had denied their request for a loan modification because of an alleged investor restriction and sought, inter alia, an order that the plaintiff produce evidence of the purported investor restriction. On September 4, 2014, the defendants filed a second motion to open the default for failure to disclose a defense. In that motion, the

defendants argued that they were waiting for the plaintiff to disclose any agreements between itself and Federal Home Loan Bank of Indianapolis regarding the servicing, including modification, of the defendants' loan. According to the defendants, these documents were relevant to their defense that the plaintiff lacked standing to bring this action.

On September 8, 2014, a hearing took place on the defendants' petition for reinclusion in the foreclosure mediation program and the defendants' motion to order the plaintiff to produce documentation of a purported investor restriction. At that hearing, counsel for the defendants argued that this matter should be referred back to mediation and that the court should order the plaintiff to produce documentation regarding the relationship and the restrictions between the investor, Federal Home Loan Bank of Indianapolis, and the plaintiff. The plaintiff argued in response that the defendants were not entitled to any of the documents requested and that the defendants were trying to interfere with the contractual relationship between the plaintiff and Federal Home Loan Bank of Indianapolis. The plaintiff further argued that the defendants were pursuing such discovery as a means to effectuate a settlement. During the argument on the defendants' motions, the court engaged in a colloquy with counsel for the plaintiff regarding the distinction between the owner and the holder of the note.[6]

[6] The transcript reveals the following:

"The Court: What about the issue if there's a question, as I have read this briefly, that the investor has a restriction, and that investor is the owner of the note.

"[The Plaintiff's Counsel]: Correct, the owner of the debt.

"The Court: The owner of the note, what's the difference? I don't get it.

"[The Plaintiff's Counsel]: There's a difference between holder and owner, Your Honor. There's a distinct difference between holder and owner.

"The Court: You're drawing that distinction between that and a servicer?

"[The Plaintiff's Counsel]: No, Your Honor. There's a difference between—a party can be a holder—

"The Court: Educate me, what's the difference?

"[The Plaintiff's Counsel]: Look at the [*J.E. Robert Co. Inc.* v. *Signature Properties, LLC*, 309 Conn. 307, 71 A.3d 492 (2013)] decision, Your Honor.

On September 17, 2014, the court denied the defendants' petition for reinclusion in the foreclosure mediation program, stating: "This case has been through an extended mediation process. Most recently, the mediator filed a report with the court indicating in part that the mortgagor was denied relief due to 'debt to income ratio.' Further, the mediator stated she had no material reason to disagree with the response. The court cannot find that further mediation has a high probability of success." On September 17, 2014, the court also denied the defendants' motion to order the plaintiff to produce documentation of a purported investor restriction.

On October 14, 2014, during a hearing on the defendants' second motion to open the default, the court questioned counsel for the plaintiff regarding whether the plaintiff was a bank or a servicer of the loan. In response, counsel for the plaintiff stated: "They're a bank and the servicer of this loan. They're also the holder of the note authorized to commence the foreclosure action which has already been resolved by the prior motion to dismiss, which is a standing issue [that] counsel's attempting to raise again, which has already been denied." On December 5, 2014, the court denied the defendants' second motion to open the default.[7]

On December 19, 2014, the defendants filed a motion for a stay, contending that this action was barred by a September 29, 2014 consent order entered into between the federal Consumer Financial Protection Bureau and the plaintiff regarding deceptive and unfair practices committed by the plaintiff. On January 21, 2015, the defendants filed an affidavit of Mark Kepple in support of their motion to stay the foreclosure proceedings. The

It states that the party who's holding the note has the opportunity to enforce that note, provided that they have the authority to do so. That's not the question that's before this court today; the issue that's raised in *J.E.* [*Robert*] is not what's before the court."

[7] The court's order stated: "The defendants have not demonstrated good cause for the opening of the default for failure to disclose a defense that was entered approximately two and one-half years earlier."

defendants attached as exhibits (1) some of the same documents that were previously found to be inadmissible hearsay by the trial court when it ruled on the defendants' motion to dismiss, and (2) additional correspondence from the plaintiff to the defendants. Specifically, Mark Kepple included a letter from the plaintiff to the defendants dated August 8, 2012, identifying Federal Home Loan Bank of Indianapolis as the investor of the mortgage loan, and letters from the plaintiff dated July 22, August 27, and November 2, 2013, in which the plaintiff identified itself as the servicer of the defendants' mortgage loan. The latter two letters each stated that the defendants were "not approved for loss mitigation options by the investor/owner of the loan."[8]

On December 24, 2014, the plaintiff filed an objection to the defendants' motion for a stay, along with an affidavit of Susan Dowd, an officer of the plaintiff.[9] A hearing on the motion for a stay took place on January 26, 2015. During a colloquy with counsel for the defendants at the conclusion of the hearing, the court commented that it appeared that the owner of the note was Federal Home Loan Bank of Indianapolis.[10] On January

[8] The defendants also attached a letter from the plaintiff to the defendants dated November 4, 2014. In addition to referencing Federal Home Loan Bank of Indianapolis as the investor and the plaintiff as the servicer of the defendants' loan, this letter indicated that, after the defendants' application for a loan modification had been denied, Mark Kepple contacted and spoke with Federal Home Loan Bank of Indianapolis regarding what he would need to do to have his loan modification application reconsidered.

[9] In the affidavit, Dowd stated that on September 29, 2014, the plaintiff had entered into a consent order with the Consumer Financial Protection Bureau pursuant to which certain loss mitigation actions were to be taken by the plaintiff, including reviews of prior loss mitigation decisions. Dowd further stated, however, that the defendants' loan was not among the loans subject to the consent order requirement to review prior loss mitigation decisions.

[10] The transcript reveals the following:

"[The Defendants' Counsel]: I mean, they have not amended their pleading, their complaint, to delete the claim that they're an owner.

"The Court: Well . . . it seems to me from reviewing the extensive work that [Mark] Kepple has done that there has been identification that the owner as opposed to the holder of the note is this Federal Home Loan Bank from the—I can't remember the precise name.

"[The Defendants' Counsel]: Federal Home Loan Bank of Indianapolis."

26, 2015, the court entered a stay in this matter without prejudice to the plaintiff demonstrating that the defendants' loan was not covered by the consent order entered into by the plaintiff with the Consumer Financial Protection Bureau. On May 19, 2016, the plaintiff filed a motion for an order requesting that the court lift the stay. In that motion, the plaintiff maintained that (1) the defendants' loan was not covered by the consent order and (2) even if it were covered, which was denied, the plaintiff had offered the defendants the very relief they had been seeking, namely, a new loan modification review. In this connection, the motion detailed the efforts that the plaintiff had made between January, 2015, and May, 2016, to obtain a completed loan modification application from the defendants; the defendants did not, however, submit a loan modification application. On July 25, 2016, the court granted the plaintiff's motion and lifted the stay.

On August 3, 2016, the plaintiff filed a motion to strike the defendants' counterclaims, which sounded in negligence, breach of the duty of good faith and fair dealing, negligent misrepresentation, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On December 20, 2016, the court, *Nazzaro*, *J.*, granted the plaintiff's motion to strike. In its memorandum of decision, the court stated that "[t]he note and mortgage are now owned by the plaintiff by virtue of assignment on February 3, 2011."

On October 10, 2017, the plaintiff filed a motion for a judgment of strict foreclosure and finding of entitlement of possession.[11] In connection with the motion, the plaintiff filed the affidavit of Vanessa M. Ellison, a

[11] On February 14, 2017, after the granting of the plaintiff's motion to strike and before the plaintiff filed its motion for judgment of strict foreclosure, the trial court, *Nazzaro*, *J.*, granted the plaintiff's motion for a protective order with regard to discovery requests served by the defendants seeking information concerning the plaintiff's standing in the foreclosure action.

loan administration analyst employed by the plaintiff. In the affidavit, Ellison stated, inter alia, that she was "duly authorized to make this Affidavit for [the plaintiff] in its capacity as the holder of the note and servicer of the mortgage loan . . . ." On October 17, 2017, the defendants filed an objection to the plaintiff's motion for a judgment of strict foreclosure; the defendants did not reassert therein that the plaintiff lacked standing to bring this action. On October 23, 2017, at a hearing on the plaintiff's motion for a judgment of strict foreclosure, the defendants, through counsel, withdrew their objection to the plaintiff's motion. Thereupon, the court stated: "All right. I have a promissory note, and it—November 19, 2004, in favor of Atlantis Mortgage Company, Inc. It's a wet-ink original, and it's endorsed in favor of [the plaintiff] by Atlantis Mortgage Company [Inc.] through the Independence Community Bank, attorney-in-fact. And then it is endorsed in blank by [the plaintiff].

"And the mortgage has been recorded on the land records contemporaneously with the closing. And I have an assignment of mortgage from [Mortgage Electronic Registration Systems, Inc.,] as nominee for Atlantis [Mortgage Company, Inc.] in favor of [the plaintiff]. That assignment is dated February 3, 2011. . . . So I'll find that the plaintiff is the holder of the note and mortgage that they seek to foreclose." Thereafter, the court rendered a judgment of foreclosure by sale.

On November 10, 2017, the defendants filed a motion to reconsider the court's order rendering a judgment of foreclosure by sale. In the motion, the defendants argued that Mark Kepple had come to the courtroom on October 23, 2017, but, following a discussion with counsel for the plaintiff, became ill and had to leave and, therefore, was unable to attend the hearing.[12] The

[12] We note that the defendants' counsel attended the hearing.

defendants also argued that, on the basis of a colloquy between counsel for the plaintiff and the court at a hearing on September 8, 2014; see footnote 6 of this opinion; the court had made a judicial finding that the plaintiff did not own the debt and the plaintiff had admitted that it did not own the debt. The plaintiff filed an objection to the defendants' motion to reconsider. On December 4, 2017, the court denied the defendants' motion, stating: "The issues raised by the defendants have previously been presented to the court in various contexts. Defendants' counsel withdrew objections. Appropriate grounds for reconsideration or reargument have not been presented." This appeal followed.

On January 22, 2018, while this appeal was pending, the plaintiff filed a motion for an order conditioning the continuation of the appellate stay pursuant to Practice Book § 61-11 upon the defendants reimbursing the plaintiff for its payments of property taxes and insurance premiums in connection with the subject property during the pendency of the appeal. On April 2, 2018, this court referred the motion and the defendants' opposition thereto to the trial court for consideration. On May 31, 2018, the trial court, *Cosgrove*, *J.*, issued its memorandum of decision, concluding that it would be equitable to condition the maintenance of the appellate stay upon the defendants' prompt reimbursement of property taxes and insurance premiums paid by the plaintiff during the pendency of the appeal. In its decision, the court stated: "This court always examines the note and mortgage, endorsements or allonges and any assignments of mortgage recorded in the land records prior to the entry of judgment. The issues of standing had been raised and addressed several times earlier in this litigation and now is the thrust of the [defendants'] appeal. . . . The court was presented with the original note and mortgage documents and examined the allonges, endorsements and assignments. No credible,

persuasive or admissible evidence has been presented to rebut the [plaintiff's] standing."[13]

Against the backdrop of this extensive factual and procedural background, we now consider the defendants' claim that the trial court lacked jurisdiction over this action on the basis of the plaintiff's alleged lack of standing. "The ability to enforce a note in Connecticut is governed by the adopted provisions of the Uniform Commercial Code. Pursuant to General Statutes § 42a-3-301, a [p]erson entitled to enforce an instrument means . . . the holder of the instrument . . . . When a note is endorsed in blank . . . the note becomes payable to the bearer of the note. See General Statutes § 42a-3-205 (b); see also *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 231, 32 A.3d 307 (2011), overruled in part on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, [supra, 309 Conn. 325 n.18]. When a person or entity has possession of a note endorsed in blank, it becomes the valid holder of the note. General Statutes § 42a-1-201 (b) (21) (A). Therefore, a party in possession of a note, endorsed in blank and thereby made payable to its bearer, is the valid holder of the note, and is entitled to enforce the note. . . .

"In *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 231, our Supreme Court stated that to seek enforcement of a note through foreclosure, a holder must be able to demonstrate it is the owner of the underlying debt. It noted, however, that a holder of a

[13] The court also stated: "Although the . . . defendants' attorney has made strenuous arguments to the court regarding the standing of the plaintiff to pursue this foreclosure action over the course of almost seven years of litigation at the trial court level, none of these arguments have been supported by evidence or persuasive to the court for the reasons that were previously stated in the memoranda of decision resolving the motions filed by the defendant[s]."

note is *presumed* to be the rightful owner of the underlying debt, and that unless the party defending against the foreclosure action rebuts that presumption, the holder has standing to foreclose. . . . A holder merely needs to produce the note to establish that presumption. The production of the note establishes his case prima facie against the [defendant] and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, supra, 160 Conn. App. 146–47.

"The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt has passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must *prove* that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis in original; footnote omitted.) Id., 150.

In the event of such proof, "the burden would shift back to the plaintiff to demonstrate that the owner has vested it with the right to receive the money secured by the note." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325 n.18.

The defendants argue that they successfully rebutted the presumption that the plaintiff, as the holder of the note, is the owner of the debt, and, therefore, has standing to seek enforcement of the note through foreclosure. The defendants rely in part on a foreclosure mediator's report filed on November 27, 2013, in which the mediator referred to the plaintiff as the servicer of the loan and Federal Home Loan Bank of Indianapolis as the investor.[14] The defendants also rely on the letters from the plaintiff to the defendants in which the plaintiff referred to itself as the servicer of the loan and to Federal Home Loan Bank of Indianapolis as the investor. The defendants specifically refer to the letter dated November 4, 2014, indicating that Mark Kepple had communicated directly with Federal Home Loan Bank of Indianapolis. See footnote 8 of this opinion. Additionally, the defendants contend that statements of counsel for the plaintiff—made at hearings during the litigation and indicating that (1) a contractual relationship existed between the plaintiff and Federal Home Loan Bank of Indianapolis and (2) the plaintiff was the servicer of the loan—constituted judicial admissions. Finally, the defendants argue that the court's statement that "it seem[ed] . . . that the owner as opposed to the holder of the note [was] . . . Federal Home Loan Bank [of Indianapolis]," made during the hearing on the defendants' motion to stay; see footnote 10 of this opinion;

[14] The foreclosure mediator's report stated that "[the plaintiff] is the servicer of the loan but does not have the authority to approve any retention options. All decisions must be made by the investor, Federal Home Loan Bank [of Indianapolis]. Federal Home Loan Bank [of Indianapolis] reviews the application based on the information [the plaintiff] sends them for review."

constituted a factual finding that Federal Home Loan Bank of Indianapolis was the owner of the underlying debt. The plaintiff counters that the defendants failed to rebut the presumption of standing in the plaintiff's favor. We agree with the plaintiff that the defendants failed to rebut the presumption that the plaintiff was the owner of the debt.

As a threshold matter, we note that the defendants do not challenge on appeal any particular ruling of the trial court relating to the plaintiff's standing. Rather, they rely on a compilation of purported evidence cherry picked from the record, which they argue should be "taken as a whole" on appeal. Notably, when the trial court rendered judgment of foreclosure by sale on October 23, 2017, the defendants did not renew their motion to dismiss based on the plaintiff's alleged lack of standing and did not present to the trial court, during the October 23, 2017 hearing or at any other time, the compilation of purported evidence on which they rely on appeal. Instead, they withdrew their objection to the plaintiff's motion for judgment of foreclosure at the October 23, 2017 hearing. See *Wells Fargo Bank, N.A.* v. *Tarzia*, 150 Conn. App. 660, 665–66, 92 A.3d 983 (rejecting defendant's argument that plaintiff failed to state claim for strict foreclosure by pleading and proving its status as holder of note and mortgage when defendant did not file opposition to plaintiff's motion for summary judgment and, therefore, never attempted to rebut presumption that plaintiff owned debt and had right to foreclose mortgage), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014).

Moreover, in the six years following the court's denial of their motion to dismiss on September 21, 2012, which the defendants do not challenge on appeal, the defendants apparently did not seek an evidentiary hearing

in order to proffer to the trial court the compilation of purported evidence on which they now rely. Their failure to do so deprived the plaintiff of the ability to present evidence demonstrating, in the event the presumption was rebutted, "that the owner has vested it with the right to receive the money secured by the note." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325 n.18. The defendants' failure to present the compilation in an evidentiary hearing also deprived the trial court of the ability to consider the proffered evidence, rule on its admissibility, and make specific findings relating to whether the presumption had been rebutted. Although it is axiomatic that subject matter jurisdiction can be raised at any time, the defendants' attempt to have this court make evidentiary determinations regarding their compilation of purported evidence and make factual findings based thereon is wholly improper. See *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 560, 833 A.2d 891 (2003) ("[o]rdinarily it is not the function of [our Supreme Court] or [this court] to make factual findings"). Accordingly, we reject the defendants' claim.

We also highlight certain reviewability problems with the defendants' compilation of purported evidence. We initially note that some of the statements upon which the defendants rely were deemed inadmissible hearsay by the trial court when it denied the defendants' motion to dismiss on September 21, 2012. The defendants do not address those evidentiary determinations on appeal and, thus, they remain undisturbed. The subsequent letters from the plaintiff to the defendants, in which the plaintiff identified itself as the servicer of the defendants' loan, were attached as exhibits to Mark Kepple's affidavit filed in support of the defendants' motion to stay. These letters were not introduced into evidence.

Moreover, we question the probative value of the correspondence from the plaintiff to the defendants and the statements in the foreclosure mediator's report identifying the plaintiff as the servicer of the loan and Federal Home Loan Bank of Indianapolis as the investor. In *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, supra, 161 Conn. App. 139–40, 147, we affirmed the trial court's finding that the deposition testimony of a home lending research officer employed by the plaintiff, who testified that the plaintiff was the holder of the note, servicer, and mortgagee, and that Freddie Mac was the investor of the debt, did not rebut the presumption in favor of the plaintiff, where the employee did not define what an "investor" is in this context and did not testify that the plaintiff was not the owner of the debt. As in *Simoulidis*, the documents upon which the defendants rely in this case do not define the role of the investor with regard to the loan. In addition, with respect to the foreclosure mediator's report, the defendants do not explain how the mediator's statement in such report would be admissible where it is not based on personal knowledge regarding ownership of the debt.

With regard to whether the statements[15] of counsel for the plaintiff—in which counsel indicated that a contractual relationship existed between the plaintiff and Federal Home Loan Bank of Indianapolis and that the plaintiff was the servicer of the loan—constituted judicial admissions, we note that "[t]he determination of whether a party's statement is a judicial admission or an evidentiary admission is a question of fact for the trial court." (Internal quotation marks omitted.) *O & G*

[15] The statements were made by counsel for the plaintiff during hearings on the defendants' petition for reinclusion in the foreclosure mediation program, the defendants' motion to order the plaintiff to produce documentation of a purported investor restriction, and the defendants' second motion to open the default.

Industries, *Inc.* v. *All Phase Enterprises*, *Inc.*, 112 Conn. App. 511, 524, 963 A.2d 676 (2009). A witness or a party should not be presumed to have made a judicial admission without a finding of the trial court. Id. In the present case, the defendants have not pointed to any finding by the trial court indicating that these statements were judicial admissions. In the absence of such a finding, we cannot conclude that these statements are conclusive regarding the plaintiff's standing to bring the action.[16]

Finally, we disagree with the defendants that the court's statement, made during the hearing on the defendants' motion to stay and indicating that "it seem[ed] . . . that the owner as opposed to the holder of the note [was] . . . Federal Home Loan Bank [of Indianapolis]," constitutes a finding of fact. This conclusion necessarily follows from the court's repeated decisions indicating that the defendants had not presented evidence sufficient to rebut the presumption that the plaintiff had standing.

On the basis of our review of the record, we conclude that at no time did the defendants rebut the presumption enjoyed by the plaintiff and, thus, the plaintiff had standing to prosecute this foreclosure action.

The judgment is affirmed.

In this opinion the other judges concurred.

[16] "Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . They excuse the other party from the necessity of presenting evidence on the fact admitted and are conclusive on the party making them. . . . The statement relied on as a binding admission [however] must be clear, deliberate and unequivocal." (Citation omitted; internal quotation marks omitted.) *O & G Industries*, *Inc.* v. *All Phase Enterprises*, *Inc.*, supra, 112 Conn. App. 523 n.5. Although the trial court in this case did not make a finding that the statements of counsel for the plaintiff constituted judicial admissions, it appears that the trial court did not consider the statements to be conclusive regarding the plaintiff's standing to bring the present action.

STATE OF CONNECTICUT *v.* MARCUS H.*
(AC 39379)
(AC 40796)

Prescott, Bright and Norcott, Js.

Syllabus

Convicted, after a jury trial, of the crimes of assault in the second degree with a motor vehicle, risk of injury to a child, reckless endangerment in the first degree, reckless driving, operating a motor vehicle while under the influence of intoxicating liquor, interfering with an officer and increasing speed in an attempt to escape or elude a police officer, the defendant appealed to this court. During jury selection, the defendant moved for a continuance to replace his private attorney, W, with another private attorney. The trial court denied the motion, and the defendant requested to represent himself. After concluding that the defendant knowingly and voluntarily had waived his right to counsel, the court granted his request and appointed W as the defendant's standby counsel. The defendant thereafter filed an application for a public defender, but the public defender's office concluded that he was not eligible for its services. Following a hearing, the trial court denied the defendant's application for a public defender, implicitly finding that the defendant was not indigent and, thus, that he was not entitled to a public defender. The defendant thereafter proceeded with the trial self-represented. After several days of trial, the state asked the court to raise the defendant's bond because he had failed to appear for trial on a previous day. The court raised the defendant's bond, and when he was unable to post it, the defendant was taken into custody by the judicial marshals and was placed in leg shackles. After a recess, the defendant did not request that the court order that his shackles be removed for the trial and, when the trial resumed, he was seated in a manner in which his shackles were not visible to the jury. The jury, however, briefly could see that he was wearing shackles on his ankles when he stood up to approach a witness. The jury was then immediately excused at the prosecutor's request, and the court ordered the judicial marshals to remove the defendant's shackles. After the jury returned, it was instructed by the court not to consider the shackles in its deliberations. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court violated his constitutional right to counsel and, therefore, to due process, by denying his application for the appointment of a public defender; that

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

court's implicit finding that the defendant was not indigent was not clearly erroneous and was supported by the evidence in the record, which indicated that the defendant had the financial ability at the time of his request for a public defender to secure competent legal representation, as he had obtained a private attorney, W, who was ready, willing and able to continue to represent him throughout the trial, and the trial court, therefore, properly denied the defendant's request for the appointment of a public defender.

2. The defendant's unpreserved claim that the trial court violated his constitutional right to due process by failing to order, sua sponte, a judicial marshal to remove his shackles during the trial was unavailing, the defendant having failed to demonstrate the existence of a constitutional violation that deprived him of a fair trial: the defendant did not have a constitutional right that obligated the trial court to inquire as to whether he was shackled and to order, sua sponte, that his shackles be removed, as the defendant's failure to object to being tried before the jury in shackles was sufficient to negate the compulsion necessary to establish a constitutional violation, and his request for the judicial marshals to remove his shackles was inadequate to alert the court that he wanted them to be removed; moreover, the defendant was not compelled to stand trial before the jury while visibly shackled, as he had the option to remain seated and to request that a marshal bring the court, or any witnesses, his documents, but, instead, he asked permission to approach the witness, voluntarily exposing his shackles to the jury, even though he obviously was aware that he was shackled and that the jury would be able to observe the shackles, and this court was not persuaded that the jury's brief exposure to the defendant in leg shackles, together with the trial court's curative instruction, denied the defendant of a fair trial; furthermore, the defendant's reliance on the rule of practice (§ 42-46) that requires the judicial authority to employ reasonable efforts to conceal such restraints from the view of the jurors was unavailing, as the rules of practice are not a source of constitutional rights for which the failure to follow establishes a constitutional violation.

Argued January 14—officially released June 4, 2019

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts each of the crimes of risk of injury to a child and reckless endangerment in the first degree, and with the crimes of assault in the second degree with a motor vehicle, reckless driving, operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle with an elevated blood alcohol content, interfering with an officer and increasing speed in an attempt to escape or elude a police officer, and, in the second part, with

previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the court, *Jongbloed*, *J.*, denied the defendant's application for the appointment of a public defender; thereafter, the first part of the information was tried to the jury; verdict and judgment of guilty; subsequently, the defendant was presented to the court on a plea of guilty to the second part of the information; thereafter, the court vacated the conviction of operating a motor vehicle with an elevated blood alcohol content, and the defendant appealed to this court; subsequently, the court, *Jongbloed*, *J.*, issued an articulation of its decision. *Appeal dismissed in AC 39379*; *affirmed*.

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were, *Michael L. Regan*, state's attorney, and *Sarah Bowman*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Marcus H., appeals from the judgment of conviction, rendered after a jury trial, of assault in the second degree with a motor vehicle in violation of General Statutes § 53a-60d, two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63, reckless driving in violation of General Statutes § 14-222, operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a (a) (1), operating a motor vehicle with an elevated blood alcohol content in violation of General Statutes § 14-227a (a) (2),[1] interfering with an

[1] The court vacated the conviction of operating a motor vehicle with an elevated blood alcohol content in violation of § 14-227a (a) (2), and sentenced

officer in violation of General Statutes § 53a-167a, and increasing speed in an attempt to escape or elude a police officer in violation of General Statutes § 14-223 (b). The defendant claims on appeal that the court improperly (1) violated his constitutional right to counsel by denying his application for the appointment of a public defender and (2) violated his constitutional right to due process when it did not order, sua sponte, a judicial marshal to remove his leg shackles during the trial.[2] We are not persuaded by the defendant's claims and, accordingly, affirm the judgment of conviction.[3]

The jury reasonably could have found the following facts. In the early morning of May 25, 2014, a motorist driving behind the defendant observed that his car

the defendant on the conviction of operating a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a (a) (1). See *State* v. *Lopez*, 177 Conn. App. 651, 668–69, 173 A.3d 485 (2017) ("[t]he legislative history reflects that the two subdivisions of § 14-227a (a) describe alternative means for committing the same offense of illegally operating a motor vehicle while under the influence of intoxicating liquor or drugs"), cert. denied, 327 Conn. 989, 175 A.3d 563 (2017).

[2] The petitioner appears to predicate his claims on the fifth, sixth, and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. Because he has not provided an independent analysis of his state constitutional claims under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we deem them abandoned. See, e.g., *Barros* v. *Barros*, 309 Conn. 499, 507 n.9, 72 A.3d 367 (2013) ("we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue" [internal quotation marks omitted]). Accordingly, we analyze the defendant's claims under the federal constitution only.

[3] The defendant filed AC 39379 before the imposition of his sentence. Practice Book § 61-6 (a) (1) provides in relevant part: "The defendant [in a criminal case] may appeal from a conviction for an offense when the conviction has become a final judgment. The conviction becomes a final judgment after the imposition of sentence. . . ." See also *State* v. *Fielding*, 296 Conn. 26, 36, 994 A.2d 96 (2010) ("[i]n a criminal proceeding, there is no final judgment until the imposition of a sentence" [internal quotation marks omitted]). Accordingly, we dismiss the appeal in AC 39379 for lack of a final judgment. In any event, all of the issues that were raised in AC 39379 are addressed in this opinion.

remained stopped through two cycles of a stoplight. The motorist pulled over, exited her car, and approached the passenger side of the defendant's car. She observed the defendant sleeping or unconscious in the driver seat and two young girls in car seats in the back of the car. The motorist woke up the defendant, who then drove off.

Due to concern for the children's safety, the motorist called the police and informed them that she thought that the defendant was intoxicated. On the basis of the information provided by the motorist, the police station issued a "be on the lookout" report over their radio system for a black Acura with a black male operator and two females in the back seat. Officer Jason Pudvah saw a car that matched the description from the report idling at a nearby gas station. Pudvah approached the car and observed the defendant slumped over in the driver's seat and his two and four year old daughters in the backseat. Pudvah knocked on the window and spoke with the defendant. After requesting the defendant's information, Pudvah returned to his vehicle. While Pudvah was speaking with police dispatch, the defendant drove off at a high rate of speed.

Pudvah initially pursued the defendant but stopped due to fear for the children's safety and in the hope that the defendant would slow down. Further down the road, the defendant lost control of his car and crashed into a telephone pole. The car became airborne and landed upside down in a residential swimming pool. As a result of the accident, the defendant's younger daughter suffered serious injuries to her arm and his older daughter sustained an ankle injury.

After the trial, during which the defendant represented himself, a jury found the defendant guilty of all charges, and the court rendered judgment in accordance with the verdict. Thereafter, the defendant pleaded

guilty to being a subsequent offender to operating a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a (g) (2). The trial court, *Jongbloed*, *J.*, sentenced the defendant to a total effective term of twenty-three years of incarceration, execution suspended after fourteen and one-half years, followed by five years of probation with special conditions. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the trial court violated his constitutional right to counsel and, therefore, to due process, by denying his application for the appointment of a public defender. We disagree.

The following additional facts are relevant to this claim. On the first day of jury selection on February 18, 2016,[4] the defendant requested a continuance to replace his private attorney, Attorney John Williams, with another private attorney. Specifically, he claimed that he had a dispute with Attorney Williams regarding payment of attorney's fees, and he did not believe that Attorney Williams would represent him properly. Attorney Williams informed the court that he had "told [the defendant] expressly and more than once that under no circumstances would his [lack of payment] in any way, shape, or form affect [his] commitment to [the defendant]." The court denied the motion for a continuance and stated that "[Attorney] Williams is going to honor his professional obligations under all circumstances and represent [the defendant] to the best of his ability."

[4] Jury selection originally occurred on October 14 and 15, 2015. On November 16, 2015, however, the court granted a motion for a competency evaluation of the defendant. On the basis of the evaluation, the court found that the defendant was competent to stand trial. Due to the evaluation, the trial was postponed and a second jury selection occurred on February 18, 19, and 22, 2016.

After the court denied the motion for a continuance, the defendant requested to represent himself. The court canvassed the defendant regarding his decision to represent himself, including inquiring as to whether he understood the dangers of self-representation. After concluding that the defendant knowingly and voluntarily waived his right to counsel, the court granted his request. The court then appointed Attorney Williams as the defendant's standby counsel. Jury selection thereafter commenced, with the defendant representing himself. That afternoon, the defendant applied for a public defender.

The next day, the court held a hearing on the defendant's request for appointment of a public defender. The assistant state's attorney, the defendant, Attorney Williams, and Attorney Sean Kelly from the public defender's office were present at the hearing. Attorney Kelly stated that, after reviewing the defendant's application, the defendant was not eligible for their services and that the Office of the Public Defender did not seek to be appointed in the case.

The defendant argued that he was financially eligible for the services of a public defender. Specifically, he argued that, although he was able to post bonds and had retained private counsel in the past, his financial situation had changed so that he had "the right to free counsel . . . on the state's dollar." Attorney Kelly stated that the public defender's office considers many factors when making a decision regarding a defendant's eligibility, including whether the defendant is receiving support from others. After evaluating the defendant's application, the public defender's office concluded that his circumstances did not warrant appointment of a public defender.

The defendant initially posted a $25,000 surety bond. His bond subsequently was increased to a $75,000

surety bond, which he also posted. Therefore, the defendant was not in custody and was living with his mother at the time he applied for a public defender. Attorney Kelly noted that the defendant's ability to post bond and to obtain private counsel "shows a pattern where, if there's money needed, money comes . . . ." The defendant himself stated that the money from his initial payment to Attorney Williams came from his mother. Attorney Kelly also noted that this was the second private attorney the defendant had retained in the case and that the defendant had posted significant bonds on two prior occasions. These facts taken together led the public defender's office to conclude that the defendant was not indigent.

The defendant responded to Attorney Kelly by stating that he still owed money to both of his private attorneys and had balances on both bonds. Finally, he restated that he believed that Attorney Williams, who was present and available to represent him, would be ineffective. At the conclusion of the hearing, the trial court denied the defendant's request. In denying the defendant's request, the court stated: "Under all the circumstances, [the public defender's office is] not seeking to be appointed. I am not going to appoint the public defender's office to represent you. We'll continue your appearance pro se with standby counsel by Attorney Williams."[5] The defendant continued to trial representing himself, with the assistance of Attorney Williams as standby counsel.

We begin with the relevant law and standard of review that govern this claim. Practice Book § 37-6 (a) provides in relevant part: "If the judicial authority determines

[5] Although the court did not explain why it concluded that the defendant was not entitled to a public defender, it appears that, on the basis of the arguments presented to it, it implicitly found that the defendant was not indigent.

after investigation by the public defender that the defendant is indigent, the judicial authority may designate the public defender or a special public defender to represent the defendant . . . . If the public defender or his or her office determines that a defendant is not eligible to receive the services of a public defender, the defendant may appeal the public defender's decision to the judicial authority in accordance with General Statutes § 51-297 (g). The judicial authority may not appoint the public defender unless the judicial authority finds the defendant indigent following such appeal. . . ."

Our Supreme Court in *State* v. *Henderson*, 307 Conn. 533, 540–41, 55 A.3d 291 (2012), stated: "[T]he trial court's assessment of the defendant's offer of proof pertaining to whether he was indigent and was, therefore, eligible for state funded . . . assistance, is a factual determination subject to a 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. . . .

"It is the duty of the state to provide adequate means to assure that no indigent [defendant] accused lacks full opportunity for his defense . . . . The right to legal and financial assistance at state expense is, however, not unlimited. Defendants seeking such assistance must satisfy the court as to their indigency . . . . This has largely been accomplished through [public defender services] . . . which has promulgated guidelines that are instructive as to the threshold indigency determination. . . .

"[General Statutes §] 51-297 (a) requires the public defender's office to investigate the financial status of

an individual requesting representation on the basis of indigency, whereby the individual must, under oath or affirmation, set forth his liabilities, assets, income and sources thereof. . . . [General Statutes §] 51-296 (a) requires that, [i]n any criminal action . . . the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender . . . to represent such indigent defendant . . . .'' (Internal quotation marks omitted.)

Section 51-297 (f) provides in relevant part: ''As used in this chapter, 'indigent defendant' means . . . a person who is formally charged with the commission of a crime punishable by imprisonment and who does not have the financial ability at the time of his request for representation to secure competent legal representation and to provide other necessary expenses of legal representation . . . .''

Here, there is evidence in the record to support the court's implicit finding that the defendant was not indigent and, thus, not entitled to the appointment of a public defender. The most probative evidence in the record that the defendant had the financial ability at the time of his request for a public defender to secure competent legal representation was that he, in fact, had obtained a private attorney who was ready, willing, and able to continue to represent him throughout the trial. On this fact alone, we conclude that the trial court's finding that the defendant was not indigent is not clearly erroneous, and, thus, this claim warrants no further discussion.[6]

[6] Because we conclude that the trial court's finding that the defendant had the requisite ability to obtain private counsel was not clearly erroneous on the basis of the fact he previously had done so, we need not reach the defendant's assertion that the public defender's office should not have considered the resources of the defendant's family in determining that he was ineligible for the services of a public defender.

Accordingly, we conclude that the court properly denied the defendant's application for the appointment of a public defender.[7]

II

The defendant next claims that the trial court violated his constitutional right to due process by failing to order, sua sponte, a judicial marshal to remove his shackles during the trial. The defendant states that this aspect of his claim does not implicate the court's denial of his motion for a mistrial.[8] Instead, he invites this

[7] Even if the defendant had established his indigency, the court would not have been obligated to replace Attorney Williams with a public defender. See *Sekou* v. *Warden*, 216 Conn. 678, 686, 583 A.2d 1277 (1990) (criminal defendant's right to counsel of choice does not grant defendant an unlimited opportunity to obtain alternative counsel on eve of trial). Under the circumstances of this case, the defendant's sixth amendment right to counsel could not have been violated when competent counsel, Attorney Williams, appeared with the defendant for trial and was fully prepared to represent the defendant through the conclusion of the trial. Furthermore, the defendant's application for a public defender was not filed in order to secure any particular attorney of the defendant's choosing but merely sought to get someone other than Attorney Williams. A defendant's dissatisfaction with counsel on the eve of trial or a disagreement over trial strategy does not entitle a defendant to the appointment of new counsel. *State* v. *Morico*, 14 Conn. App. 144–45, 539 A.2d 1033, cert. denied, 208 Conn. 812, 546 A.2d 281 (1988). Whether to allow a defendant to replace counsel in such circumstances is left to the sound discretion of the trial court. Id.

[8] The defendant notes in his appellate brief, however, that if we were to disagree with his due process claim, then "[we] would reach the issue of whether a mistrial should have been granted once the shackles became obvious." This sentence is the only mention within the defendant's main brief of this claim regarding the propriety of the court's denial of his motion for a mistrial. He makes no mention of it in his reply brief. Moreover, this claim is not accompanied by any supporting arguments or citations to relevant authority. Therefore, this claim is inadequately briefed by the defendant, and we decline to review it. See *In re Elijah C.*, 326 Conn. 480, 495, 165 A.3d 1149 (2017) ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Internal quotation marks omitted.]); see also *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) (appellate courts "are not required

court to focus on whether the trial court violated his right to due process by failing to order, sua sponte, that his shackles be removed. Although this claim is not preserved because it was not raised to the trial court, we nevertheless review it under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A. 2d 823 (1989), as modified by *In re Yasiel R*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[9] We conclude that the trial court, under the circumstances of this case, did not violate the defendant's due process rights by failing to order, sua sponte, that his shackles be removed. Therefore, the defendant's claim fails under the third prong of *Golding*, which requires that he demonstrate that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ."[10] Id., 240.

to review issues that have been improperly presented . . . through an inadequate brief" [internal quotation marks omitted]).

[9] The defendant argues that his due process claim is preserved by his motion for a mistrial, or alternatively, that it is reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 233. We disagree that his due process claim as framed on appeal was preserved by his motion for a mistrial because he never claimed in his motion that the court had an obligation to order, sua sponte, that his shackles be removed. Nevertheless, because his claim is arguably of constitutional magnitude, we review it pursuant to *Golding*. Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free . . . to respond to the defendant's [*Golding*] claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) Id., 239–40.

[10] Because we review the defendant's claim under *Golding* we need not undergo plain error analysis. See *State* v. *Abraham*, 64 Conn. App. 384, 408, 780 A.2d 223 ("[b]ecause this claim is unpreserved, our review is limited to either plain error review; see Practice Book § 60-5; or review pursuant to the *Golding* doctrine"), cert. denied, 258 Conn. 917, 782 A.2d 1246 (2001). We also decline the defendant's invitation to exercise our supervisory authority over the administration of justice.

The following additional facts are relevant to this claim. On Monday, February 29, 2016, after several days of trial, the state asked the court to raise the defendant's bond because he had failed to appear for trial on the previous Friday. After argument, the court raised the defendant's bond to require that he post an additional $50,000 in cash. The defendant was unable to post the increased bond, and he, therefore, was taken into custody by the judicial marshals. The court took a recess, during which the marshals shackled the defendant.

The record is unclear whether the court knew, at the time that it returned from the recess, that the defendant was wearing leg shackles. Nevertheless, after the recess, the defendant did not request that the court order that his shackles be removed. The defendant did object, however, to going forward with the trial because he was not feeling well. The court proceeded with the trial but granted the defendant permission to remain seated in order to accommodate any illness.

The trial resumed, and the defendant was seated in a manner in which his leg shackles were not visible to the jury.[11] At some point, however, the defendant requested permission to approach a witness. After being granted permission, the defendant stood up and started to approach the witness, at which time, the jury briefly could see that the defendant was wearing shackles on his ankles. At the request of the prosecutor, the jury immediately was excused. Once the jury was excused, the prosecutor requested that the defendant's shackles be removed. At this time, the court ordered the judicial marshals to remove the defendant's shackles. The defendant immediately moved for a mistrial. In opposition to the motion, the prosecutor argued that the defendant knew that the shackles would be visible to the

[11] Although the court did not make any specific factual finding regarding the visibility of the defendant's shackles while he remained seated, the defendant states in his brief that the shackles became visible only when he stood up and began to approach the witness.

jury when he stood up and that he could have brought the issue to the court's attention.

The court denied the defendant's motion for a mistrial. In denying the motion, the court stated that the defendant failed to request that the court order that his shackles be removed. The court also stated that it would give a limiting instruction regarding the shackles to the jury upon the defendant's request. The defendant then requested a limiting instruction regarding the shackles, which the court granted. After the jury returned, it was instructed not to consider the shackles in its deliberations.[12] The following day, the defendant renewed his motion for a mistrial. The prosecutor argued that a mistrial was not warranted because the jury's exposure to the shackles was brief and the court's response to the situation was immediate. Further, the prosecutor stated that the limiting instruction was an appropriate remedy. The court, again, denied the defendant's motion.

We begin with a discussion of the law applicable to the defendant's claim. "Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. . . . This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down."

[12] The court stated: "Ladies and gentlemen, I'm just going to give you a brief instruction. You may have noticed that the defendant did have on shackles as he walked out to show a document, to have a document marked for identification, and let me just indicate to you that I am instructing you that you're not to speculate as to any reasons for that and it's nothing that should factor into your deliberations and nothing that should be considered by you in any way."

(Citation omitted; internal quotation marks omitted.) *Holbrook* v. *Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

"As a general proposition, a criminal defendant has the right to appear in court free from physical restraints. . . . Grounded in the common law, this right evolved in order to preserve the presumption favoring a criminal defendant's innocence, while eliminating any detrimental effects to the defendant that could result if he were physically restrained in the courtroom. . . . The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. . . . In order to implement that presumption, courts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. . . . Put another way, for the presumption to be effective, courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion." (Citations omitted; internal quotation marks omitted.) *State* v. *Woolcock*, 201 Conn. 605, 612–13, 518 A.2d 1377 (1986).

"In order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion. . . . The negative connotations of restraints, nevertheless, are without significance unless the fact of the restraints comes to the attention of the jury." (Internal

quotation marks omitted.) *State* v. *Brawley*, 321 Conn. 583, 588, 137 A.3d 757 (2016).

In *Deck* v. *Missouri*, 544 U.S. 622, 626, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005), the United States Supreme Court stated that "[t]he law has long forbidden routine use of *visible* shackles during the guilt phase [of a criminal trial] . . . ." (Emphasis added.) The court further noted that "[c]ourts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints *that are visible to the jury*; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." (Emphasis added.) Id., 628. Furthermore, the court held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (Emphasis added.) Id., 629.

Turning to the defendant's claim, he argues that, because the court knew that he was taken into custody on the morning of February 29, 2016, it should have determined whether he was shackled in the courtroom and then ordered that the shackles be removed before the jury entered. The defendant's claim that he had a constitutional right obligating the trial court to inquire, sua sponte, whether he was shackled is misplaced in light of well established law.[13] Whether the defendant was or was not shackled, however, is not the critical question. Instead the critical question for purposes of the defendant's constitutional claim is whether the

[13] Although it may have been a "best practice" for the court to have inquired, sua sponte, whether the defendant in fact was shackled after he failed to post the increased bond, the defendant has not persuaded us that it was constitutionally *required* to make such an inquiry.

defendant was unnecessarily compelled to stand trial before a jury while *visibly* shackled.

This case is analogous to *Estelle* v. *Williams*, 425 U.S. 501, 502, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), in which the respondent claimed that his right to due process was violated because he was tried before a jury while wearing prison attire. Prison attire implicates the same due process concerns as shackles, as they both may have an erosive effect on the defendant's presumption of innocence. See *State* v. *Rose*, 305 Conn. 594, 622, 46 A.3d 139 (2012) (*Zarella*, *J.*, dissenting) ("A juror might associate prison attire with an increased likelihood that the defendant had committed the crime. In that sense, the harm is similar to that caused by requiring a defendant to remain visibly shackled . . . .").

In *Estelle*, the record was "clear that no objection was made to the trial judge concerning the jail attire either before or . . . during the trial." *Estelle* v. *Williams*, supra, 425 U.S. 509–10. The court noted that the respondent had raised this issue with the jail attendant prior to trial, but not to the trial judge. Id., 510. The court held that "although the State cannot, consistently with the Fourteenth Amendment, *compel* an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." (Emphasis added.) Id., 512–13. Further, the court in *Estelle* held that the trial court was not obligated to inquire of the respondent or his counsel regarding whether he was deliberately choosing to be tried while wearing prison attire. Id., 512. Therefore, the court found no constitutional violation and reversed the judgment that had set aside the respondent's conviction. Id. The court in *Estelle* noted that "the courts have refused to embrace a mechanical rule vitiating any

conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire." Id., 507.

In the present case, the defendant never requested that the court order the judicial marshals to remove his shackles. Therefore, as in *Estelle*, the defendant's constitutional right to due process was not violated because the defendant's failure to make an objection to the court was sufficient to negate the compulsion necessary to establish a constitutional violation. The present case is readily distinguishable from those relied on by the defendant in which the respective courts affirmatively ordered, or refused to remove after objection, restraints or prison attire.[14]

The defendant definitively knew that he was shackled, yet, he did not request that the court order that the judicial marshals remove his shackles. The defendant argues that he asked the judicial marshals to remove his shackles. That request, however, was inadequate to alert the court that he wished to have his shackles removed.[15] Once the trial resumed after the defendant

[14] See *State* v. *Brawley*, supra, 321 Conn. 583 (trial court ordered that defendant be shackled during trial); *State* v. *Rose*, supra, 305 Conn. 599 (trial court compelled defendant to stand trial in identifiable prison clothing and shackles); *State* v. *Shashaty*, 251 Conn. 768, 799, 742 A.2d 786 (trial court ordered that defendant remain in shackles during jury selection and trial), cert. denied, 529 U.S. 1094, 120 S. Ct. 1734, 146 L. Ed 2d 653 (1999); *State* v. *White*, 229 Conn. 125, 144–46, 640 A.2d 572 (1994) (trial court ordered that defendant be shackled during trial, "acquiescing" to sheriff's recommendation without analysis or justification); *State* v. *Williams*, 195 Conn. 1, 9–10, 485 A.2d 570 (1985) (trial court ruled that defendant remain in leg restraints during course of jury selection).

[15] The defendant argues that the trial court's inaction constituted "tacit acceptance" of the judicial marshal's actions and is the equivalent of an affirmative shackling order. See *State* v. *White*, 229 Conn. 125, 144–46, 640 A.2d 572 (1994). In *White*, our Supreme Court held that the trial court improperly had "acquiesced" in the judicial marshal's recommendation to shackle the defendants. Id., 146. In *White*, however, the defendants specifically requested that the court order their shackles removed, and the court

was taken into custody, he was seated in a manner in which his shackles were concealed. At this point, the defendant had the opportunity to request the court to order that his shackles be removed but failed to do so.

The defendant also had the option to remain seated and request that a marshal bring the court, or any witnesses, his documents. The defendant had, in fact, utilized the judicial marshals to hand documents to the court earlier that day. Instead, the defendant asked permission to approach the witness, voluntarily exposing his shackles to the jury. When the defendant approached the witness, he obviously was aware that he was shackled and that the jury would be able to observe the shackles.[16]

Additionally, the defendant has not provided any case law that stands for the proposition that a defendant's right to due process is violated if the jury is briefly exposed to facts that would lead it to believe that the defendant is in custody. In the present case, when the defendant revealed to the jury that he was shackled, the prosecutor immediately requested that the jury be excused. Once the jury was excused, the court ordered the judicial marshals to remove the defendant's shackles. Therefore, the shackles were visible to the jury for only a brief period of time. Upon the jury's return to

denied their request. Id., 144. Further, the defendants renewed their objection to the court on several occasions and filed affidavits before and after the trial regarding their complaints. Id., 145–46. Therefore, *White* wholly is distinguishable from the present case. Additionally, in *Estelle* v. *Williams*, supra, 425 U.S. 510, the respondent made a request regarding his prison attire to a jail attendant, which was not sufficient to notify the court of his request.

[16] When the defendant was canvassed by the court regarding his decision to represent himself, he stated that he understood the dangers and disadvantages of self-representation. One such risk was his lack of understanding as to how to raise properly the question of whether the shackles should be removed so that they would not be visible to the jury when he approached a witness.

the courtroom, the court gave a curative instruction regarding the shackles, the adequacy of which the defendant has not challenged.

Our conclusion that the jury's brief exposure to the defendant in shackles did not violate his constitutional rights is supported by authority from other jurisdictions. For example, in *Ghent* v. *Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002), a defendant claimed that his constitutional right to due process was violated because he was physically restrained by the state in the presence of the jury. Specifically, jurors saw the defendant in the hallway at the entrance to the courtroom in handcuffs and other restraints. Id., 1133. The reviewing court stated that "[t]he jury's 'brief or inadvertent glimpse' of a shackled defendant is not inherently or presumptively prejudicial, nor has [the defendant] made a sufficient showing of actual prejudice." Id.

Additionally, in *United States* v. *Jones*, 468 F.3d 704, 706 (10th Cir. 2006), a defendant claimed that his right to due process was violated because a juror briefly saw him in leg shackles during the afternoon break on the second day of trial. The court held that there was no due process violation and stated that, "[i]n itself, a juror's brief view of a defendant in shackles does not qualify as a due process violation worthy of a new trial." Id., 709.

We agree with the courts in *Ghent* and *Jones*, that a jury's brief or inadvertent glimpse of a shackled defendant is not inherently or presumptively unconstitutional. Unlike cases in which the defendant was ordered to remain shackled throughout the entirety of the trial, here, the exposure lasted for only a brief period of time. We are not convinced that the brief exposure to the jury of the defendant with shackles on his ankles, paired with a curative instruction, denied the defendant of a fair trial.

Finally, we are not persuaded by the defendant's reliance on Practice Book § 42-46,[17] which provides that reasonable efforts shall be employed to conceal such restraints from the view of the jurors. See footnote 17 of this opinion. The rules of practice, however, are not a source of constitutional rights, for which the failure to follow establishes a constitutional violation. See General Statutes § 51-14 (a) (noting that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right").

In conclusion, we are not persuaded that the defendant had a constitutional right obligating the court to order, sua sponte, that his shackles be removed. Furthermore, we are not convinced that the defendant was compelled to stand trial before a jury while visibly shackled. Accordingly, the defendant has not demonstrated that a constitutional violation exists and that he was deprived of a fair trial.

The judgment in AC 40796 is affirmed; the appeal in AC 39379 is dismissed.

In this opinion the other judges concurred.

[17] Practice Book § 42-46 provides the court with a statutory framework when making a determination to employ reasonable means of restraint on a defendant. Practice Book § 42-46 provides: "(a) Reasonable means of restraint may be employed if the judicial authority finds such restraint reasonably necessary to maintain order. If restraints appear potentially necessary and the circumstances permit, the judicial authority may conduct an evidentiary hearing outside the presence of the jury before ordering such restraints. The judicial authority may rely on information other than that formally admitted into evidence. Such information shall be placed on the record outside the presence of the jury and the defendant given the opportunity to respond to it.

"(b) In ordering the use of restraints or denying a request to remove them, the judicial authority shall detail its reasons on the record outside the presence of the jury. The nature and duration of the restraints employed shall be those reasonable necessary under the circumstances. All reasonable efforts shall be employed to conceal such restraints from the view of the jurors. Upon request, the judicial authority shall instruct the jurors that restraint is not to be considered in assessing the evidence or in the determination of the case."

STATE OF CONNECTICUT *v.* JODI M. DOJNIA (AC 40650)

Sheldon, Keller and Flynn, Js.*

Syllabus

Convicted of the crime of assault of a disabled person in the second degree in violation of statute (§ 53a-60b [a] [1]), the defendant appealed to this court, claiming, inter alia, that § 53a-60b (a) (1) was unconstitutionally vague as applied to her conduct to the extent that it relied on the statutory (§ 1-1f [b]) definition of physically disabled. The defendant alleged that § 1-1f (b) was impermissibly broad and did not provide sufficient guidance with respect to whether the victim was physically disabled. The defendant and the victim, her sister, had engaged in a physical altercation in which the defendant struck the victim with a wooden billy club. The victim, at the time of the encounter, suffered from fibromyalgia, a nerve condition for which she had been receiving ongoing medical treatment and was taking prescription medications. She also experienced chronic pain issues and physical limitations that made sitting, standing and walking difficult. *Held*:

1. The defendant could not prevail on her unpreserved claim that § 53a-60b (a) (1) was unconstitutionally vague as applied to her violent conduct toward the victim: the defendant failed to demonstrate that a constitutional violation occurred that deprived her of a fair trial, as a reasonable person of ordinary intelligence would have anticipated that a plain reading of § 53a-60b (a) (1) would apply to her conduct, which clearly came within the statute's unmistakable core of prohibited conduct, and the record reflected that the victim was physically disabled for purposes of § 53a-60b (a) (1) because she suffered from a chronic bodily condition that significantly hampered her ability to carry out many of the everyday activities of life, and for years prior to the events at issue had received medical treatment and prescriptions to alleviate her pain and to help her sleep; moreover, the term physical disability as used in § 1-1f (b) had a readily ascertainable meaning that referred to any recurring bodily condition that detrimentally affected one's ability to carry out life's activities, and the phrase in § 1-1f (b), "not limited to," reflected that the legislature did not intend to list in § 1-1f (b) every bodily condition that could result in a physical disability and did not necessitate a conclusion that § 1-1f (b) lacked sufficient guidance with respect to its meaning, as the language at issue was general enough to encompass a wide variety of physical conditions, yet specific enough to provide sufficient notice as to the types of bodily conditions that are encompassed by the term physical disability.
2. The evidence was sufficient to support a finding that the victim suffered from a physical disability for purposes of § 53a-60b (a) (1): evidence of

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

the victim's lengthy medical history, and the testimony of the victim and L, a physician assistant who had treated her for several years, amply supported a finding beyond a reasonable doubt that the victim had a diagnosis of fibromyalgia at the time of the assault, there was no support for the defendant's claim that the state bore the burden of proving beyond a reasonable doubt that the victim's physical disability was caused by any particular illness or injury, that the diagnosis was medically accurate or that her alleged physical disability for purposes of § 1-1f (b) was the result of fibromyalgia, and the defendant's claim that a diagnosis of fibromyalgia did not satisfy the physical disability requirement of § 53a-60b (a) (1) was unavailing, as the evidence of the victim's physical disability was not limited to a diagnosis of fibromyalgia, and the victim and L testified that she had a complex medical history, and that L had prescribed medications and provided a variety of treatments for chronic pain issues and fibromyalgia syndrome; moreover, the defendant's assertions that § 1-1f (b) was ambiguous as to whether fibromyalgia constituted a physical disability, which was based on her claim that § 1-1f (b) required that a disability be established through conclusive medical tests and be more uniform in its symptoms, severity and presentation than fibromyalgia, would graft onto § 1-1f (b) limitations that are not evident in it as it is written, and the exclusion from the definition of physical disability of a chronic and painful physical condition that significantly hinders a person's ability to carry out several everyday life activities would thwart the broad protective purpose reflected in the plain language of § 1-1f (b).

3. The defendant could not prevail on her claim that she was deprived of her right to a fair trial as a result of certain comments of the prosecutor during closing argument to the jury about a 911 call that the defendant had made after the altercation with the victim: the prosecutor's reference to what the defendant said or almost said in the 911 call was fair commentary and reasonably could be interpreted to suggest that the defendant almost said that she let the victim have it, and the inference that the prosecutor drew was not the result of speculation, as the defendant's statement to the 911 dispatcher about the manner in which the altercation began reasonably could be interpreted to reflect that the defendant changed her explanation mid-sentence to provide a less incriminatory explanation; moreover, the prosecutor's remark was based on the content of the 911 recording, which was a full exhibit at trial and was played in the jury's presence, the argument was consistent with the defendant's testimony and theory of defense, the context of the prosecutor's argument suggested that the jury was being asked to draw inferences from the 911 recording, and it was not likely that the jury would have interpreted the prosecutor's isolated remark about what the defendant said to be anything other than the prosecutor's suggested interpretation of the 911 recording.

Argued January 7—officially released June 4, 2019

Procedural History

Substitute information charging the defendant with the crimes of assault of a disabled person in the second degree, assault in the third degree and reckless endangerment in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Cremins*, *J.*; verdict of guilty of assault of a disabled person in the second degree and reckless endangerment in the second degree; thereafter, the court vacated the verdict as to the charge of reckless endangerment in the second degree; judgment of guilty of assault of a disabled person in the second degree, from which the defendant appealed to this court. *Affirmed.*

Megan L. Wade, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Karen Diebolt*, former assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Jodi M. Dojnia, appeals from the judgment of conviction, rendered following a jury trial, of assault of a disabled person in the second degree in violation of General Statutes § 53a-60b (a) (1).[1] The defendant claims that (1) § 53a-60b (a) (1) is

[1] In addition to charging the defendant with assault of a disabled person in the second degree in violation of § 53a-60b (a) (1), the state charged the defendant with assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and reckless endangerment in the second degree in violation of General Statutes § 53a-64. The jury found the defendant guilty of both assault of a disabled person in the second degree and reckless endangerment in the second degree. The jury found the defendant not guilty of assault in the third degree. At the time of sentencing, and at the state's request, the court vacated the jury's verdict of guilty of reckless endangerment in the second degree in accordance with the rationale set forth in *State* v. *Polanco*,

unconstitutionally vague as applied to her conduct, (2) the evidence did not support a finding that the victim[2] was physically disabled, and (3) prosecutorial impropriety during closing argument deprived her of a fair trial. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In October, 2015, the defendant and the victim, who are sisters, resided in separate units of a duplex style home in Naugatuck that was owned by their mother. For years prior to the events at issue, the victim suffered from chronic pain and was physically limited in performing everyday tasks, such as standing, walking, and climbing stairs.

For several years prior to the events at issue, the defendant and the victim did not have a good relationship. The relationship between the defendant and the victim worsened in January, 2015, when the defendant's son, who resided with the defendant, was involved in an altercation with the victim at her residence. According to the victim, during this prior incident, the defendant's son broke down her back door and attacked her, which led to his arrest. Tensions escalated further because the defendant was unhappy with the fact that the victim's dog entered her portion of their shared backyard, and that the victim failed to clean up after her dog. Shortly before the incident underlying this appeal, the defendant erected a small plastic fence to

308 Conn. 242, 260, 61 A.3d 1084 (2013) ("when a defendant is convicted of greater and lesser included offenses, the trial court shall vacate the conviction for the lesser offense rather than merging it with the conviction for the greater offense"). The court sentenced the defendant to serve a term of incarceration of five years, execution suspended after she completed a two year mandatory minimum sentence, followed by a term of probation of three years.

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

separate her backyard from that of the victim in an attempt to keep the victim's dog away. The fence ran across the backyard and between the two rear doors of the residence. The victim was unhappy about the fence. The victim's mother had asked the victim to look for another place to live and, by October, 2015, the victim was actively planning to move out of her residence.

Late in the evening on October 10, 2015, the victim walked out of the front door of her residence. From one of the windows of the defendant's residence, the defendant made a negative comment to the victim, who was talking on her cell phone, but the victim declined to engage the defendant in conversation. At approximately 1:30 a.m., on October 11, 2015, the victim left her residence to walk her dog by means of her back door, which was adjacent to the back door leading into the defendant's residence. By this point in time, the victim had consumed multiple alcoholic beverages. The victim walked her dog in the vicinity of her nearby driveway.

While the victim was reentering her residence with her dog, she noticed that a light had been turned on inside of the defendant's residence. The victim then stepped back outside, at which time the defendant, who was lurking near the victim's back door, grabbed the victim by the upper part of her body and pulled her over the small plastic fence that was separating their backyards, causing the victim to topple to the ground. A physical struggle between the defendant and the victim ensued, during which the defendant struck the victim repeatedly with a wooden billy club. The victim, while lying on the ground, tried to prevent the defendant from continuing to strike her. The victim grabbed the defendant's hand and pulled her by her hair, causing her to fall on top of her. The victim repeatedly told the defendant to "[l]et go" of the billy club, and the

defendant told the victim that she was tired of her, that she hated her, and that she wanted her "out of here."

Ultimately, the victim restrained the defendant, and the victim asked her what their father, who had died, would say to them if he saw them fighting. The defendant promised not to strike the victim again, at which time the victim released her grasp on the defendant's hair and the defendant stepped away from the victim.

The defendant picked up the victim's cell phone, which had fallen out of the victim's hands during the altercation, and gave it back to her. The victim tossed aside one of the defendant's garbage pails before making her way back inside. The victim was bleeding from her nose and choking on blood. The victim sustained multiple bruises and lacerations on her face, back, left arm, left shoulder, left leg, and torso. The victim's right eye swelled and she experienced a great deal of pain, particularly pain that emanated from her jaw. The victim's clothing was stained with blood and dirt, and she was unable immediately to locate either her eyeglasses or a pendant that she had been wearing prior to the altercation.

After the victim went back inside of her residence, she called the police. Soon thereafter, Naugatuck police Officer Robert Byrne arrived on the scene. He encountered the defendant and the victim arguing in front of the residence. After he separated the sisters, he met privately with the defendant. The defendant admitted that she had struck the victim with the wooden billy club, which was on her kitchen table, but stated that she had acted in self-defense. The defendant also stated that she had begun arguing with the victim after she caught the victim "snooping around in the backyard . . . ." She stated that the small plastic fence that she had erected to prevent the victim's dog from entering

her portion of the backyard was a cause of consternation between her and the victim. The defendant sustained injuries during the incident and claimed to have been "strangled" by the victim, but her injuries were not serious enough to warrant medical treatment. Byrne arrested the defendant on the assault charge, took her into custody, and transported her to police headquarters to complete the booking process.

Naugatuck police Officer Shane Andrew Pucci arrived on the scene to provide Byrne with backup assistance. He spoke with the victim privately in her residence and accompanied her to a hospital after emergency medical services had arrived on the scene. At the hospital, medical personnel took X-ray images of the victim and treated her injuries. While at the hospital, the victim provided Byrne with an oral statement concerning the incident and her injuries. By 6 a.m. on October 11, 2015, the victim was discharged from the hospital and transported home. Pucci gave the victim a misdemeanor summons for disorderly conduct. Additional facts will be set forth as necessary in the context of the claims raised on appeal.

I

First, we address the defendant's claim that § 53a-60b (a) (1) is unconstitutionally vague as applied to her conduct.[3] We disagree.

In a substitute information dated February 17, 2017, the state charged the defendant with violating § 53a-60b (a) (1) "in the town of Naugatuck . . . on or about the 11th day of October, 2015, [in that the defendant]

[3] Unlike the defendant, we address her vagueness claim before addressing her sufficiency of the evidence claim because "the gist of a vagueness claim . . . is that due process is violated whenever sufficient evidence of guilt is too readily found by a jury that is left to its own discretion without the guidance of definite enforcement standards." *State* v. *Schriver*, 207 Conn. 456, 458–59 n.3, 542 A.2d 686 (1988).

recklessly caused serious physical injury to a disabled person: to wit: [the victim] by means of a deadly weapon, by hitting her with a billy club."

Section 53a-60b (a) provides in relevant part: "A person is guilty of assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the second degree when such person commits assault in the second degree under section 53a-60 or larceny in the second degree under section 53a-123 (a) (3) and (1) the victim of such assault or larceny has attained at least sixty years of age, is blind or physically disabled, as defined in section 1-1f, or is pregnant . . . ." As is reflected in the state's substitute information, the state's theory of the case was that the defendant engaged in conduct constituting assault in the second degree as defined by General Statutes § 53a-60 (a) (3) against the victim, who is physically disabled as defined by General Statutes § 1-1f (b). Section 53a-60 (a) provides: "A person is guilty of assault in the second degree when . . . (3) the actor recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument . . . ." Section 1-1f (b) provides: "An individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device."

Relying on the protections afforded to her by the fifth and fourteenth amendments to the federal constitution, the defendant argues that § 53a-60b (a) (1) is impermissibly vague because it expressly relies on the definition of "physically disabled" that is codified in § 1-1f (b). The defendant argues that § 1-1f sets forth a definition of "physically disabled" that is impermissibly broad and that is unclear to the average person. According to the

defendant, because § 53a-60b (a) (1) fails to define the offense with sufficient definiteness, the statute was susceptible of being applied in an arbitrary and discriminatory manner against her in the present case. The defendant argues: "Specifically, it allowed [for] a conviction of assault in the second degree of a disabled person where the state introduced minimal evidence that the victim suffered from fibromyalgia, a poorly understood and oftentimes misdiagnosed syndrome. . . . Put another way, the statute was arbitrarily enforced because it is so unclear that ordinary people cannot understand what specifically constitutes 'physically disabled,' thereby allowing the state to rely on [the statute] inconsistently and on an ad hoc basis."

The defendant clarifies that she does not claim that § 53a-60b (a) (1) is vague on its face, such that she lacked notice of the conduct prohibited by the statute. Rather, the defendant argues, § 53a-60b (a) (1) and § 1-1f are "unconstitutionally vague in application because the legislature, by incorporating § 1-1f into the criminal offense . . . impermissibly delegated basic policy matters to the courts for resolution of whether a diagnosis of fibromyalgia falls within the definition of 'physically disabled' for resolution on an ad hoc basis. In so doing, the enforcement of these statutes in the defendant's case [was] arbitrary." (Footnote omitted.) In arguing that the statute was applied arbitrarily to her, the defendant relies on the fact that she "did not assault a victim in a wheelchair, a victim with an amputation, nor a victim with a type of visible, clearly diagnosable illness, disease, or impairment." Instead, the defendant argues, "she got into a fight with her sister, who has been diagnosed with fibromyalgia . . . a poorly defined medical condition about which the medical community remains divided as to its existence."

The defendant seeks review of this unpreserved claim under the bypass doctrine set forth in *Golding*, under

which "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

The record is adequate to review the claim because the record reflects the conduct that formed the basis of the defendant's conviction under § 53a-60b (a) (1). See, e.g., *State* v. *Indrisano*, 228 Conn. 795, 800, 640 A.2d 986 (1994) (discussing requirements for reviewability). Additionally, we conclude that because a claim that a statute is vague as applied to a defendant implicates the constitutional guarantee of due process that is enshrined in the fourteenth amendment to the United States constitution; see, e.g., *State* v. *Pettigrew*, 124 Conn. App. 9, 24–25, 3 A.3d 148, cert. denied, 299 Conn. 916, 10 A.3d 1052 (2010); the claim is of constitutional magnitude. Having determined that the claim is reviewable under *Golding*, we turn to its merits.

"The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review. . . . In undertaking such review, we are mindful that [a] statute is not void for vagueness unless it clearly and unequivocally is

unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning. . . .

"The United States Supreme Court has set forth standards for evaluating vagueness. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . [A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. . . .

"Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. . . . Therefore, a legislature

[must] establish minimal guidelines to govern law enforcement. . . .

"Tempering the foregoing considerations is the acknowledgment that many statutes proscribing criminal offenses necessarily cannot be drafted with the utmost precision and still effectively reach the targeted behaviors. Consistent with that acknowledgment, the United States Supreme Court has explained: The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. *Colten* v. *Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972) . . . . Simply put, [w]hile some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific terms which would afford loopholes through which many could escape." (Citations omitted; internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 758–61, 988 A.2d 188 (2010).

"A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . Unless a vagueness claim implicates the first amendment right to free speech, [a] defendant whose conduct clearly comes within a statute's unmistakable core of prohibited conduct may not challenge the statute because it is vague as applied to some hypothetical situation . . . . In contrast, [i]n a facial vagueness challenge,

we . . . examine the challenged statute to see if it is impermissibly vague in all of its applications. A statute that is impermissibly vague in all its applications is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. . . . Such a provision simply has no core." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Josephs*, 328 Conn. 21, 31–32, 176 A.3d 542 (2018). "The proper test for determining [whether] a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. . . . The test is objectively applied to the actor's conduct and judged by a reasonable person's reading of the statute . . . .

"If the language of a statute fails to provide definite notice of prohibited conduct, fair warning can be provided by prior judicial opinions involving the statute . . . or by an examination of whether a person of ordinary intelligence would reasonably know what acts are permitted or prohibited by the use of his common sense and ordinary understanding." (Internal quotation marks omitted.) *State* v. *Lavigne*, 121 Conn. App. 190, 205–206, 995 A.2d 94 (2010), aff'd, 307 Conn. 592, 57 A.3d 332 (2012).

As is reflected in the general recitation of facts, there was evidence to support a finding that, on October 11, 2015, the defendant grabbed the victim by the upper body, pulled her over the small plastic fence that separated her backyard from the victim's backyard, and struck her repeatedly with a wooden billy club until the victim restrained the defendant and stopped the attack.

At trial, the victim testified about her extensive medical history. She testified that she had experienced back problems since 2000 and had undergone two surgical

procedures on her back. She testified that she had undergone multiple "foot surgeries" in 1990, "five or six ear surgeries" in 2000, and "one breast surgery." Also, the victim testified that she had suffered from a nerve condition called fibromyalgia, for which she receives ongoing medical treatment. She testified that, at the time that the assault occurred, she was using a variety of medications that had been prescribed for her. Specifically, she was using a medication called Savella to treat her fibromyalgia, three times per day. She was using a medication called Vicodin to treat her pain, usually once per day. She explained: "Depending on the day, if . . . I know I'm not going to be doing much that day, I'll probably just take one [Vicodin] in the morning or when I wake up." She also testified that she used Ambien, which helped her to sleep, as needed. The victim testified that she had experienced physical limitations for many years: "I can't sit too long. I can't stand too long. Walking a far distance is difficult for me. Stairs are very difficult for me to do if I'm carrying something. Just grocery shopping, doing laundry, it's a task for me to do those things."

The victim testified that she had received treatment from her primary care physician as well as from Matthew Letko, whom she described as being an employee of "[the] arthritis center." The victim testified that she had received social security disability payments since 2004, and that in the ten years prior to her testimony in 2017, she had not had been engaged in any employment to supplement her disability income.

The state presented testimony from Letko, who explained that he was a physician's assistant employed by the Arthritis Center of Connecticut, in Waterbury.[4]

[4] The court recognized Letko, who testified that he had received training and licensure as a physician's assistant and had practiced under the supervision of a medical doctor, to be "an expert in the area of a physician's assistant."

Letko testified that the victim had been a patient of the center since February, 2008, and that he had been treating her since 2009 for "chronic pain issues, chronic low back pain and fibromyalgia syndrome." He testified that fibromyalgia is "a widespread pain syndrome primarily affecting muscles, upper back, mid-back, low back, hips, shoulders. It presents with a lot of tenderness, sensitivity to touch. There can also be other symptoms associated like fatigue, poor sleep." Letko testified that the treatment that he provided to the victim included prescribing "Savella, which is a medication specifically approved for fibromyalgia syndrome, muscle relaxants, anti-inflammatory medications; other treatments also include injections, physical therapy, [and] aquatic therapy." He testified that, in October, 2015, the victim was prescribed Savella, Ambien and Vicodin. Letko testified that he evaluated the victim on a monthly basis. He stated that the physical limitations related to her chronic back pain and fibromyalgia included difficulty in prolonged sitting, hearing, bending, lifting, and using stairs. Letko testified that although her pain symptoms may fluctuate from day to day, her condition was not going to improve. He testified that the goal of his treatment plan for the victim "would be to manage the pain effectively enough where she can have a quality of life where she can function around the home, in the community . . . take care of herself, get out of bed every morning, perform basic tasks around the house."

The defendant argues that to the extent that § 53a-60b (a) (1) relies on § 1-1f (b) to define "physically disabled," it lacks sufficient definiteness in that it fails to apprise ordinary persons of the meaning of "physically disabled" and, thus, it does not provide sufficient guidance with respect to whether the victim was physically disabled. Although we do not have the benefit of a prior judicial interpretation of "physically disabled,"

its meaning is ascertainable by affording the language of § 1-1f (b) its plain meaning. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Issues of statutory construction raise questions of law, over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Griffin*, 184 Conn. App. 595, 617–18, 195 A.3d 723, cert. denied, 330 Conn. 941, 195 A.3d 692, 693 (2018).

As we have set forth previously, § 1-1f provides: "An individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." It is well settled that courts may rely on dictionaries when ascertaining the commonly approved usage of words and phrases found in statutes. See, e.g., *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 115, 89 A.3d 896 (2014). "Chronic" is defined in relevant part as "marked by long duration or frequent recurrence: not acute . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2012) p. 221. "Physical" is defined in relevant part as "of or relating to the body . . . ." Id.,

p. 935. "Handicap" is defined in relevant part as "a disadvantage that makes achievement unusually difficult . . . ." Id., p. 565. "Infirm" is defined in relevant part as "of poor or deteriorated vitality . . . feeble from age . . . not solid or stable . . . ." Id., p. 640. "Impair" is defined as "to damage or make worse by or as if by diminishing in some material respect . . . ." Id., p. 622.

Contrary to the ambiguity suggested by the defendant, the term "physical disability," as used in § 1-1f (b), has a readily ascertainable meaning. It refers to *any* recurring bodily condition that detrimentally affects one's ability to carry out life's activities, regardless of whether it is congenital, the result of bodily injury, organic processes, or the result of illness. The language used in the statute, particularly the phrase, "not limited to," reflects that the legislature did not intend to set forth an exhaustive list of each and every bodily condition that could result in a physical disability, and the fact that the legislature did not do so does not necessitate a conclusion that the statute lacks sufficient guidance with respect to its meaning. See, e.g., *State* v. *Winot*, supra, 294 Conn. 760–61 (lack of specificity not necessarily result of imprecise drafting but desire not to create loopholes in statute). Here, the language at issue is general enough to encompass a wide variety of physical conditions, yet specific enough to provide sufficient notice as to its meaning and, specifically, as to the types of bodily conditions encompassed by the term "physical disability."

We conclude that the defendant's violent conduct in the present case clearly came within the unmistakable core of conduct prohibited by § 53a-60b (a) (1). The record reflects that the victim was physically disabled for purposes of § 53a-60b (a) (1) because she suffered from a chronic bodily condition that significantly hampered her ability to carry out many of the everyday

activities of life. The record reflects that the victim's physical condition, which caused her pain, disadvantaged her, and that, for years prior to the events at issue, the victim had received medical treatment to treat that condition, which included prescriptions to alleviate her pain and to help her sleep.[5] A plain reading of § 53a-60b (a) (1) and the facts in evidence strongly persuade us to conclude that a reasonable person of ordinary intelligence would have anticipated that the statute would apply to the defendant's violent conduct toward the specific victim in the present case.[6]

In light of the foregoing, we disagree with the defendant that the statute lacked minimal guidelines or sufficient standards to guide law enforcement with respect

[5] The defendant attempts to discount the weight of the evidence of disability presented by the state at trial by stating in her principal appellate brief that fibromyalgia is "an illness that even the medical community does not agree exists and believes is both misdiagnosed and overdiagnosed in staggering numbers." Moreover, in an attempt to demonstrate that the statute was unconstitutionally vague as applied to her conduct, the defendant argues that, if the statute is interpreted to encompass a condition such as fibromyalgia, it arguably could apply to an assault committed against the broad class of persons who wear prescription eyeglasses.

The defendant's arguments are not persuasive. First, the evidence does not suggest that the victim's physical disability is solely a consequence of fibromyalgia. The evidence suggests that the victim's physical disability may have resulted from one or more of the physical conditions that she and Letko discussed in their testimony and, in particular, her disability is her chronic pain and her resulting difficulty in carrying out everyday activities. Second, to the extent that the defendant invites us to evaluate whether the statute is vague as applied to persons other than the victim and conditions distinct from those experienced by the victim, which may result in physical disability, we observe that in an evaluation of whether a statute is unconstitutionally vague as applied to a defendant's conduct, we do not focus on whether it is vague as applied to a *hypothetical situation*, but whether it is vague as objectively applied *to the defendant's conduct*. See *State* v. *Josephs*, supra, 328 Conn. 31–32; *State* v. *Lavigne*, supra, 121 Conn. App. 205–206.

[6] Although the statute does not require that a defendant be aware of a victim's physical disability, the defendant testified in relevant part that she was aware that the victim was physically disabled and had discussed the victim's medical conditions with her. The defendant also testified, however, that the victim lied about and exaggerated her medical conditions.

to its proper application. Accordingly, we conclude that the defendant's claim fails under *Golding*'s third prong because she has failed to demonstrate that a constitutional violation occurred that deprived her of a fair trial.

II

Next, the defendant claims that the evidence did not support a finding that the victim was physically disabled for purposes of § 53a-60b (a) (1).[7] This claim consists of two closely related subclaims that we will analyze separately. First, the defendant claims that the evidence was insufficient to demonstrate that the victim "had a diagnosis of fibromyalgia." Second, the defendant claims that, if the evidence supported a finding that the victim had been diagnosed with fibromyalgia, "[a] diagnosis of fibromyalgia does not satisfy the physical disability requirement of § 53a-60b (a) (1)." We disagree.

We begin by setting forth the familiar standard of review for claims of evidentiary insufficiency in a criminal appeal. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those

[7] The record reflects that the defendant did not preserve this sufficiency claim for appellate review. The claim is nonetheless reviewable on appeal. See *State* v. *Lewis*, 303 Conn. 760, 767 n.4, 36 A.3d 670 (2012).

conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 402–403, 902 A.2d 1044 (2006).

We also clarify the essential elements of the offense that are the subject of the defendant's claim. To obtain a conviction under § 53a-60b (a) (1), the state bore the burden of proving beyond a reasonable doubt that (1) the defendant committed assault in the second degree pursuant to § 53a-60 and (2) the victim of the assault was physically disabled pursuant to § 1-1f (b). The defendant does not challenge the sufficiency of the evidence with respect to the first element. The defendant challenges only the second essential element of the offense, which requires proof beyond a reasonable doubt that the victim of the assault "has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not

limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." General Statutes § 1-1f (b). To the extent that the defendant's claim requires us to interpret § 1-1f (b), we rely on the interpretation of the statute set forth in part I of this opinion.

A

The defendant claims that the evidence was insufficient to sustain the conviction because the state failed to prove beyond a reasonable doubt that the victim "had a diagnosis of fibromyalgia." The defendant argues in relevant part: "Because fibromyalgia is a poorly defined illness with no clear understanding of its pathology within the medical community, the state cannot, as a matter of law, prove beyond a reasonable doubt that someone has fibromyalgia." The defendant also argues: "The dearth of evidence produced by the state as to how exactly Letko and his supervising physician came to a diagnosis and the severity of [the victim's] specific case of fibromyalgia supports a conclusion that the evidence was insufficient for the jury reasonably to conclude beyond a reasonable doubt that [the victim] suffered from a disabling case of fibromyalgia. . . .

"Letko's testimony focused on fibromyalgia, in general, and how he treated [the victim] based on a diagnosis of fibromyalgia. The state did not introduce any evidence as to Letko's methodology for arriving at [the victim's] diagnosis, or testing specific to [the victim] that he conducted to rule out other potential causes of her symptoms. . . . Nor did the state introduce any of [the victim's] medical records to support a diagnosis. Because no exclusive test exists to demonstrate that a patient suffers from fibromyalgia . . . it is important for the evidence to support a conclusion that the diagnosis is correct." (Citations omitted.)

In part I of this opinion, we discussed the evidence presented by the state with respect to the victim's physical disability. We reiterate that this evidence was in the form of testimony from the victim and Letko, the physician's assistant who treated her for many years. Letko testified in relevant part that he had treated the victim for "[v]arious chronic pain issues, chronic low back pain, and fibromyalgia syndrome." He discussed the various forms of therapy that he used on the victim, including "a medication specifically approved for fibromyalgia syndrome, muscle relaxants, anti-inflammatory medications . . . injections, physical therapy, [and] aquatic therapy." Letko testified that the victim was prescribed medication to treat fibromyalgia, medication to help her sleep, and medicine to alleviate pain. Although the victim and Letko testified that the victim suffered from fibromyalgia, neither the victim nor Letko attributed her chronic physical condition solely to fibromyalgia. To the contrary, Letko testified that the victim's "chronic back pain and fibromyalgia syndrome" caused the victim to experience pain and to have limitations with respect to activities including sitting, hearing, bending, lifting and going up and down stairs. Letko testified that his goal in treating the victim is to manage her pain so that she can "get out of bed every morning [and] perform basic tasks around the house."[8]

[8] Defense counsel cross-examined Letko with respect to the method by which a diagnosis of fibromyalgia is made generally. He testified "there's not one specific test that you can do that clarifies the diagnosis of [fibromyalgia]. There's not a simple blood test or X-ray or [magnetic resonance imaging scan]. It's certain criteria you need to meet. So, earlier, I had mentioned widespread pain; so, there's multiple tender points when you're examining the patient over the body, you know. And, also, you do other tests, so you may want to rule out . . . other medical conditions through X-rays and, basically, like, ruling out those other things and meeting the criteria of those tender points . . . with the associated symptoms of poor sleep, depression, headaches, fatigue that generally meets the criteria . . . to make the diagnosis for fibromyalgia syndrome."

Letko agreed with defense counsel that "all those tests" ruled out other causes for the victim's pain. In relevant part, Letko also testified that a diagnosis of fibromyalgia is largely based on patient complaints and agreed

The defendant couches her claim in terms of whether the victim "had a diagnosis of fibromyalgia" at the time of the assault. Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that the testimony of both the victim and Letko demonstrated that the victim had such a diagnosis. The substance of the defendant's arguments, however, reflects the defendant's apparent belief that the state bore the burden of proving beyond a reasonable doubt that the diagnosis was medically accurate and that the victim's alleged physical disability for purposes of § 1-1f (b) was the result of fibromyalgia.

As our discussion of the elements of the offense reflects, the state did not bear the burden of demonstrating beyond a reasonable doubt that the victim had been diagnosed with fibromyalgia, that she suffered from fibromyalgia, or that her physical disability was the result of fibromyalgia. Moreover, as we have noted in this opinion, in proving that the victim suffered from a chronic physical disability, one that caused the victim pain and difficulty performing life's everyday tasks, the state did not rely solely on evidence that the victim suffered from fibromyalgia. There was evidence of the victim's lengthy medical history and testimony from Letko that the victim's physical disability was attributable to "various chronic pain issues, chronic low back pain, and fibromyalgia syndrome." In any event, there is no support for the proposition that the state bore the burden of proving beyond a reasonable doubt the victim's physical disability was caused by any particular illness or injury. "We are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes

with defense counsel that patients "hypothetically" could fake their complaints. Letko also testified that it was not uncommon for patients to complain of back pain.

provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010). Section 1-1f (b) provides in relevant part that a person is physically disabled if he or she has a chronic physical handicap, infirmity or impairment "whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device."

On the basis of the foregoing, we conclude that the defendant's claim is not persuasive. The state did not have to prove beyond a reasonable doubt that the victim had received an accurate diagnosis for any particular illness or disease, but that she suffered from a chronic physical disability that resulted from causes including "bodily injury, organic processes or changes or from illness . . . ." General Statutes § 1-1f (b). Here, the testimony of the victim and Letko amply supported a finding beyond a reasonable doubt that the victim was physically disabled at the time the defendant assaulted her.

B

The defendant claims that, even if the evidence supported a finding that the victim had been diagnosed with fibromyalgia, "[a] diagnosis of fibromyalgia does not satisfy the physical disability requirement of § 53a-60b (a) (1)." The defendant argues that § 1-1f is ambiguous with respect to whether fibromyalgia constitutes a physical disability. On the one hand, the defendant argues that fibromyalgia, as defined by Letko, appears to be a chronic physical infirmity that is encompassed by the statute. On the other hand, the defendant argues that fibromyalgia does not appear to constitute a physical disability because a diagnosis of fibromyalgia cannot "be established through conclusive tests." Relying on

materials that were not presented in evidence, the defendant asserts: "Fibromyalgia manifests itself in numerous ways. In addition, the level of severity of symptoms varies widely from patient to patient, and even from day to day for the same patient. Put simply, fibromyalgia is not as uniform in its symptoms, severity, and presentation as some other disabilities that can be more easily quantified. By way of illustration, there are tests to determine the severity of hearing loss and levels of permanent impairment for orthopedic injuries. There is no indication, however, that many patients diagnosed with fibromyalgia have any presentation of a disability that can be qualified in the same way, let alone affect their level of vulnerability and require additional protections in the same way other physical disabilities do."

The defendant's claim is not persuasive for several reasons. The defendant's arguments are limited to fibromyalgia and whether a diagnosis of fibromyalgia, in and of itself, constitutes a physical disability for purposes of § 1-1f. As we observed previously in this opinion, the evidence that the state presented concerning the victim's physical disability was not limited to a diagnosis of fibromyalgia. Both the victim and Letko testified that the victim had a complex medical history and, as Letko observed, over the course of several years, he had prescribed medications and provided a variety of treatments to the victim to treat "[v]arious chronic pain issues, chronic low back pain, and fibromyalgia syndrome."

Additionally, we observe that the defendant urges us to interpret § 1-1f (b) in such a manner that it requires proof of a disability that "[can] be established through conclusive [medical] tests." Stated otherwise, the defendant argues that a physical disability must be more "uniform in its symptoms, severity, and presentation" or at least "more easily quantified" than fibromyalgia.

These arguments are readily undermined by the language used in § 1-1f. Simply put, adopting the defendant's interpretation of the statute would graft upon the statute limitations that are not evident in the statute as it is written. The statute, as written, focuses not on the cause of a physical disability, but on whether a person is disabled, and it does not require that a physical disability be obvious or readily verifiable in the manner suggested by the defendant. We reject the defendant's invitation to exclude from the definition of "physical disability" a chronic and painful physical condition that significantly hinders a person's ability to carry out several of the everyday activities of life. To do so would thwart the broad protective purpose reflected in the plain language of § 1-1f (b).

For the foregoing reasons, the defendant has failed to demonstrate that the evidence was insufficient to prove that the victim suffered from a physical disability for purposes of § 53a-60b (a) (1).

III

Last, the defendant claims that prosecutorial impropriety during closing argument deprived her of a fair trial. We disagree.

The relevant facts are as follows. There was evidence that, for many years, the defendant and the victim had a rocky relationship and that, in the days leading up to October 11, 2015, the issue of the victim's dog and the fence erected by the defendant was a cause of disagreement between them. The victim testified that, in the early morning of October 11, 2015, the defendant caught her by surprise and physically assaulted her after she had stepped out of the back door of her residence. The victim testified that the defendant grabbed her by the upper body, pulled her over the small plastic fence that separated their backyards, and struck her with a wooden billy club while she lay helplessly on

the ground. The defendant repeatedly told the victim that she hated her and wanted her to leave. The victim testified that, ultimately, she restrained the defendant and let her go after she had promised to stop striking her.

At trial, the defendant testified in relevant part that she was home alone on October 11, 2015. She became startled when her doorbell rang at approximately 1:30 a.m. She armed herself with a wooden billy club for protection and, in an attempt to see who rang her doorbell, she went outside behind her residence. She did not see anything noteworthy and turned to go back inside. At that moment, the victim's back door "goes flying open," and the victim, who smelled of alcohol, angrily motioned to the defendant and stated, "[c[ome on bitch . . . ." The defendant testified that, acting "in a rage," the victim grabbed her by the hair, pulled her to the ground, and wrapped her body so tightly around the defendant's body that she had difficulty breathing. The victim told the defendant, "[d]ie, bitch." The defendant testified that she and the victim "wrestl[ed] around" before the defendant gained control of her billy club and began to swing it "all over the place." The defendant testified that she certainly was not the aggressor, and she could not recall striking the victim. She testified that, after the altercation ended, she went inside and called the police.

During its case-in-chief, and in the absence of an objection by defense counsel, the state introduced into evidence an audio recording of the 911 call that the defendant had made at 1:58 a.m. on October 11, 2015. During the call, the defendant briefly explained what had occurred with her sister, the victim, in relevant part, as follows: "I went outside to see who was out there because somebody was ringing the fucking doorbell and it was her standing there. She came at me, and I fucking let—and a fight broke out."

During the prosecutor's rebuttal closing argument, she stated in relevant part: "What . . . the judge is going to instruct you also [is] that you can draw reasonable inferences from the evidence. And I'll give you an example of that. So, you can go further with what you have to come to a conclusion of things that we don't know. And it's the state's position that the reasonable inferences that you can draw from the evidence in this case is that . . . the defendant was upset with [the victim] . . . [the defendant] heard [the victim] walk her dog out the back; [the defendant] turned out the outside light and went outside with a billy club in her hand; they had words; *and*, *she*, *as she said or almost said in the 911 call*, *she let* [*the victim*] *have it*; she struck [the victim] with the billy club across the nose and eye; [the victim] fell to the ground." (Emphasis added.) The defendant did not object to the prosecutor's argument.

For the first time on appeal,[9] the defendant, relying on the emphasized portion of the prosecutor's rebuttal closing argument set forth in the preceding paragraph, claims that "the prosecutor made improper argument by describing facts not in evidence when she erroneously speculated to the jury how the defendant would have ended a statement that she did not finish during the [911] call." The defendant argues that the prosecutor's argument constituted an improper reference to "facts not in evidence" and that it amounted to "pure speculation" as to how the defendant may have completed the statement that she made during the 911 call.

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two

[9] Pursuant to *State* v. *Stevenson*, 269 Conn. 563, 572–76, 849 A.2d 626 (2004), the defendant's unpreserved prosecutorial impropriety claim is reviewable on appeal and it is unnecessary for this court to engage in an analysis of the claim under *State* v. *Golding*, supra, 213 Conn. 239–40.

steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question that may only be resolved in the context of the entire trial . . . .'' (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 428, 902 A.2d 636 (2006). In evaluating whether prosecutorial impropriety, if proven, amounted to a denial of due process, we consider the factors enumerated by our Supreme Court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

''[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. . . . This heightened duty derives from our long recognition of the special role played by the state's attorney in a criminal trial. He is not only an

officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. In discharging his most important duties, he deserves and receives in peculiar degree the support of the court and the respect of the citizens of the county. By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused be guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider. . . .

"Or to put it another way while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. . . . A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows." (Citations omitted; internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 246–47, 833 A.2d 363 (2003). It is beyond question that "a prosecutor may not comment on evidence that is not a part of the record and may not comment unfairly on the evidence in the record." *State* v. *Fauci*, 282 Conn. 23, 49, 917 A.2d 978 (2007).

Turning to the argument at issue in the present claim, in which the prosecutor referred to what the defendant "said or almost said in the 911 call," we observe initially that the prosecutor's challenged argument cannot reasonably be interpreted as a suggestion by her that she had additional facts concerning the 911 call beyond those that were properly before the jury. The prosecutor's isolated remark was obviously based on the content of the 911 recording, and the entire 911 recording was a full exhibit at trial which was played in the jury's presence. Thus, we are not persuaded that the remark was not based on the evidence and conclude that it was unlikely that the jury would have interpreted the prosecutor's remark as being based on evidence that was known to her, but was not before the jury. See, e.g., *State* v. *Fernandez*, 169 Conn. App. 855, 869, 153 A.23d 53 (2016) ("when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury" [internal quotation marks omitted]).

Second, we observe that the context of the prosecutor's challenged argument unmistakably suggested that she was asking the jury to draw *inferences* from the evidence presented at trial, specifically, the 911 recording. The argument directly followed the prosecutor's statement that the jury was permitted to draw reasonable inferences from the evidence, and the argument was made during what was, in the prosecutor's words, a summation of "the reasonable inferences that you can draw from the evidence *in this case* . . . ." (Emphasis added.) "A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." (Internal quotation marks omitted.) *State* v. *Fernandez*, supra, 169 Conn. App. 869.

If the prosecutor had incorrectly referred to what the defendant "said" during the 911 call, such an argument would constitute an improper comment on the evidence. Here, however, the prosecutor referred to what the defendant "said or almost said" during the 911 call. The phrasing of the argument suggests that, during the heat of closing argument, the prosecutor recognized that she was not going to merely describe the 911 call, but draw an inference from it. Thus, the phrase suggests that she immediately corrected her reference to what the defendant had "said." "When reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial. . . . [And], when a prosecutor's potentially improper remarks are ambiguous, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Citation omitted; internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). In light of the fact that the challenged argument was made in the context of the prosecutor's broader argument concerning the reasonable inferences that could be drawn from the evidence, we are not persuaded that the jury would have interpreted the isolated remark about what the defendant "said" to be anything other than the prosecutor's suggested interpretation of the 911 recording.

Moreover, the prosecutor's argument that the 911 recording reasonably could be interpreted to suggest that the defendant "almost said" during the 911 call that she "let [the victim] have it" is a fair commentary on the 911 recording. It was not in dispute that the 911 call was made in the minutes following the altercation between the defendant and the victim. Although they differed with respect to the manner in which the altercation began, both the defendant and the victim testified

that it was a startling and violent physical struggle. In the 911 call, the defendant did, in fact, state that, after she went outside, she found the victim standing there, and that "[the victim] came at me, and I fucking let—and a fight broke out."

The inference drawn by the prosecutor concerning the way that the defendant "almost" described the altercation during the 911 call was not the product of sheer speculation. The defendant's statement to the 911 dispatcher concerning the manner in which the altercation began reasonably could be interpreted to reflect that the defendant began to explain what *she had done* to the victim, but that she changed her explanation mid-sentence to provide a less incriminatory explanation by stating "*a fight broke out*." Moreover, the prosecutor's argument with respect to what the defendant "almost said" during the 911 call was consistent with the defendant's theory of defense and the defendant's trial testimony. The defendant relied on the theory of self-defense, and the defendant's testimony was that she had frantically brandished the billy club during the altercation to defend herself from the victim, who had been the initial aggressor and had held on to her so tightly that she experienced difficulty breathing. The victim testified that the defendant had repeatedly struck her with the billy club, and the evidence of her multiple physical injuries supported a finding that the defendant, in fact, had inflicted physical injuries. In describing the course of events, the inference that the prosecutor asked the jury to draw accurately reflected the defendant's own testimony, in line with her theory of the case, that after the victim came at her, she started "swinging [the billy club] anywhere" to defend herself. And, we observe, even if the requested inference was drawn by the jury, it would not necessarily have proven that the defendant had initiated the fight. Thus, the prosecutor's characterization of the 911 recording was a fair commentary on the evidence.

In light of our conclusion that the defendant has not demonstrated that prosecutorial impropriety occurred, she is unable to demonstrate that the challenged argument deprived her of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

MALGORZATA ZANIEWSKI *v.* CEZARY ZANIEWSKI (AC 39903)

Lavine, Prescott and Elgo, 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 failed to use the parties' net incomes in calculating its orders of child support and alimony, ordered the defendant to pay alimony in an amount that exceeded his ability to pay, and abused its discretion by crafting inequitable property distribution and alimony orders. *Held* that under the unique circumstances of this case, equity required a new trial on all financial matters; where, as here, the trial court's memorandum of decision was devoid of any relevant factual findings, and the court made no findings regarding the value of any marital assets or the respective financial circumstances of the parties, including their income or earning potential, provided no analysis or rationale for its division of the marital property or its other financial orders, did not indicate whether either party was at fault for the breakdown of the marriage and made no explicit credibility determinations regarding the testimony of witnesses, it was not possible to ascertain, without engaging in speculation, what path the court followed in crafting its support orders and dividing the marital assets, and because the defendant did all that could reasonably be expected of him to obtain an articulation of the factual findings necessary to obtain review of the financial orders but was thwarted, through no fault of his own, due to the retirement of the trial judge, it would be against the interests of justice to apply mechanistically a presumption of correctness of the court's support orders, which presumption has been applied in cases in which the appellant raised claims in the face of an inadequate factual record and did not resort to available procedural tools to perfect the record.

Argued January 17—officially released June 4, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, and tried to the court, *Pinkus*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Connors*, *J.*, denied the defendant's motion for articulation; subsequently, this court granted the defendant's motion for review but denied the relief requested therein. *Reversed in part*; *further proceedings*.

James E. Mortimer, for the appellant (defendant).

Katarzyna Maluszewski, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, Cezary Zaniewski, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Malgorzata Zaniewski. The defendant claims on appeal that the court improperly (1) failed to use the parties' net incomes in calculating its orders of child support and alimony, (2) ordered the defendant to pay alimony in an amount that exceeds his ability to pay, and (3) abused its discretion by crafting inequitable property distribution and alimony orders that "excessively and unjustifiably favored the plaintiff."

The trial court's memorandum of decision fails to set forth the factual basis for its financial orders. The trial judge who authored the decision retired shortly after issuing its decision, rendering fruitless the defendant's proper and timely efforts to remedy the decision's lack of findings in order to secure appellate review of his claims. In many cases, an inadequate record would foreclose appellate review of an appellant's claim. Nevertheless, the inadequacy of the record in the present case arises not from any fault attributable to the defendant,

but from the trial court's issuance of a memorandum of decision that contained virtually no factual findings that would permit us to review appropriately the defendant's appellate claims. Although we are cognizant that the trial court is entitled to great deference in crafting financial orders in marital dissolution actions, we nevertheless conclude under the unique circumstances presented here that equity requires a new trial. Accordingly, we reverse the judgment of the trial court with respect to the financial orders and order a new trial.

The matter was tried before the court over the course of three days, ending on November 22, 2016. On November 25, 2016, the court issued a four page memorandum of decision dissolving the parties' marriage on the basis of irretrievable breakdown.

The trial court's decision contains only the following uncontested facts. The parties were married in New York in 2005. They have two minor daughters who were issue of the marriage.[1] In January, 2016, the plaintiff, who had resided in Connecticut for at least one year, commenced the underlying action for dissolution of marriage.

The memorandum is devoid of any relevant factual findings, and the court's legal analysis is limited to the following statement: "The court listened to and observed witnesses, and reviewed the exhibits. In addition, the court carefully considered the criteria set forth in the Connecticut General Statutes in reaching the decisions reflected in the orders below." The court did not discuss the respective financial circumstances of the parties, including any findings regarding their income or earning potential. The court made no findings with respect to the value of any marital assets, and provided no analysis or rationale for its division of the marital property or its other financial orders. The court

[1] The children were born in July, 2006, and March, 2009.

did not indicate whether either party was at fault for the breakdown of the marriage or shared fault. The court made no explicit credibility determinations regarding the testimony of witnesses. Although the plaintiff claims that completed child support guideline worksheets were provided to the court by the parties, she concedes that they were never made a part of the record. There are no completed child support guideline worksheets in the trial court file.

The remainder of the court's decision consists of nineteen, separately numbered orders. In addition to orders dissolving the parties' marriage and incorporating by reference the parties' parenting plan,[2] the court ordered the defendant to pay the plaintiff "$204 per week as child support in accordance with the child support guidelines" and "$100 per week as alimony for a period of three years from the date of [the] judgment . . . [to] terminate upon the death of either party or the plaintiff's remarriage . . . [and] subject to the provisions of [General Statutes] § 46b-86 (b)." The parties were ordered to share equally in the cost of their children's extracurricular activities and healthcare. The court awarded the parties' delicatessen business and marital residence in Plainville to the plaintiff without assigning a value to those assets, and ordered the defendant to sign all necessary paperwork to transfer his interest in those properties to the plaintiff. The court allowed the defendant to retain "any interest he may have" in a rental property owned by his family in Queens, New York. The court did not identify what interest, if any, the defendant had in the property or assign a value to that interest, although the record indicates that these issues were hotly contested at trial.

[2] The parties agreed to joint legal custody of the children, with the plaintiff having primary physical custody subject to a visitation schedule with the defendant as set forth in the parenting plan.

The court ordered that the parties be responsible for the debts listed on their respective financial affidavits, with the exception of the balance on two credit cards, for which they would be equally responsible. Each party was awarded whatever personal property currently was in his or her possession, including automobiles, and each was permitted to retain his or her own bank accounts except for certain joint accounts with Farmington Bank, which were awarded to the plaintiff. The court also ordered that it would "retain jurisdiction over educational support orders pursuant to [General Statutes] § 46b-56c."

The defendant timely appealed from the dissolution judgment on December 15, 2016. On June 23, 2017, the defendant filed a motion for articulation in accordance with Practice Book § 66-5. The defendant asked the trial court to articulate its factual findings regarding, among other things, the parties' respective gross incomes, which were in dispute, and what value it had assigned to their various assets and liabilities. The defendant also asked the court to indicate whether it found the parties' financial affidavits or trial testimony credible with respect to these matters.

The defendant also made several requests for articulation related to the New York rental property purportedly owned by his family. In particular, he sought to have the trial court articulate the factual basis for determining that he had retained any interest in the New York property,[3] what interest, if any, it found he had retained in the property, and whether the court had credited an appraisal of the property that was

[3] The nature of the defendant's interest in the New York property was disputed at trial. The defendant testified that he had purchased the New York property for his parents and brother-in-law in 2001, prior to his marriage with the plaintiff, and then had transferred the property to his parents in October, 2014, in order to secure a loan to expand the delicatessen business. The plaintiff took the position that the transfer of the property was fraudulent and meant to hide a marital asset.

entered into evidence. These requests for articulation all related to the defendant's principal claims on appeal that the trial court improperly calculated the alimony and child support awards and inequitably divided the parties' marital assets and debts. The plaintiff did not oppose the motion for articulation.

The motion for articulation was forwarded to the trial court on June 23, 2017. Judge Pinkus, the trial judge, who retired on June 15, 2017, did not act on the motion. On September 29, 2017, the motion for articulation was redirected to Judge Susan A. Connors, the presiding family judge. On October 6, 2017, Judge Connors issued an order denying the defendant's motion for articulation. The court's order stated: "The motion for articulation is denied. Neither party has requested a hearing nor does the court deem it necessary to hold a hearing. The trial judge, Judge Pinkus, has retired and is without jurisdiction to take any further action."

On October 16, 2017, the defendant timely filed a motion for review of the court's decision denying his motion for articulation. The plaintiff did not file any objection to the motion for review. The defendant argued that Judge Connors incorrectly concluded that Judge Pinkus lacked jurisdiction to act on the motion for articulation due to his retirement. The defendant noted that General Statutes § 51-183g expressly provides authority for such action, and he asked this court to order the trial court to articulate its findings in response to the questions posed in his motion for articulation. On January 24, 2018, a panel of this court granted the motion for review, but denied the relief requested therein.[4]

[4] General Statutes § 51-183g provides: "Any judge of the Superior Court may, after ceasing to hold office as such judge, settle and dispose of all matters relating to appeal cases, as well as any other unfinished matters pertaining to causes theretofore tried by him, as if he were still such judge."

The plain language of this statute demonstrates that the trial court's assessment that Judge Pinkus lacked jurisdiction to act on the motion for articulation due to his retirement was incorrect. Nevertheless, as the panel

The defendant principally claims on appeal that he is entitled to a new trial regarding the court's financial orders because he contends that the court failed to use the parties' net incomes in calculating its orders of child support and alimony and inequitably distributed the marital assets.[5] The defendant recognizes that the trial court failed to set forth in its memorandum of decision express findings regarding what income it imputed to the parties in calculating its support orders or even what evidence it relied on in reaching its conclusions. Nevertheless, he argues that the trial court did not use the net income figures from the parties' financial affidavits, and that, under any reasonable view of the evidence before the court, "[i]t becomes quite evident that the trial court utilized some amount in excess of the respective net incomes of one or both parties when fashioning its child support award . . . ."

In response, the plaintiff does not dispute that the parties presented confusing and conflicting evidence

of this court that considered the motion for review undoubtedly concluded in declining to order an articulation, the mere fact that a retired jurist has continuing statutory authority to act does not solve the myriad of issues and impracticalities involved in forcing a retired jurist to return to service. The statute states only that a judge "may" act after retirement; it does not mandate any action. We leave for another time the proper procedure for trial courts to follow if faced with a motion for articulation or rectification directed to a retired judge, but we do not believe that the remedy contemplated by § 51-183g presents a viable option under the totality of the circumstances in this case.

[5] "It is well settled that a court must base child support and alimony orders on the available net income of the parties, not gross income." (Internal quotation marks omitted) *Tuckman* v. *Tuckman*, 308 Conn. 194, 209, 61 A.3d 449 (2013). A trial court abuses its discretion by ordering child support "without determining the net income of the parties, mentioning or applying the guidelines, or making a specific finding on the record as to why it was deviating from the guidelines." Id., 208. In the present case, although the court indicated it followed the child support guidelines, we are left to speculate as to what income figures the trial court utilized in its calculations. Furthermore, if the court deviated from the guidelines, it did not indicate this in its decision, nor did it provide any rationale for making a deviation.

to the court regarding the parties' incomes and values of marital assets and acknowledges that the trial court's decision contains no express findings of income nor any explanation of how the court calculated its support orders. The plaintiff conceded at oral argument that, although the parties provided the trial court with child support worksheets, they were never made a part of the trial court file and, thus, are not part of the record before us on appeal. The plaintiff also conceded that the court was required to assign some value to the defendant's present interest in the New York rental property in order to equitably distribute the marital assets, a finding that was not included in the court's memorandum of decision. The plaintiff nevertheless argues that (1) the court, as the trier of fact, was free to disregard the parties' financial affidavits and to credit whatever evidence it chose, (2) evidence was available for the court to make all necessary factual findings, and (3) although not expressly set forth in its decision, those findings are implied. In sum, the plaintiff argues that "sufficient facts exist on the record to draw the conclusions supporting the order[s] issued by the trial court," and, given the highly deferential standard that applies to appellate review of financial orders in dissolution actions, we must presume that the court acted correctly.

On the basis of our review of the trial transcripts and the remainder of the record, we conclude, contrary to the plaintiff's argument, that it is impossible to ascertain what path the court followed in crafting its support orders and dividing the marital assets without engaging in pure speculation. Had the defendant failed to avail himself of procedures to obtain an articulation of the court's factual findings, including those regarding the parties' gross incomes and valuation of assets, it is highly unlikely that the defendant could prevail on any of his claims on appeal. Nevertheless, the defendant

did attempt to have the court articulate the factual findings necessary to obtain review of the financial orders, although those efforts were of little avail given the retirement of Judge Pinkus.[6] We conclude, for the reasons that follow, that, given the present circumstances, which are unlikely to arise with any frequency in the future, it would be against the interests of justice to apply mechanistically a presumption of correctness to the court's support orders because to do so would effectively, and unfairly, result in a forfeiture of the defendant's statutory appellate rights. See Practice Book § 61-10, commentary.

We begin with our standard of review and other relevant law. "A fundamental principle in dissolution actions is that a trial court may exercise broad discretion in awarding alimony and dividing property as long as it considers all relevant statutory criteria. . . . Our standard of review for financial orders in a dissolution action is clear. The trial court has broad discretion in fashioning its financial orders, and [j]udicial review of a trial court's exercise of [this] broad discretion . . . is limited to the question of whether the . . . 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. . . .

"*This deferential standard of review is not, however, without limits*. There are rare cases in which the trial court's financial orders warrant reversal because they

[6] Certainly, there is no doubt that we have the authority to order the trial court to undertake whatever actions may be necessary to perfect the record on appeal. See Practice Book §§ 60-2, 60-5, and 61-10. It would not be possible, however, for a judge to state the factual basis underlying another judge's discretionary decisions, particularly because the new judge would be left to speculate about what evidence the other judge may have credited, and to reevaluate witness testimony from a printed transcript without the ability to make important and necessary credibility determinations. As we have indicated, ordering the retired judge to articulate factual findings at this time is a wholly impractical option. See footnote 4 of this opinion.

are, for example, logically inconsistent . . . or simply mistaken . . . . We cannot countenance financial orders that are the product of mistake, even if they ultimately may be seen to be reasonable. . . . *The trial court's decision must be based on logic applied to facts correctly interpreted.* . . . Each party is entitled to overall financial orders which reflect the court's discretion and are based upon the facts elicited and the statutory criteria." (Citation omitted; emphasis added; internal quotation marks omitted.) *Hammel* v. *Hammel*, 158 Conn. App. 827, 835–36, 120 A.3d 1259 (2015).

Another limit placed on the trial court discretion's in crafting financial orders is the requirement under our rules of practice that the court provide a written or oral decision that "shall encompass its conclusion as to each claim of law raised by the parties *and the factual basis therefor*." (Emphasis added.) Practice Book § 64-1. Without such a rule, a trial court could inoculate important rulings from appellate scrutiny simply by electing not to set forth the factual basis for its rulings.

In *Scherr* v. *Scherr*, 183 Conn. 366, 439 A.2d 375 (1981), our Supreme Court considered whether a trial court in a dissolution action had committed reversible error by failing adequately to set forth the factual basis for its financial orders as required under the predecessor of Practice Book § 64-1.[7] In addressing the plaintiff's claim premised on the brevity of the trial court's memorandum of decision, the court in *Scherr* stated: "The plaintiff urges that meaningful appellate review of the trial court's exercise of its discretion is made impossible by too brief a statement of its reasoning by a trial court. *Undoubtedly this becomes true at some point.* We hold, however, that in the circumstances of this case, given

[7] The trial court in *Scherr* had dissolved a twenty-three year marriage "without any award of alimony [to the plaintiff appellant], with a relatively modest award of child support, and with an award to the defendant of one-half of the equity in the marital home." *Scherr* v. *Scherr*, supra, 183 Conn. 369.

the transcript and other parts of the record available to us, the memorandum meets the minimum requirements of reviewability." (Emphasis added; footnote omitted.) *Scherr* v. *Scherr*, supra, 368.

Significantly, the court in *Scherr* also based its decision to reject the plaintiff's claim on the fact that the plaintiff had never alerted the trial court about the inadequacies in the memorandum of decision, indicating that the plaintiff could have filed a motion for articulation. Id., 368–69. We read *Scherr* as recognizing the possibility that "at some point," a court's failure to set forth factual findings in support of its financial orders *could* provide a procedural basis for reversing those orders, particularly if the appellant diligently attempted to remedy the inadequacy of the record without success. Id., 368.

The outcome in *Scherr* certainly is consistent with our appellate courts' treatment of claims raised in the face of an inadequate factual record, particularly if the appellant has not resorted to available procedural tools to perfect the record. It is axiomatic that the appellant bears the burden of providing this court "with a record adequate to review his claim of error." (Internal quotation marks omitted.) *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 129, 981 A.2d 1068 (2009). Furthermore, "a claim of error cannot be predicated on an assumption that the trial court acted erroneously." (Internal quotation marks omitted) Id., 129–30. Accordingly, our appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary. See, e.g., *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991) ("[if] an appellant has failed to avail himself of the full panoply of articulation and review procedures, and absent some indication to the contrary, we ordi-

narily read a record to support, rather than to contradict, a trial court's judgment").

The question before us is whether this same presumption is warranted in a case in which a party has done all that can reasonably be expected to obtain an articulation but has been thwarted through no fault of its own. We answer that question in the negative and decline to apply a presumption of correctness to a trial court decision that is devoid of any factual findings in support of its conclusions. In this case, the defendant took all reasonable actions necessary to remedy the lack of adequate factual findings necessary for our review. He filed a motion for articulation. When that motion was denied on faulty jurisdictional grounds, he timely filed a motion for review of that decision with this court. Furthermore, the plaintiff never filed any opposition at any stage of the proceedings contending that the requests for articulation were not necessary for a proper review of the claims on appeal.

Moreover, an action to dissolve a marriage is an equitable proceeding and, thus, principles of equity must guide the entire process, including any appeal. "The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . . The term equity denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse [between individuals]." (Citation omitted; internal quotation marks omitted.) *Luster* v. *Luster*, 128 Conn. App. 259, 264–65 n.9, 17 A.3d 1068, cert. granted on other grounds, 302 Conn. 904, 23 A.3d 1243 (2011) (appeal dismissed April 12, 2012). "To affirm for lack of record when the faulty record stems from the trial court's

failure to comply with [what is now Practice Book § 64-1], despite a motion for articulation, would deprive the plaintiff of an appeal despite the significance of the issues involved and despite the strong, yet imperfect, efforts of counsel." *Holmes* v. *Holmes*, 32 Conn. App. 317, 334, 629 A.2d 1137 (*Lavery, J.*, dissenting), cert. denied, 228 Conn. 902, 634 A. 2d 295 (1993). Having considered all the competing interests involved, which includes the plaintiff's interest in not having to relitigate issues that she would contend properly were decided in her favor, we conclude that the appropriate action in this case is to remand the matter for a new trial on all financial orders.[8]

The judgment is reversed with respect to the financial orders only and the matter is remanded for a new trial; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANTONIO VITTI *v.* CITY OF MILFORD ET AL.
(AC 40399)

Sheldon, Keller and Moll, Js.*

Syllabus

The defendant city of Milford appealed to this court from the decision of the Compensation Review Board affirming the finding and award rendered by the Workers' Compensation Commissioner ordering the city to pay to the plaintiff, a police officer, all benefits required by the Workers' Compensation Act (§ 31-275 et seq.) pursuant to the statute

[8] "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

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

(§ 7-433c) that entitles a police officer or firefighter to receive such benefits from a municipal employer if, while on or off duty, the officer or firefighter suffers any medical condition caused by hypertension or heart disease that results in a disability. In 1992, No. 92-81 of the 1992 Public Acts (P.A. 92-81) amended § 7-433c, and that amendment was codified in the 1993 revision of § 7-433c, which was in effect on the date of the plaintiff's hire in 1993. Pursuant to that amendment, police officers and firefighters who began their employment on or after July 1, 1992, would be ineligible to receive benefits pursuant to the statute under certain circumstances, including if they completed two years of service and their employer proved by a preponderance of the evidence that their health condition or impairment caused by hypertension or heart disease was not job related. In 1996, § 7-433c was again amended pursuant to No. 96-230 of the 1996 Public Acts (P.A. 96-230), which removed the eligibility restrictions under P.A. 92-81, eliminated the rebuttable presumption and restored a conclusive presumption, and included a provision that police officers or firefighters who began employment on or after July 1, 1996, were not eligible for benefits under that section. The 1996 amendments were codified in the 2009 revision of § 7-433c, which was in effect on the date of the plaintiff's injury in 2010. W, a cardiologist, had determined that the plaintiff was suffering from giant cell myocarditis. Subsequently, the plaintiff filed a timely notice of claim with the Workers' Compensation Commission. Following formal hearings, the commissioner rendered his initial finding and award in favor of the plaintiff. The commissioner had applied P.A. 92-81 contained in the 1993 version of § 7-433c, which was in effect on the date of the plaintiff's hire, and found that the plaintiff's giant cell myocarditis constituted heart disease and that the city had failed to rebut the statutory presumption that the plaintiff's health condition or impairment caused by heart disease was causally related to his employment with the city. On appeal, the board vacated the commissioner's finding and award and remanded the matter for additional proceedings, concluding that the commissioner had committed plain error by applying the 1993 version of § 7-433c rather than the 2010 version that was in effect at the date of the plaintiff's injury. After additional hearings, in December, 2015, the commissioner issued a finding and award in favor of the plaintiff, finding that the plaintiff's giant cell myocarditis constituted heart disease pursuant to the 2010 version of § 7-433c and ordering the city to pay all benefits due to the plaintiff under the act, and the board affirmed the commissioner's finding and award. On the city's appeal to this court, *held*:

1. The board properly applied to the plaintiff's claim the version of § 7-433c that was in effect on the date of the plaintiff's injury in 2010: the 2010 version of § 7-433c, by its express terms, makes clear that the benefits provided by the statute are not available to those police officers and firefighters who began employment on or after July 1, 1996, and contains

no language that makes any distinction among persons who began employment prior to that date, and although the city relied on the legislative purpose underlying the adoption of P.A. 92-81, which was to provide municipalities with financial relief by replacing a conclusive presumption of causation with a rebuttable presumption, the city cited to no maxim of statutory interpretation or any other authority for the proposition that, in the absence of statutory language permitting such an exercise, this court could disregard the language of a statute in order to advance the legislative purpose of repealed legislation; moreover, even if the 2010 version of § 7-433c could be deemed ambiguous as to the legislature's intended treatment of those persons who began employment prior to July 1, 1996, and the opportunity for municipal employers to rebut the presumption in the context of claims made by such claimants, the relevant legislative history supported the conclusion that the 1993 revision of § 7-433c did not apply to the plaintiff's claim, as the legislative history underlying the General Assembly's replacement of the rebuttable presumption with a conclusive presumption in 1996 revealed that the General Assembly intended for all police officers and firefighters hired prior to July 1, 1996, to be grandfathered in, in an effort to balance the financial concerns of municipalities with the expectations of those police officers and firefighters already employed, and the legislative history was silent as to any legislative intent to have P.A. 92-81 apply to those police officers or firefighters who were hired on or after July 1, 1992, but prior to July 1, 1996; furthermore, the application of the 2010 version of § 7-433c to the plaintiff's claim was consistent with the common-law date of injury rule, which requires courts to look to the statute in effect on the date on which the claimant suffered his or her injury to determine the substantive rights and obligations that exist between the parties.

2. The city could not prevail on its claim that the board erred as a matter of law by affirming the commissioner's finding that the plaintiff's giant cell myocarditis constituted heart disease under § 7-433c, which was based on the city's claim that, regardless of which version of § 7-433c applied to the plaintiff's claim, it presented evidence to the commissioner establishing that giant cell myocarditis was not heart disease but, rather, was a systemic autoimmune disease involving an agent produced by the body outside of the heart; there was sufficient evidence in the record to support the commissioner's finding that the plaintiff's giant cell myocarditis constituted heart disease under § 7-433c, as the commissioner found credible and more persuasive the testimony of W that giant cell myocarditis was a rare disease of inflammation of the heart, and found that W credibly distinguished giant cell myocarditis from sarcoidosis, which is a systemic disease and presents as scar tissue that forms in the lungs or other organs and is not confined to the heart, and it was within the commissioner's purview to credit W's testimony.

Argued October 12, 2018—officially released June 4, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District ordering the defendants to pay workers' compensation benefits to the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

Scott W. Williams, with whom, on the brief, were *James D. Moran, Jr.*, and *Maribeth M. McGloin*, for the appellant (named defendant).

David J. Morrissey, for the appellee (plaintiff).

Opinion

MOLL, J. The principal issue in this appeal is whether the plaintiff's claim for heart and hypertension benefits under General Statutes § 7-433c is governed by the version of the statute in effect on the date of the plaintiff's hire or the date of his injury. The named defendant, the city of Milford (defendant),[1] appeals from the decision of the Compensation Review Board (board) affirming the finding and award rendered by the Workers' Compensation Commissioner for the Third District (commissioner) of the Workers' Compensation Commission (commission), ordering the defendant to pay to the plaintiff, Antonio Vitti, all benefits required by the Workers' Compensation Act (act), General Statutes § 31-275 et seq.[2] On appeal, the defendant claims that the board

[1] PMA Management Corporation of New England, Inc. (PMA Management), the workers' compensation liability insurer for the named defendant, was also a defendant in the plaintiff's case before the Workers' Compensation Commissioner for the Third District and the Compensation Review Board. PMA Management is not participating in this appeal, however. We refer, therefore, to the city of Milford as the defendant in this opinion.

[2] The plaintiff filed a cross appeal from the board's denial of his motion to dismiss the defendant's appeal from the commissioner's December 3, 2015 finding and award. See footnote 8 of this opinion. The plaintiff did not address this claim in his brief to this court, however, and expressly abandoned his cross appeal during oral argument. We, therefore, have no occasion to review this claim.

erred, as a matter of law, by (1) applying to the plaintiff's claim the version of § 7-433c that was in effect on the date of the plaintiff's injury in 2010 (2010 version),[3] rather than the version of § 7-433c that was in effect on the date of the plaintiff's hire in 1993 (1993 version),[4] and (2) affirming the commissioner's finding that the plaintiff's giant cell myocarditis qualifies as heart disease under § 7-433c.[5] We disagree and, accordingly, affirm the decision of the board.

The following procedural history and facts, as found by the commissioner in his finding and award, dated December 3, 2015, are relevant to our resolution of this appeal. On February 12, 1993, the defendant hired the plaintiff as a police officer after the plaintiff underwent a preemployment physical examination and was deemed suitable for employment. On August 17, 2010, the plaintiff consulted a doctor after experiencing nausea, abdominal pain, and shortness of breath for several

[3] General Statutes (Rev. to 2009) § 7-433c was in effect on the date of the plaintiff's injury. For convenience, our references to the 2010 version are to that revision of the statute. The parties' principal dispute involves the applicability of statutory amendments to § 7-433c that went into effect in 1996. As we explain in part I of this opinion, those amendments are codified in the 2009 revision of the statute, which was in effect in 2010. Because the parties have generally adhered to the usage of the phrase "2010 version," we do the same throughout this opinion.

[4] General Statutes (Rev. to 1993) § 7-433c was in effect on the date of the plaintiff's hire on February 12, 1993. For convenience, our references to the 1993 version are to that revision of the statute. Although the parties, the commissioner, and the board referred to the 1992 version of § 7-433c, the 1993 revision, which codified certain 1992 amendments to the statute, was in effect on the date of the plaintiff's hire, and, therefore, we refer to the 1993 version in this opinion.

[5] Additionally, the defendant claims that the board erred as a matter of law by concluding that the defendant failed to rebut the presumption afforded by the 1993 version of § 7-433c, i.e., the presumption that a causal relationship exists between the claimant's alleged health condition or impairment caused by hypertension or heart disease and the claimant's employment. See *Malchik* v. *Division of Criminal Justice*, 266 Conn. 728, 740, 835 A.2d 940 (2003). We need not address this claim, however, because we conclude that the 2010 version of § 7-433c, which contains a conclusive presumption, applies in the present case.

days. At his wife's urging, the plaintiff also consulted a cardiologist, who performed an electrocardiogram that supported a differential diagnosis of coronary artery disease or cardiomyopathy. The plaintiff was later transferred to the Hospital of Saint Raphael, where he underwent a cardiac catheterization that revealed that he had mild coronary artery disease and severe systolic dysfunction. On August 20, 2010, a magnetic resonance imaging scan confirmed the electrocardiogram results and raised the possibility that the plaintiff had myocarditis. On August 23, 2010, the plaintiff was put on an intra-aortic balloon pump for cardiac support. Diagnostic tests indicated a progression of heart failure. The plaintiff was prescribed prednisone, a drug used as an immunosuppressive therapy. On August 24, 2010, he was admitted to Hartford Hospital with a diagnosis of acute myocarditis and cardiogenic shock and began to receive treatment from a cardiologist, Detlef Wencker. Dr. Wencker performed a number of tests and determined that the plaintiff needed a heart transplant. On September 29, 2010, the plaintiff underwent successful heart transplant surgery. A specimen of the plaintiff's heart that was harvested and analyzed showed evidence of giant cell myocarditis; Dr. Wencker, thus, determined that the plaintiff was suffering from giant cell myocarditis. The plaintiff later returned to employment with the defendant's police department.

Meanwhile, on September 10, 2010, the plaintiff filed a timely notice of claim with the commission, noting August 19, 2010, as the date of his injury. On August 14, 2013, after holding formal hearings on the matter, the commissioner, then acting for the fourth district of the commission, issued a finding and award in favor of the plaintiff. The commissioner found, inter alia, that the plaintiff's giant cell myocarditis constituted heart disease pursuant to the 1993 version of § 7-433c[6] and that the defendant had failed to rebut the statutory pre-

[6] The parties originally stipulated that the 1993 version of § 7-433c, rather than the 2010 version, applied to the plaintiff's claim.

sumption that the plaintiff's health condition or impairment caused by heart disease was causally related to his employment with the defendant. Accordingly, the commissioner ordered the defendant to pay all benefits due to the plaintiff as required by the act. Thereafter, the defendant filed a petition for review with the board.

On September 16, 2014, the board rendered its decision, concluding that (1) some of the commissioner's factual findings were inconsistent with his other findings, and (2) the commissioner had committed plain error by applying the 1993 version of § 7-433c rather than the 2010 version that was in effect on the date of the plaintiff's injury. Thereupon, the board vacated the commissioner's August 14, 2013 finding and award and remanded the matter for additional proceedings.

On December 3, 2015, after holding additional formal hearings on the matter, the commissioner, acting for the third district of the commission, issued a finding and award in favor of the plaintiff.[7] The commissioner found, inter alia, that the plaintiff's giant cell myocarditis constituted heart disease pursuant to the 2010 version of § 7-433c and ordered the defendant to pay all benefits due to the plaintiff under the act. Thereafter, the defendant filed a petition for review with the board.[8]

On appeal before the board, the defendant claimed that the commissioner's conclusion was legally inconsistent with his factual findings and that the commissioner erred as a matter of law by failing to apply the

[7] The August 14, 2013 and December 3, 2015 findings and awards were both issued by Commissioner Jack R. Goldberg.

[8] On December 18, 2015, the plaintiff filed a motion to dismiss the defendant's appeal on the ground that it was untimely because the defendant failed to appeal from the board's September 16, 2014 decision, arguing that the commissioner's December 3, 2015 finding and award was not a final, appealable decision but, rather, was a "ministerial act." On January 4, 2016, the defendant filed an objection to the motion to dismiss. On April 21, 2017, the board denied the plaintiff's motion to dismiss, concluding that the December 3, 2015 finding and award was not a "ministerial act" because the commissioner "evaluated the relative merits of the evidence presented in reaching his conclusions," which "required deliberation on his part . . . ."

1993 version of § 7-433c to his claim. On April 21, 2017, the board affirmed the commissioner's December 3, 2015 finding and award. This appeal followed.

At the outset, we set forth the standard of review and corresponding legal principles applicable to the defendant's claims. "[T]he principles [governing] our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review . . . of an appeal from the commissioner is not a de novo hearing of the facts. . . . [Rather, the] power and duty of determining the facts rests on the commissioner [and] . . . [t]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of [the board's] decisions . . . is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 362, 183 A.3d 670 (2018).

"It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the

workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Where . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." (Citations omitted; internal quotation marks omitted.) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 770–71, 770 A.2d 1 (2001). Mindful of the foregoing, we now address the defendant's claims.

I

The defendant first claims that the board erred as a matter of law by applying the 2010 version of § 7-433c to the plaintiff's claim. Specifically, the defendant argues that the board should have applied the 1993 version of § 7-433c, containing a rebuttable presumption, in order to effectuate the legislative purpose underlying such legislation, namely, to provide financial relief to municipalities required to pay heart and hypertension benefits to eligible police officers and firefighters. The plaintiff argues, to the contrary, that the board properly applied the 2010 version of § 7-433c, which contains a conclusive presumption. We agree with the plaintiff.

The threshold question of whether the 1993 version or the 2010 version of § 7-433c applies to the plaintiff's claim for heart and hypertension benefits presents a question of statutory interpretation. "When construing a statute, our fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question

of whether the language actually does apply. . . . [Pursuant to] General Statutes § 1-2z, [t]he meaning of a statute shall, in the first instance, be ascertained from 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. The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . .

"[S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . . When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 684, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018).

We begin our analysis with a discussion of the relevant statutory language of the 1993 and 2010 versions of § 7-433c. In 1992, the General Assembly amended § 7-433c by virtue of the passage of No. 92-81 of the 1992 Public Acts (P.A. 92-81). The language of P.A. 92-81 was codified in the 1993 revision of § 7-433c. Public Act 92-81 provides: "Section 1. Section 7-433c of the general statutes is repealed and the following is substituted in lieu thereof:

"(a) In recognition of the peculiar problems of uniformed members of paid fire departments and regular members of paid police departments, and in recognition

of the unusual risks attendant upon these occupations, including an unusual high degree of susceptibility to heart disease and hypertension, and in recognition that the enactment of a statute which protects such fire department and police department members against economic loss resulting from disability or death caused by hypertension or heart disease would act as an inducement in attracting and securing persons for such employment, and in recognition, that the public interest and welfare will be promoted by providing such protection for such fire department and police department members, municipal employers shall provide compensation as follows: Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and

was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, the term 'municipal employer' shall have the same meaning and shall be defined as said term is defined in section 7-467.

"(b) Notwithstanding the provisions of subsection (a) of this section, any uniformed member of a paid municipal fire department or any regular member of a paid municipal police department who begins such employment on or after July 1, 1992 (1) shall not be eligible for benefits pursuant to this section until such member has completed two years of service from the date of employment and (2) shall not be eligible for benefits pursuant to this section after such member has completed two years of service if the municipal employer proves by a preponderance of evidence that the member's condition or impairment of health caused by hypertension or heart disease is not job related.

"Sec. 2. Section 7-433a of the general statutes is repealed.

"Sec. 3. This act shall take effect July 1, 1992."

We first note that the language set forth in subsection (a) of § 1 of P.A. 92-81 remained unchanged from that of its statutory predecessor, including the preamble thereto, which provided that the benefits required to be paid pursuant to the statute were to serve as an inducement in attracting persons to serve as members of paid fire departments and paid police departments and in recognition of the unique challenges attendant upon those occupations. Public Act 92-81 served to amend § 7-433c significantly, however, by adding subsection (b), which provided that police officers and firefighters *who began their employment on or after July 1, 1992*, would be ineligible to receive benefits pursuant to the statute under two circumstances: (1) until they completed two years of service; and (2) after they completed two years of service if their employer proved by a preponderance of the evidence that their health condition or impairment caused by hypertension or heart disease was not job related. See General Statutes (Rev. to 1993) § 7-433c (b). Thus, the 1993 version of § 7-433c gave municipal employers the opportunity to rebut the statutory presumption, i.e., that a claimant's health condition or impairment caused by hypertension or heart disease was causally connected to his or her employment, which, if successful, would render the claimant ineligible for benefits under the statute.

In 1996, the General Assembly again enacted significant amendments to § 7-433c. Specifically, the General Assembly amended § 7-433c by (1) eliminating the preamble, discussed previously, (2) removing the eligibility restrictions enacted under P.A. 92-81 applicable to police officers and firefighters who began their employment on or after July 1, 1992, (3) eliminating the rebuttable presumption and restoring the conclusive presumption, and (4) adding the provision that a police officer or firefighter *who began his or her employment on or after July 1, 1996*, i.e., the effective date of the

act, was not eligible to receive any benefits pursuant to the section.[9] General Statutes (Rev. to 1995) § 7-433c, as amended by Public Acts 1996, No. 96-230, §§ 2 and 3.[10]

We pause to highlight that no other amendments to § 7-433c occurred between 1996 and 2010, and, thus, the rebuttable presumption previously available to municipal employers remained unavailable under the 2010 version of § 7-433c. Accordingly, General Statutes (Rev. to 2009) § 7-433c—the 2010 version of § 7-433c in effect on the date of the plaintiff's injury—provides in relevant part: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special

[9] See Public Acts 1996, No. 96-231, § 1 (providing in part that "only those persons employed *on the effective date of this act* shall be eligible for any benefits provided by this section" [emphasis added]); Public Acts 1996, No. 96-230, § 2 (adopted on same day as No. 96-231, § 1, of the 1996 Public Acts, to correct error therein, thereby providing in part that "those persons who began employment *on or after the effective date of this act* shall not be eligible for any benefits pursuant to this section" [emphasis added]).

[10] General Statutes (Rev. to 1995) § 7-433c, as amended by Public Acts 1996, No. 96-230, §§ 2 and 3, provides in relevant part: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

We observe at the outset that, by its express terms, the 2010 version of § 7-433c makes clear that the benefits provided by the statute are not available to those persons who began employment *on or after* July 1, 1996. General Statutes (Rev. to 2009) § 7-433c (b). By implication, and in the absence of any other language addressing dates of employment, the statute can only

be reasonably read to provide benefits to all otherwise eligible persons who began employment *before* July 1, 1996. That is, the statute contains no language that makes any distinction among persons who began employment prior to July 1, 1996.

The defendant argues that the board erred in applying the 2010 version of § 7-433c, rather than the 1993 version. Notably, the defendant points to no statutory language in the 2010 version to suggest that it does not provide protection to an individual, like the plaintiff, who began his or her employment prior to July 1, 1996. Rather, the defendant relies exclusively on the legislative purpose underlying the adoption of P.A. 92-81, which was to provide municipalities with financial relief by replacing a conclusive presumption of causation with a rebuttable presumption. In doing so, the defendant cites no maxim of statutory interpretation or any other authority for the proposition that, in the absence of statutory language permitting such an exercise, this court can disregard the language of a statute in order to advance the legislative purpose of repealed legislation. We find such a novel proposition to be without merit. *Bakelaar* v. *West Haven*, 193 Conn. 59, 69, 475 A.2d 283 (1984) ("[w]here there is no ambiguity in the legislative commandment, this court cannot, in the interest of public policy, engraft amendments onto the statutory language" [internal quotation marks omitted]).

Even if the 2010 version of § 7-433c could be deemed ambiguous as to the legislature's intended treatment of those persons who began employment prior to July 1, 1996, and the opportunity for municipal employers to rebut the presumption in the context of claims made by such claimants, the relevant legislative history supports this court's conclusion that the 1993 version does not apply to the plaintiff's claim. That is, the legislative history underlying the General Assembly's replacement

of the rebuttable presumption with a conclusive presumption in 1996 reveals that the General Assembly intended for *all* police officers and firefighters hired prior to July 1, 1996, to be "grandfathered in," in an effort to balance the financial concerns of municipalities with the expectations of those police officers and firefighters already employed. See 39 S. Proc., Pt. 8, 1996 Sess., pp. 2570–71, remarks of Senator Louis C. DeLuca;[11] see also id., pp. 2579–81, remarks of Senator John A. Kissel.[12] The legislative history is silent as to any legislative intent to have P.A. 92-81 apply to those police officers or firefighters who were hired on or after July 1, 1992, but prior to July 1, 1996.

Finally, we note that the application of the 2010 version of § 7-433c to the plaintiff's claim is consistent with the common-law date of injury rule. Since 1916, Connecticut courts have looked to the statute in effect on the date on which the claimant suffered his or her injury to determine the substantive rights and obligations that exist between the parties in workers' compensation cases. See, e.g., *Civardi* v. *Norwich*, 231 Conn.

[11] During debate on the Senate floor, Senator DeLuca remarked in pertinent part: "This amendment would become the bill if it were to pass. *This is the so-called grandfather bill* on heart and hypertension whereby all new hires after July 1, 1996 would not be under the heart and hypertension law, but *all those now currently employed as paid firemen, police in the* [*s*]*tate of Connecticut in municipal departments, would still be under the heart and hypertension law.*

"So therefore, *it would not take anything away from existing police and firemen*, but anyone who was hired after July 1st would know that they would not be under such law because it would be discontinued for any new hires, so *we would not be taking anything away from anyone*, but we would also be under the understanding that anyone being hired would know that they would not be under that." (Emphasis added.) 39 S. Proc., supra, pp. 2570–71.

[12] During debate on the Senate floor, Senator Kissel stated in relevant part: "[I]t is fundamentally fair to the firefighters and the police officers that are serving our municipalities and our cities at this time. . . . I feel that it is far better to establish grandfathering in a bright line test that says, you know what the rules of the game are going to be if you get hired after this date." 39 S. Proc., supra, pp. 2580–81.

287, 293 n.8, 649 A.2d 523 (1994) ("[the date of injury] rule dates back to 1916 and has been applied consistently to all nonprocedural aspects of a case"); see also *Schmidt* v. *O. K. Baking Co.*, 90 Conn. 217, 220, 96 A. 963 (1916) (applying version of statute in effect at time claimant suffered injury). Notably, the date of injury rule provides that "new workers' compensation legislation affecting rights and obligations as between the parties, and not specifying otherwise, applie[s] only to those persons who received injuries after the legislation became effective, and not to those injured previously." *Iacomacci* v. *Trumbull*, 209 Conn. 219, 222, 550 A.2d 640 (1988). Because the present appeal does not involve whether certain legislation should be applied prospectively versus retroactively, the cases on which the defendant cursorily relies in arguing that we should reject the application of the date of injury rule—*Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 695 A.2d 1051 (1997), *Gil* v. *Courthouse One*, 239 Conn. 676, 687 A.2d 146 (1997), and *Rice* v. *Vermilyn Brown, Inc.*, 232 Conn. 780, 657 A.2d 616 (1995)—are inapposite. In *Hall* and *Gil*, our Supreme Court considered the applicability of legislation that went into effect *after* the claimant was injured. *Hall* v. *Gilbert & Bennett Mfg. Co.*, supra, 284–86, 301–306; *Gil* v. *Courthouse One*, supra, 677–78, 685–87. In *Rice*, our Supreme Court concluded that "the date of injury rule has no applicability when the claimant's rights have already expired under the terms of the act that governed the employment relationship." *Rice* v. *Vermilyn Brown, Inc.*, supra, 788. Neither scenario applies in the present case. Here, the defendant's claim on appeal requires this court to choose between two sets of amendments to § 7-433c, both of which went into effect *before* the plaintiff's date of injury. Accordingly, while the date of injury rule does little to illuminate our analysis, we note that our conclusion is consistent with its application.

In sum, we conclude that the board properly applied the 2010 version of § 7-433c to the plaintiff's claim.

II

The defendant next claims that the board erred as a matter of law by affirming the commissioner's finding that the plaintiff's giant cell myocarditis constitutes heart disease under § 7-433c. Specifically, the defendant argues that, regardless of which version of § 7-433c applies to the plaintiff's claim, it presented evidence to the commissioner establishing that giant cell myocarditis is not heart disease but, rather, is a systemic autoimmune disease involving an agent produced by the body outside of the heart. The plaintiff argues, to the contrary, that there is sufficient evidence in the record to support the commissioner's finding that the plaintiff's giant cell myocarditis constitutes heart disease under § 7-433c. We agree with the plaintiff.

We begin by setting forth the commissioner's findings and the procedural history relevant to the defendant's claim. During formal hearings, prior to issuing the August 14, 2013 finding and award, the commissioner heard testimony from two expert witnesses and admitted into evidence multiple exhibits, including various scientific articles concerning giant cell myocarditis. Dr. Wencker, who was serving as the director of the Center for Advanced Heart Failure and Transplant at Hartford Hospital, testified on behalf of the plaintiff. Martin Krauthamer, a consulting cardiologist and former chief of cardiology at Norwalk Hospital, testified on behalf of the defendant.

Dr. Wencker testified that giant cell myocarditis is a rare disease of inflammation of the heart. As far as he knows, it is not possible for giant cell myocarditis to spread to the heart from another part of the body, and a patient with giant cell myocarditis who dies, dies from heart failure, not from any other cause. The treatment

of choice for giant cell myocarditis is a heart transplant. If a patient has a disease involving multiple organs, such as sarcoidosis, he or she would not be a candidate for a heart transplant. During a heart transplant procedure, the old, native heart is not completely removed, and there remains a small portion of the old heart to which the new heart is attached. After a heart transplant, all patients are given immunosuppressive therapy because a foreign body has been implanted, which stimulates autoimmune processes and could lead to the rejection of the heart. With respect to the plaintiff's treatment and diagnosis, Dr. Wencker testified, among other things, that the plaintiff's treatment team harvested a specimen from his heart and determined that it showed evidence of giant cell myocarditis. They did not find any evidence of autoimmune disease or any other diseases or medical conditions, the lack of which finding supported the plaintiff's diagnosis of "a primary cardiac condition that [was] explained by giant cell myocarditis . . . ." Knowing that the plaintiff had giant cell myocarditis and had failed to respond to prednisone, i.e., immunosuppressive therapy, the plaintiff's treatment team inserted the intra-aortic pump into the plaintiff's heart to keep him alive. The plaintiff underwent a heart transplant, and he has not subsequently experienced a recurrence of giant cell myocarditis.

In contrast, Dr. Krauthamer testified that giant cell myocarditis is a disease of the immune system that is mediated by CD4 T cells, which attack the heart. According to Dr. Krauthamer, in some cases, immunosuppressive therapy is effective in suppressing the development of giant cell myocarditis, which means that the disease must be one of the immune system. Additionally, Dr. Krauthamer testified that there is a body of medical literature showing that approximately 20 percent of patients with giant cell myocarditis have

giant cells and/or granulomas in other organs in addition to those located in the heart, which suggests to him that giant cell myocarditis is an autoimmune disease affecting the heart and other organs. Moreover, according to Dr. Krauthamer, the fact that, after undergoing successful heart transplant surgery, patients with giant cell myocarditis have a 20 to 25 percent chance of developing the disease in the transplanted heart is "evidence that the immune system is still attacking the heart, and that this is not heart disease but a disease of the immune system, in that the immune system is still seeing heart cells or some substance in the heart as a pathogen and attacking it."

On August 14, 2013, in consideration of the record before him, the commissioner rendered his initial finding and award, finding the testimony of Dr. Wencker to be more persuasive than that of Dr. Krauthamer on the subject of giant cell myocarditis. On December 3, 2015, on remand from the board, and in consideration of the same testimony and evidence, the commissioner expressly stated that Dr. Wencker's opinion should be accorded "great weight" and that he was "credible and persuasive" on the subject of giant cell myocarditis. Additionally, the commissioner found that sarcoidosis is different from giant cell myocarditis in that sarcoidosis affects several organs, while giant cell myocarditis is a disease "solely of the heart . . . ."

We conclude that there is support in the record for the commissioner's December 3, 2015 finding that the plaintiff's giant cell myocarditis is heart disease. Despite Dr. Krauthamer's contrasting opinions, the commissioner chose to credit heavily Dr. Wencker's testimony, which supports the commissioner's finding that the plaintiff's giant cell myocarditis is heart disease under § 7-433c. We do not disturb that determination on appeal.

In support of its argument that giant cell myocarditis is not heart disease, the defendant relies on *Estate of*

Brooks v. *West Hartford*, No. 4907, CRB 6-05-1, 2006 WL 658887 (January 24, 2006), in which the board affirmed the commissioner's finding that the claimant's sarcoidosis was not heart disease. Id., *3. In so concluding, the board stated: "We recognize that there is an element of 'line-drawing' that must take place in defining heart disease. The body is a holistic machine, involving many interdependent parts. Yet, the ingestion of poison, the metastasizing of cancer, or the sudden impact of a bullet or a knife may all cause the heart to stop functioning by the introduction of an external agent, in contrast to coronary artery disease and vascular disease, which affect the structure of the heart itself. Sarcoidosis . . . clearly involves the element of an outside agent (tissue granules), even though that agent is one produced by the body itself." Id.

The defendant's reliance on the evidentiary record and findings in *Estate of Brooks* is misplaced. In the present case, the commissioner found that Dr. Wencker credibly distinguished giant cell myocarditis from sarcoidosis. Dr. Wencker testified that, unlike giant cell myocarditis, sarcoidosis is a systemic disease and presents as granulomatous disease or scar tissue that forms in the lungs or other organs, which leads to the destruction of cells. He testified that sarcoidosis granulomas are not confined to the heart; rather, they can be seen in the lungs, liver, or other organs, whereas giant cell myocarditis is "[found] nowhere [other] than in the heart . . . ." He testified that he has not heard of a case where granulomatous disease is found with giant cell myocarditis. Furthermore, although Dr. Wencker testified that there is evidence that giant cell myocarditis is an autoimmune disease because T cells seem to play a significant role in developing the disease, he testified that giant cell myocarditis due to autoimmune disease is believed to be "reacted against the heart, exclusively the heart." Moreover, he testified that "an autoimmune process does not need to be systemic,"

and one cannot conclude that giant cell myocarditis is not a primary disease of the heart simply because an autoimmune process may be present. It was within the commissioner's purview to credit this testimony as he did.

In sum, because there is support in the record for the commissioner's finding that the plaintiff's giant cell myocarditis is heart disease under § 7-433c, we leave that finding undisturbed.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

O'BRIEN-KELLEY, LTD. *v.* TOWN OF GOSHEN ET AL.
(AC 41443)

Alvord, Sheldon and Moll, Js.

Syllabus

The plaintiff property owner sought to recover damages for conversion from the defendant state marshal, who had sought to recover delinquent real estate taxes and interest from the plaintiff on behalf of the town of Goshen. The town tax collector had issued to the plaintiff a delinquent notice, which stated that if payment in full was not timely submitted to the town, collection of the delinquent taxes could be enforced by, inter alia, having a state marshal serve on the plaintiff an alias tax warrant pursuant to statute (§ 12-162 [c]). When the plaintiff failed to pay the delinquent tax bill, the tax collector issued the tax warrant to the defendant, who then mailed a letter to the plaintiff informing it that he was in receipt of the tax warrant and that it authorized him to collect the delinquent real estate taxes. The plaintiff thereafter made payments to the tax collector, a portion of which was paid to the defendant, in accordance with § 12-162, as his fee of 15 percent of the tax, interest, fees and costs. The plaintiff alleged that the defendant was not entitled to the 15 percent fee under § 12-162 because he did not execute on the tax warrant or collect the delinquent taxes, but merely mailed notice of the tax warrant to the plaintiff, which prompted the plaintiff to pay the delinquent tax and interest to the town directly before the warrant was served. The trial court granted the defendant's motion for summary judgment and rendered judgment for the defendant, from which the

plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment and concluded that the defendant was entitled to the 15 percent fee under § 12-162; that court, which carefully reviewed the record before it and thoroughly reviewed the applicable statutory language, its legislative history and relevant case law, properly concluded that, by sending the demand letter and a copy of the tax warrant to the plaintiff, the defendant placed the plaintiff on notice of its legal obligation to pay the delinquent taxes and his responsibility to collect them, and thereby constructively executed the tax warrant, which thereby entitled the defendant to his statutory fee under § 12-162.

Argued February 11—officially released June 4, 2019

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the action was withdrawn as against the named defendant et al.; thereafter, the court, *Bentivegna*, *J.*, granted the motion for summary judgment filed by the defendant Arthur R. Quinn III and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*.

James Stedronsky, for the appellant (plaintiff).

Thomas Plotkin, with whom, on the brief, was *Joseph B. Burns*, for the appellee (defendant Arthur R. Quinn III).

Opinion

SHELDON, J. In this action arising from an alias tax warrant issued by the town of Goshen for delinquent municipal real estate taxes, the plaintiff, O'Brien-Kelley, Ltd., appeals from the summary judgment of the trial court rendered in favor of the defendant Arthur R. Quinn III,[1] a state marshal, which concluded that the

[1] The town of Goshen and its tax collector, Rebecca M. Juchert-Derungs, were defendants in this action until the plaintiff withdrew its complaint against them on May 4, 2017. As Quinn is the only remaining defendant herein, any reference to the defendant herein is only to him.

defendant was entitled, under General Statutes § 12-162 (c), to be paid a 15 percent statutory fee for executing the subject tax warrant. The plaintiff claims that the trial court erred in holding that the defendant was entitled to be paid the statutory fee because the defendant had not executed on the tax warrant or collected the delinquent taxes, but merely mailed notice of the tax warrant to the plaintiff, prompting the plaintiff to pay the delinquent tax and interest to the town directly before the warrant was served. We disagree, and, accordingly, affirm the judgment of the trial court.

The following undisputed facts are relevant to our resolution of this appeal. The plaintiff is a Connecticut corporation having offices at 39 West Street in Litchfield. It owns a single-family lakefront house at 72 Sandy Beach Road in Goshen, which it manages, by and through its president and sole member, Edward James Murphy, Jr., for a private, extended family.

In February, 2016, the tax collector for the town of Goshen determined that the plaintiff had failed to pay the January 1, 2016 installment of its 2014 property tax bill. Therefore, on February 9, 2016, the tax collector issued a delinquent notice, notifying the plaintiff that it owed the outstanding tax, plus interest calculated through February 29, 2016. The notice expressly stated that the plaintiff owed a total of $3302.21, consisting of $3206.03 in back taxes and $96.18 in interest.

In March, 2016, the tax collector further determined that the plaintiff still had not paid its January 1, 2016 installment of its 2014 property tax bill. Consequently, on March 8, 2016, the tax collector issued to the plaintiff a notice of intent to lien, in which she indicated that the plaintiff owed $3206.03 in delinquent taxes, plus interest, calculated though April 30, 2016, in the amount of $192.36, for a total amount due of $3398.39. The

notice of intent to lien[2] indicated that payment in full of the delinquent tax bill was due by April 12, 2016, and that if that payment was not timely submitted, the tax collector could enforce collection of the plaintiff's delinquent account, at the expense of the plaintiff, by any of several means, including assigning the plaintiff's account to a state marshal for the service of an alias tax warrant.

The plaintiff once again failed to pay its delinquent tax bill by the April 12, 2016 due date. Consequently, on April 26, 2016, the tax collector issued a "Property Alias Warrant" (alias tax warrant) to the defendant, commanding the defendant to collect the plaintiff's property taxes in the amount of $3476.48, consisting of $3206.03 in taxes, $240.45 in interest calculated through May 30, 2016, a $24 lien fee and a $6 warrant fee, and the defendant's "lawful charges."

On May 1, 2016, the defendant mailed a letter to the plaintiff, informing it that he was in receipt of an alias

[2] The notice of intent to lien stated, in part: "According to our records, your REAL ESTATE taxes are past due. In accordance with CT General State Statute 12-155, payment is hereby demanded for the taxes due on this statement. The Tax [Collector's] Office reserves the right to enforce collection of the taxes listed herein by use of any of the following methods, which include but are not limited to:

"Assign your unpaid account to a Connecticut State Marshal for service of an Alias Tax Warrant and enforced collection. State law provides those servicing tax warrants with the ability to levy upon, seize and sell any real estate, goods and chattels owed by you; to garnish your wages; and to seize funds on deposit in any banking institution.

"Please note that if this type of collection enforcement action is warranted, you will also be responsible for paying all of the costs of collection that are incurred in these efforts, in addition to the taxes, interest and charges due.

"In order to avoid those actions, your account must be * * * PAID IN FULL BY TUESDAY, APRIL 12, 2016 * * * or you must begin to make regular monthly payments. Please call my office to set up a payment agreement. * * * In compliance with State Statute 12-173, a lien will be placed on your 2014 Grand List property taxes on April 14, 2016 if not paid in full at that time.

"Per § 12-144b, I must apply any payment made on this property to the oldest outstanding tax levied with the interest thereon."

tax warrant authorizing him to collect the plaintiff's delinquent real estate taxes for the town of Goshen and enclosing a copy of the warrant. The letter stated, inter alia: "This Alias Tax Warrant commands me to make demand upon you for the sum of $3,997.95, payable to: State Marshal Arthur Quinn, before making any attachments. THIS PROPERTY WILL BE SUBJECT TO TAX AUCTION IF DELINQUENCY REMAINS UNPAID AFTER MAY 30, 2016." The letter further warned: "If no contact is made immediately, we will proceed to attach any wages earned or any existing bank accounts to include but not limited to the seizure of any equipment, property, vehicles, or assets for auction." The letter instructed that full payment of all sums due, including the defendant's statutory fee of $521.47, be remitted to the defendant.

On May 24, 2016, the tax collector received payment from the plaintiff in the amount of $3476.48. The tax collector applied that payment, in accordance with General Statutes § 12-144b, as follows: $453.34 for the defendant's statutory fee of 15 percent of the tax, interest, fees and costs, which totaled $3023.03; $240.45 for accrued interest; $24 for the lien fee; $6 for the warrant fee; and $2752.58 toward the plaintiff's outstanding delinquent tax bill.

After the tax collector applied the plaintiff's payment to its account, the 2014 tax bill still had an unpaid balance in the amount of $453.45 due and owing, in addition to any applicable interest, fees and costs. The plaintiff thereafter submitted payment for that remaining balance.

On July 26, 2016, the plaintiff mailed a letter to the defendant, demanding that he return to it the sum of $453.45 that the town had paid to him as his fee. The defendant did not respond to the plaintiff's demand.

The plaintiff thereafter filed this action, alleging that the defendant was not entitled to a 15 percent statutory fee under § 12-162 because he never executed the alias tax warrant. The plaintiff further alleged that, because the defendant was not entitled to that fee under § 12-162, he was liable to it for conversion of that sum under General Statutes § 52-564.[3]

On September 15, 2017, the parties filed cross motions for summary judgment. The plaintiff argued that it was entitled to judgment as a matter of law on its conversion claim because the defendant collected and retained his claimed fee without executing the alias tax warrant or collecting the delinquent taxes that the plaintiff owed to the town of Goshen, as required under § 12-162. The defendant countered that "[t]here is no genuine issue as to any material fact establishing that the defendant was at all times acting in his official capacity as a Connecticut state marshal, engaged in the lawful service and execution of a valid alias tax warrant in accordance with applicable law and within the scope of his lawful duties, and thus was lawfully authorized to receive and exercise control of his lawful statutory fee."

On February 27, 2018, by way of a memorandum of decision, the court denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment. In its decision, the court described its task as to determine the meaning of the language, "executes such warrant and collects any delinquent municipal taxes," in § 12-162 (c),[4] and consider that language specifically in relation to General

[3] The plaintiff also alleged that the defendant violated its rights under the Connecticut constitution. The trial court rejected that claim, and the plaintiff has not challenged that ruling on appeal.

[4] General Statutes § 12-162 (c) provides: "Any officer serving an alias tax warrant pursuant to this section shall make return to the collector of such officer's actions thereon within ten days of the completion of such service and shall be entitled to collect from such person the fees allowed by law for serving executions issued by any court. *Any state marshal* or constable, *authorized as provided in this section, who executes such warrant and*

Statutes § 52-261,[5] which pertains to fees and expenses of officers serving process or performing other duties, and § 12-144b, which sets forth the proper order of application of tax payments. The court set forth the applicable law governing our interpretation of statutory language, found that the phrase, "executes such warrant and collects any delinquent municipal taxes," under § 12-162 (c) "is susceptible to more than one reasonable interpretation," and thus concluded that the language is not plain or unambiguous. (Internal quotation marks omitted.) Having so concluded, the court "look[ed] for interpretative guidance in the statutes' legislative history, legislative policy and relationship to other statutes."

The court set forth the following reasoning: "The obvious policy underlying § 12-162 (c), is that, 'if a municipality chooses to use [a state marshal] to collect delinquent taxes, the cost of that collection should be borne by the delinquent taxpayers rather than by those who duly pay their taxes.' See also *New Haven* v. *Bonner*, 272 Conn. 489, 496, 863 A.2d 680 (2005) (concluding same under General Statutes § 12-166 for utilizing a 'collection agency'). 'The tax collector can use an

collects any delinquent municipal taxes or water or sanitation charges *as a result thereof shall receive, in addition to expenses otherwise allowed, a percentage of the taxes* or the water or sanitation charges collected *pursuant to such warrant, calculated at the rate applicable for the levy of an execution as provided in section 52-261.* The minimum fee for such service shall be thirty dollars. Any officer unable to serve such warrant shall, within sixty days after the date of issuance, return such warrant to the collector and in writing state the reason it was not served." (Emphasis added.)

[5] General Statutes § 52-261 provides in relevant part: "(a) Except as provided in subsection (b) of this section and section 52-261a, each officer or person who serves process, summons or attachments on behalf of: (1) An official of . . . any municipal official acting in his or her official capacity . . . shall be allowed and paid . . . (*F*) *for the levy of an execution, when the money is actually collected and paid over, or the debt or a portion of the debt is secured by the officer, fifteen per cent on the amount of the execution, provided the minimum fee for such execution shall be thirty dollars* . . . ." (Emphasis added.)

alias tax warrant, which authorizes a [marshal] . . . to collect the delinquent taxes, interest and charges. [§ 12-162 and General Statutes § 12-135 (a)]. The warrant contains language threatening the taxpayer with the sale of his property, garnishment of his wages, or payment from assets in his bank. But its effect also depends on the [marshal's] . . . persistence . . . .' [Office of Legislative Research, Connecticut General Assembly, Report No. 2001-R-0468, Towns' Authority to Contract With Private Agencies to Collect Delinquent Taxes (May 9, 2001)]. . . .

"The court must also interpret [§] 12-162 (c) in light of § 12-144b. In 2013, our legislature made changes to § 12-144b to 'improve tax collectors' ability to collect taxes . . . .' [Public Acts 2013, No. 13-276, § 20 (P.A. 13-276), Office of Fiscal Analysis, Connecticut General Assembly, Fiscal Note, Senate Bill No. 965, An Act Concerning Changes to Municipal Revenue Collection Statutes]. . . . The 2013 revisions 'modif[y] the order in which tax collectors must apply property tax payments, giving priority to expenses incurred related to the tax and delinquency-related charges before the principal on the oldest outstanding tax . . . .' [P.A. 13-276, Office of Legislative Research, Connecticut General Assembly, Bill Analysis for Senate Bill No. 965, An Act Concerning Changes to Municipal Revenue Collection Statutes]. . . .

"The legislative history of § 12-144b also includes the following: '§§ 20 [and] 43—Order of Applying Property Tax Payments. Under current law, tax collectors must apply (1) tax payments on any specific property to the oldest outstanding tax and (2) partial tax payments or installments on any assessment list containing both real and personal property to the personal property tax first, unless the person making the payment directs otherwise in writing. The bill eliminates these requirements and instead requires tax collectors to apply all

tax payments first to outstanding unsecured taxes (i.e., personal property taxes) and then to outstanding secured taxes (i.e., real property taxes). The tax payments for these respective taxes apply as follows: 1. first to expenses, including attorney's fees, collection expenses, recording fees, collector's fees, and other expenses and charges related to a taxpayer's delinquency; 2. next to accrued interest; and 3. lastly, to principal, in chronological order. The bill also specifies that a municipality is not bound by any notation accompanying a tax payment that (1) purports to be payment in full, (2) proposes to waive any of the municipality's rights or powers, or (3) directs the application of the payment in any manner that contradicts applicable law.' Id.

"The legislative history and purpose of § 52-261 is illustrative. In the 2003 revisions to § 52-261, '[t]he bill [Public Acts 2003, No. 03-224 (P.A. 03-224)] increases the fee for a person who levies an execution and either collects and pays money or secures a debt from 10 [percent] to 15 [percent] of the amount of the execution. It increases the minimum fee for this execution from $20 to $30.' [P.A. 03-224, Office of Legislative Research, Connecticut General Assembly, Bill Analysis for Substitute House Bill No. 6476, An Act Concerning State Marshals]. . . . An Office of Legislative Research report provided the following, 'ALIAS TAX WARRANTS. After making a demand for unpaid taxes, a tax collector can issue an alias tax warrant to a state marshal or constable. The alias tax warrant commands the officer to collect the tax, interest, penalty, and charges from the taxpayer. The officer can garnish the taxpayer's wages or collect funds from a bank account or the taxpayer's goods or real estate ([§ 12-162]). If the officer levies on real estate, the property is sold under the procedures for a tax sale (see below, [General Statutes] § 12-157). The tax collector's fee for issuing an alias tax warrant

is $6 ([General Statutes] § 12-140). An officer serving an alias tax warrant is entitled to collect the fees allowed by law for serving executions issued by a court. A state marshal or constable who executes a warrant and collects delinquent municipal taxes receives, in addition to expenses otherwise allowed, 15 [percent] of the taxes collected under the warrant or a $30 minimum (§§ 12-162 and 52-261). The amount a taxpayer owes is not just the amount due on the tax but includes interest on the delinquent portion of the principal of any tax due at a rate of 18 [percent] per year from the time it is due until it is paid ([General Statutes] § 12-146). This is the amount put into the alias tax warrant and the state marshal's 15 [percent] is calculated on this amount. If a state marshal performs some other functions, such as publishing advertisements or conducting title searches, he or she could also be separately reimbursed for costs.' [Office of Legislative Research, Connecticut General Assembly, Report No. 2008-R-0518, State Marshals and Selling Residential Real Estate for Delinquent Taxes (September 10, 2008)]. . . .

"Additional legislative history to P.A. 03-224 addresses a marshal's collection of money under § 52-261. For example, Robert S. Miller, the president of the Connecticut State [Marshal's Association, Inc.], submitted the following relevant written remarks to the [House] [J]udiciary [C]ommittee in support of the 2003 amendments that 'the vast majority of executions [were] both small [and] uncollectible [and] the [marshals] expend[ed] much effort, time and money trying to collect these debts and [made] no money at all,' and that P.A. 03-224, which would increase the fees for executions to [15] percent and raise the minimum to $30, was 'the first raise in [thirteen] years and [would] bring the fees in line with the minimum that collection agencies charge[d].' [Conn. Joint Standing Committee

Hearings, Judiciary, Pt. 6, 2003 Sess., p. 1964]. In addition, Representative Michael P. Lawlor explained in his remarks before the House of Representatives that 'a [s]tate [m]arshal . . . is collecting money on behalf of a creditor' under § 52-261. [46 H.R. Proc., Pt. 17, 2003 Sess., p. 5443, remarks of Representative Lawlor on P.A. 03-224].

"Pursuant to [General Statutes] § 1-2z, the court agrees with the state marshal defendant that §§ 12-162 (c), 12-144b and 52-261 may be construed more broadly than the plaintiff contends, given some purposes underlying these statutes are to make it easier for municipalities to collect delinquent taxes and to have the cost of delinquent tax collection be borne by the delinquent taxpayers rather than by those who duly pay their taxes. The court must next consider the related case law.

"The plaintiff cites to *Danbury* v. *Sullivan*, Superior Court, judicial district of Danbury, Docket No. CV-303581-S (December 4, 1991) (*Fuller*, *J.*) (5 Conn. L. Rptr. 325), as being directly on point. In that case, the defendant, a deputy sheriff, filed a counterclaim seeking to collect fees related to the collection of delinquent taxes. Id. The city filed a motion to strike, including the second count, which attempted 'to collect sheriff's fees on amounts paid directly by the taxpayer [to the city] for overdue taxes.' Id. In granting the motion to strike the second count, the court found that '[i]t is apparent from the terms of the statute that any deputy sheriff who serves an alias tax warrant is required to collect the fees for serving the execution from the taxpayer, not the municipality. To recover the additional fees under the statute the sheriff must execute the warrant *and collect* delinquent taxes. Merely serving the alias tax warrant on the taxpayer is not enough.' . . . Id., 326. The plaintiff also makes the point that this is not a case of the town hiring a collection agency instead of a marshal. See *New Haven* v. *Bonner*, supra, 272

Conn. 496 (finding 'the obvious policy underlying [§ 12-166] is that, if a municipality chooses to employ a collection agency to collect delinquent taxes, the cost of that collection should be borne by the delinquent taxpayers rather than those who duly pay their taxes'). The . . . defendant contends that *Sullivan* is not persuasive authority because [t]he trial court's interpretation is that there is a requirement of the physical collection of the delinquent tax payment by the marshal, and ignores the reality that, absent the marshal's efforts, no tax payment would have been 'collected' at all. Indeed, the tax was in fact 'collected.' Further, the [court in] *Sullivan* completely ignores the mandates of the tax warrant itself, commanding the delinquent taxpayer to make payment of the delinquent tax to the marshal. . . . The court agrees with the defendant that *Sullivan* has limited persuasive authority given the policy underlying the statutory framework for the collection of municipal delinquent taxes and the development of the law since 1991.

"The . . . defendant argues that he had either actually or constructively seized moneys owed to the town because he performed his official duty and enforced the alias tax warrant. He cites *Corsair Special Situations Fund, L.P.*, v. *Engineered Framing Systems, Inc.*, Docket No. 3:11-CV-01980 (JCH), 2016 WL 128089 (D. Conn. January 11, 2016), where the District Court determined whether the state marshal was entitled to recover his 15 percent fee and construed § 52-261 (a) (2) (F) along with the Appellate Court's decision of *Nemeth* v. *Gun Rack, Ltd.*, 38 Conn. App. 44, 52, 659 A.2d 722 (1995). After reviewing the statutory language, the District Court found that '[w]hen [the state marshal] properly served [the third party] with the [w]rit, he imposed upon [that third party] a legal obligation to pay him the money it owed the judgment debtor, rather than paying the judgment debtor directly. While [the state marshal] did not actually seize the money that [the third

party] owed the judgment debtor, he did constructively seize it by putting [that third party] on notice of its legal obligation to deliver the money it owed the judgment debtor to [the state marshal]. And, given that levy has been defined as an actual or constructive seizure, [the state marshal's] constructive seizure of the debt owed by [the third party] to the judgment debtor constitutes a levy.' *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 2016 WL 128089, *4.

"The case of *Masayda* v. *Pedroncelli*, Superior Court, judicial district of Waterbury, Docket No. CV-94-0120878-S (July 20, 1998) (*West, J.*) (22 Conn. L. Rptr. 449), also provides support for the state marshal defendant's argument. There, judgment was entered by the court for the plaintiffs, and reasonable attorney's fees and costs were awarded. Id. To collect on the judgment, the plaintiffs encumbered [the] defendants' real property with judgment liens. Id. When the debt remained unsatisfied, the plaintiffs applied for and obtained a bank execution. Id. The deputy sheriff served the execution and the defendants objected. Id., 449–50. Subsequently, the defendants' counsel forwarded to [the] plaintiffs' counsel the sum of $18,014.31, which came from a source other than [the] defendants' executed upon bank accounts. Id., 450. The plaintiffs sought payment of the deputy sheriff's fee for levying execution on [the] defendants' bank accounts, in an amount which they claim[ed] [was] $1800 pursuant to the controlling [statute], § 52-261, and argued that the judgment in this case remained unsatisfied in an amount equal to that fee. Id. The defendants denied owing any fee for the levying of the bank execution. Id. 'In the alternative, however, they argue[d] that [if] the sheriff [is] entitled to a fee, that fee would be the statutory minimum of $20 and no more.' Id. The defendants argued that 'for the deputy sheriff to be entitled to anything other than

the $20 minimum fee under [§] 52-261, money would have had to have been actually collected or paid over from the accounts against which the execution was levied.' Id. In construing § 52-261, the court found that '[c]ontrary to [the] defendants' reading,' § 52-261 'does not require that the money be collected and paid over from the account levied upon.' Id. The court did not agree with the defendants' reading of § 52-261 to add an additional requirement that the source of payment be considered. Id. 'Certainly, after levying the execution, payment by the debtor directly to the creditor should not deprive the sheriff of his fee.' Id. The court interpreted the statute as indicating the intention of the legislature to entitle a sheriff to his fee when he has performed his duty, although payment is made from another source. Id. 'In accord with the foregoing, the court [found] that the sheriff ha[d] satisfied the requirements of [General Statutes] § 52-261 . . . [he] levied an execution and the money [was] collected and paid over to the plaintiffs and, as a result, he [was] entitled to his fee of $1800 as provided by said statutes.' Id.

"This court must determine whether the state marshal defendant executed the alias tax warrant and collected any delinquent municipal taxes pursuant to § 12-162 (c), either actually or constructively. In *Benjamin* v. *Hathaway*, 3 Conn. 528, 532 (1821), the Supreme Court, in considering the mode of levy, noted that '[t]he law cannot define precisely, in every case, how these acts shall be done. It prescribes general rules; and these have been complied with.' A broad interpretation of 'levy' is also consistent with *Nemeth* v. *Gun Rack, Ltd.*, supra, 38 Conn. App. 51, where the court found that '[*l*]*evy*,' which is not a defined term in the [Uniform Commercial Code, General Statutes § 42a-1-101 et seq.], should be read broadly as including not only levies of execution proper but also attachment, garnishment, trustee process, receivership, or whatever proceeding,

under the state's practice, is used to apply a debtor's property to payment of his debts.'

"In the present case, the . . . defendant performed his duty and enforced the alias tax warrant when he mailed the plaintiff notice of the alias tax warrant and demanded payment. . . . The town's notice of intent to lien, issued on March 8, 2016, already placed the plaintiff on notice that if this type of collection enforcement action was warranted, the plaintiff was responsible for paying all of the costs of collection that are incurred in these efforts, in addition to the taxes, interest and charges due. . . .

"Pursuant to the alias tax warrant, the . . . defendant was 'hereby commanded to collect forthwith' the delinquent taxes. . . . Rather than proceed immediately against the plaintiff by levy on the real estate, goods or chattel owned by the taxpayer, garnish the taxpayer's wages, or to seize the taxpayer's funds on deposit in a bank, the . . . defendant took the less drastic step of sending a demand letter to the plaintiff. The letter made demand for the payment of $3997.95, which constituted the tax owed, $3476.48, interest and fees, plus an additional 15 percent of said amount ($521.47) as part of the marshal fees. After receiving the demand letter, the plaintiff made payment to the town in the amount of $3476.48. From that amount, the town paid the marshal's fees, including the 15 percent fee in accordance with § 12-144b. The . . . defendant should not be denied his 15 percent fee because he took the less drastic step of first sending the plaintiff a demand letter rather than proceeding directly to attachment of the plaintiff's property, wages and/or bank account. The state marshal defendant was clearly engaged in a lawful collection enforcement effort authorized by the alias tax warrant.

"By analogy to *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 2016 WL

128089, when the . . . defendant sent a demand letter to the plaintiff, he placed the plaintiff on notice of its legal obligation to pay the delinquent taxes and the state marshal defendant's legal duty to collect the delinquent taxes, and, therefore, constructively executed the alias tax warrant pursuant to § 12-162 (c). The plaintiff did not pay the delinquent taxes after the notice of intent to lien, but only after the demand letter was sent. As a result of the state marshal defendant's actions, the plaintiff made efforts to address its tax delinquency. The . . . defendant's efforts in collecting the delinquent taxes were successful without having to resort to further levy and execution on the plaintiff's property. The . . . defendant earned his statutory fee based on his performance of his statutory duties.

"Similar to *Masayda* v. *Pedroncelli*, supra, 22 Conn. L. Rptr. 449, the state marshal defendant is entitled to his fee even though the plaintiff made payment directly to the town. 'In [*Masayda*], the sheriff levied an execution, and the money was actually collected and paid over, albeit not from the accounts levied upon. Contrary to [the] defendants' reading, however, the statute does not require that the money be collected and paid over from the account levied upon. Section 52-261 of the General Statutes is clear on its face. The defendants' reading adds a nonexistent, additional requirement that the source of payment be considered. Certainly, after levying the execution, payment by the debtor directly to the creditor should not deprive the sheriff of his fee.' Id., 450.

"Pursuant to *Benjamin* v. *Hathaway*, supra, 3 Conn. 532, the . . . defendant constructively made levy of the alias tax warrant based upon the totality of the circumstances. The court finds that the . . . defendant satisfied the requirements of § 12-162 (c) and, as a result, he was entitled to collect his 15 percent fee. This finding is also consistent with [the] legislative purpose

of the statutory framework for the collection of delinquent municipal taxes. The . . . defendant's efforts made it easier for the town to collect the delinquent taxes, which were months overdue. The . . . defendant's demand letter was effective in satisfying the tax delinquency, and there was no need for further collection efforts; these facts were not reasons to deny the defendant his fee under § 52-261. In addition, the plaintiff should bear the costs of the . . . defendant's efforts rather than town residents who pay their taxes on time." (Citations omitted; emphasis in original.)

On the basis of the foregoing analysis, the court denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment. This appeal followed.

The plaintiff claims on appeal that the trial court erred in determining that the defendant was entitled to the statutory 15 percent fee pursuant to § 12-162 (c) because the defendant neither executed the alias tax warrant nor collected the delinquent taxes owed to the town of Goshen. We disagree.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005). Likewise, issues of statutory construction present questions of law, our review of which also is plenary. See *Hicks* v. *State*, 297 Conn. 798, 800–801, 1 A.3d 39 (2010) (setting forth process of ascertaining legislative intent pursuant to § 1-2z, and noting that, "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature" [internal quotation marks omitted]).

The trial court carefully examined the record before it and concluded that the defendant was entitled to the 15 percent statutory fee provided by § 12-162. We

agree with the trial court's thoughtful and comprehensive memorandum of decision, in which it thoroughly reviewed the applicable statutory language, its legislative history, and relevant case holdings. Because that memorandum of decision fully states and meets the arguments raised in the present appeal, we adopt the trial court's well reasoned legal analysis, as set forth herein, as a statement of the applicable law on these issues. We are persuaded by the trial court's application of the holding in *Corsair* to this case, particularly in light of the proceedings that occurred in *Corsair* subsequent to the District Court's initial ruling regarding the statutory fee, upon which the trial court in this case relied in concluding that the defendant was entitled to the 15 percent statutory fee.

As noted, the trial court in this case relied on the decision issued by the United States District Court for the District of Connecticut in concluding that the marshal had constructively seized the delinquent taxes that the plaintiff paid to the town of Goshen. Following the District Court's order, Corsair appealed to the United States Court of Appeals for the Second Circuit, which determined that § 52-261 is ambiguous, and thus certified two questions to our Supreme Court. *Corsair Special Situations Fund, L.P.* v. *Pesiri*, 863 F.3d 176, 179–82 (2d Cir. 2017). Our Supreme Court accepted the certification of the following questions: "(1) Was [the state marshal] . . . entitled to a [15] percent fee under the terms of [§ 52-261 (a) (F)]?

"(2) In answering the first question, does it matter that the writ was ignored and that the monies that were the subject of the writ were procured only after the judgment creditor, not the marshal, pursued further enforcement proceedings in the courts?" Id., 183.

In addressing the certified questions, our Supreme Court agreed with the Second Circuit's conclusion that the language of § 52-261 is ambiguous. *Corsair Special*

Situations Fund, L.P. v. *Engineered Framing Systems, Inc.*, 327 Conn. 467, 472–73, 174 A.3d 791 (2018). In construing the phrase "levy of an execution," the court reasoned, inter alia: "As our Appellate Court previously has recognized; see *Nemeth* v. *Gun Rack, Ltd.*, [supra, 38 Conn. App. 52–53] . . . it is generally accepted that a levy of an execution may be satisfied by a constructive seizure of the property that is the subject of the execution. See 30 Am. Jur. 2d 202, Executions and Enforcement of Judgments § 192 (2005) ('A levy on personal property is generally defined as a seizure of the property. Thus, in most jurisdictions, it is essential to the completion of a levy of execution upon personal property that there be a seizure, either actual or constructive, of the property.' . . . Ballentine's Law Dictionary (3d Ed. 1969) p. 728 ('At common law a levy on goods consisted of an officer's entering the premises where they were and either leaving an assistant in charge of them or removing them after taking an inventory. Today courts differ as to what is a valid levy, but by the weight of authority there must be an actual or constructive seizure of the goods.').

"What constitutes a constructive seizure under our law depends on the circumstances, i.e., the nature of what is to be seized and from whom it is to be seized. See General Statutes § 52-356a (a) (setting forth procedures for execution against nonexempt personal property and levying officer's responsibilities).[6] Those circumstances

[6] General Statutes § 52-356a (a) provides in relevant part: "(2) The property execution shall require a proper levying officer to enforce the money judgment and shall state the names and last-known addresses of the judgment creditor and judgment debtor, the court in which and the date on which the money judgment was rendered, the original amount of the money judgment and the amount due thereon, and any information which the judgment creditor considers necessary or appropriate to identify the judgment debtor. The property execution shall notify any person served therewith that the judgment debtor's nonexempt personal property is subject to levy, seizure and sale by the levying officer pursuant to the execution . . . .

"(3) A property execution shall be returned to court within four months after issuance. . . .

dictate the levying officer's authority, set forth in the writ of execution. When levying an execution on debt owed that is in the possession of a third party, constructive seizure is effectuated when the writ of execution is properly served on, and the demand of payment made to, the third party, provided that the debt has or will mature within the statutory term." (Footnote in original.) *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 327 Conn. 473–74.

The court then turned to the issue of the collection of the debt, reasoning: "The right to the commission fee accrues only after either of two conditions is satisfied: 'when the money is actually collected and paid over, or the debt or a portion of the debt is secured by the officer . . . .' General Statutes § 52-261 (a) (F). We therefore turn to the question of whether the phrase 'by the officer' modifies the former, as well as the latter, condition.

"Construing the phrase 'by the officer' to apply only to the latter condition is supported by rules of grammar,

"(4) The levying officer shall personally serve a copy of the execution on the judgment debtor and make demand for payment by the judgment debtor of all sums due under the money judgment. On failure of the judgment debtor to make immediate payment, the levying officer shall levy on nonexempt personal property of the judgment debtor, other than debts due from a banking institution or earnings, sufficient to satisfy the judgment, as follows:

"(A) If such nonexempt personal property is in the possession of the judgment debtor, the levying officer shall take such property into his possession as is accessible without breach of the peace;

"(B) With respect to a judgment debtor who is not a natural person, if such personal property, including any debt owed, is in the possession of a third person, the levying officer shall serve that person with a copy of the execution and that person shall forthwith deliver the property or pay the amount of the debt due or payable to the levying officer, provided, if the debt is not yet payable, payment shall be made when the debt matures if within four months after issuance of the execution . . . .

"(5) Levy under this section on property held by, or a debt due from, a third person shall bar an action for such property against the third person provided the third person acted in compliance with the execution. . . ."

the genealogy of the statute, and simple common sense. Under the last antecedent rule, '[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' . . . 2A N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2007) § 47:33, pp. 487–89; see, e.g., *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 786, 2 A.3d 823 (2010) (applying rule); *LaProvidenza* v. *State Employees' Retirement Commission*, 178 Conn. 23, 27, 420 A.2d 905 (1979) (same). There is not clear evidence of a contrary intention in the statutory text, as 'collected' may refer to the debtor/third party from whom the money is being collected or the person collecting the money. Moreover, had the legislature intended for 'by the officer' to apply to the first condition as well, it could have expressed such an intention more clearly by inserting a comma between the second condition and that phrase (when the money is actually collected and paid over, or the debt or a portion of the debt is secured, by the officer). Application of the last antecedent rule also is confirmed by a review of predecessors of § 52-261. For more than a century, the statute provided for the fee 'when the money is actually collected and paid over, or the debt secured by the officer *to the acceptance of the creditor* . . . .' " (Emphasis in original.) *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 327 Conn. 475–76, quoting General Statutes (1902 Rev.) § 4850; accord General Statutes (Rev. to 2001) § 52-261 (a) (6). "It is clear that the italicized phrase would not have applied to the first condition. That phrase necessarily reflected that the officer exercises some discretion in the means or manner by which the debt is secured. The officer exercises no similar discretion when money is

collected from the third party or debtor; the officer merely accepts the money that is provided. . . . Accordingly, if the phrase 'to the acceptance of the creditor' did not modify the first condition, then the preceding phrase 'by the officer' similarly would not modify that condition. Although the legislature recently excised the phrase 'to the acceptance of the creditor' from the statute; [P.A. 03-224], § 10; it gave no indication that this change was intended to expand application of the phrase 'by the officer' to the collection of money or that it understood the previous statute to have such a meaning. See 46 H.R. Proc., [supra], p. 5443, remarks of [Representative Lawlor] (explaining that proposed changes 'will make it easier for the marshals to carry out their responsibilities and for the [State Marshal] Commission to conduct the oversight that is called for under the reforms of a number of years ago').

"Finally, common sense dictates that we should not construe the statute to limit the fee to only those circumstances in which the marshal has personally collected the money and paid it over to the creditor, as Corsair suggests. See *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 608–609, 893 A.2d 431 (2006) ('[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended' . . .). Corsair's construction of the statute also would deprive a levying officer of the statutory commission if the third party violated the order in the writ by paying the levied upon funds directly to the creditor instead of the officer, whether mistakenly or intentionally. See, e.g., *Fair Cadillac Oldsmobile Corp.* v. *Allard*, 41 Conn. App. 659, 660, 677 A.2d 462 (1996) (after sheriff levied bank execution, bank paid funds directly to creditor, instead of to sheriff, at direction of creditor) . . . see also *Masayda* v. *Pedroncelli*, [supra, 22 Conn. L. Rptr. 449, 450] (after deputy sheriff served bank execution, judgment debtor

paid judgment creditor from source other than bank account). Under Corsair's interpretation of the statutory scheme, the officer would not be entitled to the fee, even though the creditor received the benefit of the officer's service because the third party's obligation to the judgment creditor arose only as a result of the proper service of the writ of execution. Corsair's construction would create an incentive for judgment creditors to circumvent the statutory commission, a process that could inure to the benefit of both creditor and debtor by an agreement to reduce the debt by an amount less than the 15 percent fee in exchange for direct payment. . . . Our courts previously have applied common sense constructions to the facts of a given case involving the levy of an execution when a possible reading of the statute would have yielded a result that the legislature reasonably could not have intended. See *Preston* v. *Bacon*, 4 Conn. 471, 479–80 (1823) (sheriff entitled to fee when sheriff had substantially performed, and agreement by creditor and debtor's attorney prevented sheriff from completing final action statute required to be entitled to fee) . . . *Nemeth* v. *Gun Rack, Ltd.*, supra, 38 Conn. App. 54–55 (applying expansive interpretation of time limitation for applying for turnover order when facts made it impossible for judgment creditor to commence and complete levy on goods within period prescribed, and creditor had done everything that could reasonably be required under statute)." *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 327 Conn. 476–79.

On the basis of the foregoing, our Supreme Court answered the first certified question, "[y]es," the marshal was entitled to the statutory fee. The court answered the second certified question, "[n]o," it did not matter that the writ was ignored by the judgment creditor and the funds were obtained through separate enforcement proceedings. Id., 481.

Upon receipt of our Supreme Court's response to the two certified questions, the Second Circuit determined that the marshal was entitled to the full 15 percent statutory fee and affirmed the District Court's decision to award that amount. *Corsair Special Situations Fund, L.P.* v. *Pesiri*, 887 F.3d 589, 591 (2d Cir. 2018).

The holding in *Corsair* supports the trial court's conclusion that, by sending the demand letter and a copy of the warrant, to the plaintiff, the defendant placed the plaintiff on notice of its legal obligation to pay the delinquent taxes and his responsibility to collect them, and thereby constructively executed the tax warrant, and thus that the defendant was entitled to his statutory fee under § 12-162. We therefore conclude that the trial court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

HILARIO TRUCK CENTER, LLC *v.* KEVIN S. KOHN ET AL.
(AC 41429)

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

Syllabus

The plaintiff towing company sought to recover damages from the defendant insurance company, A Co., and its insured, the defendant K, arising out of towing services that the plaintiff performed following a motor vehicle accident involving K's vehicle. In count three of the complaint, the plaintiff alleged, inter alia, that A Co. was liable to it for money damages because it was a third-party beneficiary of K's insurance contract with A Co. Thereafter, A Co. filed a motion to dismiss count three on the ground that the plaintiff lacked standing because it was not a third-party beneficiary to the insurance policy. In granting A Co.'s motion to dismiss, the trial court adopted the decision in *Hilario's Truck Center, LLC* v. *Rinaldi*, Superior Court, judicial district of Danbury, Docket No. CV-16-6019558-S (October 17, 2016), which involved the same plaintiff as this case. Two months before the plaintiff filed its appellate brief in

this case, this court affirmed the trial court's decision in *Rinaldi* and held that, under circumstances nearly identical to those in the present case, the plaintiff towing company was not an intended third-party beneficiary of an automobile insurance policy between an insurance company and the insured, and it therefore lacked standing to bring an action against the insurance company. On the plaintiff's appeal to this court, *held* that the plaintiff could not prevail on its claim that the trial court improperly dismissed the third count of the complaint against A Co.; the plaintiff's briefing on appeal did not cite to, address or distinguish the present case from either the *Rinaldi* decision adopted by the trial court, which formed the basis of its decision dismissing count three, or this court's prior decision affirming *Rinaldi*, which was binding on this court, and the plaintiff, therefore, failed to meet its burden of demonstrating that the trial court committed error by granting the defendant's motion to dismiss.

Argued March 6–officially released June 4, 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 Danbury, where the court, *Mintz, J.*, granted the motion to dismiss filed by the defendant Allstate Insurance Company and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Raymond J. Kelly, for the appellee (defendant Allstate Insurance Company).

Opinion

DiPENTIMA, C. J. The plaintiff, Hilario Truck Center, LLC, appeals from the judgment of dismissal of the third count of its operative complaint following the granting of the motion to dismiss filed by the defendant Allstate Insurance Company (Allstate).[1] The plaintiff argues that the court erred when it concluded that the

[1] In its complaint, the plaintiff also named Kevin S. Kohn and Kevin E. Kohn (Kohns) as defendants. On February 14, 2018, the court rendered judgment against the Kohns in the amount of $5000. The Kohns are not parties to this appeal.

plaintiff lacked standing to bring a claim as a third-party beneficiary against Allstate pursuant to an automobile insurance policy issued to the defendant Kevin E. Kohn. We affirm the judgment of the trial court.

The plaintiff commenced the present action in October, 2015. In its operative complaint, the plaintiff alleged the following facts.[2] On October 23, 2014, the defendant Kevin S. Kohn was operating a 1995 Buick in Newtown. The vehicle, owned by his father, Kevin E. Kohn, swerved off the road and came to rest on the property of Cliff Beers and Maryellen Beers. Kevin E. Kohn called the plaintiff to remove the vehicle from the property and tow the vehicle to its facility. The plaintiff successfully removed the vehicle from the Beers' property.

The plaintiff filed a three count complaint against Kevin S. Kohn, Kevin E. Kohn and Allstate. The first and second counts, sounding in breach of contract and unjust enrichment, were directed against Kevin S. Kohn and Kevin E. Kohn.[3] The third count, directed against Allstate, alleged that Kevin E. Kohn was the named insured of an insurance policy issued by Allstate. The plaintiff further claimed the insurance policy obligated Allstate to make payments to a third party for damages

[2] "When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *Ion Bank* v. *J.C.C. Custom Homes, LLC*, 189 Conn. App. 30, 37–38, A.3d (2019).

[3] The complaint alleged that the Kohns had failed to pay the plaintiff for its services in recovering the vehicle from the Beers' property and that, therefore, there had been a breach of contract, or, in the alternative, the Kohns had been unjustly enriched.

arising from the use of an automobile covered under the policy and that Allstate had not done so.[4] Finally, the plaintiff alleged that it was due payment for its towing services as a third-party beneficiary pursuant to the insurance policy and that Allstate had failed to pay the plaintiff.

On August 22, 2017, Allstate moved to dismiss the third count of the plaintiff's operative complaint. Allstate argued that the plaintiff was not a third-party beneficiary of its insurance policy issued to Kevin E. Kohn. Allstate reasoned, therefore, that the plaintiff lacked standing. In support of this motion, Allstate relied on the judgment rendered by the court, *Truglia, J.*, in *Hilario's Truck Center, LLC* v. *Rinaldi*, Superior Court, judicial district of Danbury, Docket No. CV-16-6019558-S (October 17, 2016), aff'd, 183 Conn. App. 597, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018).[5]

On December 18, 2017, the court granted Allstate's August 22, 2017 motion to dismiss, stating: "Granted.

[4] Specifically, the plaintiff alleged: "Allstate's third party liability insurance coverage policy with defendant, Kevin E. [Kohn] states: Allstate will pay for damages an insured person is legally obligated to pay because of bodily injury or property damage meaning . . . 2. [D]amage to or destruction of property, including loss of use. Under these coverages, your policy protects an insured person from liability for damages on account of accidents arising out of the ownership, maintenance or use, loading or unloading of the auto we insure." (Emphasis omitted.)

[5] In *Hilario's Truck Center, LLC* v. *Rinaldi*, supra, Superior Court, Docket No. CV-16-6019558-S, the defendant, Nationwide General Insurance Company (Nationwide), moved to dismiss counts one and three of the complaint filed by Hilario's Truck Center, LLC (Hilario's), on the basis of lack of standing. Specifically, the complaint had alleged that Hilario's was a third-party beneficiary of the insurance policy between Nationwide and the named defendant, Laura Rinaldi.

Judge Truglia rejected the arguments regarding Hilario's claim that it was a third-party beneficiary of the insurance policy. Accordingly, the court concluded that Hilario's lacked standing and dismissed counts one and three of its complaint. Judge Truglia's memorandum of decision subsequently was affirmed by this court. See *Hilario's Truck Center, LLC* v. *Rinaldi*, supra, 183 Conn. App. 612.

The court adopts Judge Truglia's ruling in . . . *Hilario's Truck Center*, *LLC* v. [*Rinaldi*, supra, Superior Court, Docket No. CV-16-6019558-S]." This appeal followed.

In *Hilario's Truck Center*, *LLC* v. *Rinaldi*, 183 Conn. App. 597, 598, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018), this court specifically held that, under nearly identical circumstances, a towing company is not an intended third-party beneficiary of an automobile insurance policy between an insurance company and the insured.[6] This court noted that "[a] person or entity that is not a named insured under an insurance policy and who does not qualify, at least arguably, as a third-party beneficiary, lacks standing to bring a direct action against the insurer." Id., 603–604. Additionally, this court stated that "the fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a [third-party] beneficiary." (Internal quotation marks omitted.) Id., 608. Ultimately, this court concluded that neither the language of the insurance contract nor public policy supported the claim that a towing company, under such circumstances, was a third-party beneficiary of an automobile insurance contract. Id., 606–12. As a result, the towing company lacked standing to maintain a direct action against the insurance company. Id., 612.

In its appellate brief in the present case, the plaintiff failed to mention, distinguish, or address in any way *Hilario's Truck Center*, *LLC* v. *Rinaldi*, supra, Superior Court, Docket No. CV-16-6019558-S, which served as the basis of the decision of the trial court to grant the defendant's motion to dismiss in the present case. Additionally, the plaintiff overlooked this court's opinion in *Hilario's Truck Center*, *LLC* v. *Rinaldi*, supra,

[6] The plaintiff in the present case was also the plaintiff in *Hilario's Truck Center*, *LLC* v. *Rinaldi*, supra, 183 Conn. App. 597, and was represented by the same attorney.

183 Conn. App. 597, which was issued two months *prior* to the filing of the plaintiff's appellate brief. The plaintiff did not file a reply brief nor did it provide any notice pursuant to Practice Book § 67-10 addressing the *Rinaldi* case.[7] As stated succinctly in the defendant's brief, the plaintiff, in its appellate brief, "has not even attempted to distinguish [*Hilario's Truck Center, LLC* v. *Rinaldi*, supra, 183 Conn. App. 597], from the [present] case."[8]

"It is a fundamental principle of appellate review that our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts. . . . . [T]he trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the

[7] The following colloquy occurred at oral argument before this court:

"[The Court]: I'm just curious why your brief doesn't even mention the case that was relied on by the trial court . . . and affirmed by this court in 2018, [*Hilario's Truck Center, LLC* v. *Rinaldi*, supra, Superior Court, Docket No. CV-16-6019558-S] it's a pertinent authority. Whether it's in your favor or not, it's pertinent authority.

"[The Plaintiff's Counsel]: No, no. I understand that. And I think it should have, I think it should have, Your Honor, that's my fault for not addressing it and it wasn't a conscious decision to not address it. I took the position that the facts [in] this case were different because it was a different contract, it was a different situation with a consensual tow rather than [a nonconsensual] tow."

[8] At oral argument before this court, the plaintiff's counsel made efforts to distinguish the facts of the present case from those in *Hilario's Truck Center LLC* v. *Rinaldi*, supra, 183 Conn. App. 597. We decline to consider such arguments when raised for the first time at oral argument. See *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 336–37 n.10, 193 A.3d 1192 (2018); *Filosi* v. *Electric Boat Corp.*, 330 Conn. 231, 235 n.4, 193 A.3d 33 (2018); see also *Ryan* v. *Cassella*, 180 Conn. App. 461, 475, 184 A.3d 311 (2018) (well established that claims on appeal must be adequately briefed and cannot be raised for first time on appeal).

Even if we were to consider the arguments raised by the plaintiff's counsel that the insurance policy in this case contains broader language when compared to the terms of the policy in *Hilario's Truck Center, LLC* v. *Rinaldi*, supra, 183 Conn. App. 597, and that a consensual tow occurred here, as opposed to a nonconsensual tow, we would not be persuaded that these differences warrant a different result.

contrary." (Citation omitted; internal quotation marks omitted.) *Reinke* v. *Sing*, 186 Conn. App. 665, 700, 201 A.3d 404 (2018). By declining to address the basis of the trial court's decision, as well as the controlling precedent from this court, the plaintiff has not met its burden of demonstrating error in the granting of the defendant's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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MEMORANDUM DECISIONS

SANTA ENERGY CORPORATION ET AL.
v. JANET N. SANTA, EXECUTRIX
(ESTATE OF NORMAN K.
SANTA), ET AL.
(AC 41099)

Alvord, Bright and Bear, Js.

Argued May 14—officially released June 4, 2019

Appeal by the defendant Lorraine Foell Hillgen-Santa from the Superior Court in the judicial district of Ansonia-Milford, *Hon. Arthur A. Hiller*, judge trial referee.

Per Curiam. The judgment is affirmed.

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ROGER R. *v.* COMMISSIONER OF CORRECTION
(AC 41605)

Lavine, Prescott and Eveleigh, Js.

Argued May 15—officially released June 4, 2019

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

Per Curiam. The judgment is affirmed.

JOHN TURCHIANO *v.* ROADMASTER PAVING AND SEALING, LLC
(AC 41728)

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

Submitted on briefs May 20—officially released June 4, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Litchfield, *Hon. John W. Pickard*, judge trial referee.

Per Curiam. The judgment is affirmed.

BANK OF AMERICA, N.A. *v.* MICHAEL V. DEFELICE ET AL.
(AC 41941)

Lavine, Bright and Noble, Js.

Argued May 21—officially released June 4, 2019

Defendants' appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Kevin Tierney*, judge trial referee; *Genuario*, *J.*

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

BARRY A. *v.* COMMISSIONER OF CORRECTION
(AC 41779)

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

Argued May 22—officially released June 4, 2019

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

Per Curiam. The appeal is dismissed.

IN RE ELIZABETH B. ET AL.
(AC 42531)

Alvord, Elgo and Moll, Js.

Argued May 28—officially released June 4, 2019

Respondent mother's appeal from the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, *Burgdorff*, *J.*

Per Curiam. The judgments are affirmed.

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(1) of Code of Judicial Conduct required recusal on ground that resentencing court was biased in favor of justifying defendant's initial sentence; claim that defendant's initial sentence had anchoring effect that prevented resentencing court from approaching resentencing hearing with fully open mind that would allow it to fully consider requirement under Miller *v.* Alabama *(567 U.S. 460) that it give mitigating weight to defendant's youth and its hallmark features when considering whether to impose functional equivalent of life imprisonment without parole; claim that resentencing court considered seventy year sentence to be inappropriate but nevertheless imposed it because defendant would be eligible for parole pursuant to legislative amendments (P.A. 15-84) to statutes applicable to sentencing of children convicted of certain felonies (§ 54-91g) and parole eligibility (§ 54-125a); claim that resentencing court was required under Supreme Court's reversal of defendant's initial sentence and remand order to find that defendant was incorrigible, irreparably corrupt or irretrievably depraved before resentencing him to life without possibility of parole; whether discussion by Supreme Court in decision reversing defendant's initial sentence about presumption against life sentence without parole that must be overcome by evidence of unusual circumstances was rendered inapplicable by enactment of P.A. 15-84; claim that* Miller, *Supreme Court's decision reversing defendant's sentence and P.A. 15-84 limited resentencing court's discretion by creating presumption against imposition of life sentence that could be imposed only after finding that juvenile was permanently incorrigible, irreparably corrupt or irretrievable depraved.*

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Dissolution of marriage; claim that trial court improperly failed to use parties' net incomes in calculating its orders of child support and alimony; claim that trial court improperly ordered defendant to pay alimony in amount that exceeded ability to pay; claim that trial court abused its discretion by crafting inequitable property distribution and alimony orders; whether it was possible to ascertain what path trial court followed in crafting its support orders and dividing marital assets without engaging in pure speculation; whether defendant did all that could reasonably be expected to obtain articulation; whether unique circumstances of case warranted new trial on financial matters; whether presumption of correctness of trial court's orders applied where there was inadequate factual record and appellant did all that could reasonably be expected of him to obtain articulation of factual findings necessary to obtain review of financial orders but was thwarted, through no fault of his own, due to retirement of trial judge.

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 were printed in the May 21, 2019 issue of the Connecticut Law Journal 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