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

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

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

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

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

The decision of the trial court is affirmed.

In this opinion the other justices concurred.

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

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

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

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

Syllabus

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

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

CONNECTICUT REPORTS

Vol. 332

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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GERIATRICS, INC. *v.* HELEN MCGEE ET AL.
(SC 20047)

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

Syllabus

Pursuant to a provision of the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552e [a] [1]), a transfer by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made and if the debtor made the transfer with actual intent to hider, delay or defraud any creditor of the debtor.

The plaintiff, a nursing home operator, sought to recover damages for, inter alia, the alleged breach of a residency agreement executed by the named defendant, H, upon her admission to one of the plaintiff's nursing homes. Before H was admitted to the plaintiff's facility, H's son, the defendant S, began to manage her finances under a power of attorney that she had given to him, which included access to her bank accounts. Under the residency agreement, to which S was not a party, H agreed to pay for the costs associated with her residency and related care. The plaintiff alleged, with respect to H, breach of contract and unjust enrichment owing to her failure to pay for services rendered to her by the plaintiff. With respect to S, the plaintiff alleged unjust enrichment and a violation of CUFTA on the basis that H had transferred assets to S, those transfers

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* This appeal originally was argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn. Thereafter, Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

left H with insufficient assets to pay her debts, the transfers were made with the intent to hinder H's creditors, and S had provided nothing in exchange for the assets he received. At trial, the plaintiff introduced checks issued after H had been admitted to the nursing home that were payable to S or his wife. The checks totaled about $73,000 and were drawn on H's bank accounts and signed by S with the designation for power of attorney. S also exercised his power of attorney to pay some of H's past and present expenses directly to other creditors. S's deposition testimony, which was admitted at trial, indicated that he had a verbal agreement with H to receive payment for his power of attorney services in the amount of $600 per month and that H had agreed that he could allocate money to himself for the care that he provided to her in her home before she was admitted to the nursing home. There was no claim by H's counsel that S lacked authority to make the transfers to himself on H's behalf or that he otherwise engaged in any wrongdoing in connection with those transfers. The trial court rendered judgment for the plaintiff on its breach of contract claim against H and for S on both the CUFTA and unjust enrichment counts against him. The court reasoned that CUFTA did not apply to the transfers made by S because S was not a debtor of the plaintiff, and CUFTA did not apply to third-party transferors, such as S. The court also determined, with respect to the plaintiff's unjust enrichment claim against S, that both the plaintiff and S had a right to H's assets but that the plaintiff had failed to prove that the plaintiff had the better legal or equitable right to H's assets than S did. On the plaintiff's appeal from that portion of the trial court's judgment relating to the plaintiff's claims against S, *held*:

1. The trial court improperly rejected the plaintiff's fraudulent transfer claim on the ground that S's transfers of H's assets pursuant to a power of attorney were not transfers made by a debtor, and, accordingly, the trial court's judgment as to the plaintiff's CUFTA claim was reversed and the case was remanded for a new trial on that claim at which the court must determine whether such transfers were fraudulent under any of the theories advanced by the plaintiff: the trial court improperly failed to consider the agency relationship between H and S created by the power of attorney and to apply agency principles when it determined that H's assets had been transferred by a third party rather than by the debtor; moreover, this court's review of the relevant provisions of CUFTA, including the provision (§ 52-552k) providing that the law relating to principal and agent supplements the provisions of CUFTA, unless displaced by its provisions, led it to conclude that the requirement in § 52-552e (a) that the fraudulent transfer be made "by a debtor" encompasses a transfer made by a person authorized by a power of attorney to make such a transfer on behalf of the debtor, there having no basis to conclude that the application of agency principles in this context was inconsistent with the provisions of CUFTA or conflicted with its policies of protecting creditors and suppressing fraud.

2. The trial court properly rendered judgment for S on the plaintiff's unjust enrichment claim: the trial court's finding that S, as well as the plaintiff, had an interest in H's assets was not clearly erroneous, as the court was free to consider the absence of a claim by H that S improperly transferred assets to himself and to credit S's deposition testimony, which was admitted into evidence by the parties' mutual agreement, that he used the money from H's accounts to compensate himself for the care he had provided to H before she was admitted and for the continued management of her personal and financial affairs; moreover, the trial court did not abuse its discretion in determining that the plaintiff had failed to prove that it, rather than S, had the better legal or equitable right to H's assets.

(*Three justices concurring in part and dissenting in part in one opinion*)

Argued April 4, 2018—officially released June 18, 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 New Britain and tried to the court, *Morgan*, *J.*; judgment in part for the plaintiff, from which the plaintiff appealed. *Reversed in part*; *new trial.*

Andrew P. Barsom, for the appellant (plaintiff).

Jeremy S. Donnelly, for the appellee (defendant Stephen McGee).

Opinion

McDONALD, J. The Connecticut Uniform Fraudulent Transfer Act (CUFTA or act), General Statutes §§ 52-552a through 52-552*l*, provides relief to unsecured creditors when there has been a transfer of a debtor's assets and the circumstances establish that the transfer was fraudulent. The principal issue in this appeal is whether it would be improper to impute to the debtor a transfer of the debtor's assets by the debtor's agent under the law of agency. The act directs courts to apply the law of principal and agent unless such law is "displaced by" the provisions of the act. General Statutes § 52-552k.

The defendant Stephen McGee used a power of attorney granted to him by his elderly mother, the named defendant, Helen McGee (Helen), to transfer to himself funds from Helen's checking account, claiming that Helen had authorized him to reimburse himself for various services that he had provided or was continuing to provide to her. As a consequence of those transfers, Helen had insufficient assets to pay her debt to the plaintiff, Geriatrics, Inc., the owner and operator of a nursing home in which Helen resided for a period of time. The plaintiff appeals from the judgment of the trial court insofar as it rendered judgment in the defendant's favor on counts alleging fraudulent transfer under CUFTA and unjust enrichment. We conclude that the trial court, in rejecting the plaintiff's CUFTA claim, improperly failed to consider and apply agency principles when it decided that Helen's assets had been transferred by a "third party," the defendant, and not by the debtor, Helen. We further conclude that, in light of certain unrebutted evidence, the trial court did not abuse its discretion in rejecting the plaintiff's unjust enrichment claim. Therefore, we reverse in part and affirm in part the trial court's judgment.

The record reveals the following undisputed facts. In late 2012, the defendant began to manage Helen's finances under a power of attorney.[1] In February, 2013, Helen was admitted to Bel Air Manor, a skilled nursing home operated by the plaintiff, and she agreed to pay for residency and related care. The defendant was not a party to this agreement. Although Medicare and private insurance paid Helen's expenses for the first

[1] The defendant testified that there was a power of attorney agreement, but that agreement was never produced at trial, or at the defendant's deposition, which served as the only source of his testimony. As we explain later in this opinion, the defendant's authority to execute the transfers pursuant to the power of attorney was never disputed by the parties. The trial court expressly found that the transfers were executed pursuant to that authority.

nine months at Bel-Air Manor, she began accumulating debt once those benefits were exhausted.[2]

In June, 2015, the plaintiff commenced the present action against Helen[3] and the defendant. In the counts brought against Helen, the plaintiff alleged that Helen had breached the residency agreement and had been unjustly enriched by her failure to pay in excess of $153,000 for services provided to her to date. In the counts against the defendant, the plaintiff alleged that Helen had transferred assets to the defendant, an "insider" under CUFTA; that those transfers left Helen with insufficient assets to pay her debts; that those transfers were made with the intent to hinder Helen's creditors; and that the defendant had provided nothing in exchange for the funds he received. The plaintiff alleged that this conduct constituted a fraudulent transfer in violation of CUFTA and resulted in the defendant's unjust enrichment.[4] The defendant admitted in his answer that Helen had transferred assets to him but denied the other substantive allegations.

At trial, the plaintiff introduced checks drawn on bank accounts in Helen's name, signed by the defendant with the designation "POA" (power of attorney). Some of the checks named various businesses as payees;

[2] The trial court credited the defendant's testimony that the plaintiff refused to assist the defendant in reapplying for Helen's Medicare benefits, and that the defendant unsuccessfully applied for Medicare benefits on his mother's behalf three times during her stay. At the time of her death, Helen owed the plaintiff approximately $208,000.

[3] The plaintiff named Helen as a defendant individually and in her capacity as trustee of the Helen C. McGee Revocable Trust. Discussion of the matters relating to the trust, which involved the disposition of certain real property, is not necessary to the resolution of this appeal.

[4] The plaintiff also advanced a claim of misrepresentation against the defendant for statements regarding Helen's assets made in a personal financial information form that the defendant signed and submitted to the plaintiff. The trial court rendered judgment in favor of the defendant on this count, finding that he did not know that his statements were false. The plaintiff does not challenge that holding on appeal.

forty-eight of the checks, issued over a three year period and totaling approximately $73,000, named the defendant or his wife as payee.[5]

The defendant did not testify at trial. He was unavailable due to illness, and his deposition was admitted into evidence by stipulation. In that deposition, the defendant testified that, in late 2012, he began to manage Helen's finances under a power of attorney agreement that Helen had given. He testified that various checks likely had been or were issued as payment for his power of attorney services, for which he charged $600 a month.[6] The defendant testified that he and Helen had made a verbal agreement that he would receive monthly fees for such services, and that the power of attorney agreement reflected that he could charge fees. The defendant also testified that he had cared for Helen before she was admitted to Bel Air, and that he and Helen had a verbal agreement that he could take "whatever's due [to him]" for the personal care that he had provided. The defendant estimated the value of that care to be approximately $230 per day, based on the rate for comparable professional services.

No testimony was received from Helen. She died a few months before trial commenced in September, 2016, and was never deposed.[7] However, Helen's interests were represented by counsel throughout the pro-

[5] According to the defendant's deposition testimony, many of the checks intended to compensate him were made payable to his wife because he did not maintain a checking account at that time. It appears that the plaintiff's CUFTA claim was based on the transfers issued in the names of both the defendant and his wife. The defendant's wife was not named as a defendant.

[6] The defendant's testimony was inconsistent on this point. He later testified that his fees were $1200 per month.

[7] According to the defendant's deposition testimony, Helen was exhibiting signs of dementia when he lived with her, and that condition became more constant when she entered into the nursing home.

ceedings.[8] No cross claim was made on Helen's behalf against the defendant asserting either that he lacked authority to make the transfers to himself on her behalf or that he otherwise engaged in any wrongdoing in connection with these transfers.

After the parties filed posttrial briefs, the court issued an order directing the plaintiff to file a supplemental brief clarifying the specific provisions of CUFTA on which it was relying and the factual and legal basis for each such claim. The court permitted the defendant to file a responsive supplemental brief. The plaintiff's supplemental brief asserted that the evidence at trial satisfied four statutory grounds—General Statutes §§ 52-552e (a) (1) and (2), and 52-552f (a) and (b). The court did not ask the parties to address, and neither party's brief did address, the significance, if any, of the fact that the transfers had been executed by the defendant pursuant to a valid power of attorney.

The trial court rendered judgment in favor of the plaintiff on the breach of contract count against Helen on the basis of a stipulation in which Helen's counsel conceded liability on that count. The court rendered judgment for the defendant on all counts brought against him.

In its memorandum of decision, the trial court made the following findings of fact, which were based solely on the defendant's deposition testimony.[9] When Helen's

[8] In its memorandum of decision, the trial court noted Helen's death and the fact that the plaintiff did not apply to the trial court for an order to substitute the executor of Helen's estate after Helen died. The trial court found that Helen's and the defendant's interests "were represented by their counsel at trial." Neither the trial court nor the parties otherwise addressed the significance of Helen's death with respect to the action proceeding against her or judgment rendered against her.

[9] Counsel for the defendant and Helen did not call any witnesses to testify, and the only exhibit offered was a statement from Bel Air Manor, dated March 1, 2016, showing a balance due of $166,758.08.

health first began to deteriorate, the defendant moved into her home to provide twenty-four hour a day care. He mainly offered physical aid, such as cooking and ordering groceries, bathing her, dressing her, and dealing with her incontinence. The defendant's wife assisted with Helen's care. This arrangement lasted for approximately two years. At that point, the defendant was no longer able to care for Helen because of his own debilitating disease and hired private caretakers to provide home care for her.

After Helen was admitted to Bel-Air Manor in early 2013, the defendant and his wife continued to provide care to Helen in the form of managing her personal and financial affairs. At this time, the defendant held power of attorney for Helen and the power of attorney provided the defendant with access to the bank accounts in which Helen's Social Security and pension benefits were electronically deposited. The defendant exercised the power of attorney to pay some of his mother's past and present expenses directly to her creditors. From March, 2013 to March, 2016, the defendant, "acting under the power of attorney for Helen," also wrote checks to himself and to his wife totaling approximately $73,000. The defendant and his wife used those funds to compensate themselves for the care that they had provided to Helen before and after her admission to Bel Air, to pay the defendant $600 a month for services as power of attorney, and as reimbursement for money loaned to Helen or spent on her behalf.[10]

[10] Had the defendant paid himself the $230 daily rate to which he claimed he was entitled for the two years of personal care he had provided to Helen before her admission to Bel Air, that sum would have been $167,900. Payment for the $600 monthly fee for power of attorney services over the approximately three year period Helen resided at Bel Air would have been $21,600. The checks that the defendant issued to himself and his wife over that three year period were for widely varying amounts that did not reflect a clear relationship to these two sums: fifteen were for amounts in excess of $1000; seventeen were for amounts in excess of $2000; and two were for $3000.

On the basis of these facts, the court reached the following conclusions. With regard to the fraudulent transfer claim, although all of the parties' filings and argument to the court proceeded from the view that Helen transferred the assets, the trial court on its own initiative raised the issue of whether the defendant himself was the transferor was with regard to these transactions in light of his testimony.[11] The court noted that it was not Helen, the debtor, who had actually executed the transfers, but instead it was the defendant, a "third party transferor." The court raised the issue because of language in CUFTA that provides for recovery when there is a transfer "made . . . by a debtor"; General Statutes §§ 52-552e and 52-552f; and which defines "[d]ebtor" as "a person who is liable on a claim." General Statutes § 52-552b (6). The court then reasoned "that the act does not apply to the alleged transfers at issue in this case because [the defendant] is not a debtor of the plaintiff as that term is defined in the act, and the plain and unambiguous language of the act does not apply to third-party transferors." The court did not appear to consider whether the defendant's status as Helen's attorney-in-fact distinguished him from third parties generally. The court cited cases reasoning that the act could apply to a transfer made by a third party if the debtor "participated" in the transfer but found

[11] We point out that the court raised the issue of who the transferor was, sua sponte, because it seems the likely explanation for the fact that the defendant did not produce, and the plaintiff made no effort to obtain production of, the power of attorney agreement. We also note, however, that we have admonished our courts to give the parties a fair opportunity to provide briefing and/or argument on any issue that the court raises on its own initiative. See *State* v. *Connor*, 321 Conn. 350, 372, 138 A.3d 265 (2016) ("[I]t is clear that, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a meaningful opportunity, in order to satisfy concerns of fundamental fairness. . . . The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response." [Citation omitted; emphasis omitted.]).

no evidence that Helen had "participated in any fashion in the claimed fraudulent transfers . . . ." Accordingly, the trial court held that the plaintiff had failed to make out a claim under CUFTA.

With regard to the unjust enrichment claim, the trial court agreed that the plaintiff had a right to Helen's assets because of its contract with her, but it found that the defendant also had a right to those assets because of the services and loans he had provided to Helen before and after the debt to the plaintiff arose. On the basis of these facts, the court concluded that the plaintiff had failed to prove it had "a better legal or equitable right" to Helen's assets than did the defendant. The trial court therefore held that the plaintiff had not established that the defendant was unjustly enriched at the plaintiff's expense.

The plaintiff appealed from the judgment of the trial court with regard to the CUFTA and unjust enrichment counts rendered in the defendant's favor. We transferred the appeal from the Appellate Court to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

I

We begin with the fraudulent transfer claim. The plaintiff advances several arguments as to why the trial court improperly determined that there was not a transfer by Helen, as debtor, and therefore no liability under CUFTA. We need only reach one of those arguments, namely, that the trial court improperly failed to consider the defendant's status as Helen's attorney-in-fact and to apply agency principles in its analysis of the plaintiff's claim.[12]

[12] The plaintiff also argues that (1) the defendant's admission in his answer that Helen transferred the assets was binding on the trial court, and (2) CUFTA permits liability against a transferee for receipt of those assets, irrespective of who fraudulently transferred them.

Whether CUFTA's requirement that the fraudulent transfer be "made by the debtor" encompasses a transfer made by a debtor's attorney-in-fact presents a question of statutory interpretation, to which we apply well established rules of construction and exercise plenary review. See General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

CUFTA provides relief to an unsecured creditor when there has been a "transfer made . . . by a debtor" and that transfer is "fraudulent . . . ." General Statutes §§ 52-552e and 52-552f. Although the present case turns on the first requirement—the trial court never reached the second—statutory meaning is always contextual. See General Statutes § 1-2z (directing court to consider related statutes to ascertain meaning). Therefore, we consider the framework of the entire act before turning to the specific question raised on appeal.

To establish that a transfer is fraudulent, the creditor may, but need not, prove actual fraudulent intent. See General Statutes § 52-552e (a) (1) and (b) (transfer made with "actual intent to hinder, delay or defraud any creditor").[13] Liability also can be established on

[13] General Statutes § 52-552e provides in relevant part: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . .

"(b) In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred,

the basis of constructive fraud when a transfer of the debtor's assets occurs after the creditor's claim arose and other circumstances are present, including that the debtor has not received reasonably equivalent value in exchange for the transfer, that the transfer renders the debtor insolvent (i.e., greater debts than assets), and/or that the transfer is made to an insider, such as the debtor's relative.[14] See General Statutes § 52-552e (a) (2); General Statutes § 52-552f (a) and (b); see generally *Badger State Bank* v. *Taylor*, 276 Wis. 2d 312, 328, 688 N.W.2d 439 (2004) ("[I]ntent is difficult to prove, and the drafters of the [Wisconsin] Uniform Fraudulent Transfer Act included provisions addressing transactions that might be considered wrongful toward creditors even if a debtor's intent to hinder, delay, or defraud is not proven. The focus in constructive fraud shifts

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

[14] General Statutes § 52-552e (a) provides in relevant part: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation . . . (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

General Statutes § 52-552f provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

"(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent."

from a subjective intent to an objective result. Proof of constructive fraud simply entails proof of the requirements of the statute." [Footnotes omitted; internal quotation marks omitted.]). When a creditor proves that a fraudulent transfer has occurred, the court may order avoidance of the transfer to the extent necessary to satisfy the creditor's claim, or may order various remedies to secure the asset from being dissipated. See General Statutes § 52-552h. Defenses and various other protections are available to a transferee who has taken the assets in good faith and under certain other circumstances. See General Statutes § 52-552i.

Significantly for purposes of the present case, the act makes clear that its provisions are not the exclusive source of law governing fraudulent conveyances. General Statutes § 52-552k provides in relevant part: "Unless displaced by the provisions of [this act], the principles of law and equity, including . . . the law relating to principal and agent . . . supplement the provisions of said sections."[15] That common-law principles and defenses supplement CUFTA is consistent with our recognition that CUFTA "is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances]," except that the act's remedies are broader than those available under the common law. (Emphasis omitted; internal quotation marks omitted.) *Robinson* v. *Coughlin*, 266 Conn. 1, 9, 830 A.2d 1114 (2003).

This supplementary provision is relevant to the present case because a grant of a power of attorney creates a principal-agent relationship. "Under our common law,

[15] General Statutes § 52-552k provides: "Unless displaced by the provisions of sections 52-552a to 52-552*l*, inclusive, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency or other validating or invalidating cause, supplement the provisions of said sections."

a power of attorney creates a formal contract of agency between the grantor and his [attorney-in-fact]. *Long* v. *Schull*, 184 Conn. 252, 256, 439 A.2d 975 (1981). Under our statutory law, this agency relationship encompasses a variety of transactions that the grantor presumptively has authorized his [attorney-in-fact] to undertake on his behalf. General Statutes [(Rev. to 2009)] § 1-42 et seq."[16] *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 167, 7 A.3d 919 (2010); see also 2A C.J.S. 589–90, Agency § 23 (1972) ("An attorney-in-fact is one who is given authority by his principal to do a particular act not of a legal character; a person appointed by another by a letter or power of attorney to transact any business for him out of court. . . . [A]ttorneys-in-fact created by formal letters of attorney are merely agents, and their authority and the manner of its exercise are governed by the principles of the law of agency." [Footnotes omitted.]). Our statutory law recognized that, when an attorney-in-fact undertakes transactions in that capacity, he is acting as the "alter ego of the principal . . . ." General Statutes (Rev. to 2015) § 1-55.

In light of the agency relationship created between Helen and the defendant pursuant to the power of attorney, under which the law of agency generally would impute to Helen the defendant's transfers of Helen's assets, we must consider whether this application of agency law is displaced by the provisions in the act. Guidance as to what the phrase "displaced by" means is available in a comment to an identical provision in the Uniform Commercial Code (UCC) incorporating common-law principles and defenses. See General Statutes § 42a-1-103 (b); see also General Statutes § 50a-64 (incorporating same supplementary principles for

[16] The Connecticut Statutory Short Form Power of Attorney Act, General Statutes § 1-42 et seq., was repealed in 2016, after the events at issue in the present case. See Public Acts 2016, No. 16-40, § 9.

Uniform Foreign-Money Claims Act, General Statutes § 50a-50 et seq.). That comment explains that these common-law principles would be displaced if they were inconsistent with a provision of the UCC or the UCC's principles and policies. See comment (2) to Uniform Commercial Code § 1-103, Conn. Gen. Stat. Ann. § 42a-1-103 (b) (West 2009) p. 21.

The policy underlying the act—protecting unsecured creditors from debtors who place assets beyond the reach of their unsecured creditors[17]—undoubtedly is best served by applying the law of agency to the matter at hand. See *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 330 ("The Uniform Fraudulent Transfer Act [(1984), 7A U.L.A. 274 (1999)] reflects a strong desire to protect creditors and to allow for the smooth functioning of our [credit based] society. It is a creditor-protection statute. Without such protection for creditors, [c]reditors would generally be unwilling to assume the risk of the debtor's fraudulent transfers." [Footnotes omitted; internal quotation marks omitted.]). The words of this court regarding our original fraudulent conveyance statute apply equally to CUFTA: "As the statute was enacted for the suppression of fraud, the advancement of justice and the promotion of the public good, it should be liberally and beneficially construed to suppress the fraud, abridge the mischief and enlarge the remedy. . . . [T]he common law . . . supplements

[17] Although our court has not expressly addressed the purpose of the act, many other jurisdictions have recognized that the purpose of a fraudulent transfer statutory scheme is to prevent debtors from placing assets out of the reach of unsecured creditors. See, e.g., *In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998); *In re Demitrus*, 586 B.R. 88, 92 (Bankr. D. Conn. February 27, 2018); *Lewis* v. *Superior Court*, 30 Cal. App. 4th 1850, 1873, 37 Cal. Rptr. 2d 63 (1994); *Northwestern Memorial Hospital* v. *Sharif*, 22 N.E.3d 1217, 1223 (Ill. App. 2014); *Leighton* v. *Fleet Bank of Maine*, 634 A.2d 453, 458 (Me. 1993); *Thompson* v. *Hanson*, 168 Wn. 2d 738, 750, 239 P.3d 537 (2009); *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 330. This intent is also self-evident in the terms of the act itself.

the statute to the end that justice may be done." (Citations omitted; internal quotation marks omitted.) *Allen* v. *Rundle*, 50 Conn. 9, 32 (1882). Given that the failure to apply the law of agency would create an easy end run around the act, and frustrate the ability of creditors to secure payment for debts owed to them, application of agency principles is manifestly consistent, not inconsistent, with the policies underlying the act. We cannot hypothesize a single adverse consequence that would arise from applying agency law under these circumstances.

Despite the fact that application of agency law would advance the policies underlying the act, we are bound to consider whether its application would be inconsistent with any specific provisions of the act. To this end, we observe that, even in the absence of this supplementary provision, this court has recognized "the general rule that [*u*]*nless a statute provides to the contrary* . . . principals may act through agents . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996); see, e.g., id., 620–21 ("Applying the law of agency to the tax statutes, we conclude that the plaintiff, concededly acting as the city's agent when purchasing materials and services for the parking garage, is not liable for use taxes on purchases made within the scope of its authority. . . . [General Statutes §] 12-412 [1] does not abrogate the [common-law] rule of agency that the actions of an agent, who is acting for a disclosed principal, are, as a matter of law, the actions of the principal." [Citation omitted.]). There is no provision in CUFTA that explicitly or even implicitly provides that acts of the debtor's agent shall not be imputed to the debtor.

Nor do we infer any inconsistency from the fact that the act applies to "[a] transfer made or obligation

incurred by a debtor"; General Statutes §§ 52-552e and 52-552f; and defines a debtor, unsurprisingly, as "a person who is liable on a claim." General Statutes § 52-552b (6). It would make no sense for the act to define debtor to include the debtor's agent, because an agent is not liable for the principal's debt. See *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, supra, 236 Conn. 619 ("the agent is not liable where, acting within the scope of his authority, he contracts with a third party for a known principal" [internal quotation marks omitted]); see also 2 Restatement (Third), Agency §§ 6.01 through 6.04, pp. 3–55 (addressing principal and agent liability for contracts executed by agent). It would similarly be illogical to include the debtor's agent in the substantive provisions of the act (i.e., "transfer made or obligation incurred by a debtor *or the debtor's agent*" [emphasis added]). Agency law dictates when an agent's acts shall be imputed to the principal and the limited circumstances under which an agent can be liable for a principal's debt. See, e.g., 2 Restatement (Third), supra, §§ 6.02 through 6.04, pp. 28–55 (addressing agent's liability when principal is unidentified or undisclosed or lacks capacity to be party to contract). Surely, we would not disregard agency principles and hold that the *debtor* was not liable on the claim simply because the obligation was executed by the debtor's authorized agent. See, e.g., *Hallas* v. *Boehmke & Dobosz, Inc.*, 239 Conn. 658, 673, 686 A.2d 491 (1997) ("[a] principal is generally liable for the authorized acts of his agent" [internal quotation marks omitted]).

It is important to be clear that the CUFTA claim in this appeal does not allege that the defendant/agent is personally *liable* on the claim (i.e., the debt for Helen's nursing home services) and hence *legally is the debtor*. Rather, the claim is that the defendant's act of transferring Helen's assets made under the lawful authority of

a power of attorney is an act *imputed to her*. Had the defendant fraudulently transferred Helen's assets to a third party, for example, the CUFTA action would have had to have been brought against that third party, not the defendant. See 37 Am. Jur. 2d 705–706, Fraudulent Conveyances and Transfers § 162 (2013).[18] The plaintiff is not claiming that it has the right to recover from the defendant those assets that were paid to Helen's other creditors, only those assets that he transferred as Helen's attorney-in-fact to himself as transferee.[19] Cf.

[18] "In all actions brought by creditors to subject property which it is claimed was fraudulently transferred, the person to whom the property has been transferred is a necessary party. The fraudulent grantee is a necessary party defendant in an action to set aside a conveyance as fraudulent since he or she has an interest in the subject matter of the suit which should not be affected by a decree unless he or she has been given the right to be heard. While a grantee who has parted with possession of the property is a necessary party in some jurisdictions, it is usually the case that he or she no longer has any interest in the subject matter and therefore is not a necessary party. In addition, a grantee who is merely a straw person through which the title is conveyed to another is not regarded as having a sufficient interest in the property to necessitate making him or her a party to the action." (Footnotes omitted.) 37 Am. Jur. 2d, supra, § 162, pp. 705–706.

"In the case of a debtor who has retained no legal interest in the property conveyed, there is a conflict of authority as to whether that person is a necessary party defendant to an action to set aside a fraudulent conveyance. In some jurisdictions, apparently on the theory that having parted with all interest in the property the grantor can no longer be affected by any decree pertaining to the property, the debtor is not a necessary party to the action although the debtor may be a proper party. Under other authority, the debtor, as the originator of the fraudulent conduct complained of, and as the person directly involved in the fraud in the first instance, is a necessary party to the action. Of course, where it appears that the debtor has retained some interest in, or control over, the property conveyed, the debtor is a necessary party to any suit involving such property.

"Where the creditor has not reduced its claim to judgment, the debtor is an indispensable party since, in such circumstances, the debtor has the right to be heard in regard to the validity or amount of the claim. Conversely, it has been found that where the plaintiff's claim has been reduced to judgment, it is not necessary to make the debtor a party." (Footnotes omitted.) 37 Am. Jur. 2d, supra, § 163, p. 707.

[19] The trial court's legal error in the present case may have stemmed from a misunderstanding of the basis of the plaintiff's CUFTA claim. The plaintiff's complaint makes clear that it sought to recover under CUFTA for the funds

Abbott Terrace Health Center, Inc. v. *Parawich*, 120 Conn. App. 78, 79, 88, 990 A.2d 1267 (2010) (concluding that allegations stated valid cause of action for fraudulent transfer against defendant when complaint alleged, inter alia, that defendant's aunt "acting *through the defendant as her* [*attorney-in-fact*], transferred certain moneys in her bank accounts to the defendant" just before entering into nursing home, transfer of assets rendered aunt unable to meet her financial obligations, and aunt conveyed assets without adequate consideration [emphasis added]).

Additional evidence that application of agency principles would not be inconsistent with the provisions of the act is reflected in the act's definition of "transfer." The term could hardly be defined more broadly: "every mode, direct *or indirect*, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." (Emphasis added.) General Statutes § 52-552b (12); see *In re Neri Bros. Construction Corp.*, 593 B.R. 100, 141 (Bankr. D. Conn. 2018) (describing identical definition of transfer in federal Bankruptcy Code being "as broad as possible" [internal quotation marks omitted]). This sweeping definition was in fact derived from the United States Bankruptcy Code; see Unif. Fraudulent Transfer Act (1984) § 1, comment (12),

transferred to the defendant only (directly or indirectly through his wife). An exhibit submitted by the plaintiff listed only those transfers made to the defendant or his wife. The trial court, however, stated in its analysis of the CUFTA claim: "[The defendant], acting as attorney-in-fact for Helen McGee, transferred various funds to himself, his wife, *and others* beginning in August, 2012, and continuing throughout this litigation. The plaintiff asserts its fraudulent transfer claims against [the defendant], the third party *transferor*, and not Helen McGee, the debtor. Consequently, the court must first consider whether the act applies to the transfers at issue in this case." (Emphasis added.) It appears that the trial court failed to recognize that the CUFTA claim was based on the defendant's status as transferee, not transferor, and was limited to transfers made to himself and his wife.

7A U.L.A. 261 (2017); which has a fraudulent conveyance provision similar to the one in CUFTA. See 11 U.S.C. § 548 (2012). In bankruptcy cases in which a transfer has been executed pursuant to a power of attorney, the transfer is imputed to the debtor, such that the case turns exclusively on the question of whether fraud (actual or constructive) has been established under the facts. See, e.g., *In re Simione*, 229 B.R. 329, 330, 335 (Bankr. W.D. Pa. 1999) (trustee for creditors was entitled to judgment in case seeking to avoid transfer executed by debtor's relatives under power of attorney on basis of constructive fraud because "[t]he [t]ransfer caused the [d]ebtor to become insolvent and no reasonably equivalent value was given to the [d]ebtor in exchange for the [t]ransfer"); see also *In re Gordon*, 293 B.R. 817, 822–23 (Bankr. M.D. Ga. 2003) (discussing different approaches taken by courts as to whether fraudulent *intent* of agent may be imputed to debtor in various contexts, including agency in spousal context, and noting that "[o]ne reason courts are hesitant to impute intent is that the marital relationship, by itself, does not always give rise to a legal partnership or agency.").[20] Therefore, we see no basis to conclude

[20] Some bankruptcy cases require additional facts beyond the mere agency relationship when the question is whether the agent's *intent* may be imputed to the principal to prove actual, rather than constructive, fraudulent intent. Although there is no universal rule, several bankruptcy cases hold that actual fraudulent intent by the debtor's agent may be imputed to the debtor if the agent is the transferee of the assets and retains substantial control over the debtor. See, e.g., *In re Tribune Co. Fraudulent Conveyance Litigation*, Docket No. 11-MD-2296 (RJS), 2017 WL 82391, *5 (S.D.N.Y. January 6, 2017); *In re Elrod Holdings Corp.*, 421 B.R. 700, 711 (Bankr. D. Del. 2010). Surely, if the mere act could not be imputed, there would be no need to consider whether intent could be imputed. See generally 6 A. Resnick & H. Sommer, Collier on Bankruptcy (16th Ed. 2009) § 727.02 [4], p. 727-23 ("A transfer of the debtor's property by an agent or employee with general authority upon the subject will bar the debtor's discharge if the transfer was made within the statutory period with intent to hinder, delay or defraud creditors. If the fraud is not perpetrated by the debtor or the debtor's authorized agent, it cannot be the basis of an objection to the debtor's discharge."). We note that the facts in the present case might meet this standard in any event,

that application of agency principles would be inconsistent with the provisions of the act.

The propriety of imputing a transfer made by the debtor's agent to the debtor has even greater force in a case like the present one. The debtor, Helen, was a represented party in this action, and she did not challenge the legality or propriety of the transfers. In effect, Helen's acquiescence ratified the transfers made by the defendant.[21] See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 561–62, 698 A.2d 245 (1997) ("Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances. . . . [S]ilence, as well as affirmative acts, may imply an intent to ratify." [Citations omitted; internal quotation marks omitted.]).

Finally, we are mindful that a provision in the act directs the court not only to apply and construe its

given Helen's dementia. See footnote 7 of this opinion. As we previously indicated, the trial court in the present case never addressed the question of whether the transfer was fraudulent because it concluded that there was no transfer subject to the act.

[21] What the trial court meant when it found that Helen did not "participate" in the transfers is unclear. The trial court did not address in any manner the legal implications arising from the power of attorney agreement, and, therefore, we must assume that its references to participation meant some other facts, presumably specific direction from Helen for the defendant to make particular transfers or to take payment for a specific service rather than Helen's grant of general authority to issue checks and to take compensation/reimbursement. Insofar as the trial court relied on cases applying this participation exception to third-party transfers, without regard to agency, we do not find these cases relevant to the present case. We observe, however, that the adoption of this exception in response to policy concerns is in tension with any purported "plain meaning" of the provisions.

We similarly do not view cases from this court addressing third-party transfers under the Uniform Fraudulent Conveyance Act, the predecessor to the current act, helpful. In those cases, the court attributed the third-party transfer to the debtor and did not indicate whether different facts would warrant such attribution. See, e.g., *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 433 and n.1, 429 A.2d 908 (1980).

provisions "to effectuate their general purpose," but also "to make uniform the law" among other states enacting them. General Statutes § 52-552*l*. No court, however, has expressly addressed the question before us. Courts in three jurisdictions have treated a transfer by an attorney-in-fact as a transfer subject to the act, as we do here, but without any analysis of that issue. See *Schempp* v. *Lucre Management Group, LLC*, 18 P.3d 762, 765 (Colo. App. 2000), cert. denied, Colorado Supreme Court, Docket No. 00SC667 (February 26, 2001); *Aristocrat Lakewood Nursing Home* v. *Mayne*, 133 Ohio App. 3d 651, 662–67, 729 N.E.2d 768 (1999); *Rosier* v. *Rosier*, 227 W. Va. 88, 101 n.5, 705 S.E.2d 595 (2010). We surmise that the parties in these cases were operating under the same logical assumption reflected in the parties' pleadings in the present case, that the act of the agent would be imputed to the principal as a matter of law. On the other hand, courts in two jurisdictions have applied the same "plain meaning" analysis that our trial court did, and reached the same conclusion as did the trial court here, but they too did not acknowledge the supplementary provision incorporating agency law, let alone the defendant's status as the debtor's agent. See *Folmar & Associates, LLP* v. *Holberg*, 776 So. 2d 112, 116–18 (Ala. 2000), overruled in part on other grounds by *White Sands Group, L.L.C.* v. *PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009); *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066, 1074 (Pa. Super. 2003).

One court has rejected a creditor's claim that the Uniform Fraudulent Transfer Act provided for recovery against the debtor's attorney-in-fact under agency principles but under materially different circumstances. See *Methodist Manor Health Center, Inc.* v. *Py*, 307 Wis. 2d 501, 514–15, 746 N.W.2d 824 (App. 2008). *Py* addressed a claim of conversion against the debtor's granddaughter, who, pursuant to a power of attorney, executed checks

as specifically directed by her grandmother to other persons. Id., 504, 506. The granddaughter was neither the debtor nor the transferee, but the creditor nonetheless sought to recover from her. It was in this context that the Wisconsin Appellate Court expressed the concern that "strictly applying agency principles in this scenario would disfavor unknowing and, in many cases, unsophisticated agents who were doing nothing more than attempting to assist an elderly parent or grandparent with their finances." (Internal quotation marks omitted.) Id., 517; cf. *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 322 (citing supplementary provision in context of transfer by president and principal shareholder of corporation acting as agent to principal corporation and stating that "[n]othing in [the applicable fraudulent conveyance provision] indicates that it displaces the law relating to principal and agent").

The facts in *Py* clearly supported the court's determination that no recovery could be had under those circumstances. Nothing in our decision means that an attorney-in-fact can be personally liable on the principal's debt simply because he or she executed the transfers, even if the attorney-in-fact knew that the debtor may thereby be rendered insolvent. See *In re M. Blackburn Mitchell, Inc.*, 164 B.R. 117, 123–24 (Bankr. N.D. Cal. 1994) (citing case law from Seventh and Ninth Circuit Courts of Appeals for propositions in bankruptcy case that "[a] party who acts as a conduit and who merely facilitates the transfer from the debtor to a third party, is not an 'initial transferee,' " and that court must "examine whether the party receiving the funds exercised dominion or control over the money for its own account, that is, not merely as an agent for a third party").

In sum, applying the law of agency is not inconsistent with the provisions or policies of the act. Not applying the law of agency would, in fact, undermine the pur-

poses of the act without providing any commensurate benefit. If any innocent transferee is the recipient of funds fraudulently transferred by the debtor's agent, the same defenses are available as would have been available to the transferee if the debtor personally executed the transfer. See General Statutes § 52-552i.

We therefore conclude that the trial court improperly rejected the plaintiff's fraudulent transfer claim on the ground that the defendant's transfers of Helen's assets pursuant to a power of attorney were not transfers made by the debtor. On remand, the trial court must determine whether such transfers were fraudulent under any of the theories advanced by the plaintiff.

II

The plaintiff also claims that the trial court improperly rendered judgment for the defendant on the count alleging unjust enrichment. The plaintiff asserts that the trial court incorrectly determined that the plaintiff failed to show it had a better legal or equitable right to Helen's assets than the defendant. The crux of the plaintiff's argument is that the trial court clearly erred when it credited the defendant's testimony establishing his right to the funds he transferred. Because we cannot conclude that the challenged findings were clearly erroneous, the court's determination that the plaintiff failed to establish a superior right to the transferred funds necessarily stands.

A plaintiff may recover for unjust enrichment when a contract remedy is unavailable, to the extent that the defendant has unjustly profited at the plaintiff's expense. *Horner* v. *Bagnell*, 324 Conn. 695, 707–708, 154 A.3d 975 (2017). "Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy. . . . Plaintiffs seeking recovery . . . must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the

benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) Id., 708.

"Although unjust enrichment typically arises from a plaintiff's direct transfer of benefits to a defendant, it also may be indirect, involving, for example, a transfer of a benefit from a third party to a defendant when the plaintiff has a superior equitable entitlement to that benefit." *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 468, 970 A.2d 592 (2009). In an indirect benefit scenario, the plaintiff must prove that it has "a better legal or equitable right" to the disputed benefit than the defendant. 2 Restatement (Third), Restitution and Unjust Enrichment § 48, p. 144 (2011). This standard is "highly restrictive." Id., comment (i), p. 159. It "refer[s] to a paramount interest of a kind recognized in law or equity—not to the personal merit or desert of the persons involved, or to considerations of fairness independent of preexisting entitlements." Id., comment (a), p. 145. Specifically, the plaintiff must prove that its right "is both recognized, and accorded priority over the interest of the defendant, under the law of the jurisdiction." Id., comment (i), p. 159.

Because the trial court's equitable determinations "depend on the balancing of many factors," we review its ultimate decision as to whether the defendant was unjustly enriched for abuse of discretion. (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, supra, 291 Conn. 452. Any subsidiary factual determinations by the trial court, however, are reviewed for clear error. *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 258–59, 152 A.3d 470 (2016). A finding is clearly erroneous (1) if there is no evidence in the record to support it, or (2) when, although the record provides some support, the weight of the evidence in the record leaves the

reviewing court with a "definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 259.

The trial court made two relevant findings on this issue. First, it found that the plaintiff had an interest in Helen's assets. Stemming from Helen's breach of the residency agreement, the plaintiff had been undercompensated for more than two years, resulting in unpaid bills of $208,193.

Second, the court found that the defendant also had an interest in Helen's assets. In arriving at this conclusion, it relied on the defendant's deposition testimony, which, as we previously noted, was admitted into evidence by the parties' mutual agreement. For example, the defendant testified that he "lived with [Helen] for over two years and took care of her . . . [twenty-four] hours a day," cooking for her, bathing her, dressing her, and changing her adult diapers until he could no longer do so; that he paid for an in-home care provider and for "all the expenses that were required to keep up the house," such as property tax, oil, utilities, and snow removal; and that he prepared her litigation documents, scheduled her medical appointments, and applied for her financial assistance. The trial court credited this "unrefuted evidence." It found that the defendant used the money from Helen's accounts to compensate himself for the care he had provided before she was admitted to the plaintiff's facility and for the continued management of her personal and financial affairs, and to reimburse himself for money he had spent on her behalf.

Critically, the trial court concluded: "As between the plaintiff and [the defendant], the plaintiff has not proven that it has a better legal or equitable right to the funds of Helen . . . that were paid to [the defendant] and/or his wife." In other words, although the plaintiff proved that it had a "recognized" interest in Helen's

assets, it did not prove that its interest should be "accorded priority over the interest of [the defendant], under the law of the jurisdiction." 2 Restatement (Third), Restitution and Unjust Enrichment, supra, § 48, comment (i), p. 159. The plaintiff could have met this burden by presenting evidence to discredit the defendant's testimony or by pointing to substantive law or equitable factors that would have given its interest priority over that of the defendant. See, e.g., *Nile* v. *Nile*, 432 Mass. 390, 402, 734 N.E.2d 1153 (2000) (beneficiary of contractual agreement with third party accorded priority over recipients of testamentary gift from third party); *Peirce* v. *Peirce*, 994 P.2d 193, 200 (Utah 2000) (party with contractual right to third party's assets accorded priority over recipient of inter vivos gift from third party). It declined, or neglected, to do so. Indeed, implicit in the court's findings is the recognition that the defendant's interest accrued in large part before the plaintiff's interest began to accrue.

The plaintiff contends, however, that "no evidence" supports the trial court's factual finding that the defendant had an interest in Helen's assets. More particularly, it asserts that the defendant's deposition testimony was "self-serving," vague at points, and uncorroborated by a written contract, a promissory note, receipts, or witnesses.

The plaintiff's claim founders under well settled law. The plaintiff is bound by its stipulation that the deposition testimony could be submitted for the court's consideration. Once in evidence, the trial court was permitted to rely on it to the same extent as if the defendant was present and testifying. See Practice Book § 13-31. Undoubtedly there are facts in the record and evidentiary gaps that reasonably could lead another trier of fact to find the defendant's testimony in whole or part not credible. This court, however, "cannot retry the facts or pass upon the credibility of the witnesses.

. . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . [I]t is within the province of the trier of fact to accept or reject parts of the testimony of a single witness." (Citations omitted; internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015). The trial court therefore was free to credit the defendant's deposition testimony, as well as to take into account the absence of a cross claim by Helen alleging that the defendant improperly transferred assets to himself.

In sum, it was the plaintiff's burden to prove that its rights were superior to those of the defendant. The trial court's factual finding that the defendant had an interest in Helen's assets was supported by the record and, therefore, was not clearly erroneous. As such, the trial court did not abuse its discretion in concluding that the plaintiff failed to prove it had "a better legal or equitable right" to Helen's assets.

The judgment is reversed with respect to the count of the plaintiff's complaint alleging a violation of CUFTA and the case is remanded for a new trial on that count; the judgment is affirmed in all other respects.

In this opinion PALMER, ROBINSON and ECKER, Js., concurred.

D'AURIA, J., with whom MULLINS and KAHN, Js., join, concurring in part and dissenting in part. Although I agree with part II of the majority's opinion, I disagree with part I. I would affirm the judgment of the trial court on both the Connecticut Uniform Fraudulent Transfer Act (CUFTA or act); General Statutes § 52-552a et seq.; and unjust enrichment counts of the complaint, and therefore respectfully dissent in part.

The issue we are asked to determine is whether CUFTA applies to a transfer of a debtor's assets made by the debtor's attorney-in-fact with no participation by the debtor. Under CUFTA, a transfer can only be fraudulent "as to a creditor"; General Statutes § 52-552e (a); if it is "made by a debtor . . . ." General Statutes § 52-552f (b). Relying on this language and decisions from out of state interpreting identical statutes, the trial court concluded that CUFTA did not apply to a transfer made solely by a third party, such as the attorney-in-fact of a debtor, with no participation from the debtor. Because the trial court found that "all of the transfers at issue were made by [the defendant Stephen McGee (Stephen)]" and that "[n]one were made by [Stephen's mother, the named defendant, Helen McGee (Helen)]," and because the court found no evidence that Helen "participated in any fashion in the claimed fraudulent transfers," it concluded that the plaintiff, Geriatrics, Inc., had failed to make out a claim under CUFTA.

The majority reverses the trial court's judgment in favor of Stephen on this count. I disagree and instead would affirm.

I

With few exceptions, which I will note, I have no quarrel with the majority's factual recitation. The trial court's findings are sparse, at least in part, because the live testimony in the case was brief (it was a one-half day trial) and because the trial court's ruling on the CUFTA count (that Stephen was not a "debtor") is ultimately a legal issue. Another explanation for the sparse record could be the plaintiff's failure to develop its case, including by failing to present a clear legal theory for proceeding against Stephen.[1]

[1] For this reason, I do not think it is fair to blame the trial court for addressing an essential element of the plaintiff's CUFTA claim that the plaintiff had failed to address. Nothing the plaintiff ever submitted to the trial court cited General Statutes § 52-552k, on which the majority principally relies. The plaintiff's complaint based the CUFTA claim on General Statutes

To many dispassionate readers, the facts of this case might resemble a familiar family experience. An elderly parent is in failing health. Rather than move the parent immediately to a nursing facility, a child chooses to care for the parent himself, eventually moving into her

§ 52-552h, which is merely a remedial provision. The plaintiff's pretrial and posttrial briefs reference General Statutes § 52-552 only generally—a statute that was repealed in 1991—without citation to a specific provision of CUFTA. After pretrial briefing, a trial and posttrial briefing, the trial court issued an order indicating that it was still "unclear" about "which specific provision" of CUFTA "the plaintiff claims the defendant Stephen McGee violated." It therefore ordered the plaintiff to file a supplemental brief clarifying its position. The plaintiff complied, and for the first time, cited General Statutes §§ 52-552e and 52-552f, which are CUFTA's provisions on liability. In its motion to reargue to the trial court, the plaintiff again failed to mention any provisions of CUFTA.

Nor in its briefing to this court did the plaintiff mention § 52-552k. It did, however, mention the concept of agency, asking this court to accept its argument under the plain error doctrine. See Practice Book § 60-5. I take its invocation of the plain error doctrine, which provides an avenue for reviewing *unpreserved* claims, as a concession that this claim was not preserved. See *State* v. *Darryl W.*, 303 Conn. 353, 372, 33 A.3d 239 (2012) (plain error is a "doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal" of a trial court's judgment [internal quotation marks omitted]).

The majority does not explain how this legal theory, never raised during trial, qualifies for plain error review. See id., 373 ("party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal" [internal quotation marks omitted]). As I will discuss, the position the majority adopts today is hardly "obvious and indisputable." It is at best a minority view.

Regardless, the majority is entitled to reach this issue if it has concluded that the parties have had an opportunity to brief the issue. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–62, 84 A.3d 840 (2014); id., 162 ("if the reviewing court would have the discretion to review the issue if raised by a party . . . the court may raise the claim sua sponte, as long as it provides an opportunity for all parties to be heard on the issue"). However, it is at least ironic (and in my view unfair) to scold the trial court for not ordering yet another round of supplemental briefing, given that the trial court provided the plaintiff with ample briefing opportunities; the plaintiff only belatedly landed on a theory of agency before this court, and has still never cited the statute the majority holds to govern.

home. This choice comes at significant cost to the child. As the parent's health worsens, the parent and child agree that to continue this arrangement and keep the parent at home as long as possible, the child must assume greater charge of the parent's needs—health and financial. No one begrudges the caregiver some compensation for his efforts to keep the parent in the home or for reimbursement for food, bills and other necessities paid out of his own pocket. Record keeping, however, is spotty at best and the timing of payments varies. Of course, no one knows how long the parent will live or how long the child will be able to provide the care. Eventually, though, the parent's needs exceed what the child can provide, the parent is moved to a nursing home, and the parent's remaining assets are "spent down" to qualify for government assistance. If at any point there is a gap in the payments to the nursing home or a delay in routing the government benefits to the nursing home—even due to the nursing home's own actions—the parent will become a debtor of the nursing home.

Stephen's case resembles this fact pattern. In February, 2013, after caring for Helen for several years, Stephen's own health deteriorated, and Helen was admitted to the plaintiff's skilled nursing home, Bel Air Manor, where she agreed to pay for residency. Medicare initially covered much of her expenses. It is fair to assume that Helen and Stephen (and perhaps the plaintiff) believed she would remain eligible for Medicare throughout her stay. But two efforts to qualify for continued benefits failed, and the plaintiff refused to assist Stephen in applying, despite his requests. Finally, a third application was granted, but only with a penalty. Throughout those delays, debt to the plaintiff accumulated, and at the time of her death, Helen owed the plaintiff about $208,000. Stephen was not a party to

Helen's contract with the nursing home and was not liable to the nursing home for Helen's debt.

Given the trial court's finding that Helen began accumulating debt once government benefits were stopped, it is perhaps fair to assume she had other creditors at the end of her life. This appeal involves only one creditor, her nursing home. The count on which I disagree with the majority involves that creditor's allegations of fraud. Because the case was tried to judgment, there is no need to construe the facts in the light most favorable to the plaintiff. See *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017) ("[i]n reviewing factual findings [of a trial court] . . . we make every reasonable presumption . . . in favor of the trial court's ruling" [internal quotation marks omitted]). In fact, the trial court found that the plaintiff had failed to prove "that it has a better legal or equitable right to the funds of Helen" and therefore refused to find that Stephen had been unjustly enriched at the plaintiff's expense. Although the trial court agreed that the plaintiff had a rightful claim to Helen's assets because of its contract with Helen, it also found that Stephen had a rightful claim to those assets because of the services and loans he had provided to Helen before and after her debt to the plaintiff arose. The court made no findings that the payments Stephen received were somehow illegitimate. Rather, the trial court specifically found that on this record the plaintiff had failed to demonstrate that its claim was superior to Stephen's.

Therefore, Stephen's compensation and reimbursement, which the trial court found that he was entitled to, is only potentially subject to CUFTA because of its timing. Had he received these funds before his mother's debt began to accumulate or had her Medicare coverage never lapsed, there would be no claim. Indeed, the plaintiff did not appear to argue to the trial court that Helen was even aware of—much less colluded with Stephen in making—the transfers.

II

CUFTA permits creditors to set aside or void certain transfers of a debtor's assets when those transfers are made with the purpose of frustrating the creditor's ability to collect its debt. General Statutes § 52-552a et seq. Not all transfers that frustrate creditors are fraudulent transfers under CUFTA, however. Instead, CUFTA sets out four distinct bases for fraudulent transfer liability, each with its own distinct elements. See General Statutes §§ 52-552e and 52-552f.

One basis for liability requires proof of actual fraudulent intent. General Statutes § 52-552e (a) (1) (transfer made with "actual intent to hinder, delay or defraud any creditor"). The other three require only constructive fraud, in which fraud is presumed under the circumstances. See General Statutes § 52-552e (a) (2) (transfer made without debtor "receiving a reasonably equivalent value in exchange," leaving debtor with few assets or inability to pay debts); General Statutes § 52-552f (a) (transfer made while debtor was insolvent or causing debtor to become insolvent and debtor did not receive reasonably equivalent value); General Statutes § 52-552f (b) (transfer to insider of debtor when insider had reason to believe debtor was insolvent).

A transfer does not, however, fall within any of these four bases for liability unless it was "made by a debtor . . . ." General Statutes § 52-552f (b); see also General Statutes § 52-552e (a).[2] The transfers at issue in the

[2] General Statutes § 52-552f provides: "(a) *A transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

"(b) *A transfer made by a debtor* is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent." (Emphasis added.)

case before us were actually carried out by Stephen, pursuant to a power of attorney executed by Helen, and the trial court found that Helen did not participate in any of them. On these facts, I agree with the trial court that the transfer at issue was not "made by a debtor" within the meaning of CUFTA.

A

To determine the meaning of the statute at issue, we look first to its text, giving any undefined term its ordinary meaning. See General Statutes §§ 1-1 (a) and 1-2z. Neither the plaintiff nor the majority contend that the term "debtor" in §§ 52-552e and 52-552f is ambiguous. Therefore, extratextual evidence of the legislature's intent is not relevant. Neither under § 1-2z is it relevant whether the majority's conclusion "best serve[s]" the "policy underlying the act . . . ." Finally, although it might be expedient to call CUFTA a "creditor-protection" statute, in my view such shorthand is no more useful to the exercise of statutory construction than calling the Bankruptcy Code a "debtor-protection" statute. In truth, like many acts—including uniform acts—CUFTA reflects a legislative balance of policies. Our challenge is not to advance policy, but to divine the legislative will from the statutory text.[3]

General Statutes § 52-552e provides in relevant part: "(a) *A transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ." (Emphasis added.)

[3] Although in construing legislative language it is sometimes useful to draw on related or analogous statutes, one statutory scheme that the majority relies on as analogous, the Uniform Commercial Code (UCC), General Statutes § 42a-1-101 et seq., contains a specific legislative admonition, missing in CUFTA, to "liberally [construe]" that title. General Statutes § 42a-1-103 (a). This can perhaps be explained by the fact that the UCC governs all commercial transactions while CUFTA creates a cause of action for fraud.

We are admonished by the legislature to construe the provisions of this uniform act "to effectuate their general purpose to make uniform the law . . . among states enacting them." General Statutes § 52-552*l*. Although, admittedly, not many courts have confronted the issue before us, those that have addressed it in any detail have uniformly taken a position contrary to the majority. See *Folmar & Associates*, *LLP* v. *Holberg*, 776 So. 2d 112, 116–18 (Ala. 2000), overruled in part on other grounds by *White Sands Group*, *L.L.C.* v. *PRS II*, *LLC*, 32 So. 3d 5, 14 (Ala. 2009); *Methodist Manor Health Center*, *Inc.* v. *Py*, 307 Wis. 2d 501, 505, 746 N.W.2d 824 (App. 2008); *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066, 1074 (Pa. Super. 2003). Although the majority's reasoning is plausible, its conclusion is not so obvious that any other court—or the plaintiff itself—has made the argument.

The act defines a "debtor" as "a *person* who is *liable* on a *claim*." (Emphasis added.) General Statutes § 52-552b (6). The term "person" extends to "an individual, partnership, corporation, limited liability company, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity." General Statutes § 52-552b (9). "Liable" is not defined in the act, but means "[r]esponsible or answerable in law; legally obligated"; Black's Law Dictionary (10th Ed. 2014) p. 1055; or "obligated according to law or equity"; Merriam-Webster's Collegiate Dictionary (11th Ed. 1993) p. 715. And a "claim" is defined as "a right to payment . . . ." General Statutes § 52-552b (3).

The phrase "made by"—modifying "a debtor"—is also relevant, signaling that the debtor caused the transfer and that the debtor was not passively acted on by the transfer (e.g., "a transfer involving a debtor"). It also specifies that we are to focus on who made the transfer. The subject is the actor, rather than the status

of the property (e.g., "a transfer of the debtor's assets") or the result (e.g., "a transfer for the debtor's benefit"). Thus, construed according to its plain meaning, the act in my view refers only to transfers actually made, in some capacity, by the party who owes the debt. See General Statutes § 1-2z.

Nor does the definition of "transfer" change this. I agree with the majority that CUFTA's definition of "transfer" is unquestionably expansive. See General Statutes § 52-552b (12). But that definition is informed by the qualifiers—"made by a debtor"—that follow. Even for "indirect" transfers, which the majority asserts occurred in this case, participation by the debtor is an essential predicate: "An example of an indirect transfer is when A has a claim against B, and instead of B paying A directly for the claim, *A directs B to pay C*. . . . In such a scenario, the debtor never has possession of the funds, but *directs a third party to transfer* those funds to a recipient." (Citations omitted; emphasis added.) *In re FBN Food Services, Inc.*, 175 B.R. 671, 683 (Bankr. N.D. Ill. 1994) (describing indirect transfer under 11 U.S.C. § 548 [2012]), aff'd, 185 B.R. 265 (N.D. Ill. 1995). Nothing in CUFTA expressly extends its reach to transfers of the debtor's assets made solely by a third party, including a debtor's agents.

Indeed, a number of other courts have declined to find liability for transfers of a debtor's assets made by various third parties, including spouses; see, e.g., *SPQR Venture, Inc.* v. *Robertson*, 237 Ariz. 270, 273, 349 P.3d 1107 (App. 2015); subsidiary companies; see, e.g., *Crystallex International Corp.* v. *Petroleos de Venezuela, S.A.*, 879 F.3d 79, 85–89 (3d Cir. 2018); and contractual parties; see, e.g., *Ford-Torres* v. *Cascade Valley Telecom, Inc.*, 374 Fed. Appx. 698, 700 (9th Cir. 2010).

As mentioned previously, courts that have analyzed at all this provision of the uniform act as it applies to

agents and attorneys-in-fact have concluded that the plain language the legislatures in their jurisdictions have chosen simply does not accomplish what the majority holds today and declined to permit liability in a creditor's favor under the Uniform Fraudulent Transfer Act on the basis of a transfer made by an attorney-in-fact of a debtor. The few Connecticut trial courts to address similar issues have also followed this approach. See *Peterson* v. *Hume*, Superior Court, judicial district of Hartford, Docket No. CV-11-5035394-S (May 14, 2013) (56 Conn. L. Rptr. 133, 135–36) (relying on language originating in *Folmar & Associates, LLP*, and holding that "[CUFTA], by its plain language, does not apply to claims against third-party transferors" [internal quotation marks omitted]); *Coan* v. *Geddes*, Superior Court, judicial district of Waterbury, Docket No. CV-09-4020994 (January 30, 2013) (55 Conn. L. Rptr. 458, 462) (relying on *Folmar & Associates, LLP*, and holding that "definition of 'debtor' under [CUFTA] [cannot] be expanded to bring third-party transferors equitably owned by the debtor within its scope"); *Ferri* v. *Powell-Ferri*, judicial district of Middlesex, Docket No. CV-11-6006351-S (July 30, 2012) (54 Conn. L. Rptr. 414, 416) (Relying on *Folmar & Associates, LLP*, the trial court rejected the defendant's argument urging the court "to adopt a more expansive view of 'debtor' to include anyone who was acting on the behalf of the debtor." The court ruled that the defendant had "not alleged that the debtor-beneficiary . . . participated in the claimed fraudulent transactions [executed by the trustees of two trusts in her husband's name]. Though the court agrees that there are strong policy arguments for extending the definition of a debtor under these circumstances, the court cannot ignore the plain language of the statute.").

In the leading out-of-state case, *Folmar & Associates, LLP* v. *Holberg*, supra, 776 So. 2d 116–18, the defendant

was an attorney-in-fact for the debtor, her husband, and transferred funds in her husband's name to herself. The court rejected the creditor's claim, stating: "Even if we accepted [the creditor's] argument that [the third-party transferors] engaged in a conspiracy to defraud her, the Alabama Uniform Fraudulent Transfer Act, by its plain language, does not apply to claims against third-party transferors." (Internal quotation marks omitted.) Id., 118. "Even a liberal construction of the statute requires some demonstration that *the debtor* has put his property beyond the reach of a creditor." (Emphasis in original.) Id., 117. "While there may be valid policy arguments for extending the [a]ct to apply to transferors who are in control of the debtor's assets, it is not for the [j]udiciary to impose its view on the [l]egislature." (Internal quotation marks omitted.) Id., 118.

Methodist Manor Health Center, Inc. v. *Py*, supra, 307 Wis. 2d 501, involved facts similar to the present case. The debtor had unpaid bills from a nursing home. Id., 505. Under a power of attorney, the debtor's granddaughter had written checks and transferred the debtor's assets on her behalf, thereby preventing the nursing home from collecting those assets for itself. Id., 505–506. The court rejected the nursing home's argument that ruling against it would permit a debtor to avoid fraudulent transfer liability "by simply having the fraudulent transfers performed by an agent under a durable power of attorney." (Internal quotation marks omitted.) Id., 515. The court reasoned that "[i]f there are any perceived shortcomings in the statutes, and we do not conclude that there are in this instance . . . it is the function of the legislature, not this court, to resolve them." Id. Instead, the court acknowledged that strictly applying agency principles in this scenario would disfavor "unknowing and, in many cases, unsophisticated agents who were doing nothing more than attempting to assist an elderly parent or grandparent with their

finances." (Internal quotation marks omitted.) Id., 517. Although the attorney-in-fact in that case was not also a transferee, as Stephen is here, the court's decision did not turn on that fact. It overtly relied on the plain language of the statute and the practical impact that strict application of agency law not included in the statute would have on unsophisticated agents.

In *Presbyterian Medical Center* v. *Budd*, supra, 832 A.2d 1066, again on facts similar to this case, the court rejected a nursing home's fraudulent transfer claim against a debtor's attorney-in-fact. Id., 1074. There, the debtor had unpaid bills that were owed to a nursing home, and, under a power of attorney for the debtor, the debtor's daughter transferred the debtor's assets to herself, thereby preventing the nursing home from collecting these assets for itself. Id., 1069. Citing no evidence that the debtor otherwise participated in the transfers at issue, the court rejected the nursing home's fraudulent transfer claim under Pennsylvania's version of the Uniform Fraudulent Transfer Act. Id., 1074. While it acknowledged that "under certain circumstances, an attorney-in-fact of a debtor may also qualify as a 'debtor' under [Pennsylvania's Uniform Fraudulent Transfer Act]," the court held that the nursing home had failed in that case to plead sufficient facts to establish such a connection. Id.[4]

[4] As the majority admits, the authorities it relies on reach their results "without any analysis . . . ." The majority "surmise[s]" that "the parties in these cases were operating under the same logical assumption reflected in the parties' pleadings in the present case, that the act of the agent would be imputed to the principal as a matter of law."

In my view, this assumption is a logical stretch, both in the present case and in the cases "without any analysis . . . ." In the present case, the plaintiff's complaint never mentions the terms agent, principal or impute. In fact, as discussed previously, the plaintiff never mentioned principles of agency until its brief before this court, in which it invoked the plain error doctrine; see Practice Book § 60-5; and it has never mentioned the supplementary provisions of CUFTA, General Statutes § 52-552k. See footnote 1 of this concurring and dissenting opinion. Given that the cases that provide any analysis whatsoever (*Folmar & Associates, LLP*, *Methodist Manor*

This is not to say that under some circumstances, as the court in *Presbyterian Medical Center* suggests, courts might not consider a transfer made by a third party to be a transfer "made by a debtor . . . ." General Statutes § 52-552f (b). For example, while CUFTA requires a transfer to be "made by a debtor," it does not require that the debtor actually execute it himself. As stated previously, a "transfer" may be "indirect." See General Statutes § 52-552b (12). Thus, a debtor may execute a transfer in a variety of ways, including through the use of a third-party intermediary, although the statute is clear that *the debtor* must play a role.

To find liability based on a transfer executed by a third party, courts have required that the debtor participated in the transfer in some fashion, which the trial court found Helen did not do here. For example, a transfer made by a third party may be considered a transfer "made by a debtor" when the third party is the debtor's alter ego. In *Thompson Properties* v. *Birmingham Hide & Tallow Co.*, 839 So. 2d 629 (Ala. 2002), the court reasoned that the parties "could be considered 'one and the same' " under Alabama's version of the Uniform Fraudulent Transfer Act because the third party was subject to the debtor's liabilities and control. Id., 634; see also *Kraft Power Corp.* v. *Merrill*, 464 Mass. 145, 154–55, 981 N.E.2d 671 (2013); *Dwyer* v. *Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291, 295 (Mo. App. 2002).[5]

Health Center, Inc., and *Presbyterian Medical Center*, as well as Connecticut trial court cases) go against the plaintiff's and the majority's position, and would have easily been found if searched for, the better explanation in the out-of-state cases with no analysis is that the parties simply did not consider the issue. Although the majority is perhaps free to arrive at the conclusion it does today, it does so against the weight of considered authority and on a theory the plaintiff did not pursue before the trial court.

[5] At the time Helen granted Stephen a power of attorney, Connecticut's statutory short form power of attorney provided that when the principal "confer[s] general authority," it "shall be construed to mean that the principal authorizes the agent to act as an alter ego of the principal with respect to any matters and affairs not enumerated" in the power of attorney agreement.

A transfer made by a third party also may be considered a transfer "made by a debtor" if the debtor "directed or orchestrated" the transfer. *Hart* v. *Pugh*, 878 So. 2d 1150, 1157 (Ala. 2003). In *Hart*, the debtor violated the terms of a divorce decree. Id., 1152–53. The next week, he gave his mother a power of attorney, explicitly permitting her to sell his land on his behalf. Id. Later, the debtor's mother sold a parcel of his land. Id. The debtor's former spouse argued that this was a transfer by a "debtor" because the debtor "directed" his mother to make the transfer. Id., 1156. Although the court ultimately rejected the claim because of insufficient evidence that the debtor had "participated in" his mother's decision to transfer the property, the court in *Hart* indicated that a transfer could indeed be attributed to a debtor if the debtor had "directed or orchestrated" a transfer made by a third party. Id., 1157. This court has relied on similar participation by the debtor before attributing a third-party transfer to a debtor. See *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 433, 429 A.2d 908 (1980) (debtor "caus[ed]" fraudulent conveyance, although wife actually executed it); see also *Virginia Corp.* v. *Galanis*, 223 Conn. 436, 445 n.12, 613 A.2d 274 (1992) (debtor fraudulently conveyed property by "direct[ing]" the conveyance, even though he did not "actually convey" it).

Bankruptcy law follows similar rules. Courts applying an analogous provision of the federal Bankruptcy Code attribute an agent's conduct to a principal only in limited circumstances. Under 11 U.S.C. § 548, an agent's actual fraudulent intent may be imputed to a principal; *In re Tribune Co. Fraudulent Conveyance Litigation*, No.

General Statutes (Rev. to 2015) § 1-55. The power of attorney agreement used by the parties in this case is not in the record, however. Therefore, it is unclear whether Stephen executed the transfers pursuant to a general authority, and, if so, whether Helen authorized him to act as her alter ego in such cases.

11-md-2296 (RJS), 2017 WL 82391, *5 (S.D.N.Y. January 6, 2017); but only if the agent is also the transferee and "in a position to dominate or control" the principal. *In re Elrod Holdings Corp.*, 421 B.R. 700, 711 (Bankr. D. Del. 2010). This is a high standard: "[V]icarious intent is an extreme situation that is dependent upon nearly total control of a debtor by a transferee." (Internal quotation marks omitted.) Id. It requires "formal, legal control as well as functional control." Id., 712. Thus, imputed intent cases almost exclusively arise in the corporate context, "typically involv[ing] sole shareholders of the transferor, with complete control of the transferor, transferring assets to themselves as transferee." Id. Although intertwined with general agency principles, the rule is driven by policies inapplicable to the vast majority of individual debtors: "With respect to individuals, section 548 (a) (1) (A)'s application is obvious: the inquiry is into the actual intent held by the flesh-and-blood individual. With a corporation or other juridical entity, the inquiry is blurred: which of the corporation's officers or directors matter? What if not all of the officers and directors agree? . . . '[A] corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.' " R. Levin & H. Sommer, 5 Collier on Bankruptcy ¶ 548.04 (16th Ed. 2018) § 548 (a) (1) (A) [1] [iv], pp. 548-65 and 548-66 (quoting *In re Personal & Business Ins. Agency*, 334 F.3d 239, 243 [3d Cir. 2003]).[6]

[6] The majority argues that courts in bankruptcy cases simply presume that the conduct of a debtor's agent is attributable to a debtor and instead focus only on whether the intent of the agent is attributable to the debtor. But some courts do, in fact, analyze whether conduct was attributable to the debtor, before addressing intent. E.g., *In re Maletta*, 159 B.R. 108, 116 (Bankr. D. Conn. 1993) ("The transfers of the $83,600 bonus funds in February and March of 1990 were within one year of the commencement of this case. . . . [*T*]*hose transfers were made by the defendant or authorized by him* . . . ." [Citation omitted; emphasis added.]).

Applying these principles to the present case, I would not conclude on this record that the trial court improperly determined that CUFTA did not reach the transfers Stephen made exercising his power of attorney. As the trial court found: "[A]ll of the transfers at issue were made by Stephen McGee, under a power of attorney from his mother. None were made by Helen McGee." Therefore, Stephen was not the "debtor" inasmuch as he was not "liable on a claim" to the plaintiff. Additionally, even if we were to construe CUFTA under some set of circumstances to reach transfers made by a third party at the behest of the debtor, as have some courts discussed previously, the trial court observed that "the plaintiff does not allege, and the evidence does not show, that Helen McGee participated in any fashion in the claimed fraudulent transfers . . . ." Stephen was not acting as Helen's alter ego, nor did Helen "direct or orchestrate" or "cause" Stephen's transfers in such a way that the court could attribute the transfers to her. Because the transfers at issue in this case were not "made by a debtor," in my view, the plaintiff failed to make out a claim that Stephen was liable under CUFTA.[7]

As construed by the majority, Stephen's transfers are attributed to Helen regardless of whether she partici-

[7] The plaintiff argues that Stephen admitted in his answer that Helen transferred the assets and that this admission bound the trial court. But this portion of Stephen's answer can neither be construed as an acknowledgement that Helen actually transferred the funds herself nor that Stephen's transfer of the funds was attributable, as a matter of law, to Helen. The first interpretation is contrary to the record, and the trial court therefore was entitled to find to the contrary. "[A] court may be justified in deviating from any such admission if [it is] unsupported by the underlying facts in evidence." *Dreier* v. *Upjohn Co.*, 196 Conn. 242, 248, 492 A.2d 164 (1985). No evidence suggests that Helen actually made these transfers herself, and the plaintiff did not argue as much. The second interpretation suggests a legal conclusion, and thus, did not bind the trial court in its factual findings. See *Borrelli* v. *Zoning Board of Appeals*, 106 Conn. App. 266, 271, 941 A.2d 966 (2008) ("[a]dmissions, whether judicial or evidentiary, are concessions of fact, not concessions of law"). Whether a transfer made by a third party is attributable to a debtor is, at least in part, a question of law.

pated in (or even knew about) them. Under General Statutes § 52-552k, the supplementary provisions of CUFTA on which the majority relies: "the principles of law and equity, including . . . the law relating to principal and agent," supplement CUFTA, "[u]nless displaced" by other provisions of the act. In this light, the majority relies on the rule that a principal is presumptively bound by the acts of an attorney-in-fact. *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 167, 7 A.3d 919 (2010). But strict application of agency principles is inconsistent with the limited reach of the language in CUFTA, which states that the transfer must be "made by a debtor"; General Statutes § 52-552f (b); as well as with the general approach to third-party transfers this court and others use, and with the approach that every court to consider the issue has taken with respect to attorneys-in-fact. In my view, even under § 52-552k, when a court has found that the principal did not otherwise participate in the transfer, the phrase, "made by a debtor," "displace[s]" agency law to the extent that a principal is automatically held liable for a transfer by its agent.

Just because CUFTA does not provide a remedy does not mean one is not available, though. For example, a nursing facility may require "an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract . . . to provide payment from the resident's income or resources for such care." 42 U.S.C. § 1396r (c) (5) (B) (ii) (2012); see, e.g., *Sunrise Healthcare Corp.* v. *Azarigian*, 76 Conn. App. 800, 810, 821 A.2d 835 (2003) ("if the [agent] acted in breach of the contract by not using [the patient's] assets as the contract required, then [the agent] is responsible for reimbursing the [nursing home]"). In fact, the plaintiff's "Resident Admissions Agreement" contemplates a "responsible party" who agrees to undertake certain duties on behalf of "the resident" and bears personal financial liability for fail-

ure to do so. Stephen was not named a responsible party in the agreement. More generally, a plaintiff in a breach of contract case can also obtain a prejudgment remedy on a showing of probable cause, thereby preserving the defendant's assets before any transfer to a third party. See General Statutes §§ 52-278a and 52-278d. Or a breaching principal might have a cause of action against its attorney-in-fact for improperly transferring assets. See, e.g., *Kindred Nursing Centers East, LLC* v. *Morin*, supra, 125 Conn. App. 173.

Therefore, I respectfully concur in part and dissent in part.

PRESIDENTIAL VILLAGE, LLC *v.* TONYA PERKINS ET AL.
(SC 20043)

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

Syllabus

Pursuant to federal regulation (24 C.F.R. § 247.4 [2018]), a landlord must provide notice to a tenant in federally subsidized housing before an eviction proceeding may be commenced, the notice must state the reasons for the landlord's action with enough "specificity" so as to enable the tenant to prepare a defense, and, when the basis of the action involves the nonpayment of rent, the notice must state the dollar amount of the balance due on the "rent account" and the date of such computation in order to satisfy the requirement of specificity.

The plaintiff landlord brought a summary process action against the defendant tenant, seeking immediate possession of the premises solely on the ground of nonpayment of rent. In 2010, the defendant signed a one year lease with the plaintiff, which owns and manages a housing development in which the rental units are subsidized by the Department of Housing and Urban Development (HUD). Pursuant to the terms of that lease, the defendant remained in the apartment after the first year on a month-to-month basis. In the plaintiff's summary process action, which it brought in February, 2015, the plaintiff alleged that, on January 1, 2015, the defendant failed to pay the rent of $1402 then due. Prior to initiating the action, the plaintiff had sent a pretermination notice to the defendant in accordance with HUD regulations. The pretermination

notice provided: "[Y]ou failed to pay your rent, in the total rental obligation of [$6189.56]. Your failure to pay such rent constitutes a material noncompliance with the terms of your lease." The notice further provided: "Your rental obligations will include the delinquent rent, late fees, utilities, legal fees, any other eviction proceeding sundry cost." The defendant filed a motion to dismiss, claiming that the pretermination notice was defective and, therefore, that the trial court lacked subject matter jurisdiction. The defendant contended, inter alia, that the cure amount of $6189.56 in the pretermination notice varied from the alleged nonpayment of $1402 in rent that formed the basis for termination of the tenancy. The trial court granted the motion to dismiss, concluding that the notice was defective because it contained legally impermissible and factually inaccurate grounds for termination and that the defective notice deprived it of subject matter jurisdiction. The plaintiff appealed to the Appellate Court, which reversed the trial court's judgment, concluding that the pretermination notice was not jurisdictionally defective. The Appellate Court reasoned that the trial court improperly incorporated state summary process law in determining that the notice was defective and that the notice should have been assessed solely in relation to the requirements of federal law, specifically, that portion of 24 C.F.R. § 247.4 requiring only the dollar amount of the balance due on the rent account and the date of such computation. The Appellate Court determined that the plaintiff's notice complied with that federal requirement because all of the charges listed therein were amounts for either past due rent or other financial obligations due under the lease. The Appellate Court rejected the defendant's contention that the balance due on the rent account was limited to the amount of the unpaid rent that supported the nonpayment of rent ground alleged in the plaintiff's complaint. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court improperly reversed the trial court's judgment of dismissal, as the plaintiff's inclusion in the pretermination notice of undesignated charges for obligations other than unpaid rent rendered that notice jurisdictionally defective: the common meaning of the term "rent," as gleaned from dictionaries, federal housing statutes, federal regulations applicable to subsidized housing, and the HUD handbook, led this court to conclude that the term "rent account" in 24 C.F.R. § 247.4 is limited to rent charges and does not encompass utilities, costs for repairs, late fees, and attorney's fees, and such a construction of the regulation furthered the purpose of the specificity requirement therein, which was to enable the tenant to prepare a defense, and also reflected the fact that occupancy in subsidized housing is in the nature of a welfare entitlement and that such tenants are entitled to basic substantive and procedural protections; accordingly, the requirement that the pretermination notice specify the dollar amount of the balance due on the rent account was not met in the present case, as the notice was not limited to unpaid rent, which the plaintiff alleged as the only

reason for the proposed termination of the tenancy, and did not designate which of the charges were assigned to rent and which were assigned to obligations other than rent; moreover, the plaintiff could not prevail on its claim that any defect in a pretermination notice is not jurisdictional and requires that the defendant demonstrate prejudice, this court having determined that notice must be sufficiently accurate for the tenant to understand and defend against the allegations and that, if a notice is inaccurate to the point that a tenant's ability to prepare a defense is impaired, the notice is not effective.

Argued October 9, 2018—officially released June 18, 2019

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Ecker*, *J.*, granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Prescott*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings, and the named defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Amy Eppler-Epstein, with whom was *Shelley White*, for the appellant (named defendant).

David E. Schancupp, with whom was *Hugh D. Hughes*, for the appellee (plaintiff).

J.L. Pottenger, *Jr.*, filed a brief for the Jerome N. Frank Legal Services Organization et al. as amici curiae.

Opinion

McDONALD, J. This summary process action concerns the degree of specificity required in the pretermination notice[1] that, pursuant to regulations promulgated

[1] Although federal regulations refer to the notice as a "termination notice"; 24 C.F.R. § 247.4 (2018); we use the term "pretermination" in this opinion to reflect the fact that the federal notice precedes a notice to quit, which is the sole mechanism to terminate a tenancy under Connecticut law. We note that the plaintiff also referred to the notice as such in its complaint.

by the federal Department of Housing and Urban Development (HUD), must be provided to a tenant who resides in federally subsidized housing before the landlord may commence an eviction proceeding against that tenant. Specifically, the issue presented is whether a pretermination notice asserting nonpayment of rent as the ground for the proposed termination of the tenancy is jurisdictionally defective if it includes either rent charges that cannot serve as a basis for termination of the tenancy under state summary process law or undesignated charges for obligations other than rent. The trial court concluded that the inclusion of both types of charges renders the notice jurisdictionally defective. The Appellate Court concluded that state law is irrelevant to the legal sufficiency of such a notice, and that the inclusion of charges other than for rent is not a material defect under federal law. *Presidential Village, LLC* v. *Perkins*, 176 Conn. App. 493, 500, 506, 170 A.3d 701 (2017).

The defendant tenant, Tonya Perkins,[2] appeals, upon our grant of certification, from the Appellate Court's judgment reversing the judgment of the trial court dismissing the summary process action initiated by the plaintiff landlord, Presidential Village, LLC. We conclude that the inclusion of undesignated charges for obligations other than rent rendered the notice jurisdictionally defective. Accordingly, we reverse the Appellate Court's judgment.

The record reveals the following undisputed facts and procedural history. The plaintiff is a private company that owns and manages Presidential Village, a housing development in New Haven in which the rental units are subsidized by HUD through a project based

[2] We note that two additional defendants, "John Doe" and "Jane Doe," who may have resided in the premises with Perkins, were also named in the complaint but are not parties to the present appeal. All references in this opinion to the defendant are to Perkins.

Section 8[3] program intended to benefit low income families. Tenants are responsible for a portion of the rent, based on a percentage of their income and other factors; HUD makes monthly payments to the plaintiff to make up the difference between the tenant's portion of the rent and the full market rent. If a tenant fails to provide information relevant to the determination of the tenant's share of the rent, which may be periodically adjusted as circumstances change, the tenant may be required to pay the market rent.[4] See generally United States Dept. of Housing & Urban Development, HUD Handbook 4350.3 Rev-1: Occupancy Requirements of Subsidized Multifamily Housing Programs (November, 2013) (HUD Handbook).

In March, 2010, the defendant signed a HUD model lease for an apartment in Presidential Village for a term beginning March 2, 2010, and ending February 28, 2011, *and thereafter* "*continu*[*ing*]" *for successive terms of one month* . . . ." (Emphasis added.) The lease set the defendant's rent at $377 per month; it did not indicate the amount of HUD's subsidy or the market rate for the unit. The lease provides that the defendant's rent

[3] The trial court observed: "Section 8 refers to Section 8 of the Housing Act of 1937, although what are now called Section 8 programs were not created until almost forty years later, with the enactment of the Housing and Community Development Act of 1974. Section 8, as amended, is codified at 42 U.S.C. § 1437f et seq. There are many different Section 8 programs in existence. . . . In general, the Section 8 rental assistance programs can be categorized as either tenant based or project based. There are various programs within each of these two categories, and the variations themselves have spawned subvariations and permutations. . . . [HUD] has issued publications intended to provide guidance regarding occupancy and termination issues in connection with various Section 8 programs." (Internal quotation marks omitted.)

[4] Market rent is the rent HUD authorizes the owner to collect from families ineligible for assistance. See United States Dept. of Housing & Urban Development, HUD Handbook 4350.3 Rev-1: Occupancy Requirements of Subsidized Multifamily Housing Programs (November, 2013), glossary, p. 22.

may increase (or decrease) for various reasons, including a change in her income.[5]

In February, 2015, the plaintiff commenced the present summary process action against the defendant, seeking immediate possession of the premises, solely on the ground of nonpayment of rent. The complaint alleged that the defendant's monthly rent was $1402, the defendant's portion of that rent was $1402,[6] and, on January 1, 2015, the defendant failed to pay the rent then due and payable.

The complaint further alleged the procedures undertaken by the plaintiff prior to initiating the action. Specifically, it alleged that, on January 14, 2015, with the January rent still unpaid, the plaintiff sent a pretermination notice to the defendant, in accordance with HUD regulations, regarding her past due rent. It further alleged that, on January 29, 2015, with the rent still unpaid, the plaintiff served a notice to quit on the defendant. Both notices were attached as exhibits to the complaint. Relevant to the present case, the pretermination notice stated as follows:

[5] It appears that a qualifying tenant's rent is capped at 30 percent of adjusted gross income. See 42 U.S.C. § 1437a (a) (1) (2012). The model lease indicates that, annually, the landlord requests information from the tenant regarding income, family composition, and any other information required by HUD to recertify eligibility for HUD rental assistance. The landlord verifies that information and then uses it to recalculate the amount of the tenant's rent and the HUD assistance payment, if necessary. In the intervening period between annual reviews, the tenant is obligated to advise the landlord if the pertinent information changes.

[6] The basis of this amount is not established in the record. Statements by the parties' counsel at oral argument suggest that $1402 represented the market rent for the unit. The plaintiff's counsel suggested that the entire amount was owed by the defendant because she had failed to provide information or forms necessary to maintain eligibility for the subsidy. The defendant's counsel disputes that the defendant owes the entire amount but does not contend that any such overcharge would constitute a jurisdictional defect.

"You have violated the terms of your lease in that you failed to pay your *rent*, *in the total rental obligation of $6,189.56*. Your failure to pay such *rent* constitutes a material noncompliance with the terms of your lease.

"We hereby notify you that your lease agreement may be subject to termination and an immediate eviction proceeding, initiated by our office. We value our tenants and request that you immediately contact our office, regarding full payment of your rental obligations. *Your rental obligations will include the delinquent rent*, *late fees*, *utilities*, *legal fees*, *and any other eviction proceeding sundry cost.*

"You have the right within ten days after receipt of this notice or within ten days after the date following the date this notice was mailed whichever is earlier to discuss the proposed termination of your tenancy with your landlord's agent[7] . . . .

"If you remain in the premises on the date specified for termination, we may seek to enforce the termination by bringing judicial action at which time you have a right to present a defense." (Emphasis added.)

The defendant filed a motion to dismiss the plaintiff's summary process complaint on the ground that the pretermination notice was defective and, therefore, that the court lacked subject matter jurisdiction. The alleged defects were (1) a variance in the cure amount requested in the pretermination notice ($6189.56) and the alleged nonpayment that is the basis of the com-

[7] In a footnote in its memorandum of decision, the trial court acknowledged that the parties disputed whether the defendant had discussed, or attempted to discuss, this matter with the plaintiff during the ten day period. The court explained that it had declined to hold an evidentiary hearing to resolve this dispute because its resolution of the case on other grounds rendered it unnecessary. The Appellate Court did not address this footnote when it stated that the defendant "did not discuss the possible termination of her tenancy with the plaintiff's agent during the ten day period . . . ." *Presidential Village, LLC* v. *Perkins*, supra, 176 Conn. App. 496.

plaint ($1402), which contravenes federal laws regulating the pretermination notice, as articulated in the HUD Handbook and state case law, and (2) the notice's allegations of violations of leases that are no longer in effect, which violate Connecticut summary process law.

In its opposition to the motion, the plaintiff argued that the pretermination notice was not defective. It asserted that there was nothing defective about a pretermination notice that lists the total financial obligations owed by the defendant to the plaintiff. The plaintiff further contended that a federal pretermination notice fully complies with the law if it includes the specific information supporting the landlord's right to termination; a notice does not become defective simply because it contains more information than strictly necessary.

The trial court granted the defendant's motion to dismiss. The court determined that the notice was defective because it contained legally impermissible and factually inaccurate grounds for termination. The trial court explained that one purpose of the pretermination notice is to provide the tenant with the opportunity to cure. The present notice did not provide this opportunity because it was misleading in at least two ways. First, the notice informed the defendant that she had to pay $6189.56 in order to prevent eviction when, under state summary process law, payment of a far lesser amount, $2804 (rent for December, 2014, and January, 2015), would have prevented the only eviction that could have been initiated based on that particular notice.[8] See General Statutes § 47a-23 (d). Second, the

[8] As of March 1, 2011, the defendant's one year lease converted to a month-to-month lease. In a month-to-month tenancy, "[t]he tenancy for each month is separate and distinct from that of every other month. *Welk* v. *Bidwell*, 136 Conn. 603, 607, 73 A.2d 295 [(1950)]. There is a new contract of leasing for each successive month; *DiCostanzo* v. *Tripodi*, 137 Conn. 513, 515, 78 A.2d 890 [(1951)]; and the right of tenancy ends with that month for which the rent has been paid." *Kligerman* v. *Robinson*, 140 Conn. 219, 221, 99 A.2d 186 (1953). Each month is a separate contract. Id. Our summary process law modifies the common law by permitting a landlord to terminate a month-

notice included charges as "rental obligations" that did not qualify as "rent." The trial court noted that the plaintiff had conceded that the $6189.56 in "rental obligations" included approximately $1300 in attorney's fees for which the defendant was not even liable,[9] and that it could not account for another portion of one of the charges listed. The trial court concluded that the defective notice deprived it of subject matter jurisdiction and rendered a judgment of dismissal.

The plaintiff appealed to the Appellate Court. The Appellate Court reversed the judgment, holding that the pretermination notice was not jurisdictionally defective. *Presidential Village* v. *Perkins*, supra, 176 Conn. App. 494. The Appellate Court determined that the trial court improperly incorporated state summary process law in determining that the notice was defective. Id., 499–500. The Appellate Court held that the notice must be assessed solely in relation to the requirements of federal law; id., 500; under which a pretermination notice for nonpayment of rent required only "the dollar amount of the balance due on the rent account and the date of such computation . . . ." (Internal quotation marks omitted.) Id., 502, quoting 24 C.F.R. § 247.4 [e] (2017). The Appellate Court determined that the

to-month tenancy based on nonpayment of rent not only for the month in which the notice to quit is served but also for the immediately preceding month. See General Statutes § 47a-23 (d). In the present case, because the plaintiff served the notice to quit in January, 2015, it had the right to claim nonpayment of rent for December, 2014, but not for prior months.

[9] According to the trial court's decision, the plaintiff conceded during oral argument before that court that the attorney's fees were from a prior, unsuccessful action that should not have been charged to the defendant. At oral argument before this court, the plaintiff's counsel suggested that perhaps the defendant was liable for the attorney's fees. As this statement is in direct conflict with the trial court's decision, the proper time and means to have raised this matter would have been through the filing of a motion for rectification in the trial court. See Practice Book § 66-5. In the absence of any such rectification, we presume that the plaintiff did make, and is bound by, such a concession.

plaintiff complied with this requirement because all of the charges listed in the pretermination notice were amounts for either past due rent or other financial obligations due under the lease. Id., 502–503.

The Appellate Court rejected the defendant's argument that the balance due on the "rent account" was limited to the amount of unpaid rent that supported the nonpayment of rent ground alleged in the complaint. Id., 503–504. It agreed with the plaintiff that, irrespective of whether the notice may have misled the defendant as to the amount needed to cure the violation of the lease agreement, the federal notice requirement is intended only to allow the tenant to prepare a defense against the summary process action, not to afford an opportunity to cure noncompliance and thereby avoid such an action.[10] Id. Finally, the Appellate Court noted that, even if it were to agree with the trial court that

[10] By drawing a clear distinction between curing a default and preparing a defense, the Appellate Court appears to have implicitly rejected the possibility that the opportunity to cure may be relevant to preparing a defense to present in an eviction action. For example, equitable nonforfeiture is a defense that may apply to a summary process action premised on nonpayment of rent. See *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630, 987 A.2d 1009 (2010). "[T]he doctrine against forfeitures applies to a failure to pay rent in full when that failure is accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of a lease." (Internal quotation marks omitted.) Id. "[T]he conduct of the [lessee] after he was informed of the nonpayment . . . is conclusive of the good faith of the [lessee] . . . and his continuous desire to avoid a forfeiture . . . ." *Thompson* v. *Coe*, 96 Conn. 644, 657, 115 A. 219 (1921). "[M]any courts have also taken into consideration the tenant's actions after receiving notice by the landlord of the termination of the lease, *looking favorably on any actions by the tenant to cure the default or evidencing an intent to prevent the forfeiture* . . . ." (Emphasis added; internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 634. Thus, if the lack of specificity in a notice discourages the tenant from taking steps to cure the default, it also could impair the tenant's ability to establish an equitable defense to eviction. In light of our conclusion that the inclusion of nonrent charges rendered the notice defective, we need not determine whether a notice could be jurisdictionally defective if it is so misleading as to impair the opportunity to cure.

the inclusion of nonrent charges was relevant, it would view the inclusion of such charges as insufficient to render the pretermination notice "fatally defective." Id., 506, citing *Jefferson Garden Associates* v. *Greene*, 202 Conn. 128, 142, 145, 520 A.2d 173 (1987).

We then granted the defendant's petition for certification to appeal to this court. Although the certified questions are framed in relation to whether state summary process law is relevant to the propriety of the federal notice; see *Presidential Village, LLC* v. *Perkins*, 327 Conn. 974, 174 A.3d 193 (2017);[11] we conclude that, because the notice is jurisdictionally defective even if measured solely by reference to federal law, we need not consider whether, and the extent to which, state law would be relevant.

In reviewing the Appellate Court's determination that the trial court improperly granted the defendant's motion to dismiss, we are guided by the following well established principles. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss [is] de novo." (Internal quotation marks omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 316, 138 A.3d 257 (2016).

[11] We granted the defendant's petition for certification as to the following issues: "1. Did the Appellate Court properly reverse the trial court's holding that a federal pretermination notice for nonpayment of rent must be limited to rent charges that are a permissible basis for such an eviction under Connecticut summary process law?

"2. Did the Appellate Court properly conclude that state law is not relevant in determining whether the information provided in a federal pretermination notice is so misleading as to render it jurisdictionally defective?" *Presidential Village, LLC* v. *Perkins*, supra, 327 Conn. 974.

"There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction. General Statutes § 51-164s. The jurisdiction of the Superior Court in summary process actions, however, is subject to [certain] condition[s] precedent." *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989). "[B]efore a landlord may pursue its statutory remedy of summary process . . . the landlord must prove its compliance with all the applicable preconditions set by state and federal law for the termination of a lease." *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 143; see, e.g., *Lampasona* v. *Jacobs*, supra, 729 ("[a]s a condition precedent to a summary process action, proper notice to quit is a jurisdictional necessity"); *Lampasona* v. *Jacobs*, supra, 729 ("we have held other statutory time limitations and notice requirements to be conditions precedent to court actions and thus to be jurisdictional").

The record establishes that the preconditions required under state summary process law were met; there is no claim to the contrary. The plaintiff timely served the notice to quit alleging nonpayment of rent, and alleged in its complaint that the defendant had failed to pay rent due January 1, 2015, in the amount of $1402. See footnote 8 of this opinion.

Federal law, however, imposes additional preconditions in order to terminate a Section 8 tenancy. The purpose of these requirements is to afford due process and avoid arbitrary or discriminatory termination. See *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 143–45; see also *Anderson* v. *Denny*, 365 F. Supp. 1254, 1260 (W.D. Va. 1973); *Green* v. *Copperstone Ltd. Partnership*, 28 Md. App. 498, 516, 346 A.2d 686 (1975); *Timber Ridge* v. *Caldwell*, 195 N.C. App. 452, 454, 672

S.E.2d 735 (2009); *Nealy* v. *Southlawn Palms Apartments*, 196 S.W.3d 386, 389–90 (Tex. App. 2006).

Under HUD regulations, a tenancy in a federally subsidized project cannot be terminated in the absence of good cause. See 24 C.F.R. § 247.3 (2018). One such ground is material noncompliance with the rental agreement; see id., § 247.3 (a) (1); which includes "[n]onpayment of rent or any other financial obligation due under the rental agreement . . . ." Id., § 247.3 (c) (4).

Service of a valid pretermination notice is a condition precedent to a summary process action. See id., § 247.4.[12] In any subsequent summary process action, the landlord can rely only on grounds that were set forth in that notice, unless the landlord had no knowledge of an additional ground at the time the pretermination notice was served. See id., § 247.6 (b). With respect to the statement of such grounds in the pretermination notice, the regulations mandate that the notice must, among other things, "state the reasons for the landlord's action with *enough specificity so as to enable the tenant to prepare a defense* . . . ." (Emphasis added.) Id., § 247.4 (a) (2). When the reason is nonpayment of rent,

[12] Title 24 of the 2018 edition of the Code of Federal Regulations, § 247.4 (a), provides: "The landlord's determination to terminate the tenancy shall be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section."

We note that, although the defendant did not advance this ground in the trial court, it is apparent that the pretermination notice served on her clearly fails to comply with subsection (a) (1), in that it does not include a date on which the tenancy will terminate. We need not base our decision on this ground in light of our conclusion that the notice is jurisdictionally defective for another reason that was raised in the trial court.

the regulation provides that "a notice stating the dollar amount of the balance due on the *rent account* and the date of such computation shall satisfy the requirement of specificity . . . ." (Emphasis added.) Id., § 247.4 (e).

The question then is whether the pretermination notice served on the defendant properly states what is due on the "rent account." The notice sets forth the defendant's "rental obligations." The notice unambiguously equates this term to rent, but then indicates that rental obligations include not only delinquent rent, but also "late fees, utilities, legal fees, and any other eviction proceeding sundry cost." Although the notice lists various dollar amounts and assigns a specific due date to each amount, it does not indicate whether the amount is derived from any particular obligation, or a combination thereof.

The term "rent account" is not defined in HUD regulations, the HUD Handbook, or the HUD model lease executed in the present case. The plaintiff's view, apparently shared by the Appellate Court, is that this term encompasses any financial obligation arising under the lease. The defendant's view is that it is limited to rent charges, and only those rent charges that are a proper basis for the eviction action under state summary process law. We agree with the defendant's first point and therefore need not reach the second.

We begin with the observation that the common meaning of "rent" is a charge for the use and occupancy of the property. See, e.g., The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 1487; Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1054. This common meaning is consistent with Section 8 law, under which the tenant's rent is for a fixed amount, set in relation to the tenant's income. See 42 U.S.C. § 1437a (a) (1) (2012). It is also consistent with the definitions of various types of rent in the HUD

Handbook.[13] See HUD Handbook, supra, glossary; see also, e.g., id., p. 6 ("Contract [r]ent" is defined as "[t]he rent HUD or the Contract Administrator has approved for each unit type covered under an assistance contract. The rent may be paid by the tenant, HUD, or both. Refer to the project's rental schedule [Form HUD-92458] or Rental Assistance contract for exact amounts.").[14] Although there is some indication in one type of rent defined in the HUD Handbook's glossary that rent may include utilities; see id., p. 23 (defining "[m]inimum [r]ent" as "the tenant's contribution for rent and utilities");[15] and in the HUD form used to calculate the rent schedule; see Form HUD-92458, "Rent Schedule Low Rent Housing" (November, 2005); no definition suggests that rent may include late fees or attorney's fees. Unlike private parties, landlords receiving subsidies from HUD are not free to define "rent" as they see fit.

[13] The trial court observed that, "[t]o the extent that a requirement contained in the HUD Handbook does not appear in the relevant federal regulations, it is fair to ask whether those requirements are legally enforceable against Section 8 landlords." The trial court did not decide this issue because the plaintiff did not challenge the binding nature of the HUD Handbook, many provisions of which are reflected in the HUD model lease used by plaintiff. We observe that, even when an agency handbook is not legally binding, courts have relied on the agency's interpretations of the governing law therein to the extent that such interpretations are persuasive. See, e.g., *Burroughs* v. *Hills*, 741 F.2d 1525, 1529 (7th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S. Ct. 2321, 85 L. Ed. 2d 840 (1985); *Roberts* v. *Cameron-Brown Co.*, 556 F.2d 356, 360–61 (5th Cir. 1977); *Jackson* v. *Medical Board*, Docket No. CV-07-2188 SVW (RZ), 2008 WL 11378892, *4 (C.D. Cal. April 17, 2008); see also *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 268 n.4, 86 A.3d 1044 (2014).

[14] This definition also conforms to state law. See General Statutes § 47a-1 (h) (defining "[r]ent" as "all periodic payments to be made to the landlord under the rental agreement").

[15] In the HUD model lease, the landlord may designate certain utilities as ones that the tenant is responsible for paying directly to the utility company or as ones that are "included in the [t]enant's rent." In the lease between the parties in the present case, gas (for hot water and heat) was included in tenant rent.

Further support for a narrow construction of the term rent is found in the federal regulations distinguishing between nonpayment of rent and "any other financial obligation" due under the rental agreement as a ground for termination. See 24 C.F.R. § 247.3 (c) (4) (2018) (citing nonpayment of rent "or" other financial obligation under lease). Nonpayment of either may demonstrate material noncompliance with the rental agreement. Although an eviction action may be brought based on the failure to pay other financial obligations, if permitted under the agreement, such an action would not be one for nonpayment of "rent." It so happens that the HUD model lease expressly provides that "[t]he [l]andlord may not terminate this [a]greement for failure to pay late charges, but may terminate this [a]greement for [nonpayment] of rent . . . ."

A narrow construction of the term rent also is consistent with the manner in which rent is defined elsewhere in federal regulations applicable to subsidized housing, albeit not to privately owned property. Regulations applicable to the Public Housing Agency distinguish "[t]enant rent," defined as "[t]he amount payable monthly by the family as rent to the unit owner"; 24 C.F.R. § 5.603 (b) (2018); from other payments due under the lease. See id., § 966.4 (b) (listing as payments due under lease: [1] tenant rent; [2] charges for maintenance and repair beyond normal wear and tear, and excess utilities; [3] late payment penalties; [4] and security deposits). Additionally, lease agreements may not include a provision providing "that the tenant agrees to pay attorney's fees or other legal costs whenever the landlord decides to take action against the tenant even though the court determines that the tenant prevails in the action." Id., § 966.6 (h). Such an exclusion plainly indicates that such fees are not considered "rent." Consistent with this narrow construction, other jurisdictions have defined "tenant rent" in accordance with the

common meaning, and have refused to construe it more expansively to include charges for utilities, repairs, late fees, or attorney's fees. See *Miles* v. *Metropolitan Dade County*, 916 F.2d 1528, 1532 n.4 (11th Cir. 1990), cert. denied, 502 U.S. 898, 112 S. Ct. 273, 116 L. Ed. 2d 225 (1991); *In re Parker*, 269 B.R. 522, 533 (D. Vt. 2001); *Housing Authority & Urban Redevelopment Agency* v. *Taylor*, 171 N.J. 580, 591–94, 796 A.2d 193 (2002).

Although the Appellate Court dismissed as irrelevant case law that construed HUD regulations applicable to public housing, we view this law as persuasive because it is consistent with every other relevant source and because the HUD provisions governing subsidized housing all serve the same purpose of ensuring affordable housing to low income families. See *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("[a] court must therefore interpret the statute as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole" [citation omitted; internal quotation marks omitted]).

Finally, we observe that a narrow construction of "rent account," consistent with the meaning of "rent," furthers the purpose of the specificity requirement of a pretermination notice, to "enable the tenant to prepare a defense . . . ." 24 C.F.R. § 247.4 (a) (2) (2018). A defense to nonpayment of a financial obligation may vary depending on the nature of the obligation and its source (lease or otherwise), as well as the amount claimed to be owed.[16] The inclusion of extraneous and

[16] As state law will be the principal source of defenses to a summary process action, it is clear that state law will be relevant in some cases as to whether a pretermination notice is sufficiently specific to allow the tenant to prepare a defense. Moreover, HUD regulations expressly acknowledge that state law applies, except if preempted. See 24 C.F.R. § 247.6 (a) (2018) ("[t]he landlord shall not evict any tenant except by judicial action pursuant to [s]tate or local law"); id., § 247.6 (c) ("[a] tenant may rely on [s]tate or local law governing eviction procedures where such law provides the tenant

irrelevant charges undoubtedly can inhibit a tenant from preparing his or her defense. So too can the failure to specify the particular amount claimed as unpaid rent. Cf. *Swords to Plowshares* v. *Smith*, 294 F. Supp. 2d 1067, 1073 (N.D. Cal. 2002) (addressing specificity requirement when nuisance was alleged as ground for eviction); *Edgecomb* v. *Housing Authority*, 824 F. Supp. 312, 315 (D. Conn. 1993) (addressing specificity requirement when criminal activity was alleged as ground for eviction). It is not the tenant's obligation to ferret out the particulars. The regulations place that obligation squarely and exclusively on the landlord.

If we were to conclude otherwise, we would ignore "that occupancy in a subsidized housing project is in the nature of a welfare entitlement and that tenants in these units are entitled to basic substantive and procedural protections." "Evictions from Certain Subsidized and HUD-Owned Projects," 41 Fed. Reg. 43,330, 43,331 (September 30, 1976); see *Goldberg* v. *Kelly*, 397 U.S. 254, 261–63, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (recognizing welfare benefits as right, not privilege, entitling beneficiary of welfare benefits to procedural due process protection). These basic due process protections include not only notice of termination of welfare benefits, but "effective notice," by providing "enough information to understand the basis for the [termination] . . . ." (Citation omitted.) *Kapps* v. *Wing*, 404 F.3d 105, 124 (2d Cir. 2005). These protections are especially important because the tenant's dispossession results in the loss of the subsidy and, in turn, affordable housing, placing some low income families at risk of homelessness. See 42 U.S.C. § 1437f (a) (2012) (purpose of federal rental assistance program is to aid "low-income families in obtaining a decent place to live"); see also Task Force on the Civil Right to Counsel,

procedural rights which are in addition to those provided by this subpart, except where such [s]tate or local law has been preempted").

Boston Bar Assn., "The Importance of Representation in Eviction Cases and Homelessness Prevention" (March, 2012), Appendix A, pp. 1–3, available at http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf. Wrongful termination of a subsidized tenancy may cause irreparable harm. See, e.g., *Caulder* v. *Durham Housing Authority*, 433 F.2d 998, 1003 (4th Cir. 1970) (recognizing that wrongfully evicted tenant is, "by definition, one of a class who cannot afford acceptable housing so that he is condemned to suffer grievous loss, but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others" [internal quotation marks omitted]), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971); National Low Income Housing Coalition, "The Gap: A Shortage of Affordable Homes" (March, 2019) p. 7 (estimating that Connecticut has only thirty-eight affordable rental units for every 100 extremely low income households), available at https://reports.nlihc.org/sites/default/files/gap/Gap-Report 2019.pdf.

Having determined that in order to comply with title 24 of the Code of Federal Regulations, § 247.4, the plaintiff was required to specify the alleged dollar amount of unpaid rent in the pretermination notice, it is apparent that this requirement was not met in the present case. The notice, by its own terms, is not limited to unpaid rent. Even if we were to accept the plaintiff's dubious overinclusiveness argument (i.e., that a notice that provides more information than that required is not defective), the notice still would be defective. The notice does not designate which of the charges are assigned to rent and which are assigned to obligations other than rent. Cf. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980)

(The court stated in relation to the Truth in Lending Act, 15 U.S.C. § 1601 et seq. [1976]: "The concept of meaningful disclosure . . . cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload]." [Citation omitted; internal quotation marks omitted.]). This flaw similarly dooms the plaintiff's analogy to case law in which there is no defect when a notice to quit alleges two grounds and the plaintiff proceeds on only one in the complaint. See, e.g., *Wilkes* v. *Thomson*, 155 Conn. App. 278, 282–83, 109 A.3d 543 (2015) (no defect where one of two grounds in notice to quit turns out to be factually unsupported). The plaintiff alleged nonpayment of "rent" as the only reason for the proposed termination.

We agree with the amici curiae, groups providing services to low income families in our state,[17] that the exclusion of superfluous charges that a tenant would not need to defend against to avoid eviction is especially important in light of the lack of legal sophistication of many recipients of these notices. As the amici point out, "[a] growing body of research confirms that many low income tenants do not understand the procedural complexities of housing court. Many tenants in court face 'barriers such as low literacy, mental illness, and limited English proficiency.' [Judiciary Committee, Connecticut General Assembly, Report of the Task Force To Improve Access to Legal Counsel in Civil Matters (December 15, 2016) p. 12]. Research suggests that federal housing aid recipients are also disproportionately hindered by financial illiteracy. See [J. Collins], The

[17] An amicus brief was filed in support of the defendant by the Jerome N. Frank Legal Services Organization at Yale Law School on its behalf and on behalf of Connecticut Legal Rights Project, Connecticut Legal Services, Inc., The Connecticut Veterans Legal Center, and Disability Rights Connecticut, Inc.

Impacts of Mandatory Financial Education: Evidence from a Randomized Field Study, 95 J. Econ. Behavior & Org. 146 (2013)."

The plaintiff alternatively argues that any defect in the notice is not jurisdictional. As such, it contends that the defendant should be required to demonstrate prejudice, a burden that it posits the defendant cannot meet. We disagree with the main premise of this argument.

There is a split of authority in other jurisdictions as to whether a defect in the pretermination notice deprives the court of subject matter jurisdiction, requiring dismissal of the action regardless of prejudice. Compare *Riverview Towers Associates* v. *Jones*, 358 N.J. Super. 85, 86, 817 A.2d 324 (App. 2003) (lack of jurisdiction), *Fairview Co.* v. *Idowu*, 148 Misc. 2d 17, 22–23, 559 N.Y.S.2d 925 (Civ. 1990) ("fatal" defect), and *Hedco, Ltd.* v. *Blanchette*, 763 A.2d 639, 643 (R.I. 2000) (lack of jurisdiction), with *Hill* v. *Paradise Apartments, Inc.*, 182 Ga. App. 834, 836–37, 357 S.E.2d 288 (1987) (defective notice must cause harm), *Fairborn Apartments* v. *Herman*, Docket No. 90 CA 28, 1991 WL 10962, *6 (Ohio App. January 31, 1991) (not jurisdictional), *Pheasant Hill Estates Associates* v. *Milovich*, 33 Pa. D. & C.4th 74, 76–77 (Com. Pl. 1996) (same), and *Nealy* v. *Southlawn Palms Apartments*, supra, 196 S.W.3d 392 (same).

The plaintiff reads this court's decision in *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 128, as falling into the latter camp. It is mistaken. In that case, this court stated that, when evaluating the propriety of a federal pretermination notice, "not every deviation from the strict requirements of either [state] statutes or [federal] regulations warrants dismissal of an action for summary process. When good cause for termination of a lease has clearly been shown, and when notices of termination have been sent in strict compliance with statutory timetables, a landlord should not be precluded

from pursuing summary eviction proceedings because of hypertechnical dissection of the wording of the notices that he has sent." Id., 145. These statements were aimed at the question of whether there is a cognizable defect, not whether a cognizable defect is jurisdictional. Tellingly, this court treated the federal regulation under the same rubric as state statutes governing summary process. See id. (citing as support *Southland Corp.* v. *Vernon*, 1 Conn. App. 439, 452–53, 473 A.2d 318 [1984], which applied same hypertechnical standard to notice to quit). It is well settled that a notice to quit that is defective under our law deprives the court of subject matter jurisdiction over the summary process action. See *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 5, 931 A.2d 837 (2007).

We recognize that certain inaccuracies in a pretermination notice may go to the merits and should be addressed at trial (for example, if the amount of unpaid rent for the period at issue is incorrect, or, as is claimed in the present case, overstates the tenant's share of the rent). However, the notice must be sufficiently accurate for the tenant to understand and defend against the allegations. If a notice is inaccurate to the point that a tenant's ability to prepare a defense against the alleged reason for termination is impaired, the notice is not effective.

For the reasons previously articulated, the pretermination notice in the present case cannot be said to reflect a hypertechnical deviation from the regulatory requirements. See *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 864 (2d Cir.) ("even small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level"), cert. denied, 400 U.S. 853, 91 S. Ct. 54, 21 L. Ed. 2d 91 (1970). As such, the Appellate Court improperly concluded that the trial court's judgment of dismissal must be reversed.

In light of this conclusion, we need not reach the defendant's claim that the notice also was jurisdictionally defective because it misleadingly included rent charges for leases that are no longer in effect and that could not be used to support a summary process action under Connecticut law. While prudent landlords would be well served by limiting their pretermination notices to the rent charges that lawfully may support the summary process action, we have no occasion to determine that question in this case.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court.

In this opinion the other justices concurred.

ORDERS

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ORDERS

ROBERT GUIJARRO *v.* SUSAN ANTES

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 904 (AC 39932), is denied.

David V. DeRosa, in support of the petition.

Decided June 5, 2019

MARY DOE ET AL. *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 188 Conn. App. 275 (AC 40190), is denied.

Lisa M. Vincent, in support of the petition.

Ralph E. Urban, assistant attorney general, in opposition.

Decided June 5, 2019

STATE OF CONNECTICUT *v.* JOSE DIEGO GONZALEZ

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 304 (AC 41512), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the defendant's right to due process was not violated by prosecutorial impropriety during closing arguments?"

Vishal K. Garg, assigned counsel, in support of the petition.

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

Decided June 5, 2019

MICHELLE WILLIAMS *v.* STATE OF CONNECTICUT

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 172 (AC 40294), is denied.

David V. DeRosa, in support of the petition.

Edward P. Brady III and *Catherine M. Blair*, in opposition.

Decided June 5, 2019

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

The defendants' petition for certification to appeal from the Appellate Court, 189 Conn. App. 477 (AC 40325), is denied.

Ridgely Whitmore Brown, in support of the petition.

Robert J. Wichowski, in opposition.

Decided June 5, 2019

DARCY YUILLE *v.* LAURENCE V. PARNOFF ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 124 (AC 40381), is denied.

Laurence V. Parnoff, self-represented, in support of the petition.

Decided June 5, 2019

JOHN BREWER *v.* COMMISSIONER OF CORRECTION

The petitioner John Brewer's petition for certification to appeal from the Appellate Court, 189 Conn. App. 556 (AC 40984), is denied.

Daniel Fernandes Lage, assigned counsel, in support of the petition.

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

Decided June 5, 2019

WILMINGTON TRUST COMPANY, TRUSTEE *v.* HERBERT H. BACHELDER, JR., ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 904 (AC 41380), is denied.

Herbert H. Bachelder, Jr., self-represented, in support of the petition.

Marissa I. Delinks, in opposition.

Decided June 5, 2019

FRANCIS P. GAFFNEY, JR. *v.* COMMISSIONER OF CORRECTION

The petitioner Francis P. Gaffney, Jr.'s petition for certification to appeal from the Appellate Court (AC 41808) is denied.

Francis P. Gaffney, Jr., self-represented, in support of the petition.

Decided June 5, 2019

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
v. DAWID KUPCZYK ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42631) is denied.

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

Paul S. Nakian, in support of the petition.

Christopher J. Picard, in opposition.

Decided June 5, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ISMAIL H. ABDUS-SABUR
(AC 41515)

Keller, Prescott and Pellegrino, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. He claimed, inter alia, that that there was insufficient evidence to support his murder conviction because the state did not establish that he had the specific intent to cause the death of the victim. *Held*:

1. The defendant's claim that there was insufficient evidence to prove the specific intent element necessary to support his murder conviction was unavailing: the jury reasonably could have inferred from the evidence and testimony that the defendant had the requisite intent to kill, as an intent to kill could have been inferred from his use of a deadly weapon when he repeatedly shot a firearm into a group of people who were standing together within a close range, striking and killing the victim, and the shooting followed an altercation earlier in the night between the defendant and the victim's two sons and, thus, the defendant had a motive to seek retribution; moreover, there was evidence of the defendant's conduct after the shooting from which the jury could have inferred an intent to kill, as the defendant threatened the victim's sons the day after the shooting, and the defendant displayed a consciousness of guilt by immediately fleeing the scene following the shooting, travelling out of town the following day, and leaving the state later that week.
2. The defendant could not prevail on his claim that the court improperly denied his request for a third-party culpability instruction, as the defendant did not establish a direct connection between the third party, C, and the offense with which the defendant was charged; the only evidence before the jury suggesting that C was the shooter was the testimony of a witness that another person had told her that C was the shooter, which was admitted as a prior inconsistent statement for the sole purpose of impeaching the witness, and defense counsel conceded at oral argument before this court that there was no evidence regarding C's culpability that was admitted for substantive proposes.
3. The defendant's claim that the trial court abused its discretion in admitting into evidence testimony regarding the defendant's alleged gang affiliation, which he claimed constituted improper uncharged misconduct evidence, was not reviewable; the defendant failed to address in his principal or reply brief to this court how the allegedly improper admission of the uncharged misconduct evidence constituted harmful error, and although he addressed the prejudicial effect of the uncharged misconduct evidence in his principal brief, prejudicial effect and harmful error are not necessarily equivalent and must be briefed separately.

Argued February 11—officially released June 18, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, manslaughter in the first degree with a firearm, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal as to the count of murder; verdict and judgment of guilty of murder and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Jodi Zils Gagné, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Cynthia S. Serafini* and *Don E. Therkildsen, Jr.*, senior assistant state's attorneys, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Ismail H. Abdus-Sabur, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant claims on appeal that (1) there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent to kill, as required for the crime of murder, (2) the trial court improperly denied his request for a third-party culpability instruction, and (3) that the court improperly admitted evidence of his gang affiliation. We disagree and, accordingly, affirm the judgment of the trial court.

The facts, as could have been reasonably found by the jury, and procedural history, are as follows. On the evening of January 17, 2014, the defendant was at an apartment on the third floor of a Waterbury housing complex known as "Brick City." The defendant's

friends, Arvaughn Clemente and Daniel Clinton, were hosting a house party at the apartment. The defendant's brother, Isa Abdus-Sabur (Isa), and Ryan Curry, Sthalron Freeman, and Katrina Montgomery were also in attendance. Clemente was dating Ja-Ki Calloway, who was also in the apartment. Calloway's father, Kareem Morey, Sr. (victim), rented a second floor apartment in the same complex, where he resided with his adult son, Kareem Morey, Jr. (Kareem). On the evening of January 17, 2014, his other son, Kentrell Morey, was also at the housing complex.

That night, Calloway's brother, Kareem learned that Clemente had assaulted Calloway, and became angry. Kareem and Kentrell then presented themselves at the third floor apartment and demanded that Calloway leave the apartment, but she refused. Kareem wanted to fight Clemente for having assaulted his sister. A verbal altercation then ensued between the Morey brothers and the men inside the apartment, which spilled onto the landing outside the apartment. The altercation escalated into a fist fight between a number of the party attendees and the Morey brothers.

After the fight ended, the Morey brothers, upset by the altercation, left and walked to a nearby neighborhood to recruit additional people to renew the fight. They also called the victim, who had not been present at the initial altercation, and he informed them that he would return home. When the Morey brothers left, the partygoers returned to the third floor apartment. At this point, Montgomery overheard the defendant mention a gun to the other men at the party.

At about 10:30 p.m., the Morey brothers returned to Brick City with four additional men. Around this time, the victim also returned and parked his car on the street outside of the housing complex. The Morey brothers then entered the interior courtyard of Brick City through a passage from the street and climbed the

stairs to the landing outside of Clemente and Clinton's third floor apartment. The victim remained standing at ground level in the courtyard near the foot of the stairs. The Morey brothers began kicking Clemente and Clinton's apartment door. Eventually, the door to the apartment opened, but all the lights were off inside the apartment. Shortly thereafter, Kareem heard the "click, click" sound of a gun. The Morey brothers then fled by descending the stairs toward the courtyard.

As the Morey brothers retreated down the stairs, the occupants of Clemente and Clinton's apartment emerged onto the third floor landing overlooking the courtyard. Within the crowd on the third floor porch were the defendant, Isa, Clemente, Clinton, Curry, and Freeman. The defendant then began firing a black handgun from the railing of the landing toward the people in the courtyard below.

By the time the defendant started shooting, the Morey brothers had arrived at the bottom of the stairs, where the victim was standing. When the victim heard the first gunshot, he pushed Kareem out of the way. The victim was then struck in the chest with a .45 caliber bullet. He told his sons that he had been hit and ran out of the courtyard through the passage toward his parked vehicle. The victim was driven to St. Mary's Hospital in Waterbury, where he later died as a result of the gunshot wound to his chest.

Following the shooting, the defendant and Isa ran to the defendant's car and left Brick City. The next day, the defendant and Isa pulled up in a sports utility vehicle alongside Kentrell's girlfriend, Zyaira Cummings, while she was walking on a street near Brick City. The defendant then said to Cummings, "they're next," which she interpreted to be a threat against the Morey brothers, whom she then warned about the interaction. On January 18, 2014, the day after the shooting, the defendant

fled to Southington. On January 21, 2014, the defendant traveled to New York City. That same day, the police obtained a warrant for his arrest. The defendant eventually turned himself in on January 27, 2014.

After a trial by jury, the defendant was convicted of murder and criminal possession of a firearm. The court sentenced the defendant to forty-five years of incarceration for his conviction of murder and two years of concurrent incarceration for his conviction of criminal possession of a firearm, for a total effective sentence of forty-five years of incarceration. This appeal followed.

I

The defendant claims that there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent to cause the death of the victim.[1] We disagree.

The following additional procedural history is relevant to this claim. At the close of the state's evidence, the defendant made a motion for a judgment of acquittal, contending that the evidence was insufficient to prove beyond a reasonable doubt that he intended to cause the death of the victim. Specifically, defense counsel argued that the evidence that the defendant possessed and fired a firearm was insufficient to establish the requisite intent to cause the death of the victim. The court denied the defendant's motion.

"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.

[1] For jurisprudential reasons, we address the sufficiency of the evidence claim first, although this differs from the order the claims were presented by the defendant in his principal appellate brief.

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 jury 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 conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004).

"Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it

speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 93, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . 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. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, supra, 271 Conn. 246–47.

"[I]t is well settled that the specific intent to kill is an essential element of the crime of murder. To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from

conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 780, 59 A.3d 221 (2013).

Finally, "transporting a deadly weapon to the location where that weapon ultimately is used supports an inference of an intent to kill." *State* v. *Otto*, 305 Conn. 51, 71, 43 A.3d 629 (2012). Moreover, "an intent to kill can be inferred *merely* from the use of a deadly weapon on another person." (Emphasis added.) *State* v. *McClam*, 44 Conn. App. 198, 210, 689 A.2d 475, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). "One who uses a deadly weapon upon a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was an intent to kill. . . . A pistol . . . or gun is a deadly weapon per se." (Citations omitted; internal quotation marks omitted.) *State* v. *Rasmussen*, 225 Conn. 55, 72, 621 A.2d 728 (1993).

In the present case, the jury was presented with evidence that the defendant repeatedly shot a firearm into a group of people who were standing together within a close range, striking and killing the victim. Therefore, an intent to kill can be inferred based solely on the defendant's use of a deadly weapon on another person. Moreover, even if Kareem was the intended target, the fact that the defendant struck the victim does not undermine the existence of the necessary specific intent to cause the death of another person. See *State* v. *Gary*, 273 Conn. 393, 411–12, 869 A.2d 1236 (2005) (defendant who, under chaotic circumstances, shot bystander rather than intended target possessed intent to kill).

"The doctrine of transferred intent operates to render a defendant culpable of the murder of a third person when the defendant causes the death of that third person with the intent to cause the death of someone else. . . . The principle, which is reflected in the express language of § 53a–54a (a),[2] represents a policy determination by the legislature that a defendant who engages in such conduct is no less culpable than if he had killed his intended victim." (Citations omitted; footnote added.) *State* v. *Courchesne*, 296 Conn. 622, 719, 998 A.2d 1 (2010).

Furthermore, the events leading to and immediately following the victim's death support a finding that the defendant possessed the intent to kill. The shooting followed an altercation earlier in the night between the partygoers, including the defendant and the Morey brothers. Accordingly, the defendant had a motive to seek retribution. See *State* v. *Gary*, supra, 273 Conn. 407 (evidence that defendant had been involved in altercation with intended victim on night of murder, and intended victim had punched defendant, supported inference that defendant had motive to kill).

Additionally, there was evidence that the defendant fled the scene directly after the shooting, travelled out of town the next day, and travelled out of state later that week. These facts are indicia of an intent to kill. See *State* v. *Melendez*, 74 Conn. App. 215, 223 n.5, 811 A.2d 261 (2002) ("[T]he defendant's fleeing the scene [of the murder] and subsequent flight to Puerto Rico are evidence of his consciousness of guilt. 'We have in the past considered consciousness of guilt evidence as part of the evidence from which a jury may draw an inference of an intent to kill.' "), cert. denied, 262 Conn.

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

951, 817 A.2d 111 (2003). Finally, there was evidence that the defendant threatened the Morey brothers the day after the murder by stating "they're next" to Cummings. This evidence further supports the conclusion that the defendant had the specific intent to kill.

In sum, from the cumulative weight of this evidence, the jury reasonably could have concluded beyond a reasonable doubt that the defendant possessed the specific intent required for murder. Accordingly, we reject the defendant's claim that the trial court improperly denied his motion for a judgment of acquittal.

II

The defendant next claims that the court improperly denied his request for a third-party culpability instruction. We disagree.

The following facts are relevant to this claim. Nunez, who lived in Brick City and was present at the shooting, identified the defendant as the shooter on several occasions during her testimony. Nunez also stated that she did not see anyone other than the defendant with a gun. Nunez was impeached, however, by a prior inconsistent statement that she admitted she had made to her friend, Queyla Martinez, that she did not see the shooter. She also testified that Kareem told her that Clinton was the shooter.

At the conclusion of the evidentiary portion of the trial, the court instructed the jury that the testimony of Nunez, Kareem, and Martinez given on December 7, 2016, that related to whether Clinton was the shooter was not substantive evidence in the case but, instead, could be considered only for impeachment purposes.[3]

Following closing arguments, but before the court charged the jury, defense counsel, contending that Clinton was the actual shooter on the night of the incident,

[3] The court provided the following limiting instruction: "The testimony that you heard today from Ms. Nunez, from [Kareem], and most recently just now from Ms. Martinez, again, that testimony related to alleged prior

requested a jury charge on third-party culpability. Specifically, defense counsel relied on testimony from Nunez that Kareem had told her that Clinton was the shooter.[4]

The court denied the request for a third-party culpability instruction. After the court charged the jury, defense counsel took an exception to the charge and renewed his request for a third-party culpability charge. The state argued that it would be inappropriate to give such a charge because the only evidence before the jury suggesting that Clinton was the shooter was admitted for impeachment purposes only. The court again declined to instruct the jury on third-party culpability, stating that there must be more than a mere suspicion that Clinton was the shooter, and that there was no substantive evidence that Clinton was the shooter in this case.

On appeal, defense counsel conceded during oral argument that there was no evidence regarding Clinton's culpability that was admitted for substantive purposes.[5] Moreover, the defendant does not challenge on appeal the court's decision limiting the testimony to impeachment purposes only.

"In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to

consistent and inconsistent statements made by other individuals. Therefore, the only thing you could use those statements for is for credibility. You cannot use them for substantive purposes to the truth of their content.

"This is the situation under our rules that statements that were or were not made—allegedly were or were not made go to the credibility of that witness, not to the substance of what the person may or may not have said. So it's limited to credibility. It's not for the truth of the matter asserted in the counts."

[4] Witnesses at the trial frequently referred to Daniel Clinton by the nicknames of "Country" and "DaDa."

[5] The panel at oral argument before this court asked defense counsel whether there was "any evidence in this record that you say supports a third-party culpability instruction where the evidence was admitted for something other than impeachment purposes?" Defense counsel replied, "There was none, Your Honor."

supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty *not* to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion

that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt. . . .

"[I]f the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 607–10, 935 A.2d 975 (2007).

In the present case, there simply was no evidence that tended to establish a direct connection between Clinton and the charged offense. The defendant cites only to testimony by Nunez that she had told Martinez that she did not know the identity of the shooter, and that she had heard from Kareem that Clinton was the shooter. Importantly, this testimony was not admitted for its truth, but rather only to assess the credibility of the witnesses' testimony. Defense counsel conceded at oral argument before this court that there was no substantive evidence that Clinton was the shooter. See footnote 5 of this opinion. Accordingly, we conclude that the court properly determined that the defendant was not entitled to a jury instruction on third-party culpability.

III

Finally, the defendant claims that the court abused its discretion by permitting Nunez and Kareem to testify

regarding the defendant's gang affiliation. In particular, the defendant argues that this evidence was improperly permitted because it constituted uncharged misconduct and did not fall within one of the exceptions provided by § 4-5 (c) of the Connecticut Code of Evidence.[6] Moreover, the defendant argues that the evidence was unduly prejudicial and that its prejudicial effect outweighed its probative value. We decline to reach this claim because the defendant failed to brief whether the admission of this testimony constituted harmful error. Accordingly, we deem the claim abandoned.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the state filed a notice of uncharged misconduct evidence, indicating that it intended to present evidence of the defendant's gang affiliation. The defendant objected to admission of such evidence, and the court deferred ruling on the evidentiary issue. Thereafter, prior to the start of trial, the court directed that, until it had ruled on an offer of proof outside the jury's presence, witnesses were not to mention the defendant's gang affiliation. The court stated that it would consider each offer of each witness' testimony individually, and would not make a blanket ruling on the issue.

At trial, during Nunez' direct examination, the state asked for the jury to be excused and, outside the jury's presence, notified the court that it anticipated asking Nunez about the defendant's gang affiliation. The state then examined Nunez outside the presence of the jury, where she stated that she had not reported the shooting to the police on the night it occurred because she was afraid "that somebody would do something to [her]."

[6] Section 4-5 (c) of the Connecticut Code of Evidence provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

When asked who she meant by "somebody," she replied, "the Bloods." After hearing this proffer, the court ruled that it would allow the examination, but that it would provide a limiting instruction. The jury returned and the prosecutor elicited the proffered testimony from the witness that implied that the defendant was a member of the Bloods.[7]

Kareem also testified that the defendant was in a gang. There was a proffer of this testimony outside the presence of the jury before it was admitted. At the request of defense counsel, when the prosecutor questioned the witness he specifically used a transcript of the approved questions from the proffer.

We now turn to the relevant law. "Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . [Because] the admission of uncharged misconduct evidence is a decision within

[7] The court provided the following limiting instruction: "There are certain circumstances under which evidence is admitted for a limited purpose only. The testimony that you just heard about any relationship to a gang is admitted solely for purposes of establishing why this witness did not give a statement earlier than the time that she did, that's the only thing that it's admitted for, nothing else, it's limited to that purpose, you can use it for nothing else."

the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only [if] it has abused its discretion or an injustice has occurred. . . .

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling [that] was probably harmful to him. . . . We do not reach the merits of [a] claim [if] the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 815–17, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017)

"[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id., 817.

Although the defendant in his brief discusses the prejudicial effect of the evidence that he was a member of a gang, he does so in the context of arguing that the evidence was inadmissible because its prejudicial effect outweighed its probative value. What the defendant has failed to do, however, is to analyze whether the allegedly erroneous admission of this evidence deprived him of a fair trial, in other words, that the admission of the evidence constituted harmful error.

As the court noted in *State* v. *Toro*, supra, 172 Conn. App. 819, the concept of the prejudicial effect of evidence and whether its admission constitutes harmful error "may overlap with one another to some extent, [but they] are not necessarily equivalent and must be briefed separately. . . . Indeed, it is not inconsistent for a reviewing court to conclude that, although evidence was unduly prejudicial, and thus improperly admitted at trial, its improper admission nevertheless was harmless." (Citation omitted.)

In the present case, beyond summarily concluding that the court's decision to allow witness testimony regarding the defendant's gang affiliation prejudiced him, and stating in his reply brief that "[t]his error is not harmless because it painted the defendant in a very negative and violent light," the defendant has failed to address the issue of whether the alleged error was harmful in light of the evidence as a whole and the court's limiting instruction. The defendant has the burden of demonstrating that the court's allegedly improper ruling likely affected the outcome of the trial.

"[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties

must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Because the defendant has failed adequately to brief the question of whether the allegedly erroneous admission of his membership in a gang was harmful, we deem his claim abandoned. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

HECTOR L. CASABLANCA *v.* ANOLAN CASABLANCA (AC 40332)

Alvord, Keller and Beach, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court resolving certain postjudgment motions. The trial court had incorporated into the dissolution judgment the terms of an agreement between the parties, which included a retirement asset provision that required the plaintiff to transfer to the defendant via a qualified domestic relations order, 50 percent of the value of the marital portion of his benefit in a certain retirement fund, minus the amount of the defendant's social security benefit. After the plaintiff submitted a proposed qualified domestic relations order to the defendant, the defendant refused to sign it, and the plaintiff filed a motion to compel, which sought a court order requiring the defendant to execute the proposed qualified domestic relations order. Thereafter, the defendant filed a motion to open the dissolution judgment on the grounds of mutual mistake and unilateral mistake, and on the basis of equitable principles. She claimed that the relevant part of the retirement asset provision that required the amount of her anticipated future social security benefit to be subtracted from the amount of her share of the plaintiff's pension benefit was entered upon mutual mistake, and provided an inequitable and unconscionable windfall to the plaintiff. At a hearing on the parties' motions, the trial court granted a motion in limine filed by the plaintiff, which sought to preclude the defendant from presenting parol evidence in support of

her motion to open the judgment. The court subsequently denied the defendant's motion to open, granted the plaintiff's motion to compel and ordered the defendant to sign the qualified domestic relations order. On the defendant's appeal to this court, *held* that the trial court erroneously determined that the retirement asset provision of the parties' agreement was unambiguous, as the language of the provision was susceptible to more than one reasonable interpretation: in light of the language in the provision, there was more than one possible approach to calculating the amount of the defendant's social security benefit and, therefore, the provision was ambiguous, and because the court's underlying determination that the provision was unambiguous was erroneous, its subsequent conclusion that the evidence regarding the intent of the parties was irrelevant necessarily also was erroneous; accordingly, a remand to the trial court was necessary for the court to hold a new hearing on the parties' motions and to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement.

Argued March 19—officially released June 18, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Suarez*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Nastri*, *J.*, granted the plaintiff's motion in limine, denied the defendant's motion to open the judgment, and granted the plaintiff's motion to compel; subsequently, the court, *Nastri*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; thereafter, the court, *Nastri*, *J.*, granted in part the defendant's motion for articulation; subsequently, this court granted the defendant's motion for review but denied the relief requested therein. *Reversed*; *further proceedings*.

Brandon B. Fontaine, with whom, on the brief, was *C. Michael Budlong*, for the appellant (defendant).

Steven R. Dembo, with whom were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellee (plaintiff).

Opinion

ALVORD, J. In this marital dissolution action brought by the plaintiff, Hector L. Casablanca, the defendant, Anolan Casablanca, appeals from the judgment of the trial court resolving certain postjudgment motions. On appeal, the defendant claims that the court erred by (1) granting the plaintiff's motion to compel the defendant to execute the plaintiff's proposed qualified domestic relations order (QDRO)[1] and (2) granting the plaintiff's motion in limine to preclude the defendant from offering parol evidence in support of her motion to open the dissolution judgment. We conclude, contrary to the decision of the trial court, that the provision of the dissolution settlement agreement at issue in this case is ambiguous. Thus, we determine that the court should have considered extrinsic evidence of, and made additional factual findings regarding, the parties' intent in agreeing to this provision before it denied the defendant's motion to open the judgment and adjudicated the plaintiff's motion to compel the defendant to sign the proposed QDRO. Accordingly, we reverse the judgment of the court and remand this case for further proceedings.

The record reveals the following relevant facts and procedural history. The parties were married on July 23, 2005. The parties' marriage was dissolved on January 21, 2016. On that date, the parties entered into a separation agreement (agreement). Article 11 of the agreement (retirement asset provision), titled "Retirement/Stock Accounts," provided: "The husband shall transfer to the wife, via QDRO, fifty (50%) percent of the value of the marital portion of his benefit under the City of Hartford

[1] "A QDRO is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." (Internal quotation marks omitted.) *Richman* v. *Wallman*, 172 Conn. App. 616, 617 n.1, 161 A.3d 666 (2017).

Municipal Retirement fund, valued as of date of dissolution, minus the amount of the wife's Social Security Benefit. The assigned benefit shall be paid as a separate interest payment over the life of the wife. The husband shall retain his Mass Mutual 457 Plan and wife shall make no claim to same. Attorney Jeffrey Winnick shall prepare said QDRO(s) and the parties shall be equally responsible for the cost of same." The court, *Suarez*, *J.*, found the agreement fair and equitable and incorporated its terms into the dissolution judgment. Attorney Winnick subsequently prepared a proposed QDRO and transmitted it to the parties. The defendant refused to sign it.

On May 23, 2016, the defendant filed the first of a series of motions to open the dissolution judgment.[2] On October 25, 2016, the plaintiff filed a motion captioned "motion to compel," which sought a court order requiring the defendant to execute the proposed QDRO.[3] On February 14, 2017, the defendant filed the operative motion to open the dissolution judgment on grounds of mutual mistake and unilateral mistake, and on the basis of equitable principles. Specifically, she contended that the relevant part of the retirement asset provision, the phrase " 'minus the amount of the wife's Social Security Benefit,' was entered upon mutual mistake of the parties." In her memorandum of law in support of the motion, the defendant maintained that

[2] The May 23, 2016 motion to open was dismissed for lack of personal jurisdiction due to insufficiency of process and insufficiency of service of process. The motion to open the judgment that was adjudicated on its merits and is at issue in this appeal was filed February 14, 2017.

[3] On November 2, 2016, the plaintiff also filed a disclosure of expert witness, stating that Attorney Winnick was expected to testify concerning the QDRO "required by the judgment in this matter, the plaintiff's City of Hartford Municipal Retirement fund, the defendant's social security benefit and the calculation required to comply with the terms of the judgment." The disclosure further stated that Winnick would testify that he drafted the QDRO "in compliance with the terms of the judgment."

the intent of the parties was to equalize the plaintiff's retirement pension benefits and the defendant's social security benefits. According to the defendant, she was to receive 50 percent of the marital portion of the plaintiff's monthly pension benefit until she became eligible to receive social security benefits some thirty years in the future, whereupon her assigned portion of the monthly pension benefit would be reduced by the amount of her monthly social security benefit she was then receiving.

Under the proposed QDRO, however, the defendant's share of the pension benefit was reduced by immediately subtracting her anticipated future social security benefit amount of $1479 a month at her full retirement age (sixty-seven years old), which resulted in a current monthly retirement asset payment to the defendant of $242.75. She argued that because she was not entitled to receive her social security benefit until age sixty-five, approximately thirty years in the future, the proposed QDRO provided the plaintiff with "an inequitable and unconscionable windfall of $1479 per month . . . ."

On February 22, 2017, the parties appeared for a hearing on the defendant's motion to open the judgment and the plaintiff's motion to compel. On the day of the hearing, the plaintiff filed a motion in limine seeking to preclude the defendant from presenting parol evidence, including testimony of the defendant herself, in support of her motion to open the judgment.[4] According to the

[4] Following a motion filed by the plaintiff to disqualify Attorney Frank Romeo from representing the defendant on the basis that he would be a necessary witness in connection with the motion to open the judgment, the court approved the parties' stipulation that Attorney Romeo "shall not provide any testimony or act as a witness of any type." The parties' stipulation, regardless of whether it should have been accepted by the court under the circumstances of this matter, as Attorney Romeo was the defendant's counsel at the time the separation agreement was executed, is no longer in effect on remand.

plaintiff, the agreement was fully integrated and therefore no evidence could be introduced to vary or contradict its terms. The plaintiff also argued that even if the defendant was permitted to testify that she was mistaken as to the language of the retirement asset provision, her claim of mutual mistake would necessarily fail on the basis that the plaintiff would testify in opposition that the provision accurately reflected the parties' intent. After hearing oral argument on the motion in limine, the court, *Nastri*, *J.*, granted the motion in part, stating: "The parol evidence rule prohibits the use of extrinsic evidence to vary [or] to contradict the terms . . . of a fully integrated written contract. The parties' separation agreement is a fully integrated written contract, therefore the motion in limine is granted, the court will not hear parol evidence." As to the second ground challenging the merits of the defendant's mutual mistake claim, the court stated: "I'm not going to grant the motion in limine on that basis." The court then asked whether the defendant's counsel was prepared to proceed, to which counsel replied: "I'm not quite sure then, the court will not accept testimony from my client?" The court responded: "Well the court will not accept testimony that is contrary to the written contract. I don't know what your client is prepared to testify to or what the substantive evidence is, but the court will not hear parol evidence."

The court then held an evidentiary hearing, during which the defendant presented the testimony of the defendant, Attorney Winnick, Attorney Kim Duell (who represented the plaintiff during the dissolution proceedings), and the plaintiff. The attorney who represented the defendant during the dissolution proceedings did not testify. See footnote 4 of this opinion. At the conclusion of the hearing, the court issued an oral ruling denying the motion to open. It stated: "The court finds that there was no mutuality of mistake, there's no

mutual mistake or any unilateral mistake and [it] is not unconscionable or inequitable to enforce the contract. The parties entered the agreement knowingly, voluntarily and intelligently with the assistance of competent counsel. Judge Suarez canvassed the parties and made a finding that the agreement was fair and equitable." Without hearing further evidence, the court thereafter granted the plaintiff's motion to compel and, affording the defendant sufficient time to take an appeal from the decision, ordered the defendant to sign the QDRO on or before March 24, 2017. The court subsequently issued a written order to the same effect.

On March 14, 2017, the defendant filed a motion to reargue the court's February 22, 2017 rulings. In her motion, she argued that the court's granting of the motion in limine improperly precluded her from eliciting testimony as to the intent of the parties, which would have been offered in support of her claims of mutual and unilateral mistake.[5] She further argued that the testimony she sought to introduce in support of her motion to open did not constitute parol evidence because, as evidence of the parties' intent, it was not introduced to vary or contradict the terms of the agreement. The plaintiff filed an objection on March 21, 2017.

[5] Although she did not argue expressly that the evidence she sought to introduce as to intent was admissible to explain an ambiguity in the retirement asset provision, she argued relatedly as follows: "The intent of both parties upon entering into article 11 of the separation agreement was to equalize the value of [the plaintiff's] Hartford retirement pension with [the defendant], by assigning her 50 [percent] of his $5554/month pension, or $2777.02/month, from the date of dissolution, until she was eligible for Social Security benefits. This language fails to include precise language as to exactly when [the defendant] is eligible for social security benefits, [and] the definition of the exact benefit, although it is logically presumed [the defendant] would not be entitled to social security benefits until she reached the age of [sixty-five]. The vague language also does not account for if the [defendant] failed to reach the age of [sixty-five]. Thus, the vague language and omission of exact dates and explanation of the term 'benefit' makes it impossible to decipher the true intent of either party, making [the] plaintiff's assertion that mutual mistake does not exist . . . unfounded." (Emphasis omitted.)

The court denied the motion to reargue on the papers without comment, and this appeal followed.

The defendant sought articulation of the court's decision denying the motion to reargue and its February 22, 2017 orders. The defendant's fifth request asked the court to articulate "whether, when granting the plaintiff's motion in limine . . . to exclude parol evidence and when enforcing that ruling during the February 22, 2017 hearing, the court: (a) considered whether article 11 of the parties' separation agreement contained any relevant ambiguities, particularly regarding its proper application, and (b) determined that article 11 of the separation agreement is clear and unambiguous." The plaintiff objected on the basis that the defendant had not raised the issue of ambiguity during the hearing. Over the plaintiff's objection, the court granted the request for articulation in part. Answering question five in the affirmative, the court stated: "After carefully considering the arguments advanced in the defendant's motion to open, the testimony of the witnesses,[6] the well-articulated arguments of counsel and applicable case law, the court found no ambiguities in Article 11. In the absence of any ambiguity or uncertainty, the evidence the defendant [sought] to introduce regarding the intent of the parties or their object was irrelevant."[7] (Footnote added.) The defendant filed a motion for review of the court's partial denial of articulation. This court granted review but denied the relief requested.

On appeal, the defendant claims that the court erred by granting both the plaintiff's motion to compel the

[6] As noted previously, the attorney who represented the defendant during the dissolution proceedings did not testify. See footnote 4 of this opinion.

[7] As to a separate request for articulation regarding whether the QDRO properly conformed to the judgment, the court stated that the motion to open had not sought the court's determination of this issue, nor was it raised during the hearing.

defendant to execute the proposed QDRO and the plaintiff's motion in limine to preclude parol evidence. We begin by addressing the defendant's claim of error as to the court's ruling on the motion to compel because our resolution of whether the court properly found the retirement asset provision unambiguous will inform our consideration of the defendant's claim that the trial court improperly excluded extrinsic evidence in support of her motion to open the judgment.

In his motion to compel, the plaintiff requested an order requiring the defendant to execute the QDRO. As support, the plaintiff cited to the retirement asset provision and a separate provision of the agreement requiring the parties to "execute such additional documents as may be necessary to carry out the provisions of this agreement." (Internal quotation marks omitted.) Captioned "motion to compel," the motion in substance sought enforcement of the agreement's retirement asset provision, which had been incorporated into the dissolution judgment. In order to grant the motion and order compliance with the judgment in the manner requested by the plaintiff, however, the court necessarily had to determine that the judgment was clear. See *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 847, 100 A.3d 909 (2014) ("[t]he trial court's continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted, is grounded in its inherent powers, and is not limited to cases wherein the noncompliant party is in contempt, family cases, cases involving injunctions, or cases wherein the parties have agreed to continuing jurisdiction" [internal quotation marks omitted]), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015).[8] Likewise, "[a] trial court has the

[8] A threshold determination as to ambiguity likewise would have been required had the plaintiff sought relief by way of a motion for contempt and for order. See *Hansen* v. *Hansen*, 80 Conn. App. 609, 609, 612, 836 A.2d

inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993); see also *Matos* v. *Ortiz*, 166 Conn. App. 775, 777, 144 A.3d 425 (2016) ("[i]t is well established that a court may summarily enforce—within the framework of existing litigation—a clear and unambiguous settlement agreement reached during that litigation").

It is evident from the trial court's articulation that it did consider whether the retirement asset provision was ambiguous and expressly concluded that it was unambiguous. The court articulated as follows: "After carefully considering the arguments advanced in the defendant's motion to open, the testimony of the witnesses, the well-articulated arguments of counsel and applicable case law, the court found no ambiguities in article 11." We disagree with this legal determination.

At the outset, we address the plaintiff's argument that this court should decline to review the defendant's claim of error as to the granting of the motion to compel. He argues that the defendant, in failing to file a written objection or to raise objection at the hearing, induced or invited the granting of the motion to compel. We first note that the plaintiff does not direct this court's attention to any authority requiring that the defendant file a written objection to his motion. Furthermore, the defendant's counsel opposed the motion through his attempt to elicit the defendant's testimony as to why she did not sign the QDRO when it was presented to her. However, counsel was unable to pursue this line

1228 (2003) (affirming finding of contempt on basis that defendant refused to accede to proposed QDRO and holding that court did not abuse its discretion in refusing to hear evidence of parties' intent in formulating portion of marital dissolution agreement, where language was susceptible to only one meaning).

of questioning, as the plaintiff's counsel objected to the questioning of the defendant regarding her defense to the motion. The plaintiff's counsel stated, "I'm going to object in so far as it seeks to vary, contradict, and it would be law of the case in terms of your ruling," and the court sustained the objection.[9] Moreover, the record reflects that the court viewed the motion to compel as contested. In responding to a question from the plaintiff's counsel regarding whether the parties would need to return, the court stated: "[W]ell it depends on what they take an appeal from, they may also appeal . . .

[9] In responding to the argument of the plaintiff's counsel on the motion to compel, the defendant's counsel stated: "I have to talk to my client to see if she's going to appeal this, but certainly the court can order whatever the court wants." He further stated: "I don't know if you want to withhold ruling on [the motion to compel] or if you want to order it and we can file [our] appeal."

We conclude that the comments of the defendant's counsel do not rise to the level of implicating the doctrine of induced error, as that doctrine has been applied. See *Healey* v. *Haymond Law Firm, P.C.*, 174 Conn. App. 230, 241, 166 A.3d 10 (2017) ("[t]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling" [internal quotation marks omitted]). The cases cited by the plaintiff demonstrate the types of factual scenarios this court has previously found to constitute encouraging or prompting the court to make an erroneous ruling. See id., 242 (defendant induced alleged instructional impropriety by affirmatively requesting language it sought to challenge on appeal); *Gorelick* v. *Montanaro*, 119 Conn. App. 785, 796–97, 990 A.2d 371 (2010) (party could not claim error on appeal that court should not have decided matter without live testimony where party had signed stipulation, orally requested court to decide cases on basis of trial transcripts, exhibits, briefs, and oral argument, and counsel assured trial court that parties wanted to proceed in that fashion); *Moran* v. *Media News Group, Inc.*, 100 Conn. App. 485, 502, 918 A.2d 921 (2007) ("[a] party may not attend an informal hearing, fail to object to an issue being addressed, voluntarily enter into an agreement and later claim that the commissioner should never have entertained the issue that led to an agreement"); *State* v. *Maskiell*, 100 Conn. App. 507, 517, 918 A.2d 293 (under unique circumstances of case, party's failure to object was conduct that implicated the doctrine of induced error, where defense counsel's silence in the face of representation by prosecutor that there was agreement as to admissibility of state's evidence prompted or encouraged court to rely upon report), cert. denied, 282 Conn. 922, 925 A.2d 1104 (2007).

from the order granting the motion to compel." We conclude that the defendant's claim of error as to the granting of the motion to compel is reviewable.[10]

We begin by setting forth relevant law and our standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the

[10] The plaintiff also argues that the defendant did not argue during the hearing that the QDRO was not drafted in conformance with the agreement. The court stated as much in its articulation. Because we disagree with the court's conclusion that the agreement was unambiguous, and we remand the matter for a new hearing during which the court is directed to hear extrinsic evidence and make factual findings as to the parties' intent regarding the provision at issue, we do not reach the issue of whether the QDRO conformed to the agreement. See *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 328, 186 A.3d 771 (court was required to resolve ambiguity by considering extrinsic evidence and making factual findings as to parties' intent), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

It is the plaintiff's position that the defendant's argument that the retirement asset provision is ambiguous should not be reviewed because it was not raised until her motion for articulation. We note that the trial court, in its articulation, answered that it had considered whether the provision was ambiguous, and, therefore, the circumstances do not amount to a trial by ambuscade of the trial judge. Cf. *Musolino* v. *Musolino*, 121 Conn. App. 469, 477, 997 A.2d 599 (2010). Moreover, as discussed further infra, the issue of whether the provision was ambiguous was necessarily subsumed within the plaintiff's motion to compel.

contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341–42, 152 A.3d 1230 (2016). "[T]he construction of a written contract is a question of law for the court. . . . The scope of review in such cases is plenary." (Citations omitted; internal quotation marks omitted.) *Sachs* v. *Sachs*, 60 Conn. App. 337, 342, 759 A.2d 510 (2000).[11]

[11] The plaintiff contends that the proper standard of review is one of abuse of discretion and summarily provides in his brief the general standard of review applicable to factual decisions in family matters. See *Harlow* v. *Stickels*, 151 Conn. App. 204, 208, 94 A.3d 706 (2014) ("[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented" [internal quotation marks

With these principles in mind, we turn to the retirement asset provision of the agreement in the present case, which states: "The husband shall transfer to the wife, via QDRO, fifty (50%) percent of the value of the marital portion of his benefit under the City of Hartford Municipal Retirement fund, valued as of date of dissolution, minus the amount of the wife's Social Security Benefit. The assigned benefit shall be paid as a separate interest payment over the life of the wife. The husband shall retain his Mass Mutual 457 Plan and wife shall make no claim to same. Attorney Jeffrey Winnick shall prepare said QDRO(s) and the parties shall be equally responsible for the cost of same." On the basis of the language in this provision, we conclude that there is more than one possible approach to calculating the amount of the defendant's social security benefit and, therefore, that the provision is ambiguous. The ambiguity of the retirement asset provision is framed by the plaintiff's Exhibit 4, the defendant's social security statement, which states, "Your payment would be about $1479 a month at full retirement age," and also states, on the first line: "You have earned enough credits to qualify for benefits. At your current earnings rate, if you continue working until . . . your full retirement age (67 years), your payment would be about . . . $1479 a month; age 70, your payment would be about . . . $1834 a month; age 62, your payment would be about . . . $1030 a month."

There are at least three possible interpretations of the retirement asset provision. First, that provision could be interpreted as captured in the proposed QDRO, i.e., the defendant's estimated full retirement (age sixty-seven) payment of "about . . . $1479 a month" must be subtracted, as though it were commencing immediately,

omitted]). Because the motion presented issues of law, including the construction of the separation agreement's retirement asset provision, we agree with the defendant that the applicable scope of review is plenary.

from the defendant's 50 percent assigned monthly benefit. Second, the provision could be read to require that the defendant receives her 50 percent assigned benefit until such time as she elects to receive her social security benefit,[12] at which future time her 50 percent assigned benefit would be reduced by the monthly social security benefit she actually elects to receive. A third interpretation of the provision would require calculating the present lump sum equivalent of the defendant's future estimated full retirement (age sixty-seven) payment of "about . . . $1479 a month," which lump sum would then be converted to an immediate stream of payments, each of which would be subtracted from the 50 percent monthly assigned benefit.[13]

Because the language of the provision is susceptible to more than one reasonable interpretation, the court erroneously determined that the provision is unambiguous. See *Thomasi* v. *Thomasi*, 181 Conn. App. 822, 831, 188 A.3d 743 (2018) ("A word is ambiguous when it is capable of being interpreted by reasonably well informed persons in either of two or more senses. . . . Ambiguous can be defined as unclear or uncertain, or that which is susceptible of more than one interpretation, or understood in more ways than one." [Internal quotation marks omitted.]); *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 398, 186 A.3d 739 (2018) ("[b]ecause the phrase 'initiation fee' in the modified judgment could have referred to any one of three available levels of membership in the Innis Arden Country Club, each with its distinct initiation fee, that phrase, as used in the modified judgment, was ambiguous").

On the basis of our conclusion that the court erroneously determined that the provision was unambiguous, we conclude that a remand to the trial court is neces-

[12] As noted previously, the plaintiff's exhibit 4 identified three different approximate social security benefit amounts corresponding with the age of the defendant upon retirement.

[13] We express no opinion as to the feasibility or the validity of any of the three illustrated interpretations of the retirement asset provision.

sary for the court to hold a new hearing on the parties' motions[14] and to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement. See *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 328, 186 A.3d 771 (court was required to resolve ambiguity by considering extrinsic evidence and making factual findings as to parties' intent), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018); see also *Parisi* v. *Parisi*, 315 Conn. 370, 386, 107 A.3d 920 (2015) (remanding case to trial court to resolve ambiguity in parties' separation agreement "through a determination of their intent after consideration of all available extrinsic evidence and the circumstances surrounding the entering of the agreement"); *Fazio* v. *Fazio*, 162 Conn. App. 236, 251, 131 A.3d 1162 (same), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

After stating in its articulation that it found no ambiguities in the retirement asset provision, the court continued: "In the absence of any ambiguity or uncertainty, the evidence the defendant [sought] to introduce regarding the intent of the parties or their object was irrelevant." Because the court's underlying determination that the provision was unambiguous was erroneous, its subsequent conclusion that the evidence regarding the intent of the parties was irrelevant necessarily also is erroneous. Because the issue may arise on remand, we note the general legal principles concerning the parol evidence rule and its exceptions.[15]

[14] The plaintiff argues that the defendant has not claimed error in the denial of her motion to open the dissolution judgment. The defendant responds that she "indirectly challenges the motion to open ruling, by arguing that the court erred by granting the motion in limine and misapplying the parol evidence rule, which prevented the defendant from presenting the evidence necessary to support her motion to open." We agree with the defendant that her claim is adequately raised as a challenge to the denial of her motion to open the judgment.

[15] The plaintiff argues in the alternative that any error in granting the motion in limine was harmless. Because we reverse the decision of the trial court on the basis that it improperly concluded that the provision was unambiguous and we remand for a new hearing during which the court

"Parol evidence offered solely to vary or contradict the written terms of an integrated contract is . . . legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. . . . These recognized exceptions are, of course, only examples of situations where the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated, or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud." (Internal quotation marks omitted.) *Sullo Investments, LLC* v. *Moreau*, 151 Conn. App. 372, 378–79, 95 A.3d 1144 (2014); see *Hirschfeld* v. *Machinist*, supra, 181 Conn. App. 328 ("parol evidence, including conversations of those involved in drafting the contract, may be used as an aid in the determination of the intent of the parties which was expressed by the written words" [internal quotation marks omitted]).

This court cannot find facts in the first instance. See *Fazio* v. *Fazio*, supra, 162 Conn. App. 251. Thus, a remand is necessary for the trial court to hold a new hearing on the parties' motions[16] and to "determine the intent of the parties after consideration of all the

should consider all available extrinsic evidence, we need not address the claim of harmless error.

[16] Because the court erroneously concluded as a matter of law that the retirement asset provision was unambiguous, and thus did not make the necessary factual determination of the intent of the parties in agreeing to the provision, the court could not reasonably have reached a conclusion as to whether the arguments raised by the defendant in her motion to open the judgment had merit.

available extrinsic evidence and the circumstances surrounding the entering of the agreement." Id.; see also *Parisi* v. *Parisi*, supra, 315 Conn. 386.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

MARCELLA WOODBURY-CORREA *v.* REFLEXITE CORPORATION
(AC 39397)

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

Syllabus

Pursuant to statute (§ 31-294c [b]), "an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury . . . ."

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner denying her motion to preclude the defendant employer from contesting the compensability of her injuries pursuant to § 31-294c (b). The commissioner denied the plaintiff's motion to preclude on the ground that it was not possible for the defendant to comply with § 31-294c (b) under the facts of this case. Specifically, the commissioner found that on April 17, 2009, the plaintiff had filed a form 30C notifying the defendant that she was seeking compensation for repetitive trauma injuries she sustained at work, but the defendant did not file a proper and timely form 43 to contest liability for the plaintiff's claim. The commissioner concluded that although the defendant had not filed a proper and timely form 43, it was impossible for the defendant to have complied with § 31-294c (b) because it could not commence payment within the twenty-eight day statutory time period where, as here, it had not received any medical bills or claims for benefits from the plaintiff during that time. The board affirmed the commissioner's decision, agreeing that it had been impossible for the defendant to file a timely form 43 under these circumstances. The board further concluded that although the defendant had failed to file a timely form 43, it had filed a proper form 43 contesting liability with the Workers' Compensation Commission, which was sent to the commission via facsimile transmission on July 24, 2009. On the plaintiff's appeal to this court, *held*:

1. The board exceeded its authority by making a new factual finding, in contradiction to that made by the commissioner, that the defendant had filed a proper, albeit untimely, form 43 contesting liability: the commissioner expressly found that the defendant had not filed a proper and timely form 43 as required by § 31-294c (b), the parties did not request the commissioner to correct that finding or challenge that finding on appeal to the board, the plaintiff specifically argued to the board that the commissioner had found that the defendant had never filed a proper form 43 with the commission as required by § 31-294c (b), and a review of the exhibits relied on by the commissioner in support of that finding demonstrated that it was not clearly erroneous; moreover, although the record revealed that the defendant had faxed a copy of its form 43 to the commission on July 24, 2009, within one year of the plaintiff's notice of claim, both form 43 and the applicable statute (§ 31-321) require notice of service to be made either personally or by registered or certified mail, and the record on appeal contained no properly filed form 43 served on the commission in accordance with § 31-321.
2. The board improperly affirmed the commissioner's decision denying the plaintiff's motion to preclude the defendant from contesting liability on the basis of impossibility: although the defendant was unable to commence payment within the statutory twenty-eight day time period because the plaintiff's medical bills had not been submitted during that time, the defense of impossibility was not applicable in this case, as the defendant contested liability rather than the extent of the plaintiff's disability, and, therefore, it was not impossible for and the defendant was required to file a form 43 notice of intent to contest liability on or before the twenty-eighth day after it had received the plaintiff's form 30C notifying it of her claim pursuant to § 31-294c (b); accordingly, because the defendant failed to file a form 43 to contest liability for the plaintiff's work related repetitive trauma claim within twenty-eight days of the plaintiff's filing of her claim, the plaintiff's motion to preclude the defendant from contesting liability should have been granted.

Argued January 28—officially released June 18, 2019

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Sixth District denying the plaintiff's motion to preclude the defendant from contesting liability as to her claim for certain workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

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

Colin J. Hoddinott, with whom, on the brief, was *Deborah J. DelBarba*, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Marcella Woodbury-Correa, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), denying the plaintiff's motion to preclude[1] the defendant, her employer, Reflexite Corporation, from contesting liability for the repetitive trauma injuries claimed and noticed on her form 30C.[2] On appeal, the plaintiff claims that the board (1) exceeded its authority by making new factual findings that contradict the findings made by the commissioner, and (2) erred in affirming the commissioner's denial of the motion to preclude the defendant from contesting liability for the plaintiff's repetitive trauma injuries. We agree with both claims and reverse the decision of the board.

We begin with the underlying facts as found by the commissioner, as well as the procedural history and uncontested facts as revealed by the record. On April 17, 2009, the plaintiff had an existing employment relationship with the defendant. On that date, she filled out a form 30C claiming repetitive trauma injuries, the

[1] General Statutes § 31-301b provides: "Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

[2] "A form 30C is the name of the form prescribed by the workers' compensation commission of Connecticut for use in filing a notice of claim under the [Workers' Compensation Act, General Statutes § 31-275 et seq.]." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 80 n.5, 144 A.3d 1075 (2016).

symptoms of which, she alleged, began in 2003. She sent the form 30C via certified mail on April 18, 2009, both to the defendant and to the Workers' Compensation Commission (commission). Both the commission and the defendant received the form 30C on April 20, 2009. The defendant did not file a proper and timely form 43 to dispute liability.[3] On February 24, 2014, pursuant to General Statutes § 31-294c (b), the plaintiff filed a motion to preclude the defendant from contesting liability for her repetitive trauma injuries. Nearly one year later, on January 5, 2015, the defendant filed a written objection to the plaintiff's motion on the ground that it had filed a form 43 in a timely manner.[4]

The commissioner found that the commission file reflected that "there were never any claims for indemnity or medical benefits for the [plaintiff]," and that the "first claim for benefits was . . . some five years after the claimed date of injury." The commissioner, thereafter, concluded that it was "impossible for the [defendant] to comply with the statutory requirements to issue any benefit payments during the [twenty-eight] day period following the filing of the [plaintiff's] form 30C as no benefits were claimed," and, on that basis, he denied the plaintiff's motion to preclude the defendant from contesting liability. The plaintiff filed a petition for review of the commissioner's decision with the board.[5]

[3] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim. . . . The form 43 generally must be filed within twenty-eight days of receiving written notice of the claim." (Citation omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 79 n.2, 144 A.3d 1075 (2016); see General Statutes § 31-294c.

[4] The defendant filed a motion to bifurcate the motion to preclude from the other issues pending before the commission. The plaintiff had no objection to bifurcation, and the commissioner granted the motion.

[5] Following her appeal to the board, the plaintiff also filed a motion to correct the commissioner's findings and conclusion, which the commissioner denied.

A hearing was held before the board on March 18, 2016. In a June 22, 2016 written decision, the board affirmed the commissioner's decision denying the plaintiff's motion to preclude the defendant from contesting liability, specifically agreeing, in part, that the defendant was not able to file a timely form 43 due to "impossibility." This appeal followed. Additional facts will be set forth as necessary.

Before reviewing the plaintiff's claims, we set forth the applicable standard of review. "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry facts. . . . The conclusions drawn by [the commissioner] from the facts found [also] 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. . . . [Moreover, 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 review board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.], we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers'

compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes. . . .

"Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citations omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 84–86, 144 A.3d 1075 (2016).

"In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b).[6] If the notice of claim is adequate but the employer fails to comply

[6] General Statutes § 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury . . . and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury . . . on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided

with the statute, then the motion to preclude must be granted." (Footnote altered; internal quotation marks omitted.) Id., 86–88.

I

The plaintiff claims that the board exceeded its authority by making a new factual finding concerning the form 43 that contradicts the finding made by the commissioner, despite the fact that the commissioner's finding had not been challenged on appeal to the board. She argues that the board acted improperly "when it liberally construed the unambiguous factual finding of the commissioner that 'a proper and timely form 43 was not filed by the [defendant]' to mean that 'the form 43 that was filed was not "proper" [because] it was not "timely."' The board not only inserted a new factual finding into the commissioner's decision, but [it] deleted the commissioner's original finding that the defendant failed to properly serve the commission with a form 43 in accordance with its statutory mandate." We agree.

the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury . . . unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury . . . on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury . . . ."

In his findings, the commissioner specifically found that "[e]vidence produced at the formal hearing as well as the contents of the commission's file indicate that a proper and timely form 43 was not filed by the [defendant]." The commissioner cited, as support for this finding, several exhibits. The commissioner was not requested to correct this finding, and neither party challenged this finding on appeal to the board. Moreover, although the finding was not preserved for review, an examination of the exhibits cited by the commissioner readily confirms that this finding was not clearly erroneous. The plaintiff properly filed a form 30C claiming repetitive trauma injuries, as found by the commissioner, which was received both by the board and by the defendant on April 20, 2009. On May 5, 2009, the defendant sent its form 43, via certified mail, to the plaintiff's attorney, as evidenced by the return receipt. The defendant did not serve the commission with its form 43 at that time. Instead, on July 24, 2009, despite the requirements of General Statutes § 31-321[7] and form 43,[8] the defendant sent, via *facsimile transmission*, its form 43 to the commission.

The board, in its written decision, attacked the argument of the plaintiff's attorney that the "commissioner

[7] General Statutes § 31-321 requires that "[u]nless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

[8] Form 43 contains the following language, printed across the bottom of the form: "This notice must be served upon the Commissioner and Employer (or representative, if applicable) by personal presentation or by registered or certified mail. When medical care is the issue for contest, send a copy of this form to the medical provider also. For the protection of both parties, the claimant should note the date when this notice was received and the employer/insurer should keep a copy of this notice with the date it was served." (Emphasis omitted.)

found that the [defendant] never filed a form 43 with the . . . commission as required by the act. Therefore, statutory preclusion must lie." (Internal quotation marks omitted.) The board opined that the statement of the plaintiff's attorney was "unequivocally factually incorrect [in that the defendant] did file a form 43 contesting the claim which was received by the commission on July 24, 2009, a date more than [twenty-eight] days after the claimant filed her form 30C seeking benefits but well within the one year safe harbor period to contest the extent of disability . . . . The trial commissioner in [his] findings . . . found that the [defendant] had not filed 'a *proper and timely* form 43.' . . . We suggest that the trial commissioner inartfully expressed . . . in [his] findings . . . that the form 43 that was filed was not 'proper' as it was not 'timely.' To suggest in pleadings before this commission, and indeed again at oral argument before this tribunal, that a form 43 had *never* been filed by the [defendant], or that the evidence presented would support such a factual finding by the trial commissioner, is a distortion of the facts on the record." (Citations omitted; footnote omitted; emphasis in original.) The board thereafter proceeded to review the plaintiff's appeal as though the commissioner had found that the defendant's form 43 had been filed untimely with the commission, but, nonetheless, properly filed. We agree with the plaintiff that this was in error.

The commissioner clearly found that "a proper and timely form 43 *was not filed* by the [defendant]." (Emphasis added.) The plaintiff's attorney had argued to the board that the commissioner had found that the defendant had never filed a form 43 with the commission *as required by the act*. A review of the commissioner's findings reveals that the argument of the plaintiff's attorney was accurate and not "a distortion of the facts on the record." The defendant improperly and untimely

sent its form 43 to the commission in a facsimile transmission. As indicated by the commissioner's decision, a proper form that complied with the act was not filed by the defendant. Form 43 and § 31-321 do not contain any language that permits the filing of a form 43 by facsimile transmission to the commission; rather, both the form and the statute require that it must be filed either in person, by registered mail, or by certified mail. See *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 274, 76 A.3d 657 ("[i]t is well settled that notice provision under the [act] should be strictly construed" [internal quotation marks omitted]), cert. denied, 310 Conn. 935, 78 A.3d 859 (2013). The record provided to us on appeal contains no properly filed form 43.[9]

Accordingly, we agree with the plaintiff that the board improperly changed a finding of the commissioner and relied on that changed finding in its decision.

II

The plaintiff next claims that the board erred in affirming the commissioner's denial of the motion to preclude the defendant from contesting liability on the basis of the defense of "impossibility." Specifically, she argues that the defense of impossibility, as articulated in *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 269–70, is not applicable when an employer contests liability rather than the extent of disability. She contends that if an employer chooses to *contest liability* for the employee's injuries, it must file a proper

[9] We are aware that § 31-294c (c) contains a savings provision for a defect in an employee's notice of claim: "No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice." General Statutes § 31-294c (c). The extent to which this provision may save a form 30C that was not served in accordance with § 31-321 is not before us. We note, however, that § 31-294c (c) contains no language that extends this savings provision to an employer filing a disclaimer.

and timely form 43, regardless of whether the employee submitted medical bills within twenty-eight days of the employee's filing of form 30C. We agree.[10]

The following additional facts aid in our analysis. The commissioner concluded that there was no evidence that the plaintiff had "claimed either medical or indemnity benefits for her alleged injuries during the [twenty-eight] day period following the filing of the form 30C," and that because the plaintiff had not submitted a claim for any benefits during that time, "[i]t was impossible for the respondents to comply with the statutory requirements to issue any benefit payments during [that twenty-eight] day period . . . ."

In her appeal to the board, the plaintiff argued that the commissioner improperly concluded that the defense of impossibility applied in this case and that it improperly denied her motion to preclude the defendant from contesting liability. She contended that the commissioner was required to grant her motion because he found that the defendant had failed to file a proper and timely form 43, as is required by § 31-294c (b), to contest liability.

The board affirmed the commissioner's decision, concluding in relevant part that "[t]he [plaintiff] simply did not proffer a credible argument that subsequent to filing her form 30C, the [defendant] failed in [its] obligation to respond, and, therefore, the 'safe harbor' under

[10] We note that, in the present case, our construction of § 31-294c (b) is guided by appellate case law and our Supreme Court's interpretation of the statute, which it has determined to be ambiguous. See *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 547–49, 970 A.2d 630 (2009) (§ 31-294c [b] is not plain and unambiguous on issue of employer's role once preclusion has been granted); *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 111, 942 A.2d 396 (2008) (§ 31-294c (b) does not yield plain meaning on issue of preclusion). Additionally, the worker's compensation section of the Connecticut Practice Series has indicated that there is confusion regarding § 31-294c (b) and that the chairman of the board repeatedly has called for legislative guidance on the issue of preclusion. See R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation (Supp. 2018–2019) § 18:11, pp. 448–50.

Dubrosky [v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 269–70] was in effect [because] the [defendant] filed a form 43 within the one year period provided . . . under § 31-294c . . . . In the present case, the trial commissioner found that there had been no event subsequent to the [plaintiff] filing the form 30C to which the [defendant] could have reacted and determined [its] 'safe harbor' was in place."[11]

The plaintiff argues that the board improperly found that the defendant properly had filed a form 43; see part I of this opinion; and it improperly concluded that the commissioner correctly determined that the "safe harbor" provision articulated in *Dubrosky* applied to cases in which an employer was attempting to contest *liability* rather than to contest the *extent of disability*. We agree.

In *Dubrosky*, the dispositive issue was whether the employer was precluded from contesting *the extent of a disability* under § 31-294c (b) because it had been impossible for it to have commenced payment of compensation within the statutory twenty-eight day time period because no medical bills had been submitted to it during that time period. *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 263; see generally *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 130, 942 A.2d 396 (2008) (under § 31–294c (b), if employer neither timely pays nor timely contests liability, conclusive presumption of compensability attaches and employer is barred from contesting employee's right to receive compensation on any ground or extent of employee's disability). Unlike the present case, the defendant employer in *Dubrosky* did not contest liability; it contested only the extent of the plaintiff's disability. *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 266.

[11] We assume that the board is referring to the twenty-eight day period after the plaintiff filed her form 30C.

The plaintiff in *Dubrosky* fell during a work related business call on January 9, 2009, and injured his knee. Id., 264. He reported the injury to his supervisor on January 12, 2009, but did not seek immediate medical attention or miss time from work. Id. More than one month later, on February 18, 2009, the plaintiff filed a form 30C seeking compensation for the injury to his knee. Id., 265. Beginning on February 27, 2009, the plaintiff began seeking medical treatment from various providers, but the defendant did not begin receiving bills for the plaintiff's injury until June, 2009, which bills it paid. Id. On October 20, 2009, the defendant employer filed a form 43 contesting the plaintiff's claim. Id. The defendant also filed a motion to dismiss the claim, and the plaintiff filed a motion to preclude the defendant from contesting *liability and the extent of disability*. Id., 266. At a January 31, 2011 hearing, the defendant withdrew its motion to dismiss and *accepted the plaintiff's claim*, but it argued that it should be permitted to contest the extent of the plaintiff's disability and, therefore, that the motion to preclude should be denied. Id. The commissioner granted the motion to preclude the defendant from contesting both liability and the extent of disability because, although the defendant could not have commenced payment within twenty-eight days, it could have filed a form 43 during that period. Id. The board upheld the commissioner's decision. Id., 267.

On appeal to this court, the defendant claimed that the board improperly affirmed the decision of the commissioner. Id. It argued that it could not have complied with § 31-294c (b) to contest its liability because no medical bills had been generated within the twenty-eight statutory time period. Id. This court concluded that "it was not reasonably practical for the board to require the defendant to have complied with § 31-294c (b) . . . ." Id. We reasoned that the defendant could not have commenced payment of medical bills because

no bills had been submitted for payment, and the defendant could not be required to file a form 43 within twenty-eight days of the plaintiff's claim because the defendant was not contesting liability; it was contesting only the extent of disability. Id., 271.

In *Dubrosky*, this court explained that there is an important distinction between an employer who is contesting liability and one who solely is contesting the extent of the employee's disability: "This distinction is not a superficial one, as an employer who is contesting liability is distinguishable from one who solely contests the extent of the disability. For example, in *Adzima* v. *UAC/Norden Division*, 177 Conn. 107, 113, 411 A.2d 924 (1979), our Supreme Court recognized the difference between an employer contesting the extent of the employee's disability instead of its liability: The statute clearly speaks to a threshold failure on the employer's part to contest liability: to claim, for example, that the injury did not arise out of and in the course of employment . . . that the injury fell within an exception to the coverage provided by [workers'] compensation . . . or that the plaintiff was not an employee of the defendant, but an independent contractor . . . . See id., 114 (no question that [employee's] injury was a compensable injury within the terms of the [workers'] compensation statute, i.e., that he had a right to receive compensation; the only contest concerned the extent of his lower back disability)." (Internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 271–72; see also *Adzima* v. *UAC/Norden Division*, supra, 113–14 (conclusive presumption does not bar employer, who has accepted liability and paid benefits on claim, from contesting extent of disability).

This court, in *Dubrosky*, then distinguished how the defendant in that case had been placed in a situation that the act had not contemplated: "The circumstances of this case, however, place the defendant squarely within a situation that the statutory scheme fails to

contemplate, namely, where an employee files a form 30C claim for which *the employer does not contest liability* but fails to generate medical bills within twenty-eight days for the employer to commence payment. To require strict compliance in a case such as this creates an incentive for claimants to deliberately delay seeking medical treatment until the very end of the twenty-eight day period such that the employer cannot file a timely form 43 to avoid being precluded from contesting the extent of the claimant's disability because no medical bills are generated sufficiently within the statutory time period to allow the employer to commence payment. . . .

"Thus, where notice, by filing a form 43 or commencing medical payments is impossible to provide in a timely manner, the failure to comply strictly with § 31-294c (b) will not preclude the employer from contesting *the extent of the employee's disability*. . . . Finally, we note the limited applicability of this excusing of strict compliance because in the vast majority of workers' compensation cases it will be possible for an employer either to file a truthful form 43 because it is actually contesting liability or to pay medical bills generated by the claimant within twenty-eight days. As *neither option* was available to the defendant under the circumstances of this case, it should not be precluded from *contesting the extent of the plaintiff's disability* when it filed its form 43 [seeking to contest only the extent of disability] within one year from the date of the injury." (Citations omitted; emphasis added; internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 273–75.

The *Dubrosky* case is similar to the present case only insofar as the defendant in *Dubrosky* did not file a form 43 within twenty-eight days of the plaintiff's claim, and it was unable to commence payment within twenty-eight days because no medical bills had been submitted during that time and the plaintiff continued to work.

See id. The defendant in *Dubrosky*, however, began paying medical bills upon receipt, and it then filed a form 43 to contest the extent of the plaintiff's disability. See id., 265. This court held that, under such circumstances, when a defendant employer does not challenge the claim of a work related injury, but challenges only the extent of the plaintiff's disability, strict compliance with the twenty-eight day statutory timeframe to begin payment of benefits will be excused when it is impossible for the plaintiff to comply. Id., 273–75. In *Dubrosky*, the defendant complied with the statute insofar as it was able, by commencing payment of medical bills when they were received and then filing a form 43 to challenge the extent of the plaintiff's disability. Although the defendant may have been precluded from challenging that the plaintiff's claim was work related, it was not precluded from challenging the extent of the plaintiff's disability because it began payments as soon as it could and it then filed a form to contest the extent of the plaintiff's disability. Consequently, the "safe harbor" discussed in *Dubrosky* applies only when the employer is contesting the extent of the employee's injury, and does not apply to an employer who is contesting liability.

In the present case, although the defendant could not commence payment within the twenty-eight day statutory time period because the plaintiff's bills were submitted several years later, it certainly could have filed its form 43 contesting liability within twenty-eight days of when it received the plaintiff's form 30C. In fact, although the defendant did not timely file its form 43 with the commission, it did serve the plaintiff with a copy of it within the statutorily prescribed time. In that form 43, which was untimely transmitted by facsimile to the commission, the defendant specifically alleged that the plaintiff's injuries "did not arise out of or in the course of her employment at [the defendant] and cannot be causally traced to such employment in accordance with [§] 31-275." Because the defendant was

not seeking solely to contest the extent of the plaintiff's disability, but, rather, was contesting its liability for the plaintiff's claim, i.e., contesting that her repetitive trauma injuries were work related, it was not impossible for the defendant to file a form 43 disclaiming its liability within the statutory twenty-eight day timeframe. Accordingly, *Dubrosky* is not only distinguishable from the present case, but it actually reinforces the requirement that an employer who is contesting liability must strictly comply with the filing requirements of § 31-294c (b).

Because the defendant failed to file a form 43 to contest its liability for the plaintiff's work related repetitive trauma claim within twenty-eight days of the plaintiff's filing of her claim, we conclude that the plaintiff's motion to preclude the defendant from *contesting liability* should have been granted.

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner denying the plaintiff's motion to preclude and to remand the case to the commissioner for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY CRESPO
(AC 41111)

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

Syllabus

The defendant, who had been on probation as a result of his conviction of charges of sexual assault and risk in injury to a child related to his sexual abuse of a minor child, appealed to this court from the judgment of the trial court finding him in violation of his probation. The defendant's probation had included special conditions imposed by the sentencing court that required, inter alia, that he have no unsupervised contact with minors under the age of sixteen, and that any supervisor be approved

by his treatment provider and supervising probation officer. In preparation for his release from incarceration, the defendant signed a certain standardized form that was prepared by the Office of Adult Probation, pursuant to statute (§ 53a-30 [b]), that prohibited him from being in the presence of or having contact with children under the age of sixteen without probation officer approval. The defendant's probation officer, S, thereafter obtained an arrest warrant after he received an anonymous report that a fourteen year old was living at the apartment that the defendant shared with his wife. At the probation violation hearing, S described a meeting with the anonymous person, and the trial court overruled the defendant's objection to that testimony, which the defendant claimed was hearsay and violated his right to confrontation. The defendant thereafter moved to dismiss the violation of probation charge on the ground that the approval condition on the standardized form was inconsistent with the sentencing court's supervisor requirement. The trial court denied the motion to dismiss and then denied the defendant's motion for judicial disqualification, which was based on his claim that certain of the court's evidentiary rulings and its colloquy with defense counsel about the filing of the motion to dismiss would lead a reasonable defendant to believe that the court would be biased toward the defendant. *Held*:

1. The defendant's claim that the trial court violated his right to confrontation when it overruled his objection to S's testimony on confrontation grounds without making a finding of good cause was not reviewable, as the record was inadequate for review and the defendant failed to distinctly raise that claim at trial; although defense counsel referenced the confrontation clause in his objection, the defendant's claim on appeal was predicated on his fourteenth amendment right to due process, the record reflected that he failed to distinctly raise at trial the inquiry that the trial court was required to conduct, which entailed balancing his interest in confronting the declarant with the state's interest in not producing the declarant and the reliability of the proffered hearsay, and the defendant provided this court with no authority indicating that the sixth amendment right to confrontation applied to probation revocation proceedings.
2. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss: the approval condition and the supervisor condition of his probation complemented each other and were not inherently inconsistent or contradictory, as the supervisor condition ensured that a supervisor was present for any contact between the defendant and a minor under the age of sixteen, and the approval condition ensured that such contact was approved by his probation officer in the first instance; moreover, because the defendant's incarceration stemmed from the sexual and physical assault of a six year old child, it was entirely appropriate for the Office of Adult Probation to impose the approval condition as a prerequisite to any supervised contact between the defendant and minors under the age of sixteen.

3. The defendant's unpreserved claim that the trial court improperly failed to hold an evidentiary hearing on the veracity of certain allegations in S's arrest warrant affidavit was not reviewable; the defendant never requested a hearing during the probation revocation proceeding and did not distinctly raise that claim with the trial court, and, thus, the record lacked the requisite findings as to whether any allegedly false statements were knowingly and intentionally made with reckless disregard for the truth, and whether those statements were necessary to the finding of probable cause.
4. The trial court did not abuse its discretion in denying the defendant's motion for judicial disqualification: adverse rulings do not amount to evidence of bias sufficient to support a claim of judicial disqualification, and the defendant's claim that the court offered no explanation for denying his right to confront the witness against him was unfounded, as the defendant failed to bring that concern distinctly to the court's attention and never requested an explanation or articulation from the court on that ruling, as provided for in our rules of practice; moreover, nothing in the transcript of the hearing reflected bias on the part of the court, as defense counsel clarified in his colloquy with the court that his concern regarding the filing of the motion to dismiss had nothing to do with the court and offered an apology, which the court accepted.
5. The trial court's finding that the defendant violated his probation was not clearly erroneous, as that court reasonably could have found that the defendant did not comply with the approval condition: the record indicated that, prior to the defendant's release from incarceration, he reviewed and signed the terms and conditions of his probation, including the approval condition, and thereby manifested his understanding of the necessity to abide by those conditions, and S testified that the approval condition obligated the defendant to obtain his approval prior to having any contact with a minor child, and that the defendant had admitted to him that the fourteen year old was staying at his residence and that he was having contact with her; moreover, S testified that the defendant had not obtained his approval for any such contact, and that when S and another probation officer visited the defendant's apartment, they encountered a sixteen year old, who had informed them that the fourteen year old was staying there and had done so at several intervals throughout the year, and the court was free to credit S's testimony.

Argued January 28—officially released June 18, 2019

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Suarez*, *J.*; thereafter, the court denied the defendant's motion to dismiss; subsequently, the court, *Diana*, *J.*, denied the defendant's motion to disqualify the judicial authority;

thereafter, the court, *Suarez*, *J.*, rendered judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed*.

Michael S. Hillis, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Peter A. McShane*, former state's attorney, and *Russell Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Anthony Crespo, appeals from the judgment of the trial court finding him in violation of probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that (1) the court improperly overruled an objection predicated on the right to confront adverse witnesses without making the requisite finding of good cause, (2) the court improperly denied his motion to dismiss due to the imposition of allegedly inconsistent conditions of probation, (3) the court improperly failed to conduct an evidentiary hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), (4) the court abused its discretion in denying his motion for judicial disqualification and (5) the evidence was insufficient to sustain the court's finding that the defendant violated a condition of his probation. We affirm the judgment of the trial court.

On April 23, 2007, the defendant pleaded guilty to assault in the second degree in violation of General Statutes § 53a-60 (a) (2), risk of injury to a child involving sexual contact in violation of General Statutes § 53-21 (a) (2), and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A).[1] At sentencing, the court remarked: "This is some of

[1] Evidence presented at the probation revocation hearing indicated that the defendant's plea followed allegations of sexual and physical assault of a six year old child, "including digital penetration, fondling and physical abuse, which included beating her with a wire clothes hanger, and . . . punching her in the face, leaving bruising."

the worst treatment of a minor child that I have ever seen in my years on the bench. In my opinion, Mr. Crespo, you are a sexual deviant, and you are a violent and physical human being, except that you are a violent and physical human being toward those who cannot defend themselves." The court then sentenced the defendant to a total effective term of sixteen years incarceration, execution suspended after nine and one-half years, followed by fifteen years of probation. The special conditions of probation imposed by the court required, inter alia, that the defendant have "no unsupervised contact with minors under the age of sixteen and that any supervisor be approved by both his treatment provider and his supervising [probation] officer" (supervisor condition).

On December 8, 2014, in preparation for his release from incarceration, the defendant signed several standardized forms prepared by the office of adult probation, including one titled "Sex Offender Conditions of Probation." Among the conditions specified therein and marked applicable to the defendant was the following requirement: "You will not be in the presence of minors, nor have contact in any form, direct or indirect . . . with children under the age of sixteen without Probation Officer approval. Any contact must be reported immediately to a Probation Officer" (approval condition).

On March 17, 2015, the defendant's probationary period commenced upon his release from the custody of the Commissioner of Correction. In accordance with the supervisor condition imposed by the court at sentencing, the defendant's wife, Rosa,[2] subsequently was approved as the defendant's supervisor by his probation officer, the treatment provider, and the victim's advocate.

[2] Rosa did not testify at the probation revocation proceeding. Although the record indicates that Rosa was the defendant's wife at all relevant times, her surname is not specified therein. We therefore refer to her in this opinion by her first name.

Approximately nine months into the defendant's probationary period, his probation officer, Michael Sullivan, received a report that a fourteen year old female was living at the apartment that the defendant shared with Rosa. Following an investigation, Sullivan obtained an arrest warrant for the defendant's violation of the terms of his probation. In that application, Sullivan alleged that the defendant had violated both the supervisor condition and the approval condition of his probation. The defendant then was arrested and charged with breaching the terms of his probation in violation of § 53a-32.

A probation revocation hearing commenced on November 8, 2017, at which the court heard testimony from Sullivan and Vanessa Valentin, a probation officer who was involved in the investigation of the defendant's alleged violation of the terms of his probation. When the state rested in the adjudicatory stage of that proceeding, the defendant moved to dismiss the charge on the ground that the approval condition of his probation was inconsistent with the supervisor condition ordered by the trial court. After hearing argument from the parties, the court denied that motion. Defense counsel then asked the trial court to disqualify itself on the ground of bias. In response, the court stated: "Because of the seriousness of the matter before the court, because of the fact that your client is facing incarceration and because of the fact that you've raised the issue now, at this late stage of the proceeding, I am going to ask that another judge hear your motion to disqualify . . . ." Following a recess, Judge Leo V. Diana presided over a hearing on the defendant's motion for judicial disqualification, at the conclusion of which the court denied the motion.

The adjudicatory phase of the probation revocation hearing resumed on November 17, 2017. The defendant presented the testimony of one witness, the fourteen year old female who allegedly resided at the defendant's

apartment for a period of time in December, 2016.[3] When her testimony concluded, the defendant rested, and the court heard argument from the parties. The prosecutor argued that the evidence demonstrated that the defendant had violated the approval condition of his probation. The court agreed and found, by a fair preponderance of the evidence, that the defendant had violated the terms of his probation. During the dispositional phase of the proceeding, the court revoked the defendant's probation and sentenced him to a term of six and one-half years of incarceration, execution suspended after five years, followed by ten years of probation.[4] This appeal followed.

I

The defendant first contends that the court improperly overruled his objection to certain testimony on confrontation grounds without making a specific finding of good cause. The state counters that this claim is unpreserved. We agree with the state.

The following additional facts are relevant to the defendant's claim. During his testimony at the probation revocation hearing, Sullivan stated that he had received an anonymous report regarding the defendant's alleged violation of the terms of his probation. When Sullivan then proceeded to describe a meeting with that anonymous person, defense counsel objected on hearsay grounds. The court summarily overruled that objection. Sullivan then was asked about the substance of his conversation with that anonymous person, to which defense counsel again objected, stating: "Your Honor,

[3] Although she acknowledged that Rosa was her aunt, the fourteen year old female testified that she had never met the defendant. She further testified that she had never visited the residence the defendant shared with Rosa. At the conclusion of the adjudicatory stage of the hearing, the court found that the fourteen year old female's testimony "was completely not credible" and that it contradicted the defendant's admission to the contrary.

[4] On appeal, the defendant raises no claim with respect to the dispositional phase of the probation revocation proceeding.

I move to strike all of that inquiry for two reasons. One, it isn't just that there were relaxed rules of evidence for these procedures, but the confrontation clause is my client's constitutional right. I have no way of doing any of this with this officer because he's not the person that witnessed or saw any of this. So, it's not just an evidentiary violation, it's a violation of my client's constitutional rights to confront. And therefore, again, also, it contained total hearsay, which is hearsay within hearsay within this. And I believe that they should produce the witness so that witness can be properly cross-examined. Failing to do that, this testimony, should be stricken." In response, the court stated, "Overruled." The prosecutor then resumed his questioning of Sullivan, and defense counsel thereafter made no further mention of the confrontation issue.

As a preliminary matter, we note that the defendant has provided this court with no authority indicating that the right to confrontation contained in the sixth amendment to the United States constitution applies to probation revocation proceedings. See, e.g., *State* v. *Esquilin*, 179 Conn. App. 461, 472 n.10, 179 A.3d 238 (2018), and cases cited therein (noting that "an overwhelming majority of federal circuit and state appellate courts that have addressed this issue have concluded that [the confrontation standard articulated in *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)] does not apply to a revocation of probation hearing"). Although defense counsel referenced the "confrontation clause" in his objection before the trial court, his claim on appeal is predicated on the due process rights contained in the fourteenth amendment to the United States constitution, which mandate "certain minimum procedural safeguards before that conditional liberty interest [of probation] may be revoked"; *State* v. *Polanco*, 165 Conn. App. 563, 570, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708

(2016); including the right to question adverse witnesses.[5] Id., 571.

The exercise of the right to confront adverse witnesses in a probation revocation proceeding is not absolute, but rather entails a balancing inquiry conducted by the court, in which the court "must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Citation omitted; internal quotation marks omitted.) Id. To properly preserve for appellate review a confrontation claim in this context, our precedent instructs that a defendant must distinctly raise the balancing issue with the court at the probation revocation proceeding. If the defendant fails to do so, the claim is deemed unpreserved. See *State* v. *Tucker*, 179 Conn. App. 270, 278–79 n.4, 178 A.3d 1103 ("a defendant's due process claim is unpreserved where the defendant never argued to the trial court that it was required to balance his interest in cross-examining the victim against the state's good cause for not calling the victim as a witness"), cert. denied, 328 Conn. 917, 180 A.3d 963 (2018); *State* v. *Esquilin*, supra, 179 Conn.

[5] In *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), a case involving a violation of parole hearing, the United States Supreme Court held that "minimum requirements of due process" mandate, inter alia, that a defendant be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." The United States Supreme Court subsequently held that the due process requirements recognized in *Morrissey* extend to probation revocation proceedings. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

App. 474 (same); *State* v. *Polanco*, supra, 165 Conn. App. 571 (same).

The record plainly reflects that the defendant failed to distinctly raise that claim in the present case. For that reason, resort to the familiar rubric of *Golding* review is unavailing,[6] as the record in such circumstances is inadequate to review the alleged due process violation. See *State* v. *Esquilin*, supra, 179 Conn. App. 477–78. Accordingly, we decline to review the merits of the defendant's unpreserved claim.

II

The defendant next claims that the court improperly denied his motion to dismiss on the ground that the approval condition included on the sex offender conditions of probation form that he signed in preparation for his release from incarceration was inconsistent with the supervisor condition imposed by the court at his sentencing. We disagree.

The proper interpretation of conditions of probation presents a question of law. *State* v. *Faraday*, 268 Conn. 174, 191, 842 A.2d 567 (2004). Our review, therefore, is plenary.

Our analysis begins with General Statutes § 53a-30 (b), which "expressly allows the office of adult probation to impose reasonable conditions on probation." *State* v. *Thorp*, 57 Conn. App. 112, 116, 747 A.2d 537, cert. denied, 253 Conn. 913, 754 A.2d 162 (2000). Such

[6] 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." (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).

"[p]ostjudgment conditions imposed by adult probation are not a modification or enlargement of some condition already imposed by the court, but are part of an administrative function that [§ 53a-30 (b)] expressly authorizes as long as it is not inconsistent with any previously court-imposed condition." *State* v. *Johnson*, 75 Conn. App. 643, 652, 817 A.2d 708 (2003).

More specifically, § 53a-30 (b) provides: "When a defendant has been sentenced to a period of probation, the Court Support Services Division may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court." Section 53a-30 (b) thus contains two requirements. First, the condition of probation contemplated by the Office of Adult Probation must be one that the trial court could have imposed under § 53a-30 (a). Second, the condition must not be inconsistent with any condition of probation previously imposed by the court.

The state submits, and the defendant concedes, that the approval condition was one which the sentencing court could have imposed. Pursuant to § 53a-30 (a), the sentencing court was authorized to impose any condition "reasonably related to the defendant's rehabilitation." Given the context of the defendant's guilty plea; see footnote 1 of this opinion; we agree that the court could have imposed the approval condition at the time of sentencing.

With respect to the second requirement of § 53a-30 (b), the defendant claims that the approval condition is inconsistent with the supervisor condition that the court imposed at sentencing. This court previously has equated the term "inconsistent," as it is used in § 53a-30 (b), with incompatibility. *State* v. *Johnson*, supra, 75 Conn. App. 653. This court has further explained

that, to run afoul of the mandate of § 53a-30 (b), the condition imposed by the Office of Adult Probation must be "in direct contradiction to [a] condition imposed by the sentencing court . . . ." *State* v. *Armstrong*, 86 Conn. App. 657, 664, 862 A.2d 348 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1081 (2005).

We disagree with the defendant that the approval condition imposed by the Office of Adult Probation prior to his release from incarceration is incompatible with, and in direct contradiction to, the supervisor condition ordered by the court at sentencing. Rather, those two conditions complement each other. Whereas the supervisor condition ensured that a supervisor was present for any contact between the defendant and a minor under the age of sixteen, the approval condition ensured that such contact was approved by his probation officer in the first instance. We perceive nothing inherently inconsistent or contradictory about those two conditions of probation.

The core functions of probation officers are "to guide the [probationer] into constructive development" and to prevent "behavior that is deemed dangerous to the restoration of the individual into normal society." *Morrissey* v. *Brewer*, 408 U.S. 471, 478, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Under Connecticut law, probation officers are obligated to "keep informed of [the probationer's] conduct and condition and use all suitable methods to aid and encourage him and to bring about improvement in his conduct and condition." General Statutes § 54-108 (a). Because the defendant's incarceration in the present case stemmed from the sexual and physical assault of a six year old child, it was entirely appropriate for the Office of Adult Probation, in effectuating that statutory obligation, to impose the approval condition as a prerequisite to any supervised contact between the defendant and minors under the age of sixteen. We therefore reject the defendant's claim that

the approval and supervisor conditions of his probation are incompatible or inconsistent.

III

The defendant claims the court improperly failed to hold an evidentiary hearing pursuant to *Franks* v. *Delaware*, supra, 438 U.S. 154, on the veracity of certain allegations contained in the arrest warrant affidavit prepared by Sullivan. In *Franks*, the United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the [f]ourth [a]mendment requires that a hearing be held at the defendant's request." Id., 155–56. As our Supreme Court has explained, before a defendant is entitled to a *Franks* hearing, the defendant must "(1) make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and (2) show that the allegedly false statement is necessary to a finding of probable cause." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 363, 796 A.2d 1118 (2002).

In *State* v. *Bangulescu*, 80 Conn. App. 26, 832 A.2d 1187, cert. denied, 267 Conn. 907, 840 A.2d 1171 (2003), this court held that a defendant must distinctly raise a request for a *Franks* hearing before the trial court in order to preserve the claim for appellate review. As it stated: "[W]hen confronted with [the objectionable] testimony at trial, the defendant did not seek a *Franks* hearing; therefore, the court was not given the opportunity to determine whether [the witness'] inaccurate statement was made knowingly and intentionally, or with reckless disregard for the truth . . . or whether

it was necessary to the finding of probable cause . . . . As a consequence, the defendant's first claim must fail, as it does not meet the threshold requirement of *Golding* that the record be adequate for appellate review." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 33–34. That conclusion comports with the purpose of the preservation requirement, as "the essence of preservation is fair notice to the trial court . . . ." *State* v. *Miranda*, 327 Conn. 451, 465, 174 A.3d 770 (2018).

The logic of *Bangulescu* compels the same result in the present case, as it is undisputed that the defendant never requested a *Franks* hearing at any time during the probation revocation proceeding. The record further reveals that he did not distinctly raise with the trial court the claim he now pursues on appeal. As such, the claim is unpreserved.

Although unpreserved claims of constitutional dimension nonetheless may qualify for appellate review under *Golding*, such recourse is not available in the present case. Because the claim never was presented to the trial court, the record lacks the requisite findings as to (1) whether any allegedly false statements were knowingly and intentionally made with reckless disregard for the truth, and (2) whether those statements were necessary to the finding of probable cause. The defendant therefore cannot surmount *Golding*'s first prong, as the record is inadequate to review his unpreserved claim.[7]

IV

The defendant also claims that the court abused its discretion in denying his motion for judicial disqualification on the ground of bias. We do not agree.

[7] In light of our conclusion that the record is inadequate for review, we need not consider the state's alternate contention that probation revocation hearings, being akin to a civil proceeding; see *State* v. *Taveras*, 183 Conn. App. 354, 364, 193 A.3d 561 (2018); fall outside the scope of *Franks*.

The following additional facts are relevant to this claim. After the state rested its case-in-chief during the adjudicatory stage of the hearing, defense counsel made an oral motion to dismiss. Counsel then informed the court that he had "a written memorandum in support of my motion to dismiss." In response, the prosecutor stated that he had not seen the defendant's motion. The court then recessed the proceeding to provide the prosecutor with an opportunity to review the motion.

When the hearing resumed, the court noted that the written motion that the defendant submitted was dated October 19, 2017. At that time, the prosecutor indicated that he was "still not prepared . . . to respond adequately. The motion is dated October 19th, and here we are, November 8th, and I just was handed it right after the state rested its case." The prosecutor thus requested an additional ten to fifteen minutes to review the defendant's motion. Defense counsel asked to be heard and stated that he could not have filed that motion until he had heard the state's evidence. The following colloquy then occurred:

"[Defense Counsel]: I've been a trier of federal and state trials my whole adult . . . life. And good prudence is dictated to me that I wait to see all the evidence before I would file a motion that would argue the evidence. And the evidence before this court was that [the sentencing judge] issued a ruling that [the defendant] could have contact with minors as long as there was . . . supervision, the supervision was vetted, therefore there's no violation of [the court's] order. What's been confused here—

"The Court: Well, let's not argue the motion, counsel—

"[Defense Counsel]: Oh, I know. . . . [I]f [the prosecutor] wants more time to argue this, I don't have any problem with it, at all, or the judge to review it. There's

no urgency in this. But I really could only file it. I want to make sure because Your Honor doesn't know me, as a practitioner, but I can tell you that seasoned defense counsel would wait until the evidence came out before they would file anything arguing the evidence.

"The Court: Well, I, too, have been a seasoned judge for some time.

"[Defense Counsel]: Right.

"The Court: And I know how to handle this procedure. I have been sitting in the criminal bench for some period of time. I take a little offense to the lecture from counsel as to whether or not this should have been filed now or otherwise.

"[Defense Counsel]: I certainly apologize to the court . . . it had nothing to do with the court.

"The Court: I think it's fair, then—I accept your apology.

"[Defense Counsel]: Yeah, I do. That was not the intention, the intention was to explain my own behavior, not imply anything against the court.

"The Court: All right, well I think it's fair for everybody to be able to have an opportunity to review this memorandum that's been filed just minutes ago, and it's now eight pages in length with an affidavit also that's attached from a person who has not testified in this court."

With the agreement of both parties, the court then took a midday recess to allow the prosecutor additional time to review the defendant's motion to dismiss. When that recess concluded, the court heard argument on the merits of the motion from both the prosecutor and defense counsel. The court then denied the motion to dismiss and asked defense counsel if he wanted to put on any evidence. In response, defense counsel stated:

"Your Honor, at this time I'm going to ask that the court disqualify itself, and I move for your recusal. A reasonable defendant sitting in this chair . . . would find that this court's ruling on the evidence in the beginning of the case, as well as the discord that Your Honor and I had prior to the break, would find that you would be partial and biased towards him; he felt that way. And I move that you disqualify yourself and recuse yourself from this hearing." After acknowledging the gravity of that request, the court indicated that it would ask another judge to rule on the defendant's motion for judicial disqualification.

Following a recess, Judge Diana presided over a hearing on the defendant's motion, at which the court heard argument from the parties and playback of the foregoing colloquy between defense counsel and the court. In ruling on the motion, the court stated in relevant part: "It's a fundamental principle that to demonstrate bias sufficient to support a claim of judicial disqualification, the due administration of justice requires that such a demonstration be based on more than opinion or conclusion. Vague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse. The reasonable standard . . . is an objective one. The question is not only whether the particular judge is, in fact, impartial, but whether a reasonable person would question a judge's impartiality, based on the basis of all the circumstances. The law presumes that a duly elected or appointed judge, consistent with their oath of office, will perform their duties impartially and that they're able to put aside personal impressions regarding a party, the burden rests upon the party urging disqualification to show that it is warranted. . . . Based upon the evidence . . . my review of the [relevant] Practice Book section[s], the Code of Judicial Conduct, the exchange between counsel and [the trial

court], the apology [by defense counsel] and the acceptance [of that apology by the court, the facts of this case do] not rise to [the level of] a disqualification. The motion, therefore . . . is denied."

As our Supreme Court has observed, "[r]ule 2.11 (a) (1) of the Code of Judicial Conduct provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

Appellate review of the trial court's denial of a defendant's motion for judicial disqualification "is subject to the abuse of discretion standard. . . . That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.) *State* v. *Petaway*,

107 Conn. App. 730, 736, 946 A.2d 906, cert. denied, 289 Conn. 926, 958 A.2d 162 (2008).

In the present case, the defendant claims that a reasonable person would question the trial court's impartiality on the basis of certain adverse rulings that it made during the hearing and the aforementioned colloquy regarding the filing of the defendant's motion to dismiss. With respect to the former, it suffices to note that "adverse rulings by the judge do not amount to evidence of bias sufficient to support a claim of judicial disqualification." *State* v. *Bunker*, 89 Conn. App. 605, 613, 874 A.2d 301 (2005), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006). We further observe that the defendant's complaint that the court "offered no explanation for denying [his] right to confront the witness against him" is unfounded, as the defendant failed to bring that concern distinctly to the court's attention; see part I of this opinion; and he never requested an explanation or articulation from the court on that ruling, as expressly provided for in our rules of practice. See Practice Book §§ 64-1 and 66-5.

We also agree with Judge Diana that the colloquy regarding the filing of the motion to dismiss does not evince any partiality or bias on the part of the court. In that exchange, defense counsel clarified that his concern regarding the filing of the motion to dismiss "had nothing to do with the court" and offered an apology, which the court promptly accepted, stating, "I think it's fair then—I accept your apology." The court proceeded to grant a recess to afford the prosecutor additional time to review the defendant's motion and later heard argument from the parties before ruling on the merits of the motion. In sum, nothing in the transcript of the November 8, 2017 hearing reflects bias on the part of the court.

On our thorough review of the record before us, we cannot conclude that Judge Diana abused his discretion in concluding that a reasonable person would not

question the court's impartiality on the basis of the circumstances present in this case. Accordingly, the defendant's claim fails.

V

As a final matter, the defendant contends that the evidence adduced at the probation revocation hearing was insufficient to sustain the court's finding that he violated the terms of his probation. We disagree.

Under Connecticut law, a challenge to the court's determination during the adjudicatory phase of a violation of probation proceeding that a probationer has violated a condition of probation is governed by the clearly erroneous standard of review. As our Supreme Court has explained, in that adjudicatory phase the "trial court initially makes a factual determination of whether a condition of probation has been violated. In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling."[8] (Internal quotation marks omitted.) *State* v. *Hill*, 256 Conn. 412, 425–26, 773 A.2d 931 (2001).

In the present case, the record indicates that, prior to his release from incarceration, the defendant reviewed and signed the terms and conditions of his probation,

[8] By contrast, review of the court's determination during the dispositional phase of a probation revocation proceeding as to whether revocation is warranted is governed by the abuse of discretion standard. See *State* v. *Preston*, 286 Conn. 367, 377, 944 A.2d 276 (2008).

including the approval condition, and thereby manifested his understanding of the necessity to abide by those conditions. At trial, Sullivan testified that the approval condition obligated the defendant to obtain his approval prior to having any contact with a minor child. Sullivan explained that he received a report that a fourteen year old female had been residing in the defendant's apartment for approximately one week in December, 2016. When Sullivan confronted the defendant about that accusation, the defendant initially denied having any contact with her, but later broke down and started crying. Sullivan testified that he asked the defendant why he was crying, and that the defendant then admitted that the fourteen year old female "was staying at his residence and that he was having contact [with her]."

Sullivan and Valentin also testified that the investigation also included a visit to the defendant's apartment, where they encountered a sixteen year old who informed them that the fourteen year old female currently "was staying at [the defendant's] residence" and had done so at several intervals throughout the year, including holidays and recesses from school. Sullivan testified that the defendant had not obtained his approval for any such contact. The court, as trier of fact, was free to credit that testimony. *State* v. *Dunbar*, 188 Conn. App. 635, 642, 205 A.3d 747, cert. denied, 331 Conn. 926, A.3d (2019).

On the basis of that evidence, the court reasonably could find that the defendant violated his probation by not complying with the approval condition of his probation. The court's determination, therefore, is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EARL V. THOMPSON (AC 41780)

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

Syllabus

The defendant, who had been convicted of the crimes of conspiracy to commit robbery in the first degree, robbery in the first degree and kidnapping in the first degree, appealed to this court from the trial court's dismissal of his motion to correct an illegal sentence. In his operative motion, he alleged that his conviction of conspiracy to commit robbery in the first degree should be vacated because the state failed to present sufficient evidence that a plan existed between the defendant and his codefendant to threaten the victim with a gun after they gained entry into the victim's home, or showing that he intentionally aided his codefendant in the commission of the crime of robbery in the first degree. On appeal, the defendant claimed that the court improperly concluded that it lacked jurisdiction to consider the claim raised in his motion. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; for that court to have jurisdiction over the motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's claim here that the state did not present sufficient evidence to support his conviction of conspiracy to commit robbery in the first degree constituted a collateral attack on the validity of his conviction, via a sufficiency of the evidence claim, and did not challenge the legality of the sentence or the manner in which it was imposed.

Argued April 8—officially released June 18, 2019

Procedural History

Substitute information charging the defendant with the crimes of conspiracy to commit robbery in the first degree, robbery in the first degree, burglary in the first degree and kidnapping in the first degree as an accessory, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of burglary in the first degree; verdict of guilty of conspiracy to commit robbery in the first degree, robbery in the first degree and kidnapping in the first degree; subsequently, the court denied the defendant's motion for a new trial

and rendered judgment in accordance with the verdict, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the court, *Dewey, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Mark Diamond, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and, on the brief, *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Earl V. Thompson, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. In this appeal, the defendant claims that the trial court improperly concluded that it lacked subject matter jurisdiction to consider his motion. We conclude that, in the motion to correct considered by the trial court, the defendant challenged only the validity of his conviction and not his sentence or the sentencing proceeding, and, therefore, the court properly determined that it lacked subject matter jurisdiction. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion. The defendant was convicted, after a jury trial, of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (4) and 53a-48, robbery in the first degree in violation of § 53a-134 (a) (4) and kidnapping in the first degree as an accessory in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-8. See *State* v. *Thompson*, 128 Conn. App. 296, 298, 17 A.3d 488 (2011), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012). Following his conviction, the court sentenced him to a term of twenty years

incarceration on each of the robbery counts, to run concurrently, and a term of twenty-five years incarceration on the kidnapping count, to run consecutively to the other terms, for a total effective sentence of forty-five years of incarceration. Id., 300. This court affirmed the defendant's conviction on direct appeal.[1] Id., 298.

On October 29, 2015, the self-represented defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. He argued that his sentence was internally contradictory and violated his right against double jeopardy. The front page of this motion contains two notations from the court. The first notation, dated March 31, 2016, states that the motion was

[1] In this court's decision, we set forth the following facts: "At approximately 11:30 p.m. on August 10, 2004, Stephan Julian arrived at her home in Bloomfield. At that time, her son, Damien Gardner, resided with her but was not present that night. As Julian entered the house, she was confronted by a man with a gun. A second man, also armed with a gun, quickly emerged. Because the faces of both men were covered, Julian could not recognize them, but she was able to determine that they were both dark skinned with Jamaican accents. The men repeatedly asked Julian where money was located in the house and forced her to lie on the floor in a downstairs bathroom while they searched the house. The men periodically checked on Julian, and she could hear them going up and down the stairs of her home. At one point, she heard an upstairs toilet flush. Eventually, when Julian no longer heard the men in her home, she peeked out of the bathroom and saw that it was light outside. She exited the bathroom and called the police.

"Detective Eric Kovanda was primarily responsible for processing the crime scene. In addition to other forensic evidence, Kovanda collected two urine samples from the rim of the toilet located in one of the upstairs bathrooms. The DNA profile developed from the urine swabs did not match any in the existing offender databases. In 2006, two jailhouse informants identified the defendant as a suspect, and, consequently, on February 11, 2008, the police collected a DNA sample from the defendant for comparison to the DNA profile developed from the urine samples that had been collected from the crime scene.

"On February 28, 2008, Kovanda met with the defendant to discuss the August 11, 2004 incident. The defendant indicated that he knew Julian's son, Gardner, and that he had been at their house a week or a few days prior to August 11, 2004. The defendant was arrested and charged with conspiracy to commit robbery in the first degree, robbery in the first degree, burglary in the first degree and kidnapping in the first degree as an accessory. . . .

"At the close of evidence, the state conceded that it had not presented sufficient evidence to support the burglary charge, and the court granted the defendant's motion for a judgment of acquittal as to that charge. The jury found the defendant guilty of the remaining counts." *State* v. *Thompson*, supra, 128 Conn. App. 298–300.

withdrawn. The second notation, dated August 24, 2016, states that the motion should be placed back on the docket and that a special public defender would review the motion to correct an illegal sentence. The self-represented defendant essentially reasserted the contents of his motion to correct an illegal sentence in a motion dated May 6, 2016,[2] and captioned "Motion to reopen Motion to correct illegal sentence pursuant to Connecticut Practice Book [§] 43-22." This "motion to reopen" included the claims that the defendant's sentence was internally contradictory and violated his right against double jeopardy.

On September 20, 2016, Attorney Robert J. McKay entered an appearance on behalf of the defendant. On April 24, 2017, McKay filed a motion to correct an illegal sentence. In the accompanying memorandum of law, McKay set forth the following: "The defendant now comes and claims that . . . there is a question regarding which statutory provision . . . applied at that time. Within the current case law, the defendant's conviction for conspiracy to commit robbery in the first degree . . . should be vacated as there existed no facts to support that there existed a plan between the defendant and a codefendant to threaten the victim with a gun upon enter[ing] the victim's home and/or intentionally aided the codefendant in committing the offense of robbery in the first degree."[3] McKay did not present a

[2] The court's date stamp on the defendant's motion to reopen is illegible and we cannot discern when this motion was received by the trial court.

[3] Three days later, during a brief hearing, the following colloquy occurred:

"The Court: Counsel, you have filed a substantial memoranda in support of the motion.

"[Defense Counsel]: Yes, Your Honor.

"The Court: And at this point, there is nothing left other than for me to review the allegations—

"[Defense Counsel]: Right.

"The Court: —individually and file my response to that.

"[Defense Counsel]: Yes, Your Honor.

"[The Prosecutor]: Thank you, Your Honor.

"The Court: That is it. So at this point, I have all the papers. I'll be reviewing them. I'll get to the decision as soon as is possible. Thank you.

"[Defense Counsel: Thank you."

double jeopardy argument in his motion to correct. On May 25, 2017, the state filed an objection to the motion to correct an illegal sentenced filed by McKay.

On July 28, 2017, the court dismissed the motion to correct an illegal sentence filed by McKay. It set forth the general legal principles regarding a motion to correct filed pursuant to Practice Book § 43-22. It then concluded: "Insofar as the defendant's motion to correct constituted a collateral attack on his conviction it is outside of this court's jurisdiction. See, e.g., *State* v. *Starks*, 121 Conn. App. 581, 590, 997 A.2d 546 (2010); *State* v. *Wright*, 107 Conn. App. 152, 157–58, 944 A.2d 991, cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008)." Furthermore, the last page of the motion to correct an illegal sentence filed by McKay contains the following handwritten notation, signed by Judge Dewey: "[D]ismissed, see memorandum of decision." This appeal followed.

We begin by setting forth the relevant legal principles and our standard of review. "The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to

correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Mukhtaar*, 189 Conn. App. 144, 148–49, A.3d (2019); see also *State* v. *Walker*, 187 Conn. App. 776, 783–84, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019). The determination of whether a claim may be brought via a motion to correct an illegal sentence presents a question of law over which our review is plenary. *State* v. *Abraham*, 152 Conn. App. 709, 716, 99 A.3d 1258 (2014); *State* v. *Koslik*, 116 Conn. App. 693, 697, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009).

"[A]n illegal sentence is essentially one which . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . Considering these categories . . . this court [has] held . . . that a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal

sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 779, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). Stated differently, "the motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal . . . ." Id., 781.

In the memorandum in support of the motion to correct an illegal sentence filed by McKay, the defendant expressly challenged his conviction for conspiracy to commit robbery in the first degree. Specifically, he argued that his conviction for that offense should be vacated because the state failed to present evidence that (1) a plan existed between the defendant and the codefendant to threaten the victim with a gun after entry into the victim's home and/or (2) the defendant intentionally aided the codefendant in the commission of the crime of robbery in the first degree. Simply stated, the defendant claims that there was insufficient evidence to support his conviction for conspiracy to commit robbery in the first degree.

The motion filed by McKay was the only one considered and decided by the court. Thus, the only claim before the court was whether the state had produced sufficient evidence to support the defendant's conviction for conspiracy to commit robbery in the first degree. In *State* v. *Starks*, supra, 121 Conn. App. 590, this court held that a claim of insufficient evidence "do[es] not concern the legality of [a defendant's sentence] or the manner in which it was imposed" and therefore lies outside the court's jurisdiction in regard to a motion to correct an illegal sentence. Put differently, the defendant's motion constituted a collateral attack on his conviction and, thus, was not within the court's jurisdiction. See, e.g., *State* v. *Koslik*, supra, 116

Conn. App. 699. Accordingly, we conclude that the court properly dismissed the motion to correct an illegal sentence filed by McKay.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ANAISHALY C. ET AL.*

(AC 41830)
(AC 41889)

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

Syllabus

The respondent parents filed separate appeals to this court from the judgments of the trial court terminating their parental rights with respect to their minor children A and K. The trial court had found, inter alia, that the children came into the custody of the petitioner, the Commissioner of Children and Families, because of the respondents' problems with marijuana use, domestic violence and transience. The court considered the respondents' refusal to submit to substance abuse testing, concerns over domestic violence, and the lack of suitable housing when it concluded that the respondents had failed to achieve a sufficient degree of personal rehabilitation since the Department of Children and Families began providing reunification services to them. *Held*:

[4] We have reviewed the record, including the court file and the memorandum of decision, and conclude that the motion to correct and the motion to reopen filed by the self-represented defendant were not before the trial court. Thus, it never considered or acted upon the double jeopardy claim raised in those motions. We note that "[a] violation of a defendant's right against double jeopardy is one of the permissible grounds on which to challenge the legality of a sentence [in a motion to correct an illegal sentence]." *State* v. *Santiago*, 145 Conn. App. 374, 379, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013); see also *State* v. *Wade*, 178 Conn. App. 459, 466, 175 A.3d 1284 (2017) (defendant properly may raise double jeopardy claim in context of motion to correct illegal sentence), cert. denied, 327 Conn. 1002, 176 A.3d 1194 (2018).

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

1. The respondents could not prevail on their claim that there was insufficient evidence for the trial court to find by clear and convincing evidence that they had each failed to achieve the degree of personal rehabilitation as would encourage the belief that, within a reasonable time, they could assume a responsible position in the lives of the children: the respondents' claim that there was no evidence that their use of marijuana affected their ability to parent was unavailing, as they offered no authority to support their claim that the movement toward legalization of marijuana was relevant to the law the court was required to apply in evaluating the evidence in this case, the respondents' personal history of substance abuse, which had included the illegal use of marijuana, as well as other substances, had properly informed and determined their specific steps, which, in turn, were prerequisites to their own rehabilitation, the current movement and controversy over the legalization of marijuana in the criminal justice context was irrelevant because there is a vast difference in the purpose and application of criminal laws designed to protect the general public as compared to specific steps tailored to parents whose parenting issues are precisely why they had come to the attention of the department and the child protection court in the first instance, and the court properly found that the evidence showed the respondents' significant lack of insight about the correlation between substance abuse and intimate partner violence, as well as their failure to recognize how their use of illegal substances had harmed the children; moreover, the respondents' claim that there was insufficient evidence for the trial court to conclude that they had failed to rehabilitate on the basis of their problems with domestic violence was also unavailing, because although the court did not find that there were any instances of domestic violence since 2016, it was reasonable for the court to infer that the respondent father had not been able to control his temper or anger, and the record indicated that the court did not base its determination regarding failure to rehabilitate solely on the respondents' problems with domestic violence; furthermore, the respondents could not prevail on their claim that their housing situation did not support the trial court's ultimate conclusion that they had failed to rehabilitate, as the respondents' housing situation was one of multiple factors the court considered when it made its decision, and although the respondents were living with the father's mother, there was evidence, which the court credited, to support its conclusion that such housing was neither suitable nor permissible.
2. The respondents could not prevail on their claim that the trial court improperly determined that the termination of their parental rights was in the best interests of the children, which was based on their claim that the court's conclusion was improper in light of its findings that they had made progress in their rehabilitation and that they had a strong bond with the children: that court found that the respondents, despite receiving many supportive services during the lengthy pendency of this matter, did not resolve the serious and chronic problems that resulted

in the children's commitment to the custody of the commissioner, and that the children required the security of a safe and stable, permanent home, which their current placement in a foster home provided to them, and which the respondents remained unable to provide; moreover, although the court found that the respondents had made some progress in their rehabilitation efforts, it also found that despite successfully completing certain programs, the respondents were unsuccessful or noncompliant with others since the department removed the children from their care, and even when there is a finding of a bond between a parent and a child, as the court found in the present case, it still may be in the child's best interest to terminate parental rights.

Argued January 16—officially released June 10, 2019**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to certain of their minor children, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Dyer*, *J.*; judgments terminating the respondents' parental rights, from which the respondents filed separate appeals with this court. *Affirmed.*

David J. Reich, for the appellant in AC 41830 (respondent father).

Joshua Michtom, assistant public defender, for the appellant in AC 41889 (respondent mother).

Rosemarie T. Weber, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee in both cases (petitioner).

Opinion

ELGO, J. The respondent mother (mother) and the respondent father (father)[1] appeal from the judgments of the trial court terminating their parental rights with

** June 10, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We refer to the mother and the father collectively as the respondents.

respect to their minor children, Anaishaly C. and Khrianalis C.,[2] and appointing the petitioner, the Commissioner of Children and Families (commissioner), as the statutory parent.[3] The respondents contend that the court improperly concluded that (1) they failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112, and (2) termination of their parental rights was in the best interests of the children. We affirm the judgments of the trial court.

The following facts, which the trial court found by clear and convincing evidence, and procedural history are relevant to the resolution of this appeal. On August 28, 2012, the father was arrested on charges of assault in the third degree and disorderly conduct after he punched and kicked the mother during an argument at their residence, leaving a boot shaped imprint on her back. The mother was transported to the hospital by ambulance. Although the father told police officers that he had consumed several drinks, the police report noted his ability to articulate his thoughts clearly and calmly. According to the police report, the mother told officers that Anaishaly, who was born in June, 2011, and was fourteen months old at the time, was living with the respondents and had not witnessed the assault. Thereafter, a no contact protective order was issued by the criminal court. The order barred the father from initiating any contact with the mother and required him to vacate the home that they shared.

On October 21, 2014, the mother met with a Department of Children and Families (department) social worker and its domestic violence consultant. At that time, the mother indicated that she was afraid of the

[2] The mother gave birth to two other children. See footnote 6 of this opinion. We refer to all four children individually by their names, and we refer to Anaishaly and Khrianalis collectively as the children.

[3] We note that pursuant to Practice Book § 67-13, the attorney for the minor children filed a statement adopting the brief of the commissioner in the mother's appeal.

father and informed the department about his ongoing abuse. She told the department personnel about the incident that occurred on August 28, 2012, and about another occasion in which the father had choked and had assaulted her, which left a scar on her forehead. On October 22, 2014, after the mother signed a safety plan in which she agreed to have no contact with the father,[4] the department brought her and Anaishaly to a domestic violence shelter. During October, 2014, the mother received drug treatment because she had rendered a positive urine test during a substance abuse assessment.

On October 27, 2014, the department learned that the mother and Anaishaly were no longer at the shelter after a department worker called the cell phone number provided by the mother and the father answered. He stated that he was at work and that the mother was at home with Anaishaly. Later that day, the mother spoke with a department worker. She reported that she had bipolar disorder, expressed her reluctance to return to the shelter, and recanted the allegations that the father had abused her physically. On that same date, the commissioner assumed temporary custody of Anaishaly, who was then three years old, pursuant to an administrative ninety-six hour hold. On October 30, 2014, the commissioner filed a neglect petition as to Anaishaly and obtained an ex parte order of temporary custody. That order was sustained at a hearing held on November 5, 2014.[5]

[4] According to a department social worker affidavit, pursuant to the safety plan, the mother agreed to go to the domestic violence shelter, follow the shelter's rules, and follow its recommendations, including those related to advocacy and domestic violence education. The mother also agreed to have no contact with the father and to file a restraining order against him. She further agreed to request advocacy regarding her lease. The department agreed to maintain communication with the mother and shelter staff. It also agreed to continue its assessment and to provide case management services.

[5] The file indicates that the respondents were issued specific steps filed on October 30, 2014, and signed by the respondents on November 5, 2014, which provided, inter alia, that they: participate in counseling and make

At 4:11 a.m. on January 1, 2015, police were called to the respondents' address. The police report indicated that the father had kicked in the front door of the apartment and attempted to punch the mother. Responding officers observed the damaged door, overturned furniture, and other vandalism. The father was not at the scene when the police arrived. The police returned to the residence again at approximately 6 a.m., at which time the mother told the police that she had received a telephone call from the father, who had threatened to "kill her" and "burn down" the apartment. (Internal quotation marks omitted.) The police discovered the father on the premises and arrested him on charges of threatening, criminal mischief, disorderly conduct, and possession of a hallucinogenic substance. The police report noted that the father was "acting like he had consumed some kind of drug(s) and alcohol." Tablets, later identified as the illegal drug ecstasy, were found on the father's person. The police report also noted that the father was combative during booking. On January 2, 2015, another full no contact protective order was issued against the father, which prohibited him from having any contact with the mother and required him to stay 100 yards away from her. He subsequently was convicted of threatening and received a six month suspended jail sentence as a result of this incident.

Anaishaly was adjudicated neglected and committed to the commissioner's custody on February 24, 2015. Thereafter, the department referred both respondents to various rehabilitative services in order to facilitate their reunification with Anaishaly. During 2015, the

progress toward the identified treatment goals; not use illegal drugs or abuse alcohol or medicine; submit to random drug testing; cooperate with service providers' recommendations for parenting/individual/family counseling, in-home support services, and/or substance abuse assessment/treatment; get and/or maintain adequate housing and a legal income; and learn about the impact of domestic violence on children.

mother successfully completed an intimate partner violence course, substance abuse treatment, and a parenting education course.

The father's progress reports revealed mixed results. Although a department report received on March 18, 2015, indicated that he had attended all sessions in a parenting education course, he did not appear to gain insight about "how to effectively parent and display an image of a good father to his child." He also received drug treatment, from which he was discharged on September 29, 2015. Although his drug tests were negative on August 3, August 17 and September 28, 2015, he tested positive for opiates on September 8, 2015, and positive for oxycodone on September 14, 2015. The father claimed that the positive urine tests resulted from his use of his mother's prescription pain killers to treat a back injury. Following his completion of a family violence program on November 17, 2015, the department believed that he made progress in that program.

Khrianalis was born in August, 2015. After being discharged from the hospital, she lived with the respondents. Approximately six months after Khrianalis was born, the department referred the respondents to the Village for Children & Families (Village) for reunification services in an effort to reunify Anaishaly with the respondents and Khrianalis. The Village began providing reunification services on March 3, 2016. On the basis of the respondents' satisfactory participation with the Village, the department returned Anaishaly to the respondents' home on a trial basis on May 31, 2016.

Approximately one month later, on June 28, 2016, neighbors overheard the father cursing at the mother, followed by loud noises coming from the respondents' apartment. Several tenants were concerned that it sounded like the father was physically abusing the mother. A department social worker met with the respondents the next day. Both respondents denied that

there had been any physical violence. They told the department social worker that they had not argued but had discussed an accusation that the father had been seen with another woman earlier that day. The department social worker also learned that the mother was pregnant. The department social worker spoke with Anaishaly, who was five years old at the time. Anaishaly reported to the department social worker that she and Khrianalis had stayed the previous night at their paternal grandmother's home. She also reported that she had observed the mother and the father arguing and had observed the father hit the mother. Anaishaly proceeded to describe verbally and physically where and how the father hit the mother, pointing to her left cheek when asked where the mother was hit. She showed an open hand and performed a slapping motion when she was asked how the father hit the mother. In response to Anaishaly's disclosure, "[t]he [respondents] openly blamed Anaishaly for the current situation, saying she has lied about witnessing violence and has lied on a frequent basis."

As a result of this incident, the department returned five year old Anaishaly to foster care on June 29, 2016. On that same date, the commissioner assumed temporary custody of almost ten month old Khrianalis pursuant to an administrative ninety-six hour hold. On July 1, 2016, the commissioner filed a neglect petition as to Khrianalis and obtained an ex parte order of temporary custody. That order was sustained on July 8, 2016. Khrianalis was adjudicated neglected on September 8, 2016. The children have remained in department foster care continuously from June 29, 2016, to the time of trial and have been placed with their paternal stepuncle, Jose Q., and his domestic partner.

On July 1, 2016, the court issued amended specific steps to the respondents. They were "ordered, inter alia, to cooperate with counseling and gain insight about how domestic violence affects their children; abstain

from illegal drugs; submit to random drug testing; submit to substance abuse evaluations and follow treatment recommendations; visit the children as often as permitted; and obtain suitable housing." To facilitate their compliance with the treatment goals and reunification, the department referred the respondents to appropriate services and treatment that focused on their problems with substance abuse, parenting skills, intimate partner violence, and lack of suitable housing.

On November 26, 2016, the mother gave birth to another daughter, Knitzeyalis.[6] Both the mother and the child's meconium tested positive for marijuana. On November 30, 2016, the commissioner obtained an ex parte order granting her temporary custody of Knitzeyalis. That order was sustained by the court at a hearing held on December 9, 2016.[7] Knitzeyalis was adjudicated neglected and committed to the commissioner's custody on January 3, 2017. She has remained in the commissioner's custody and guardianship from the date of her removal through the time of trial and lives with her sisters in the foster home of Jose Q.

As the court indicated in its memorandum of decision, "[e]xtensive evidence was presented during this trial about the [respondents'] varying degrees of cooperation and involvement with services during the past two years." On September 29, 2016, prior to the birth

[6] The respondents' parental rights as to Knitzeyalis are not the subject of this action. The mother also has an older child, Taisha R.G., who was born on December 19, 2007. According to a department social study, from "March 19, 2008, to August, 2009, [the mother] had protective services involvement in Massachusetts due to domestic violence and homelessness/transience." Guardianship of Taisha was transferred from the mother to the child's paternal grandmother in May, 2008. Since that time, Taisha has remained in her paternal grandmother's care.

[7] In its memorandum of decision, the court took judicial notice of the fact that "the court issuing that order of temporary custody made a legal finding that Knitzeyalis was in immediate danger of physical injury from [the] surroundings in the parental home at the time the order was signed."

of Knitzeyalis, the department referred the respondents to the Intimate Partner Violence-Family Assessment Intervention Response (IPV-FAIR) program at Community Health Resources. The service provider informed the department that the respondents were discharged from the program on January 3, 2017, due to poor attendance.

On May 5, 2017, the commissioner filed termination of parental rights petitions as to the respondents on behalf of the children. The department had been providing reunification services since October, 2014, when Anaishaly was first placed into foster care at three years old. At the time the petitions were filed, Anaishaly was nearly six years old, and Khrianalis, who was placed in foster care when she was almost ten months old, was twenty months old.

The respondents subsequently reengaged in the IPV-FAIR program on May 22, 2017, and successfully completed it on November 1, 2017. They attended the IPV-FAIR program "regularly, participated consistently in the sessions, were cooperative, and made progress in the program."[8] In a discharge summary dated November 11, 2017, an outreach therapist at Community Health Resources "recommended that [the father] should undergo a mental health assessment and follow treatment guidelines to deal with [the] underlying trauma issues in his life that appear to cause his reactive behavior." The father had not initiated this treatment as of the conclusion of trial.

On October 24, 2017, while the termination of parental rights petitions were still pending, the department

[8] In addition to the IPV-FAIR program, the mother also successfully completed an "Intimate Partner Violence Group" on September 17, 2016, and a "Positive Parenting & Support Group" on May 20, 2017. (Internal quotation marks omitted.) The mother also completed similar domestic violence programs known as "Integrated Family Violence Services" on dates not specified and "Positive Parenting Education and Support Groups" on July 28, 2015, and September 17, 2016. (Internal quotation marks omitted.)

referred the family to the Village for a reunification readiness assessment to determine if the children could be safely returned to the respondents' care. Chastity Chandler, who holds a master's degree in social work and is employed as a family support specialist at the Village, was assigned to conduct the thirty day evaluation. She met with the family on eight occasions. She observed four visits between the respondents and the children and also visited the family home four times. The court found that Chandler "credibly reported that [the respondents] actively engaged with the children during the visits and that [the respondents] were capable of meeting the children's basic needs. . . . She credibly testified that the respondents displayed love and affection for the children during these contacts and that a strong bond exists between the [respondents] and their children. . . . Chandler testified credibly that Anaishaly articulated her desire to live with [the respondents]." (Citations omitted.)

Chandler, however, did not recommend reunification. Notwithstanding the pendency of the termination of parental rights petitions, both respondents were noncompliant with random drug testing. The father cooperated with only one out of twelve random drug screens. He did not appear for his first random drug test on September 8, 2017. He submitted a sample that was negative for all illicit substances on September 19, 2017, but he then failed to attend all subsequent random testing sessions. Further, the father told Chandler that he would continue smoking marijuana after the children were returned to his care because he did not believe that using it was harmful. The mother refused to give a urine sample when one was requested on October 25, 2017. Both respondents refused to submit to segmented hair tests.

On November 21, 2017, Chandler held a "closing meeting," which was attended by the respondents and department personnel, where she explained the outcome of the Village's reunification assessment to the

respondents. During the meeting, the father became upset, used profanity, made a threat to harm a department social worker, and threatened that he would "blow up" the department office.

After the reunification assessment, in December, 2017, the department asked both respondents to submit to segmented hair drug testing. The mother did not attend scheduled appointments for hair testing on either December 21 or December 26, 2017. A hair sample was collected from the mother on January 2, 2018, which came back negative. The mother admitted, however, that she had used marijuana sometime between Christmas and New Year's Day.[9] The father appeared for testing on December 26, 2017, but because he had cut his hair, he could not provide a testable sample. Between that date and trial, the father had been scheduled for four appointments for hair testing, and he had still not been tested.

The court also found that the respondents failed to secure adequate housing. At the time of the reunification assessment, in the fall of 2017, the respondents were residing in a five bedroom apartment that was leased by the father's mother, who was the recipient of section 8 housing benefits whereby program rules prohibited the respondents from living with her in the apartment. Consequently, the court found that "at the time of the readiness reunification assessment, the [respondents] lacked stable housing for [the children and Knitzeyalis]." In making these findings, the court also found relevant that in February, 2017, the mother was dismissed from a supportive housing assistance program, which provided her with rental assistance, due to noncompliance with program rules. The program

[9] A clinician at the agency where the testing was conducted testified that the mother's use of marijuana would likely not have shown on the hair test because of how recently the hair sample was collected relative to the time frame of the mother's reported use of the drug.

allowed for two warnings of noncompliance, and the mother was issued three warnings due to disturbances at the home and her failure to attend meetings.

Through the date of trial, the children resided with their foster parents, their foster parents' two children, and Knitzeyalis. The court found that the children have bonded well with their foster parents and other family members. Although Jose Q. and his domestic partner initially told the department that they would not serve as long-term placement resources, they have since informed the department that they are willing to adopt the children. The court credited a department social study, which opined that the children "need permanent and stable living arrangements in order to grow and develop in a healthy manner."

A trial on the termination of parental rights was held on January 11, April 12 and May 1, 2018. On May 22, 2018, the court terminated the respondents' parental rights and appointed the commissioner as the children's statutory parent. This appeal followed.

I

The respondents first claim that there was insufficient evidence for the trial court to find by clear and convincing evidence that they have each failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, they could assume a responsible position in the lives of the children.[10] We disagree.

We begin by setting forth the applicable standard of review and general principles. "The trial court is

[10] We note that the father does not argue that the court's findings are clearly erroneous and, in the mother's appellate brief, she explicitly states that she "does not by the present appeal challenge the trial court's factual findings." Instead, both respondents argue that those findings are insufficient to support the court's ultimate conclusion.

required, pursuant to § 17a-112,[11] to analyze the [parents'] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

[11] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"When a child is taken into the commissioner's custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights." (Citations omitted; footnote added; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted.) *In re Elvin G.*, 310 Conn. 485, 507–508, 78 A.3d 797 (2013).

"While . . . clear error review is appropriate for the trial court's subordinate factual findings . . . the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587–88.

"An important corollary to these principles is that the mere existence in the record of evidence that would support a different conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is *enough* evidence in the record to support the finding that the trial court made." (Emphasis altered.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

The court found by clear and convincing evidence that the department's offer and provision of services from 2015 through the end of the trial "constituted reasonable and timely efforts by the department to assist each parent's rehabilitation and to reunify the family."[12] It also found by clear and convincing evidence that the respondents had each "failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering [the] ages and needs of [the children], they could assume a responsible position in the lives of those children." Our review of the record in light of the lengthy recitation of the factual findings made by the court convinces us that the extensive evidence credited by the court supports its determination.

The court found that "[the children] came into [the commissioner's] custody because of [the respondents'] problems with marijuana use, domestic violence and transience. Anaishaly was twice removed from the custody of [the respondents]. She has been committed to the [commissioner's custody] since February 24, 2015. Khrianalis followed her sister into the child protection

[12] We note that the respondents do not argue on appeal that the department did not make reasonable and timely efforts to assist in their rehabilitation and reunification with the children.

system on June 29, 2016. Both children have lived in their current foster home since that date." The court concluded "[b]ased on all of the evidence presented . . . that [the respondents] are unable or unwilling to benefit from the extensive assistance that [the department] and other agencies have offered and provided to them while the children's cases have been pending." As the court explained in its memorandum of decision: "[The department] has offered and provided multiple reunification services to [the respondents] on an ongoing basis since October, 2014. These have included mental health counseling, substance abuse evaluations, counseling and testing, parenting education, intimate partner violence programs, supervised visitation, case management, supportive housing assistance, and reunification readiness assessments and services. The court has found that these services were timely and constituted reasonable efforts to reunify the family. The respondents successfully completed some programs, but they were unsuccessful, or noncompliant, with others. One [department] witness offered an apt analogy during her testimony when she likened the twists and turns of this case to a roller coaster ride. There were high points when [the respondents] appeared to be making progress, followed by low points when the [respondents], who were twice assessed for the return of the children, engaged in negative behavior that stopped reunification in its tracks."

In challenging these findings, both respondents argue that there is no evidence that their use of marijuana affected their ability to parent, and that "because the law concerning [the criminalization of] marijuana has changed, this change must also be reflected in the law concerning child protection . . . ." We are not persuaded.

First, the respondents offer no authority to support their claim that the movement toward legalization of

marijuana is relevant to the law the court was required to apply in evaluating the evidence in this case. Indeed, our Supreme Court has held otherwise. The court in *In re Shane M.*, supra, 318 Conn. 596 n.23, found "unpersuasive the respondent's claim that, even properly drawn, [the] inference [that he had continued to use marijuana based on his proven past marijuana use and his refusal to submit to drug testing] did not prove that he failed to rehabilitate because criminal penalties for possession of marijuana have been reduced and the legislature has approved the use of marijuana for palliative medical purposes." Our Supreme Court reasoned that, "regardless of marijuana's recent limited legalized status, the respondent was ordered to refrain from using it due to his extensive personal history of substance abuse." Id. Similarly, in the present case, the respondents' personal history of substance abuse, which has included the illegal use of marijuana, as well as other substances, has properly informed and determined their specific steps, which, in turn, are prerequisites to their own rehabilitation. See id.; see also *In re Elvin G.*, supra, 310 Conn. 507–508 ("[s]pecific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights").

Second, there is a vast difference in the purpose and application of criminal laws designed to protect the general public as compared to specific steps tailored to parents whose parenting issues are precisely why they have come to the attention of the department and the child protection court in the first instance. In the same way that the general public may legally consume alcohol while those who are alcohol dependent may not enjoy the same freedom, less restrictive laws around marijuana use for the general public[13] have no bearing

[13] In her appellate brief, the mother specifically refers to the permitted palliative use of marijuana; see General Statutes § 21a-408a et seq.; and the decriminalization of possession of less than one-half ounce of marijuana. See General Statutes § 21a-279a.

on respondents whose abuse of substances, including marijuana, has required treatment and abstention. The current movement and controversy over the legalization of marijuana in the criminal justice context is simply irrelevant.

Further, the respondents' focus on the legalization of marijuana operates on the assumption that their admissions of marijuana use are credible evidence of the extent of their rehabilitation. Understood in the context of the respondents' failure to cooperate with drug testing, evidence amounting to the respondents' self-report of marijuana use was simply that—a self-serving assessment of their own rehabilitative status—which the court was free not to credit. In fact, the proper measure of their compliance with the requirement that they refrain from abusing substances is in their ability to provide negative and randomized drug testing results over a sustained period of time, which they failed to do. The respondents knew full well that the failure to submit to drug testing violated their specific steps, which, in turn, would impede reunification with their children. Understanding these consequences, and notwithstanding the pending termination petitions, the respondents nevertheless chose not to comply, which the court properly considered in finding that the respondents failed to rehabilitate. In observing that the mother "was also aware that her fitness to resume custody of [the children and Knitzeyalis] was being evaluated when she refused to submit to drug testing in October, 2017," the court gave appropriate weight to this factor when considering whether the respondents were willing and able to reunify with the children.

We simply do not find fault in the court's finding that "the [respondents'] refusal to comply with drug testing during the assessment period, and the father's attitude about continued marijuana use, [was] particularly disturbing. This evidence reveals each parent's significant lack of insight about the correlation between substance

abuse and intimate partner violence, as well as their failure to recognize how their use of illegal substances has harmed [the children] and Knitzeyalis."

The respondents also argue that there was insufficient evidence for the court to conclude that they had failed to rehabilitate on the basis of their problems with domestic violence, noting that there were no incidents of intimate partner violence since 2016, and that they had each completed domestic violence programs.[14] We

[14] The mother argues that the court cited to a department social study written before she completed the IPV-FAIR program in November, 2017, to support the following findings: "The court finds that the mother lacks understanding about the dynamic of intimate partner violence that exists in her relationship with the father, and how it is harmful to her children. The court finds that there is a substantial likelihood that [the children] would be exposed to acts of domestic violence, or other angry outbursts by [the father] if they were returned to parental custody. The court also finds that [the mother] has not demonstrated that she would be able to shield [the children] from the potential physical and psychological dangers associated with the father's reactive behavior." The mother, however, has not distinctly raised a claim that the court's factual findings were clearly erroneous. To the contrary, she specifically states in her appellate brief that she "does not by the present appeal challenge the trial court's factual findings." Moreover, on the evidence before us, we do not conclude that the court's factual findings were clearly erroneous. "In reviewing the trial court's decision, [b]ecause it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 593 n.20.

We further note that the mother completed the IPV-FAIR program to which she refers in November, 2017, subsequent to the May, 2017 filing of the termination of parental rights petitions. Practice Book § 35a-7 (a) provides: "In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." This court "has expanded that rule to *allow* courts to consider events subsequent to the filing date of the petitions in the adjudicatory phase of termination proceedings. Practice Book § 33-3 (a) [now § 35a-7] limits the time period reviewable by the court in the adjudicatory phase to the events preceding the filing of the petition or the latest amendment. . . . In the adjudicatory phase, the court *may* rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis in original; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 494–95, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003).

reiterate that, on review, we must determine "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that *the cumulative effect of the evidence* was sufficient to justify its [ultimate conclusion]." (Emphasis added; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 588.

The record indicates that the court did not base its determination regarding failure to rehabilitate solely on the respondents' problems with domestic violence. The court expressed its specific concern with the father's history of domestic violence and the link between at least two of those instances and his use "of alcohol and/or illegal controlled substances." Although the court did not find that there were any instances of domestic violence since 2016, it was reasonable for the court to infer that the father has not been able to control his temper or anger. The court specifically noted "the similarity between [the father's] conduct on January 1, 2015, when he threatened to kill [the mother] and burn down her apartment, and his behavior on November 21, 2017, when he threatened to cause physical harm to [a department social worker] and blow up the [department] office." That November 21, 2017 incident occurred after the respondents had completed the IPV-FAIR program.

The respondents also argue that their housing situation did not support the court's ultimate conclusion that they have failed to rehabilitate. We again note that we must look at the cumulative effect of the evidence; *In re Shane M.*, supra, 318 Conn. 588; and that the respondents' housing situation was but one of multiple factors the court considered when it made its decision. The court credited the evidence that the respondents cannot legally stay with the children at the home of the father's mother. It concluded that, "[a]s a result, the mother and the father are still without suitable housing for the children . . . [and] this problem might have

been solved if the mother had not been discharged due to noncompliance last year from the supportive housing assistance program to which she had been referred by [the department]." Neither respondent challenges the court's factual findings. See footnote 10 of this opinion. Although the respondents were living with the father's mother, there was evidence, which the court credited, to support its conclusion that such housing was neither suitable nor permissible.

The court's memorandum of decision plainly indicates that the court considered the respondents' refusal to submit to substance abuse testing, concerns over domestic violence, *and* the lack of suitable housing when it concluded that the respondents have failed to achieve a sufficient degree of personal rehabilitation since the department began providing reunification services to the respondents, beginning in October, 2014. The record before us contains evidence that substantiates these findings. Accordingly, we conclude that the court reasonably could have determined, on the basis of its factual findings and the reasonable inferences drawn therefrom, that the respondents failed to achieve sufficient rehabilitation that would encourage the belief that, within a reasonable time, they could assume a responsible positon in the children's lives.

II

The respondents next claim that the court improperly determined that the termination of their parental rights was in the best interests of the children. Specifically, they argue that the court's conclusion was improper because the court found, among other things, that they have made progress in their rehabilitation and that they have a strong bond with the children.[15] We disagree.

[15] The mother also asserts "that there was absolutely no evidence adduced suggesting that ongoing visits with the [respondents] while the children remained in the sole relative foster placement [that they have] known since removal was having any negative effect on them. . . . Indeed, there was no evidence suggesting that the continuation of the [respondents'] legal rights would affect the children's well-being in any way." (Citation omitted.)

We begin by setting forth the applicable standard of review and general principles. "In the dispositional phase of a termination of parental rights hearing,[16] the

This assertion, however, ignores established case law and the fundamental underlying public policy that recognizes the importance of permanency in a child's life. Anaishaly was removed from the respondents' care when she was three years old. Khrianalis was almost ten months old when she was removed from the respondents' care. The children have been in legal limbo since then. At the time the termination of parental rights petitions were filed, Anaishaly was almost six years old and Khrianalis was almost two years old. When the court rendered its decision, Anaishaly was almost seven years old and Khrianalis was almost three years old.

Our appellate courts have "noted consistently the importance of permanency in children's lives. *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 646, 436 A.2d 290 (1980) (removing child from foster home or further delaying permanency would be inconsistent with his best interest); *In re Victoria B.*, 79 Conn. App. 245, 263, 829 A.2d 855 (2003) (trial court's findings were not clearly erroneous where much of child's short life had been spent in custody of [commissioner] and child needed stability and permanency in her life); *In re Teshea D.*, [9 Conn. App. 490, 493–94, 519 A.2d 1232 (1987)] (child's need for permanency in her life lends added support to the court's finding that her best interest warranted termination of the respondent's parental rights). Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008). "Termination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption. . . . Even if no adoption is forthcoming, termination can aid stability and lessen disruption because a parent whose rights have been terminated no longer may file a motion to revoke the commitment of the child to the custody of the [commissioner] . . . or oppose an annual permanency plan." (Citation omitted; internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 733, 120 A.3d 1177 (2015).

Evidence before the court supported its findings that the children require permanency, and the court properly considered their need for permanency in its consideration of whether termination was in their best interests. Accordingly, we reject the mother's assertion.

[16] "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 582–83 n.12.

emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)].[17] . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to

[17] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnotes added and altered; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015).

In the portion of its memorandum of decision where it addressed the dispositional phase, the court reasoned: "The court has given careful consideration to the strong feelings which the [respondents] and the children have for each other. However, the court must examine and weigh this evidence in conjunction with the evidence about the length of time that both children have been in foster care and each parent's lack of progress toward reunification. Anaishaly, who will turn seven in June, [2018], has spent a total of more than three and [one-half] years in the custody of [the commissioner]. Khrianalis, who will be three in August, [2018], has resided for almost [twenty-three] months—or slightly less than two thirds of her life—in a foster home. Based on each parent's inability to sufficiently recognize and remedy the issues that caused the children's removal, and their failure to substantially benefit from services and treatment, it is impossible to predict when in the future [the children] could be safely returned home. The evidence also established that [the children] are both doing well in their present placement, and that their caretakers have committed to adopting them." The court concluded: "Because of the strong bond that exists between the [respondents] and [the children], it is very appropriate that [the mother] and [the father] were afforded much help and many opportunities to achieve reunification. However, despite receiving many supportive services during the lengthy pendency of this matter, the respondents have not resolved the serious and chronic problems that resulted in the children's commitment to [the commissioner's custody]. [The children] require the security of a safe and stable, permanent home. Their current placement provides this to them. Their biological parents remain unable to offer this to them. The

court finds that it would be detrimental to the well-being of these children [to] delay permanency any longer in order to afford the respondents additional time to pursue rehabilitative efforts which have thus far proven unsuccessful." The court also made additional findings as to the seven factors enumerated in § 17a-112 (k) and those findings are supported by the record.

Although the respondents contend that certain positive facts found by the court outweigh the negatives, "we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." *In re Shane M.*, supra, 318 Conn. 593. The respondents point out that the court found that they had made some progress in their rehabilitation efforts. We will not, however, overlook the court's finding that despite "successfully complet[ing] some programs," the respondents were "unsuccessful, or noncompliant, with others" since the department removed Khrianalis and Anaishaly, for the second time, from their care on June 29, 2016.

Moreover, as to the respondents' contention that the court found that they shared a bond with their children, " '[o]ur courts consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights.' *In re Rachel J.*, 97 Conn. App. 748, 761, 905 A.2d 1271, cert. denied, 280 Conn. 941, 912 A.2d 476 (2006); see also *In re Tyqwane V.*, 85 Conn. App. 528, 536, 857 A.2d 963 (2004) ('The Appellate Court has concluded that a termination of parental rights is appropriate in circumstances where the children are bonded with their parent if it is in the best interest of the child to do so. . . . This is such a case.' . . .); *In re Ashley S.*, 61 Conn. App. 658, 667, 769 A.2d 718 ('[A] parent's love and biological connection . . . is simply not enough. [The department] has demonstrated by clear and convincing evidence that [the respondent] cannot be a competent parent to these children because

she cannot provide them a nurturing, safe and structured environment.'), cert. denied, 255 Conn. 950, 769 A.2d 61 (2001)." *In re Melody L.*, 290 Conn. 131, 164, 962 A.2d 81 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014). The existence of a bond, while relevant to the court's analysis, is not dispositive of the best interests determination.

On our careful review of all the evidence, we cannot conclude that the trial court's determination that the termination of the respondents' parental rights was in the best interests of the children was clearly erroneous.

The judgments are affirmed.

In this opinion the other judges concurred.

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Lavy *v.* Lavy 186
Dissolution of marriage; whether trial court properly determined that plaintiff's failure to disclose certain assets on financial affidavit constituted material omissions that violated parties' separation agreement, which had been incorporated into dissolution judgment; claim that plaintiff's failure to disclose assets on

financial affidavit was not material omission because defendant knew about them at time of dissolution judgment; claim that trial court inflated significance of omissions by comparing their value to total value of disclosed assets in same asset category; claim that trial court's discussion of relative value of assets rendered its determination that nondisclosures were material omissions legally or logically incorrect or unsupported by record; claim that trial court's finding that plaintiff knew about undisclosed bank account at time of dissolution judgment was clearly erroneous; whether trial court properly awarded defendant statutory (§ 37-3a [a]) prejudgment interest, where defendant raised claim for prejudgment interest in posthearing brief; claim that plaintiff was denied reasonable notice and opportunity to present defense regarding defendant's request for prejudgment interest; whether trial court violated rule of practice (§ 61-11) that provides for automatic appellate stay by awarding defendant postjudgment interest after plaintiff filed appeal; claim that § 37-3a was part of mechanism for statutory (§ 52-350f) enforcement of money judgment that is limited to execution or foreclosure of lien.

Lewis *v.* Alves 580
Summary judgment; alleged deprivation of plaintiff's federal constitutional rights; whether trial court properly rendered summary judgment in favor of defendants on plaintiff's claims that he was denied due process of law when he was not permitted to call witness and was assigned unwanted advocate at disciplinary hearing, and that he was subjected to improper conditions of confinement.

Miller *v.* Maurer (Memorandum Decision) 904

O'Brien-Kelley, Ltd. *v.* Goshen 420
Tax warrant; whether trial court properly granted motion for summary judgment; whether trial court properly concluded that defendant state marshal was entitled to statutory fee of 15 percent of tax, interest, fees and costs for service of alias tax warrant pursuant to statute (§ 12-162 [c]) to collect delinquent real estate tax and interest; claim that defendant was not entitled to 15 percent fee under § 12-162 because he did not execute on tax warrant or collect delinquent taxes, but merely mailed notice of tax warrant to plaintiff, which thereafter paid delinquent tax and interest to town directly before warrant was served.

Oudheusden *v.* Oudheusden 169
Dissolution of marriage; claim that trial court improperly double counted certain marital asset for purposes of property division and spousal support awards; claim that trial court abused its discretion in failing to make equitable orders in division of marital estate; whether trial court deprived defendant of means with which to comply with orders; whether trial court's award of nonmodifiable, lifetime alimony to plaintiff was supported by facts in evidence; whether plaintiff's testimony at trial precluded conclusion that her physical condition and age rendered her permanently incapable of earning any income from any type of employment.

Outing *v.* Commissioner of Correction 510
Habeas corpus; whether habeas court properly determined that petitioner's trial counsel did not render ineffective assistance; claim that habeas court improperly concluded that trial counsel's decision not to present alibi defense was not constitutionally deficient; whether trial counsel's approach to handling of certain witnesses was within wide range of reasonably effective assistance; whether trial counsel's decision to forgo testimony from expert witness concerning reliability of witness identifications was reasonable tactical choice under circumstances; claim that trial counsel performed deficiently by not preserving for appellate review claim related to trial court's exclusion of expert witness' testimony regarding eyewitness identifications; whether habeas court properly concluded that petitioner failed to prove that appellate counsel was deficient in failing to claim in petitioner's direct appeal that trial court incorrectly denied request to present surrebuttal evidence; claim that habeas court incorrectly determined that petitioner did not prove claim of actual innocence.

Patrowicz *v.* Peloquin 124
Contracts; statute of frauds; whether trial court abused its discretion in denying request for continuance in order to subpoena witness; whether trial court committed reversible error by permitting material variance between amount of damages alleged in complaint and amount pursued at trial without requiring plaintiffs to file amended complaint; claim challenging trial court's determinations with respect to statute of frauds defense.

Rauser *v.* Pitney Bowes, Inc.. 541
Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner dismissing claim for workers' compensation benefits; whether evidence amply supported commissioner's determination that for several hours plaintiff was engaged in substantial deviation from his employment activities; claim that commissioner failed to set forth factual determination as to whether, at time plaintiff sustained subject injuries, he was on direct route of his business travel; whether plaintiff failed to demonstrate that either commissioner or board misapplied law in evaluating claim for benefits; credibility determinations.
Reiner *v.* Reiner 268
Breach of fiduciary duty; enforcement of settlement agreement; claim that trial court, following hearing pursuant to Audubon Parking Associates Ltd. Partnership *v.* Barclay & Stubbs, Inc. *(225 Conn. 804), improperly denied motion to enforce settlement agreement; whether trial court incorrectly concluded that settlement agreement was clear and unambiguous with respect to method for calculating buyout price of plaintiff's interests in certain real properties; whether settlement agreement that is not clear and unambiguous can be enforced summarily pursuant to* Audubon Parking Associates Ltd. Partnership.
Roger R. *v.* Commissioner of Correction (Memorandum Decision). 902
Rosenthal Law Firm, LLC *v.* Cohen 284
Contracts; attorney's fees; discussion of Jones *v.* Ippoliti *(52 Conn. App. 199); claim that trial court erred in concluding that plaintiff, as self-represented law firm, was precluded from recovering attorney's fees from defendant under parties' retainer agreement; claim that portion of* Jones *on which trial court relied in reaching its conclusion was dictum and, therefore, was improperly treated as binding precedent by trial court; whether this court could overrule precedent established by previous panel in* Jones.
St. Denis-Lima *v.* St. Denis 296
Dissolution of marriage; whether trial court abused its discretion in ruling on motion to dismiss dissolution action without first holding evidentiary hearing; claim that certified and officially translated Brazilian document that plaintiff submitted to trial court established disputed jurisdictional fact that required evidentiary hearing on motion to dismiss; whether trial court's determination that there was final judgment of dissolution in Brazil was clearly erroneous; whether trial court abused its discretion in affording comity to dissolution judgment rendered by Brazilian court; claim that Brazilian judgment was contrary to public policy of Connecticut.
Santa Energy Corp. *v.* Santa (Memorandum Decision) 901
Stamford Hospital *v.* Schwartz. 63
Debt collection; action to collect debt, pursuant to statute (§ 46b-37 [b]), for medical services that plaintiff hospital rendered to defendants' minor child; special defenses; accord and satisfaction; reviewability of claims; whether record supported findings of attorney trial referee and trial court that defendants were indebted to plaintiff and that they exhibited bad faith throughout litigation; credibility of witnesses; whether referee acted within his authority to find by preponderance of evidence that defendants were untruthful; whether trial court's decision to award plaintiff attorney's fees was legally and logically correct.
State *v.* Abdus-Sabur 589
Murder; criminal possession of firearm; sufficiency of evidence; whether evidence was sufficient to prove specific intent element necessary to support conviction of murder; whether trial court properly denied request to instruct jury on third-party culpability; whether defendant established direct connection between third party and offense with which defendant was charged; reviewability of claim that trial court improperly admitted evidence of uncharged misconduct of defendant's gang affiliation; whether defendant addressed in appellate brief harmfulness of allegedly improper admission of evidence; whether prejudicial effect is equivalent to harmful error or must be briefed separately.
State *v.* Crespo. 639
Violation of probation; whether trial court improperly found defendant in violation of probation; reviewability of unpreserved claim that trial court violated defendant's right to confrontation when it overruled objection to probation officer's testimony without making finding of good cause; claim that trial court improperly denied motion to dismiss violation of probation charge because certain condition of probation imposed by Office of Adult Probation pursuant to statute (§ 53a-30

[b]) was inconsistent with or contradictory to certain condition of probation imposed by sentencing court; reviewability of unpreserved claim that trial court improperly failed to hold evidentiary hearing on veracity of certain allegations in probation officer's arrest warrant affidavit; whether trial court abused its discretion in denying motion for judicial disqualification; claim that certain of trial court's evidentiary rulings and colloquy with defense counsel regarding filing of motion to dismiss would lead reasonable defendant to believe that trial court would be biased toward defendant.

State *v.* Dojnia 353

Assault of disabled person in second degree; unpreserved claim that statute (§ 53a-60b [a] [1]) prohibiting assault of disabled person in second degree is unconstitutionally vague as applied to defendant's violent conduct toward victim; whether statute (§ 1-1f [b]) that defines physical disability is ambiguous as to whether fibromyalgia constitutes physical disability; claim that state bore burden of proving beyond reasonable doubt that victim's physical disability was caused by any particular illness or injury and that diagnosis was medically accurate; whether evidence was sufficient to prove that victim had diagnosis of fibromyalgia; whether diagnosis of fibromyalgia satisfied physical disability requirement of § 53a-60b (a) (1); whether evidence was sufficient to prove that victim suffered from physical disability for purposes of § 53a-60b (a) (1); whether defendant was deprived of right to fair trial as result of prosecutor's comment during closing argument.

State *v.* Fernandes (See State *v.* Sanchez) 466

State *v.* Irizarry. 40

Assault in second degree; breach of peace in second degree; whether evidence was sufficient to support conviction of assault in second degree in violation of statute (§ 53a-60 [a] [1]); claim that state did not establish that defendant caused victim serious physical injury as defined by statute (§ 53a-3 [4]); claim that improper statement by prosecutor during closing argument to jury deprived defendant of constitutional right to fair trial; harmfulness of improper statement by prosecutor during closing argument to jury.

State *v.* Marcus H.. 332

Assault in second degree with motor vehicle; risk of injury to child; reckless endangerment in first degree; reckless driving; operating motor vehicle while under influence of intoxicating liquor; interfering with officer; increasing speed in attempt to escape or elude police officer; application for public defender; claim that trial court violated defendant's constitutional right to counsel and, therefore, to due process, by denying application for appointment of public defender; whether trial court's implicit finding that defendant was not indigent was clearly erroneous; claim that trial court violated defendant's constitutional right to due process by failing to order, sua sponte, judicial marshal to remove defendant's shackles during trial; whether defendant demonstrated existence of constitutional violation that deprived him of fair trial; whether defendant's failure to object to being tried before jury in shackles was sufficient to negate compulsion necessary to establish constitutional violation; whether defendant was compelled to stand trial before jury while visibly shackled.

State *v.* Nalewajk 462

Possession of narcotics with intent to sell by person who is not drug-dependent; failure to appear in first degree; motion to correct illegal sentence; mootness; whether defendant's death during pendency of appeal rendered appeal moot.

State *v.* Ramon A. G. 483

Assault in third degree; criminal violation of protective order; whether defendant properly preserved claim that trial court violated his constitutional rights to due process and to present defense by improperly declining to give jury instruction on defense of personal property with respect to assault charge; whether doctrine of implied waiver precluded substantive consideration of claim of instructional impropriety; whether improper comment of prosecutor deprived defendant of fair trial.

State *v.* Riley 1

Murder; whether resentencing court improperly denied motion for recusal where resentencing court was same court that presided over defendant's trial and imposed initial sentence; claim that recusal of resentencing court was required by statute (§ 51-183c), rule of practice (§ 1-22 [a]) Code of Judicial Conduct (rule 2.11 [a] [1]), and due process clauses of fifth and fourteenth amendments to United States constitution; claim that Practice Book § 1-22 provided ground

for recusal independent of that provided by § 51-183c; claim that rule 2.11 (a) (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.*

State *v.* Rodriguez (See State *v.* Sanchez) 466

State *v.* Sanchez 466

Sale of narcotics by person who is not drug-dependent; possession of narcotics with intent to sell by person who is not drug-dependent; whether trial court improperly dismissed motions to correct illegal sentence for lack of subject matter jurisdiction; claim that lack of drug dependency by defendants was element that state was required to plead and prove beyond reasonable doubt pursuant to statute ([Rev. to 2013] § 21a-278 [b]); whether drug dependency is affirmative defense that must be proven by defendant; whether, at time trial court dismissed motions to correct, defendants raised colorable claims; whether, in light of Supreme Court's decision in State *v.* Evans *(329 Conn. 770), defendants' motions to correct no longer presented colorable claims of illegal sentence.*

State *v.* Slaughter (See State *v.* Sanchez) 466

State *v.* Thigpen (See State *v.* Sanchez) 466

State *v.* Thompson. 660

Conspiracy to commit robbery in first degree; robbery in first degree; kidnapping in first degree; whether trial court properly dismissed motion to correct illegal sentence for lack of subject matter jurisdiction where motion attacked validity of guilty pleas, via claim of insufficiency of evidence, and did not challenge legality of sentence or manner in which sentence was imposed.

Turchiano *v.* Roadmaster Paving & Sealing, LLC (Memorandum Decision) 902

U.S. Bank Trust, N.A. *v.* Giblen 221

Foreclosure; motion for approval of committee sale; annulment of automatic stay by Bankruptcy Court; claim that trial court's approval of sale was void ab initio because it exceeded scope of Bankruptcy Court's order annulling bankruptcy stay; whether Bankruptcy Court's order annulling stay was intended only to permit committee to recover fees and expenses; whether trial court abused its discretion in granting committee's motion for approval of sale; reviewability of claim that certain irregularities with motion for approval of sale prevented defendants from realizing substantial amount of equity in subject property; whether defendants failed to show any injury resulting specifically from five claimed irregularities with motion for approval of sale.

Vassell *v.* Commissioner of Correction (Memorandum Decision). 903

Viking Construction, Inc. *v.* 777 Residential, LLC 245

Contracts; whether trial court erred in rendering summary judgment in favor of cross claim plaintiffs; whether defects, errors and omissions exclusion of builder's risk policy unambiguously barred coverage; claim that defects, errors and omissions exclusion of builder's risk policy did not bar recovery because damaged windows were not part of renovation; claim that recovery for damage to windows was not barred by defects, errors and omissions exclusion of builder's risk policy because exclusion applied only to finished product, not to process implemented

by subcontractor who damaged windows; claim that renovation endorsement would have been rendered meaningless if exclusion applied; whether trial court incorrectly interpreted resulting loss clause as entitling cross claim plaintiffs to coverage.

Villafane *v.* Commissioner of Correction 566

Habeas corpus; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether habeas court improperly denied motions for appointment of habeas counsel; failure of petitioner to raise claim in petition for certification to appeal; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether trial counsel rendered ineffective assistance; failure to brief claim adequately.

Vitti *v.* Milford 398

Workers' compensation; whether Compensation Review Board erred as matter of law by applying version of applicable statute ([Rev. to 2009] § 7-433c) that was in effect on date of plaintiff's injury to plaintiff's claim for heart and hypertension benefits; claim that board should have applied version of § 7-433c that was in effect on date of plaintiff's hire in 1993; claim that board erred as matter of law by affirming finding of Workers' Compensation Commissioner that plaintiff's giant cell myocarditis constituted heart disease under § 7-433c; credibility of witnesses.

Wells Fargo Bank, N.A. *v.* Fitzpatrick. 231

Foreclosure; notice requirements of mortgage; whether trial court properly determined that certain two letters together substantially complied with notice requirements in mortgage deed; whether trial court's finding that defendants did not prove special defense of laches was clearly erroneous; whether defendants established that any alleged delay by plaintiff resulted in prejudice to them; whether trial court's reduction in interest that accrued while first of two foreclosure actions was pending equitably addressed any delay in first foreclosure action.

Woodbury-Correa *v.* Reflexite Corp. 623

Workers' compensation; motion to preclude, appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner denying motion to preclude defendant employer from contesting compensability of plaintiff's injuries; whether board exceeded its authority by making new factual finding, in contradiction to that made by commissioner, that defendant had filed proper form 43 contesting liability; claim that, pursuant to statute (§ 31-249c [b]), defendant was conclusively presumed to have accepted compensability of plaintiff's injury because form 43 disclaimer was not timely filed; whether defense of impossibility applied where defendant could not commence payment within statutory time period but could provide timely notice of intent to contest liability by filing form 43.

Zaniewski *v.* Zaniewski 386

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.

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-S: CBCT Dental Fee Schedule Revisions and Addition of Composite Resin Fillings

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

Changes to Medicaid State Plan

Effective on or after July 1, 2019, SPA 19-S will amend Attachment 4.19-B of the Medicaid State Plan to adjust the procedure codes related to Cone Beam CT (CBCT) imaging found on the Medicaid dental fee schedules. Procedure code D0364 will be repriced, and procedure codes D0365, D0366, D0367 and D0368 will be added. In addition, posterior composite resin restorations codes D2991, D2992, D2993 and D2994 will be added to the dental fee schedule at the same rates currently set for the corresponding amalgam restorations for adults aged twenty-one and older.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then go to the Adult or Children's Dental Fee Schedule, as applicable. The fees for the codes referenced above are as follows:

CDT Code	Description	Fee
D0364	Cone Beam CT Capture and Interpretation with limited field of - less than one whole jaw view	$90.00
D0365	Cone Beam CT Capture and Interpretation with field of view of one full dental arch – mandible	$125.00
D0366	Cone Beam CT Capture and Interpretation with field of view of one full dental arch - maxilla, with or without cranium	$125.00

D0367	Cone Beam CT Capture and Interpretation with field of view of both jaws; with or without cranium	$170.00
D0368	Cone Beam CT Capture and Interpretation for TMJ series including two or more exposures	$200.00
D2391	Resin-Based Composite - One Surface Posterior Tooth	$49.40
D2392	Resin-Based Composite – Two Surfaces Posterior Tooth	$59.28
D2393	Resin-Based Composite – Three Surfaces Posterior Tooth	$75.40
D2394	Resin-Based Composite– Four or More Surfaces Posterior Tooth	$104.00

Fiscal Impact

DSS estimates that this SPA will increase aggregate annual expenditures by approximately $4,500 in State Fiscal Year (SFY) 2020 and $5,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-S: CBCT Dental Fee Schedule Revisions and Addition of Composite Resin Fillings''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 3, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment

SPA 19-T: Updates to the Access for Baby Care to Dental Examination and Fluoride Program on the Physician Office & Outpatient Fee Schedule

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

Changes to Medicaid State Plan

Effective on or after July 1, 2019, Medicaid State Plan Amendment (SPA) 19-T will amend Attachment 4.19-B of the Medicaid State Plan to update the physician office and outpatient fee schedule as follows:

This SPA will restructure the payment methodology for pediatric medical providers who apply fluoride varnish to the teeth of HUSKY Health members as follows:

- Expand the age range to include individuals ages 4-7 years with no preventative dental history who could receive an oral health assessment and/or an application of fluoride varnish by a pediatric medical provider;
- Remove a duplicative procedure code (D1206) for the application of topical fluoride listed on the physician office and outpatient fee schedule;
- Remove Current Dental Terminology (CDT) code D0145 from the physician office and outpatient fee schedule; and
- Add a fixed fee when modifier DA - Oral health assessment by an eligible, licensed non-dental provider is billed with select evaluation/management procedure codes, which is paid at $25.00 (in addition to the existing payment for the select evaluation/management procedure codes).

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $175,000 in State Fiscal Year (SFY) 2020 and $196,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-T: Updates to the Access for Baby Care

to Dental Examination and Fluoride Program on the Physician Office & Outpatient Fee Schedule''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 3, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment

SPA 19-U: Medical Equipment Devices and Supplies (MEDS) Fee Schedule Update

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

Changes to Medicaid State Plan

Effective on or after July 1, 2019, Medicaid State Plan Amendment (SPA) 19-U will amend Attachment 4.19-B of the Medicaid State Plan in order to add three procedure codes to the MEDS fee schedule, which will allow for correct coding of services that are already covered and reimbursed by the Department, each of which is specified below. This SPA will also revise the reimbursement methodology for procedure code E0635 (patient lift, electric with seat or sling) in order to improve access to this type of patient lift, which is generally associated with improved safety outcomes compared to certain other types of lifts.

The Department will be adding the following procedure codes to the Medical Surgical Supply Fee Schedule:

- A4459 (Manual pump-operated enema system, includes balloon, catheter and all accessories, reusable, any type);
- A9274 (External ambulatory insulin delivery system, disposable, each includes all supplies and accessories); and
- A9283 (Foot pressure off loading/ supportive device, any type, each).

All three procedure codes will be manually priced at the lesser of actual acquisition cost (AAC) plus 25% or list price minus 15%.

In addition, the Department will be revising the purchase and rental fees for procedure code E0635 Procedure code E0635 will be manually priced at the lesser of Actual Acquisition Cost plus 35% or list price minus 15%. A capped amount of $1,694.85 has been established for the purchase of this item. Please note the repair fee will remain at the same rate of $624.06.

Code	Description	Modifier	New Fee
E0635	Patient lift, electric with seat or sling	NU	Manually Priced
E0635	Patient lift, electric with seat or sling	RR	Manually Priced
E0635	Patient lift, electric with seat or sling	RB	$624.06

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $6,400 in State Fiscal Year (SFY) 2020 and $7,200 in SFY 2021.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-U: Medical Equipment Devices and Supplies (MEDS) Fee Schedule Update''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 3, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Renew the Acquired Brain Injury II Waiver and to Amend the Acquired Brain Injury Waiver

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services (DSS) intends to renew the Acquired Brain Injury II Waiver (ABI II), and amend the Acquired Brain Injury ABI Waiver (ABI I) to align with proposed changes in the ABI II renewal. The current ABI II waiver expires on November 30, 2019. There are no changes to eligibility or rates.

The proposed changes to both the ABI I and ABI II Waivers are as follows:

- A Board Certified Behavioral Analyst credential is being added to the list of authorized providers of cognitive behavioral services;
- An annual training requirement of six hours of continuing education for Independent Living Skills Training (ILST) providers has been added;
- A new provider credential, Certified Adult Day Health Provider, is being added to the list of authorized providers of ABI Group Day Services;
- Credentials to provide ABI Group Day have been expanded to include providers beyond those with a CARF certification or JCAHO accreditation;
- The name of the ''Specialized Medical Equipment and Supplies'' service has been replaced with ''Assistive Technology,'' which more accurately describes the service being provided. Medically-necessary medical equipment is already covered under the Medicaid state plan;
- The new ''Assistive Technology'' service will prohibit the replacement of smartphones, tablets or computers at the Department's expense within a three year period from delivery to the participant. In addition, the $10,400 per person annual limit for this service will be replaced with a $15,000 limit over 3 years to align with other Medicaid waiver programs.

The following change is proposed for the ABI II Waiver only:

- 10 reserve slots are being added for current ABI I participants who are unable to self-direct their Personal Care Services and wish to transition to ABI II in order to obtain access to the agency-based Personal Care Services that are available only on ABI II.

A complete text of the waiver renewal and amendment is available, at no cost, upon request to the Community Options Unit, Department of Social Services, 55 Farmington Ave., Hartford, Connecticut 06105; or via email to shirlee.stoute@ct.gov. It is also available on the Department's website, www.ct.gov/dss, under ''News and Press,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications.

Any written comments regarding this waiver renewal and amendment must be submitted by **July 18, 2019 to** the Department of Social Services, Community Options Unit, 55 Farmington Ave, Hartford, CT 06105, Attention: Kathy Bruni, Director; or via email to kathy.a.bruni@ct.gov.

NOTICES

Notice of Interim Suspension and Appointment of Trustee

DOCKET NO. NNH-CV-19-6091460-S. DISCIPLINARY COUNSEL VS. COREY HEIKS. SUPERIOR COURT, JUDICIAL OF NEW HAVEN AT NEW HAVEN, MAY 29, 2019.

ORDER: The foregoing matter having been heard, the Court hereby finds that the Respondent, Corey Heiks, Juris, No. 432852, failed to appear for trial scheduled for May 29, 2019.

Accordingly, the Court imposes the following interim Orders:

1. The Respondent, Corey Heiks, Juris No. 432852, is placed on interim suspension from the practice of law, effective immediately, until further order of the Court.
2. Attorney Karen Miller, Juris No. 429326, of 203 Campbell Avenue, West Haven, CT 06516, is hereby appointed as Trustee to take such steps as are necessary to protect the interest of Respondent's clients, to inventory Respondent's files, and to take control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the Trustee in this regard.
3. The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts until further order of the Court.
4. The Respondent shall comply with Practice Book 2-47B (Restrictions on the Activities of Deactivated Attorneys).
5. The Respondent shall comply with Practice Book 2-53 if the Respondent remains suspended for one (1) year or more.
6. The Respondent shall file a request for a hearing if he wishes to be reinstated but in no event shall the Respondent be reinstated until such time as he appears in court to address the allegations of the presentment complaint.

By the Court,
Abrams, Judge