CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXX No. 52 June 25, 2019 300 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JOHN GIROLAMETTI, JR., ET AL. *v.* MICHAEL HORTON ASSOCIATES, INC.
(SC 20032)
(SC 20033)
(SC 20036)

JOHN GIROLAMETTI, JR., ET AL. *v.* VP BUILDINGS, INC., ET AL.
(SC 20034)
(SC 20035)

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

Syllabus

The plaintiff property owners sought to recover damages from the defendant contractor and subcontractors for, inter alia, their alleged negligence in connection with a commercial construction project. Prior to the commencement of the present actions, the plaintiffs and the general contractor, R Co., pursuant to a contract between them, entered into arbitration to resolve various disputes regarding the project, which resulted in an award in favor of R Co. R Co. and five of the defendant subcontractors thereafter moved for summary judgment in the plaintiffs' actions on the basis of res judicata, contending that all of the claims raised in the underlying actions had been or could have been raised

and resolved during the arbitration between the plaintiffs and R Co. The trial court granted R Co.'s motion for summary judgment but denied the defendant subcontractors' motions for summary judgment, concluding, with respect to the defendant subcontractors, that they were not parties to the arbitration and were not in privity with R Co. The defendant subcontractors thereafter appealed from the denial of their summary judgment motions to the Appellate Court. The Appellate Court reversed the trial court's denial of the summary judgment motions, concluding that the defendant subcontractors were in privity with R Co. for purposes of res judicata and, therefore, that the plaintiffs' claims were barred because they could have been raised during the arbitration. In so concluding, the Appellate Court adopted a rebuttable presumption that subcontractors are in privity with a general contractor on a construction project for purposes of res judicata. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The Appellate Court correctly determined that, when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, the subcontractors are presumptively in privity with the general contractor for purposes of precluding subsequent litigation against the subcontractors concerning the project under the doctrine of res judicata: adopting a rebuttable presumption of privity under such circumstances, but allowing parties to contract around it if they so choose, fosters a fair and efficient system for resolving construction disputes, and the value of arbitration would be undermined if arbitration awards were not presumptively final as to all subcontractors, as owners would otherwise be able to bring subsequent actions against subcontractors in different forums, leading to the inefficient proliferation of proceedings and potentially inconsistent outcomes; moreover, there was no merit to the plaintiffs' claim that it would be unfair to adopt such a presumption because many of the potential sources of dispute between a property owner and a subcontractor either cannot be raised and resolved in an arbitration between the property owner and the general contractor or will not be apparent before the arbitration has concluded, as the plaintiffs failed to provide legal authority for the proposition that subcontractors typically owe property owners a duty independent of the general contractor that would provide the basis for a direct action against the subcontractors or that such claims could not be raised in arbitration between the owner and general contractor regardless of whether subcontractors could be compelled to participate in arbitration, and the record in the present case was devoid of any indication that the plaintiffs sought and were denied permission to raise such claims in their arbitration with R Co.; furthermore, the plaintiffs could not prevail on their claims that the Appellate Court improperly ignored this court's prior precedent in concluding, on the basis of the defendant subcontractors' contractual relationship with R Co., that they were in privity with R Co., and that a presumption of privity was ill suited for the complexities of the commercial construction industry.

2. The plaintiffs could not prevail on their claim that the presumption of privity should not apply in the present case because the parties did not intend to structure their legal relationships in such a manner, and, accordingly, the Appellate Court correctly concluded that the defendant subcontractors and R Co. were in privity and that the trial court improperly denied the defendant subcontractors' motions for summary judgment on the basis of res judicata: the record indicated that the plaintiffs anticipated, or reasonably should have anticipated, that their arbitration with R Co. would be the proper forum for addressing any claims that they may have had against the defendant subcontractors at that time, as the standard form construction contract that the plaintiffs chose to use provided that the general contractor would be responsible for all of the subcontractors' work and would be answerable to the owner for such work, the contract contained an arbitration clause that allowed for the unrestricted submission of virtually all claims and disputes, and the plaintiffs' conduct throughout the arbitration process indicated an expectation that R Co. could be held accountable for the conduct of its subcontractors; moreover, the arbitrator's finding that the construction contract did not obligate R Co. to perform or to be responsible for all design and engineering aspects of the project did not represent a finding that R Co. and the defendant subcontractors were not in privity with respect to the engineering work on the project, as that finding merely indicated that the plaintiffs had outsourced certain site, plumbing and electrical work and that R Co. was not responsible to the plaintiffs for the work of those contractors.

Argued December 14, 2018—officially released June 25, 2019

Procedural History

Action, in the first case, to recover damages from the defendant Michael Horton Associates, Inc., for alleged negligence, brought to the Superior Court in the judicial district of Danbury, where the defendant Michael Horton Associates, Inc., filed apportionment complaints against the defendant Rizzo Corporation et al., and action, in the second case, to recover damages for, inter alia, the defendants' alleged negligence, brought to the Superior Court in the judicial district of Danbury, where the cases were transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the plaintiffs in the first case filed an amended complaint asserting claims against the defendant Rizzo Corporation et al.; subsequently, in the first case, the court, *Agati*, *J.*, granted the motion for summary judgment

filed by the defendant Rizzo Corporation and denied the motions for summary judgment filed by the defendant Michael Horton Associates, Inc., et al.; thereafter, in the second case, the court, *Agati*, *J.*, denied the motion for summary judgment filed by the defendant BlueScope Buildings North America, Inc., et al.; subsequently, the plaintiffs and the defendant Michael Horton Associates, Inc., et al. in the first case, and the defendant BlueScope Buildings North America, Inc., et al. in the second case, filed separate appeals with the Appellate Court, *Sheldon*, *Mullins* and *Bishop*, *Js.*, which affirmed the decision of the trial court granting the motion for summary judgment filed by the defendant Rizzo Corporation in the first case, reversed the decisions of the trial court denying the motions for summary judgment filed by the defendant Michael Horton Associates, Inc., et al. in the first case, reversed the decision of the trial court denying the motion for summary judgment filed the defendant BlueScope Buildings North America, Inc., et al. in the second case, and remanded both cases with direction to grant those motions for summary judgment, from which the plaintiffs, in both cases, on the granting of certification, appealed. *Affirmed.*

Brian J. Donnell, with whom was *Michael G. Caldwell*, for the appellants (plaintiffs in both cases).

Anita C. Di Gioia, for the appellee in Docket No. SC 20032 (defendant Domenic Quaraglia Engineering, Inc.).

Kevin M. Godbout, with whom, on the brief, was *Alison H. Weinstein*, for the appellee in Docket No. SC 20033 (defendant Michael Horton Associates, Inc.).

Sean R. Caruthers, with whom, on the brief, was *Mark A. Milano*, for the appellee in Docket No. SC 20034 (defendant Pat Munger Construction Company, Inc.).

Curtis L. Brown, pro hac vice, with whom were *Damian K. Gunningsmith* and, on the brief, *David S. Hardy*, for the appellee in Docket No. SC 20035 (defendant BlueScope Buildings North America, Inc., et al.).

Deborah Etlinger, with whom, on the brief, was *Erin E. Canalia*, for the appellee in Docket No. SC 20036 (defendant Lindade Construction, Inc.).

Louis R. Pepe and *Douglas M. Poulin* filed a brief for Associated General Contractors of Connecticut as amicus curiae in Docket No. SC 20036.

Opinion

D'AURIA, J. This certified appeal poses the question of whether and under what circumstances arbitration of a construction dispute between a property owner and a general contractor is res judicata as to the claims of subcontractors[1] that did not participate in the arbitration. We agree with the Appellate Court that, in the absence of clear evidence of contrary intent by the parties, subcontractors are presumptively in privity with the general contractor on a construction project for purposes of res judicata. Accordingly, we affirm the judgment of the Appellate Court.

I

The relevant factual and procedural history is set forth in full in the decision of the Appellate Court. See *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 636–46, 164 A.3d 731 (2017). We briefly summarize that history as follows.

These five consolidated appeals arise from disputes regarding the construction of an expansion to a Party Depot Store located in Danbury. The plaintiffs are the

[1] For brevity, we use the term "subcontractors" to refer both to direct subcontractors of a general contractor and to sub-subcontractors who are hired by and/or answerable to direct subcontractors or other sub-subcontractors.

owners of the store, John Girolametti, Jr., and Cindy Girolametti. The defendant-appellees are five subcontractors on the project: Michael Horton Associates, Inc. (Horton), Domenic Quaraglia Engineering, Inc. (Quaraglia), Lindade Construction, Inc. (Lindade), BlueScope Buildings North America, Inc., and its employee, Steven Oakeson (BlueScope), and Pat Munger Construction Company, Inc. (Munger). Other original defendants, including the general contractor on the project, Rizzo Corporation (Rizzo), and other subcontractors, are not involved in the present appeals.[2]

In 2009, following the completion of the project and Danbury's issuance of a certificate of occupancy, the plaintiffs and Rizzo, pursuant to the contract between them (prime contract), entered arbitration to resolve various disputes regarding the project. Rizzo contended that the plaintiffs owed it further sums beyond the contract price for extra work performed and costs incurred in connection with the project. For their part, the plaintiffs sought to hold Rizzo liable for costs arising from, among other things, Rizzo's alleged failure to complete the project in a timely and proper manner. They claimed, for example, that Rizzo was responsible for multiple construction defects, had failed to provide a pre-engineered structure that complied with the intent of the original design, and had eliminated some important construction elements, jeopardizing the building's load carrying capacity. None of the other defendants was formally a party to the arbitration.

In December, 2010, on the thirty-third day of what would ultimately be a thirty-five day hearing, the plaintiffs decided to no longer participate in the arbitration hearings, despite the urging of the arbitrator that they proceed to present their damages claims. The arbitrator

[2] For this reason, in the remainder of this opinion we refer to the present appellees—Horton, Quaraglia, Lindade, BlueScope, Oakeson, and Munger—collectively as the defendants.

subsequently issued an award ordering the plaintiffs to pay $508,597 to Rizzo for sums due. Rizzo's subsequent application to confirm the award was granted by the trial court.

With respect to the plaintiffs' claims, the arbitrator found that the plaintiffs made a conscious and informed decision to no longer attend the hearing, and intentionally refused to present any evidence or expert witnesses to explain or justify any alleged damages. From this finding, the arbitrator concluded that either the plaintiffs did not incur any damages or were unable to prove their damages. The arbitrator also rejected the plaintiffs' claims that the second floor of the building remained unoccupied due to construction defects resulting in structural problems. The arbitrator instead concluded that the structure had passed inspection but that Danbury zoning regulations did not permit use of the second floor for any purpose.

The present appeals arise from two lawsuits, one filed during the arbitration proceedings and one filed subsequently, in which the plaintiffs sought to recover from Rizzo and from its subcontractors. At the heart of many of the plaintiffs' claims in these underlying cases are allegations of negligence in connection with the design and construction of the steel joists used to support the second floor of the building. In the actions underlying these appeals, each of the defendants—who were involved in various capacities in the design and construction of the second floor supports—moved for summary judgment against the plaintiffs on the basis of, among other grounds, res judicata. That is, they contended that all of the claims raised in the underlying actions either had been or could have been raised and resolved during the arbitration.

The trial court granted the motion filed by Rizzo but denied the motions for summary judgment filed by the other defendants. The court concluded that the plain-

tiffs' actions against the subcontractor defendants were not barred by res judicata because those defendants were not parties to the arbitration and were not in privity with Rizzo. Although it is unclear from the court's brief order, its conclusion that the defendants were not in privity with Rizzo appears to be founded on the premise that they could not have been compelled to participate in the arbitration process.

The defendants brought an interlocutory appeal from the court's denial of their motions for summary judgment. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 346 n.7, 63 A.3d 940 (2013) (interlocutory appeal may be taken from denial of motion for summary judgment based on res judicata or collateral estoppel). The Appellate Court reversed the judgment of the trial court with respect to the res judicata issue as to all of the defendants. That court held that all of the defendants were in privity with Rizzo for purposes of res judicata and, therefore, that the plaintiffs' claims were barred because they could have been raised during the arbitration. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 630. These certified appeals followed.[3] Additional facts will be set forth as appropriate.

[3] We granted certification, limited to the following question: "Did the Appellate Court properly reverse the trial court's denial of summary judgment based on the doctrine of res judicata when it determined privity existed between the defendant subcontractors and the general contractor after the general contractor had arbitrated issues relating to the construction project with the project owner[s]?" *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 980, 175 A.3d 42 (2017); accord *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 981, 175 A.3d 564 (2017); *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 981, 982, 175 A.3d 42 (2017); *Girolametti* v. *VP Buildings, Inc.*, 327 Conn. 982, 186 A.3d 12 (2017); *Girolametti* v. *VP Buildings, Inc.*, 327 Conn. 983, 175 A.3d 45 (2017). We note that the plaintiffs sought certification as to, and have briefed, various other issues that are peripheral to the certified question, including whether and how claims of fraud, latent defect, and unripe professional, statutory, and warranty obligations influence the res judicata analysis in a case such as this. We address those issues only to the extent that they are encompassed within the certified question.

We also granted permission to Associated General Contractors of Connecticut to file an amicus curiae brief.

II

"[T]he applicability of res judicata . . . presents a question of law over which we employ plenary review." *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010). The Appellate Court accurately set forth the well established legal principles that govern res judicata: "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 650. With respect to the first element, a judgment rendered on the merits, the Appellate Court also noted, and the parties do not dispute, that "[a]n arbitration award is accorded the benefits of the doctrine of res judicata in much the same manner as the judgment of a court." (Internal quotation marks omitted.) Id., 649; accord *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 21 n.5, 699 A.2d 964 (1997).

The following principles govern the second element of res judicata, privity, the only element at issue in the present appeal: "Privity is a difficult concept to define

precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that [preclusion] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." (Citation omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 813–14, 695 A.2d 1010 (1997).

"While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented . . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) Id., 813.

Consistent with these principles, this court and other courts have found a variety of factors to be relevant to the privity question. These factors include the functional relationships between the parties, how closely their interests are aligned, whether they share the same legal rights, equitable considerations, the parties' reasonable expectations, and whether the policies and rationales that underlie res judicata—achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments—would be served. See id., 812–16; see also *Wayne County Hospital, Inc.* v. *Jakobson*, 567 Fed. Appx. 314, 317 (6th Cir. 2014) (applying Kentucky law); *DKN Holdings, LLC* v. *Faerber*, 61 Cal. 4th 813, 826, 352 P.3d 378, 189 Cal. Rptr. 3d 809 (2015);

Foster v. *Plock*, 394 P.3d 1119, 1126 (Colo. 2017). "[T]he crowning consideration, [however, is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 167, 129 A.3d 677 (2016).

III

Applying these principles to the facts of the present case, the Appellate Court concluded that each of the defendants was in privity with Rizzo for purposes of res judicata. *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 685–86. On appeal, the plaintiffs contend that the Appellate Court improperly applied a presumption—they label it a "safe harbor" rule—that a general contractor is in privity with all of its subcontractors on a construction project, and, therefore, if an owner and a general contractor choose to arbitrate the typical postconstruction disputes at the end of a project, then the outcome of that arbitration will be res judicata as to all subcontractors (assuming that the other elements of res judicata are satisfied). The plaintiffs argue that such a rule conflicts with established Connecticut precedent and also that, for various reasons, adopting such a rule would be both unwise and unfair. Because we agree that a general contractor is presumptively in privity with its subcontractors for purposes of res judicata, and because we perceive no reason to depart from that presumption under the specific facts and circumstances of the present case, we affirm the judgment of the Appellate Court.

A

1

When applying the law to complex endeavors such as large-scale commercial construction, it often is desirable to adopt default rules, whether in the form of legal

presumptions or standardized contracts. See E. Zamir, "The Inverted Hierarchy of Contract Interpretation and Supplementation," 97 Colum. L. Rev. 1710, 1755–56, 1768 (1997); T. Rakoff, Comment, "Social Structure, Legal Structure, and Default Rules: A Comment," 3 S. Cal. Interdisc. L.J. 19, 20, 25–26 (1993). These default rules help to reduce transaction costs, increase efficiencies, and resolve contractual ambiguities. E. Zamir, supra, 1755–56, 1756 n.175. At the same time, to the extent that public policy is not offended, parties retain the flexibility and freedom to contract around default rules to better serve their unique interests and needs.[4] See id., 1769–70; see also I. Ayres & R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale L.J. 87, 87–88 (1989).

The amicus explains why adopting a default presumption of privity between general contractors and subcontractors is an efficient approach that mirrors the choices that reasonable parties would have made had they expressly considered the question at the outset. See I. Ayres & R. Gertner, supra, 99 Yale L.J. 89–92 (default rules should reflect either what these particular parties actually would have chosen or what arrangements most reasonable bargainers would prefer). The amicus notes that the standard form contracts used in the construction industry typically make the general contractor responsible for the work of all subcontractors.[5]

[4] Although the question before us is not entirely one of contract law, the same contractual approach is suitable for application to noncontract matters. See I. Ayres & R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale L.J. 87, 88 n.10, 129 (1989); T. Merrill & H. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle," 110 Yale L.J. 1, 31 (2000).

[5] This court has recognized as much, albeit in a different context, noting that "most . . . construction work is often subcontracted . . . by a general contractor who oversees the entire project and is responsible [to the owner] for the final result." (Internal quotation marks omitted.) *Meadows* v. *Higgins*, 249 Conn. 155, 167, 733 A.2d 172 (1999).

They explain that owners as well as contractors benefit from a presumption that all outstanding disputes involving work on a project can be resolved in the context of an owner-general contractor arbitration. Such a rule permits owners to bring and efficiently and finally resolve all of their claims arising from a project in a single forum, without having to pursue individual subcontractors and sub-subcontractors for satisfaction. The amicus also contends that the use and value of arbitration—particularly specialized construction industry arbitration—would be undermined if arbitration awards were not presumptively final as to all subcontractors. This is because owners who fail to prevail in arbitration could bring subsequent actions against various subcontractors in different forums, leading to the inefficient proliferation of proceedings and potentially inconsistent outcomes.

A number of other jurisdictions have adopted the rule advocated by the amicus by applying at least a rebuttable presumption that subcontractors are in privity with a general contractor for purposes of res judicata. See, e.g., *Columbia Steel Fabricators, Inc.* v. *Ahlstrom Recovery*, 44 F.3d 800, 802 (9th Cir.) (holding that arbitration award for general contractor was res judicata as to subcontractor, which was in privity with general contractor), cert. denied, 516 U.S. 864, 116 S. Ct. 178, 133 L. Ed. 2d 117 (1995); *United States ex rel. Paul* v. *Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 373 (S.D. Tex. 1994) (under Texas law, general contractor is in vicarious liability relationship with its subcontractor for purposes of res judicata), aff'd, 53 F.3d 1282 (5th Cir. 1995), cert. denied, 516 U.S. 1094, 116 S. Ct. 817, 133 L. Ed. 2d 762 (1996); *Chestnut Hill Development Corp.* v. *Otis Elevator Co.*, 739 F. Supp. 692, 698 (D. Mass. 1990) (subcontractor could bind developer with respect to issues litigated between developer and general contractor in prior arbitration); *Asso-*

ciated Construction Co. v. *Camp*, *Dresser & McKee*, *Inc.*, 646 F. Supp. 1574, 1578 (D. Conn. 1986) (applying Connecticut law, subcontractors were deemed to be in privity with general contractor with respect to res judicata effects of prior arbitration between general contractor and city because [1] claims were asserted under project contract and [2] subcontractors had received payment for work from which claims arose); *DKN Holdings*, *LLC* v. *Faerber*, supra, 61 Cal. 4th 828 ("[d]erivative liability supporting preclusion has been found between . . . a general contractor and subcontractors" [citations omitted]); *E.W. Audet & Sons*, *Inc.* v. *Fireman's Fund Ins. Co. of Newark*, *New Jersey*, 635 A.2d 1181, 1187 (R.I. 1994) (subcontractors and prime contractor were in privity for purposes of res judicata); cf. *Kansas City*, *Missouri ex rel. Lafarge North America*, *Inc.* v. *Ace Pipe Cleaning*, *Inc.*, 349 S.W.3d 399, 404–405 n.11 (Mo. App. 2011) (subcontractor is in direct privity of contract with general contractor and law adopts legal fiction that sub-subcontractor also is in privity of contract with general contractor, for purposes of recovery against statutory payment bond); *CDJ Builders Corp.* v. *Hudson Group Construction Corp.*, 67 App. Div. 3d 720, 722, 889 N.Y.S.2d 64 (2009) ("[a]s a general rule, a subcontractor is in privity with the general contractor on a construction project"). At least one Connecticut court also has applied this rule. See *Tierney* v. *Renaud Morin Siding*, *Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5014179-S (October 29, 2008) (46 Conn. L. Rptr. 599) (homeowners who had arbitrated dispute with general contractor were precluded from bringing subsequent claim against subcontractor, who was deemed to be in contractual privity with general contractor).

Although this rule primarily has been justified on the theory that subcontractors are in privity of contract with a general contractor, some commentators and other legal authorities also have reasoned that the par-

ties share legal rights because general contractors are vicariously or derivatively liable for the work of their subcontractors. See 2 Restatement (Second), Judgments § 51, comment (a), pp. 48–49 (1982) (With respect to preclusion, "[m]any relationships between persons result in one of them being vicariously liable for the conduct of another, the primary obligor. Among these relationships are that of . . . principal contractor and sub-contractor to the extent the former is responsible for the conduct of the latter . . . ."); C. Ingwalson et al., "Arbitration and Nonsignatories: Bound or Not Bound?," 6 J. Am. C. Constr. Laws., No. 1 January, 2012, p. 3 (discussing various contract and noncontract theories according to which nonsignatories may be bound to arbitration agreements).

Adopting this default rule, but allowing parties to contract around it if they so choose, creates a system, both efficient and fair, for resolving complex construction disputes of this sort. Absent this sort of clear default rule, a property owner who fails to prevail in arbitration against a general contractor often will be able to relitigate its claims by simply recharacterizing what are essentially contract claims as violations of a subcontractor's allegedly independent, noncontractual duties. Such fact intensive claims will be difficult for courts to resolve on summary judgment, largely defeating the purpose and benefits of the unrestricted arbitration of disputes.[6]

2

The plaintiffs offer several arguments as to why the Appellate Court should not have adopted a default presumption that general contractors and subcontractors

[6] "A submission [of a dispute to arbitration] is unrestricted when . . . the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

are in privity for purposes of res judicata with respect to a postconstruction arbitration in which the subcontractors did not participate. Their primary arguments are that (1) adoption of such a rule would be unfair, (2) any rule that grounds res judicata exclusively in contractual privity and fails to take into account other aspects of the functional relationship between the parties is inconsistent with this court's precedent, and (3) a presumption of privity is inconsistent with the realities of the construction industry. We consider each argument in turn.

The plaintiffs first argue that it would be unfair to adopt a presumption that a general contractor is in privity with all of its subcontractors on a project for purposes of applying res judicata rules in this context. The plaintiffs contend that adopting such a default rule would be unjust because many of the potential sources of dispute between a property owner and a subcontractor either (1) cannot be raised and resolved in an arbitration, participation in which is limited to the owner and the general contractor, or (2) will not be apparent and addressable at the time that the normal postconstruction disputes are arbitrated in the immediate aftermath of a project's completion. The plaintiffs offer, by way of example, claims involving extended warranties, latent defects, defects fraudulently concealed, and violations of professional and statutory obligations.

The plaintiffs have not provided any legal authority, however, for their assertion that subcontractors typically owe the property owner any independent statutory, professional, or common-law duties that (1) would provide the basis for a direct action against the subcontractor and (2) cannot be raised in the arbitration between the owner and the general contractor. When pressed at oral argument before this court, the plaintiffs' counsel ultimately conceded that an arbitrator would not be barred from entertaining any such

claims and holding a general contractor responsible for any such breach, regardless of whether the subcontractors themselves could be compelled to participate in the arbitration. Counsel speculated that, in practice, most arbitrators would be reluctant to pursue such tangentially related matters. The record is devoid of any indication, however, that the plaintiffs in the present case sought and were denied permission to raise claims of that sort in their arbitration with Rizzo. To the contrary, the arbitrator indicated that he would have preferred to be able to focus on the "forest" and address "the entire [p]roject as a whole" but was prevented from doing so by "the personal and juvenile manner" in which the plaintiffs and Rizzo approached the arbitration.

We recognize, of course, that a property owner cannot possibly raise in arbitration claims that have not yet arisen, such as latent defects, refusal to honor an extended warranty or ongoing service commitment, and the like. But for that very reason, such claims would fail to satisfy the third element of res judicata, which is that there must have been an adequate opportunity to litigate the matter fully. Accordingly, an owner would not be barred from raising claims of this sort in a subsequent action, regardless of the existence of privity.

In the present case, we do not understand the plaintiffs to allege that any failure of design or workmanship *manifested* subsequent to the arbitration. Rather, their primary claim is that, in early November, 2010, prior to the conclusion of the arbitration, Rizzo and certain of the defendants became aware of alleged defects in the project design but conspired to fraudulently conceal those defects from the plaintiffs so that they could not be raised in the arbitration. The Appellate Court concluded that any claim arising from that alleged fraud is now barred by General Statutes § 52-420 (b), which provides that a party seeking to vacate an arbitration

award on grounds of corruption, fraud, or undue means must do so within a thirty day limitation period. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 653; see also *Wu* v. *Chang*, 264 Conn. 307, 312, 823 A.2d 1197 (2003) (after thirty day limitation period prescribed by § 52-420 [b], court loses jurisdiction to entertain claim that arbitration award was obtained by fraud). Because we declined to certify the question of whether the Appellate Court properly applied § 52-420 (b) under the facts of the present case, that question is not before us, and we express no opinion as to whether the fraud exception to res judicata; see *Weiss* v. *Weiss*, supra, 297 Conn. 472; applies in the arbitration context.

We emphasize in this respect that the presumption of privity is merely a default rule. If, as the plaintiffs contend, some property owners are reluctant to agree to arbitrate their disputes with general contractors for fear that they will be barred subsequently from litigating related disputes with their subcontractors, nothing precludes the parties to a construction project from negotiating a contract that carves out certain issues or certain third parties from the scope of arbitration.

The plaintiffs next argue that the Appellate Court improperly ignored controlling authority by concluding, solely on the basis of contractual relationships, that the defendants were in privity with Rizzo. Specifically, the plaintiffs contend that our decision in *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 146, modified the transactional test that governs the privity analysis for purposes of res judicata and that, under *Wheeler*, there can be no privity when the claims at issue are factually distinct from those raised in the prior litigation or arbitration. The plaintiffs' reliance on *Wheeler* is misplaced.

As we explained in *Wheeler*, the question of whether the element of res judicata requiring that the prior adju-

dication involves the same underlying claim is distinct from the privity element. Id., 156–57. It is true that, under the unique facts and procedural history of *Wheeler*, there was substantial overlap between the privity analysis and the "same claim" element. Id., 165 n.20. *Wheeler* was a real property case, however, in which the plaintiffs held lots distinct from those of the parties with whom they were allegedly in privity. We emphasized that the parties did not share any common ownership interests with respect to each other's lots; there were no common chains of title, no mutual or successive prescriptive easement rights, and there was no privity of estate. Id., 169–70. Accordingly, the only way that the plaintiffs could have been in privity with prior litigants with respect to the claimed prescriptive rights was if their use of the disputed common lawn was so factually similar as to give rise to an identical legal right. Id., 158, 166–68. Thus, although commonality of use might, under different factual circumstances, have been *sufficient* to establish privity, we never suggested in *Wheeler* that factual commonality would have been *necessary* if, say, the parties had been in privity by virtue of contract or shared or successive ownership.

The present case, by contrast, is a contract matter in which a contractual theory of privity is alleged. Insofar as there is contractual privity, the question of factual commonality is simply irrelevant to the privity analysis.[7]

Finally, the plaintiffs contend that adopting a presumption of privity would be unwise because construction projects, contracts, and relationships are

[7] It also bears noting that, in *Wheeler*, the defendants asserted res judicata against lot owners who were not party to the prior proceedings and, therefore, had no prior opportunity to litigate their claims, a consideration that framed our preclusion analysis. See *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 166. In the present case, by contrast, res judicata is being asserted against the plaintiffs, who *were* parties to the arbitration and arguably had the opportunity to raise these issues therein.

complicated; subcontractors may have duties to and agreements with owners that are independent of and distinct from the duties that run through the general contractors. The plaintiffs warn that any preclusion rule that fails to account for this reality will sound the death knell of construction arbitration; property owners will be loath to agree to arbitration with their general contractors if doing so risks abandoning whatever independent rights and claims they may have against the subcontractors.

We doubt that a presumption of privity would create a disincentive for property owners to participate in arbitration. As the amicus explains, it is as much to the benefit of owners as it is to subcontractors to be able to expeditiously resolve all disputes arising from a construction project in a single forum. Moreover, the fact that other jurisdictions apply such a rule, and presumably have not encountered the negative experiences invoked by the plaintiffs, reassures us that to do so would not be unwise.

We also are skeptical of the plaintiffs' contention that the rule that the Appellate Court applied is ill suited for the complexities of many present day construction projects, which tend to feature multiple and divergent lines of authority running between a project owner and various contractors and subcontractors. We observe that the plaintiffs and Rizzo arbitrated their dispute pursuant to the construction industry arbitration rules of the American Arbitration Association, and that they selected as their arbitrator Arthur G. Folster, a general contractor and registered professional engineer with more than forty years of experience in contract administration and the design and construction of major building projects worth as much as $500 million. Folster had been trained as a construction industry arbitrator and had arbitrated a wide range of project disputes.

The award of this experienced construction arbitrator suggests that, although this particular project was indeed characterized by multiple, convoluted lines of authority and "complicate[d]" legal relationships, the type of arrangement that the plaintiffs orchestrated here is neither normal nor desirable. Rather, the arbitrator concluded that the administration of the prime contract was "unique," and that the administration and coordination of the project were performed in a "flawed manner . . . ."[8] Accordingly, the fact that a presumption of privity might not dovetail with the realities of this particular project does not count as a general strike against a default presumption of privity.

For these reasons, we conclude that the Appellate Court correctly determined that when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project.

B

Having concluded that the Appellate Court properly adopted a rebuttable presumption that general contractors and subcontractors are in privity for purposes of res judicata, we now consider whether the record supports the plaintiffs' contention that the presumption should not apply in the present case because the parties did not intend to structure their legal relationships in

[8] For example, although the prime contract gave the plaintiffs' architect, Russell J. Larrabee, much of the responsibility for administering the contract, in practice, Larrabee either refused or was not allowed by the plaintiffs to perform that role. The plaintiffs also changed project engineers midstream. The arbitrator found that matters were further complicated by the fact that the plaintiffs contracted separately with various building and design professionals, and that the parties kept virtually no written records of their communications.

such a manner.[9] We conclude, to the contrary, that the record indicates that the plaintiffs anticipated, or reasonably should have anticipated, that the arbitration between themselves and Rizzo would be the proper forum for addressing any claims that existed against the defendants at that time.

1

The clearest evidence of the parties' intent in this regard is the prime contract. The plaintiffs chose to use a standard form owner-contractor construction contract published by the American Institute of Architects, and so presumably intended that their agreement would be governed by industry norms.

The prime contract includes the following relevant terms: (1) "Nothing contained in the Contract Documents shall create any contractual relationship between the Owner or the Architect and any Subcontractor or Sub-subcontractor"; (2) "[t]he Contractor . . . shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract"; (3) "[t]he Work comprises the completed construction required by the Contract Documents and includes all labor necessary to produce such construction"; (4) "[t]he Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and their agents and employees, and other persons performing any of the Work under a contract with the Contractor"; and (5) "[u]nless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor . . . and other facilities and ser-

[9] See G. Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L. Rev. 623, 663–65 (1988) ("[T]he court must ask itself what rational parties would have agreed to had the matter of preclusion been explicitly negotiated between them. . . . If a party clearly intended to arbitrate the transaction at issue, then that party should not later be permitted to circumvent the prior arbitration award by suing a person who was functionally central to the transaction but who was technically not a party to the arbitration.").

vices necessary for the proper execution and completion of the Work . . . .'' Accordingly, although other provisions of the prime contract reserve to the owner the right to perform work on the project with his own forces and to award separate contracts to other contractors in connection with portions of the project, absent such arrangements, the contract clearly provides that the general contractor will be responsible for all of the subcontractors' work on the project and will be answerable to the owner therefor.

Indeed, the prime contract requires the contractor to formalize these so-called ''flow down'' obligations with each subcontractor. Another provision provides: ''By an appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner . . . . Said agreement shall preserve and protect the rights of the Owner . . . under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights . . . . Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with his Sub-subcontractors.'' As noted in the opinion of the Appellate Court, although Rizzo's subcontract with Lindade includes the flow down provision required by the prime contract,[10] the other

[10] ''Section 1 (b) of the agreement provides: '[Lindade] assumes toward [Rizzo] all obligations, risks, and responsibilities for the Work, which [Rizzo] assumes toward [the plaintiffs] in the Contract Documents, and shall be bound to [Rizzo] in the same manner and to the same extent [Rizzo] is bound to [the plaintiffs] by the Contract Documents.' '' *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 639–40; see also C. Ingwalson et al., supra, 6 J. Am. C. Constr. Laws., no. 1, p. 3 (''[p]articularly for those in the construction industry, a clear and express incorporation by reference of one agreement into another is usually effective'').

defendants' subcontracts did not include such provisions. This fact might be relevant to assessing the *defendants'* expectations, but the question before us is whether the *plaintiffs*, in view of the provisions of the *prime* contract, reasonably could have expected that any claims that they had against Rizzo's subcontractors could have been raised against Rizzo in the arbitration. The answer to that question is unequivocally yes.

The arbitration provision contained in the prime contract confirms this conclusion. "When the arbitration agreement is broad . . . and there are no other limits on the scope of the arbitration, courts have applied res judicata based on a broad, transactional view of the arbitrated claim." G. Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L. Rev. 623, 643 (1988). In the present case, the prime contract includes a standard construction industry arbitration clause that allows the unrestricted submission of all claims and disputes to the arbitrator, with the exception of claims relating to the plaintiffs' project architect. In addition, the arbitration provision envisions and permits the joinder or other participation of third parties who are "substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration." That provision further undercuts the plaintiffs' argument that they could not have sought relief in the arbitration with respect to claims arising from the work of Rizzo's subcontractors. See C. Ingwalson et al., supra, 6 J. Am. C. Constr. Laws., no. 1, p. 3 ("[w]hen a contract providing for arbitration refers to the role to be played by nonsignatories, or when a pleading in a dispute between signatories refers to conduct of nonsignatories . . . there is an increased likelihood that nonsignatories can be bound by, or claim rights pursuant to, an arbitration clause").

We also think that the plaintiffs' conduct throughout the arbitration process further evidences an expectation that Rizzo could be held accountable for the conduct of its subcontractors, consistent with a finding of privity. See footnote 9 of this opinion. In their prehearing brief to the arbitrator, the plaintiffs contended that "[t]he structural issues on the project for the [p]re-[e]ngineered [b]uilding are Rizzo's and [Horton's] responsibility." During discovery, the plaintiffs requested that Rizzo provide all documents relating to its communications and agreements with its subcontractors. The plaintiffs then issued subpoenas and document requests to Quaraglia, Munger, Oakeson, Lindade, and Horton, among other subcontractors. Although most of the defendants ultimately were not called to testify, a representative of Horton, Douglas H. McCloskey, was called and testified at length over the course of several days of the arbitration hearing. Further, as the Appellate Court emphasized, during the arbitration, the plaintiffs adduced evidence of the alleged failure of several of the defendants to meet their obligations on the project. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 672 (Quaraglia); id., 680 (Munger); id., 684 (BlueScope). In addition, while the arbitration was pending, the plaintiffs' structural engineer, Richard J. Marnicki, prepared a report reviewing the building's load bearing capacities. In preparing that report, Marnicki visited the offices of and requested engineering drawings and calculations from several of the defendants. It seems clear, then, that although the defendants never were formally made party to the arbitration, the plaintiffs viewed them as an integral part of the process, saw Rizzo as responsible for their conduct, and were not precluded from involving the defendants in the arbitration in various capacities.

2

In arguing for a contrary conclusion, the plaintiffs contend that the conclusion of the Appellate Court that Rizzo was in privity with all of its subcontractors is inconsistent with the arbitrator's factual findings. In this respect, the plaintiffs rely heavily on the following sentence in the arbitration award: "The [c]ontract, as drafted by [the project architect] and executed by [the plaintiffs], does not obligate [Rizzo] to perform or be responsible for all design and engineering aspects of the [p]roject." The plaintiffs interpret this finding to mean that, regardless of any default presumptions, Rizzo was not in privity with and could not be held responsible for the defendants' engineering work on the project.

The defendants respond, and we agree, that, when read in context, the arbitrator's statement does not represent a finding that Rizzo and its subcontractors were not in privity with respect to engineering work on the project. The paragraph of the award in which the sentence appears begins by noting that the contractual arrangements governing the project were complicated by virtue of the fact that the plaintiffs chose to contract independently with Danbury Septic for site work, with Rieve Plumbing & Mechanical for mechanical design and construction, and with Tucker Electrical for electrical design work, and that those contractors reported directly and exclusively to the plaintiffs. That arrangement was consistent with the prime contract, which permitted the plaintiffs to hire separate contractors and subcontractors to perform portions of the project. Considered in that context, the most reasonable reading of the sentence at issue is that the arbitrator was simply noting that the plaintiffs permissibly outsourced and supervised the referenced site work, and plumbing and electrical work, and, therefore, that Rizzo was not responsible to the plaintiffs for the work of those subcontractors. Our interpretation is supported by the fact

that site work represented one of the principal grounds for Rizzo's arbitration claims against the plaintiffs.[11]

To summarize, we find nothing in the record to rebut the presumption that the plaintiffs reasonably should have expected that any claims they had against Rizzo's subcontractors could have been raised in the context of the arbitration. Accordingly, we agree with the Appellate Court that the defendants and Rizzo were in privity for purposes of res judicata and, therefore, that the trial court improperly denied their motions for summary judgment on that basis.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

MICHAEL A. FIANO *v.* OLD SAYBROOK FIRE COMPANY NO. 1, INC., ET AL.
(SC 20135)

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

Syllabus

The plaintiff sought to recover damages from the defendants, S, F Co., and the town of Old Saybrook, for personal injuries he sustained when his motorcycle collided with a motor vehicle operated by S as S was exiting

[11] This interpretation of the award also is consistent with the position that the plaintiffs took in the underlying litigation when responding to the defendants' interrogatories. For example, in response to BlueScope's request that the plaintiffs "identify each and every person with whom [they] contracted to procure labor, services, materials and/or equipment for the [p]roject," the plaintiffs responded that they had contracted directly with site work, sprinkler, and test/inspection contractors, but that, otherwise, they "contracted only with Rizzo . . . for the design and construction . . . on the [p]roject" and that, "[a]s part of its representations to the [plaintiffs], Rizzo assumed the responsibility to contract with the required design professionals. . . . Rizzo engaged multiple entities to provide structural engineering services, including . . . [Horton, Munger, VP Buildings, Inc., Lindade, and Quaraglia]." In other words, the plaintiffs themselves drew a clear distinction during the discovery process between subcontractors who were answerable directly to them and those, including all of the defendants, whose responsibility ran directly through Rizzo.

the driveway of F Co., a fire department in Old Saybrook, and entering a public roadway. The plaintiff alleged that the collision had occurred as a result of S's negligent operation of his motor vehicle when S, a junior volunteer firefighter with F Co., was acting within the scope of his employment with F Co. The plaintiff further alleged that, because S was an employee or agent of F Co. and the town, they were vicariously liable for S's negligence pursuant to the statutes (§§ 7-308 and 7-465) that indemnify volunteer firemen and municipal employees for liability imposed while acting within the scope of their employment. F Co. and the town filed a motion for summary judgment, claiming that, because S was leaving the fire department and on his way home to attend to personal matters when the collision occurred, there was no genuine issue of material fact as to whether S was acting within the scope of his employment with F Co. at that time. The trial court granted the motion and rendered judgment for F Co. and the town, from which the plaintiff appealed to the Appellate Court. The Appellate Court upheld the trial court's granting of the motion for summary judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's granting of summary judgment in favor of F Co. and the town on the ground that there was no genuine issue of material fact that S was not acting within the scope of his employment at the time of the accident and, therefore, that F Co. and the town could not be held vicariously liable for S's negligence as a matter of law: a reasonable jury, properly instructed in the legal principles governing the doctrine of respondeat superior, could conclude only that S was engaged in the pursuit of purely personal affairs and was not under the control of F Co. or acting in furtherance of its business when the accident occurred, and the fact that S was on or very close to F Co.'s premises at the time of the accident and would have been able to respond immediately if there had been an emergency call did not lead to the conclusion that F Co. actually exercised control over S or that S was performing some act for F Co.'s benefit at that time; moreover, although there was some overlap in the factors to be considered in determining whether an employee is acting within the scope of his employment for purposes of workers' compensation law and under the doctrine of respondeat superior, the public policies underlying that law and doctrine are very different, and, even if S was engaged in fire duties at the time of the accident within the meaning of the statute (§ 7-314 [a]) that defines fire duties with respect to volunteer firefighters for purposes of workers' compensation coverage, S was not acting within the scope of his employment for purposes of imposing vicarious liability on F Co. or the town.

Argued February 20—officially released June 25, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Keller*, *Bright* and *Mihalakos*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed*.

James J. Healey, with whom was *Douglas P. Mahoney*, for the appellant (plaintiff).

Michael F. O'Connor, for the appellees (named defendant et al.).

Opinion

VERTEFEUILLE, J. The issue that we must resolve in this certified appeal is whether the trial court properly determined that there was no genuine issue of material fact as to whether the defendant James M. Smith, a junior volunteer firefighter with the named defendant, the Old Saybrook Fire Company No. 1, Inc. (fire company), was acting within the scope of his employment with the fire company at the time that the motor vehicle that he was driving collided with a motorcycle being driven by the plaintiff, Michael A. Fiano. The plaintiff brought this action alleging that he had been injured as the result of Smith's negligent operation of his motor vehicle and that the fire company and the defendant town of Old Saybrook (town) were vicariously liable for Smith's negligence pursuant to General Statutes

§§ 7-308[1] and 7-465.[2] The fire company and the town (collectively, municipal defendants) filed a motion for summary judgment, claiming that, because Smith had left the firehouse and was on his way home to attend to personal matters when the collision occurred, there was no genuine issue of material fact as to whether Smith was acting within the scope of his employment with the fire company at that time. The trial court ultimately granted that motion and rendered judgment in favor of the municipal defendants. Thereafter, the plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 180 Conn. App. 717, 744, 184 A.3d 1218 (2018). We then granted the plaintiff's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Did

[1] General Statutes § 7-308 (b) provides in relevant part: "Each municipality of this state, notwithstanding any inconsistent provision of law, general, special or local, or any limitation contained in the provisions of any charter, shall protect and save harmless any volunteer firefighter, volunteer ambulance member or volunteer fire police officer of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of (1) any claim, demand, suit or judgment by reason of alleged negligence on the part of such volunteer firefighter, volunteer ambulance member or volunteer fire police officer while performing fire, volunteer ambulance or fire police duties . . . ."

[2] General Statutes § 7-465 (a) provides in relevant part: "Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, except firemen covered under the provisions of section 7-308, and on behalf of any member from such municipality of a local emergency planning district, appointed pursuant to section 22a-601, all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment . . . ."

We note that § 7-465 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2015, No. 15-85, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

the Appellate Court properly uphold the trial court's granting of summary judgment on the ground that there is no genuine issue of material fact that an agency relationship did not exist between the [municipal] defendants and [Smith] at the time of his motor vehicle accident with the plaintiff?" *Fiano* v. *Old Saybrook Fire Co. No. 1*, *Inc.*, 329 Conn. 910, 186 A.3d 14 (2018). We affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts, which we have supplemented and viewed in the light most favorable to the plaintiff for purposes of reviewing the trial court's grant of summary judgment. "Smith became a junior member of the fire company in 2012.[3] As a junior member, he was authorized to fight exterior fires and respond to other emergency calls. Smith possessed an electronic key fob that enabled him to enter the firehouse during the day. Smith, along with the other members of the fire company, was encouraged [by the fire company's chiefs and other officers] to spend time at the firehouse monitoring the radio for emergency calls in order to quicken response times, perform training exercises, and to build comradery with one another. In order to entice members to spend time at the firehouse, the fire company provided televisions, computers, a weight room, laundry facilities, and showers." (Footnote added.) *Fiano* v. *Old Saybrook Fire Co. No. 1*, *Inc.*, supra, 180 Conn. App. 734.

John Dunn, the chief of the fire company at the time of the accident, testified at his deposition that, "[d]epending on the incident," it can be advantageous for firefighters to be at the firehouse so that they are available to respond immediately to any calls that come in. Dunn further testified that, if an adult firefighter who is

[3] Smith was a junior in high school when he joined the fire company as a junior member.

authorized to drive a fire truck were at the firehouse, it would be beneficial to the fire company for firefighters to be there when an emergency call came in because "the fire truck could leave the building quicker than if [the firefighters] came from their home[s] . . . ."

"The fire company utilized a 'points system' in order to track a firefighter's participation, and the firefighters were required to obtain a minimum number of points in order to maintain active membership. Firefighters earned points by responding to emergency calls, staffing the firehouse during emergencies, and, at the fire company's discretion, spending time at the firehouse waiting for a call. Additionally, although the fire company is a volunteer department, the town's firefighters received monetary compensation for their duties. Full members of the fire company are eligible for pensions and receive tax abatements from the town. Members are also paid in the event they respond to a brush fire. Prior to the accident, Smith personally received payment for his time spent staffing the firehouse during emergencies.

"As a junior member, Smith was not allowed to drive any of the fire company's vehicles. Thus, Smith used his personal vehicle to respond to emergency calls, [to] travel to and from the firehouse, and to attend training. Using this vehicle, Smith also would transport other members of the company to emergencies and other fire company related events. The fire company instructed how its members were to use their personal vehicles when responding to emergencies, such as how to properly park at the scene. In his personal vehicle, Smith kept his company issued firefighting equipment, which included a helmet, coat, bunker pants, and fire boots. His vehicle was adorned with a special license plate that identified him as a member of the fire company, which grants him access to closed roads during emergencies."

"On [October 26, 2013] the day of the accident, Smith went to the firehouse [on Main Street in Old Saybrook] because he had a 'couple [of] extra hours to spare.' Smith's girlfriend at the time, who also was a junior member of the fire company, and two other members of the fire company, were also present at the firehouse that day. Smith spent his time at the firehouse monitoring the radio for emergency calls. After spending approximately three and one-half hours at the firehouse, Smith left with the intention to go home to change his clothing in order to have his picture taken for his senior yearbook. Smith departed the firehouse in his personal vehicle, and, as Smith pulled out of the firehouse driveway onto Main Street, his vehicle and the plaintiff's vehicle collided." *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 734–35.

Thereafter, the plaintiff, who was seriously injured in the collision, brought this action alleging that the collision was the result of Smith's negligent operation of his vehicle, and the municipal defendants were vicariously liable for Smith's negligence because he was their agent or employee and was performing duties within the scope of his employment at the time of the accident. The municipal defendants filed a motion for summary judgment, claiming that there was no genuine issue of material fact that Smith was not acting as the agent or employee of the fire company at the time of the accident because he had left the firehouse and was on his way home to attend to personal matters. Accordingly, they argued, there was no basis for vicarious liability. After the trial court summarily denied the motion, the municipal defendants filed a motion to reargue and for articulation. The trial court also denied that motion. On the day before jury selection was scheduled to commence, the municipal defendants filed a second motion to reargue and for reconsideration. The trial court granted that motion the same day. The next day, the trial court

vacated its prior decision denying the municipal defendants' motion for summary judgment, granted the motion and rendered judgment in favor of those defendants.[4]

The plaintiff then appealed to the Appellate Court. That court concluded that, because Smith was "in the process of leaving [the firehouse] to attend to his personal affairs" when the accident occurred, "he was no longer furthering the [municipal] defendants' interests at that time." Id., 739. Accordingly, the Appellate Court concluded that the trial court properly had determined that there was no genuine issue of material fact that Smith was not acting as the fire company's employee, and it affirmed the judgment of the trial court. See id., 744.

This certified appeal followed. The plaintiff contends that, contrary to the conclusions of the trial court and the Appellate Court, there is a genuine issue of material fact as to whether Smith was furthering the fire company's interests at the time of the accident and, therefore, was acting within the scope of his employment, because there was evidence that would support a finding that the fire company benefited from his presence in close proximity to the firehouse when he was "ready, willing and able" to respond immediately to any emergency calls that might come in. We disagree.

[4] In his appeal to the Appellate Court, the plaintiff claimed that the trial court improperly granted the municipal defendants' second motion to reargue and for reconsideration and then granted their motion for summary judgment without providing him with an opportunity to be heard on the issue. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 727. The Appellate Court concluded that the trial court improperly granted the motion for summary judgment without holding a hearing, as required by Practice Book § 11-12, but that the impropriety did not require reversal because it was harmless. See id., 730. That portion of the Appellate Court's opinion, concerning the trial court's failure to hold a hearing before granting the second motion to reargue and for reconsideration, is not at issue in this certified appeal because we limited certification to the issue of whether the ruling was correct on the merits.

We begin with the standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

We next review the legal principles governing an employer's vicarious liability for the acts of an employee. Under the doctrine of respondeat superior, "[a] master is liable for the wilful torts of his servant

committed within the scope of the servant's employment and in furtherance of his master's business." *Pelletier* v. *Bilbiles*, 154 Conn. 544, 547, 227 A.2d 251 (1967). "A servant acts within the scope of employment while engaged in the service of the master, and it is not synonymous with the phrase during the period covered by his employment. . . . While a servant may be acting within the scope of his employment when his conduct is negligent, disobedient and unfaithful . . . that does not end the inquiry. Rather, the vital inquiry in this type of case is whether the servant on the occasion in question was engaged in a disobedient or unfaithful conducting of the master's business, or was engaged in an abandonment of the master's business. . . . Unless [the employee] was actuated at least in part by a purpose to serve a principal, the principal is not liable." (Citations omitted; internal quotation marks omitted.) *A-G Foods*, *Inc.* v. *Pepperidge Farm*, *Inc.*, 216 Conn. 200, 209–10, 579 A.2d 69 (1990); see also *Harp* v. *King*, 266 Conn. 747, 782–83, 835 A.2d 953 (2003) ("[i]n determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: [1] occurs primarily within the employer's authorized time and space limits; [2] is of the type that the employee is employed to perform; and [3] is motivated, at least in part, by a purpose to serve the employer").

The parties in the present case also rely on general agency principles. "Agency is defined as the fiduciary relationship [resulting] from [the] manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act . . . ." (Internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier*, *Inc.*, 191 Conn. 120, 132, 464 A.2d 6 (1983). "An essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the princi-

pal." *Leary* v. *Johnson*, 159 Conn. 101, 105–106, 267 A.2d 658 (1970). "[I]t must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine [of respondeat superior] to apply." *Mitchell* v. *Resto*, 157 Conn. 258, 262, 253 A.2d 25 (1968).

"In most cases, it is the function of the jurors to determine from the facts before them whether . . . a servant was acting within the scope of his employment. . . . In some situations, however, the acts of the servant are so clearly without the scope of his authority that the question is one of law." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Housing Authority*, 23 Conn. App. 624, 628, 583 A.2d 643 (1990), cert. denied, 217 Conn. 808, 585 A.2d 1233 (1991).

In the present case, the Appellate Court's conclusion that there was no genuine issue of material fact that Smith was not acting within the scope of his employment by the fire company at the time of the accident as a matter of law was based in large part on this court's decision in *Levitz* v. *Jewish Home for the Aged, Inc.*, 156 Conn. 193, 239 A.2d 490 (1968). See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 743–44. In *Levitz*, the defendant Igors Blankenfeld was an employee of the defendant Jewish Home for the Aged, Inc. (Home), in New Haven. See *Levitz* v. *Jewish Home for the Aged, Inc.*, supra, 194. Blankenfeld also lived at the Home. See id., 195. On the date at issue, Blankenfeld left his room in the Home and went to the office, where he received his pay. Id., 196. He then left the Home and went to his vehicle, which was parked on a public road in front of the Home. Id., 195–96. He intended to drive the vehicle downtown to pay some of his own bills. See id., 196. When he started the vehicle, however, "it went out of control, mounted a curb and struck the plaintiff, [a resident of the Home] who was seated on the steps of the [Home's] premises." Id. The

plaintiff brought a negligence action against Blankenfeld and the Home, as Blankenfeld's employer. See id., 194. After the jury returned a verdict for the plaintiff against both defendants, the Home filed a motion to set aside the verdict and for judgment in its favor notwithstanding the verdict. See id. The trial court granted the motion on the ground that the evidence conclusively established that Blankenfeld was not acting on behalf of the Home at the time of the accident. See id. On appeal, this court affirmed the judgment of the trial court, concluding that "[t]he evidence is reasonably susceptible of but one conclusion, that is, that, at the time of the accident, Blankenfeld was not performing an act for the Home in furtherance of its business." Id., 197–98.

In the present case, Smith had left the firehouse, entered his own personal vehicle and driven the vehicle away from the premises with the intent of attending to his own personal affairs when the accident occurred. Thus, in the absence of any additional circumstances rendering the case meaningfully distinguishable, we would agree with the Appellate Court that *Levitz* is controlling here. The plaintiff contends that there are three such circumstances. First, the plaintiff contends that, unlike in the present case, there was no evidence in *Levitz* that Blankenfeld's off duty presence at the Home benefited his employer. Second, the plaintiff contends that Blankenfeld's presence at the Home "had nothing to do with his job and everything to do with his status as a resident," while Smith was present at the firehouse to be on call for emergencies. Third, he contends that Blankenfeld had left the Home's premises before entering his vehicle, whereas, in the present case, "Smith was still on [fire company] property when he negligently pulled into the plaintiff, and never successfully left the premises."

We can easily dispose of the plaintiff's second and third claims. With respect to the plaintiff's claim that *Levitz* is distinguishable because Blankenfeld had not been working at the Home before the accident occurred, this court expressly stated in *Levitz* that, "[e]ven if we were to assume that Blankenfeld had worked at his usual employment on the day of the accident, this fact, in the light of the other evidence, would not impose liability on the Home." *Levitz* v. *Jewish Home for the Aged, Inc.*, 156 Conn. 198. With respect to the plaintiff's claim that *Levitz* is distinguishable because Blankenfeld's car was not parked on the Home's premises, nothing in *Levitz* suggests that the result in that case turned on the precise location of Blankenfeld's vehicle when he entered it. Rather, the court's exclusive focus was on whether Blankenfeld was "performing an act for the Home in furtherance of its business" when he entered and drove the car. Id., 197–98.

Accordingly, we turn to the plaintiff's primary contention that this case is distinguishable from *Levitz* because Smith's presence in close proximity to the firehouse at the time of the accident benefited his employer. Specifically, the plaintiff contends that the evidence would support a finding that the fire company benefited from Smith's presence on the premises after he left the firehouse and entered his vehicle because he would have been available to respond immediately to an emergency call.

In support of this claim, the plaintiff relies on the Appellate Court's decision in *Glucksman* v. *Walters*, 38 Conn. App. 140, 659 A.2d 1217, cert. denied, 235 Conn. 914, 665 A.2d 608 (1995).[5] In *Glucksman*, the defendant,

[5] The plaintiff also relies on two Superior Court cases, *Ambrosio* v. *AWAC Services Co.*, Docket No. CV-12-6036172-S, 2014 WL 2854076 (Conn. Super. May 16, 2014), and *Sheftic* v. *Marecki*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-56764 (October 22, 1999) (25 Conn. L. Rptr. 584). Both of these cases are distinguishable. In *Ambrosio*, the court relied on the Appellate Court's decision in *Hodgate* v. *Ferraro*, 123 Conn. App. 443, 462, 3 A.3d 92 (2010)—a workers' compensation case—for the proposi-

Kris Walters, was a part-time employee of the defendant Young Men's Christian Association (YMCA) in Stamford. See id., 141, 142. During a pickup basketball game at the YMCA, Walters assaulted and seriously injured the plaintiff, Allen Glucksman, after Glucksman fouled Walters. See id., 142–43. Walters was not working his scheduled hours at the time, but evidence was presented that part-time employees of the YMCA "considered themselves to be on duty, ready to help maintain order in the facility, during work and off hours." Id., 143. The plaintiff brought a negligence action against both Walters and the YMCA, under the doctrine of respondeat superior. See id., 141. The trial court granted the YMCA's motion for a directed verdict in its favor. See id. The Appellate Court reversed that ruling on appeal; id., 148; concluding that the evidence would support findings that, "but for his position as an employee, Walters would not have been on the basketball court, that Walters had been responsible for helping to maintain order on the basketball court, that the YMCA benefited when Walters played basketball because it had an employee on the court to help keep

tion that "[t]he going and coming rule (which precludes recovery for injuries sustained in travel to and from the place of employment) has no application to employees who have no fixed place of employment. . . . Where injuries are incurred while an employee is traveling and it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment." (Internal quotation marks omitted.) *Ambrosio* v. *AWAC Services Co.*, supra, *2. Thus, even if we were to assume that this principle of workers' compensation law applies when determining liability under the doctrine of respondeat superior, the case is distinguishable because the plaintiff has neither claimed nor cited any authority for the proposition that the firehouse was not Smith's fixed place of employment. In *Sheftic*, the court concluded that the so-called " 'going and coming rule' " that other jurisdictions have adopted in the context of vicarious liability claims does not apply in cases in which the employee has become intoxicated at a function hosted by the employer because, "[i]f the employer values the 'conviviality' it believes alcohol adds to the functions it sponsors, the employer should be expected to pay for any carnage on the highway resulting from intoxication." *Sheftic* v. *Marecki*, supra, 585–86. In the present case, the fire company did not provide any alcohol to Smith.

order, that the commission of fouls disrupts a basketball game, and that Walters attacked Glucksman in a misguided effort to prevent Glucksman from committing fouls and disrupting the game." Id., 145.

In the present case, the plaintiff contends that *Glucksman* supports his claim that Smith was acting within the scope of his employment when the accident occurred because, like Walters, Smith's presence at the firehouse was due to his employment there, and he was providing a benefit to the fire company by being ready, willing and able to respond immediately to emergency calls. The plaintiff fails to recognize, however, that, in *Glucksman*, Walters was not merely ready, willing and able to provide a benefit to the YMCA, *but he actually engaged in an effort to do so when he attempted to maintain order on the basketball court*. Thus, *Glucksman* does not support the proposition that an employee who is, in fact, attending to purely personal affairs, but who is ready, willing and able to provide a benefit to his employer if summoned to do so, may be deemed to be acting for the employer's benefit, even if the employee is not actually summoned and does not actually provide any beneficial services.

Cases from our sister jurisdictions addressing the question of whether on call employees are acting for the benefit of their employers merely by virtue of being on call are instructive on this issue. In *Wayman* v. *Accor North America, Inc.*, 45 Kan. App. 2d 526, 251 P.3d 640, review denied, 292 Kan. 969 (2011), Frederick Ristow was the general manager of a Motel 6, where he also lived. See id., 527–28. As part of his work duties, Ristow was "on call [twenty-four] hours per day to handle emergency situations." Id., 528. On the day in question, Ristow returned to the motel early in the afternoon after visiting out of state family members. See id. "After asking the manager on duty to stay so he could get something to eat, Ristow left the motel and went to [a nearby

tavern] where he stayed until approximately 8 p.m. drinking alcohol. . . . Although Ristow understood that he was on call if the manager on duty needed help at the motel, he did not receive any phone calls that day about problems at the motel." Id. Ristow left the tavern at approximately 8 p.m. and returned to the motel. See id. As he attempted to park his vehicle, he struck and injured the plaintiff, Donald Wayman, who was a guest at the motel and was standing near the doorway of his room. See id., 527–28. Wayman filed an action against both Ristow and, under a theory of vicarious liability, his employer. See id., 529. The trial court granted the employer's motion for summary judgment on the ground that Ristow had not been acting within the scope of his employment. See id., 530.

On appeal, the Court of Appeals of Kansas observed that "the modern rationale for vicarious liability is the enterprise justification concept . . . . Under such a justification, the losses caused by an employee's tort are placed on the enterprise as a cost of doing business and on the employer for having engaged in the enterprise." (Internal quotation marks omitted.) Id., 538. The court concluded that "[i]mposing vicarious liability on an employer for the negligent acts of an employee merely because the employee is on call does not serve this justification." Id. Because Ristow had been returning from a "purely personal . . . excursion" when the accident occurred, and had not been called to respond to any emergency at the motel, the court concluded that "he was not performing any work-related activity," despite the fact that the accident occurred in the motel parking lot. Id., 539; see also *Le Elder* v. *Rice*, 21 Cal. App. 4th 1604, 1608–1609, 26 Cal. Rptr. 2d 749 (1994) (when employee was on personal errand, fact that he was on call twenty-four hours per day seven days per week and had ability to respond to calls at any hour from any location did not mean that

his activities were within scope of employment, even though his being on call benefited employer); *Le Elder* v. *Rice*, supra, 1609 ("[p]ublic policy would be ill-served by a rule establishing [twenty-four] hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident"); *Le Elder* v. *Rice*, supra, 1610 ("[on call] accessibility or availability of an employee does not transform his or her private activity into company business"); *Migliore* v. *Gill*, 81 So. 3d 900, 903, 904 (La. App. 2011) (fact that employee was on call and expected to report to employer's premises within thirty minutes of being summoned did not give rise to vicarious liability when employee was driving personal vehicle and was engaged in strictly personal activity at time of accident, and employer had exercised no control over him), review denied, 84 So. 3d 555 (La. 2012); *Clickner* v. *Lowell*, 422 Mass. 539, 543–44, 663 N.E.2d 852 (1996) (for purposes of determining whether municipal employer was required to indemnify employee, fact that employee was on call and was attempting to call employer in response to page at time of accident did not mean that employee was acting within scope of employment duties); *Johnson* v. *Daily News, Inc.*, 34 N.Y.2d 33, 35–36, 312 N.E.2d 148, 356 N.Y.S.2d 1 (1974) (employer is not vicariously liable for acts of on call employee unless employee is "performing some act in furtherance of a duty he owes the employer and . . . the employer is, or could be, exercising some control, directly or indirectly, over his activity"); *Thurmon* v. *Sellers*, 62 S.W.3d 145, 155 (Tenn. App. 2001) (in determining whether on call employee is acting within scope of employment, court should consider whether employee's use of vehicle benefited employer, whether employee was subject to employer's control at time of accident, whether employee's activities were restricted while on call, whether employee's use of vehicle was authorized by employer and employee's primary reason for using vehicle at time of accident).

We recognize that the plaintiff in the present case has expressly denied making any claim that the fire company would be vicariously liable for any tort committed by Smith at any time that he was on call to respond to emergencies. Rather, he claims that the fire company is liable here only because Smith was still on or very close to the firehouse premises when the accident occurred and, therefore, that he would have been able to respond immediately if there had been an emergency call. We are aware of no authority, however, for the proposition that the test for determining whether an employee was acting within the scope of his employment or, instead, was merely on call, is *how long* it would have taken the employee to respond to the employer's call to return to duty *if* such a call had occurred. Rather, the test is whether, at the relevant time, the employer had actually exercised control over the employee and the employee was actually performing some act for the employer's benefit—*other* than the benefit inherent in merely being on call. Although we acknowledge that it may be difficult in some situations to determine the precise line between being on duty and being on call, we conclude in the present case that a reasonable jury could conclude only that, by the time that Smith entered his vehicle, at the very latest, he had embarked on the pursuit of purely personal affairs, and nothing that occurred after that point and before the accident brought him back under the control of the fire company.

The plaintiff, however, raises two additional claims to support his position that there is a genuine issue of material fact as to whether Smith was on duty when the accident occurred. First, he points to Dunn's testimony that he believed that a firefighter who had been involved in an accident while driving home after a call was still "on duty" at that time for purposes of workers' compensation law. See General Statutes § 31-275 (1) (A) (i)

("[f]or a police officer or firefighter, 'in the course of his employment' encompasses such individual's departure from such individual's place of abode to duty, such individual's duty, and the return to such individual's place of abode after duty"). Second, he contends that a jury reasonably could find that, as a *volunteer* firefighter, Smith was on duty for workers' compensation purposes because he testified that "he was following the orders of superior officers in being present at the firehouse on a weekend . . . ." See General Statutes § 7-314 (a) (with respect to volunteer firefighters, the term fire duties includes "duties performed while at fires, while answering alarms of fire, while answering calls for mutual aid assistance, while returning from calls for mutual aid assistance, while directly returning from fires, while at fire drills or parades, while going directly to or returning directly from fire drills or parades, while at tests or trials of any apparatus or equipment normally used by the fire department, while going directly to or returning directly from such tests or trials, while instructing or being instructed in fire duties, while answering or returning from ambulance calls where the ambulance service is part of the fire service, while answering or returning from fire department emergency calls and any other duty ordered to be performed by a superior or commanding officer in the fire department"); see also *Evanuska* v. *Danbury*, 285 Conn. 348, 352, 939 A.2d 1174 (2008) (proof that injury was sustained during performance of "fire duties" within meaning of § 7-314 [a] is predicate to filing workers' compensation claim pursuant to General Statutes § 7-314a [a]); *Evanuska* v. *Danbury*, supra, 357–58 ("General Statutes §§ 7-314a and 7-314b are the only procedural vehicles available for volunteer firefighters to obtain workers' compensation benefits for injuries

sustained while performing fire duties" [footnote omitted]).[6]

We are not persuaded. Even if we were to assume that Smith was acting within the scope of his employment for purposes of workers' compensation law—an issue on which we express no opinion—that would not necessarily mean that he was acting within the scope of his employment for purposes of imposing vicarious liability on his employer. The public policies underlying workers' compensation and the doctrine of respondeat superior are very different.[7] Specifically, "[t]he purpose

[6] The municipal defendants appear to contend that the definition of "fire duties" set forth in § 7-314b (b) is the exclusive definition for workers' compensation purposes. See General Statutes § 7-314b (b) (defining " 'fire duties' " as "duties performed while at fires, answering alarms of fire, answering calls for mutual aid assistance, returning from calls for mutual aid assistance, at fire drills or training exercise, and directly returning from fires"). In *Evanuska*, however, this court applied the definition of "fire duties" set forth in § 7-314 (a) to a workers' compensation claim brought pursuant to § 7-314a (a). See *Evanuska* v. *Danbury*, supra, 285 Conn. 352.

[7] Indeed, "courts have repeatedly noted the distinction between [workers'] compensation law and the theory of vicarious liability." *Wayman* v. *Accor North America, Inc.*, supra, 45 Kan. App. 2d 537, citing *O'Shea* v. *Welch*, 350 F.3d 1101, 1106 (10th Cir. 2003) ("[w]e also agree that the public policies behind [workers'] compensation and third party liability cases are different"), *Garcia* v. *Estate of Arribas*, 363 F. Supp. 2d 1309, 1318 (D. Kan. 2005) ("[workers'] compensation laws . . . are quite different, in many respects, from the laws pertaining to the liability of employers to third parties"), *Stokes* v. *Denver Newspaper Agency, LLP*, 159 P.3d 691, 693–95 (Colo. App. 2006) (discussing differences between respondeat superior and workers' compensation theories of recovery), cert. denied, Colorado Supreme Court, Docket No. 06SC697 (April 23, 2007), and *Salt Lake City Corp.* v. *Labor Commission*, 153 P.3d 179, 182 (Utah 2007) ("[w]ith very different presumptions governing [workers'] compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other" [internal quotation marks omitted]).

In support of his claim that this court should be guided by principles of workers' compensation law in the present case, the plaintiff relies on this court's statement that "a charge relating to principles of law enunciated in workers' compensation cases is equally applicable to cases brought under the common law." *Cirrito* v. *Turner Construction Co.*, 189 Conn. 701, 705, 458 A.2d 678 (1983); see also id. (for purpose of construing scope of indemnification clause in construction contract that was intended to protect general contractor from potential liability as principal employer under workers' compensation statutes by requiring reimbursement from subcontractors for compensation payments for which it might be obligated, court considered principles of workers' compensation law); *D'Addario* v. *American Automo-*

of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . The Workers' Compensation Act compromise[s] an employee's right to a [common-law] tort action for work related injuries in return for relatively quick and certain compensation." (Citation omitted; internal quotation marks omitted.) *Panaro* v. *Electrolux Corp.*, 208 Conn. 589, 598–99, 545 A.2d 1086 (1988). In contrast, the public policy underlying the doctrine of respondeat superior is that "substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit." (Internal quotation marks omitted.) *Chase* v. *New Haven Waste Material Corp.*, 111 Conn. 377, 380, 150 A. 107 (1930). Accordingly, although there may be some overlap in the factors to be considered in determining whether an employee is acting within the scope of his employment for purposes of workers' compensation law—many of which are established by statute—and the factors to be considered under the doctrine of respondeat superior, there is no reason to expect that those factors will be identical in all respects. We conclude, therefore, that, even if the plaintiff were correct that Smith was acting within the scope of his employment for purposes of workers' compensation law at the time of the accident because he was in close proximity to the firehouse, where he had been engaged in fire duties for purposes of § 7-314,

bile Ins. Co., 142 Conn. 251, 254, 113 A.2d 361 (1955) (for purpose of construing scope of exclusion from insurance policy for any obligation for which insured could be held liable under workers' compensation law, court considered workers' compensation principles). We are not persuaded. In *Cirrito* and *D'Addario*, this court merely recognized that principles of workers' compensation law governing the scope of employment are relevant when construing a contract that was intended to incorporate those principles. The cases do not support the proposition that this court is *bound* by principles of workers' compensation law whenever it is required to determine whether activities were within the scope of employment for any other purpose.

Smith was not acting within the scope of his employment for purposes of establishing vicarious liability because he was engaged in the pursuit of purely personal affairs and was not acting for the benefit of or under the control of the fire department when the accident occurred.

For the foregoing reasons, we conclude that a reasonable jury, properly instructed in the legal principles governing the doctrine of respondeat superior, could conclude only that Smith was engaged in the pursuit of personal affairs when the accident occurred, and he was not acting for the benefit of the fire company or in furtherance of its interests. Accordingly, we conclude that the Appellate Court properly upheld the trial court's grant of summary judgment in favor of the municipal defendants on the ground that there is no genuine issue of material fact that Smith was not acting within the scope of his employment at the time of the accident and, therefore, that the municipal defendants could not be held vicariously liable for his negligence as a matter of law. We therefore affirm the judgment of the Appellate Court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.* JEMAL E. BETHEA

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 263 (AC 40429), is denied.

Judie L. Marshall, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided June 12, 2019

LAMONT FIELDS *v.* COMMISSIONER OF CORRECTION

The petitioner Lamont Fields' petition for certification to appeal from the Appellate Court, 188 Conn. App. 902 (AC 41067), is denied.

Mark M. Rembish, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided June 12, 2019

MARTIN J. PRAISNER, JR. *v.*
STATE OF CONNECTICUT

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 540 (AC 40784), is granted, limited to the following issue:

"Did the Appellate Court properly hold that a university police officer is not a member of a 'local police department' entitled to indemnification under General Statutes § 53-39a?"

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

David C. Yale, in support of the petition.

Emily V. Melendez, assistant attorney general, in opposition.

Decided June 12, 2019

SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 93 (AC 40956), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the plaintiff's action had to be dismissed pursuant to the sovereign immunity provisions of General Statutes § 4-160 (d), notwithstanding the time limitations set forth in General Statutes § 52-555 for bringing a wrongful death action?"

Mario Cerame, in support of the petition.

James M. Belforti, assistant attorney general, in opposition.

Decided June 12, 2019

EZRA BENJAMIN *v.* COMMISSIONER OF CORRECTION

The petitioner Ezra Benjamin's petition for certification to appeal from the Appellate Court, 189 Conn. App. 905 (AC 41374), is denied.

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

Justine F. Miller, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided June 12, 2019

IN RE PROBATE APPEAL OF MYRNA FUMEGA-SERRANO ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court (AC 41655) is denied.

Myrna Fumega-Serrano, self-represented, *Berta Fumega*, self-represented, and *Robert Fumega*, self-represented, in support of the petition.

Emily V. Melendez, assistant attorney general, in opposition.

Decided June 12, 2019

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* AVELINO ROBLES ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42351) is denied.

Avelino Robles, self-represented, in support of the petition.

Decided June 12, 2019

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* SHERI A. SPEER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42364) is denied.

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

Decided June 12, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 190

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ELIZABETH K. TURNER (AC 41179)

Lavine, Prescott and Bright, Js.

Syllabus

Convicted, following a jury trial, of various crimes, including felony murder and robbery in the first degree in connection with the stabbing death of two victims, B and P, the defendant appealed. B had invited the defendant and her husband, T, to live with her in her home. Several months later, the defendant directed T to tell B that the defendant was in jail and needed money for bail, which was not true. T and the defendant used the money to buy drugs. The day after the defendant's bail scheme, T murdered B, and her adult son, P, in B's home. After the murders, the defendant went through B's purse and took money, gift cards, and the keys to B's automobile. In the days following the murders, the defendant and T sold various possessions of the victims, and the defendant spent the money she procured from those sales on food, hotels, and cocaine. The defendant and T then traveled to Baltimore, where they were arrested. *Held*:

1. The defendant could not prevail on her claim that her due process rights were violated because the trial court improperly allowed the jury to base a guilty verdict on a legally invalid but factually supported theory that a completed larceny by false pretenses, which was accomplished by the bail scheme, that preceded a use of force, and was part of a continuous course of larcenous conduct, could be the predicate felony

for robbery and felony murder: the defendant's claim that a larceny by false pretenses could not be a predicate felony for robbery or felony murder because no force was used to obtain the property was unavailing, as larceny by false pretenses could be a proper predicate for a robbery where force was used in a larceny by false pretenses in order to retain the property immediately after the taking, and, therefore, the defendant's claim alleged an improper charge to the jury that was legally valid but was unsupported by the evidence; moreover, although the larceny by false pretenses was complete before the victims were murdered and, thus, the trial court should not have included references to it in its charge to the jury, that instructional error was harmless, the defendant having failed to meet her burden of establishing that any error would have, more probably than not, affected the jury's verdict, as the defendant conceded that there was a factually supported basis for the felony murder and robbery convictions, including evidence that supported the conclusion that the defendant and T had planned to kill the victims in order to take, and obtain through the sale of the victims' possessions, money for drugs, and it was clear from the verdict on the counts for felony murder as to P, larceny in the third degree, and robbery in the first degree as to P, in the context of the charge, that the jury based its verdict on the larcenies that occurred immediately following the murders.

2. The defendant's claim that there was insufficient evidence to support her conviction of attempt to possess narcotics, which was based on her claim that there was insufficient evidence that she actively attempted to possess narcotics, was unavailing: D, whose DNA was found in the backseat of B's automobile, testified that he gave cocaine to an intermediary in exchange for the use of the car and he gave a basic description of the people in the car, there was evidence that the defendant took the keys to the car shortly after T killed B, and the jury reasonably could have concluded that the defendant and T used the car after the murders to buy drugs, that the defendant was present and involved in the transaction, which involved narcotics, and that the defendant, therefore, engaged in conduct intending to result in the possession of narcotics; accordingly, there was a reasonable view of the evidence that supported the jury's verdict of guilty of attempted possession of narcotics beyond a reasonable doubt.

Argued January 11—officially released June 25, 2019

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of conspiracy to commit larceny in the third degree and accessory to larceny in the third degree, and substitute information, in the second case, charging the defendant with three counts of the crime of robbery in the first degree, two counts

of the crime of felony murder, and with the crimes of criminal attempt to possess narcotics, larceny in the third degree, burglary in the third degree, hindering prosecution in the second degree, forgery in the second degree, conspiracy to commit robbery in the first degree, and tampering with evidence, and substitute information, in the third case, charging the defendant with the crimes of larceny in the second degree, using a motor vehicle without the owner's permission, and forgery in the second degree, brought to the Superior Court in the judicial district of Waterbury, where the cases were consolidated; thereafter, the matter was tried to the jury before *Cremins*, *J.*; verdicts and judgments of guilty, from which the defendant appealed. *Affirmed.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence D. Mariani* and *Cynthia S. Serafini*, senior assistant state's attorneys, for the appellee (state).

Opinion

LAVINE, J. This case tragically exemplifies the adage that no good deed goes unpunished. In February, 2012, Donna Bouffard invited a homeless couple, the defendant, Elizabeth K. Turner, and her husband, Claude Turner, to live with her in her home.[1] In June of the same year, Turner brutally murdered both Bouffard and her adult son, Michael Perkins, in Bouffard's Watertown home. The defendant appeals from the judgments of conviction, rendered after a jury trial, of two counts of felony murder in violation of General Statutes § 53a-

[1] In this opinion, we refer to Elizabeth Turner as the defendant, to Claude Turner as Turner, and to them collectively as the Turners.

54c,[2] one count of criminal attempt to possess narcotics in violation of General Statutes § 53a-49 and General Statutes (Rev. to 2011) § 21a-279 (a), one count of larceny in the third degree in violation of General Statutes § 53a-124 (a), one count of burglary in the third degree in violation of General Statutes § 53a-103 (a), one count of hindering prosecution in the second degree in violation of General Statutes § 53a-166 (a), two counts of forgery in the second degree in violation of General Statutes § 53a-139 (a) (1), two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), one count of robbery in the first degree in violation of § 53a-134 (a) (3), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), one count of tampering with evidence in violation of General Statutes (Rev. to 2011) § 53a-155 (a) (1), one count of conspiracy to commit larceny in the third degree in violation of §§ 53a-48 and 53a-124, one count of accessory to larceny in the third degree in violation of General Statutes §§ 53a-8 and 53a-124, one count of larceny in the second degree in violation of General Statutes § 53a-123, and one count of using a motor vehicle without the owner's permission in violation of General Statutes § 53a-119b. On appeal, the defendant claims that (1) the trial court improperly allowed the jury to consider a legally invalid but factually supported theory for the robbery and felony murder convictions, specifically, that a larceny by false pretenses that is part of a continuous course of larcenous conduct culminating in a murder can provide the predicate felony for a robbery and felony murder, and (2) there was insufficient evidence to support the conviction of attempted possession of narcotics. We affirm the judgments of the trial court.

[2] Section 53a-54c was amended by No. 15-211, § 3, of the 2015 Public Acts; those amendments made technical changes and added a separate predicate felony, neither of which are relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

The record discloses the following facts that the jury reasonably could have found on the basis of the evidence presented at trial. In February, 2012, Christine Perkins, Bouffard's daughter, and Christine Perkins' then husband, David Ortiz, met the Turners at the Waterbury mall. Christine Perkins recognized Turner from previously having seen him in a Salvation Army food line. As the defendant was noticeably pregnant at the time, Christine Perkins and Ortiz invited her and Turner to stay with them in Bouffard's home. As a result, the Turners moved into Bouffard's home. Eventually, the relationship between the Turners and Bouffard deepened, and the defendant and Turner started calling Bouffard, "mom."

In April, 2012, Bouffard received a disability settlement of $13,000, which she put in an envelope that she hid under her mattress. When money began to disappear from the envelope, she moved it into a safe. Her relationship with the Turners soured, and Bouffard accused the defendant of stealing from her. On April 19, 2012, the same day that she left for vacation, Bouffard served eviction papers on Christine Perkins and Ortiz so that Michael Perkins, who had moved out of her house due to a conflict with Ortiz, could return to the home.

At the end of April, 2012, upon returning from vacation, Bouffard noticed that the safe had been moved and pried open, and approximately $6000 was missing. Bouffard accused the defendant of taking the money. The defendant later admitted to police that she had told Turner to take money from under the mattress and from the safe. The defendant explained that Turner did everything for her, that he did all he could to try to keep her happy, that she and Turner used the stolen money to buy drugs, and that she was "in her glory."

As indicated, the relationship between Bouffard and the Turners deteriorated. The defendant, on more than one occasion, expressed her desire to put rat poison

into Bouffard's and Michael Perkins' food because they were "always in her business." The defendant also mentioned to a stranger that she and Turner didn't like Bouffard and Michael Perkins. After Bouffard had been killed, the defendant explained to police that Bouffard would lecture her about how she, Bouffard, was unhappy, which the defendant described as "[c]ondescending. Poor me, poor me. . . . Everyone needs to wait on me." The defendant admitted to having arguments with Bouffard, and that when Bouffard would start "running her mouth," the defendant would "usually go upstairs because [she didn't] want to hear it because [she would] cuss [Bouffard] out and make her cry." Bouffard asked the defendant and Turner to leave in May, 2012, but they did not.

In June, 2012, only Bouffard, Michael Perkins, Turner, and the defendant lived in the home. On June 28, 2012, the defendant directed Turner to tell Bouffard that she was in jail and needed $50 for bail, which was untrue. After Bouffard gave Turner the $50, Turner and the defendant used the money to buy drugs. The defendant and Turner performed the ruse one more time that evening, with Turner explaining to Bouffard that the bond was actually $100, and he needed another $50 to get the defendant out of jail. Bouffard gave Turner the additional $50.[3]

When the Turners returned to Bouffard's home in the early hours of June 29, 2012, Michael Perkins was asleep on the couch and Bouffard was awake in her bedroom. The defendant later stated to police that Bouffard was "running her mouth" and "she didn't want to listen to [Bouffard] run her mouth, so she went upstairs, but she was curious about what might be taking place downstairs, so she lowered the sound on the television so

[3] This was referred to as "the bail scam" or "bail scheme" on appeal and at trial.

that she could listen in." She heard some banging and Michael Perkins yelling, and went downstairs. She saw Turner stabbing Michael Perkins in the stomach, but did not protest or intercede. Michael Perkins was saying, "please stop, I love you." Bouffard did not come out of her room, which led the defendant to believe that Turner had already killed her. Turner told the defendant to go back upstairs, which she did. A short while later, Turner went upstairs and handed the defendant Bouffard's purse. The defendant went through the purse and took money, gift cards, and the keys to Bouffard's Lincoln town car. The defendant went downstairs and walked past the lifeless bodies of Bouffard and Michael Perkins, each with numerous stab wounds, to go into Bouffard's room and look for the paperwork for Bouffard's car.

The Turners took Bouffard's car and picked up Anthony Acosta, a friend of Turner's; Turner stopped to buy marijuana and cocaine. They returned to the house, at which point Acosta saw the bodies of Bouffard and Michael Perkins lying on the floor. The three proceeded to use the drugs. The defendant told Acosta that she regretted telling Turner to kill the victims. When the defendant was rifling through the victims' belongings, she discovered that Bouffard had been served with an eviction notice, and commented to Acosta, "good for them. They deserved it."

In the following days, the Turners, accompanied by Acosta, sold Michael Perkins' scooter, guitar, and Wii system, as well as Bouffard's camper, phone, and jewelry. They also attempted to sell a television and took a gun from Bouffard's home. The defendant later admitted to police that both she and Turner had the idea to sell Bouffard's camper and other items. The defendant also made an effort to take money out of Bouffard's bank account by means of a check that she had forged. She additionally took Michael Perkins' debit card, and

because she knew his pin number, took money out of his account and got cash back on items purchased with the card. The Turners continued to use Bouffard's Lincoln town car and ultimately sold the car for $400. The defendant spent the money she procured from the sale of Bouffard's and Michael Perkins' possessions on food, hotels, and cocaine.

The Turners then traveled to Baltimore, where they were arrested. The defendant was interviewed by Watertown police in Baltimore, after which the Turners were extradited to Connecticut. After a follow-up interview with police in Watertown, the defendant was seen kissing Turner through the bars of her cell. While in prison awaiting trial, she wrote a letter to a friend in which she acknowledged that she "made a huge mistake" that resulted in "lives [being] lost." Following a jury trial, the defendant was sentenced to a total effective sentence of sixty years. Additional facts, as they reasonably could have been found by the jury, will be set forth as necessary.

I

The defendant has conflated some of her arguments and legal theories in a way that requires us to recharacterize them. The defendant claims that her due process rights were violated because the trial court improperly allowed the jury to base a guilty verdict on a legally invalid but factually supported theory that a completed larceny *by false pretenses*[4] that precedes a use of force, and is part of a continuous course of larcenous conduct, can be the predicate felony for robbery and felony murder. The larceny by false pretenses accomplished by the bail scheme ended *prior* to the murders, the defendant contends, and was not accompanied by force. Consequently, the bail scheme lacked a nexus to the murders.

[4] A larceny by false pretense occurs when a person, "by any false token, pretense or device . . . obtains from another any property, with intent to defraud him or any other person." General Statutes § 53a-119 (2).

The essence of the defendant's claim is that the trial court improperly instructed the jury in this regard, and, as such, the defendant's robbery and felony murder convictions may have been predicated on an inadequate legal theory that was purportedly argued by the state.[5] The larceny by false pretenses, the defendant contends, could not have provided the basis for a predicate felony for a robbery because it was not accompanied by force, but the court's charge, in light of the state's position

[5] We note that the state never asserted in its closing arguments that the conduct engaged in by the defendant prior to the murders, most particularly the bail scam, could be the predicate felony for robbery and felony murder because it was part of a continuous course of larcenous conduct. Rather, the state argued: "But a robbery with force, the evidence that supports that here, is that . . . the defendant . . . admitted that she had come up with this . . . bail scheme whereby [the Turners] were going to get money out of [Bouffard]. And what happened was, she said to [Turner], got to get fifty bucks. Tell her that I've been arrested. [Bouffard] gives him fifty bucks. Off they go. They use the money for drugs, according to what [the defendant] said. Next, she sends [Turner] back. You've got to get some more money. Sends him back to get another $50. [Bouffard] gives up the $50. But the problem is this. There is no bail. She hasn't been arrested. This is larceny by false pretenses . . . .

"And you also know that with respect to this, that she used that money on drugs, and she admitted that . . . . So, I would argue at this point, we know from that that the state has proven that there was a larceny at that point.

"The force that's involved is any type of physical power over somebody else, and that can be used to either prevent them from keeping their property or compelling them to give you up their property.

"Here, what we know is, according to [the defendant's] statement . . . she heard some banging. She heard [Turner]—her statement was that she heard banging, she came downstairs, she saw him stabbing Michael [Perkins], and she knew that [Bouffard] must be dead because she didn't come out of her room. You can infer that the only reason the defendant would think that [Bouffard] is dead at that point was because she knew that [Bouffard] had already been stabbed by [Turner]. Why would she think that [Bouffard] was dead at that point in time just because she heard some thumping or bumping? We know . . . that [Bouffard] died from multiple stab wounds. So, I would submit to you, the state has proven a robbery, a larceny plus force, beyond a reasonable doubt.

* * *

"And, 'in furtherance of,' means it has to be connected to the robbery or the flight from the robbery. So, again, the actions of the defendant or another participant has to have caused the death of [Bouffard] and it must be done in some way to aid the robbery in some way or further the purpose of the robbery. The evidence here is, you have the defendant's statement in Baltimore *where she said that immediately after* [*Turner*] *finished stabbing Michael* [*Perkins*], *he came upstairs, he gave her* [*Bouffard's*] *purse. She*

during trial and in its closing argument, mistakenly created the impression that it could.[6]

Although it is possible to construe the defendant's claim that the court permitted the state to make a legally

went through it. She took out the money, the gift cards, and then they were stealing items out of that house for the next few days. The robbery continues as long as they continue to steal from the home.

"You also have the [defendant's] statement . . . with regard to the bail scheme, and that's the genesis of the larceny. And then when the forces are being applied to [Bouffard], it morphs into a robbery. *At this point in time, the larceny continued.* Even though [Bouffard] may have passed away, that larceny continues." (Emphasis added.)

[6] We note that the defendant challenges only the charge in regard to its inclusion of larceny by false pretenses as a type of larceny, given the context of this case, and does not challenge the court's charge as to the elements of robbery and felony murder. The court charged the jury on felony murder and robbery in part as follows: "The defendant is charged in count one as to [Bouffard] and in count two as to Michael Perkins . . . with felony murder. The statute defining this offense reads in pertinent part as follows: 'A person is guilty of murder when, acting either alone or with one or more persons, she commits or attempts to commit robbery, and in the course of and in furtherance of such crime or of flight therefrom, she, or another participant, if any, causes the death of a person other than one of the participants.'

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: The first element is that the defendant, acting alone or with one or more other persons, committed or attempted to commit the crime of robbery of [Bouffard], as to count one, [and] Michael Perkins, as to count two. . . .

"[Section] 53a-133 of the Penal Code defines robbery as follows: 'A person commits robbery when she, in the course of committing a larceny, she or another participant in the crime uses or threatens the immediate use of physical force upon another person for the purpose of: (1) preventing or overcoming resistance to the taking of the property or the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.' Thus, the elements of robbery are (1) in the course of a larceny; and [2] uses physical force.

* * *

"[To prove that the defendant was committing larceny], the state must prove beyond a reasonable doubt that the defendant would have to . . . (1) wrongfully take property from the owner; and (2) she did so with the intent to permanently deprive the owner of their property or permanently appropriate the property to herself or a third person. If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of larceny, then you shall consider the second element of robbery, the use of physical force.

* * *

"If you find that the defendant or another participant in the crime used physical force or threatened its immediate use in the course of committing a larceny, you must then determine whether such physical force was used

invalid but factually supported claim to be, in reality, a camouflaged claim of prosecutorial impropriety, the defendant specifically disavows that she is raising a prosecutorial impropriety claim and does not provide briefing on prosecutorial impropriety. Similarly, the defendant's claim could be construed that the court abused its discretion by allowing the state to make an improper closing argument, but, again, the defendant has not briefed such a claim. Consequently, any claim that the court improperly allowed the state's argument

or threatened for the purpose of preventing or overcoming resistance to the taking of property or to ret[ain] . . . property immediately after the taking, or compelling the owner of the property or another person to deliver up the property or to engage in other conduct that aids in the commission of larceny.

* * *

"The second element is that the actions of the defendant or another participant in the crime of robbery or attempted robbery were the proximate cause of the death of [Bouffard], as to count one, and Michael Perkins, as to count two.

* * *

"The third element is that the defendant or another participant caused the death of [Bouffard], as to count one, and Michael Perkins, as to count two, while in the course of, and in furtherance of, the commission or attempted commission of the crime of robbery, or immediate flight from the crime. This means that the death occurred during the commission of a robbery or attempted robbery and in the course of carrying out its objective.

" 'In the course of the commission' of the robbery or attempted robbery means during any part of the defendant's participation in the robbery or attempted robbery. The phrase 'in the course of the commission' is a time limitation and means conduct occurring immediately before the commission, during the commission, or in immediate flight after the commission of the robbery or attempted robbery. The immediate murder of a person to eliminate a witness to the crime or to avoid detection is also 'in the course of the commission.' Thus, the death of [Bouffard] as to count one, and Michael Perkins as to count two, must have occurred somewhere within the time span of the occurrence of facts which constitutes the robbery or attempted robbery.

" 'In furtherance of' the robbery or attempted robbery means that the killing must in some way be causally connected to or as a result of the robbery or attempted robbery or the flight from the robbery or attempted robbery. The actions of the defendant or other participant that caused the death of [Bouffard] as to count one, and Michael Perkins as to count two, must be done to aid the robbery or attempted robbery in some way or to further the purpose of the robbery or attempted robbery. . . .

"The fourth element is that [Bouffard] as to count one, and Michael Perkins as to count two, was not a participant in the robbery or attempted robbery."

is, therefore, inadequately briefed and will not be considered. Appellate courts "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. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 414, 168 A.3d 658, cert. denied, 327 Conn. 975, 174 A.3d 195 (2017). Thus, we are left with the defendant's claim that the court erred in its instruction to the jury.

Because the jury instruction included a definition of larceny by false pretenses, the defendant argues that the jury might have found her guilty of robbery and felony murder under the misguided understanding that a completed larceny by false pretenses that preceded the use of force can be the predicate crime of a robbery and felony murder. Thus, the defendant in essence makes an instructional error claim and argues that her conviction may have resulted from a legally invalid but factually supported theory. Citing *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931),[7]

[7] In *Stromberg*, the defendant was convicted under a California statute that provided: "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device or any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony." (Internal quotation marks omitted.) *Stromberg* v. *California*, supra, 283 U.S. 361. The United States Supreme Court concluded that the first clause regarding the display of a flag "as a sign, symbol or emblem of opposition to organized government" was "repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid . . . the conviction . . . which so far as the record discloses may have rested upon that clause exclusively, must be set aside." (Internal quotation marks omitted.) Id., 369–70. *Stromberg* differs from the present case in a fundamental way; in *Stromberg*, the United States Supreme Court could

the defendant argues that the verdict must be reversed if this court cannot be certain that the jury found her guilty under a valid legal theory. In response, the state argues that the defendant is really challenging a factually unsupported instruction, not a legally invalid one. Consequently, the holding in *Stromberg* does not apply. We agree with the state.[8]

Before turning to the defendant's principal claim, it is necessary to discuss the crimes of robbery and felony murder. "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." General Statutes § 53a-133.

not discern if the jury's verdict was constitutionally infirm. Here, as we explain, no constitutional infirmity exists, and the jury had an appropriate, fact based path to its verdict on the robbery and felony murder charges.

[8] The state also argues that the defendant waived any instructional error claim when she stated that she had no objection to the court's charge. Although the defendant previously made statements that she did not object to the language in the court's charge, the defendant specifically objected to the larceny by false pretenses being presented as a predicate for felony murder and argued that the facts did not support the bail scheme as a predicate felony. Thereafter, during a charging conference, the court ruled that whether the bail scheme, as part of a continuous course of conduct, was a predicate felony was a question of fact that was properly left for the jury, and the defendant objected again for the record. This is a close question and we, therefore, presume the issue to be preserved and review the merits of the defendant's claim. See *State* v. *Salmond*, 179 Conn. App. 605, 625–26, 180 A.3d 979 ("[T]he sina qua non of preservation is fair notice to the trial court. . . . An appellate court's determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [in the trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim." [Internal quotation marks omitted.]), cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018).

"Felony murder[9] occurs when, in the course of and in furtherance of another crime, one of the participants in that crime causes the death of a person who is not a participant in the crime. . . . The two phrases, in the course of and in furtherance of, limit the applicability of the statute with respect to time and causation." (Footnote added; internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 290, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016).

"In order to obtain a conviction for felony murder the state must prove, beyond a reasonable doubt, all the elements of the statutorily designated underlying felony, and in addition, that a death was caused in the course of and in furtherance of that felony." (Internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 786, 717 A.2d 1140 (1998). "The requirement that the death be 'in the course of' the felony focuses on the temporal relationship between the killing and the underlying felony." *State* v. *Cooke*, 89 Conn. App. 530, 536, 874 A.2d 805, cert. denied, 275 Conn. 911, 882 A.2d 677 (2005). "[I]f the use of force occurs during the continuous sequence of events surrounding the taking or attempted taking, *even though some time immediately before or after*, it is considered to be in the course of the robbery or the attempted robbery within the meaning of [§ 53a-133]." (Emphasis added; internal quotation marks omitted.) *State* v. *Ghere*, 201 Conn. 289, 297, 513 A.2d 1226 (1986).

The defendant argues that a larceny by false pretenses could not be a predicate felony for robbery or felony murder because no force was used to obtain the

[9] General Statutes § 53a-54c, titled "Felony murder," provides in relevant part: "A person is guilty of murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery . . . and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants . . . ."

property. Once the property was obtained, the defendant argues, the larceny by false pretenses was complete and any subsequent use of force would not have a nexus to the larceny. According to the defendant, the theory that the larceny by false pretenses could support the felony murder and robbery conviction was not legally valid and, thus, her convictions must be reversed. The state argues that, at most, the *facts* of this case would not support the legal theory, but that that the theory itself is legally valid. The state argues that because there were other facts that the defendant concedes support the felony murder and robbery convictions, the defendant's claim fails.

The United States Supreme Court and our Supreme Court have discussed the significant difference between a legally invalid basis and a factually unsupported basis for a conviction. In *Griffin* v. *United States*, 502 U.S. 46, 47–48, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), a jury instruction included a charge of defrauding the Drug Enforcement Administration despite the lack of supporting evidence. When analyzing how a reviewing court should treat such an instructional error, the United States Supreme Court rejected the argument that *Stromberg* should apply and limited *Stromberg*'s application by stating that "[the] language, and the holding of *Stromberg*, do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Id., 53.

Furthermore, *Griffin* distinguished the situation before it, where the instruction was challenged for including a theory of liability that was not supported by the evidence, from situations where one of the possible grounds for conviction was legally insufficient, such as in *Yates* v. *United States*, 354 U.S. 298, 77 S. Ct. 1064,

1 L. Ed. 2d 1356 (1957), overruled on other grounds by *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), where a jury instruction included a charge that was barred by a statute of limitations. *Griffin* v. *United States*, supra, 502 U.S. 55–56. The Supreme Court reasoned, that "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence . . . ." (Citation omitted; emphasis omitted.) Id., 59. The Supreme Court concluded that "if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction." Id., 60.

Building on *Griffin*, our Supreme Court in *State* v. *Chapman*, 229 Conn. 529, 643 A.2d 1213 (1994), explained that when a court charges the jury on a legally adequate theory for which there was no evidence, "[t]he jurors . . . were in a position to be able to evaluate the testimony presented and to assess whether the charged theory was supported by the evidence." Id., 540. Our Supreme Court noted that "a factual insufficiency regarding one statutory basis, which is accompanied by a general verdict of guilty that also covers another,

factually supported basis, is not a federal due process violation." Id., 539.

Based on these cases, we disagree with the defendant's argument because it does not take into account the possibility that force could be used in a larceny by false pretenses in order to retain the property immediately after the taking. See General Statutes § 53a-133 ("[a] person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . the retention [of the property] immediately after the taking [of the property]"). Although we agree with the defendant that, in the present case, the killings did not occur until after the bail scheme was completed, this does not mean that there could never be a circumstance in which a use of force has a proper nexus to a larceny by false pretenses in order to constitute a robbery. We set forth the following hypothetical as an example. Suppose that during the course of the bail scheme, Michael Perkins glanced out the window and saw the defendant in the car. If he exclaimed, after Bouffard has handed over the money, that the defendant was not in jail but was outside, and Turner immediately used physical force in order to retain possession of the money, then the larceny by false pretenses could have been a proper predicate for a robbery.[10] We, therefore, view the defendant's claim as alleging an improper charge to the jury that was legally valid but was unsupported by the evidence. For such a claim, our Supreme Court's decision in *Chapman* controls.

We agree with the defendant that the larceny by false pretenses was complete before the victims were mur-

[10] Although we are unaware of any case law supporting, or refuting, the proposition that a larceny by false pretenses, in concert with other conduct, can constitute a predicate felony for robbery and felony murder, logically, we see no reason why an individual could not be convicted of robbery on the facts set forth in the hypothetical or other similar scenarios.

dered, so the court should not have included references to it in its charge.[11] See *State* v. *Chapman*, supra, 229 Conn. 537 ("It is improper for the trial court to read an entire statute to a jury when the pleadings or the evidence support a violation of only a portion of the statute. . . . The jury charge was overly expansive because the state had presented no evidence [for the portion of the charge]." [Citations omitted.]). Nevertheless, the court's error was harmless and does not require reversal.

"[A reviewing court] consider[s], on a nonconstitutional basis, the harmfulness of the impropriety in the trial court's instruction. When a trial error in a criminal case does not involve a constitutional violation the burden is on the defendant to demonstrate the harmfulness of the court's error. . . . The defendant must show that it is more probable than not that the erroneous action of the court affected the result. . . .

"For an erroneous portion of a charge to be reversible error, [an appellate] court must consider the whole charge and it must be determined, in appeals not involving a constitutional question, if it is reasonably probable that the jury [was] misled . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 544–45. "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 599, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

Although the trial court's charge included, as an example of a larceny, three references to larceny by false pretenses, as well as a definition of false pre-

[11] Although the court should not have charged on larceny by false pretenses, the defendant does not dispute that the rest of the charge was appropriate.

tenses,[12] the defendant cannot meet her burden of establishing that any error would have, more probably than not, affected the jury's verdict because the defendant concedes[13] that there was a factually supported basis for the felony murder and robbery convictions. In particular, the evidence supported the conclusion that the Turners had, either together as equal partners or, more likely, with the defendant as the brains of the operation, planned to kill the victims in order to take, and obtain through the sale of the victims' possessions,

[12] The trial court charged in relevant part: "Larceny is a separate offense, which has two elements. The statute defining larceny reads in pertinent part as follows: A person commits larceny when, with intent to deprive another . . . of the property or to appropriate the same to herself or a third person, she wrongfully takes, obtains or withholds such property from an owner . . . . 'Larceny' simply means theft or stealing. Larceny also includes 'obtaining property by false pretenses.' 'False pretense' means a false representation of fact. Since nothing to happen in the future can properly be referred to as a fact, the representation must relate to past or present circumstances and not to future events. A representation may be made in writing, verbally, or even by actions or conduct. It is an expression . . . of a fact upon which it is expected that others will rely. Usually a representation takes the form of a statement of fact, oral or written, but it may involve conduct only. Because a false pretense refers to past or existing facts, a mere promise to do something in the future is not a false pretense. Furthermore, a mere statement of opinion, as distinguished from a statement of fact, is not a false pretense. Puffing, exaggeration, praise of an article for the purpose of selling it, or giving an opinion as to the value or worth of property are not ordinarily a specific basis for a charge of false representation."

[13] In the defendant's brief, she states, "[t]o be sure, the theft of money and gift cards from Bouffard's purse immediately after her death can support a [conviction of] robbery and felony murder." Likewise, during oral argument, the following exchange occurred between Judge Prescott and defense counsel:

"Q. As you concede in your brief, there was a lawful basis . . . [for] the verdict that the jury rendered, and it was a path that was support[ed] by the evidence.

"A. Yes.

* * *

"Q. Could the defendant have been convicted of robbery because it was necessary to kill Michael Perkins in order to complete the theft of items generally from the house without any evidence, or any specific evidence, that the property that was taken belonged to Michael Perkins?

"A. That would be a valid legal theory."

money for drugs. Some of the evidence that provides support for this inference includes: the defendant repeatedly expressed the desire to put rat poison in the victims' food; she told police that Turner would do anything for her in order to keep her happy; she had directed Turner to steal money from under the mattress and in the safe; she personally orchestrated the bail scheme; she described Bouffard as condescending and "running her mouth"; she did not intercede when she witnessed Turner stabbing Michael Perkins; she rifled through Bouffard's purse immediately following the murders, taking Bouffard's money, gift cards, and keys; she walked past the victims' bodies to look for the paperwork for the car, and, shortly thereafter, she and Turner left to acquire drugs; the Turners later used the drugs at the home with the two bodies lying there; she had mentioned to Acosta that she regretted telling Turner to kill the victims; she was glad to find out that the victims had been facing eviction; and she admitted in her letter from jail that she had made a huge mistake, resulting in lives lost.[14] These facts, and others, provided a basis for the jury to have concluded beyond a reasonable doubt that at least the killing of Bouffard was planned in advance and was designed to gain possession of her money and property, and that Michael Perkins was killed because he was a witness and/or attempted

[14] As the state argued in closing: "[K]eep in mind that [the] defendant shared, throughout the course of this, in the proceeds from the crime. She shared in the proceeds from the crimes that occurred before the killing with the stealing from the safe, with the stealing from the envelope, she and [Turner] were in on that together. She and [Turner] were in on it together when they tricked [Bouffard] out of a hundred dollars and she and [Turner] were in on it together after the killings. So how—how can you argue, reasonably, I mean, with your common sense that [the defendant] had nothing to do with the killings? She was in on the stealing before with the safe, stealing before with the envelope, stealing before with the larceny by false pretenses, and the numerous acts of stealing afterwards. But that piece, the killings, she didn't know anything about it, and she wasn't any part of it. That just doesn't make sense, and that flies in the face of the evidence and of common sense."

to intervene.[15] This conclusion is also supported by the verdict for the counts alleging felony murder as to Michael Perkins, larceny in the third degree, and robbery in the first degree as to Michael Perkins, in which the jury found the defendant guilty of larceny for actions that took place *after* the murders, which factually supports the robbery and felony murder convictions. See *State* v. *Johnson*, supra, 165 Conn. App. 290–91 ("Felony murder occurs when, in the course of and in furtherance of another crime, one of the participants in that crime causes the death of a person who is not a participant in the crime. . . . We previously have defined the phrase in the course of for purposes of § 53a-54c to include the period immediately before or after the actual commission of the crime . . . ." [Citation omitted; internal quotation marks omitted.]); *State* v. *Ali*, 92 Conn. App. 427, 440, 886 A.2d 449 (2005) (finding that fact that defendant took items after murder sufficiently supported felony murder conviction), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006).

The defendant was charged with larceny in the third degree for committing a larceny that exceeded $2000 worth of property. When charging the jury on that count, the court stated that, "[i]n this case, the property allegedly stolen is a Wii game system, guitar, television, jewelry, cell phone, moneys, gift cards, camper, gun, and scooter."[16] In other words, by finding her guilty on

[15] Additionally, there was evidence before the jury that, in the days following the murders, the defendant appeared at ease, and was seen laughing and joking. Specifically, the defendant had lunch with her mother the day after the murders and had acted normally, the defendant had gone by herself to retrieve the Lincoln town car and returned to Bouffard's home rather than trying to remove herself from the situation, the defendant attempted to hide from police in Baltimore, and she was seen kissing Turner through the bars of her cell after her arrest.

[16] In its closing argument, when discussing the count charging larceny in the third degree, the state argued: "Well, so, what was stolen here? You heard the testimony—[the] defendant's own statement that she took money and the gift cards from [Bouffard's] purse. You know that she took Michael [Perkins'] bank card, there was the [television]. You saw them trying to

that charge, it is quite clear that the jury found that the defendant committed larceny immediately *after* the murders through the theft of Bouffard's and Michael Perkins' property, which, as the defendant concedes in her brief and in oral argument to this court, serves as a proper predicate for the robbery and felony murder convictions.

Additionally, the jury found the defendant guilty as to the counts that charged her with felony murder and robbery as to Michael Perkins. In its charge to the jury on the count alleging felony murder as to Michael Perkins, the court instructed that "the defendant, acting alone or with one or more other persons, committed or attempted to commit the crime of robbery of . . . Michael Perkins . . . ." Similarly, in its charge to the jury on the count alleging robbery as to Michael Perkins, the court instructed that "the state must prove beyond a reasonable doubt that . . . the defendant wrongfully took property from an owner . . . Michael Perkins . . . of the property or to appropriate such property to [herself] or a third person." In so doing, the court instructed the jury that to find the defendant guilty of both counts, the jury would need to find that the defendant took property specifically from Michael Perkins. Because his property was not involved in the bail scheme, it is clear that the jury, in finding the defendant guilty of those counts, based its verdict on the larcenies that occurred immediately *following* the murders, and not on any larceny by false pretenses. We, therefore, conclude that there was a firm and proper factual basis for the jury's verdict in the present matter because it is clear, in the context of the charge, that the jury based its verdict on the larcenies that occurred immediately *following* the murders.

pawn that . . . . The Wii, the guitar, the cell phone, the jewelry, the gun, the camper, and the scooter, all of those things that were stolen out of the house, all of those things belonged to [Bouffard] and Michael Perkins, and they were the rightful owners. So, I would submit to you that the state has proven that there was a theft of property."

"Our task on appeal is not to second guess the jury's findings . . . ." *State* v. *Bradley*, 39 Conn. App. 82, 91, 663 A.2d 1100 (1995), cert. denied, 236 Conn. 901, 670 A.2d 322 (1996). Here, there is a plausible factual and legal basis for the jury's verdict in regard to the robbery and felony murder counts. "The jurors . . . were in [the best] position to be able to evaluate the testimony presented and to assess whether the charged theory was supported by the evidence." *State* v. *Chapman*, supra, 229 Conn. 540. We must "assume that the jury found the defendant guilty under the supported allegation, rather than the unsupported allegation." Id., 543–44. We, therefore, conclude that even though there was instructional error through the inclusion of the definition of false pretenses, any error was harmless; see id.; and the defendant's claim fails.

In summary, although there was error in the charge, the error was harmless because we conclude that there was a proper, factually and legally supported path for the jury's robbery and felony murder verdict and, thus, they must stand.

II

The defendant's second claim is that there was insufficient evidence to support her conviction of attempted possession of narcotics. Specifically, she argues that there was insufficient evidence that she actively attempted to possess narcotics. We disagree.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded

that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the 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. . . .

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

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

"Essentially an attempt under § 53a-49 (a)[17] is an act or omission done with the intent to commit some other

[17] General Statutes § 53a-49 (a) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

crime. . . . The act or acts must be something more than mere preparation for committing the intended crime; they must be at least the start of a line of conduct which will lead naturally to the commission of a crime which appears to the actor at least to be possible of commission by the means adopted." (Footnote added; internal quotation marks omitted.) *State* v. *Carey*, 13 Conn. App. 69, 74–75, 534 A.2d 1234 (1987).

We conclude that there is a reasonable view of the evidence that supports the jury's verdict of guilty of attempted possession of narcotics beyond a reasonable doubt. At trial, Lamond Daniels, whose DNA was found in the back seat of Bouffard's Lincoln town car, testified that he was in the car as part of a drug trade. Daniels testified that a "black guy" and a "white female"[18] were driving the car, and that, through the use of an intermediary, he exchanged cocaine for the use of the car.

The defendant argues that Daniels' testimony was inadequate to support the finding beyond a reasonable doubt that the defendant engaged in a course of conduct intending to culminate in the purchase and possession of narcotics. Specifically, the defendant argues that there was insufficient evidence for the jury to find that she was in the car and that the transaction with the intermediary involved drugs. We are unpersuaded.

There was evidence that the defendant took the keys to Bouffard's Lincoln shortly after Turner killed Bouffard, and the defendant and Turner regularly used it thereafter. Daniels' DNA was found in Bouffard's Lincoln, and he testified that he gave cocaine to the intermediary in exchange for the use of the car. He also gave a basic description of the people in the car. The jury reasonably could have concluded that the defendant and Turner used the car after the murders to buy drugs, the defendant was present and involved in the

[18] Turner is African-American; the defendant is Caucasian.

transaction, which involved narcotics, and the defendant, therefore, engaged in conduct intending to result in the possession of narcotics.

"We will not second guess the jury's verdict on the basis of some vague, speculative or amorphous feeling that some doubt of guilt is shown by the cold printed record. . . . We have not had the jury's opportunity to observe the conduct, demeanor and attitude of the witnesses, and to gauge their credibility." (Citation omitted.) *State* v. *Peruccio*, 47 Conn. App. 188, 196, 702 A.2d 1200 (1997), cert. denied, 243 Conn. 964, 707 A.2d 1266 (1998). We conclude that the evidence presented at trial was sufficient to support the defendant's conviction of attempted possession of narcotics.

The judgments are affirmed.

In this opinion the other judges concurred.

THOMAS J. BROCUGLIO, SR. *v.* THOMPSONVILLE FIRE DISTRICT #2
(AC 41237)

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

Syllabus

The defendant employer appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner that the plaintiff employee's claim for benefits as a result of heart disease was compensable under the Heart and Hypertension Act (§ 7-433c). The defendant claimed that the board improperly affirmed the commissioner's award because the plaintiff's notice of claim, which was for mitral valve replacement and coronary artery disease, was not timely filed pursuant to statute (§ 31-294c [a]) and § 7-433c (a) does not allow a claimant to file more than one claim for heart disease. The plaintiff had been informed by his cardiologist almost thirteen years prior to the claim at issue that he suffered from pericarditis, a form of heart disease. The plaintiff did not file a notice of claim, as required by § 31-294c (a), within one year of when he was informed that he had pericarditis. The commissioner determined, on the basis of a report by a cardiologist who had examined the plaintiff, that mitral valve replacement and coronary artery disease was a condition

separate and distinct from the plaintiff's pericarditis. The commissioner, thus, concluded that the mitral valve replacement and coronary artery disease were new injuries, and that the plaintiff's failure to file a timely notice of claim relative to the pericarditis did not bar his subsequent claim for mitral valve replacement and coronary artery disease. *Held* that the board improperly affirmed the commissioner's award, as the commissioner lacked jurisdiction to consider the plaintiff's claim for benefits pursuant to § 7-433c because he failed to file the notice of claim required by § 31-294c (a) within one year of when he was informed by his cardiologist that he suffered from pericarditis; although a variety of maladies may be diagnosed as heart disease, as the commissioner found here, § 7-433c makes no provision for the filing of multiple claims for different forms of heart disease, and a claimant who forgoes the filing of a notice of claim within one year of being informed by a medical professional that he or she has a heart disease, and who later files a claim for a different heart disease, is precluded from receiving benefits under § 7-433c.

Argued March 6—officially released June 25, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the First District finding that the plaintiff had sustained a compensable injury and awarding, inter alia, temporary total disability benefits; thereafter, the commissioner denied the defendant's motion to correct and issued an articulation of her decision; subsequently, the defendant appealed to the Compensation Review Board, which affirmed the commissioner's decision, and the defendant appealed to this court. *Reversed*; *decision directed.*

Joseph W. McQuade, for the appellant (defendant).

Eric W. Chester, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendant, the Thompsonville Fire District #2, appeals from the decision of the Compensation Review Board (board) affirming the finding and award (award) of the Workers' Compensation Commissioner for the First District (commissioner) with respect to the 2013 claim filed by the plaintiff, Thomas

J. Brocuglio, Sr., pursuant to General Statutes § 7-433c, "commonly referred to as the Heart and Hypertension Act."[1] The defendant claims that the board improperly affirmed the commissioner's award because the plaintiff's heart disease claim was not timely filed pursuant to General Statutes § 31-294c (a), and § 7-433c (a) does not allow a claimant to file more than one claim for heart disease. We conclude that because the plaintiff failed to file a claim in 2000 when he was first informed by a medical professional that he had heart disease, the claim he filed for heart disease in 2013 is jurisdictionally barred. We, therefore, reverse the decision of the board.

The present appeal may be summarized as follows. The plaintiff, a qualified firefighter employed by the defendant, filed a claim for heart disease under § 7-433c (a)[2] following surgery for heart disease that took place in 2013. Prior to the heart surgery that is the subject of the present appeal, in 2000, the plaintiff was hospitalized, treated, and informed that he suffered from heart disease in the form of pericarditis. The commissioner determined that the plaintiff did not file a § 7-433c claim for heart disease within one year of being informed that he had pericarditis. The defendant, therefore, argues that because the plaintiff did not file a claim for pericarditis within one year of being informed of the heart disease in 2000, the claim for heart disease he filed in 2013 is jurisdictionally barred by § 31-294c

[1] See *Pearce* v. *New Haven*, 76 Conn. App. 441, 443–44, 819 A.2d 878 (overruled in part by *Ciarlelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 [2010]), cert. denied, 264 Conn. 913, 826 A.2d 1155 (2003).

[2] General Statutes § 7-433c (a) provides in relevant part: "Notwithstanding any provision of chapter 568 [the Workers' Compensation Act, General Statutes § 31-275 et seq.] or any other general statute . . . in the event a uniformed member of a paid municipal fire department . . . who successfully passed a physical examination on entry to such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he . . . shall receive from his municipal employer compensation and medical care in the same amount and the same manner as provided under chapter 568 . . . ."

(a).[3] On the basis of our plenary review, we conclude that because the plaintiff did not timely file a claim for heart disease in 2000, he failed to meet the jurisdictional prerequisite entitling him to an award for his 2013 claim for heart disease.

The following relevant facts were set out in the commissioner's award issued subsequent to a formal hearing that she held on October 1 and 29, 2015. The plaintiff has been a full-time firefighter employed by the defendant since September 3, 1987. Prior to his employment with the defendant, the plaintiff passed a preemployment physical examination that was a condition of his employment. On or about June 19, 2013, the plaintiff felt weak, tired, out of breath, and had difficulty walking up stairs. He consulted his primary care physician, Melissa A. Hession, who later issued a report stating that "[o]n June 11, 2013, [the plaintiff] presented to my office with a lingering cough and new heart murmur on exam. He was sent for an echocardiogram on June 19, 2013, which revealed severe mitral regurgitation with a flail posterior mitral valve leaflet. He subsequently underwent emergency surgery to repair the damaged heart valve."

When William Martinez, a cardiothoracic surgeon, performed surgery on the plaintiff on July 3, 2013, he replaced the mitral valve and performed a single coronary bypass procedure. The plaintiff was discharged from Saint Francis Hospital and Medical Center in Hartford and next treated at the Hospital for Special Care

Section 7-433c (a) was the subject of technical amendments in 2014. See Public Acts 2014, No. 14-122, § 72. Those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] General Statutes § 31-294c (a) provides in relevant part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written *notice of claim for compensation is given within one year from the date of the accident* . . . which caused the personal injury . . . ." (Emphasis added.)

in New Britain for postsurgical care from July 15 to 31, 2013. John I. Baron, the plaintiff's cardiologist, treated the plaintiff for postoperative complications related to the surgery and diagnosed the plaintiff as totally disabled until April 21, 2014, when he released the plaintiff to return to work. Despite Baron's having released the plaintiff to work, the defendant required the plaintiff to be seen by its own physician for a " 'fitness for duty examination.' "

The commissioner also found that the plaintiff completed a form 30C[4] and delivered it to the defendant on September 10, 2013, the date the defendant first was notified of the plaintiff's heart disease claim. The defendant filed two form 43s denying the plaintiff's claim.[5] Although the plaintiff claimed that the defendant failed to timely file form 43, the commissioner found that the defendant had timely contested the plaintiff's 2013 claim.[6]

The commissioner found that the plaintiff, in discussing his medical history at the formal hearing, testified that he had been diagnosed with "constrictive pericarditis"[7] in November, 2000, for which he was treated by

[4] A form 30C is the document prescribed by the Workers' Compensation Commission to be used when filing a notice of claim pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq.

The commissioner found that form 30C contains the following instructions: "This notice must be served upon the commissioner and [e]mployer by personal presentation or by registered or certified mail. For the protection of both parties, the employer should note the date when this notice was received and the claimant should keep a copy of this notice with the date it was served." (Internal quotation marks omitted.)

[5] Form 43 is titled: "Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits." It is used by an employer to contest liability to pay compensation to an employee for a claimed injury. *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 265 n.6, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

[6] The timeliness of the defendant's filing of form 43 is not an issue on appeal.

[7] The pericardium is the "fibroserous membrane . . . covering the heart and beginning of the great vessels." Stedman's Medical Dictionary (28th Ed. 2006) p. 1457. "Constrictive pericarditis" is "postinflammatory thickening

James B. Kirchhoffer, a cardiologist. According to the plaintiff, he was out of work for a few days, but he could not remember how many days. He was released to return to full-duty work, but before he was able to return to work, the defendant required that he undergo a fitness for duty examination. The plaintiff used his sick days to cover the time he was out of work. The plaintiff sought a second opinion about his pericarditis and treatment from Baron in September, 2001.[8] Baron was still the plaintiff's cardiologist at the time of the formal hearing.

The plaintiff testified that he delivered a form 30C for the pericarditis to the defendant's then fire chief, but he could not recall the chief's name. He did not request a hearing on his alleged pericarditis claim. He further testified that he never discussed it again with the chief, and that he did not keep a copy of the form 30C for his records. The commissioner found that there is no record in the workers' compensation system of a claim filed by the plaintiff for an injury to his

and scarring of the membrane producing constriction of the cardiac chambers . . . ." Id.

[8] At the formal hearing, the plaintiff testified in part on cross-examination that he was admitted to the hospital on November 8, 2000, where he remained for a few days and was told that he had constrictive pericarditis; that upon discharge he was not to work until cleared by Kirchhoffer. He was readmitted on June 22, 2001, and discharged with a diagnosis of recurrent pericarditis. He was permitted to return to work after one week. The plaintiff's wife encouraged him to seek a second opinion, and the plaintiff consulted Baron. Baron's records, which were admitted into evidence, state in part: "[The plaintiff], a [forty-two] year old gentleman . . . is seen today in an initial evaluation of chest pain. . . . [C]hest discomfort which . . . [w]as similar to his earlier symptoms related to pericarditis. He has an extensive history dealing with pericarditis, starting in November 2000, for which he was evaluated at Baystate [Medical Center in Springfield, Massachusetts] and treated with nonsteroidals. He had a second flare of the symptoms in the summer [of] 2001 and was treated with Prednisone, Pulse therapy with improvement. He has been treated with a brief course of nonsteroidals after his Pulse treatment." The plaintiff continued to take 800 milligrams of ibuprofen for a number of years.

heart in or about November, 2000.[9] Acting Fire Chief William Provencher testified that he had searched the defendant's personnel and workers' compensation records, but that he could find no form 30C for pericarditis filed by the plaintiff. The commissioner found that the plaintiff did not testify credibly or persuasively that he had filed a form 30C for pericarditis in 2000.

Kevin J. Tally, a cardiologist, examined the plaintiff on behalf of the commissioner on January 21, 2015, and submitted a report. Tally diagnosed the plaintiff with a distant history of pericarditis, with one recurrence, healed and of historical interest only as of 2013; acute posterior leaflet mitral valve prolapse with resultant pulmonary edema status postmitral valve replacement with bioprosthesis, July 3, 2013, currently with normal valve function; nonischemic cardiomyopathy postopen-heart surgery, "LVEF of 45 percent," currently out of congestive heart; postpericardiotomy syndrome, resolved; sternal wound pain, chronic; and coronary artery disease, among other heart issues.

Tally also wrote: "The cause of [the plaintiff's] mitral valve deterioration is presumably on the basis of an inherent weakness in the mitral valve. It is somewhat spontaneous and unpredictable. The patient's single vessel moderate coronary artery disease has a causative [input:] his hypertension, occasional smoking, obesity and lack of regular exercise. The distant history of pericarditis is most likely from a viral illness of some sort. This pericarditis represents a *completely separate episode of heart disease*." (Emphasis added.) On the basis of Tally's report, the commissioner found that the plaintiff "suffered a completely different type of heart disease in 2013. The mitral valve replacement and the

[9] The commissioner, however, found that the plaintiff filed a form 30C for a work-related knee injury he suffered in 1999, a claim for hypertension on July 14, 2007, and a claim for a back injury on August 11, 2008.

coronary artery bypass are different medical problems from the distant and resolved pericarditis of 2000." (Internal quotation marks omitted.)

At the hearing, the defendant's counsel argued that § 7-433c grants benefits for either hypertension or heart disease. In 2000, the plaintiff suffered a distinct heart disease, pericarditis, for which he did not file a claim within one year of November, 2000. The plaintiff, therefore, cannot file a claim for another type of heart disease, in this case, mitral valve replacement and coronary artery disease, in 2013. The defendant argued that the plaintiff had one opportunity to make a claim for heart disease, which he failed to do in 2000, and, thus, the plaintiff's attempt to make a claim for a 2013 heart disease was jurisdictionally barred.

On the basis of her findings, the commissioner concluded that Tally's report of January 21, 2015, was persuasive, in particular his opinion that pericarditis was a completely separate episode of heart disease and that the plaintiff had not suffered from pericarditis in several years. Hypertension and heart disease are two separate and distinct conditions. According to Tally, pericarditis, and mitral valve replacement and coronary artery disease, are separate and distinct conditions. The commissioner found, therefore, that the plaintiff had suffered an injury to his heart and had made a claim for benefits pursuant to § 7-433c. The commissioner ultimately concluded that the plaintiff's claim for benefits due to his heart injury of June 19, 2013, is compensable pursuant to § 7-433c.

The defendant filed a motion to correct, seeking to have the commissioner add a conclusion that the plaintiff was told by his cardiologist that he had heart disease in the form of pericarditis in or around November, 2000. It also requested that the commissioner delete certain of her findings and substitute, "I find that the [plaintiff's]

claim for workers' compensation benefits due to his injury of June 19, 2013, is time barred under § 31-294c because he did not file a claim for compensation within one year of being told that he had heart disease in November, 2000. The [plaintiff's] claim is dismissed." The commissioner denied the motion to correct.

On June 10, 2016, the defendant filed a motion for articulation, seeking to have the commissioner articulate the authority for the proposition that § 7-433c, as interpreted by the board and Connecticut courts, permits a claimant to recover for multiple diagnoses of heart disease. The defendant pointed out that the commissioner found that the plaintiff had suffered from pericarditis for which he was treated by two cardiologists, missed time from work, was required to take medication, and underwent a fitness for duty examination. In addition, the defendant noted that the commissioner credited Tally's opinion that pericarditis was an episode of heart disease that is separate from mitral valve replacement and coronary artery disease. The defendant further noted that a claimant may file separate claims for hypertension and for heart disease, but neither party cited any authority for the proposition that § 7-433c, as construed by the board or Connecticut courts, permits a claimant to recover for multiple instances or diagnoses of heart disease, even different kinds of heart disease. The defendant asserted that the commissioner's award failed to address the defendant's central argument that the plaintiff's failure to comply with § 31-294c (a) by filing a claim in or around 2000 precluded a heart disease claim in 2013.

In her articulation, the commissioner stated in relevant part: "In *McNerney* v. *New Haven*, [15 Conn. Workers' Comp. Rev. Op. 330, 2098 CRB-3-94-7 (June 25, 1996)],[10] the [board] affirmed the . . . commissioner's

[10] The issue in *McNerney* was whether the claimant timely filed a notice of claim for hypertension. Although the claimant previously had suffered from hypertension, the commissioner found that the claimant's March, 1991

finding that [the plaintiff], having been cured of his hypertension diagnosed in 1975, was entitled to file a new claim for hypertension in 1991. The . . . commissioner had found [that] the claimant had cured his 1975 hypertension through diet and lifestyle changes. The . . . commissioner further found the 1991 hypertension to be a new injury and not a recurrence. . . .

"[In the present case, the commissioner] found that [the plaintiff's] mitral valve replacement and coronary artery bypass were new injuries based on . . . Tally's report. Therefore, the fact that the [plaintiff] had not filed a timely claim for his distant and resolved and healed pericarditis did not bar a new claim for mitral valve prolapse and coronary artery disease." (Internal quotation marks omitted.)

Thereafter, the defendant appealed to the board, which affirmed the commissioner's finding in a decision dated December 21, 2017. The board stated that the

hypertension was a new injury and that his notice of claim filed on May 27, 1993, was timely. In its decision, the board addressed § 31-294c (a), which requires a claimant to file a written notice of claim "within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease . . . ." The board noted that this court had held that a claim for hypertension pursuant to § 7-433c is not presumed to be an occupational disease. See *Zaleta* v. *Fairfield*, 38 Conn. App. 1, 7, 658 A.2d 166, cert. denied, 234 Conn. 917, 661 A.2d 98 (1995). "Without evidence establishing that the claimant's injury is a result of an occupational disease, the one year statute of limitations applies." Id., 6. The board stated that there was no evidence that the claimant's hypertension constituted an occupational disease and remanded the case to the commissioner solely for the purpose of determining whether the claimant's hypertension constituted an occupational disease. See *McNerney* v. *New Haven*, supra, 15 Conn. Workers' Comp. Rev. Op. 333.

McNerney was not appealed to this court or otherwise subjected to judicial scrutiny. We, therefore, accord it no precedential value. See *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 612, 149 A.3d 165 (2016) (traditional deference accorded agency's interpretation of statute unwarranted when construction of statute has not previously been subject to judicial scrutiny). Moreover, *McNerney* is procedurally and factually distinct from the present appeal.

gravamen of the defendant's appeal was the commissioner's finding that the plaintiff's claim was timely pursuant to § 31-294c (a), as the plaintiff's prior episode of pericarditis mandated that he seek heart benefits at that time and that his failure to do so rendered his current claim of mitral valve failure jurisdictionally invalid. The plaintiff responded that the commissioner's award is predicated on probative medical evidence and is in accord with our Supreme Court's decision in *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 149 A.3d 165 (2016). The board found the plaintiff's position more persuasive and, therefore, affirmed the commissioner's award.

The board recognized the defendant's claim that *McNerney* is no longer good law subsequent to our Supreme Court's decision in *Ciarlelli* v. *Hamden*, 299 Conn. 265, 296–98, 8 A.3d 1093 (2010). The board, however, concluded that *Ciarlelli* and *Malchik* v. *Division of Criminal Justice*, 266 Conn. 728, 733, 835 A.2d 940 (2003) (determining whether claimant presented sufficient evidence that his coronary artery disease was occupational disease), a case on which the plaintiff relied, were distinguishable from the present case. The board concluded that under *Holston*, the commissioner properly concluded that the plaintiff's 2013 claim for heart disease was timely filed because the mitral valve ailment was separate from and unrelated to the plaintiff's prior pericarditis heart disease. More specifically, the board stated that it is the role of the "commissioner to determine whether an ailment is or is not 'heart disease.' We extend this reasoning to the role of a trial commissioner in determining whether a 'new' heart disease is similar to or different from a prior heart disease. If the new heart disease can be distinguished from the prior disease, then the holding of *Holston* [v. *New Haven*, supra, 323 Conn. 607], renders the subsequent claim jurisdictionally valid." This is because, the board

reasoned, the undisputed medical evidence supported the commissioner's determination that the mitral valve ailment was a new injury. The defendant appealed from the board's decision affirming the commissioner's finding that the plaintiff's § 7-433c (a) claim was timely filed in 2013.

The question presented in the present case is whether the plaintiff failed to meet the jurisdictional prerequisite for his 2013 claim for heart disease because he failed to file a claim within one year of being told by a medical professional that he suffered from pericarditis in 2000, which is unrelated to the mitral valve failure and coronary heart disease he suffered in 2013. Our research has not disclosed a case that has decided the question, and the parties have not brought any case concerning multiple instances or different forms of heart disease to our attention.[11] "Where . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." (Internal quotation marks omitted.) *Dowling* v. *Slotnik*, 244 Conn. 781, 798, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998).

Our Supreme Court has stated that an "agency's reasonable interpretation of an ambiguous statute is entitled to deference only when that interpretation has been

[11] Throughout the litigation, the parties have cited cases concerning when a claimant with a history of periodic high blood pressure readings should know that he or she has hypertension and must file a claim. See, e.g., *Arborio* v. *Windham Police Dept.*, 103 Conn. App. 172, 928 A.2d 616 (2007), overruled in part on other grounds by *Ciarlelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 (2010); *Pearce* v. *New Haven*, 76 Conn. App. 441, 819 A.2d 878 (overruled in part on other grounds by *Ciarlelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 [2010]), cert. denied, 264 Conn. 913, 826 A.2d 1155 (2003). Our Supreme Court has held that the legislature intended for hypertension and heart disease to be treated as two separate diseases for the purposes of § 7-433c. See *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 616.

subjected to judicial review or the agency interpretation is both reasonable and time-tested." *Vincent* v. *New Haven*, 285 Conn. 778, 784 n.8, 941 A.2d 932 (2008). "To satisfy the time-tested requirement of the rule according deference to an agency's interpretation of a statute, that interpretation must formally have been articulated and applied over a long period of time . . . ." (Internal quotation marks omitted.) Id. Our Supreme Court has concluded that "§ 7-433c is not ambiguous, [and] the board's interpretation would not be entitled to deference in any event." *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 612 n.6. We, therefore, undertake a plenary review of the defendant's claim.

We, of course, are "mindful of the principles underlying Connecticut practice in [workers'] compensation cases: that the legislation is remedial in nature . . . and that it should be broadly construed to accomplish its humanitarian purpose." (Citation omitted; internal quotation marks omitted.) *Suprenant* v. *New Britain*, 28 Conn. App. 754, 759, 611 A.2d 941 (1992). Nonetheless, we also are aware that our construction of a statute is constrained by General Statutes § 1-2z and that we may not read language into a statute that is not there to reach a particular result. See *State* v. *George J.*, 280 Conn. 551, 570, 910 A.2d 931 (2006) ("As a general matter, this court does not read language into a statute. . . . [W]e are bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained." [Citation omitted; internal quotation marks omitted.]), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007). A review of the historical underpinnings of § 7-433c, therefore, is warranted.

"The statute concerning heart disease and hypertension was originally drafted as part of the Workers' Compensation Act [act] [General Statutes § 31-275 et seq.] and provided police officers and firefighters with a

rebuttable presumption that heart disease and hypertension were causally connected to their occupations. . . . In 1969, this rebuttable presumption was made conclusive and the statute was soon declared unconstitutional . . . . In response to that problem, § 7-433c was enacted in its present form in 1977 as legislation separate and distinct from the [act].

"[Section] 7-433c gives a special compensation to those who qualify, in the sense that they have no burden of proof that the disease resulted from the employee's occupation or that it occurred in the course of employment. The mere fact that the employee has hypertension or heart disease and dies or is disabled because of it is all that is necessary. The employee does not need to prove that his heart disease is causally connected to his employment. . . . In order to collect the benefits provided by § 7-433c, a claimant need show only that he or she is a uniformed member of a paid fire department or a regular member of a paid police department, whose preemployment physical examination revealed no evidence of hypertension or heart disease, who now suffers a condition or an impairment of health caused by hypertension or heart disease that has resulted in death or disability, and has suffered a resultant economic loss. . . . [O]nce the conditions of § 7-433c are met, benefits must be paid by the municipality in accordance with the [act]. . . .

"Nevertheless, [our Supreme Court] has stated on many occasions that [t]he procedure for determining recovery under § 7-433c is the same as that outlined in chapter 568 [of the act], presumably because the legislature saw fit to limit the procedural avenue for bringing claims under § 7-433c to that already existing under chapter 568 rather than require the duplication of the administrative machinery available [under the

act] and further burden the courts and the municipalities [with additional litigation from claims by (firefighters) and (police officers) pursuant to this legislation].

"[A] claimant for workers' compensation benefits must provide both notice of injury; General Statutes § 31-294b . . . and notice of a claim. General Statutes § 31-294c . . . . *Funaioli* v. *New London*, 52 Conn. App. 194, 195, 726 A.2d 626 (1999) (first report of injury together with letter from claimant's lawyer stating that claimant not requesting hearing at this time sufficient to satisfy notice of claim requirement of § 31-294c). [T]he written notice intended is one which will reasonably inform the employer that the employee is claiming or proposes to claim compensation under the [act]. . . . The purpose of § 31-294[12] [notice of injury and of claim for compensation], in particular, is to alert the employer to the fact that a person has sustained an injury that may be compensable . . . and that such person is claiming or proposes to claim compensation under the [a]ct." (Citations omitted; footnotes added and footnotes omitted; internal quotation marks omitted.) *Pearce* v. *New Haven*, 76 Conn. App. 441, 446–49, 819 A.2d 878 (overruled in part on other grounds by *Ciarlelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 [2010]), cert. denied, 264 Conn. 913, 826 A.2d 1155 (2003). Our Supreme Court has explained "that the one year limitation period for claims under § 7-433c begins to run only when an employee is informed by a medical professional that he or she has been diagnosed with hypertension [or heart disease]. In many respects, this simply represents a return to the standard that the board applied prior to *Pearce*, which, in our view, more faithfully adhered to the statutory definition of accidental injury in view of the fact that, as a general matter, a

[12] We note that § 31-294 was repealed by No. 91-32 of the 1991 Public Acts and that its subject matter was transferred to General Statutes §§ 31-294b and 31-294c.

formal diagnosis of hypertension [or heart disease] can be definitely located in time and place." *Ciarlelli* v. *Hamden*, supra, 299 Conn. 300–301.

"Thus, § 7-433c directs claimants to the provisions of the [act] to determine how to proceed with a claim for benefits. Since § 31-294[13] states that [n]o proceedings for compensation . . . shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident . . . we conclude that compliance with this section is also a prerequisite to entitlement to benefits under § 7-433c. . . .

"Giving notice of the claim and the time of filing are essential to maintaining a right of action against an employer. Where a statutory right of action sets a time within which that right must be carried out, a limitation on the action is created and must be strictly enforced. . . . Not being merely a procedural matter, the doctrine of waiver upon which the claimant relies, cannot avail, since jurisdiction cannot be waived, nor can it be conferred by agreement." (Citations omitted; footnote added; internal quotation marks omitted.) *Cuccuro* v. *West Haven*, 6 Conn. App. 265, 267–68, 505 A.2d 1, cert. denied, 199 Conn. 804, 508 A.2d 31 (1986).

"Although a claimant need not prove that his heart disease is causally connected to his employment in order to qualify for benefits pursuant to § 7-433c, he must prove that he satisfies the jurisdictional threshold set forth in § 31-294c (a), which requires that a claimant provide his employer a written notice of claim for compensation . . . within one year from the date of the accident . . . which caused the personal injury . . . ." (Internal quotation marks omitted.) *Carter* v. *Clinton*, 304 Conn. 571, 578–79, 41 A.3d 296 (2012).

[13] See footnote 12 of this opinion.

"[C]ompliance with [§ 31-294c] is essential to maintaining a claim for compensation under chapter 568 and therefore under . . . § 7-433c . . . because timely notice is a jurisdictional requirement that cannot be waived . . . ." (Internal quotation marks omitted.) Id., 579.

First, we set forth the standard of review applicable to workers' compensation appeals. "The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [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 [the] 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 . . . ." (Footnote omitted; internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 611–13.

"[Our Supreme Court has] stated: [T]he power and duty of determining the facts rests on the commissioner, the trier of facts. . . . The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably

drawn from them." (Internal quotation marks omitted.) *Pearce* v. *New Haven*, supra, 76 Conn. App. 445.

"It matters not that the basic facts from which the [commissioner] draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) Id., 445–46.

The defendant's claim raises a question of statutory construction. "When interpreting the statutory provisions at issue in the present case, we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This proposition applies as well to the provisions of [§] 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits that may be awarded to a [claimant] under . . . [the act]. . . . We also recognize, however, that the filing of a timely notice of claim is a condition precedent to liability and a jurisdictional requirement that cannot be waived." (Citation omitted; internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, supra, 299 Conn. 277–78.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering

such relationship, the meaning of such text is plan and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Footnote omitted; internal quotation marks omitted.) *Vincent* v. *New Haven*, supra, 285 Conn. 784–85.

On appeal, the defendant claims that the plaintiff is jurisdictionally barred from submitting a claim for heart disease in 2013 because he failed to file a § 7-433c claim for pericarditis in 2000, when he was first told by a medical professional that he had heart disease. See *Ciarlelli* v. *Hamden*, supra, 299 Conn. 298–99. The principal facts are not in dispute: the plaintiff suffered pericarditis in 2000; pericarditis is a form of heart disease; the plaintiff was informed by his cardiologist that he had pericarditis in 2000; the plaintiff continued to be under the care of a cardiologist until he underwent heart surgery in 2013; in 2013 the plaintiff was informed that he had a mitral valve failure and coronary artery disease; mitral valve failure and coronary artery disease are diseases of the heart; pericarditis, mitral valve failure, and coronary artery disease are distinct forms of heart disease; there is no record that the plaintiff filed a claim for heart disease in 2000; he did file a claim for heart disease in 2013.

The defendant's claim is controlled by § 7-433c (a), which provides in relevant part that ''in the event a uniformed member of a paid municipal fire department . . . who . . . passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers

either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he . . . shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 . . . ."

The plain language of § 7-433c (a); see footnote 2 of this opinion; "demonstrates that a uniformed member of a paid municipal fire department . . . is entitled to benefits under the statute when the officer meets the following requirements: (1) has passed a preemployment physical; (2) the preemployment physical failed to reveal any evidence of . . . heart disease; (3) suffers either off duty or on duty any condition or impairment of health; (4) the condition or impairment of health was caused by . . . heart disease; and (5) the condition or impairment results in his death or his temporary or permanent, total or partial disability. The statute contains no other requirements to qualify for its benefits." *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 616–17.

"[B]ecause . . . § 7-433c (a) does not set forth a limitation period for filing a claim but provides for the administration of benefits in the same amount and the same manner as that provided under [the act] if such death or disability was caused by a personal injury which arose out of and in the course of his employment, the one year limitation period of . . . 31-294c (a) governs claims filed under § 7-433c." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, supra, 299 Conn. 278.

In *Ciarlelli*, our Supreme Court defined the rule to determine when a uniformed municipal firefighter's timely claim for hypertension or heart disease must be filed. Id., 265. Because § 7-433c (a) "provides for an

award of benefits to an otherwise eligible claimant who suffers . . . any condition or impairment of health caused by hypertension or heart disease resulting in his death or his . . . disability, it stands to reason that a formal diagnosis of hypertension or heart disease, communicated to an employee by his or her physician constitutes the injury that triggers the running of the limitation period of § 31-294c. Indeed, under § 7-433c, a claimant may recover benefits for hypertension only if he suffers from that condition; a claimant is not entitled to benefits merely because he exhibits symptoms consistent with hypertension, such as elevated blood pressure, from time to time. Furthermore, requiring that an employee file a notice of claim for hypertension benefits only *after he has been informed by a medical professional* that he is suffering from that condition, and not merely from its symptoms, is consistent with the principle that, as a remedial statute . . . § 7-433c must be liberally construed in favor of the claimant." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 298–99. We conclude that, given our Supreme Court's construction of the statute, including the phrase "hypertension or heart disease," the notice provision pertains to a diagnosis of heart disease as well as to a diagnosis of hypertension.

In the present case, the defendant claims that because the plaintiff was diagnosed with pericarditis in 2000 and did not file a form 30C at that time when his cardiologist told him that he had heart disease, his 2013 form 30C filing for heart disease was untimely and the commissioner lacked jurisdiction to consider the claim. The plaintiff does not dispute that he was informed by a cardiologist in 2000 that he suffered from pericarditis, that he was unable to work for a period of time, was required to take medicine for the condition, and was required to undergo a physical examination to determine whether he was fit to return to work. He also

acknowledges that he had a recurrence of pericarditis in 2001 and continued to take 800 milligrams of ibuprofen for a number of years. The plaintiff's argument is not that he did not suffer from heart disease in 2000, but rather that because Tally testified, and the commissioner found, that his pericarditis had healed, and that pericarditis and mitral valve failure and coronary artery disease are separate and distinct heart diseases, he should be permitted to file a claim for the heart disease with which he was diagnosed in 2013. We agree with the defendant. Pursuant to *Ciarlelli*, the plaintiff was required to file a form 30c notice of claim under § 7-433c within one year of being advised by his cardiologist that he suffered from pericarditis.

The defendant also argues that the language of § 7-433c is clear and permits a municipal firefighter to file only one claim for heart disease and only one claim for hypertension, if any.[14] Although the commissioner found, on the basis of Tally's testimony, that pericarditis and mitral valve failure and coronary artery disease are separate and distinct forms of heart disease, a fact the defendant does not dispute, the defendant argues that in order for the plaintiff to receive benefits for heart disease, he was required to file a notice of claim within one year of first being told he had heart disease, i.e., pericarditis. There is no dispute that the plaintiff was informed that he had pericarditis in 2000 and was under the care of a cardiologist thereafter. Although the plaintiff testified that he filed a form 30C in 2000, the commissioner found that the testimony was not credible.[15]

"The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the ques-

[14] In fact, the plaintiff filed a § 7-433c claim for hypertension in 2007. See footnote 9 of this opinion.

[15] The plaintiff does not dispute the commissioner's finding on appeal.

tion of whether the language actually does apply." (Citation omitted.) *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 431, 692 A.2d 742 (1997). "Where the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intent of the legislature and there is no need for statutory construction or a review of the legislative history." (Internal quotation marks omitted.) *Haesche* v. *Kissner*, 229 Conn. 213, 223, 640 A.2d 89 (1994). Our Supreme Court has determined that § 7-433c (a) is not ambiguous. This court, therefore, is not free to consider extratextual evidence of the meaning of the statute. See General Statutes § 1-2z. "Where statutory language is clearly expressed, as here, courts must apply the legislative enactment according to the plain terms and cannot read into the terms of a statute something which manifestly is not there in order to reach what the court thinks would be a just result." (Internal quotation marks omitted.) *Hammond* v. *Commissioner of Correction*, 54 Conn. App. 11, 17–18, 734 A.2d 571 (1999), aff'd, 259 Conn. 855, 792 A.2d 774 (2002).

Tally's report states that pericarditis, and mitral valve failure and coronary artery disease, are separate and distinct forms of heart disease. The defendant does not dispute his expert opinion. It argues that a claimant seeking heart disease benefits is required to file a claim for the first diagnosis of heart disease. We acknowledge that there are a variety of maladies that may be diagnosed as heart disease, but the statute does not take that fact into account and makes no provision for the filing of multiple claims for different forms of heart disease a firefighter may suffer during his or her term of employment.

Our Supreme Court has stated that "[t]he plain language of § 7-433c demonstrates that a uniformed member of a paid municipal fire department . . . is entitled to benefits under the statute when the officer meets the following requirements: (1) has passed a preemployment physical; (2) the preemployment physical failed

to reveal any evidence of hypertension or heart disease; (3) suffers either off duty or on duty any condition or impairment of health; (4) the condition or impairment of health was caused by hypertension or heart disease; and (5) the condition or impairment results in his death or his temporary or permanent, total or partial disability. The statute contains no other requirements to qualify for its benefits." *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 616–17. Requirements (3) and (4) are controlling of the defendant's claim. The condition or impairment of health is written in the singular, not the plural. It contains no modifier of heart disease such as first instance of or second form of heart disease. The statute does not include language or suggest that the firefighter may file multiple claims for heart disease or claims for different forms of heart disease.

The plaintiff argues on the basis of *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 615, that because our Supreme Court has determined that hypertension and heart disease are separate and distinct forms of disease, the separate and distinct language analysis should apply to all forms of heart disease, as well as to the difference between hypertension and heart disease. We disagree. In *Holston*, a municipal police department appealed from the award of heart disease benefits, claiming that the commissioner had improperly determined that the police officer's "hypertension and heart disease were separate diseases, each with its own one year limitation period for filing a claim for benefits." Id., 610. In construing the statute, our Supreme Court stated that § 7-433c "uses the phrase hypertension *or* heart disease repeatedly. We have held that the use of the word *or* in a statute indicates a clear legislative intent of separability. . . . Thus because § 7-433c is written in the disjunctive, we conclude that a plaintiff can file a claim for benefits related to either hypertension or heart disease. Furthermore, the use of the disjunctive term *or* in § 7-433c indicates that the legislature

intended for hypertension and heart disease to be treated as two separate diseases for the purposes of § 7-433c." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 615-16. There is no language in §7-433c or *Holston* or *Ciarlelli* that permits a paid municipal firefighter to file more than one claim for heart disease.

In conclusion, a claimant who forgoes filing a claim within one year of being informed by a medical professional that he or she has a heart disease and who later files a claim for a different heart disease is precluded from receiving benefits under § 7-433c. We, therefore, reverse the decision of the board and remand the case to the board with direction to remand the case to the commissioner with direction to dismiss the plaintiff's claim. We recognize the seeming harshness of our decision and the humanitarian purpose of the statute, but we are constrained by the language of the statute, the dictates of § 1-2z, and the decisions of our Supreme Court.[16]

For the foregoing reasons, we conclude that the commissioner lacked jurisdiction to consider the plaintiff's 2013 claim for § 7-433c benefits for heart disease. We also conclude that the board improperly affirmed the commissioner's award.

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to remand the case to the Workers' Compensation Commissioner with direction to dismiss the plaintiff's claim.

In this opinion the other judges concurred.

[16] As the facts of this case demonstrate, there are multiple forms of heart disease. Whether a firefighter or police officer may file a claim for each instance of a distinct and separate heart disease is a public policy question to be determined by the legislature, not this court. It is also for the legislature to determine whether a firefighter may forgo filing a claim for one form of heart disease and later file a claim for a different and perhaps more serious form of heart disease.

FARMINGTON-GIRARD, LLC *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD

THE PAMELA CORPORATION ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD (AC 41601)

Lavine, Bright and Alexander, Js.

Syllabus

The plaintiff property owner, F Co., appealed to the trial court from the decisions of the defendant Planning and Zoning Commission of the City of Hartford adopting certain amendments to the city's zoning regulations and changes to the zoning map. In 2012, F Co. submitted a special permit application proposing the construction of a fast food restaurant with a drive-through on its property. Shortly thereafter, the commission made changes to the zoning map causing the classification of F Co.'s property to change from a B-3 zone that allows drive-through operations to a B-4 zone that does not. In response to F Co.'s application, H, the city's chief staff planner, sent a letter to F Co., stating that the application was incomplete because it lacked certain required information, and, therefore, it was not sufficient to review. Thereafter, F Co. appealed the commission's zoning map change to the trial court, which invalidated the change because the commission had failed to comply with statutory notice requirements. In September, 2014, the commission amended the text of the zoning regulations, which resulted in the inability of F Co. to use its property for a fast food restaurant with a drive-through. F Co. appealed the amendment to the trial court on the ground that the commission had failed to comply with procedural notice requirements. In October, 2014, C sent a letter on F Co.'s behalf to D, the director of the city's planning division. The letter purportedly supplied all of the required information that was lacking on the special permit application. In response, D sent C a letter stating that F Co.'s 2012 application was void and that a new application with the required information had to be submitted. D's letter coincided with the commission's adoption of a zoning map change that prohibited F Co. from constructing a fast food restaurant with a drive-through on its property. F Co. appealed the zoning map change to the trial court on the ground that the commission failed to comply with procedural notice requirements. Thereafter, F Co. filed two additional appeals challenging the commission's subsequent adoption of an amendment to the zoning regulations and a change to the zoning map. The trial court consolidated F Co.'s appeals and, following a hearing, rendered judgments dismissing the appeals for F Co.'s failure

to exhaust its administrative remedies. In reaching its decisions, the court determined that the subject zoning map changes and text amendments were void because the commission failed to comply with certain procedural requirements, that F Co. had an application pending before the commission on or about October, 2014, that, pursuant to the plain language of the zoning regulations, D had the authority to declare the application void, that D had articulated a clear and definite interpretation of the zoning regulations in her letter to C, and that F Co. had a statutory right to appeal D's decision to the city's Zoning Board of Appeals but failed to do so. On appeal to this court, F Co. claimed that the trial court improperly concluded that it was required to appeal D's decision to the board and, thus, that it failed to exhaust its administrative remedies. *Held*:

1. The trial court properly concluded that the city's zoning regulations provided D with the authority to declare F Co.'s 2012 special permit application void; contrary to F Co.'s claim that the zoning regulations support its contention that only the commission had the authority to declare the application void, §§ 66 and 67 of the regulations give the director of the city's planning division the overall responsibility for the administration of the regulations and designate the director as the zoning administrator, § 68 of the regulations explicitly provides that a special permit may not issue until the zoning administrator finds that the application and plans conform to all provisions of the regulations, and § 913 of the regulations, on which F Co. relied, requires compliance with § 68.
2. F Co.'s claim that there was no statutory or regulatory avenue for appeal of D's decision voiding its application was unavailing, there having been a right of appeal to the board under the applicable statute (§ 8-6 [a] [1]); D's letter voiding F Co.'s application was an appealable decision under § 8-6 because it had both a legal effect and contained a clear and definite interpretation of the zoning regulations, as D did not simply give advice to F Co. on a hypothetical situation, but, rather, she made a decision to void F Co.'s application, due to a clear and definitive interpretation of the regulations regarding an application's required information, and that decision had a legal effect on F Co. because F Co. was then required to file a new application that conformed to the regulations that were in place at that time.
3. F Co. could not prevail on its claim that an appeal to the board would have been futile; contrary to F Co.'s contention, D's determination in her letter that a new application must conform to the zoning map changes and text amendments in place at the time of the letter was based on her determination that the application was void, and, therefore, the board properly could have reviewed D's decision and provided an adequate remedy to F Co. by deciding that the application was not void and that no new application needed to be filed, and because the board could have found that the application was not void and was subject to the regulations in place at the time of its filing rather than to the zoning map changes and text amendments, an appeal to the board was an adequate administrative remedy that F Co. was obligated to seek.

Argued March 12—officially released June 25, 2019

Procedural History

Appeals from the decisions of the defendant adopting certain amendments to the zoning regulations and changes to the zoning map of the city of Hartford, brought to the Superior Court in the judicial district of Hartford and transferred to the Land Use Litigation Docket, where the appeals were consolidated; thereafter, the court, *Berger*, *J.*, granted the motions to withdraw filed by the plaintiff The Pamela Corporation; judgments dismissing the appeals, from which the plaintiff Farmington-Girard, LLC, on the granting of certification, appealed to this court. *Affirmed*.

David F. Sherwood, for the appellant (plaintiff Farmington-Girard, LLC).

Daniel J. Krisch, with whom was *Matthew J. Willis*, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff Farmington-Girard, LLC,[1] appeals from the judgments of the trial court, rendered after a trial to the court, dismissing the plaintiff's four consolidated appeals that challenged text amendments to the Hartford Zoning Regulations (regulations) and zoning map changes made by the defendant, the Planning and Zoning Commission of the City of Hartford (commission), for failure to exhaust its administrative remedies. In this appeal, the plaintiff claims that (1) the trial court improperly concluded that it was required to appeal to the city's Zoning Board of Appeals (board) and, thus, failed to exhaust its administrative remedies, and (2) the defendant is estopped from applying the

[1] The Pamela Corporation, the owner of 255 Farmington Avenue, was a coplaintiff in two of the four appeals made to the trial court in the present matter. The Pamela Corporation filed motions to withdraw, however, which the trial court granted, thus leaving Farmington-Girard, LLC, as the sole plaintiff. In this opinion, we refer to Farmington-Girard, LLC, as the plaintiff.

current regulations to the plaintiff's property.[2] We affirm the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The plaintiff owns property at 510 Farmington Avenue in Hartford. On December 10, 2012, the plaintiff submitted a special permit application, which the plaintiff describes as a "hastily submitted" placeholder application "in order to preserve its rights," proposing the construction of a small fast food restaurant with a drive-through. On December 11, 2012, the defendant made changes to the city zoning map causing the classification of the plaintiff's property to change from a B-3 zone that allows drive-through operations to a B-4 that does not. In response to the plaintiff's application, Kim Holden, the city's chief staff planner, sent a letter dated December 19, 2012, to the plaintiff, stating in relevant part: "A site plan with minimal information was attached to the application which is not sufficient to review with respect to the zoning regulations. . . . The application is considered incomplete and as such, the time clock on the application has been stopped."[3]

The plaintiff appealed the defendant's zoning map change to the Superior Court, *Peck*, *J.*, which invalidated the commission's December 11, 2012 zoning map change because the commission failed to comply with prehearing and posthearing statutory notice requirements.[4] *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6038698-S (August 19, 2014).

On September 23, 2014, the defendant amended the text of the regulations, resulting in the plaintiff's inabil-

[2] Because we conclude that the court lacked subject matter jurisdiction, we do not reach the plaintiff's second claim.

[3] The letter also detailed specific items necessary for a special permit application that were not included in the plaintiff's submission.

[4] The Pamela Corporation also appealed the zoning map changes, and the two cases were consolidated.

ity to use its property for a fast food restaurant with a drive-through. The plaintiff appealed this amendment to the Superior Court in a complaint dated February 18, 2015, on the ground that the defendant failed to comply with procedural notice requirements.

In response to Holden's letter, stating that the plaintiff's December 10, 2012 application was incomplete, Michelle Carlson wrote a letter dated October 20, 2014, on behalf of the plaintiff to Khara L. Dodds, the director of the city's planning division. According to the plaintiff, it had waited until after the court invalidated the 2012 zoning map change to complete its application. Carlson's letter purportedly supplied all of the required information outlined by Holden and requested that the time clock on the application run and that a public hearing for the application be set. In an affidavit, Carlson attested that she verbally was informed by the city that a new application was required and that the supplemental materials would not be accepted. Dodds responded to Carlson in a letter dated October 28, 2014, stating: "We are contacting you with regard to a site plan review application submitted December 10, 2012 and your desire to re-activate this application with your current plan submittal. After our initial review, it was clear that the original site plan application, #2012-6263 filed in December 2012, lacked the required materials to be considered valid. The application was submitted without site and architectural elevation plans: as a result the application is void. A new site plan application with the required materials must be submitted. Please note several changes to the City of Hartford Zoning Regulations have occurred since your last submittal. Please review these changes to ensure that all required materials are submitted with your new application."

Dodds' October 28, 2014 letter coincided with the defendant's adoption of another zoning map change that blocked the plaintiff's plan to build a drive-through

fast food restaurant. The plaintiff appealed the October 28, 2014 zoning map change to the Superior Court in a complaint dated November 14, 2014, on the ground that the defendant failed to comply with procedural notice requirements. The plaintiff filed a variance application on October 28, 2014, as well.

The plaintiff additionally appealed to the Superior Court, in complaints dated December 15, 2014 and April 28, 2015, respectively, from the defendant's December 9, 2014 zoning map change and its April 14, 2015 text amendment to the regulations. The defendant amended its December 9, 2014 zoning map and its April 14, 2015 text in the same manner as it had on September 23, 2014 and October 28, 2014, respectively. In its appeals, the plaintiff again asserted that the defendant failed to comply with procedural notice requirements.

On January 20, 2015, the board denied the plaintiff's variance application. The plaintiff's appeals challenging the defendant's October 28 and December 9, 2014 zoning map changes were filed before the board denied the plaintiff's variance application.

After the plaintiff filed the four appeals that constitute the present matter, the defendant adopted new regulations on January 12, 2016, that place the plaintiff's property in a MS-1 zone. The plaintiff has not appealed from the new zoning scheme or designation of its property.

On May 4, 2016, the defendant moved to dismiss the plaintiff's appeals as moot due to the passage of the new zoning scheme. The trial court, however, concluded that "if the plaintiff's particular application was complete on October 20, 2014, and the zone change was improper because of the failure to provide proper notice, then [the plaintiff] may have had a viable complete application that was in conformance with the applicable zoning regulations at that time." (Internal quotation marks omitted.)

After the parties filed briefs, including additional briefing on the exhaustion issue as requested by the court, and the court heard the appeals, the court made various findings. First, the court found that the defendant failed to comply with the procedural requirements for the September 23, October 28 and December 9, 2014, and April 14, 2015 zoning map changes and text amendments to the regulations. The court, therefore, concluded that the zoning map changes and text amendments were void. Second, the court concluded that the plaintiff had an application pending on or about October 20, 2014, as it found that "[w]hile the December 19, 2012 letter from the planning division informs [the plaintiff] that the application is incomplete, there is no evidence that [the] application was rejected or deemed void until 2014. The language of the December 19, 2012 letter was less than unequivocal." (Internal quotation marks omitted). Third, the court found that, contrary to the plaintiff's arguments, Dodds had the authority to declare the application void and that she had articulated "a clear and definite interpretation of the zoning regulations in her letter declaring the plaintiff's application void . . . ." (Citations omitted; internal quotation marks omitted.) Therefore, the court concluded that the plaintiff had a statutory right to appeal Dodds' decision to the board and had failed to do so. As a result, the court dismissed the plaintiff's appeals for a failure to exhaust its administrative remedies.

The plaintiff filed a motion to reargue on September 25, 2017, which the court granted. At the February 8, 2018 hearing, the court rejected the plaintiff's argument that an appeal to the board was not necessary because the futility exception applied, and denied the plaintiff relief from the dismissal of its claims. The plaintiff thereafter appealed to this court.

The plaintiff claims that the court improperly concluded that it was required to appeal Dodds' decision

to the board and thus that it failed to exhaust its administrative remedies. Specifically, the plaintiff makes three arguments: (1) Dodds had no authority to deny the application, (2) there was no statutory authority requiring an appeal from an unsuccessful special permit application, and (3) an appeal would have been futile.[5] We disagree.

[5] During the pendency of the plaintiff's appeal, this court became aware of an action that the plaintiff brought in the federal District Court against the defendant and the city of Hartford (municipal defendants) on the basis of the same essential circumstances as the present appeals. See *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, United States District Court, Docket No. 3:17-cv-1915 (MPS), 2019 WL 935500 (D. Conn. February 26, 2019). In the District Court, the plaintiff claimed, in part, that the municipal defendants violated its constitutional rights under 42 U.S.C. § 1983. Id., *1. After the plaintiff filed the present appeal, but before the oral arguments to this court, the District Court denied, in part, the municipal defendants' motion to dismiss the plaintiff's claims as unripe because the appeal before this court was not yet decided. Id. The District Court concluded that, because we, as an appellate court, are a remedial body, the plaintiff's claims were not unripe. Id., *8. Nonetheless, the court *sua sponte* ordered the parties to submit briefs on a different aspect of ripeness—whether the claims were unripe due to the plaintiff's failure to seek a variance before filing each of its federal appeals. Id. The District Court found that the plaintiff alleged sufficient facts to support the futility exception regarding the finality requirement of seeking a variance before appealing. Id., *8–9. We note, however, that the futility exception as it pertains to the exhaustion doctrine is fundamentally different from the futility exception as it applies to ripeness of a § 1983 claim because the focus of a § 1983 claim's ripeness is on whether there has been a final order that can be reviewed on appeal by the federal District Court, not on whether there was an administrative remedy available to the plaintiff.

"The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. . . . While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." (Citations omitted.) *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 192–94, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). For finality purposes for a § 1983 claim, a plaintiff is "required to obtain a final, definitive position as to how it could use the property from the entity charged with implementing the zoning regulations. . . . [T]his jurisdictional prerequisite conditions federal review on a property owner submitting at least one meaningful application for a variance." (Citations

"As a preliminary matter, we set forth the applicable standard of review. . . . Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim. . . . [Additionally] [b]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 807, 82 A.3d 602 (2014). "Moreover, [i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Novak* v. *Levin*, 287 Conn. 71, 79, 951 A.2d 514 (2008).

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 477, 55 A.3d 251 (2012).

omitted.) *Murphy* v. *New Milford Zoning Commission*, 402 F.3d 342, 348–49 (2d Cir. 2005). However, "[a] property owner . . . . will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile." Id., 349. Although a plaintiff would need to seek a variance or prove that it would have been futile to do so for finality purposes, "a plaintiff is not required to exhaust administrative remedies prior to filing a § 1983 claim . . . ." *Mangiafico* v. *Farmington*, 331 Conn. 404, 408, 204 A.3d 1138 (2019).

The District Court's conclusion, therefore, does not speak to whether the plaintiff has exhausted all administrative remedies as was required in the present matter, or whether it would have been futile to do so. The District Court's analysis focused only on whether there was a final order from the board, the highest decision-making body. The issue in the present appeal is whether a remedy was available to the plaintiff that it failed to seek.

"A primary purpose of the doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities. . . .

"The [exhaustion] doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. . . . . [Our Supreme Court has] recognized such exceptions only infrequently and only for narrowly defined purposes . . . such as when recourse to the administrative remedy would be futile or inadequate. . . . Because of the policy behind the exhaustion doctrine, we construe these exceptions narrowly." (Citations omitted; internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 564–65, 821 A.2d 725 (2003).

Municipal zoning boards of appeal are empowered, under Connecticut law, "[t]o hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ." General Statutes § 8-6 (a) (1).

"As our Supreme Court has explained, the futility exception applies *only* when [the administrative remedy] could not result in a favorable decision . . . . Our Supreme Court further has instructed that an administrative remedy is adequate when it could provide the [party] with the relief that it seeks and provide a mechanism for judicial review of the administrative decision." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 628, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).

I

The plaintiff first argues that the commission alone had the authority to determine the completeness of the special permit application and that Dodds had no authority to reject the application herself. The trial court rejected the plaintiff's argument because it concluded that the plain language of the regulations gave Dodds the authority to reject the application. It stated: "Section 66 of the regulations provided that they 'shall be administered and enforced by the [D]epartment of [D]evelopment [S]ervices' and that the director of planning had 'overall responsibility for the administration of the regulations, and shall be the zoning administrator.' . . . Pursuant to § 67 [of the regulations], the director of the planning division had the authority to designate the zoning enforcement officer who was responsible for enforcement of the regulations and for the issuance of zoning permits. . . .

"Section 68 (a) [of the regulations], in relevant part, provided that '[p]rior to the issuance [of a zoning permit], the zoning administrator must find that the application and plans conform to all provisions of these regulations.' . . . Section 68 (c), in relevant part, required that each zoning permit application shall include 'an administrative review plan as well as such

information and exhibits as are required in these regulations or may be reasonably required by the zoning administrator in order that the proposal of the applicant may be adequately interpreted and judged as to its conformity with the provisions set forth in these regulations.' . . . Section 68 (e) (1) required a special permit application to include a site plan . . . .

"Section 163 (h) [of the regulations] provided . . . 'All projects requiring a special permit as outlined in the table of permitted uses shall be referred to the [c]ommission for review. . . .

"Section 875 [of the regulations] provided . . . 'Every application for the use of property subject to conditions set forth in this division shall be filed with the zoning administrator in accordance with the provisions of section 68 (relating to applications for zoning permits) and shall be subject to approval by the zoning administrator and any other commission, board or agency stipulated in this division.' . . .

"[Section] 913 [of the regulations] was entitled, 'Eating places with drive-in or curb service,' and, in relevant part, provided: '(a) The zoning administrator shall refer each application for an eating place with drive-in or curb service in the B-3 zoning district to the commission. The application shall be filed and acted on in accordance with the procedures set forth in section 68 (relating to applications for zoning permits). . . .

"(d) Every application for a special permit for a restaurant with drive-in or curb service shall be filed and acted on in accordance with the provisions of section 68 (relating to applications for zoning permits).' . . .

"In the present case, Dodds was responsible for the administration of the regulatory scheme." (Citations omitted; footnotes omitted.)

On appeal, the plaintiff does not claim that the court misstated or misconstrued the regulations,[6] but argues, rather, that §§ 163 and 913 of the regulations, which were acknowledged by the court in its analysis, and case law support its contention that only the commission may act on the application. We are unpersuaded, as none of the authorities on which the plaintiff relies states that *only* the commission had the authority to declare an application, which does not include the information as required by the regulation, void as incomplete after a public hearing.[7] Sections 66 and 67 of the regulations, however, give the director of the city's planning division the "overall responsibility for the administration of the regulations," and designate the director "the zoning administrator." Furthermore, § 68 of the regulations explicitly provides that a permit may not issue until the *zoning administrator* finds that the application and plans conform to all provisions of the regulations. Finally, § 913 of the regulations, on which the

[6] Our own independent review of the applicable regulations confirms that the trial court correctly set forth the relevant language of the applicable regulations.

[7] Although the plaintiff cites cases that state that the commission has the discretion to proceed on an application, when, notably, the regulations did not require additional information; see *Woodburn* v. *Conservation Commission*, 37 Conn. App. 166, 179, 655 A.2d 764, cert. denied, 233 Conn. 906, 657 A.2d 645 (1995); or that the commission was not prohibited by the regulations from holding a hearing on an incomplete application; see *Michel* v. *Planning & Zoning Commission*, 28 Conn. App. 314, 331, 612 A.2d 778, cert. denied, 223 Conn. 923, 614 A.2d 824 (1992); the cases the plaintiff cites do not support the notion that a bare-bones application with minimal information could be deemed void or incomplete only by the commission. The plaintiff construes the receipt of an application as ministerial, even when the application is clearly incomplete; however, the cases it cites do not stand for that proposition. *Viking Construction Co.* v. *Planning Commission*, 181 Conn. 243, 247, 435 A.2d 29 (1980), deals only with when the time clock starts to tick for an application, and *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347–48, 197 A.2d 645 (1964), supports the opposite notion—that ministerial duties can involve quasi-judicial determinations. See id. ("A ministerial duty on the part of an official often follows a quasi-judicial determination by that official as to the existence of a state of facts. Although the determination itself involves the exercise of judgment, and therefore is not a ministerial act, the duty of giving effect, by taking appropriate action, to the determination is often ministerial.").

plaintiff relies, requires compliance with § 68. We, therefore, agree with the court that the regulations provide Dodds with the authority to declare the application, which did not conform to the applicable regulations, void.

II

The plaintiff next argues that there was no statutory or regulatory avenue for appeal of Dodds' decision voiding its application. We disagree.

In its memorandum of decision, the court stated: "[Section] 8-6, in relevant part, provides: '(a) The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by *the official charged with the enforcement* of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . .' . . .

"The plaintiff argues that it could not have appealed Dodds' determination because she was not 'the official charged with the enforcement' under § 67 of the regulations. Nevertheless, our Supreme Court has 'not disagree[d], in principle, with the . . . contention that appeals under § 8-6 may be taken from decisions made by someone other than the designated zoning enforcement officer, if that other person in fact exercised, and was authorized to exercise, the relevant authority.' . . . Dodds had 'overall responsibility for the administration of the regulations' under § 66. . . . More importantly, she rendered 'a clear and definite interpretation of zoning regulations' in her letter declaring the plaintiff's application void . . . that ultimately affected the plaintiff's ability to use its property. . . . Thus, the plaintiff

had a statutory right of appeal under § 8-6 (a) (1)."[8] (Citations omitted; emphasis in original; footnote omitted.)

We agree with the court that Dodds' letter voiding the plaintiff's application was an appealable decision because the letter had both a legal effect and contained a clear and definite interpretation of the regulations. "[W]hen there is a written communication from a zoning official relating to the construction or application of zoning laws, the question of whether a 'decision' has been rendered for purposes of appeal turns on whether the communication has a legal effect or consequence. . . . The obvious examples of such appealable decisions would be the granting or denying of building permits and the issuance of certificates of zoning compliance. . . . This interpretation is consistent with the terms used in relation to 'decision' under §§ 8-6 and 8-7—'order' and 'requirement'—which similarly import legal effect or consequence." (Citations omitted.) *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 365–66, 87 A.3d 1070 (2014). "[W]hen a landowner obtains a clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals." *Piquet* v. *Chester*, 306 Conn. 173, 186, 49 A.3d 977 (2012); contra *Holt* v. *Zoning Board of Appeals*, 114 Conn. App. 13, 29, 968 A.2d 946 (2009) (letter advising on hypothetical situation was not appealable decision). Dodds did not simply give advice to the plaintiff on a hypothetical situation, but, rather, she made a decision to void the plaintiff's application, due to a clear and definitive interpretation of the regulations regarding an application's required materials, and that decision had a legal effect

[8] Furthermore, this court recently held that even the question of whether the zoning official had the authority to act must be raised before the zoning board of appeals for a plaintiff to exhaust its administrative remedies. See *Wethersfield* v. *PR Arrow, LLC*, supra, 187 Conn. App. 627.

on the plaintiff because the plaintiff was then required to file a new application that conformed to the regulations in place at that time. We, therefore, reject the plaintiff's argument that it could not have appealed from Dodds' decision to void its application.

III

The plaintiff's third argument is that an appeal to the board would have been futile because Dodds made two determinations in her letter: (1) that the application was void, and (2) that a reapplication must conform to the zoning map changes and text amendments in place at the time of the letter. The plaintiff argues that the "significance of the first determination in . . . Dodds' letter is wholly dependent on the validity of the second determination." Thus, the plaintiff contends that its claim can be reviewed only by a court of law as the validity of the zoning map and text amendments were under question and could not be resolved by the board. This argument is unpersuasive because, contrary to the plaintiff's argument, Dodds' second determination relies on her first determination—that the application was void and a new application needed to be submitted. The board properly could have reviewed Dodds' decision and provided a remedy to the plaintiff by deciding that the application was not void and that no new application needed to be filed.

If the board had determined that Dodds erred in deeming the application void, the plaintiff's application would not have had to conform to the new zoning map and text amendments pursuant to General Statutes § 8-2h (a), which provides, in relevant part, that "[a]n application filed with a . . . planning and zoning commission . . . which is in conformance with the applicable zoning regulations as of the time of filing shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change

in the zoning regulations or the boundaries of zoning districts of such town, city or borough taking effect after the filing of such application."[9] Because the board could have found that the application was not void and was subject to the regulations in place at the time of its filing rather than to the zoning map changes and text amendments, an appeal to the board was an adequate administrative remedy that the plaintiff was obligated to seek. "[A]n administrative remedy is adequate when it *could* provide the [party] with the relief that it seeks . . . ." (Emphasis added; internal quotation marks omitted.) *Wethersfield* v. *PR Arrow, LLC*, supra, 187 Conn. App. 628. We, therefore, reject the plaintiff's

[9] The plaintiff appears to argue that the board would have been unable to provide a remedy because the board could allow only the admittedly incomplete application to be considered. This argument fails to acknowledge that the plaintiff sought to complete the application through the submission of additional materials, and in response, Dodds considered the incomplete application void rather than allowing it to be completed by the submission of additional materials. We see no reason why the board would not have the power to conclude that the application, although incomplete, was not void.

The plaintiff additionally argues: "The plaintiff . . . [was] not seeking . . . the opportunity to have the defendant consider its permit application under the prior zoning regulations. That argument misses the forest for the trees. The plaintiff . . . [was] seeking permission to build and operate a McDonald's restaurant with a drive-through window at 510 Farmington Avenue. The December 10, 2012 application was simply a means to that end. If a new application need be submitted, so be it, but it should not be made subject to text amendments and a rezoning that were adopted illegally." We reject this argument.

Consideration of the application under the prior regulations would have given the plaintiff the chance to receive permission to construct and operate a restaurant with a drive-through on its property. It does not matter whether another manner of obtaining such a remedy was amenable or available to the plaintiff as long as an appeal to the board could have provided the plaintiff with relief and prevented the courts from being unnecessarily burdened. See *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 564–65 ("exhaustion of remedies . . . protects the courts from becoming unnecessarily burdened with administrative appeals" [internal quotation marks omitted]); *Wethersfield* v. *PR Arrow, LLC*, supra, 187 Conn. App. 628 ("an administrative remedy is adequate when it could provide the [party] with the relief that it seeks and provide a mechanism for judicial review of the administrative decision" [internal quotation marks omitted]).

claim that it was not required to appeal to the board and that the court improperly dismissed its appeals for a failure to exhaust its administrative remedies.

The judgments are affirmed.

In this opinion the other judges concurred.

CRISTIANE M. ALMEIDA *v.* RENATO ALMEIDA (AC 41312)

Keller, Elgo and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for clarification of the dissolution judgment. As part of its judgment of dissolution, the court had ordered, inter alia, that the defendant quitclaim to the plaintiff all interest in certain real property, and the defendant signed a quitclaim deed, assigning his rights and interest in the property to the plaintiff. After the plaintiff subsequently learned that the defendant's business partner was on the deed of the property, she filed a postjudgment motion for clarification, in which she asked the court to determine whether it intended for the defendant to make whatever arrangements were necessary with his business partner to transfer all interest in the property to the plaintiff or if the court, instead, intended to award the plaintiff with a 50 percent interest in the property. The court granted the plaintiff's motion, finding that it had previously determined in its dissolution judgment that the defendant's testimony regarding a business partner was not credible, that it had previously ordered the defendant to quitclaim all interest in the property to the plaintiff, and that it intended for the plaintiff to acquire 100 percent interest in the property. The court, thus, ordered the defendant to take the necessary measures to effectuate the terms of the dissolution judgment. *Held* that the trial court improperly modified the dissolution judgment when it issued its clarification order; that court's order did not simply effectuate its existing judgment but, instead, introduced a new element into the details of the judgment because, when it became obvious that the defendant could not transfer 100 percent ownership interest to the plaintiff solely by his execution of a quitclaim deed, the court ordered the defendant to take additional steps beyond quitclaiming his interest in the property to the plaintiff, and although the plaintiff claimed that the court's original intent that the plaintiff receive a 100 percent interest in the property is evinced by the language

in the dissolution judgment memorandum of decision, the court's subsequent order is premised on facts that it originally did not believe, as the court, in its dissolution judgment, did not credit the defendant's testimony that he was only a 50 percent owner of the property, and by subsequently ordering the defendant to take the necessary measures so that the plaintiff could acquire a 100 percent interest in the property, the court substantively modified the dissolution judgment.

Argued March 5—officially released June 25, 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, *Ficeto*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court granted the plaintiff's motion for clarification and issued a clarification of the dissolution judgment, and the defendant appealed to this court. *Reversed*; *judgment directed*.

David R. Peck, with whom, on the brief, was *Brittany Wallace*, for the appellant (defendant).

Giovanna Shay, with whom, on the brief, were *Ramona Mercado-Espinoza* and *Enelsa Diaz*, for the appellee (plaintiff).

Opinion

ELGO, J. In this postdissolution matter, the defendant, Renato Almeida, appeals from the judgment of the trial court granting the motion for clarification filed by the plaintiff, Cristiane M. Almeida. On appeal, the defendant claims that the court improperly modified the dissolution judgment when it rendered its clarification.[1]

[1] The defendant also claims that the trial court's order dated January 5, 2018, is unenforceable because the court had no authority to order the defendant to acquire an interest in property he did not have at the time of the dissolution. Because we agree with the defendant's first claim that the court improperly modified the dissolution judgment, we need not address this issue.

We agree and, therefore, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved on October 16, 2015. In its memorandum of decision, the court, *Ficeto*, *J.*, found, inter alia, that "[t]he defendant acquired four properties during the course of the marriage. The property at 409 Sigourney Street, Hartford [property], is where the parties made their home and the defendant currently resides. It is a three family home; the defendant resides in one unit and rents two. [The defendant] listed the value of [the property] at $144,000 on his financial affidavit. He alleges [that] he is only a 50 percent owner of [the property] and that his business partner owns 50 percent through a business entity known as Talyah Home Improvement, LLC. . . . All properties were purchased with cash. Counsel for the plaintiff inquired how the defendant was able to acquire the . . . properties with no loans or mortgages. [The defendant] testified that a sister brought him $100,000 from Brazil and that he used it as seed money for 'flipping' houses. He alleges [that] the money was his and that he had saved it in Brazil. He was unable to provide documentation relative to the $100,000. The defendant testified relative to his business entity, Talyah Home Improvement, LLC. There was no evidence introduced relative to either the limited liability [company] or its members. [The defendant] vaguely testified about his partner, who has been in Brazil for the past year. [The defendant] alleges that he deals with his partner's 'people.' A review of the defendant's tax returns for the years 2010, 2011, 2012, and 2014 show[s] no schedules related to income from a business entity known as Talyah Home Improvement, LLC.[2] . . . The

[2] "The 2013 tax returns were not submitted into evidence. The 2010, 2011, 2012 and 2014 tax returns contain a Schedule C Profit or Loss from Business for [another business entity]."

court does not find credible [the defendant's] recitation relative to his financial affairs." (Footnote in original.)

As part of its judgment of dissolution, the court ordered, inter alia, that "[t]he defendant shall forthwith vacate and quitclaim to the plaintiff all interest in [the property]. [The] [p]laintiff shall thereafter be responsible for all expenses relating to said [property], including, but not limited to, real estate taxes, insurance, and utilities, and shall indemnify and hold the defendant harmless in regard to the same."

Subsequently, on December 4, 2015, the defendant signed a quitclaim deed, assigning his rights and interest in the property to the plaintiff.[3] On February 2, 2016, the parties entered into an agreement, which provided, in relevant part, that the "[p]laintiff will execute a substitution of agent and interim change of member for Talyah Home Improvement, LLC, and [the] defendant will file said documents and pay the associated filing fees to the Connecticut Secretary of State. This will allow [the] plaintiff to lawfully collect rents at [the property] going forward."

On September 21, 2017, the plaintiff filed a motion for contempt in which she claimed: "1. On October 16, 2015, the court ordered the defendant to vacate and quitclaim to the plaintiff all interest in [the property]. 2. On December 4, 2015, the defendant quitclaimed to the plaintiff [the property]; however, it has come to the plaintiff's attention that there was another person on the deed of the property. 3. The plaintiff is now being sued by Domingos, Joelson, in care of Salatiel De Matos through a power of attorney. . . . 4. During the divorce

[3] Pursuant to General Statutes § 47-36f, "[a] deed entitled 'Quitclaim Deed,' when duly executed, has the force and effect of a conveyance to the releasee of all the releasor's right, title and interest in and to the property described therein except as otherwise limited therein, but without any covenants of title. A 'Quitclaim Deed' may be used as a release of a mortgage, attachment, judgment lien or any other interest in real property."

proceedings, the defendant never stated that he was only [one-half] owner of the aforementioned property. 5. As a result, the plaintiff may have to sell the aforementioned property and [lose one half] of the equity in the home. 6. The defendant is in violation and in contempt of the court orders."

On December 4, 2017, the plaintiff filed a postjudgment motion for clarification, in which she argued that "[c]larification of the [dissolution] judgment [was] necessary to determine if the court intended for the defendant to make whatever arrangements were necessary with his business partner in Brazil to transfer 'all interest' in the [property] to the plaintiff, or if it was the court's intention to award the plaintiff with a 50 percent interest in the property and/or [the limited liability company]."

On December 5, 2017, the court, *Nastri*, *J.*, entered an order, which provided that: "1. Upon agreement of the parties, [the] plaintiff will withdraw the motion for contempt . . . and pursue the more appropriate motion for clarification filed [on] December 4, 2017. 2. The plaintiff's new motion will be calendared at a later date. It will be appropriate for Judge Ficeto to hear the plaintiff's new motion, as she was [the] judge who issued the judgment memorandum on October 16, 2015."

On January 5, 2018, without the motion ever being calendared, as ordered by Judge Nastri, the court entered an order granting the plaintiff's motion for clarification. That order stated in relevant part: "The court noted in its factual findings of October 16, 2015, that it did not find the defendant . . . credible relative to the ownership of the [property]. The defendant produced no evidence relative to the ownership of the property. He testified vaguely about a limited liability [company] and a partner in Brazil. He alleged that the partner resided in Brazil, so he dealt with the alleged

partner's representative. The court did not find the testimony credible. The court ordered that the defendant quitclaim 'all interest' to the plaintiff. The court intended that the plaintiff . . . acquire 100 percent interest in [the property] and be the sole owner of said property. The defendant is ordered to take the necessary measures to effectuate the terms of the judgment." From that decision, the defendant appeals.

On appeal, the defendant claims that the court improperly modified the dissolution judgment when it rendered its clarification order. In response, the plaintiff contends that the court's order was a proper clarification of its original judgment. We agree with the defendant.

We begin by setting forth our standard of review and relevant legal principles. "It is well established that [t]he court's judgment in an action for dissolution of a marriage is final and binding [on] the parties, where no appeal is taken therefrom, unless and to the extent that statutes, the common law or rules of [practice] permit the setting aside or modification of that judgment. Under Practice Book [§ 17-4], a civil judgment may be opened or set aside . . . [when] a motion seeking to do so is filed within four months from the date of its rendition. . . . Absent waiver, consent or other submission to jurisdiction, however, a court is without jurisdiction to modify or correct a judgment, in other than clerical respects, after the expiration of [that four month period] . . . .

"Even beyond the four month time frame set forth in Practice Book § 17-4,[4] however, courts have continuing

[4] "Practice Book § 17-4 provides in relevant part: '(a) Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the [S]uperior [C]ourt may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court. . . .' " *Bauer* v. *Bauer*, 308 Conn. 124, 130, 60 A.3d 950 (2013).

jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . . In cases in which execution of the original judgment occurs over a period of years, a motion for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. . . .

"Although a trial court may interpret an ambiguous judgment . . . a motion for clarification may not . . . be used to modify or to alter the substantive terms of a prior judgment . . . and we look to the substance of the relief sought by the motion rather than the form to determine whether a motion is properly characterized as one seeking a clarification or a modification. . . .

"In order to determine whether the trial court properly clarified ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court's judgment. It is well established that the construction of a judgment presents a question of law over which we exercise plenary review. . . . In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . In addition . . . because the trial judge who issues the order that is the subject of subsequent clarification is familiar with the

entire record and, of course, with the order itself, that judge is in the best position to clarify any ambiguity in the order. For that reason, substantial deference is accorded to a court's interpretation of its own order. . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Citations omitted; footnote in original; internal quotation marks omitted.) *Bauer* v. *Bauer*, 308 Conn. 124, 129–32, 60 A.3d 950 (2013).

"[T]he purpose of a clarification is to take a prior statement, decision or order and make it easier to understand. Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision. Moreover, motions for clarification may be made at any time and are grounded in the trial court's equitable authority to protect the integrity of its judgments." (Citation omitted.) *In re Haley B.*, 262 Conn. 406, 413, 815 A.2d 113 (2003).

In the present case, the court, in its dissolution judgment memorandum of decision, ordered the defendant to *quitclaim* all interest in the property to the plaintiff, and the defendant subsequently signed a quitclaim deed, thereby assigning his interest to the plaintiff. Although the plaintiff essentially asked the court in her motion for clarification to clarify what it meant in its dissolution judgment order by "all interest" when it ordered the defendant to "quitclaim to the plaintiff all interest" in the property, she asserted that "[c]larification of the [dissolution] judgment [was] necessary to determine if the court intended for the defendant *to make whatever arrangements were necessary* with his business partner in Brazil to transfer 'all interest' in the [property] to the plaintiff . . . ." (Emphasis added.) The court's dissolution judgment order, however, identified that the specific action the defendant was required

to take was to *quitclaim* all interest in the property. The plaintiff's motion sought to change the substance of the judgment by asking the trial court to revisit its original judgment and effectuate its original intent by introducing a new element into its judgment—that the defendant not just quitclaim whatever interest in the property he was able to, but that he "make whatever arrangements were necessary" so as to be able to transfer his partner's interest as well. Accordingly, the plaintiff's motion more properly is characterized as a motion to modify because it "represent[s] an attempt to alter the substantive terms of the original judgment." *Mickey* v. *Mickey*, 292 Conn. 597, 606, 974 A.2d 641 (2009); see also *In re Haley B.*, supra, 262 Conn. 414 (motion for clarification properly characterized as motion to alter or to modify original judgment when trial court changed, on basis of mistake made at trial, visitation order by reducing frequency of visitation from weekly to monthly visitation in order to effectuate intent of original judgment); *Miller* v. *Miller*, 16 Conn. App. 412, 416–17, 547 A.2d 922 (motion for clarification improperly modified original judgment, which allowed defendant to satisfy $500,000 lump sum alimony award by transferring securities to plaintiff, by subsequently ordering that any securities transferred to plaintiff in satisfaction of lump sum alimony award pay dividends of at least $50,000 per year), cert. denied, 209 Conn. 823, 552 A.2d 430 (1988).

Moreover, by ordering in its clarification order that the defendant "take the necessary measures" so that the plaintiff could acquire a 100 percent interest in the property, the court did more than simply effectuate its existing judgment. In *Lawrence* v. *Cords*, 165 Conn. App. 473, 484, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016), this court "explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but

leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Internal quotation marks omitted.) The court's clarification order in the present case introduced a new element into the details of the judgment because, when it became obvious that the defendant could not transfer 100 percent ownership interest to the plaintiff solely by his execution of a quitclaim deed, the court ordered the defendant to take additional steps beyond quitclaiming his interest in the property to the plaintiff. Accordingly, the court's order amounted to a modification of the dissolution judgment.

As the plaintiff correctly notes, in construing a marital dissolution judgment, the court's judgment must be interpreted as a whole. See *Bauer* v. *Bauer*, supra, 308 Conn. 131 ("The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." [Internal quotation marks omitted.]). The plaintiff asserts that the court's original intent that the plaintiff receive a 100 percent interest in the property is evinced by the language in the dissolution judgment memorandum of decision. Specifically, she points our attention to the language within the court's factual findings wherein the court states that it did not find credible the defendant's "recitation relative to his financial affairs." She also refers to the language within the dissolution judgment orders, which provide that the plaintiff will be responsible for all expenses associated with the property, including real estate taxes, insurance, and utilities. Despite these statements, however, the court recognized that the defendant had testified that he owned a 50 percent interest in the

property, as was indicated on his financial affidavit. While the court did not credit the defendant's testimony, it also did not find that the defendant owned a 100 percent interest in the property, and there was no testimony or evidence submitted that would have supported such a finding.[5] Therefore, the court's subsequent order is premised on facts that it originally did not believe. "It is well established that disbelief of a witness is not the equivalent of proof." *State* v. *Simmons*, 188 Conn. App. 813, 843, 205 A.3d 569 (2019). Having not credited the defendant's testimony that he was only a 50 percent owner of the property, and having ordered the defendant to "take the necessary measures" so that the plaintiff could acquire a 100 percent interest in the property, the court substantively modified the dissolution judgment.

We also are not persuaded by the plaintiff's argument that the present case is "analogous" to *Bauer* v. *Bauer*, supra, 308 Conn. 124.[6] In *Bauer*, the judgment of dissolution rendered by the trial court provided that its memorandum of decision was incorporated by reference. Id., 126. Within its memorandum of decision,

[5] Throughout the trial, the defendant testified that the property was owned by Talyah Home Improvement, LLC, and that he was a co-owner of that company. The defendant, however, did not provide any evidence to support his testimony. In his financial affidavit dated September 11, 2015, his most recent financial affidavit before the trial began, the defendant listed the property as an asset owned "joint with other," and he indicated that the value of his interest was one half of the equity in the property. The defendant's financial affidavit also included Talyah Home Improvement, LLC, as a business interest, of which he indicated he owned 50 percent. Although the plaintiff's counsel questioned the defendant about the company and his business partner, the plaintiff did not provide any evidence to suggest that the defendant was not a 50 percent owner of the property through the company, as he had claimed.

[6] In her appellate brief, the plaintiff also explicates the facts in *Ranfone* v. *Ranfone*, 119 Conn. App. 341, 987 A.2d 1088 (2010), and *Stewart* v. *Stewart*, 157 Conn. App. 601, 117 A.3d 958 (2015), but she does not offer any analysis as to how they apply to the present case beyond the conclusory statements: "This case is similar to *Bauer* and *Ranfone* and *Stewart*. The trial court's clarification resolved a latent ambiguity in the language of the judgment, was based on its original factual findings, and sought to effectuate the trial court's intent in the original order."

the court stated that the parties agreed to split equally the defendant's pension accounts. Id. When the court issued twelve orders at the end of its memorandum of decision, however, the court did not refer to the pension accounts. Id., 127. Neither party appealed from the court's judgment. Id. Years later, the plaintiff filed a motion for clarification asking the court to "reconfirm its previous order requiring [that] the defendant equally split his [pension accounts] with the plaintiff . . . ." (Internal quotation marks omitted.) Id. The court granted the motion for clarification; id.; and explained that "[b]ecause there is an alleged ambiguity or incompleteness in the decision of the trial court . . . [the] court will clarify that, pursuant to the parties' stipulation: The defendant is ordered to split equally his . . . pension [accounts] . . . ." (Internal quotation marks omitted.) Id., 128. On appeal, our Supreme Court concluded that, given the discrepancy between the trial court's factual findings indicating that the parties would equally divide the defendant's pension accounts and the lack of a formal order to that effect, the judgment was ambiguous. Id., 132. The court further concluded that "a motion for clarification was the proper method for resolving the ambiguity because the motion did not seek to change the terms or substance of the judgment, but merely sought to resolve the ambiguity in the judgment by reconciling the discrepancy between the court's factual findings and its orders. . . . The plaintiff sought to clarify that the pension accounts would be split equally by the parties rather than awarded in their entirety to the defendant—she did not seek to change the percentage of the amount that would be awarded to her." (Citation omitted.) Id., 132–33. Our Supreme Court, thus, determined that "[n]ot only was [the trial court's] interpretation reasonable, but any other interpretation would have rendered the trial court's factual finding superfluous and inconsistent with its orders. Moreover, the clarification merely reit-

erated the factual finding as originally stated and, thus, did not change or modify the judgment." Id., 135.

The plaintiff correctly points out that the defendant in the present case, like the defendant in *Bauer*, did not raise on appeal any challenge to the trial court's factual findings. The plaintiff also contends that the present case is similar to *Bauer* because the court's clarification in the present case, like that in *Bauer*, "merely reiterated the factual finding[s] as originally stated and, thus, did not change or modify the judgment." Id. In making that analogy, however, the plaintiff misconstrues *Bauer*. In *Bauer*, the factual finding that was reiterated in the court's clarification was the court's statement that the parties agreed to split the pension accounts. Id., 132. In its clarification, the court took its prior factual finding regarding that agreement and clarified that it was part of its orders. The facts of the present case are markedly different.

Unlike *Bauer*, where the trial court stated that an agreement was reached by the parties as to the division of certain property in its factual findings and then reiterated that factual finding in its clarification; id., 135; in the present case, after the defendant had already quitclaimed his interest in the property to the plaintiff pursuant to the court's dissolution judgment, the court's clarification adds that the defendant "is ordered to take the necessary measures to effectuate the terms of the judgment" so that the plaintiff may acquire a 100 percent interest in the property. Accordingly, the court's clarification is not a reiteration of its previous order, as the plaintiff suggests, but, rather, constituted a substantive change to the dissolution judgment that introduces an additional element.[7]

[7] We note that, inexplicably, the plaintiff asserts that the court's clarification order "did not require [the defendant] to acquire a new interest in the property; rather, it reconfirmed that the trial court had rejected his claim that he could not transfer the assets of the [limited liability company], specifically, [the property], to the plaintiff." The fact that the defendant has executed a quitclaim deed to the plaintiff and has assigned his rights in

For the foregoing reasons, we conclude that the trial court improperly modified the dissolution judgment when it issued its clarification order.

The judgment is reversed and the case is remanded with direction to deny the plaintiff's motion for clarification.

In this opinion the other judges concurred.

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* CHRISTOPHER M. FITZPATRICK ET AL.
(AC 41513)

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

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant F. In its complaint, the plaintiff alleged that F and C Co. had executed a promissory note that was secured by a mortgage on F's property, that the plaintiff was the holder of the note and that the note was in default for nonpayment. F filed an answer and raised special defenses of laches and unclean hands. Thereafter, the plaintiff filed a motion for summary judgment as to liability along with a memorandum of law and, inter alia, copies of the note and two allonges that were attached to the note. F filed an objection to the motion for summary judgment, asserting that genuine issues of material fact existed as to his special defenses of laches and unclean hands. Subsequently, F filed a motion to dismiss on the ground that the plaintiff lacked standing to bring the foreclosure action because it was not the holder of the note or the mortgage. In his memorandum of law in support of his motion, F asserted that C Co. had transferred the note to S Co. via a special endorsement in the first allonge and that although the second allonge purported to transfer the note from S Co. to the plaintiff via a special endorsement, it was ineffective because it was stamped void. The trial court held a hearing on the motions, during which the plaintiff's counsel presented the court with the original note. After examining the note, the court denied F's motion to dismiss, concluding that the note contained an endorsement in blank executed by S Co., and, therefore, it was payable to the bearer, and that the plaintiff,

Talyah Home Improvement, LLC, to the plaintiff, and yet a second owner to the property has brought an action to protect that interest, undermines that argument.

as the possessor and valid holder of the note, was entitled to enforce it and had standing to bring the action. The court then granted the plaintiff's motion for summary judgment, concluding that no genuine issues of material fact existed as to F's liability and that the plaintiff had demonstrated a prima facie case for foreclosure. It further concluded that the defendant had failed to provide any evidence in support of his special defenses. Thereafter, the trial court rendered a judgment of foreclosure by sale, from which F appeal to this court. *Held*:

1. The trial court properly denied F's motion to dismiss, that court having correctly determined that the plaintiff had standing to bring the foreclosure action; contrary to F's contention that the plaintiff lacked standing because it was not the holder of the note, the plaintiff presented the court with the original note endorsed in blank, thereby demonstrating that it was the valid holder of the note and owner of the debt with standing to pursue the action, and F failed to satisfy his burden of proving that another party was the owner of the note and the debt.
2. The trial court properly granted the plaintiff's motion for summary judgment as to liability.

   a. F's claim that a genuine issue of material fact existed as to the plaintiff's standing was unavailing; the plaintiff demonstrated to the trial court that it possessed the note, which was endorsed in blank and payable to bearer, and as the valid holder of that instrument, it was entitled to enforce it and had standing to bring the action, and F failed to produce any evidence raising a genuine issue of material fact regarding the plaintiff's standing, as his arguments failed to account for the blank endorsement on the note and focused primarily on the two allonges, the existence of which did not negate the fact that the plaintiff possessed the note endorsed in blank and, therefore, was the valid holder of the note and entitled to enforce it.

   b. F failed to meet his burden of demonstrating that genuine issues of material fact existed as to his equitable defenses of laches and unclean hands; although F asserted that such issues existed as to whether the plaintiff's delay in commencing this action caused the debt to become greater than his equity in the property, whether the value of the property declined as a result of the plaintiff's delay and whether the plaintiff's delay had been fair, equitable and honest, he failed to support those assertions with any evidence, and such bald assertions were insufficient to defeat a motion for summary judgment.

Argued January 30—officially released June 25, 2019

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Truglia, J.*, denied the named defendant's motion to dismiss; thereafter, the court

granted the plaintiff's motion for summary judgment as to liability; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, rendered a judgment of foreclosure by sale, from which the named defendant appealed to this court. *Affirmed.*

Ryan P. Driscoll, with whom, on the brief, was *Richard J. Buturla*, for the appellant (named defendant).

Jeffery M. Knickerbocker, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant Christopher M. Fitzpatrick[1] appeals from the denial of his motion to dismiss and from the summary judgment rendered in favor of the plaintiff, U.S. Bank, National Association, as trustee for MASTR 2007-2. On appeal, the defendant claims that the court improperly (1) denied his motion to dismiss by concluding that the plaintiff had standing to commence and maintain its foreclosure action and (2) granted the plaintiff's motion for summary judgment by determining that no genuine issues of material fact existed with respect to the plaintiff's standing and his special defenses of laches and unclean hands. We disagree and, accordingly, affirm the denial of the defendant's motion to dismiss and the summary judgment rendered in favor of the plaintiff.

The following detailed recitation of the facts and procedural history is necessary for the resolution of the defendant's appeal. The origin of the present case lies in a prior foreclosure action commenced on October 21, 2009, by SunTrust Mortgage, Inc. (SunTrust), against the defendant concerning property located at 48 Second Avenue in Stratford. On June 14, 2010, SunTrust filed a motion to substitute the plaintiff in the present

[1] In its complaint, the plaintiff also named the Department of Revenue Services and the Internal Revenue Service as defendants but these governmental entities are not parties to this appeal. We therefore refer in this opinion to Christopher M. Fitzpatrick as the defendant.

case as the plaintiff, stating that the subject mortgage deed and note had been assigned to the plaintiff. The court granted this motion on July 6, 2010. An unsuccessful mediation effort ensued.

In the SunTrust action, on September 27, 2013, the court, *Tyma*, *J.*, granted the plaintiff's motion for summary judgment as to liability only. *SunTrust Mortgage, Inc.* v. *Fitzpatrick*, Superior Court, judicial district of Fairfield, Docket No. CV-09-6004428-S (September 27, 2013). First, the court noted that the plaintiff had presented evidence, by way of an affidavit, a copy of the note and two allonges, that SunTrust had been the proper party to initiate the foreclosure action and that the plaintiff was the current owner of the debt and, thus, the proper party to maintain the foreclosure action. Id. Additionally, the court concluded: "Having failed to present any evidence rebutting the presumption that SunTrust was the rightful owner of the debt at the time that it commenced the foreclosure action, and that the . . . plaintiff is presently the rightful owner, the defendant had failed to satisfy his burden of providing any evidentiary foundation to demonstrate the existence of a genuine issue of material fact concerning the note holder." Id.

On June 5, 2014, the plaintiff moved for a judgment of strict foreclosure, and the defendant filed an objection fifteen days later. On June 26, 2014, the court, *Bellis*, *J.*, issued an order dismissing the action.[2] The plaintiff unsuccessfully moved to open the judgment of dismissal.

The plaintiff subsequently commenced the present action in May, 2016. In its complaint, the plaintiff alleged that the defendant and Comp-U-Fund Mortgage Corporation (Comp-U-Fund) had executed a promissory note in the amount of $580,000 on August 16, 2007. The note

[2] The court issued the following order: "The above entitled matter was dismissed at the dormancy calendar of [June 26, 2014]."

was secured by a mortgage on the defendant's property, located at 48 Second Avenue in Stratford, in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Comp-U-Fund.[3] The mortgage was executed on August 16, 2007, and recorded on the Stratford land records on August 20, 2007.

The plaintiff further alleged that on or before May 26, 2015, it became, and at all times thereafter has been, the party entitled to collect the debt evidenced by the August 16, 2007 note. It further alleged that as a result of the defendant's nonpayment of the monthly installment of principal and interest starting on May 1, 2009, the note was in default. The plaintiff accelerated the balance on the note, declaring it to be due in full, and sought to foreclose on the mortgage.

After an unsuccessful mediation, the defendant filed an answer and counterclaim on March 2, 2017.[4] On December 22, 2017, the plaintiff moved for summary

[3] "As one court has explained, MERS does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members. The MERS system is designed to allow its members, which include originators, lenders, servicers, and investors, to assign home mortgage loans without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located. . . .

"The benefit of naming MERS as the nominal mortgagee of record is that when the member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record. According to MERS, this system saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans. . . .

"If, on the other hand, a MERS member transfers an interest in a mortgage loan to a non-MERS member, MERS no longer acts as the mortgagee of record and an assignment of the security instrument to the non-MERS member is drafted, executed, and typically recorded in the local land recording office." (Internal quotation marks omitted.) *21st Mortgage Corp.* v. *Schumacher*, 171 Conn. App. 470, 472 n.1, 157 A.3d 714, cert. denied, 325 Conn. 923, 159 A.3d 1171 (2017).

[4] As we set forth in greater detail in part II B of this opinion, the court permitted the defendant to amend his answer and to raise the special defenses of laches and unclean hands on February 26, 2018.

judgment as to liability, attaching a supporting affidavit, documentary evidence and a memorandum of law to its motion. In its memorandum of law, the plaintiff argued that it had established a prima facie case[5] of the defendant's liability in this mortgage foreclosure action. Additionally, the plaintiff directed the court to the attached mortgage, note, assignments of the mortgage and affidavit of Shaundra Hunt, an officer employed by SunTrust. The plainitff claimed that these documents established that no genuine issue of material fact remained, and, therefore, it was entitled to summary judgment as to the liability with respect to its foreclosure complaint.

On February 5, 2018, the defendant filed an objection to the plaintiff's motion for summary judgment. Specifically, he argued that genuine issues of material fact existed as to whether his special defenses of laches and unclean hands, as set forth in his amended answer, barred the plaintiff's claim. With respect to the former, the defendant argued that "[a] genuine issue of material fact exists as to whether there was an inexcusable delay and whether that delay prejudiced [the defendant] by unnecessarily increasing his alleged debt and/or by decreasing the value of his collateral through the passage of time." Specifically, the defendant contended that six years had elapsed from the claimed nonpayment until the commencement of the present action. With respect to the unclean hands defense, the defendant argued: "Here, given the considerable passage of time between the alleged default and the [p]laintiff's commencement of the foreclosure, there are genuine issues

[5] Specifically, the plaintiff noted that "[t]o establish a prima facie case, a foreclosing mortgagee must plead and prove that there was a loan, evidenced by a promissory note, secured by a mortgage, that the loan is in default and the debt has been accelerated. . . . [The] [p]laintiff's [c]omplaint alleges the necessary allegations to state a cause of action for mortgage foreclosure, and all of the allegations of [the] [p]laintiff's [c]omplaint material to liability are proved by competent evidence or admission." (Citation omitted.) See, e.g., *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 435, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018).

of material fact as to whether the [plaintiff's] 'sitting on its rights' for many years has been fair, equitable, and honest."

Before the trial court decided the plaintiff's motion for summary judgment, the defendant initiated, on two fronts, an attack on the plaintiff's standing to bring its foreclosure action. First, on March 2, 2018, he filed a motion to dismiss, pursuant to Practice Book § 10-30,[6] arguing that the plaintiff lacked standing. In his accompanying memorandum of law, the defendant asserted that the court lacked subject matter jurisdiction because the plaintiff was not a holder of the note or the mortgage. In support thereof, the defendant argued that he had executed the note with Comp-U-Fund on August 16, 2007. The defendant claimed that Comp-U-Fund transferred the note to SunTrust via the special endorsement[7] in the first allonge attached to the note.[8] A second allonge to the note was specially

[6] Practice Book § 10-30 (a) provides: "A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process."

[7] "The definitions of the terms blank endorsement and special endorsement are relevant to the defendant's claims. If an endorsement is made by the holder of an instrument . . . and the endorsement identifies a person to whom it makes the instrument payable, it is a special endorsement. When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. . . . If an endorsement is made by the holder of an instrument and is not a special endorsement it is a blank endorsement. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed. General Statutes § 42a-3-205 (a) and (b)." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Ugrin*, 150 Conn. App. 393, 396 n.6, 91 A.3d 924 (2014).

The special endorsement provides: "Pay Without Recourse to the order of: SUNTRUST MORTGAGE, INC."

By: SUNTRUST MORTGAGE, INC., POA FOR COMP-U-FUND MORTGAGE CORP. (POA ON FILE-PROVIDED UPON REQUEST)"

The endorsement was signed by the assistant vice president as attorney-in-fact for Comp-U-Fund.

[8] "An allonge is [a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the

endorsed by SunTrust to the plaintiff; however, this document was stamped "VOID." The defendant argued, therefore, that the note had not been transferred to the plaintiff, and, therefore, it lacked standing to foreclose on the property.

The defendant also challenged the plaintiff's standing in a March 2, 2018 supplemental objection to the plaintiff's motion for summary judgment wherein he repeated the legal argument set forth in his memorandum of law in support of his motion to dismiss. Specifically, the defendant asserted that the note had been transferred from Comp-U-Fund to SunTrust via the special endorsement in the first allonge. The second allonge, which would have transferred the note from SunTrust to the plaintiff, was stamped "VOID" and therefore was ineffective. In conclusion, the defendant stated: "The evidence produced to date shows that there is a genuine issue of material fact as to whether [the plaintiff] is entitled to enforce the note. Therefore, [the plaintiff's] motion for summary judgment should be denied."

On March 2, 2018, the plaintiff filed an objection to the defendant's motion to dismiss. It emphasized that page three of the note contained an endorsement in blank, executed by SunTrust, and, therefore, the note was payable to the bearer.[9] See, e.g., *Equity One, Inc.*

original paper is filled with indorsements. . . . Pursuant to General Statutes § 42a-3-204 (a), [f]or the purpose of determining whether a signature is made on [a negotiable] instrument, [an allonge] is a part of the instrument." (Citation omitted; internal quotation marks omitted.) *AS Peleus, LLC* v. *Success, Inc.*, 162 Conn. App. 750, 755 n.3, 133 A.3d 503 (2016); see also *SKW Real Estate Ltd. Partnership* v. *Gallicchio*, 49 Conn. App. 563, 566 n.3, 716 A.2d 903, cert. denied, 247 Conn. 926, 719 A.2d 1169 (1998).

In his memorandum of law, the defendant incorrectly asserted that the allonges were dated August 16, 2007. Although that date does appear on the allonges, it appears to be in reference to the execution date of the note itself, and not the date of the allonges.

[9] The defendant did not address the blank endorsement contained on page three of the note in his memorandum of law in support of his motion to dismiss or in his supplemental objection to the plaintiff's motion for summary judgment.

v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013). Thus, the plaintiff maintained that it did not need to be in possession of a specifically endorsed note to pursue this foreclosure action. It also argued that the defendant had offered only speculation rather than proof, in challenging the plaintiff's standing.

The court conducted a hearing on March 5, 2018, during which it first addressed the defendant's motion to dismiss. The defendant repeated its argument that the plaintiff lacked standing, stating that the note was not a negotiable instrument payable to the bearer because the first allonge contained the SunTrust specific endorsement. The plaintiff's counsel responded that he was in possession of the original note, which contained a blank endorsement[10] executed by SunTrust and the allonges. The court examined the original note and concluded that it contained a blank endorsement, making it a bearer instrument. After hearing further argument, the court denied the defendant's motion to dismiss.[11]

The court then turned to the plaintiff's motion for summary judgment. The plaintiff's counsel argued that

[10] The blank endorsement on page three of the note stated: "WITHOUT RECOURSE PAY TO THE ORDER OF

SUNTRUST MORTGAGE, INC."

It was signed by Dean Liverman, an officer of SunTrust.

[11] Specifically, the court stated: "Okay. All right. The court respectfully disagrees. The court overrules—or the court denies the motion to dismiss for the reasons stated therein. It is clear to the court that the note is endorsed in blank on the signature page, and the plaintiff . . . has possession of the note. It appears to the court that [it is] the proper [party] to foreclose the mortgage. Let the record reflect I'm giving back the original note to the plaintiff's counsel. The motion to dismiss is respectfully denied, the objection is sustained, and we will now move forward."

The court issued the following order on May 6, 2018: "After a hearing on the motion, at which both parties appeared, the court finds: (1) that the plaintiff is the holder of the promissory note which is the subject of this action; and (2) that the note was endorsed in blank by [SunTrust], making it a bearer instrument. The plaintiff therefore has standing to bring this action. The defendant's motion to dismiss for lack of subject matter jurisdiction is denied."

the court, in denying the defendant's motion to dismiss, had considered and rejected the standing argument raised in the defendant's supplemental objection.[12] The plaintiff's counsel then turned to the special defenses of laches and unclean hands. He argued that the defendant had failed to present any evidence in support of his special defenses. The defendant's counsel countered that genuine issues of material fact existed as to laches and unclean hands, and, therefore, the court should deny the motion for summary judgment.

On March 14, 2018, the court issued a memorandum of decision granting the plaintiff's motion for summary judgment. It concluded that no genuine issues of material fact existed as to the defendant's liability and that the plaintiff had demonstrated a prima facie case for foreclosure. It further concluded that the defendant had failed to provide any evidence in support of his unclean hands and laches defenses. The court also denied the defendant's motion for reconsideration of its denial of the motion to dismiss.

[12] The plaintiff's counsel stated: "First of all, the court has examined the original note; the court knows that the plaintiff—has already found that the plaintiff is the holder and entitled to proceed with the foreclosure action. The affidavits and documentary evidence submitted with the plaintiff's motion for summary judgment, including the affidavit established the default and notice of default given, have not been controverted by the defendant in connection with that.

"*The supplemental objection to the plaintiff's motion for summary judgment is predicated entirely on the claims that were just argued with regard to the motion to dismiss.* Since the plaintiff has the original note endorsed in blank and therefore has . . . standing and the right to enforce it it—the issues raised by the supplemental objection to the motion to dismiss fail as to an objection to summary judgment as they failed in connection with the motion to dismiss. The reason being that—if anything, the motion to dismiss establishes by using the exact same documents the plaintiff would to show that they're [consistent] of the note as endorsed with the allonge, with the mortgage attached as exhibit A to the motion to dismiss; the assignments attached as exhibits C and D to the motion to dismiss. So, the defendant has submitted to the court for its motion the same evidence that the plaintiff had submitted for summary judgment in terms of its right to foreclose." (Emphasis added.)

On March 15, 2018, the plaintiff moved for a judgment of strict foreclosure. One week later, the court rendered a judgment of foreclosure by sale. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to dismiss. Specifically, he argues that the plaintiff lacked standing to prosecute the foreclosure action because the note had become payable to SunTrust and there was no evidence that the note had been assigned to the plaintiff. The plaintiff counters that its standing was established by its possession of the note, endorsed in blank, and thereby payable to the bearer. We conclude that the court properly determined that the plaintiff had standing and, therefore, was correct in denying the defendant's motion to dismiss.

We begin with a review of the relevant legal principles. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time. . . .

"[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting

a motion to dismiss. . . . The standard of review for a court's decision on a motion to dismiss is well settled. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Citation omitted; internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 145, 125 A.3d 262 (2015); see also *Equity One, Inc.* v. *Shivers*, supra, 310 Conn. 125–26; *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 574–75, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).

Next, we review the law pertaining to standing in a foreclosure action.[13] "In Connecticut, one may enforce a note pursuant to the [Uniform Commercial Code (UCC) as adopted in General Statutes § 42a-1-101 et seq.] . . . General Statutes § 42a-3-301 provides in relevant part that a [p]erson entitled to enforce an instrument means . . . the holder of the instrument . . . . When a note is endorsed in blank, the note is payable to the bearer of the note. See General Statutes § 42a-3-205 (b); see also *RMS Residential Properties, LLC* v. *Miller*, [303 Conn. 224, 231, 32 A.3d 307 (2011), overruled in part by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013)]. A person in possession of a note endorsed in blank, is the valid holder of the note. See General Statutes § 42a-1-201 (b) (21) (A). *Therefore, a party in possession of a note, endorsed in blank and thereby made payable*

[13] We note that our Supreme Court has stated: "The law governing . . . foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature. . . . Because foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . In exercising its equitable discretion, however, the court must comply with mandatory statutory provisions that limit the remedies available to a foreclosing mortgagee. . . . It is our adjudicatory responsibility to find the appropriate accommodation between applicable judicial and statutory principles." (Citations omitted; footnote omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256–57, 708 A.2d 1378 (1998).

to its bearer, is the valid holder of the note, and is entitled to enforce the note. See *RMS Residential Properties, LLC* v. *Miller*, supra, 231.

"In *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 231, our Supreme Court stated that to enforce a note through foreclosure, a holder must demonstrate that it is the owner of the underlying debt. *The holder of a note, however, is presumed to be the rightful owner of the underlying debt, and unless the party defending against the foreclosure action rebuts that presumption, the holder has standing to foreclose the mortgage. A holder only has to produce the note to establish that presumption. The production of the note establishes his case prima facie against the* [*defendant*] *and he may rest there. . . . It* [*is*] *for the defendant to set up and prove the facts* [*that*] *limit or change the plaintiff's rights*." (Citation omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 143–44, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016); see also *Equity One, Inc.* v. *Shivers*, supra, 310 Conn. 126–27; *U.S. Bank, National Assn.* v. *Schaeffer*, supra, 160 Conn. App. 146–47.

In the present case, the defendant contends that the plaintiff was not the holder of the note and, therefore, lacked standing to pursue the foreclosure action. The defendant's argument is primarily focused on the two undated allonges to the note. The first allonge showed that ownership of the note had been transferred from the original lender, Comp-U-Fund, to SunTrust. The second allonge purportedly transferred ownership of the note from SunTrust to the plaintiff; however, this document contained a "VOID" stamp. The defendant claimed, therefore, that the "negotiable instrument became payable to SunTrust and could be negotiated only by SunTrust. [See General Statutes § 42a-3-205 (a)].

The uncontroverted facts are devoid of any assignments of the note from SunTrust to the [p]laintiff. As a result, the trial court should have found that the [p]laintiff was not entitled to enforce the note . . . .'' We are not persuaded by the defendant's reasoning.

At the March 5, 2018 hearing, the court examined the original note and concluded that it had been endorsed in blank by SunTrust, making it a bearer instrument. It also concluded that the plaintiff, as the possessor of a note endorsed in blank and therefore payable to the bearer, was the valid holder and entitled to enforce the note.

It bears repeating that ''[t]he holder of a note seeking to enforce the note through foreclosure must produce the note. The note must be endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement or by means of a blank endorsement to bearer. . . . If the foreclosing party produces the note demonstrating that it is a valid holder of the note, the court is to presume that the foreclosing party is the rightful owner of the debt. . . . The defending party may rebut the presumption . . . but bears the burden to prove that the holder of the note is not the owner of the debt. . . . This may be done, for example, by demonstrating that ownership of the debt has passed to another party. . . . The defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that might give rise to the possibility that a party other than the foreclosing party owns the debt. . . . To rebut the presumption that the holder of a note endorsed specifically or to bearer is the rightful owner of the debt, the defending party must prove that another party is the owner of the note and debt. . . . Without such proof, the foreclosing party may rest its standing to foreclose the mortgage on its status as the holder of the note.'' (Citations omitted;

emphasis omitted.) *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, supra, 161 Conn. App. 145–46.

At the hearing on the defendant's motion to dismiss, the plaintiff presented the court with the original note endorsed in blank.[14] See, e.g., *Chase Home Finance, LLC* v. *Fequiere*, supra, 119 Conn. App. 577 (party in possession of promissory note endorsed in blank is valid holder and entitled to enforce note); *Countrywide Home Loans Servicing, LP* v. *Creed*, 145 Conn. App. 38, 51–52, 75 A.3d 38, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013). At that point, the court properly concluded that the plaintiff was the owner of the debt and had standing to pursue the foreclosure action. See *Chase Home Finance, LLC* v. *Fequiere*, supra, 578 (possession of note endorsed in blank imports prima facie that party acquired note in good faith for value and in course of business, before maturity and without notice of any circumstances impeaching its validity). The defendant failed to satisfy his burden of proving that

[14] In his principal brief, the defendant, without any analysis or legal citation, contends that the note "by way of both page three and the allonge to SunTrust, identifies SunTrust as the entity to whom it is payable. It is therefore, 'specially endorsed.' Accordingly, it is not endorsed in blank or bearer paper such that the holder is entitled to commence a foreclosure as the court suggested in its ruling." He repeats this bald assertion in his reply brief.

The trial court examined the original note provided by the plaintiff at the March 5, 2018 hearing and concluded that it contained a blank endorsement executed by SunTrust. See General Statutes § 42a-3-205 (b). The defendant disagrees with that determination but failed to support his contrary position with any legal authority. The defendant's conclusory assertion of error by the trial court is insufficient to persuade this court that the endorsement on page three of the note was a special endorsement. See, e.g., *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279 (appellate courts do not presume error by trial court; appellant bears burden to demonstrate reversible error and unsupported statements, divorced from any meaningful analysis do not satisfy that burden), cert. denied, 315 Conn. 901, 104 A.3d 107 (2014); see generally *Cornfield Associates Ltd. Partnership* v. *Cummings*, 148 Conn. App. 70, 78, 84 A.3d 929 (2014), cert. denied, 315 Conn. 929, 110 A.3d 433 (2015); *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 803, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

another party was the owner of the note and the debt. See id. Accordingly, we conclude that the court properly concluded that the plaintiff had standing and denied the defendant's motion to dismiss.

II

The defendant next claims that the court improperly granted the plaintiff's motion for summary judgment. Specifically, he argues that genuine issues of material fact existed with respect to his (1) claim that the plaintiff lacked standing and (2) special defenses[15] of laches and unclean hands. We disagree and, accordingly, affirm the summary judgment rendered by the trial court in favor of the plaintiff.

We begin by setting forth the relevant legal principles. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . [I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has

[15] "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 705, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002).

Although the defenses to a foreclosure action historically have been limited to payment, discharge, release or satisfaction, or lien invalidity, Connecticut courts have permitted several equitable defenses to a foreclosure action. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 372, 143 A.3d 638 (2016); see also *LaSalle National Bank* v. *Shook*, 67 Conn. App. 93, 97, 787 A.2d 32 (2001) (where plaintiff's conduct is inequitable, court may withhold foreclosure on equitable considerations and principles).

defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"A party opposing summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . In other words, [d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be reasonably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact . . . . The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Internal quotation marks omitted.) *Seaside National Bank & Trust* v. *Lussier*, 185 Conn. App. 498, 502–503, 197 A.3d 455, cert. denied, 330 Conn. 951, 197 A.3d 391 (2018); see also *Bank of America, N.A.*, v. *Aubut*, 167 Conn. App. 347, 358, 143 A.3d 638 (2016).

In support of its motion for summary judgment, the plaintiff attached a memorandum of law, copies of the

note, the two allonges and an affidavit from Hunt. Hunt's December 19, 2017 affidavit stated that SunTrust was the mortgage loan servicer for the plaintiff and that on the basis of her review of the business records relating to this note, "[o]n or before May 26, 2015, the [p]laintiff became and at all times since then has been the party entitled to collect the debt evidenced by the [n]ote . . . ." She also indicated that the note was in default as a result of nonpayment, the default had not been cured, and the plaintiff had exercised its right to accelerate the indebtedness.

In the defendant's February 5, 2018 initial objection to the motion for summary judgment, he argued that genuine issues of material fact existed as to the equitable defenses of laches[16] and unclean hands.[17] Approximately one month later, on March 2, 2018, the defendant filed a supplemental objection to the motion for summary judgment, essentially repeating the arguments contained in his memorandum of law in support of his motion to dismiss and claiming that a genuine issue of material fact existed as to whether the plaintiff had standing to bring and prosecute this foreclosure action.

On March 14, 2018, the court issued a memorandum of decision granting the plaintiff's motion for summary

[16] "The defense of laches, if proven, bars a plaintiff from [obtaining] equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 466, 131 A.3d 288 (2016); see generally *Florian* v. *Lenge*, 91 Conn. App. 268, 281–82, 880 A.2d 985 (2005).

[17] "The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001); see also *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 407, 867 A.2d 841 (2005).

judgment. Specifically, it concluded that the plaintiff had demonstrated a prima facie case for foreclosure of its mortgage and that the defendant had failed to establish the existence of any material fact regarding his liability under the note and mortgage. It then considered and rejected the defendant's arguments relating to his equitable defenses. Specifically, the court determined that the defendant had failed to submit any evidence to support his claim of an unreasonable delay by the plaintiff. Further, it observed that the record in the prior foreclosure action demonstrated that the delays were the result of his efforts to extend mediation, and not the result of any action or inaction on the part of the plaintiff. The court also stated that the defendant had not alleged any facts other than the passage of time that created an issue of fact regarding any prejudice. Finally, the court concluded: "Therefore, as the defendant has filed no affidavits or other evidence in opposition to the plaintiff's motion, the court agrees with the plaintiff that the defendant's objection is based solely on the allegations of inequitable conduct with no evidentiary support."

A

The defendant first argues that a genuine issue of material fact existed as to the plaintiff's standing. Specifically, he contends that the note was not endorsed in blank and was payable to SunTrust, not to the plaintiff. Additionally, the plaintiff claims that there was no evidence that the note had been transferred to the plaintiff and, therefore, "[t]here is an issue of fact as to whether the [p]laintiff is the owner of the note." We disagree.

As we explained in greater detail in part I of this opinion, the plaintiff demonstrated to the trial court that it possessed the note endorsed in blank. A party in possession of a note endorsed in blank and, therefore, payable to the bearer, is a valid holder of that instrument

and entitled to enforce it and, thus, has standing to commence and prosecute a foreclosure action. *Countrywide Home Loans Servicing, LP* v. *Creed*, 145 Conn. App. 38, 51–52, 75 A.3d 38, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013). Additionally, Hunt's affidavit stated that the plaintiff was the party entitled to collect the debt evidenced by the note and to enforce the mortgage securing that debt. The plaintiff, therefore, established that it had standing to prosecute this foreclosure action. See, e.g., *21st Mortgage Corp.* v. *Schumacher*, 171 Conn. App. 470, 486, 157 A.3d 714, cert. denied, 325 Conn. 923, 159 A.3d 1171 (2017).

In contrast, the defendant failed to produce any evidence raising a genuine issue of material fact regarding the plaintiff's standing. His arguments failed to account for the blank endorsement on the note and focused primarily on the two allonges, one of which contains a "VOID" stamp. The existence of these two allonges does not negate the fact that the plaintiff possessed the note endorsed in blank and, therefore, had standing to foreclose. See *21st Mortgage Corp.* v. *Schumacher*, supra, 171 Conn. App. 486. Accordingly, for the reasons previously set forth in this opinion, we are not persuaded that a genuine issue of material fact exists with respect to the plaintiff's standing in the present matter.

B

The defendant next argues that genuine issues of material fact existed as to his equitable defenses of laches and unclean hands. Specifically, he emphasizes the six year delay between the May, 2009 default and the commencement of the present action. He further contends that this delay unnecessarily increased his debt and decreased the value of the property. Finally, he claims that the extended delay in this case created an issue of fact as to whether the plaintiff had acted fairly, equitably and honestly. We are not persuaded.

The following additional facts are necessary for the resolution of this claim. After the plaintiff filed a

demand for disclosure of defenses pursuant to Practice Book § 13-19, the defendant disclosed the special defenses of laches and unclean hands on October 23, 2017. On January 31, 2018, the defendant filed a request to amend his answer and to include the special defenses of laches and unclean hands. On February 22, 2018, the court overruled the plaintiff's objection to the request to amend the answer.[18] The plaintiff subsequently replied to the defendant's special defenses.

Under the procedural posture of this case, the defendant bore the burden of demonstrating the existence of a genuine issue of material fact with respect to his equitable defenses of laches and unclean hands. See *Bank of America, N.A.* v. *Aubut*, supra, 167 Conn. App. 382. Specifically, he asserted that such issues existed as to whether (1) the plaintiff's delay in commencing this action caused the debt to become greater than his equity in the property, (2) the value of the property declined as a result of the plaintiff's delay and (3) the plaintiff's delay had been fair, equitable and honest. The defendant, however, failed to support these assertions with any evidence. See, e.g., *LaSalle National Bank* v. *Shook*, 67 Conn. App. 93, 99, 787 A.2d 32 (2001). Such bald assertions are insufficient to defeat a motion for summary judgment. See, e.g., *Connecticut Bank & Trust Co.* v. *Carriage Lane Associates*, 219 Conn. 772, 781, 595 A.2d 334 (1991); *Gough* v. *Saint Peter's Episcopal Church*, 143 Conn. App. 719, 728–29, 70 A.3d 190 (2013). We agree with the trial court that the defendant has not met his burden. Accordingly, we conclude that the court properly granted the plaintiff's motion for summary judgment.

[18] Specifically, the court stated: "Objection overruled. [The] [d]efendant has asserted laches and unclean hands in his [d]isclosure of [d]efense[s] . . . and has briefed laches and unclean hands in opposition to [the] plaintiff's [m]otion for [s]ummary [j]udgment . . . . [The] [p]laintiff is not surprised [or] prejudiced by permitting laches and unclean hands to be filed as a special defense. Connecticut has [a] liberal amendment policy before, during and even after trial."

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW M. PUGH (AC 40402)

Keller, Bright and Flynn, Js.

Syllabus

Convicted of the crimes of robbery in the first degree, assault in the first degree and carrying a pistol or revolver without a permit in connection with the shooting and robbery of the victim, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly denied his motion to dismiss the charges, in which he alleged that his right to due process was violated because of a twenty-three month delay between the time that the crimes at issue were committed and the date of his arrest. The defendant had approached the victim on a street, took a shoulder bag that she was carrying, which contained her credit cards, and shot her before running down the street with the bag. Thereafter, the defendant drove several of his acquaintances to stores where purchases were made using one of the victim's credit cards. The victim, and two witnesses, A and M, all gave the police similar descriptions of the defendant, and M identified him in court and from a photographic array shown to her by the police. The trial court found that the twenty-three month delay in the defendant's arrest had occurred because of a gap in the police department's assignment of robbery cases after the department eliminated its robbery division and transferred the investigating detectives to other duties. *Held*:

1. The evidence of the defendant's identity was sufficient to support his conviction of the charges, as the jury reasonably could have concluded from the evidence presented that the defendant was the perpetrator of the shooting and robbery; the victim, A and M gave similar descriptions of the perpetrator to the police in close proximity in time and location to the events at issue, in which they identified him as a medium complexioned black male who wore a cap or a do-rag as he ran down the street carrying a bag, in light of M's testimony that she got a good look at the defendant when he went past her while carrying a woman's handbag, which occurred in close proximity in time and location to the attack on the victim, it was reasonable for the jury to infer that M saw the man who shot the victim, one of the defendant's acquaintances identified him as the individual who drove her to the stores where the victim's credit cards were used, and although there were differences in the witnesses' physical descriptions of the defendant, it was the function of the fact finder to assess credibility.

2. The defendant could not prevail on his claim that the trial court violated his right to due process when it denied his motion to dismiss the charges, as he could not show actual, substantial prejudice from the twenty-three month delay between the time that the crimes were committed and the date of his arrest: the defendant was unable to show, in the absence of the delay, that he would have been able to obtain his employment records, which he claimed would have demonstrated that he was at work during the time that the crimes took place, as he presented no evidence regarding record retention by the agency that kept his employer's records, the instances of faded memories of witnesses cited by the defendant did not establish actual, substantial prejudice, as there was sufficient evidentiary support for the trial court's finding that it was not likely that a manager at the defendant's workplace would have remembered if one particular employee out of approximately one hundred worked on the night of the crimes at issue, and the testimony of the defendant's girlfriend was of limited value, given her close connection to him; moreover, the defendant failed to show that, in the absence of the delay, certain information pertaining to his cell phone number would have been available at trial to show that he had called his girlfriend more than four hours after the crimes took place, as a representative of the cell phone company did not verify at trial that the cell phone number used by the defendant was from her company or that there existed for that number cell site information, which merely discloses the location of the nearest cell tower with the strongest signal from the cell phone, and the trial court found that even if the cell phone information existed, it would have done little to support the defendant's claim that he was not in the vicinity of the robbery and shooting at the time it occurred.

3. The defendant's claim that the trial court committed plain error by giving the jury a consciousness of guilt instruction regarding a letter he wrote to his girlfriend while in custody was unavailing: the instruction did not improperly bolster an insufficient case, as the evidence was sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt, the letter supported a reasonable inference that the defendant attempted to influence a witness to lie, which supported an inference that he was guilty of assaulting the victim and stealing her credit cards, it was for the jury to infer whether the letter referred to an acquaintance of the defendant who was in the car that the defendant drove to the stores where the victim's credit cards were used and, thus, whether the letter was highly probative of and supported a reasonable inference as to whether the defendant tampered with a witness who could testify as to his presence when the victim's credit cards were used, and the possibility that the letter could be subject to innocent interpretations was not enough to render the instruction improper; moreover, the court balanced the consciousness of guilt instruction by summarizing the defendant's explanations for writing the letter, the instruction allowed the jury to draw a permissive inference of the defendant's guilt without

an expression of opinion as to what inference, if any, might be drawn, and the instruction did not undermine the integrity or fairness of the proceeding.

Argued March 18—officially released June 25, 2019

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree, assault in the first degree, carrying a pistol or revolver without a permit and tampering with a witness, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Alander*, *J.*; verdict of guilty; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of tampering with a witness, and denied the defendant's motion to dismiss the charges of robbery in the first degree, assault in the first degree and carrying a pistol or revolver without a permit; judgment of guilty of robbery in the first degree, assault in the first degree and carrying a pistol or revolver without a permit, from which the defendant appealed to this court. *Affirmed.*

Shanna P. Hugle, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *John M. Waddock*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. The defendant, Matthew M. Pugh, appeals from the judgment of conviction, rendered following a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), assault in the first degree in violation of General Statutes § 53a-59 (a) (5), and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a). On appeal, the

defendant claims that (1) the evidence was insufficient to support his conviction on each of these charges, (2) the trial court improperly denied his motion to dismiss in which he contended that his right to due process was violated by a preaccusation delay, and (3) the court abused its discretion in giving any consciousness of guilt instruction and committed plain error in giving the actual instruction in this case. We disagree with the first claim and conclude that the evidence sufficed to permit a reasonable jury to find the defendant guilty of all charges. We further conclude that the defendant has failed to show the requisite actual, substantial prejudice to establish a due process violation resulting from the preaccusation delay. Finally, the court did not err by giving a consciousness of guilt instruction because such an instruction is permissible under our law and the evidence supported the giving of such an instruction in this case. We affirm the judgment of the trial court.

The jury was presented with the following evidence upon which to base its verdict. On August 21, 2008, at approximately 8 p.m., while Tatiana Grigorenko was walking on Edwards Street near the corner of Nicoll Street in New Haven, she noticed the defendant acting in a strange manner. On her right shoulder, Grigorenko had a shoulder bag, which contained her wallet, cash, credit cards, cell phone, keys, and other personal items. She felt someone tug on her shoulder bag. The defendant "swerved" in front of Grigorenko, pointed a gun at her, and told her several times to give him the bag. The defendant shot Grigorenko, striking her right thumb. Grigorenko released her bag, and the defendant ran down Nicoll Street carrying the bag. Grigorenko, who was in pain, began screaming. Grigorenko was not able to identify the defendant, but described her assailant as a black male, with a medium complexion, who was wearing a do-rag on his head and was "slightly" taller than her height of five feet, four and one-half inches,

in addition to some added height as a result of her wearing "a little bit of heels . . . ."

At approximately 8 p.m. that same evening, while Stephanie Aquila was inside her house, which was located on the corner of Lawrence and Nicoll Streets in New Haven, she heard what she initially thought to be fireworks followed by screaming coming from the direction of Edwards Street. She looked out the window and saw a young, black, medium complexioned male, approximately five feet six inches tall, who was wearing dark loose fitting clothing and either a black baseball cap or a do-rag. The man was carrying a purse under his right arm and running down Nicoll Street from the direction of Edwards Street toward Lawrence Street. Aquila was unable to identify the runner from a photographic array that she was later shown by the police.

At approximately 8 p.m. on that same evening, Kristine Mingo was in the passenger seat of a vehicle that was traveling on Nicoll Street. Mingo's vehicle stopped at the corner of Nicoll Street and Lawrence Street, and she saw a man carrying a woman's handbag in his right hand, running on Nicoll Street toward her vehicle from the direction of Edwards Street. Mingo saw the man run past her vehicle and then turn onto Lawrence Street. Mingo's vehicle followed the man as he headed down Lawrence Street in the direction of Foster Street. Mingo described the individual as a young, medium complexioned black male between five feet five, and five feet seven inches tall, who was wearing a loose dark shirt, baggy pants, and a do-rag on his head. While Mingo's vehicle was stopped at the intersection of Lawrence and Foster Streets, the man "brushed against the front of the car" and Mingo got a good look at him when they "locked eyes and looked right at each other." On August 29, 2008, a detective with the New Haven Police Department showed Mingo a photographic array from

which she identified the defendant as the man she had observed on the night of August 21, 2008.

On August 23, 2008, one of Grigorenko's stolen credit cards was used at Shaw's Supermarket, and other transactions involving the credit cards were declined at the Burlington Coat Factory. From a surveillance video at Shaw's Supermarket, police identified Latricia Black as the individual who used the stolen credit card. Black testified that on August 23, 2008, a man named "Matt" drove her, Joann Anderson, and another woman,[1] to Shaw's Supermarket where Black purchased items with the stolen credit card that Anderson had given to her. Black identified the defendant, both in and out of court, as the man named "Matt" who was driving the car. Black testified that only she, Anderson, and Black's child went inside Shaw's, and that all the individuals in the car went into the Burlington Coat Factory. Black testified that the group proceeded to Burlington Coat Factory, where a credit card with the name "Tatiana" on it was declined multiple times.

Following a jury trial, the defendant was convicted of robbery in the first degree, assault in the first degree, and carrying a pistol or revolver without a permit. Thereafter, the defendant filed a motion to dismiss the counts of the substitute information charging him with robbery, assault, and carrying a pistol without a permit on the ground that his right to due process had been violated by the preaccusation delay.[2] The court denied

[1] Black described the fourth person as a Spanish woman with a tattoo on her arm. Black testified that she saw the woman in the hallway outside the courtroom in which she was testifying and that the woman was wearing a white shirt. Mariam Diaz, the defendant's girlfriend, testified that she had a tattoo on her arm. During closing argument, the prosecutor reminded the jury that Diaz "was dressed in white . . . ."

[2] The defendant also was convicted of tampering with a witness in violation of General Statutes § 53a-151 (a). The defendant filed a motion for a judgment of acquittal on statute of limitations grounds as to his conviction of that offense and the court granted that motion on that ground on December 16, 2016.

the motion on December 16, 2016. On January 26, 2017, the court sentenced the defendant to a total effective sentence of fifteen years of incarceration, to be served consecutively to an unrelated sentence for murder that he then was serving. This appeal followed.

I

The defendant first claims that the evidence of identity was insufficient to sustain his convictions for robbery in the first degree, assault in the first degree, and carrying a pistol or revolver without a permit. We disagree.

The following principles guide our resolution of the defendant's sufficiency of the evidence claim. The United States Supreme Court held in *Jackson* v. *Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), that the fourteenth amendment commands that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

"Unlike Aristotelian and Thomistic logic, law does not demand metaphysical certainty in its proofs. In law, we recognize three principal proofs: beyond a reasonable doubt, which is the very high burden in a criminal case; clear and convincing evidence, required to prove fraud and certain other claims, which equates to a very high probability; and preponderance of the evidence, applied to civil claims generally, which means it is more probable than not. None of these varying proofs require absolute certainty.

"To meet one's burden of proof, evidence is necessary. This evidence comes in two forms, direct and circumstantial. The basic distinction between direct and circumstantial evidence is that in the former instance

the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to common experience. . . . Proof of a fact by the use of circumstantial evidence usually involves a two-step process. A fact is first established by direct evidence, which is ordinarily eyewitness or other direct testimony. That direct evidence can serve as a basis from which the jury infers another fact. Thus, the direct evidence may operate as circumstantial evidence from which a fact is inferred by the jury. . . . When the necessity to resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in its reception . . . .

"An inference is a factual conclusion that can rationally be drawn from other facts. If fact A rationally supports the conclusion that fact B is also true, then B may be *inferred* from A. The process of drawing inferences based on a rough assessment of probabilities is what makes indirect or circumstantial evidence relevant at trial. If the inference (fact B from fact A) is strong enough, then fact A is relevant to prove fact B. Inferences are by their nature permissive, not mandatory: although the fact proved rationally supports the conclusion the offering party hopes will be inferred, the factfinder is free to accept or reject the inference." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Curran* v. *Kroll*, 118 Conn. App. 401, 408–10, 984 A.2d 763 (2009), aff'd, 303 Conn. 845, 37 A.3d 700 (2012).

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom

the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a [trier's] factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 151–52, 976 A.2d 678 (2009).

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . . Moreover, [i]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence." (Citations omitted; internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 339–40, 746 A.2d 761 (2000).

"Review of any claim of insufficiency of the evidence introduced to prove a violation of a criminal statute

must necessarily begin with the skeletal requirements of what necessary elements the charged statute requires to be proved." *State* v. *Pommer*, 110 Conn. App. 608, 613, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). The state has the burden of proving beyond a reasonable doubt the defendant's identity as the perpetrator of the crime. See *State* v. *Ingram*, 43 Conn. App. 801, 810–11, 687 A.2d 1279 (1996), cert. denied, 240 Conn. 908, 689 A.2d 472 (1997).

The defendant does not dispute that Grigorenko suffered a gunshot wound or that her handbag was stolen, but challenges only the evidence of identity. He contends that the evidence of identity was insufficient because it was based on speculation and conjecture that the perpetrator, whom Grigorenko was unable to identify, was the same individual seen later by Mingo and Aquila, despite the discrepancies in their physical descriptions of the assailant.

The jury reasonably could have concluded from the evidence presented at trial that the defendant was the perpetrator of the crimes. Significantly, Grigorenko, Aquila, and Mingo described events occurring at approximately 8 p.m. on the evening of August 21, 2008, in the same area of New Haven. Grigorenko could not identify her attacker, but she described him as a medium complexioned black male who wore a do-rag on his head, and an oversized T-shirt. Another witness, Aquila, heard a noise that she first thought was fireworks exploding and then saw a medium complexioned black man wearing a cap or a do-rag, running down the middle of Nicoll Street, which is near Edwards Street, toward Lawrence Street with a shoulder bag under his right arm. Finally, a third witness, Mingo, testified that while she was a passenger in a car on Nicoll Street, she saw a medium complexioned black male, who was wearing a do-rag and carrying a woman's handbag in his hand, run down the middle of Nicoll Street toward Lawrence Street. It was reasonable for the jury to infer

that Mingo saw the man who shot Grigorenko, given that she saw him carrying a woman's handbag in close proximity in time and location to the attack on Grigorenko. To delve into the differences in the witness' physical descriptions of the defendant would usurp the function of the fact finder to assess credibility, which we cannot do. See *State* v. *Morgan*, 274 Conn. 790, 802, 877 A.2d 739 (2005).

Mingo locked eyes and was able to get a good look at the man when he ran in front of the car in which she was riding. When the police showed her a man near the scene of the crime, she told police that the man who they had stopped was not the person she had seen running with the woman's handbag. On August 29, 2008, she was able to identify positively the defendant from an eight person photographic array as the person she had seen running with a purse. She also identified the defendant in court. "[W]hen determining whether a witness had sufficient time to observe a defendant to ensure a reliable identification, we have stated that a good hard look will pass muster even if it occurs during a fleeting glance. . . . Furthermore, it is the jury's role as the sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses. . . . Connecticut case law has previously recognized in-court identifications and identifications from fairly presented photographic arrays as sufficient evidence by themselves to allow the trier of fact to conclude that it was the defendant who committed the crimes charged." (Citations omitted; internal quotation marks omitted.) Id., 801–802; see also *State* v. *Smith*, 57 Conn. App. 290, 298–99, 748 A.2d 883, cert. denied, 253 Conn. 916, 754 A.2d 164 (2000).

Additionally, Black identified the defendant as the individual who drove the group to Shaw's Supermarket and Burlington Coat Factory where they successfully and unsuccessfully used Grigorenko's various stolen credit cards. "[P]ossession of recently stolen property

raises a permissible inference of criminal connection with the property, and if no explanation is forthcoming, the inference of criminal connection may be as a principal in the theft, or as a receiver under the receiving statute, depending upon the other facts and circumstances which may be proven." (Internal quotation marks omitted.) *State* v. *Rivera*, 39 Conn. App. 96, 104, 664 A.2d 306, cert. denied, 235 Conn. 921, 665 A.2d 908 (1995). In *State* v. *Cote*, 136 Conn. App. 427, 445–46, 46 A.3d 256 (2012), aff'd, 314 Conn. 570, 107 A.3d 367 (2014), burglary convictions were sustained that were based entirely on circumstantial evidence that the defendants were at or near the residence at about the time of the burglary and that they were in possession of items stolen from the residence thereafter. These facts, coupled with the similarity in descriptions given by Grigorenko, Aquila, and Mingo in close proximity in time, lead us to conclude that the state adduced sufficient evidence. In the present case, the defendant's involvement in the use of the stolen credit cards supports Mingo's positive identification of the defendant. Accordingly, we conclude that the state adduced sufficient evidence of the defendant's identity to support his convictions of robbery in the first degree, assault in the first degree, and carrying a pistol without a permit.

II

The defendant next claims that the court erred in denying his motion to dismiss when it improperly concluded that a twenty-three month delay between the commission of the crimes and his arrest did not violate his federal due process rights.[3] We are not persuaded.

[3] The defendant also mentions the state constitution in his brief on appeal, but fails to provide an analysis of the *Geisler* factors. See *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Accordingly, we deem his claim under the state constitution abandoned and decline to review it. See *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

In its memorandum of decision on the defendant's motion to dismiss, the court found that the defendant was arrested on July 14, 2010, that a warrant for his arrest was not prepared until June 25, 2010, and that all of the evidence supporting the allegations contained in the arrest warrant was known to the police as of August 29, 2008. After administrators in the New Haven Police Department eliminated the robbery division and its investigating detectives were transferred to other duties, there was a gap in the assignment of pending robbery cases to investigative personnel.

"We must first consider the standard of review where a claim is made that the court failed to grant a motion to dismiss. Our standard of review of a trial court's . . . conclusions of law in connection with a motion to dismiss is well settled. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *State* v. *Vitale*, 76 Conn. App. 1, 14, 818 A.2d 134, cert. denied, 264 Conn. 906, 826 A.2d 178 (2003).

"The role of due process protections with respect to preaccusation delay has been characterized as a limited one. . . . [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . This court need only determine whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency . . . . The due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges." (Citation omitted; internal quotation

marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 391–92, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018).

"[T]o establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant . . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . . [Additionally] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.[4] (Citations omitted; internal quotation marks omitted.) *State* v. *Morrill*, 197 Conn. 507, 522, 498 A.2d 76 (1985).

The defendant first argues that the delay prejudiced him because it prevented him from obtaining his employment records, which he claims would have shown that he was working at Connecticut Distributors in Stratford during the time that the crimes took place in New Haven. In its decision, the court noted the following relevant facts. The defendant testified at the hearing on his motion to dismiss that he was employed through a temporary service agency and placed at Connecticut Distributors, where he was working the third shift from 7:30 p.m. to 3:30 a.m. on August 21, 2008. At

[4] We do not agree with the defendant's argument that the trial court improperly failed to apply the standard in *State* v. *Hodge*, 153 Conn. 564, 219 A.2d 367 (1966). In that case our Supreme Court stated that the defendant's rights in a claim of prearrest delay "must necessarily depend on all the circumstances, including the length of the delay, the reason for the delay, prejudice to the defendant, and a timely presentation of the claim to the trial court." Id., 568. *Hodge* preceded the prearrest delay cases of the Supreme Court in *United States* v. *Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), and *United States* v. *Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977), which use a substantial prejudice standard. Our Supreme Court has adopted that standard in *State* v. *Morrill*, 197 Conn. 507, 522, 498 A.2d 76 (1985), and its progeny.

the hearing on the motion to dismiss, the defendant offered the testimony of Jack Connell, the night manager for Connecticut Distributors, who testified that time cards were kept for temporary employees for "a few months" and that no records for temporary employees were currently available. The court credited the testimony of Bill Steindl, the compliance manager at Connecticut Distributors, who testified that Connecticut Distributors did not retain records for temporary employees. Steindl also testified that temporary employees had their own time cards, which were not retained by Connecticut Distributors, but were sent to a temporary employment agency that paid the temporary employees. We agree with the court's conclusion that the defendant was unable to show, absent the delay, that he would have been able to obtain his employment records from Connecticut Distributors. The defendant presented no evidence regarding record retention by the temporary agency. He, therefore, has not shown that he suffered actual substantial prejudice.

The defendant also argues that he suffered prejudice because the memories of witnesses had faded during the delay. He contends that because he was unable to obtain employment records due to the delay, he had to rely on the memories of Mariam Diaz, the defendant's girlfriend, and Connell, who both had difficulty remembering whether the defendant was working the night shift at Connecticut Distributors on August 21, 2008. "A claim of general weakening of witnesses' memories, relying on the simple passage of time, cannot, without a more specific showing, be said to prejudice the defendant." (Internal quotation marks omitted.) *State* v. *Mooney*, 218 Conn. 85, 121, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). The specific instances of faded memories cited by the defendant do not establish actual substantial prejudice. With regard to Diaz and Connell, the trial court stated: "It is

unclear that Connell would have remembered which temporary employees were working the evening of August 21, 2008, after a delay of any length, as he testified that one hundred or more temporary employees worked at Connecticut Distributors in the course of one year. While Diaz, absent a lengthy delay, may have remembered whether the defendant was at work on August 21, her testimony would have been of limited value, as she was the girlfriend as well as mother of the defendant's child and subject to impeachment for bias." Because there was sufficient evidentiary support for the court's findings that it was not likely that Connell would have remembered after any length of time if one particular temporary employee out of approximately one hundred worked on a particular night, and that Diaz' testimony was of limited value given her close personal connection to the defendant, we conclude that the defendant has not shown that he suffered actual substantial prejudice.

The defendant last argues that the delay in his arrest prejudiced his ability to obtain cell phone records, which he claims would have demonstrated his approximate location when he called Diaz during his shift at Connecticut Distributors. The trial court determined that the defendant failed to satisfy his burden of showing that absent the delay, the cell site information for his cell phone number would have been available to him at trial. The court noted that the defendant testified that the cell phone number that he used to call Diaz from work was a Sprint phone number, and that the defendant offered at the hearing the testimony of Kerry Walker, a representative from Sprint. The court found that Walker did not verify that the cell phone number used by the defendant was a Sprint cell phone number, nor did she testify that cell site information existed for that cell phone number. The court additionally found that even if the defendant's cell phone number was a

Sprint cell phone number and even if cell site records were available to the defendant at trial "that information would have been of limited value. Cell site information does not disclose the location of the cell phone or the identity of the cell phone user. Cell site information merely discloses the location of the closest cell tower with the strongest signal used by the cell phone, which can be a distance as great as thirty miles away. Finally, the only relevant cell phone records submitted [for the phone number allegedly used by Diaz] show phone calls between Diaz and the cell phone number [the defendant testified belonged to him] at 12:39 a.m., 12:57 a.m., and 1:07 a.m. on August 22, 2008. Since the robbery occurred at 8 p.m. on August 21, 2008, the location of the cell tower used in the early morning hours of August 22 does little to support the defendant's claim that he was not in the vicinity of the robbery at the time it occurred." We conclude that the defendant has not shown actual substantial prejudice. The court found that the defendant had not shown that Sprint cell phone records ever existed for the phone number in question. The record supports the court's factual findings. Furthermore, the defendant has not shown that information from a cell tower, which could have been up to thirty miles away, for calls purportedly between Diaz and the defendant that took place the next day more than four hours after the crimes took place, would be of anything more than limited value, which is not enough in this case to prove actual substantial prejudice.

For the foregoing reasons, the defendant has not shown that he suffered actual substantial prejudice from the preaccusation delay, which is "a hurdle the defendant must overcome to succeed in his due process claim."[5] *State* v. *Roger B.*, 297 Conn. 607, 616, 999 A.2d

[5] Because we conclude that the defendant has not demonstrated that he suffered actual, substantial prejudice, we need not consider whether the state's delay in arresting him was wholly unjustifiable. See *State* v. *Crosby*, supra, 182 Conn. App. 395 n.11.

752 (2010). We cannot conclude that the preaccusation delay violated the defendant's right to due process of law. We therefore conclude that the trial court did not err in denying the defendant's motion to dismiss.

III

We next turn to the defendant's claim that the court erred in giving a consciousness of guilt charge regarding a letter the defendant wrote to Diaz while he was held in custody awaiting trial. We are not persuaded.

The following facts, which the jury reasonably could have found, are pertinent to our review. There was evidence before the jury that, while incarcerated and awaiting trial, the defendant wrote a letter to Diaz, stating: "I go to high court the 8th and I'll write you [and] let you know what's going on, in the meantime Ma, try get in touch with Joan because they are gonna try and send an investigator to questioned her to see if she knew me and I need her to be on point let it be known that she doesn't know me at all my love. So please try and call her to see if her phone still works to get the message to her." The court admitted the letter over the defendant's objection. The court noted that some of the letter was difficult to read, including the name "Joan," but that, in light of the totality of the evidence, it was a reasonable inference for the jury to find that the defendant was referring to Joann Anderson, and that he was attempting to get her to testify falsely that she did not know him, although she had been in his company when the stolen credit cards were presented for use at the stores. The court stated that although other reasonable interpretations of the letter could exist, that did not make the letter inadmissible. The court found that the letter was relevant to consciousness of guilt.

The court gave the following charge on consciousness of guilt: "You heard testimony that, after the robbery was supposed to have been committed, the defendant wrote a letter to Mariam Diaz, which the

state claims was intended to tamper with a witness in this case, Joann Anderson. The defendant has testified that he wrote the letter, but that it was written to assist his investigator and not to tamper with a witness. If you find, based on the evidence presented, that the defendant did write such a letter and that he intended to tamper with a witness, then you may, but are not required to, infer from those facts that the defendant was acting with a guilty conscience; that is, that he thought he was guilty and was trying to avoid punishment. It is for you to determine whether or not the claims of the state have been proven, whether or not the actions of the defendant reflect a consciousness of guilt, and the significance, if any, to attach to any such evidence."

We first address the defendant's claim that consciousness of guilt instructions should never be given.[6] This claim properly was preserved in the defendant's request to charge and by the defendant's objection at the charging conference to the giving of a consciousness of guilt instruction. The defendant acknowledges in his appellate brief that the law in Connecticut is to the contrary and states that this claim is raised for the sake of future appellate review. In Connecticut, "[t]he decision to give a consciousness of guilt instruction is left to the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 820, 155 A.3d 209 (2017). We follow the binding precedent of our Supreme Court.

[6] "We review a trial court's decision to give a consciousness of guilt instruction under an abuse of discretion standard. . . . Evidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, is ordinarily the basis for a [jury] charge on the inference of consciousness of guilt." (Citation omitted; internal quotation marks omitted.) *State* v. *Vasquez*, 133 Conn. App. 785, 800, 36 A.3d 739, cert. denied, 304 Conn. 921, 41 A.3d 661 (2012). "To prevail on her claim, the defendant must establish both that the court abused its discretion and that she suffered harm as a result." *State* v. *Silva*, 113 Conn. App. 488, 496, 966 A.2d 798 (2009).

We next turn to the defendant's claim that the trial court should not have given a consciousness of guilt instruction in this particular case. At trial, his counsel interposed only a general objection to the giving of the instruction, without any of the specifics raised for the first time on appeal, which follow. Although the defendant has requested plain error review; see Practice Book § 60-5; the state claims it should not be granted, but nonetheless has briefed his claims on the merits. Our case law oft contains the nostrum that plain error review is a rule of reversibility. The frequent recitation of that epigram never adequately explains how an appellate tribunal can arrive at a conclusion that a case is not reversible without engaging in some review. Our Supreme Court has left "for another day" whether a trial court's exercise of its discretion can ever amount to plain error. Id., 820 n.13.

"It is clear that an appellate court addressing an appellant's plain error claim *must* engage in a review of the trial court's actions and, upon finding a patent error, determine whether the grievousness of that error qualifies for the invocation of the plain error doctrine and the automatic reversal that accompanies it." (Emphasis in original; internal quotation marks omitted.) *State* v. *McCoy*, 331 Conn. 561, 591, 206 A.3d 725 (2019). Given this background, we review in accordance with this standard.

The defendant first asserts that the giving of the instruction bolstered the state's allegedly insufficient case. For reasons that require little more amplification, we already have concluded that the evidence was sufficient to permit a reasonable jury to find the defendant guilty of the charges against him beyond a reasonable doubt. Grigorenko, Aquila, and Mingo all described events occurring on the same evening at approximately 8 p.m. on New Haven streets that connect with one another involving a young, medium complexioned black

male, who was somewhat taller in height than five feet four inches and who was running with a woman's handbag. Grigorenko described being shot in her right thumb by an assailant who took her handbag by that force and ran away. Aquila heard the gunshot, which she first thought to be fireworks, and then saw a man running down the street with a woman's handbag. Mingo positively identified the defendant as the person running with the handbag. We therefore reject the defendant's argument that the evidence was insufficient, improperly bolstered by the court's charge, or needed bolstering.

We next deal with the defendant's assertion that the letter from the defendant to Diaz, which formed the evidentiary basis for the consciousness of guilt charge, was difficult to read and therefore did not justify the charge. We have reviewed the letter in evidence and do not conclude that it lacked clarity in its printing. Although the letter refers to "Joan" and Anderson's first name is Joann, we agree with the court that it was for the jury to infer whether the letter was referring to Joann Anderson, who was present in the car that the defendant drove to Shaw's and who accompanied the defendant inside Burlington Coat Factory where Grigorenko's stolen credit card was presented.[7] The circumspect reference in the defendant's letter to Diaz noting his need for Anderson to be "on point" in her denial that she knew him could be viewed by the jury as just that, circumspection. The letter supported a reasonable inference that the defendant attempted to influence a witness to lie, which supported an inference that the defendant was guilty of assaulting Grigorenko and stealing her credit cards. The possibility that the letter could be subject to innocent interpretations is not enough to render the instruction improper. "Undisputed evidence

[7] The defendant testified that he knew a woman named Joann Anderson, they were not close, and that he wrote the letter so that Anderson could "get the situation situated, that she didn't know me."

that a defendant acted because of consciousness of guilt is not required before an instruction is proper. Generally speaking, all that is required is that the evidence have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render evidence of flight inadmissible but simply constitutes a factor for the jury's consideration. . . . The fact that the evidence might support an innocent explanation as well as an inference of a consciousness of guilt does not make an instruction on flight erroneous. . . . Moreover, [t]he court [is] not required to enumerate all the possible innocent explanations offered by the defendant. . . . Once [relevant] evidence is admitted, if it is sufficient for a jury to infer from it that the defendant had a consciousness of guilt, it is proper for the court to instruct the jury as to how it can use that evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Silva*, supra, 113 Conn. App. 496–97. We therefore conclude that the letter was properly grist for the jury's fact-finding mill.

Next, the defendant argues that the court erred in instructing the jury on consciousness of guilt by relying on the defendant's letter to Diaz because the probative value of the letter was outweighed by its prejudicial effect, citing to *State* v. *Gonzalez*, 315 Conn. 564, 593–94, 109 A.3d 453, cert. denied, U.S. , 136 S. Ct. 84, 193 L. Ed. 2d 73 (2015). This claim seems to center on the assertion that there was no proof that "Joan" was a reference in the letter to Joann Anderson and that there was no proof of what "on point" meant. We disagree. In this appeal, the defendant has not raised a claim of evidentiary error related to the letter. The letter was in evidence and was probative of the defendant's guilt. A jury is permitted to make logical inferences. If the jury inferred that the reference was to Joann Anderson, the letter was highly probative as to whether the defendant was tampering with a witness who could

testify as to the defendant's presence at the use of Grigorenko's stolen credit cards, which could further connect him as the person who had stolen, at the point of a gun, Grigorenko's shoulder bag containing them. "[I]t is the province of the jury to sort through any ambiguity in the evidence in order to determine whether [such evidence] warrants the inference that [the defendant] possessed a guilty conscience." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 594.

Finally, the defendant also claims harm from the giving of the instruction because it undermined his defense, giving significance to problematic evidence, requiring him to explain the context of his letter to Diaz, and negatively impacting the credibility of his defense witnesses. We reject these claims. The court balanced its instructions by summarizing the defendant's explanations for writing the letter. The instructions given by the court properly allowed the jury to draw a permissive inference of the defendant's guilt on the basis of the letter that the defendant wrote to Diaz without expressing an opinion on what inference, if any, might be drawn.

None of these arguments show any clear or obvious error, nor did the giving of the instruction undermine the integrity and the fairness of the proceeding so as to warrant reversal of the defendant's convictions under the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

ROGER B. *v.* COMMISSIONER OF CORRECTION* (AC 39919)

Lavine, Bright and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of sexual assault and risk of injury to a child in connection with certain incidents that occurred between 1995 and 2000, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing to raise a statute of limitations affirmative defense with respect to an eighteen month delay between the issuance in 2005 of the warrant for the petitioner's arrest and the execution of the warrant in 2007. The petitioner had given the police a statement in 2000, after which he relocated to Indiana and then to Alabama. The police completed their investigation in 2000 and discovered no additional evidence between then and 2005. In 2007, after the police located the petitioner, he was extradited to Connecticut from Alabama and served with the arrest warrant. The petitioner contended that although the arrest warrant was issued within the applicable five year statute of limitations (§ 54-193a), the issuance of the warrant did not satisfy § 54-193a because the police did not execute the warrant without unreasonable delay. The habeas court rendered judgment denying the habeas petition. The court concluded that trial counsel did not act deficiently in not filing a motion to dismiss the charges against the petitioner and that the petitioner had failed to establish that he was prejudiced by counsel's failure to challenge the warrant as stale or to challenge the delay in the execution of the warrant. The habeas court limited its discussion of the petitioner's claim to whether the warrant had been issued within the limitations period of the applicable statute (§ 54-193) and did not consider whether the delay in the service of the warrant was unreasonable. The petitioner then appealed to this court, which reversed the habeas court's judgment in part and remanded the case to that court for a hearing in accordance with *State* v. *Crawford* (202 Conn. 443) on the petitioner's claim with regard to the statute of limitations affirmative defense. On remand, a different habeas court rendered judgment denying the habeas petition and concluded that the petitioner had failed to establish that his trial counsel rendered ineffective assistance. The second habeas court determined that *Crawford* did not apply to the petitioner's statute of limitations affirmative defense

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

because the limitations period in § 54-193a had been tolled by § 54-193 (d) as a result of the petitioner's relocation outside of Connecticut. In an articulation of its decision, the second habeas court stated that the petitioner had been elusive, unavailable and unapproachable by Connecticut law enforcement, and that he had failed to present evidence that the state could not demonstrate that the delay in executing the warrant was reasonable. The court thereafter granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed, inter alia, that the second habeas court improperly determined that § 54-193 (d) tolled the statute of limitations and concluded that he had been elusive, unavailable and unapproachable by the police. *Held*:

1. The second habeas court properly denied the petition for a writ of habeas corpus, as the petitioner failed to demonstrate that he was prejudiced or harmed by his trial counsel's failure to assert a statute of limitations affirmative defense:

   a. The habeas court incorrectly determined that § 54-193 (d), and not *Crawford*, was the controlling law on the petitioner's statute of limitations affirmative defense claim, as the arrest warrant was issued within the five year limitation period of § 54-193, and, thus, § 54-193 (d), which extends the time within which an indictment, information or complaint may be brought with respect to a person who fled from and resided outside the state after the commission of the offense, became irrelevant.

   b. The habeas court erred in determining that the petitioner had been elusive, unavailable and unapproachable by the police once the arrest warrant had been issued, that court having made no factual findings as to his actions following the date that the warrant was issued, save that he moved from Indiana to Alabama; whether the warrant was executed without unreasonable delay is determined by whether the petitioner was elusive, unavailable and unapproachable, factors that do not come into play until the date that the warrant has been issued, from which reasonable time is measured, and the court predicated its findings on movements by the petitioner that occurred at least four years before the warrant was issued.

   c. The habeas court properly found that the petitioner failed to demonstrate that the state could not prove that the time in which the arrest warrant was served was reasonable; the evidence demonstrated that the petitioner left Connecticut approximately four years before the warrant was issued, that he had numerous addresses in Indiana, including a post office box number, that he moved to Alabama, and that the police made efforts to locate him through the United States Marshals Service, and the record demonstrated that the petitioner was promptly served with the warrant approximately one month after he was located in Alabama and extradited to Connecticut.

2. The habeas court properly found that trial counsel's representation of the petitioner did not fall below an objective standard of reasonableness and that the petitioner was not prejudiced by his counsel's performance; although this court disagreed with the statutory routes by which the

habeas courts reached their conclusions that counsel did not render deficient performance, the underlying procedural history did not support a conclusion that trial counsel's performance was deficient, as the record did not reveal that the petitioner presented expert testimony to contradict the opinions of his trial counsel and the appellate lawyers with whom counsel had consulted about the statute of limitations affirmative defense, both habeas courts agreed that counsel's decision to forgo a statute of limitations affirmative defense was legally sound, and the petitioner's claim that the delay in the execution of the arrest warrant violated his right to due process had been rejected in his direct appeal from his conviction.

Argued March 21, 2018, and January 8, 2019—officially released June 25, 2019**

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, which reversed the judgment in part and remanded the case for further proceedings; subsequently, the matter was tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Sferrazza*, *J.*, issued an articulation of its decision. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The primary issue in this appeal from the denial of the amended petition for a writ of habeas

** Following supplemental briefing, this court heard additional argument on January 8, 2019.

corpus filed by the petitioner, Roger B., is whether he was denied the effective assistance of counsel at his criminal trial because trial counsel failed to assert a statute of limitations affirmative defense to the criminal charges against him. We conclude that no such deprivation occurred because the petitioner failed to carry his burden to prevail on an ineffective assistance of counsel claim pursuant to the two part test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To succeed under *Strickland*, a petitioner must present evidence that "(1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Emphasis in original.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008). The petitioner bears "the burden to prove that his counsel's performance was objectively unreasonable." *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018). "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." (Internal quotation marks omitted.) *Fisher* v. *Commissioner of Correction*, 45 Conn. App. 362, 366–67, 696 A.2d 371, cert. denied, 242 Conn. 911, 697 A.2d 364 (1997). In the present case, the petitioner not only failed to prove that his counsel's performance was deficient but also failed to demonstrate that he was prejudiced by the alleged deficient performance.[1] A detailed review of this case's tangled procedural history is required to place this decision in its proper context.

[1] In resolving the petitioner's claims, we take a different route than the one taken by this court in the petitioner's first habeas appeal. We do so on the basis of additional facts found by the second habeas court on remand.

This is the petitioner's second appeal challenging the denial of his amended petition for a writ of habeas corpus. In *Roger B.* v. *Commissioner of Correction*, 157 Conn. App. 265, 278–80, 116 A.3d 343 (2015), this court reversed in part the judgment of the habeas court, *Cobb*, *J.*, and remanded the case with direction to hold a hearing in accordance with *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), regarding the petitioner's claim that his trial counsel rendered ineffective assistance by failing to assert a statute of limitations affirmative defense with respect to the eighteen month delay between the issuance and execution of the warrant for the petitioner's arrest. On remand, the second habeas court, *Sferrazza*, *J.*, denied the amended petition, concluding that the petitioner failed to establish that his trial counsel rendered ineffective assistance. Central to its conclusion was the court's determination that *Crawford* did not apply because the applicable statute of limitations, General Statutes § 54-193a,[2] had been tolled by General Statutes § 54-193 (c), now § 54-193 (d),[3] as a result of the petitioner's relocation outside

[2] General Statutes § 54-193a, which is titled, "Limitation of prosecution for offenses involving sexual abuse of minor," provides in relevant part: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within . . . five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense . . . ."

Although § 54-193a has been amended since the date of the crimes underlying the petitioner's conviction, the amendments to that statute are not relevant to the claims on appeal. Accordingly, we refer to the current revision of the statute. We further note that this court has applied *Crawford* when considering statute of limitations claims under § 54-193a. See *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 274 n.8; *State* v. *Derks*, 155 Conn. App. 87, 93–95, 108 A.3d 1157, cert. denied, 315 Conn. 930, 110 A.3d 432 (2015); see generally *Gonzalez* v. *Commissioner of Correction*, 122 Conn. App. 271, 999 A.2d 781, cert. denied, 298 Conn. 913, 4 A.3d 831 (2010).

[3] General Statutes § 54-193 (d) provides: "If the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it

Connecticut. In a subsequent articulation, the second habeas court found that the petitioner was elusive, unavailable, and unapproachable when he left Connecticut and that he had failed to present evidence that the state could not demonstrate that the delay in executing the warrant was reasonable.

In this certified appeal, the petitioner claims that the second habeas court improperly (1) determined that § 54-193 (d) tolled the statute of limitations in analyzing whether trial counsel rendered ineffective assistance by failing to raise a statute of limitations affirmative defense, (2) concluded that the petitioner was elusive, and unavailable to and unapproachable by the police, (3) concluded that he failed to demonstrate that the state would have been unable to show that the police had acted reasonably in executing the warrant, and (4) rejected his claim of ineffective assistance of counsel. We agree with the petitioner's first two claims but reject the latter two. We, therefore, affirm the judgment of the second habeas court albeit on different grounds.[4]

On direct appeal from the petitioner's underlying criminal conviction, our Supreme Court concluded that the jury reasonably could have found the following facts on the basis of the evidence presented. See *State* v. *Roger B.*, 297 Conn. 607, 609, 999 A.2d 752 (2010)

may be brought against such person at any time within such period, during which such person resides in this state, after the commission of the offense."

In this opinion, we refer to the current codification of the statute, i.e., § 54-193 (d).

In *State* v. *Ward*, 306 Conn. 698, 52 A.3d 591 (2012), our Supreme Court placed judicial gloss on the term *fled*, which previously had been undefined. Specifically, the court construed *fled* to mean "when a defendant absents himself from the jurisdiction with reason to believe that an investigation may ensue as the result of his actions." Id., 711.

[4] "[T]his court repeatedly has observed, if a trial court reaches a correct decision but on mistaken grounds, an appellate court will sustain the trial court's action if proper grounds exist to support it . . . ." (Internal quotation marks omitted.) *Stevens* v. *Commissioner of Correction*, 112 Conn. App. 385, 394, 963 A.2d 62 (2009), quoting *State* v. *Johnson*, 289 Conn. 437, 450 n.16, 958 A.2d 713 (2008).

(affirming conviction of sexual assault and risk of injury to child). In 1995, the petitioner lived with his girlfriend and her three children, two girls and a boy. Id., 609. The girls shared a bedroom, and almost nightly, the petitioner awakened the older of the two and took her to the living room where he sexually assaulted her. Id. In 1996, the petitioner, his girlfriend, and her children moved to a new home. Id., 610. In the new home, the petitioner awakened the younger girl, took her to another room, and sexually assaulted her. Id.

The petitioner's girlfriend was institutionalized in the fall of 1999, and the petitioner became the sole caretaker of the children until Department of Children and Families (department) personnel removed them because the petitioner was not one of the children's relatives. Id. In time, the girls were placed together in a foster home. Id. A few months thereafter, the older girl disclosed to her boyfriend, and later to her foster mother, that the petitioner had abused her. Id. When the younger girl told her foster mother that the petitioner had abused her as well, the foster mother reported the allegations to department personnel. Id.

Department personnel reported the girls' allegations of abuse to the New Milford Police Department (police). *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 272. On July 17, 2000, Detective James M. Mullin watched a forensic interview of the girls. Id. On August 31, 2000, the petitioner gave Mullin a statement and permission for the police to search his apartment and storage unit. Id. The petitioner left Connecticut approximately five months after he gave the statement to Mullin. Id.

The police completed their investigation in 2000 and discovered no additional evidence between 2000 and 2005. Id. On *July 6, 2005*, the police obtained a warrant to arrest the petitioner. Id. When the petitioner left

Connecticut, he moved to Indiana, where he had several addresses, including a post office box. He later moved to Alabama where United States marshals found him in November, 2006. Id., 272–73. The state's attorney authorized the petitioner's extradition from Alabama, and he was transported to New York. Id. Mullin executed the arrest warrant on *January 24, 2007*. Id., 273. The petitioner was charged in a substitute information with offenses that occurred on various dates between October 1, 1995, and February 1, 2000. A jury found the petitioner guilty of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and three counts of risk of injury to a child in violation of General Statutes § 53-21 (2). In April, 2008, the trial court, *Sheldon, J.*, sentenced the petitioner to a total effective term of twenty-nine years in prison, execution suspended after twenty-three years, and thirty years of probation. *State* v. *Roger B.*, supra, 297 Conn. 610–11. The petitioner's conviction was affirmed on direct appeal. Id., 621.

The petitioner filed a petition for a writ of habeas corpus on August 21, 2008, and an amended petition on August 25, 2011. *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. 268–69. In his amended petition, the petitioner alleged that his trial counsel, Christopher Cosgrove, had rendered ineffective assistance by failing to assert a statute of limitations affirmative defense, among other things. Id., 269. The habeas court held an evidentiary hearing on the amended petition and issued a memorandum of decision on August 16, 2013. Id. The habeas court determined that the statute of limitations at issue was § 54-193a, which contains a five year statute of limitations. See footnote 2 of this opinion.

With respect to the performance prong of *Strickland* and the statute of limitations affirmative defense, the habeas court quoted *State* v. *Crawford*, supra, 202 Conn. 450, for the proposition that "[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him . . . ." (Internal quotation marks omitted.) *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 276. The habeas court found that Cosgrove had "reviewed the statute of limitations issue when he received the case, did the math, and determined that the warrant was executed within the applicable statute of limitations period. Accordingly, he did not act deficiently in not filing a motion to dismiss the charges . . . ."

As to the prejudice prong of *Strickland* v. *Washington*, supra, 466 U.S. 687, the habeas court "found that the petitioner [had] failed to provide any credible evidence to establish that he was prejudiced at trial by [Cosgrove's] failure to challenge the warrant as stale or the delay in executing it." (Internal quotation marks omitted.) *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 275. The habeas court, therefore, denied the petition for a writ of habeas corpus and, thereafter, denied a petition for certification to appeal. Id., 267.

The petitioner filed his first habeas appeal on September 30, 2013; id., 269; claiming that the habeas court had abused its discretion by denying his petition for certification to appeal; id., 267; and improperly had concluded that Cosgrove had not rendered ineffective assistance because the habeas court "failed to address the postwarrant delay [in executing the warrant], finding only that [trial counsel] reasonably calculated that

the warrant had been issued within the period of limitation." (Internal quotation marks omitted.) Id., 276. The petitioner argued that Cosgrove's failure to assert a statute of limitations affirmative defense constituted ineffective assistance pursuant to *State* v. *Crawford*, supra, 202 Conn. 443, and *State* v. *Ali*, 233 Conn. 403, 660 A.2d 337 (1995). *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 271. Moreover, he contended that the issuance of the warrant for his arrest did not satisfy the statute of limitations because the warrant was not executed without unreasonable delay. Id. Although the warrant had been issued on July 6, 2005, it was not executed until January 24, 2007. See id.

The petitioner noted that our Supreme Court has held that the "timely issuance of the arrest warrant [satisfied] the statute of limitations in the absence of an evidentiary showing of unreasonable delay in its service upon the defendant." *State* v. *Crawford*, supra, 202 Conn. 452.[5] In *Ali*, our Supreme Court held that "in order to toll the statute of limitations, an arrest warrant, when issued within the limitations of § 54-193 (b), must be executed without unreasonable delay." *State* v. *Ali*, supra, 233 Conn. 415. The petitioner further contended that Cosgrove's failure to assert an affirmative defense rendered his performance deficient and that, if the statute of limitations defense had been asserted, the outcome of the criminal trial would have been different. *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 272.

This court agreed with the petitioner that the habeas court's analysis under § 54-193 (c) was improper, as it failed to consider whether the delay in serving the warrant after it was issued was unreasonable. The habeas

[5] The statute of limitations at issue in *Crawford* was General Statutes (Rev. to 1983) § 54-193 (b). *State* v. *Crawford*, supra, 202 Conn. 445–46 n.4. This court, however, has applied *Crawford* when considering statute of limitations claims under § 54-193a.

court's "discussion of the petitioner's claim that [Cosgrove] was ineffective in failing to assert a statute of limitations affirmative defense was limited to the issuance of the warrant within the statute of limitations. Although the habeas court discussed the delay in execution of the warrant as it affected the petitioner's defense, the court focused on Cosgrove's testimony that no witnesses went missing and that the witnesses were able to recall the events in concluding that the petitioner's defense had not been hindered." Id., 278. This court stated that a proper resolution of the petitioner's claim under *State* v. *Crawford*, supra, 202 Conn. 443, and *State* v. *Ali*, supra, 233 Conn. 403, required the habeas court to consider whether "there was a reasonable probability that the petitioner would have succeeded on a statute of limitations affirmative defense that was based on unreasonable delay in *executing* the warrant. Such analysis would include considering whether the petitioner had [put] forth evidence to suggest that [he] was not elusive, was available and was readily approachable, such that the burden [would have] shift[ed] to the state to prove that the delay in executing the warrant was not unreasonable. *State* v. *Woodtke*, [130 Conn. App. 734, 740, 25 A.3d 699 (2011)]; see *Gonzalez* v. *Commissioner of Correction*, [122 Conn. App. 271, 286 and n.6, 999 A.2d 781, cert. denied, 298 Conn. 913, 4 A.3d 831 (2010)] . . . ." (Emphasis added; internal quotation marks omitted.) *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 278–79.

In addition, this court concluded that the record was inadequate to review the alternative ground proffered by the respondent, the Commissioner of Correction, to affirm the habeas court's judgment, which was that trial counsel was not ineffective in failing to challenge the eighteen month delay in the service of the warrant "[b]ecause [the] petitioner's decision to flee the state tolled the statute of limitations," pursuant to § 54-193

(d) and *State* v. *Ward*, 306 Conn. 698, 711, 52 A.3d 591 (2012). *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 279–80 n.11.[6] This court, therefore, reversed the judgment in part and remanded the case for a new hearing at which the petitioner could "present his claim that his trial counsel was ineffective for failing to raise a statute of limitations affirmative defense."[7] Id., 280. The respondent was not precluded from raising his alternative ground for affirmance on remand. Id., 280 n.11.

On remand, the petitioner filed a pretrial brief in which he set forth the evidence adduced at the first habeas trial, "suggest[ing] that [he] was not elusive, was available and was readily approachable," and argued that, given such evidence, the respondent bore the burden of proving that the delay in executing the warrant was not unreasonable. (Internal quotation marks omitted.)

The second habeas court held a hearing on August 29, 2016, receiving evidence solely on the claim that Cosgrove had rendered ineffective assistance by failing to pursue a statute of limitations affirmative defense to the criminal charges against the petitioner.[8] The court

[6] "In support of [the alternative basis], the respondent relies on *State* v. *Ward*, supra, 306 Conn. 698, interpreting General Statutes (Rev. to 1987) § 54-193 (c), which is now § 54-193 (d), and provides: 'If the person against whom an indictment, information or complaint for any of said offenses is brought has fled from and resided out of this state during the period so limited, it may be brought against such person at any time within such period, during which such person resides in this state, after the commission of the offense.' " *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 279 n.11.

[7] The judgment was reversed only with respect to the petitioner's claim that Cosgrove rendered ineffective assistance for failing to assert a statute of limitations affirmative defense. The judgment denying the petitioner's remaining claims of ineffective assistance of trial counsel was affirmed in all other respects. *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 289.

[8] The parties stipulated to the admission of all exhibits offered at the first habeas trial, as well as the transcripts from that proceeding. The petitioner rested on his pretrial brief and called no witnesses, stating that there was an adequate factual basis in the existing record on which the court could

issued a memorandum of decision on November 23, 2016, in which it denied the petitioner's amended petition. Thereafter, the court granted the petition for certification to appeal.

The petitioner appealed, claiming that in analyzing his ineffective assistance of counsel claim, the second habeas court (1) incorrectly determined that § 54-193 (d) tolled the statute of limitations and (2) improperly rejected his claim of ineffective assistance of counsel.[9] The appeal initially was argued on March 21, 2018. On July 31, 2018, we sua sponte issued an articulation order stating that "[t]his court retains jurisdiction over this appeal and the case is remanded to [the second habeas court] for further factual findings on the basis of the existing record. See *Barlow* v. *Commissioner of Correction*, 328 Conn. 610, 614–15, 182 A.3d 78 (2018);[10] Practice Book § 60-2 (8). In particular, the court is to make

render a decision. The respondent presented testimony from Cosgrove. At the conclusion of Cosgrove's testimony, the second habeas court asked counsel for the respondent whether she would be raising the issue of § 54-193 (d), given footnote 11 of this court's opinion in *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 279. See footnote 5 of this opinion. The respondent filed a posttrial brief raising that issue, to which the petitioner replied.

[9] In his appellate brief, the petitioner maintained that (1) the respondent abandoned any claim that § 54-193 (d) is applicable, (2) the second habeas court ignored controlling precedent when applying § 54-193 (d) rather than *State* v. *Crawford*, supra, 202 Conn. 443, (3) § 54-193 (d) is inapposite when a suspect has been identified and an arrest warrant has been issued, (4) indefinite tolling is disfavored by the law, (5) the second habeas court's findings of fact do not support the application of § 54-193 (d) as construed by *State* v. *Ward*, supra, 306 Conn. 698, (6) interpreting § 54-193 (d) to apply under the circumstances presented in the present case renders it an unconstitutional violation of equal protection law, (7) the petitioner established that he was easily accessible and not elusive as required by *Crawford*, (8) the respondent, when given a second chance, offered no evidence to show the delay in serving the warrant was not unreasonable, and (9) defense counsel rendered ineffective assistance in failing to assert a statute of limitations defense and the petitioner was prejudiced thereby.

[10] A reviewing court may remand a case to the trial court to make additional factual findings. *Barlow* v. *Commissioner of Correction*, supra, 328 Conn. 614–15.

factual findings related to the petitioner's statute of limitations defense as discussed by this court in *Roger B.* v. *Commissioner of Correction*, [supra, 157 Conn. App. 278–79] . . . including whether the petitioner was not elusive, was available and was readily approachable, and if so, whether the delay in executing the warrant was unreasonable."

The second habeas court issued its articulation on August 7, 2018, finding in part that the petitioner knew of the sexual misconduct complaints against him when he left Connecticut and that he was elusive, unavailable, and unapproachable by Connecticut law enforcement, except through extradition. Moreover, the petitioner failed to demonstrate that a reasonable likelihood exists that the state would have been unable to show that the police acted reasonably and did not generate unjustifiable delay in executing the warrant.

On August 10, 2018, the petitioner filed a motion to correct an allegedly erroneous factual finding in the articulation and a motion for additional briefing on the second habeas court's formulation and application of the law. We denied the petitioner's motion to correct, but granted the motion for supplemental briefing. After the parties submitted supplemental briefs, we heard additional argument from the parties on January 8, 2019. Although we agree with the petitioner that the second habeas court improperly determined that the petitioner's claim was controlled by § 54-193 (d), rather than *Crawford*, we conclude that the court properly determined that Cosgrove's legal representation was not deficient, and that the petitioner failed to prove prejudice in that he failed to present evidence that it was reasonably likely that the state could not present evidence that the delay in executing the warrant was reasonable.

I

STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE

On appeal, the petitioner claims that the second habeas court improperly (1) determined that § 54-193 (d) tolled the statute of limitations in analyzing whether Cosgrove rendered ineffective assistance by failing to raise a statute of limitations affirmative defense, (2) concluded that the petitioner was elusive, unavailable, and unapproachable by the police, and (3) concluded that he failed to show that it was unlikely that the state would have been unable to prove that the police had acted reasonably in executing the warrant. We agree with the petitioner's first two claims, but not his third.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Therefore, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 822, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"To the extent that we are required to review conclusions of law or the interpretation of the relevant statute by the [habeas] court, we engage in plenary review." *Location Realty, Inc.* v. *Colaccino*, 287 Conn. 706, 717, 949 A.2d 1189 (2008); see also *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 799–800, 950 A.2d 1220 (2008). "[W]hen the plaintiff asserts that the facts

found were insufficient to support the court's legal conclusion, th[e] issue presents a mixed question of law and fact to which we apply plenary review. . . . We must therefore decide whether the court's conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *State* v. *Derks*, 155 Conn. App. 87, 92, 108 A.3d 1157, cert. denied, 315 Conn. 930, 110 A.3d 432 (2015).

The second habeas court issued a memorandum of decision following the remand hearing, in which it made the following findings of fact. "On July 6, 2005, an arrest warrant issued authorizing the apprehension of the petitioner for having sexually assaulted his girlfriend's two young daughters . . . from October, 1995, to February, 2000. The pertinent statute of limitations was . . . § 54-193a, which permitted prosecution for such crimes within a period of five years from the time when the victims notified law enforcement officials of the . . . assaults. Unquestionably, the arrest warrant issued within the designated period of time. The [police] promulgated a wanted persons notice regarding the petitioner on July 7, 2005, one day after the judicial authority issued the arrest warrant." The court also found that approximately four years before the arrest warrant was issued, the petitioner had left Connecticut. United States marshals located him in Alabama, where he was apprehended on December 11, 2006. The police returned him to Connecticut and executed the arrest warrant on January 24, 2007.

The court stated: "[O]bviously, the date of arrest, January 24, 2007, was beyond the five year time limit afforded by § 54-193a for offenses committed between 1995 and 2000." "Cosgrove recognized a possible violation of the statute of limitations. He researched that issue and discussed the question with appellate lawyers for the Office of the Chief Public Defender. As a result,

[Cosgrove] opined that, without proof of actual prejudice to the petitioner caused by the delay, no viable statute of limitations affirmative defense existed. [Cosgrove] explained his legal opinion to the petitioner, and he declined to present such a defense at trial. . . .

"Cosgrove represented the petitioner within the bounds of effective assistance by deciding not to raise a statute of limitations defense. Central to this . . . finding is that [Cosgrove's] assessment of the law regarding execution of a stale warrant was correct; that is, the running of the allotted time for service of the arrest warrant was tolled by . . . § 54-193 (d) in light of the petitioner's relocation outside Connecticut. The result was that both the issuance and service of the arrest warrant occurred within the five year period, as expanded by the petitioner's absence from Connecticut. . . .

"The legal significance of [the] application of § 54-193 [(d)] is that the entire question of unreasonable delay becomes one of a denial of due process rather than a statute of limitations violation. This is because the rule announced in *State* v. *Crawford*, [supra, 202 Conn. 443], becomes inapposite. In *Crawford*, our Supreme Court held that, even where an arrest warrant has issued within the statute of limitations, that warrant must be served without unreasonable delay . . . . But in *Crawford*, the arrest came after the five year [limitation period] had elapsed.

"In footnote 8 [of its opinion, the court in *Crawford*] explicitly stated that its decision avoided any consideration of tolling under § 54-193 [(d)] because the [state] failed to raise that question in that case. . . . Thus, the *Crawford* holding only applies to situations where no tolling under § 54-193 [(d)] comes into play to bring the service of the arrest warrant within the five year [limitation period] such that the warrant cannot be deemed stale. . . .

"[T]he analysis set forth in [*Crawford*] arrives at the proper interpretation of the meaning of the word prosecution necessary to satisfy a purely statutory rule, namely, that [the] time constraint set forth in § 54-193a, in the situation when the issuance of an arrest warrant and the execution of it fall on opposite sides of the mandated time limit. Where, as in the present case, both issuance and service take place within the five year period, as elongated by the tolling provision contained in § 54-193 [(d)] because the petitioner relocated outside of Connecticut during the five year period, the trial court would never have had occasion to address the *Crawford* holding. . . .

"Thus, [Cosgrove's] opinion, that a statute of limitations affirmative defense was unlikely to succeed without a showing of actual prejudice sufficient to establish an unfair trial, was accurate. The court finds that the petitioner has failed to satisfy his burden of proving, by a preponderance of the evidence, either prong of the [*Strickland* v. *Washington*, supra, 466 U.S. 668] standard." (Citations omitted; emphasis omitted; internal quotation marks omitted.)

A

The petitioner claims that the second habeas court wrongly concluded that § 54-193 (d), *not State* v. *Crawford*, supra, 202 Conn. 450–52, governs the resolution of his claim that Cosgrove rendered ineffective assistance by failing to raise a statute of limitations affirmative defense with respect to the eighteen month delay between the issuance and the execution of the arrest warrant. We agree with the petitioner that *Crawford*, not the statute, is controlling.

"An accused's primary protection from having to answer to stale criminal charges is the statute of limitations." *State* v. *Echols*, 170 Conn. 11, 16–17, 364 A.2d 225 (1975). "A statute of limitations . . . [ensures] that a defendant receives notice, within a prescribed time,

of the acts with which he is charged, so that he and his lawyers can assemble the relevant evidence [to prepare a defense] before documents are lost [and] memor[ies] fade . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Jennings*, 101 Conn. App. 810, 818, 928 A.2d 541 (2007). ''The policies underlying statutes of limitations are best served when exceptions are interpreted narrowly in favor of the accused and the state has a strong incentive to ensure that a defendant is provided timely notice of charges.'' *State* v. *Swebilius*, 325 Conn. 793, 814, 159 A.3d 1099 (2017). ''A statute of limitations claim is an affirmative defense for which the burden rests with the defendant to prove the elements of the defense by a preponderance of the evidence.'' *State* v. *Woodtke*, supra, 130 Conn. App. 740.

''A statute of limitations affirmative defense on the basis of unreasonable delay in execution of the warrant is properly considered according to the framework set forth in [*State* v. *Crawford*, supra, 202 Conn. 450] and articulated in subsequent appellate decisions.'' *Roger B.* v. *Commissioner of Correction*, supra, 157 Conn. App. 273. Pursuant to *Crawford*, ''[w]hen an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is [satisfied].[11] . . . An accused should

[11] In *State* v. *Ali*, supra, 233 Conn. 413 n.8, our Supreme Court explained that *Crawford* ''used the term 'tolled,' as well as other forms of the verb 'toll,' in connection with § 54-193 (b) merely to describe the practical effect of a delay in the execution of an arrest warrant. Of course, in light of the traditional meaning of the term 'toll' within the parlance of statutes of limitations, namely as a synonym for 'suspended'; see Black's Law Dictionary (6th Ed. 1990); a 'prosecution' within the applicable time period *satisfies*, rather than 'tolls,' the statute of limitations. Only § 54-193 [(d)] specifically concerns the tolling of the statute of limitations.'' (Emphasis added.)

not be rewarded, absent evidence of a lack of due diligence on the part of the officer charged with executing the warrant, for managing to avoid apprehension to a point in time beyond the period of limitation. . . . [H]owever . . . some [time] limit as to when an arrest warrant must be executed after its issuance is necessary in order to prevent the disadvantages to an accused attending stale prosecutions . . . .'' (Citation omitted; footnote added and footnote omitted.) *State* v. *Crawford*, supra, 450.

Adopting the approach of the Model Penal Code,[12] the court in *Crawford* held: ''[I]n order to [satisfy] the statute of limitations, an arrest warrant, when issued within the time limitations of § 54-193 (b),[13] *must be executed without unreasonable delay*. . . . We do not adopt a per se approach as to what period of time to execute an arrest warrant is reasonable. A reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to [satisfy]

[12] ''[A] prosecution is commenced either when an indictment is found [or an information filed] or when a warrant or other process is issued, provided that such warrant . . . is executed without unreasonable delay.'' 1 A.L.I. Model Penal Code and Commentaries (1985) § 1.06 (5), p. 9.

[13] General Statutes § 54-193 (b), which is within the section titled, ''Limitation of prosecution for certain violations or offenses,'' provides: ''No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed.''

Although § 54-193 (b) has been amended since the date of the crimes underlying the petitioner's conviction, the amendments to that statute are not relevant to the claim on appeal. Accordingly, we refer to the current revision of the statute.

the statute of limitations." (Citation omitted; emphasis added; footnote added.) Id., 450–51. Moreover, the "timely issuance of the arrest warrant [satisfied] the statute of limitations in the absence of an evidentiary showing of unreasonable delay in its service upon the defendant." Id., 452.[14]

On the basis of footnote 8 in *Crawford*, the habeas court in the present case and the respondent both postulate that controlling precedent does not require the application of *Crawford* to the petitioner's claim. Notwithstanding the footnote, the court in *Crawford* summarized the proper application of § 54-193 (d) as follows: "[Section 54-193 [(d)] . . . which tolls the statute as to the person who has fled from and resides outside the state after the commission of the offense, *simply extends the time within which an indictment, information or complaint may be brought*." (Emphasis added; internal quotation marks omitted.) Id., 450 n.12.

In *State* v. *Ali*, supra, 233 Conn. 412, however, our Supreme Court held that the defendant's departure from the state was not dispositive of his unreasonable delay claim because "the outcome [was] controlled by [*Crawford*]." Our Supreme Court explicitly rejected the state's argument that "by leaving the jurisdiction immediately after the . . . incident, the defendant intended to evade the authorities and . . . the statute of limitations was satisfied." Id. Connecticut courts consistently have applied this framework to claims of unreasonable delay in the execution of an arrest warrant issued within the limitation period, regardless of whether a defendant has relocated outside the state. See *State* v. *Figueroa*, 235 Conn. 145, 177–78, 665 A.2d 63 (1995); *State* v.

[14] Our Supreme Court did not consider the effect of § 54-193 (d), if any, because "[t]he prosecution [did] no[t] claim that the defendant was out of the state at any period after the commission of the offenses charged . . . ." *State* v. *Crawford*, supra, 202 Conn. 447 n.8.

Derks, supra, 155 Conn. App. 93–95; *Axel D.* v. *Commissioner of Correction*, 135 Conn. App. 428, 434–36, 41 A.3d 1196 (2012); *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 276–77; *Thompson* v. *Commissioner of Correction*, 91 Conn. App. 205, 210–12, 880 A.2d 965 (2005), appeal dismissed, 280 Conn. 509, 909 A.2d 946 (2006).

In the present case, the information was filed within the five year limitation period, when the judicial authority signed the petitioner's arrest warrant on July 6, 2005. Because the warrant was issued within the limitation period, § 54-193 (d) became irrelevant. The only question that remained was whether the warrant was executed without unreasonable delay. See *State* v. *Crawford*, supra, 202 Conn. 451–52. We reject the second habeas court's conclusion that the statute extended the time in which the warrant could be served. We conclude, therefore, that the habeas court incorrectly determined that § 54-193 (d), not *Crawford*, is the controlling law on a statute of limitations affirmative defense in the present case.

B

The petitioner also claims that the second habeas court improperly found that (1) he was elusive, unavailable, and unapproachable, and (2) the execution of the warrant was reasonable. We agree with the petitioner that the court erred in finding that he was elusive, unavailable, and unapproachable, but disagree that the court improperly determined that the delay in executing the warrant was reasonable.

Following oral argument in March, 2018, we ordered the second habeas court to articulate its findings as to "whether the petitioner was not elusive, was available and was readily approachable, and if so, whether the delay in executing the warrant was unreasonable." In its August 7, 2018 articulation, the second habeas court

made the following factual findings: "[I]t is incontrovertible that the petitioner knew of the sexual misconduct complaints against him before he moved to Indiana and Alabama. He remained out of Connecticut for the entire time between the issuance of the arrest warrant on July 7, 2005, to his apprehension in Alabama on December 11, 2006, and extradition to Connecticut. Upon his return to Connecticut, the arrest warrant was served. The court, guided by *State* v. *Ward*, [supra, 306 Conn. 698], finds that the petitioner was elusive, unavailable, and unapproachable by Connecticut law enforcement personnel except through extradition.

"Alternatively, employing the common meanings of elusive, available, and approachable, uninfluenced by the holding of *State* v. *Ward*, supra, [306 Conn. 698], the court also finds that the petitioner acted elusively and was unavailable and unapproachable. [The police] interviewed the petitioner regarding the allegations of child molestation against him in August, 2000. The petitioner acknowledged that he knew, at that time, that the victims had undergone forensic interviews. In January, 2001, about five months later, he [left] Connecticut for Indiana, where he [married] a woman he met online and [began] a new life. He moved from Indiana to Alabama in September, 2006.

"The petitioner testified at the first habeas trial . . . and he never stated that he left a forwarding address upon his departure from Connecticut. Nor was any other evidence adduced at either habeas hearing that he notified any governmental agency in Connecticut, such as the United States Postal Service, about his new residence in Indiana. While it is true that he never concealed his identity while in Indiana or Alabama, that circumstance falls short of proving, by a preponderance of the evidence, that he remained available and approachable to Connecticut law enforcement officers while in those states."

1

The petitioner claims that the second habeas court improperly found that he was elusive and unavailable to and unapproachable by the police. We agree.

The petitioner does not take issue with the facts found by the second habeas court, but disputes its conclusions that he was elusive, unavailable, and unapproachable. The court predicated its findings on the fact that the petitioner knew that there was an ongoing criminal investigation, that he left Connecticut approximately five months after he gave a statement to the police and permitted them to search his property. The court relied on language in *Ward*, specifically, "§ 54-193 [(d)] may toll the statute of limitations when a defendant absents himself from the jurisdiction with reason to believe that an investigation may ensue as the result of his actions." *State* v. *Ward*, supra, 306 Conn. 711. *Ward*, however, is factually distinct from the present case. In that case, the defendant, a Massachusetts resident, whose employment took him to Connecticut; id., 704; sexually assaulted the victim in her Killingly home in 1988. Id., 701. The defendant immediately returned to Massachusetts. Id., 713. The victim did not know the defendant; id., 701; and his identity was not discovered until 2006. Id., 704. Following his conviction of sexual assault in the first degree, the defendant appealed and claimed, in part, that the trial court had improperly denied his motion to dismiss the charges pursuant to § 54-193 (b). Id., 700–701.

On appeal, the defendant argued that the state "did not present any evidence to show that he was aware of a criminal investigation against him and that he fled in order to avoid prosecution. In response, the state contend[ed] that the term fled does not require an intent to avoid arrest or prosecution and that any absence

from the jurisdiction, regardless of intent, tolls the statute of limitations. [Our Supreme Court agreed] with the state that the plain language of § 54-193 [(d)] does not require the defendant to leave the state with the intent of avoiding prosecution." Id., 710. The court ascertained that the term *fled* means, in the context of § 54-193 (d), to run from an investigation. Id., 711. It reviewed the facts and determined that "it [was] undisputed that the defendant returned to Massachusetts after the commission of a crime and continued to reside there until his arrest more than twenty years later." Id., 713. It concluded, therefore, that the state had presented sufficient evidence to toll the statute of limitations. Id., 713–14.

The issue in the present case, however, is not whether the statute of limitations had been tolled while the petitioner was absent from the state or even why he left the state. The issue is whether he was elusive, unavailable, or unapproachable once the warrant for his arrest had been issued. Section 54-193 (d) "simply extends the time within which an indictment, information or complaint may be brought." (Internal quotation marks omitted.) *State* v. *Crawford*, supra, 202 Conn. 450 n.12. *Crawford* teaches that the "timely issuance of the arrest warrant [satisfied] the statute of limitations in the absence of an evidentiary showing of unreasonable delay in its service upon the defendant." Id., 452. It is undisputed that the warrant for the petitioner's arrest was issued within the statute of limitations. Factors to consider when determining whether the warrant was executed without unreasonable delay are whether the petitioner was elusive, unavailable and unapproachable. Those factors do not come into play until the warrant has been issued, because the measure of reasonable time is from the date the warrant is issued. In the present case, the second habeas court considered the petitioner's movements that occurred at least four

years before the warrant was issued. The court made no factual findings as to the petitioner's actions following the date the warrant was issued, save that he moved from Indiana to Alabama, demonstrating that he was elusive and unavailable and unapproachable.[15] For the foregoing reasons, the second habeas court erred in its determination that the petitioner was elusive, unavailable, and unapproachable.[16]

2

The petitioner also claims that the second habeas court improperly concluded that the delay in executing the warrant was not unreasonable and that the burden was on him to prove that the respondent could not demonstrate that the delay in the execution of the warrant was reasonable. We disagree.

The following portion of the second habeas court's articulation is relevant to our resolution of the petitioner's claim: "Even if the petitioner could establish that he was available and approachable by the [police] while he was out of state, the petitioner has failed to demonstrate that a reasonable likelihood exists that the prosecution would have been unable to show that [the police] acted unreasonably and generated unjustifiable delay in executing the arrest warrant. It must be kept in mind that this is a *habeas* case assessing whether the petitioner's defense counsel represented him within the bounds of reasonable competency by opining that an attack on the tardiness of arrest would be unsuccessful unless actual prejudice to the defense resulted from delay. Present habeas counsel has acknowledged that actual prejudice never occurred. The burden rests with the

[15] The evidence showed that the police had the petitioner's operator's license with his current address at the time the warrant was issued.

[16] The petitioner also argued that the inferences that the second habeas court drew from its factual findings are erroneous. We need not address this argument because we conclude that the court improperly considered the petitioner's actions prior to the issuance of the warrant.

petitioner to prove that . . . Cosgrove's legal research, consultation with experienced appellate defense counsel on this issue, and interpretation of the statutes and relevant case law fell below that exhibited by ordinarily competent criminal defense practitioners at the time.

"Our Supreme Court has recently reminded the lower courts, with respect to ineffective assistance claims, it is the petitioner who bears the burden to prove that his counsel's performance was objectively *unreasonable*. *Eubanks* v. *Commissioner of Correction*, [supra, 329 Conn. 598]. When the record is devoid of evidence on an essential issue, the decision must be against the habeas petitioner. Id. This default outcome may even result in a criminal case where an accused is attempting to establish the affirmative defense of undue delay . . . . We cannot assume, nor could the trial court, that the warrant was not executed with due diligence. . . . [*State* v. *Crawford*, supra, 202 Conn. 451]. It is . . . presumed until the contrary appears that a public officer acting officially has done his duty. Id." (Emphasis altered; internal quotation marks omitted.)

The second habeas court found that the police promulgated a wanted persons notice one day after the arrest warrant was judicially authorized and that it is not known whether the Indiana authorities received notice or acted upon it. When the police in Alabama apprehended the petitioner, he promptly was extradited to Connecticut and arrested on the warrant.[17] Because the record is bereft of evidence pointing to a lack of diligence on the part of any law enforcement agency, the second habeas court concluded that the petitioner had failed to show the existence of a reasonable probability that at the criminal trial the prosecution would not have been able to justify the delay between the time the

[17] The petitioner does not claim that the second habeas court's underlying factual findings are clearly erroneous.

warrant was issued and executed when the petitioner was outside of Connecticut for the entire time.

On appeal, the petitioner takes issue with the second habeas court's finding that the record is bereft of evidence pointing to a lack of diligence on the part of any law enforcement agency. He claims that his counsel examined Mullin with respect to actions taken by the police to locate the petitioner. Indeed, the record discloses that criminal and habeas counsel questioned Mullin about efforts to locate the petitioner outside Connecticut. The petitioner, however, has not identified what specific evidence proves that the delay in serving the warrant was unreasonable.

"A reasonable period of time is a question of fact that will depend on the circumstances of each case. If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable." Id. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Thompson* v. *Commissioner of Correction*, 184 Conn. App. 215, 222, 194 A.3d 831, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018). "If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the [petitioner's] claim." *State* v. *Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989). As our Supreme Court "frequently has observed, a trial court is in the best position to observe the demeanor of the parties, witnesses, jurors and others who appear before it." *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 396, 3 A.3d 892 (2010).

On the basis of the record before us, we conclude that the second habeas court's finding that the petitioner failed to demonstrate that the state could not prove that the time in which the warrant was served was reasonable was not in error. The evidence demonstrates that the petitioner left the state approximately four years before the warrant was issued; he had numerous addresses in Indiana, including a post office box number; he moved to Alabama; and the police made efforts to locate the petitioner through the United States Marshals Service. The record further demonstrates that approximately one month after United States marshals located the petitioner in Alabama, he was extradited to Connecticut and promptly served with the warrant.

"Connecticut cases have determined that a delay in executing an arrest warrant is not unreasonable when a defendant has relocated outside of the state. See, e.g., *Gonzalez* v. *Commissioner of Correction*, [supra, 122 Conn. App. 285–86] (in habeas corpus case alleging ineffective assistance of counsel, habeas court found that petitioner would likely not succeed on motion to dismiss when he had relocated to Puerto Rico and authorities did not have his address) . . . *Merriam* v. *Warden*, [Docket No. CV-04-0004319, 2007 WL 2034825, *14 (Conn. Super. May 25, 2007)] (finding no unreasonable delay when defendant fled state after learning of victim's mother's intention to contact police and police continued in their effort to locate him), appeal dismissed, 111 Conn. App. 830, 960 A.2d 1115 (2008), cert. denied, 290 Conn. 915, 965 A.2d 553 (2009); *State* v. *Tomczak*, Superior Court, judicial district of Tolland, Docket No. CR-9659766 (August 21, 1996) (17 Conn. L. Rptr. 478) (finding delay of nearly five years reasonable where defendant left Connecticut before warrant issued and police continued to make efforts to locate defendant after he left state)." *State* v. *Woodtke*, supra, 130 Conn. App. 743–44.

The petitioner also claims that the habeas court improperly shifted the burden to him to demonstrate that the warrant was not served within a reasonable time. As the second habeas court properly noted, the burden is on the petitioner to demonstrate that his counsel's representation was objectively unreasonable. See *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 598. The petitioner, therefore, failed to demonstrate that even if Cosgrove asserted a statute of limitations affirmative defense, it would have been successful. Consequently, the petitioner has failed to demonstrate that he was prejudiced or harmed by Cosgrove's representation.

II

STRICKLAND ANALYSIS

The petitioner claims that the habeas court improperly determined that Cosgrove did not render ineffective assistance for failing to assert a statute of limitations affirmative defense to the criminal charges. We disagree.

Under both the federal and state constitutions a criminal defendant is entitled to the effective assistance of counsel. A defendant, however, is not entitled to error free representation. See *Cosby* v. *Commissioner of Correction*, 57 Conn. App. 258, 259–60, 748 A.2d 352 (2000). "[A] petitioner [is] not entitled to error free representation, only representation falling within the range of competence demanded of attorneys in criminal cases . . . . Without an analysis of whether [an attorney's] performance had fallen below an objective standard of reasonableness . . . the habeas court [is] without ground to determine that there had been deficient performance." (Citations omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Rodriquez*, 222 Conn. 469, 478–79, 610 A.2d 631 (1992), overruled in part on

other grounds by *Simms* v. *Warden*, 229 Conn. 178, 185, 186 n.12, 640 A.2d 601 (1994).

To prevail on a claim of ineffective assistance of counsel, the petitioner first "must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires [a] showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . The sixth amendment, therefore, does not guarantee perfect representation, only a reasonably competent attorney." (Internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, 184 Conn. App. 709, 713–14, 196 A.3d 388, cert. denied, 330 Conn. 949, 197 A.3d 389 (2018). The reality is that lawyers, like other professionals, perform with widely varying levels of effectiveness. *Strickland* v. *Washington*, supra, 466 U.S. 691, does not require error free representation; it requires competent representation. Id., 690.

As previously stated, "[a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong." *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 678, 51 A.3d 948 (2012). "This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable." (Internal quotation

marks omitted.) *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 442, 159 A.3d 109 (2016). It bears repeating that "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney. . . . Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Citations omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 110, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

With respect to the performance prong, the question is whether "counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, supra, 466 U.S. 688. "As a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 79, 967 A.2d 41 (2009). "Counsel's decision need not have been the best decision, or even a good one; it need only fall within the wide range of reasonable decisions that a defense attorney in counsel's position might make. See, e.g., *Harrington* v. *Richter*, supra, 562 U.S. 110; *Strickland* v. *Washington*, supra, 466 U.S. [689]." *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 454. "To satisfy the performance prong, a [petitioner] must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment [to the United States constitution]." (Internal quotation marks omitted.] *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

"[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's

performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . *A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time*." (Emphasis added; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 443.

"Because of the difficulties inherent in making [this] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and [to have] made all significant decisions in the exercise of reasonably professional judgment." (Internal quotation marks omitted.) Id., 443–44.

"[T]he United States Supreme Court has emphasized that a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons

. . . counsel may have had for proceeding as [he] did . . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 539–40, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

In the present case, both the first and the second habeas courts found facts that supported their conclusions that Cosgrove's representation did not fall below that of criminal defense counsel guaranteed by the sixth amendment. Even though we conclude that both courts incorrectly analyzed the statute of limitations affirmative defense pursuant to § 54-193 (d), their analysis of the *Strickland* performance prong was reasonable and proper. The first habeas court found that Cosgrove "did not consider challenging the warrant delays in executing or serving the warrant because he did not believe that there was a basis for doing so. Although he reviewed the issue, he determined that the delays did not hinder the defense in any way, in that no information arose during the period, no witnesses went missing, and the witnesses were able to recall events. Although . . . Cosgrove did not challenge the delays by way of a motion to dismiss the charges, he did question . . . Mullin on cross-examination with respect to the delay in issuing the warrant to show the ineptitude of the police investigation."

The second habeas court found that Cosgrove "represented the petitioner within the bounds of effective assistance by deciding not to raise a statute of limitations defense." "The proper measure of attorney performance remains simply reasonableness under prevailing

professional norms." *Strickland* v. *Washington*, supra, 466 U.S. 688. The court further found that Cosgrove "recognized a possible violation of the statute of limitations. He researched that issue and discussed the question with the appellate lawyers for the Office of the Chief Public Defender. As a result . . . Cosgrove opined that, without proof of actual prejudice to the petitioner caused by the delay, no viable statute of limitations affirmative defense existed. . . . Cosgrove explained his legal opinion to the petitioner, and he declined to present such a defense at trial." The second habeas court found that Cosgrove represented the petitioner within the bounds of effective assistance by deciding not to raise a statute of limitations defense. The court's finding was predicated in part on its conclusion that "Cosgrove's assessment of the law regarding execution of a stale warrant was correct, that is, the running of the allotted time for service of the arrest warrant was tolled by virtue of . . . § 54-193 (d), in light of the petitioner's location outside Connecticut. The result was that *both* the issuance and the service of the arrest warrant occurred within the five-year period as expanded by the petitioner's absence from Connecticut." (Emphasis in original.)

The findings of both the first and second habeas courts reveal that Cosgrove was aware of a possible statute of limitations affirmative defense.[18] The habeas court found that Cosgrove reviewed the applicable statute of limitations, "did the math," and determined that the warrant had been executed within the statute of limitations. The second habeas court found that Cosgrove researched the issue and consulted with the appellate lawyers in the chief public defender's office. The second habeas court also found that on the basis

[18] This court may take judicial notice of the files of the trial court in the same or other cases. See *Disciplinary Counsel* v. *Villeneuve*, 126 Conn. App. 692, 703 n.15, 14 A.3d 358 (2011).

of Cosgrove's knowledge of the underlying facts, his knowledge of the law, research, and consultation with other lawyers, Cosgrove made the correct strategic decision not to file a motion to dismiss or to assert a statute of limitations affirmative defense because service of the warrant was timely under a proper reading of the statute of limitations.

On appeal, the petitioner has not shown that Cosgrove's decision was objectively unreasonable in that it fell below the standard of reasonableness as measured by prevailing professional practice. See *Moore* v. *Commissioner of Correction*, 186 Conn. App. 254, 269, 199 A.3d 594 (2018) (citing *Strickland* v. *Washington*, supra, 466 U.S. 687–88), cert. granted on other grounds, 330 Conn. 970, 200 A.3d 700 (2019). Indeed, it appears to have been entirely reasonable. The record does not reveal that at the habeas trial or on remand the petitioner presented expert testimony to contradict the opinions of Cosgrove and the appellate lawyers with whom he consulted. Moreover, two judges of the Superior Court agreed that Cosgrove's decision to forgo a statute of limitations affirmative defense was legally sound. In view of those facts, we conclude that the second habeas court properly found that Cosgrove's representation of the petitioner did not fall below the objective standard of reasonableness. Although we disagree with the statutory routes by which the habeas courts reached their ultimate conclusions that Cosgrove did not render deficient performance, the underlying procedural history does not support a conclusion that Cosgrove's performance was deficient. The petitioner, therefore, cannot prevail on his claim of ineffective assistance of counsel under *Strickland*, as his claim fails to satisfy the performance prong.

Moreover, the petitioner has not carried his burden to prove by a preponderance of the evidence that he was prejudiced by Cosgrove's representation. The habeas court noted that in his criminal appeal, the petitioner

claimed that the delay by the police in applying for the arrest warrant violated his constitutional right to due process pursuant to the fourteenth amendment to the United States constitution. *State* v. *Roger B.*, supra, 297 Conn. 611. Our Supreme Court rejected the claim, finding that the record contained no evidence that the petitioner suffered "actual prejudice as a result of the delay." Id., 615. In the present case, the petitioner has failed to demonstrate that the state would not have been able to prove that the delay in the execution of the warrant was reasonable. The petitioner, therefore, was not harmed by Cosgrove's failure to assert a statute of limitations affirmative defense or to file a motion to dismiss.

For the foregoing reasons, we affirm the judgment of the second habeas court denying the amended petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

AMBER DECHELLIS *v.* ANTHONY DECHELLIS
(AC 40108)

Elgo, Moll and Bear, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgments of the trial court granting the plaintiff's motion to confirm an arbitration award and denying his motion to vacate in part that award, which, inter alia, awarded the plaintiff attorney's fees related to work performed by her attorneys, T and C, on certain postjudgment motions. *Held*:

1. This court declined to review the defendant's claim, raised for the first time on appeal, that the trial court improperly confirmed the award of attorney's fees incurred by T in complying with a certain order of the arbitrator, which the defendant claimed did not conform to the arbitration submission approved by the court; the defendant did not distinctly or even functionally raise that claim before the court, where he, instead, argued that the award of attorney's fees related to T's efforts to comply with the arbitrator's order should be vacated because there was insufficient evidence to support T's claims for fees and because the arbitrator

had made certain evidentiary errors, and, therefore, the claim was not preserved.

2. The defendant could not prevail on his unpreserved claim that the court committed plain error in denying his motion to vacate in part the arbitration award, which was based on his claim that the arbitrator's award of attorney's fees to C violated public policy and did not conform to the arbitration submission approved by the court; the defendant's claim, which differed from his claim in the trial court that the evidence established that C was not owed the amount he sought, did not present an extraordinary situation in which the alleged error was so plain and obvious as to affect the fairness and integrity of and public confidence in the judicial proceedings or result in manifest injustice, especially given that the defendant's counsel expressly agreed at the arbitration hearing to permit the arbitrator to resolve the dispute relating to C's claim for attorney's fees, even though the parties had not included that issue in the arbitration agreement as one to be submitted to and decided by the arbitrator.

3. This court declined to review the defendant's claim that the court improperly confirmed the award of attorney's fees associated with T's work on certain motions to reargue the underlying judgment, which award the defendant claimed was contrary to the terms of the dissolution judgment that required each party to bear their own fees and costs; the defendant failed to raise the claim that the award contravened the dissolution judgment before the court, where he, instead, argued that the arbitrator had improperly based that award on the parties' current finances rather than their finances at the time of the dissolution.

4. This court declined to exercise its supervisory authority over the administration of justice to reverse the trial court's approval of the agreement to arbitrate the plaintiff's motion for attorney's fees and to provide guidance to the trial courts regarding the proper application of the statute (§ 46b-66 [c]) governing the procedure to be followed when the parties in a dissolution proceeding agree to binding arbitration, as this case did not present a rare circumstance where traditional protections were inadequate to ensure the fair and just administration of the courts.

Argued January 2—officially released June 25, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Schofield, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Emons, J.*, approved the agreement of the parties to enter into binding arbitration as to certain postjudgment motions;

subsequently, the arbitrator issued an award and entered certain orders; thereafter, the court, *Tindill, J.*, granted the plaintiff's motion to confirm the arbitration award and denied the defendant's motion to vacate in part the award, and the defendant appealed to this court. *Affirmed.*

Charles D. Ray, with whom was *Brittany A. Killian*, for the appellant (defendant).

Peter J. Zarella, with whom, on the brief, was *Gary I. Cohen*, for the plaintiff (appellee).

Opinion

ELGO, J. In this postdissolution matter, the defendant, Anthony DeChellis, appeals from the judgments of the Superior Court granting the motion of the plaintiff, Amber DeChellis, to confirm the arbitration award and denying his motion to vacate that award in part. On appeal, the defendant claims that: (1) the court improperly confirmed the award of attorney's fees because, to the extent that it was based on the efforts of Louise Truax, one of the plaintiff's attorneys, to comply with the orders of the arbitrator, the award does not conform to the submission; (2) the award of attorney's fees to Gary Cohen, another of the plaintiff's attorneys, does not conform to the submission and violates public policy because the court never approved an agreement to arbitrate Cohen's fees pursuant to General Statutes § 46b-66 (c); (3) the court improperly confirmed the award of attorney's fees related to motions to reargue the underlying judgment because the arbitrator exceeded his powers by issuing an award that was contrary to the dissolution judgment, which specified that each party should bear its own fees and costs, and thereby "effectively undid the carefully crafted financial mosaic rendered by the [dissolution] court in the underlying dissolution"; and (4) we should invoke our supervisory authority to provide guidance to the trial courts

with respect to the proper application of § 46b-66 (c) and reverse the court's approval of the parties' agreement to arbitrate the plaintiff's motion for counsel fees, dated March 19, 2014. In response, the plaintiff contends that the defendant has not preserved any of the claims he raises on appeal and that our use of supervisory authority is not warranted in this case. We agree with the plaintiff and, therefore, affirm the judgments of the court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved in January, 2009. In its memorandum of decision, the dissolution court determined that "[e]ach party will be responsible for their own counsel and expert fees." The parties subsequently engaged in extensive postjudgment litigation and, beginning in 2012, voluntarily entered into written agreements to arbitrate certain disputes.[1] Among the issues the parties submitted to arbitration were their respective requests for postjudgment attorney's fees. Specifically, the plaintiff submitted two motions for attorney's fees to the arbitrator, and the defendant submitted one motion for attorney's fees to the arbitrator. The only motion for attorney's fees relevant to this appeal is the plaintiff's March 19, 2014 motion, signed by Truax, which stated: "The plaintiff respectfully represents that this court award her a reasonable sum of counsel fees, postjudgment, for fees already incurred by her and to be incurred by her as a result of the various postjudgment motions."

On September 22, 2016, the arbitrator issued his decision on the motions for postjudgment attorney's fees. The arbitrator granted the plaintiff's March 19, 2014 motion for attorney's fees in part, awarding the plaintiff

[1] Their initial arbitration agreement was signed on August 6, 2012. It subsequently was amended by agreements dated January 28, 2013, May 12, 2014, and July 30, 2014. Each arbitration agreement was approved by the court.

$444,116.17 in attorney's fees incurred by her for services rendered by Truax and Cohen. The arbitrator referred to the court the consideration of certain additional attorney's fees claims. On September 23, 2016, the plaintiff filed in the court a motion to confirm the arbitration award, and on September 30, 2016, the defendant filed a motion to vacate that award in part. The court held a hearing on November 7, 2016, and thereafter granted the plaintiff's motion to confirm the arbitration award and denied the defendant's motion to vacate that award in part. This appeal followed.

I

The defendant first claims that the court improperly confirmed the award of attorney's fees related to Truax' efforts to comply with the orders of the arbitrator because the award does not conform to the submission. In response, the plaintiff contends that the defendant has not preserved that claim on appeal. We agree with the plaintiff.

The following additional facts are relevant to this claim. On September 8, 2015, the arbitrator sent an e-mail to the parties' counsel stating that they "must specifically apportion in their affidavits for counsel fees attribution of fees to specific motions, by title date and number, for which any party seeks an award" (arbitrator's order). On December 1, 2015, Truax submitted an affidavit of attorney's fees postjudgment. During the arbitration hearing, the defendant's counsel objected when the plaintiff's counsel sought to admit Truax' December 1, 2015 affidavit into evidence because it did not comport with the arbitrator's order. The parties' counsel disagreed as to whether they had reached an agreement modifying the arbitrator's order. On the basis of that dispute, the arbitrator gave counsel "an opportunity to submit whatever documents that they wish to submit and specifically referencing affidavits which

comport with this [September 8, 2015] order within two weeks." Subsequently, Truax submitted seventy-two affidavits of attorney's fees in an attempt to comply with that order. Those fees included time related to her efforts to comply with the arbitrator's order.

In his posthearing brief submitted to the arbitrator, the defendant argued that it was evidentiary error for the arbitrator to allow the plaintiff to submit additional affidavits and that the arbitrator did not have a proper record to make an award based on those affidavits. The defendant did not argue that the award of fees relating to Truax' efforts to comply with the arbitrator's order failed to conform to the submission.

In his decision, the arbitrator, inter alia, granted in part the plaintiff's motion for attorney's fees in the amounts of $37,985.22 and $73,730 on the basis of two of Truax' affidavits. The arbitrator concluded that "Truax expended [these] fees in furtherance of the [September 8, 2015] order of the arbitrator, which provided the arbitrator with the ability to parse with precision the fees appropriately recoverable. . . . The arbitrator [found] that the evidence presented by the plaintiff [was] credible and that she met her evidentiary burden of the reasonableness of the fees requested."

In his motion to vacate the arbitration award in part, the defendant argued that the arbitrator engaged in evidentiary misconduct in awarding these fees.[2] Specifically, the defendant argued that the arbitrator relied

[2] We note that the defendant argued that the arbitrator committed misconduct pursuant to the arbitration agreement and General Statutes § 52-418 (a) (3). Section 52-418 (a) (3) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award . . . if the arbitrators have been guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced . . . ." Although the defendant does not make clear how § 52-418 (a) (3) supports his claim of evidentiary misconduct, we note that the record contains no evidence that the arbitrator refused to hear evidence.

on affidavits that included claims for prior proceedings not before the arbitrator, that there was insufficient evidence presented to support the fee claims, and that the arbitrator improperly allowed Truax two weeks to prepare additional affidavits and improperly admitted those affidavits into evidence. The defendant made no claim that the award of these fees should be vacated because they did not conform to the submission.[3]

On appeal to this court, the defendant argues that the arbitrator's award of these fees should be vacated because the award did not conform to the submission due to the fact that the parties did not submit to the arbitrator the issue of fees incurred by Truax in her

[3] The defendant did argue in his reply to the plaintiff's objection to his motion to vacate the arbitration award in part that if the court found that the arbitration agreement was an unrestricted submission, it should find that the award failed to conform to the submission because the arbitrator ordered that the resolution of some of the attorney's fees claims were referred to the court.

At the November 7, 2016 hearing before the court, the defendant's counsel again made that argument. After the defendant's counsel argued that the arbitration agreement was a restricted submission, the following colloquy occurred:

"The Court: And you have the alternative argument that even if I find—I don't find that argument compelling, that even if I find it to be unrestricted, I should vacate it because it didn't—it didn't conform to the submission. Okay.

"[The Defendant's Counsel]: It didn't—it didn't comply with the submission, and that—

"The Court: Okay.

"[The Defendant's Counsel]: —and that is the issue of where he exceeded his jurisdiction.

"The Court: Yes.

"[The Defendant's Counsel]: Just the very fact that we did have to come back to Your Honor at the arbitrator's request to resolve the issue of whether the interest and some of the other issues that—that were raised by plaintiff's counsel were included in the arbitration, makes it clear that—that he knew that he was bound by the law, he was bound by the rules of evidence and he was bound by the arbitration agreement. So this isn't a free-floating free-for-all where the parties just hope to mediate this or—or try to, you know, come to some agreement. This was—this was a very rigid and carefully crafted arbitration agreement."

efforts to comply with the arbitrator's order. The plaintiff contends that the defendant has not preserved that claim on appeal. In his appellate reply brief, the defendant provides various reasons why this court should review his claim on appeal.[4] We are not persuaded.

"It is fundamental that claims of error must be distinctly raised and decided in the trial court. . . . Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise such claims before the trial court. Practice Book § 60-5; see Practice Book § 5-2 ([a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority); see also *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010) (raised distinctly means party must bring to attention of trial court precise matter on which decision is being asked). As our Supreme Court has explained, [t]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . For that reason, Connecticut appellate courts generally will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *21st Century*

[4] In particular, the defendant argues that this court should review this claim because: (1) he raised before the court the argument that these fees were improperly awarded; (2) at the hearing before the court, the court mentioned his "alternative argument"; see footnote 3 of this opinion; that if it determined that the arbitration was an unrestricted submission, it should vacate the award because the award did not conform to the submission and, in its decision, the court found that the award conforms to the submission; (3) the argument was functionally raised before the court; (4) the plaintiff would not be prejudiced if the claim is reviewed; (5) "the court approval requirements of [General Statutes] § 46b-66 (c) have not previously been addressed by either this court or the Supreme Court and the issue presents a matter of important public policy"; and (6) the issue is one of law and this court's review is plenary.

North America Ins. Co. v. *Perez*, 177 Conn. App. 802, 819–20, 173 A.3d 64 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

"It is true that our appellate courts occasionally have expressed a willingness to review claims that a party did not explicitly raise to the trial court if it is clear from the record that the substance of the claim was raised." (Internal quotation marks omitted.) *McMahon* v. *Middletown*, 181 Conn. App. 68, 76–78, 186 A.3d 58 (2018). "[A]lthough a party need not use the term of art applicable to the claim, or cite to a particular statutory provision or rule of practice to functionally preserve a claim, he or she must have argued the underlying principles or rules at the trial court level in order to obtain appellate review." *State* v. *Santana*, 313 Conn. 461, 468, 97 A.3d 963 (2014), cert. denied sub nom. *Anderson* v. *Semple*, U.S. , 135 S. Ct. 1453, 191 L. Ed. 2d 403 (2015).

On the basis of our review of the record, we cannot fairly say that the defendant's claim on appeal was raised distinctly, or even functionally, before the court. The defendant correctly points out that he had argued before the court that these fees were improperly awarded. As we have addressed, the defendant raised before the court various issues he had with the arbitrator's evidentiary rulings and the arbitrator's reliance on certain evidence. He also directs our attention to the court's acknowledgment of the alternative argument he raised before the court that if the court found that the arbitration agreement was an unrestricted submission, it should vacate the award. In making that argument, however, the defendant specifically asserted that the award did not conform to the submission because, by leaving the decision as to certain attorney's fees awards to the court, the arbitrator "fail[ed] to fully address the issue submitted . . . ." See footnote 3 of this opinion. We cannot conclude that, by making these arguments

before the court, the defendant argued the underlying principles of the claim he now raises on appeal. In the proceeding below, neither the court nor the plaintiff was apprised of the claim he makes on appeal before this court that these particular fee awards did not conform to the submission because they were "not included in the parties' arbitration agreement and the [court] never approved any agreement to arbitrate the issue of fees incurred in an effort to comply with the [arbitrator's order]." Accordingly, the defendant's claim is not preserved.

II

The defendant next argues that the award of Cohen's attorney's fees does not conform to the submission and violates public policy because the court never approved an agreement to arbitrate Cohen's fees pursuant to § 46b-66 (c).[5] In response, the plaintiff again contends that the defendant has not preserved this claim on appeal. Because the record reveals that the defendant agreed at the arbitration hearing to have Cohen's fees resolved by the arbitrator and did not assert before the court the claim he now raises on appeal, we agree with the plaintiff that this claim is not preserved.

The following additional facts are relevant to this claim. The plaintiff filed with the court a postjudgment motion for attorney's fees dated November 13, 2015,

[5] General Statutes § 46b-66 (c) provides: "The provisions of chapter 909 [General Statutes § 52-408 et seq.] shall be applicable to any agreement to arbitrate in an action for dissolution of marriage under this chapter, provided (1) an arbitration pursuant to such agreement may proceed only after the court has made a thorough inquiry and is satisfied that (A) each party entered into such agreement voluntarily and without coercion, and (B) such agreement is fair and equitable under the circumstances, and (2) such agreement and an arbitration pursuant to such agreement shall not include issues related to child support, visitation and custody. An arbitration award in such action shall be confirmed, modified or vacated in accordance with the provisions of chapter 909."

signed by Cohen,[6] which was not included in the operative arbitration agreement as a motion to be decided by the arbitrator. Before the arbitrator, the defendant's counsel articulated an agreement reached by the parties' counsel to have the arbitrator consider Cohen's motion. The defendant's counsel stated: "It is not part of the third amended arbitration agreement. But I believe that we have an agreement of counsel that we would proceed on that because we would like to avoid a duplication of effort." Cohen provided the following recitation for the record: "So may we have a specific recitation so there's no confusion on the record? That . . . Truax' claim for counsel fees is within the scope of the arbitration and now before the arbitrator; [counsel for the defendant's] motion for counsel fees on behalf of the defendant is within the scope of the arbitration and now before the arbitrator; my motion for counsel fees is now by stipulation within the scope of the arbitration and before the arbitrator. Might I ask if we can have a verbal assent to that recitation so the record is clear?" The defendant's counsel and Truax agreed with Cohen's recitation.[7] Pursuant to this agreement, the arbitrator granted Cohen's request for attorney's

[6] The motion stated: "The plaintiff in the above-captioned matter respectfully represents that she is without sufficient liquid assets or income with which to pay her reasonable counsel fees. The plaintiff further represents that the defendant has sole control over the parties' marital assets, and that the defendant has circumvented the plaintiff's entitlement to equitable distribution, and to her entitlement to alimony and child support. WHEREFORE, the plaintiff respectfully moves the court to order the defendant to pay a reasonable sum as and for her counsel fees in accordance with [General Statutes] § 46b-62. The plaintiff requests such other and further relief to which she may be entitled in law or equity."

[7] Truax added: "The only thing that I would add is that part of the arbitration order is that everything that happens here is confidential and that, therefore, the transcript is confidential. I would ask that everybody agree that if anybody takes a position otherwise in court to try to challenge the scope, that that part of the transcript not be confidential." The defendant's counsel and Cohen agreed to that request.

fees under the plaintiff's motion for attorney's fees postjudgment, dated March 19, 2014.[8]

Before the court, the defendant never claimed that the award of Cohen's fees did not conform to the submission or that the award violated public policy. Instead, as he acknowledges in his appellate brief, the defendant had argued "that the evidence established that Attorney Cohen was not owed the amount he sought." The record reveals that the defendant presented nothing before the court to demonstrate that his current claim, that the award does not conform to the submission and that it violates public policy, was distinctly or even functionally raised before the court. See *21st Century North America Ins. Co.* v. *Perez*, supra, 177 Conn. App. 819 ("[i]t is fundamental that claims of error must be distinctly raised and decided in the trial court" [internal quotation marks omitted]); *State* v. *Santana*, supra, 313 Conn. 468 ("[an appellant] must have argued the underlying principles or rules at the trial court level in order to obtain appellate review"). Accordingly, the defendant's claim is not preserved.

The defendant argues that this court should nonetheless review this claim under the plain error doctrine. "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate

[8] During the arbitration, when Cohen submitted the affidavit for his attorney's fees, the arbitrator opined that Cohen's motion fell within the plaintiff's motion for counsel fees postjudgment, dated March 19, 2014. The following colloquy occurred:

"Attorney Cohen: . . . I would like to submit my affidavit with counsel fees in connection with my motion for fees under [§] 46b-62.

"[The Defendant's Counsel]: I object. I think we should finish this motion first and do that—

"Attorney Cohen: It is part of this motion. Motion for counsel fees.

"[The Defendant's counsel]: This is Attorney Truax' motion.

"The Arbitrator: Well, that's interesting. Well, that doesn't mean that Attorney Cohen's submission is precluded because this reference—this does not limit the request for an award in connection only to Attorney Truax' fees. This is the plaintiff's motion for counsel fees."

courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it 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 the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [defendant] simply to demonstrate that his position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must demonstrate that the claimed impropriety was so clear,

obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *In re Sydnei V.*, 168 Conn. App. 538, 562–64, 147 A.3d 147, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016).

The defendant has demonstrated neither that the court made a plain and obvious error nor that the failure to grant relief will result in manifest injustice, particularly when the defendant agreed to permit the arbitrator to resolve this issue relating to Cohen's claim for attorney's fees. Accordingly, we decline the defendant's request to reverse the court's judgments pursuant to the plain error doctrine.

III

The defendant also argues that the court improperly confirmed the award of attorney's fees related to motions to reargue the underlying judgment because the arbitrator exceeded his powers by issuing an award that was contrary to the dissolution judgment, which specified that each party should bear their own fees and costs, and the arbitrator thereby "effectively undid the carefully crafted financial mosaic rendered by the

[dissolution] court in the underlying dissolution."[9] In response, the plaintiff contends that the defendant has not preserved this claim. We agree with the plaintiff.

The following additional facts are relevant to this claim. During the arbitration hearing, Truax submitted an affidavit of attorney's fees for fees incurred related to the plaintiff's postjudgment motion to reargue, correct, clarify and/or articulate the judgment (plaintiff's postjudgment motion to reargue) and the defendant's postjudgment motion to open, reargue and clarify (defendant's postjudgment motion to reargue).[10] The requested fees amounted to $301,316.55.

In the defendant's memorandum on the attorney's fees motions, which was submitted to the arbitrator prior to the issuance of his decision, the defendant did

[9] The defendant also argues that the award of attorney's fees related to the motions to reargue the underlying judgment should be vacated because the award does not conform to the submission. As we discussed in part I of this opinion, the defendant argued before the court that if it found that the arbitration agreement was an unrestricted submission, it should vacate the award because, by leaving decision as to some attorney's fees awards to the court, the arbitrator "fail[ed] to fully address the issue submitted" and the award, therefore, did not conform to the submission.

We cannot conclude that the defendant, by making that argument before the court, argued the underlying principles of the claim he now raises on appeal, in which he argues that the award of these fees does not conform to the submission because "those fees were incurred based on both parties' efforts to change the [dissolution] judgment entered . . . in January, 2009, and, therefore, were not 'postjudgment' motions as contemplated by the parties' arbitration agreement or by the [court's] approval of that agreement." Accordingly, the defendant's claim that the award of these fees does not conform to the submission is not preserved. See *21st Century North America Ins. Co.* v. *Perez*, supra, 177 Conn. App. 819 ("[i]t is fundamental that claims of error must be distinctly raised and decided in the trial court" [internal quotation marks omitted]); *State* v. *Santana*, supra, 313 Conn. 468 ("[an appellant] must have argued the underlying principles or rules at the trial court level in order to obtain appellate review").

[10] We note that both motions to reargue were included within the operative arbitration agreement as issues submitted to the arbitrator, "with the exception of those issues related to the parenting plan, which are specifically excluded from the arbitration . . . ."

not argue that the arbitrator would exceed his authority and unravel the financial mosaic if he awarded the plaintiff these fees. Instead, the defendant argued that the plaintiff did not provide evidence to show that she lacked sufficient assets to pay her own fees and that it would be inequitable for the defendant to have to pay the plaintiff's fees.

In his decision, the arbitrator, inter alia, granted the plaintiff the $301,316.55 in attorney's fees pursuant to her March 19, 2014 motion for attorney's fees. In granting the award of fees, the arbitrator reasoned: "The plaintiff's financial affidavit dated June 21, 2016 discloses assets of $2,194,827. The fee award requested represents 13.72 percent of the plaintiff's total assets awarded to her pursuant to the dissolution of marriage judgment and arbitration orders. The plaintiff's request for Attorney Truax' counsel fees is granted. . . . The arbitrator finds that the evidence presented by the plaintiff is credible and she met her evidentiary burden of the reasonableness of the fees requested." (Citation omitted.)

The defendant asserts that, before the court, he had "moved to vacate the award based in part because the arbitrator had exceeded his authority and in part because the arbitrator had refashioned the trial court's financial mosaic." The defendant, however, mischaracterizes the argument he made to the court. He points our attention to specific language he used without acknowledging the context in which it was used.[11] In

[11] In his appellate reply brief, the defendant argues that this court should review his claim on appeal because various sentences included in his application to vacate the arbitration award in part place the claim properly before this court. Specifically, the defendant contends that, within his motion to vacate the arbitration award in part, he "clearly invokes both the 'American Rule' regarding attorney's fees, as well as the [dissolution] court's order that '[e]ach party will be responsible for their own counsel and expert fees.' " He asserts that he also had "noted that in rendering his decision on equitable distribution of the marital assets, the arbitrator made clear that he was not refashioning the orders of the [dissolution] court."

his motion to vacate the arbitration award in part, the defendant argued that this fee award should be vacated because the arbitrator engaged in misconduct in various ways. Specifically, he argued that the arbitrator improperly based the award of fees on the current finances of the parties, rather than on the finances of the parties at the time of the dissolution.[12] On appeal, however, the defendant argues that the arbitrator should not have awarded fees at all and that doing so was in contravention of the dissolution judgment.

Accordingly, we simply cannot conclude that the underlying principles of the defendant's claim on appeal were argued before the court. See *21st Century North*

Finally, the defendant points out that he had stated in his motion to vacate the arbitration award in part that any "obligation to pay the plaintiff's counsel fees would improperly undermine the original financial orders in the judgment of divorce, which the arbitrator . . . definitively stated he was not altering." For context, this statement is located within a paragraph of the defendant's motion to vacate the arbitration award in part, which provides in its entirety: "Instead, the award of fees must be considered in the context of the original judgment of dissolution, and the parties resulting financial circumstances. The plaintiff failed to present sufficient evidence for the arbitrator to enter a properly supported decision in that context. To the extent there was any such evidence, the financial affidavits of the parties at the time of [the dissolution] trial showed that the marital estate at the time of dissolution was between $4,000,000 [and] $5,000,000 in total. The [dissolution] court's intention in its judgment was to divide that estate 50/50. Pursuant to the arbitrator's orders on equitable distribution, the plaintiff had recently received more than $2,000,000. The evidence demonstrated that the defendant has shouldered significant counsel fees of his own regarding this issue, and the combination of his fees and an obligation to pay the plaintiff's counsel fees would improperly undermine the original financial orders in the judgment of divorce, which the arbitrator has definitively stated he was not altering. See *Fitzgerald* v. *Fitzgerald*, 190 Conn. 26, 34 [459 A.2d 498] (1983) (court's decision regarding attorney's fees should not undermine its purpose in making any other financial award)."

[12] In his application to the court to vacate the arbitration award in part, the defendant had also argued that the arbitrator could not base the award of fees on the present finances of the parties because the evidence presented was insufficient as to what the plaintiff's current finances were. He further argued that the plaintiff's description of the fees left the arbitrator with insufficient evidence on which he could base the fee award.

America Ins. Co. v. *Perez*, supra, 177 Conn. App. 819 ("[i]t is fundamental that claims of error must be distinctly raised and decided in the trial court" [internal quotation marks omitted]); *State* v. *Santana*, supra, 313 Conn. 468 ("[an appellant] must have argued the underlying principles or rules at the trial court level in order to obtain appellate review"). The defendant's claim is, thus, not preserved.

IV

Finally, the defendant claims that we should invoke our supervisory authority to provide guidance to the trial courts regarding the proper application of § 46b-66 (c)[13] and, in so doing, reverse the court's approval of the parties' agreement to arbitrate the plaintiff's motion for attorney's fees, dated March 19, 2014. In response, the plaintiff contends that the use of our supervisory authority is not warranted in this case. We decline to exercise our supervisory authority in the present case.

"Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory

[13] See footnote 5 of this opinion.

powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice . . . .'' (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015). This is not such a case. Accordingly, we decline the defendant's invitation to exercise our supervisory authority in the present case.

The judgments are affirmed.

In this opinion the other judges concurred.

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Dissolution of marriage; arbitration; reviewability of unpreserved claim that trial court improperly confirmed award of attorney's fees incurred by plaintiff's counsel in complying with order of arbitrator because award did not conform to arbitration submission approved by court; claim that court committed plain error in denying motion to vacate arbitration award on grounds that award of attorney's fees did not conform to arbitration submission approved by court and violated public policy; reviewability of unpreserved claim that court improperly confirmed award of attorney's fees associated with certain motions to reargue underlying judgment because award was contrary dissolution judgment; request for this court to exercise its supervisory authority over administration of justice to reverse trial court's approval of agreement to arbitrate and to provide guidance to trial courts regarding proper application of statute (§ 46b-66 [c]) governing

procedure to be followed when parties in dissolution proceeding agree to binding arbitration.

DeMaria *v.* Bridgeport 449

Personal injury; claim that defendant city was liable under municipal defective highway statute (§ 13a-149) for damages plaintiff sustained in fall on sidewalk owned by city; whether trial court improperly admitted into evidence, under applicable statute (§ 52-174 [b]), certain medical records that had been written by plaintiff's primary care provider, who worked in veterans affairs hospital; claim that our Supreme Court previously had recognized standard for admissibility of medical records under § 52-174 (b) that requires only that plaintiff testify as to relevance of records and that records originated from hospital; whether medical records at issue should not have been admitted where, as here, author of records was prohibited, pursuant to applicable federal regulation (38 C.F.R. § 14.808), from providing any opinion or expert testimony in any forum and, thus, was unavailable for cross-examination; whether city was harmed by improper admission of medical records.

Farmington-Girard, LLC *v.* Planning & Zoning Commission 743

Zoning; administrative appeals; subject matter jurisdiction; claim that trial court improperly dismissed appeals for failure to exhaust administrative remedies; whether trial court properly concluded that plaintiff was required to appeal to city's zoning board of appeals from decision of city's director of planning division voiding its special permit application; whether trial court properly concluded that city's zoning regulations provided director with authority to declare special permit application void; whether zoning regulations supported plaintiff's claim that only defendant city planning and zoning commission had authority to declare application void; claim that there was no statutory or regulatory avenue for appeal of decision voiding application; claim that appeal to board would have been futile.

Ferrari *v.* Johnson & Johnson, Inc. 152

Product liability; whether trial court properly granted motion for summary judgment as to design defect and breach of warranty claims; whether expert testimony was required to establish that product was defective and that alleged defect caused plaintiff's injury; whether ordinary consumer expectation test was applicable such that jury would not need expert testimony; whether trial court properly rendered summary judgment as to failure to warn claim on basis of learned intermediary doctrine.

Fisk *v.* Redding 99

Public nuisance; whether trial court abused its discretion in denying motion to set aside verdict; claim that jury's answers to special interrogatories in verdict form were inconsistent and could not be harmonized; claim that trial court erred in excluding evidence of subsequent remedial measures taken by defendant; whether evidence of remedial measures was inadmissible to prove defendant's liability for nuisance.

Flagstar Bank, FSB *v.* Kepple 312

Foreclosure; claim that plaintiff lacked standing to commence foreclosure action; whether defendants failed to rebut presumption that plaintiff, as holder of note, was rightful owner of underlying debt and, therefore, had standing to commence foreclosure action; whether statement by trial court at hearing constituted finding of fact.

Hilario Truck Center, LLC *v.* Kohn 443

Contracts; third-party beneficiary; whether plaintiff towing company that provided towing services to defendant insured motorist had standing as third-party beneficiary to bring direct breach of contract action against defendant insurance company that provided automobile liability coverage to motorist; whether plaintiff met its burden of demonstrating that trial court committed error by granting motion to dismiss.

In re Anaishaly C. 667

Termination of parental rights; whether there was insufficient evidence for trial court to find by clear and convincing evidence that respondent parents had each failed to achieve degree of personal rehabilitation as would encourage belief that, within reasonable time, they could assume responsible position in lives of children; claim that there was no evidence that respondents' use of marijuana affected their ability to parent, and that because law concerning criminalization of marijuana had changed, that change had to be reflected in law concerning child protection; claim that there was insufficient evidence for trial court to

conclude that respondents had failed to rehabilitate on basis of their problems with domestic violence; claim that respondents' housing situation did not support trial court's ultimate conclusion that they had failed to rehabilitate; claim that trial court's conclusion that termination of respondents' parental rights was in best interests of children was improper where, as here, court found, inter alia, that respondents had made progress in their rehabilitation and that they had strong bond with children.

In re Elizabeth B. (Memorandum Decision) 902

In re Natalia M. 583

Termination of parental rights; mootness; claim that trial court improperly concluded that Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 [j] [1]); failure of respondent father to challenge trial court's finding that he was unable or unwilling to benefit from reunification efforts, which was separate independent basis for upholding trial court's determination that requirements of § 17a-112 (j) (1) had been satisfied; whether there was practical relief that could be afforded to father; whether appeal was moot.

In re Probate Appeal of Knott 56

Probate appeal; whether trial court properly dismissed probate appeal as untimely on ground that substitute plaintiff did not appeal within time limits set by applicable statute (§ 45a-186 [a]); whether time limits for filing probate appeal were tolled by filing of application for waiver of fees pursuant to applicable statute (§ 45a-186c [b]).

Jackson *v.* Commissioner of Correction (Memorandum Decision) 901

Jordan *v.* Commissioner of Correction 557

Habeas corpus; subject matter jurisdiction; manslaughter in first degree with firearm; carrying pistol or revolver without permit; claim that respondent Commissioner of Correction entered into, and subsequently breached, purported contract to award petitioner risk reduction credit in exchange for petitioner's adherence to offender accountability plan; whether habeas court properly dismissed petitioner's breach of contract claim for lack of subject matter jurisdiction; whether petitioner's claim gave rise to cognizable liberty interest.

Kaminski *v.* Poirot. 214

Legal malpractice; whether trial court properly granted motion for summary judgment; whether trial court properly determined that action was commenced beyond three year statute of limitations (§ 52-577) applicable to tort claims.

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.

Pamela Corp. *v.* Planning & Zoning Commission (See Farmington-Girard, LLC *v.* Planning & Zoning Commission) 743

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 B. *v.* Commissioner of Correction 817
Habeas corpus; whether habeas court properly denied petition for writ of habeas corpus; whether petitioner demonstrated that he was prejudiced or harmed by his trial counsel's failure to assert statute of limitations affirmative defense to charges with respect to eighteen month delay between issuance of arrest warrant and execution of arrest warrant; claim that habeas court incorrectly determined that five year statute of limitations (§ 54-193), and not State *v.* Crawford *(202 Conn. 443), was controlling law on statute of limitations affirmative defense; claim that habeas court incorrectly determined that § 54-193 (d) tolled limitation period; claim that habeas court improperly concluded that petitioner had been elusive, unavailable and unapproachable by police once arrest warrant had been issued; whether habeas court properly found that petitioner failed to demonstrate that state could not prove that time in which arrest warrant was served was reasonable; whether habeas court properly found that trial counsel's representation of petitioner did not fall below objective standard of reasonableness; whether petitioner proved that he was prejudiced by counsel's performance.*
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.* Pugh 794

Robbery in first degree; assault in first degree; carrying pistol or revolver without permit; whether evidence of defendant's identity was sufficient to support conviction; claim that trial court violated defendant's right to due process when it denied motion to dismiss charge; claim that defendant was substantially prejudiced by twenty-three month delay between time crimes were committed and date of his arrest; claim that in absence of delay in defendant's arrest, he would have been able to obtain certain employment records that would have shown he was at work when crimes took place; claim that delay in defendant's arrest resulted in faded memories of witnesses; whether defendant showed that, in absence of delay in his arrest, information pertaining to his cell phone number would have been available at trial to show that he was not in vicinity of robbery and shooting at time it occurred; whether trial court committed plain error by giving jury consciousness of guilt instruction regarding letter defendant wrote to girlfriend; claim that consciousness of guilt instruction improperly bolstered insufficient case; whether letter was highly probative of and supported reasonable inference as to whether defendant tampered with witness.

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.
State *v.* Turner 693
Felony murder; robbery in first degree; attempt to possess narcotics; claim that defendant's due process rights were violated because trial court improperly allowed jury to base guilty verdict on legally invalid but factually supported theory that completed larceny by false pretenses, which was accomplished by bail scheme, that preceded use of force, and was part of continuous course of larcenous

conduct, could be predicate felony for robbery and felony murder; claim that larceny by false pretenses could not be predicate felony for robbery or felony murder because no force was used to obtain property; claim that there was insufficient evidence to support conviction of attempt to possess narcotics; claim that there was insufficient evidence that defendant actively attempted to possess narcotics.

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

U.S. Bank, National Assn. *v.* Fitzpatrick 773

Foreclosure; standing; special defenses; claim that trial court improperly denied motion to dismiss action; whether trial court correctly determined that plaintiff had standing to bring action; whether plaintiff demonstrated that it was valid holder of note and owner of the debt with standing to pursue action; whether defendant failed to satisfy his burden of proving that another party was owner of subject note and debt; claim that trial court improperly granted motion for summary judgment as to liability; claim that genuine issues of material fact existed as to plaintiff's standing; whether defendant failed to meet his burden of demonstrating that genuine issues of material fact existed as to his equitable defenses of laches and unclean hands.

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.

CONNECTICUT APPELLATE REPORTS

Vol. 191

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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BRANT SMITH *v.* MARSHVIEW FITNESS, LLC, ET AL.
(AC 41219)

Prescott, Elgo and Bishop, Js.

Syllabus

The plaintiff brought an action against the defendant M Co., seeking to recover, inter alia, damages for the allegedly fraudulent transfer of certain assets to M Co. The plaintiff, who was the owner of two fitness centers, sold the businesses to R, who bought the businesses through C Co. and O Co. That purchase was financed by a bank loan from W Co. that was secured by a security interest in the assets of C Co. and O Co. Subsequently, M Co. reached an agreement with R to purchase the assets of C Co. and O Co. The agreement was approved by W Co., which subsequently released its lien on the assets of C Co. and O Co. in exchange for $100,000, even though its loan exceeded $800,000, and the plaintiff released his subordinate lien on those assets in exchange for $59,806.13. M Co. then sold the assets of C Co. and O Co. to a new tenant in the building for $159,806.13. The plaintiff thereafter brought the present action, alleging violations of the Uniform Fraudulent Transfer Act (UFTA) (§ 52-552a et seq.), common-law fraudulent transfer, and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). The plaintiff claimed that M Co., C Co., and O Co. conspired to strip C Co. and O Co. of assets sufficient to satisfy their indebtedness to him by fraudulently transferring those assets to M Co. for a price that was not reasonably equivalent to their value. After the trial court granted a motion for summary judgment filed by M Co. and rendered judgment thereon, it denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly concluded that the transfer of the property of C Co. and O Co. to M Co. was not fraudulent under the common law or UFTA, which was based on the court's determination that the property did not constitute "assets" because it was encumbered by a valid lien in excess of its value: that court determined, on the basis of an affidavit submitted by the plaintiff's expert witness, that because it was undisputed that the property transferred to M Co. had a value of $551,437 and was encumbered by a valid lien held by W Co. in excess of $800,000 at the time of that transfer, it did not meet the definition of "assets," the plaintiff's own deposition testimony and an affidavit submitted by a member of M Co. supported the court's finding as to the amount of the W Co. lien, and the plaintiff did not submit any evidence in opposition to the motion for summary judgment that disputed the amount of that lien; moreover, the plaintiff's claim that the transfer of assets was not limited to the personal property or equipment of C Co. and O Co. but, instead, included the businesses of C Co. and O Co., the value of which exceeded the W Co. lien, was unavailing, as the record was clear that M Co. did not purchase the businesses of C Co. and O Co. but only the personal property, consisting of the gym and office equipment, and, therefore, the record supported the trial court's determination that the property transferred to M Co. did not constitute "assets" that were subject to fraudulent conveyance because there was no genuine issue of material fact that the property was encumbered by a valid lien that exceeded its value at the time of the transfer.

2. The plaintiff could not prevail on his claim that the trial court improperly rendered summary judgment on his CUTPA claim, which was based on his claim that the underlying conduct on which he claimed that M Co. violated CUTPA was broader than the facts supporting his fraudulent transfer claims: the plaintiff's claim was belied by the complaint itself, wherein the plaintiff simply incorporated the facts from his fraudulent transfer counts and added allegations that those facts constituted an unfair or deceptive practice by M Co. that caused him to suffer an ascertainable loss in violation of CUTPA, and although, with respect to his fraudulent transfer claims, the plaintiff set forth an allegation, which he then incorporated into his CUTPA count, that M Co. secretly conspired to purchase the property from C Co. and O Co. to strip them of any assets to satisfy their debts to him, such a bare assertion did not raise a claim of a deceptive or unfair trade practice that was factually or legally distinct from the plaintiff's claims relating to alleged fraudulent transfers; moreover, the plaintiff's discussion of this issue in his brief on appeal was confined to a single paragraph in which he failed to explain, other than in sweeping generalities, how that allegation, if proven, would amount to an unfair trade practice, separate and distinct from the claims relating to fraudulent transfer.

3. The trial court did not abuse its discretion in denying the plaintiff's motion to reargue the motion for summary judgment; the plaintiff's motion to reargue sought to rehash the arguments that the plaintiff previously had made in opposition to the motion for summary judgment, which had already been presented to, and rejected by, the trial court.

Argued March 11—officially released June 25, 2019

Procedural History

Action to recover damages for, inter alia, the allegedly fraudulent transfer of certain property to the named defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed*.

Rowena A. Moffett, for the appellant (plaintiff).

Kenneth J. McDonnell, with whom, on the brief, was *Michael L. McGlinchey*, for the appellee (named defendant).

Opinion

PRESCOTT, J. In this commercial dispute relating to the sale of certain property belonging to two fitness centers, the plaintiff, Brant Smith, appeals from the summary judgment rendered in favor of the defendant Marshview Fitness, LLC.[1] The trial court concluded that the defendant was entitled to summary judgment because the transfer of certain property, in which the plaintiff claims to have had an economic interest, was not fraudulent, as a matter of law, under either the common law or the Uniform Fraudulent Transfer Act (UFTA), General Statutes § 52-552a et seq. In doing so,

[1] SHF-Clinton, LLC, and SHF-Old Saybrook, LLC, also are defendants in this action. They have been defaulted for failing to appear and the claims against them are still pending. Because they have not participated in this appeal, any reference herein to the defendant is to Marshview Fitness, LLC.

the trial court also rejected the plaintiff's related claim under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On appeal, the plaintiff claims, among other things,[2] that the trial court improperly (1) concluded that the transfer at issue was not fraudulent under the common law or UFTA because the property that was transferred did not constitute "assets," (2) rejected his CUTPA claim on the ground that it was based solely on his allegations of fraudulent transfer, and (3) denied his motion to reargue. We affirm the judgment of the trial court.

The trial court set forth the following factual and procedural history. "The plaintiff was the owner of two fitness centers that had been operated as 'Shoreline Health and Fitness' in Clinton and Old Saybrook, Connecticut. On September 15, 2010, the plaintiff and his former partners sold the businesses to Ryan Rothschild. Rothschild bought the businesses through two separate companies, SHF-Clinton, LLC, and SHF-Old Saybrook, LLC (SHF entities). The Rothschild/SHF entities' purchase of the plaintiff's fitness centers was financed by Wells Fargo Bank [Wells Fargo] under a program sponsored by the United States Small Business Administration [SBA]. The principal amount of the Wells Fargo loan at the time of the plaintiff's sale to the SHF entities was $1.2 million. That loan was secured by a security interest in the assets of the SHF entities, which was prior in right to the security interest of the plaintiff.

[2] With respect to the fraudulent transfer claims, the plaintiff challenges each of the three legal grounds on which the court based its conclusion that the defendant was entitled to judgment as a matter of law on those claims. We agree that the property transferred did not qualify as an "asset" that could be transferred fraudulently in light of the fact that it was encumbered by a valid lien that exceeded its value. Accordingly, we need not address the plaintiff's challenges to the court's additional grounds for concluding that the transfer was not fraudulent.

"As part consideration for the sale to Rothschild, the plaintiff took back a promissory note for $150,000 and another note for $300,000. Rothschild defaulted on the notes, and the plaintiff commenced [an action] against him titled *Smith* v. *Rothschild*, [Superior Court, judicial district of Middlesex, Docket No. CV-14-6012641-S] (Rothschild action). In that case, the plaintiff filed a motion for temporary injunction and court-ordered inspection of company records dated October 21, 2014. That motion sought to enjoin Rothschild from selling the interests or assets of the SHF entities and an order permitting the plaintiff to inspect and copy the books and records of the SHF entities. The plaintiff never sought a hearing or otherwise proceeded on the foregoing motion.

"In connection with the motion for temporary injunction, the plaintiff signed an affidavit in which he averred that the $300,000 note referred to above was secured by a security agreement [that] gave the plaintiff 'a continuing security interest in all of the assets of [the SHF entities].' . . . [The plaintiff] also averred that 'I maintain that I am entitled to a right of first refusal with respect to any proposed sale of the [SHF entities].' . . .

"While the plaintiff was litigating his claims against Rothschild, he was simultaneously negotiating with Rothschild to purchase the assets of the SHF entities. The plaintiff's offer to purchase the assets of the SHF entities was accepted by Rothschild. However, Wells Fargo did not accept the offer because SBA regulations prohibited repurchase of the assets by the plaintiff, a former owner. At that time, Rothschild and the SHF entities owed Wells Fargo in excess of $800,000 on the SBA loan used to purchase the assets from the plaintiff. Wells Fargo had to agree to release its security interest in the SHF entities' assets before [they] could be sold.

"[The defendant] was the landlord for the SHF-Clinton fitness center. The members of [the defendant] are

Todd Pozefsky and John Giannotti. After the plaintiff's failed attempt to purchase the assets of the SHF entities, Pozefsky and Giannotti negotiated with Rothschild for the purpose of purchasing the assets of the SHF entities so that Rothschild would voluntarily vacate the [defendant's] premises.

"[The defendant] reached an agreement with Rothschild to purchase the assets of the SHF entities. The agreement was approved by Wells Fargo, which agreed to accept $100,000 to release its security interest in the SHF entities' assets, even though its loan exceeded $800,000. Wells Fargo approved the sale by Rothschild contingent on the plaintiff receiving no more than $63,500 in exchange for the release of his subordinate security interest in the assets of the SHF entities. At his deposition, the plaintiff admitted that he was aware of the [defendant's] purchase, and that he was represented by counsel in the preparation of a payoff letter accepting $59,806.13 in exchange for a release 'terminating [his Uniform Commercial Code] lien on the assets of the [SHF entities].' . . .

"On February 26, 2016, Wells Fargo released its lien on the SHF entities' assets in exchange for $100,000, and the plaintiff released his subordinate lien on those assets in exchange for $59,806.13.[3] On February 29, 2016, [the defendant] then sold the assets to a new tenant in the building for $159,806.13, the exact amount it had paid for the assets.

"After the sale of the SHF entities' assets, Rothschild stopped defending the Rothschild action and allowed

[3] The plaintiff argues that the trial court erroneously determined that by releasing his $150,000 lien in exchange for $59,806.13, he consented to the alleged fraudulent transfer. The plaintiff contends that he did not consent, and that he retained a right to prevent the sale of the SHF entities' assets under a security agreement related to the $300,000 note. We need not address this argument, as it is not material to the grounds on which we base our resolution of the plaintiff's claims on appeal.

a default judgment to enter against himself and the SHF entities. Rothschild then appealed the default judgment and filed bankruptcy proceedings. Although the plaintiff released his lien in order to permit the sale of the SHF entities' assets to occur, he now claims that [the] sale constituted a fraudulent transfer as to him." (Citations omitted; footnote added.)

The plaintiff brought this action by way of a four count complaint dated August 10, 2016, alleging violations of UFTA under General Statutes §§ 52-552e and 52-552f in the first two counts, respectively, a common-law fraudulent transfer in the third count, and a violation of CUTPA in the fourth count. The plaintiff alleged that the defendant and the SHF entities conspired to "strip the SHF entities of assets sufficient to satisfy their indebtedness to [him]" by fraudulently transferring the assets of the SHF entities to the defendant for a price that was not reasonably equivalent to their value.

On August 1, 2017, the defendant moved for summary judgment, arguing that it was entitled to judgment as a matter of law on all counts of the plaintiff's complaint. The plaintiff objected to the defendant's motion, asserting that the defendant had "failed to meet its burden of showing that there was no genuine issue as to any material fact." By way of a written memorandum of decision filed on November 16, 2017, the court granted the defendant's motion for summary judgment. The court concluded that the defendant was entitled to judgment as a matter of law on the plaintiff's fraudulent transfer claims for three reasons: (1) the plaintiff consented to and voluntarily participated in the transaction that he now claims was fraudulent; (2) the defendant retained no proceeds from the transaction; and (3) the property that was transferred did not constitute "assets" of the SHF entities because it was encumbered by a valid lien. The court further concluded that the defendant was entitled to judgment as a matter of law

on the plaintiff's CUTPA claim because that claim was based on the invalid claims of fraudulent transfer. The court denied the plaintiff's subsequent motion to reargue, and this appeal followed.

We begin by setting forth the relevant standard of review that governs our review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). With these principles in mind, we turn to the plaintiff's claims on appeal.

I

The plaintiff first challenges the trial court's summary judgment on his claims of fraudulent transfer. Specifically, the plaintiff argues that the court improperly concluded that the transfer of the SHF entities' property to the defendant was not fraudulent on the ground that the property did not constitute "assets" because it was encumbered by a valid lien in excess of its value. We are not persuaded.

"A party alleging a fraudulent transfer or conveyance under the common law bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations or (2) that the conveyance was made with a fraudulent intent in which the grantee participated. . . . The party seeking to set aside a fraudulent conveyance need not satisfy both of these tests. . . . These are also elements of an action brought pursuant to . . . §§ 52-552e (a) and 52-552f (a). . . . Indeed, although [UFTA] provides a broader range of remedies than the common law . . . [it] is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances] . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 394–95, 957 A.2d 836 (2008). Accordingly, our Supreme Court has considered claims of fraudulent transfer based on the common law and claims based on UFTA together. See id.; see also *National Loan Investors, L.P.* v. *World Properties, LLC*, 79 Conn. App. 725, 731 n.8, 830 A.2d 1178 (2003) ("[o]ur analysis proceeds under the UFTA, but a common-law analysis would reach the same result"), cert. denied, 267 Conn. 910, 840 A.2d 1173 (2004).

Section 52-552e (a) sets forth the test to determine whether a transfer is fraudulent: "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, 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."

The term transfer is defined by General Statutes § 52-552b (12) to mean "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." Section 52-552b (2) defines an asset as, "property of a debtor, but the term does not include . . . (A) Property to the extent it is encumbered by a valid lien . . . ." A valid lien, pursuant to § 52-552b (13), is "a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings." Thus, a transfer cannot be considered fraudulent if, at the time of the transfer, the transferred property is encumbered by valid liens exceeding the property's value because the property would no longer be considered an asset under § 52-552b (2), and only assets may be transferred fraudulently. See generally *Dietter* v. *Dietter*, 54 Conn. App. 481, 494, 737 A.2d 926, cert. denied, 252 Conn. 906, 743 A.2d 617 (1999).[4]

[4] The plaintiff also argues that the definition of "asset" under UFTA does not apply to his common-law fraudulent transfer claim. The plaintiff fails, however, to provide any analysis or cite to any legal authority for this argument, and his argument is belied by this court's decision in *National Loan Investors, L.P.* v. *World Properties, LLC*, supra, 79 Conn. App. 725,

Here, the trial court determined that it was undisputed that the property transferred to the defendant had a value of $551,437 and was encumbered by a valid lien held by Wells Fargo in excess of $800,000 at the time of that transfer. The trial court based its valuation on an affidavit submitted by the plaintiff's expert witness, Joe Fay. On that basis, the court concluded that the property did not meet the definition of "assets" and that the transfer of that property could not be considered fraudulent.

The plaintiff's challenge to the trial court's conclusion that the property transferred did not constitute "assets" is twofold. First, the plaintiff claims that there was a dispute as to the amount of the Wells Fargo lien. In support of its finding of the amount of the Wells Fargo lien, the trial court cited to the plaintiff's own deposition testimony in which he estimated the outstanding debt to Wells Fargo to be "in the neighborhood of $800,000." The defendant filed with its memorandum of law in support of summary judgment, the affidavit of Pozefsky, in which he averred that, at the time of the allegedly fraudulent transaction, the transferred property was encumbered by a lien held by Wells Fargo in excess of $800,000. The plaintiff did not submit any evidence in opposition to summary judgment that disputed the amount of the lien and, thus, failed to demonstrate the existence of a genuine issue of material fact as to it.

Second, the plaintiff argues that the transfer was not limited to the personal property or equipment of the SHF entities but, instead, included the SHF businesses themselves, the value of which exceeded the Wells Fargo

as discussed herein. Indeed, the rationale for this principle—that any property of the debtor that is encumbered would not generally be available to pay the debts of its creditors, as those holding security interests would be first in line and, thus, are not considered assets—is logically applicable to common-law claims, as well as to claims under UFTA.

lien. The plaintiff contends that the property transferred to the defendant included the "customer list and business goodwill" of the SHF entities. The plaintiff has not provided a citation to the record in support of this argument, and our exhaustive search of the record has revealed no evidentiary support for it. The Asset Purchase Agreement clearly provides that the defendant would purchase "certain assets" of the SHF entities, including "all equipment, furniture and fixtures, inventory and computers" that are listed on Exhibit A, Assets-Equipment List, attached thereto. Likewise, Pozefsky's affidavit states that the defendant agreed to purchase "all equipment, furniture and fixtures, inventory and computers utilized by the SHF entities . . . ." The payoff letter from Wells Fargo also references "collateral comprising all equipment, furniture, fixtures, inventory and computers." The record is clear that the defendant did not purchase the businesses of the SHF entities but only the personal property, consisting of the gym and office equipment.[5]

On the basis of the foregoing, we conclude that the record supports the trial court's determination that the property transferred to the defendant did not constitute "assets" that were subject to fraudulent conveyance because there was no genuine issue of material fact that it was encumbered by a valid lien that exceeded its value at the time of the transfer. Accordingly, the court did not improperly render summary judgment in favor of the defendant on all three of the fraudulent transfer counts of the plaintiff's complaint.

[5] The plaintiff also argues that the property was not encumbered at the time of the transfer because Wells Fargo released its lien "prior to the consummation of the subject transaction." The plaintiff ignores the facts that the release of the Wells Fargo lien was required in order for the transaction to take place, and the lien would not have been released if Wells Fargo had not been satisfied by the proceeds from the transaction at issue.

II

The plaintiff also claims that the trial court improperly rendered summary judgment on count four alleging that the defendant violated CUTPA. The plaintiff contends that the underlying conduct on which he claims the defendant violated CUTPA is broader than the facts supporting his fraudulent transfer claims. We disagree.

The plaintiff brought this action by way of a four count complaint; three counts alleging fraudulent transfer and a fourth count alleging a violation of CUTPA. In the fourth count, the plaintiff incorporated by reference most of the paragraphs of the first three counts of his complaint and set forth two additional paragraphs. In addition to the fraudulent transfer allegations that he incorporated into his CUTPA count, the plaintiff alleged: "[The defendant's] conduct as aforesaid constitutes unfair or deceptive acts or practices in the conduct of trade or commerce, in violation of CUTPA." The plaintiff also alleged: "As a direct result of [the defendant's] wrongful conduct, [the plaintiff] has suffered ascertainable loss. More specifically, but without limitation, [the defendant's] purchase of the SHF entities' assets for less than reasonable value deprived the SHF entities of sufficient means to satisfy their indebtedness to [the plaintiff]."

In granting summary judgment on the plaintiff's CUTPA claim, the trial court explained: "In count four of the complaint, the plaintiff alleges a violation of CUTPA based on the fraudulent conveyances alleged in counts one through three. As set forth above, the court has found that there were no fraudulent conveyances. Therefore, summary judgment enters on count four, as well as counts one through three."

"CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade

or commerce. . . . [CUTPA] provides for more robust remedies than those available under analogous common-law causes of action, including punitive damages . . . and attorney's fees and costs, and, in addition to damages or in lieu of damages, injunctive or other equitable relief. . . . To give effect to its provisions, [General Statutes] § 42-110g (a) of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . ." (Internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015).

The plaintiff argues that "the underlying conduct which formed the basis of [his] CUTPA claim is broader than the facts supporting the fraudulent transfer claims." This argument is belied by the complaint itself, wherein the plaintiff simply incorporated the facts from his fraudulent transfer counts and added allegations that those facts constituted an unfair or deceptive practice by the defendant that caused him to suffer an ascertainable loss in violation of CUTPA.

It is true that, with respect to his fraudulent transfer claims, the plaintiff set forth an allegation, which he then incorporated into his CUTPA count, that the defendant secretly conspired to purchase the subject property from the SHF entities to strip them of any assets to satisfy their debts to him. We are not persuaded that this bare assertion raises a claim of a deceptive or unfair trade practice that is factually or legally distinct from his claims relating to alleged fraudulent transfers. Indeed, the plaintiff's discussion of this issue in his brief on appeal is confined to a single paragraph in which he fails to explain, other than in sweeping generalities, how that allegation, if proven, would amount to an unfair trade practice, separate and distinct from the

claims relating to fraudulent transfer. We, therefore, conclude that the plaintiff's argument that his CUTPA claim was broader than his allegations of fraudulent transfer is unavailing.

III

The plaintiff finally claims that the trial court erred in denying his motion to reargue the motion for summary judgment. We disagree.

"The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . .

"The purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *Seaport Capital Partners, LLC* v. *Speer*, 177 Conn. App. 1, 16–17, 171 A.3d 472 (2017), cert. denied, 331 Conn. 931, A.3d (2019).

In his motion to reargue, including his memorandum of law in support of the motion and several exhibits, which consisted of 166 pages in total, the plaintiff asserted that the court had "overlook[ed] controlling principles of law and demonstrate[d] a misapprehension of certain key facts, which preclude[d] the [rendering] of summary judgment in [the] defendant's favor." The court summarily denied the plaintiff's motion.

The plaintiff claims on appeal that the court abused its discretion in denying his motion to reargue "given the controlling legal precedent and key facts precluding

the entry of summary judgment, which were presented to the court but which the court failed to correct following its decision, resulting in an injustice because of the court's oversight of material issues of fact and law." On the basis of our review of the plaintiff's motion to reargue, we conclude that, as to the dispositive issues addressed in this opinion, the plaintiff was seeking to rehash the arguments that he made in opposition to summary judgment, which had already been presented to and rejected by the trial court.[6] We, therefore, conclude that the court did not abuse its discretion in denying the plaintiff's motion to reargue.

The judgment is affirmed.

In this opinion the other judges concurred.

1916 POST ROAD ASSOCIATES, LLC *v.* MRS. GREEN'S OF FAIRFIELD, INC., ET AL.
(AC 41276)

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

Syllabus

The plaintiff, which had entered into a commercial lease for certain of its real property, sought to recover damages from the defendant U Co., the guarantor on the commercial lease, which had been assigned to N Co. When N Co. assigned its interest to G Co., U Co. confirmed in a letter to the plaintiff that its guarantee would remain in effect. During the term of G Co.'s lease, G Co. was sold to P Co. Prior to the sale, U Co. sent a second letter to the plaintiff in which U Co. requested that the plaintiff irrevocably waive its option to cancel the lease as a result of P Co.'s acquisition of G Co., and that neither P Co.'s acquisition of G Co. nor the cancellation waiver would limit U Co.'s obligations under

[6] The defendant argues that the plaintiff improperly attached exhibits to his motion to reargue that he did not submit in his opposition to summary judgment, and because those documents were not submitted in his opposition, they were not properly before the court in deciding the plaintiff's motion to reargue. Because we conclude that the plaintiff's motion to reargue constituted an improper attempt to rehash his arguments in opposition to summary judgment, we need not address the propriety of the plaintiff's submission of new exhibits with his motion to reargue.

the guarantee. Thereafter, G Co., in connection with its acquisition by P Co., informed the plaintiff that it was exercising its option to extend the lease term beyond the original termination date of the lease. The plaintiff then consented to the acquisition of G Co. by P Co. and waived its option to cancel the lease. Thereafter, G Co. failed to pay rent owed, and the plaintiff obtained a judgment in its favor in a summary process action against G Co. and evicted G Co. for failure to pay rent. Subsequently, the plaintiff brought this action, in which it claimed that U Co. was liable for G Co.'s debts to the plaintiff. U Co. filed a motion for summary judgment, asserting that, under the language of the guarantee, it could not be held liable for a breach that occurred after the expiration date of the original lease term. The plaintiff claimed that U Co.'s two letters to the plaintiff created a genuine issue of material fact as to whether U Co.'s guarantee was expanded or modified to cover the optional lease term. The trial court granted U Co.'s motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly granted U Co.'s motion for summary judgment, as the unambiguous language in U Co.'s two letters to the plaintiff did not change U Co.'s obligations under the guarantee and, thus, there was no genuine issue of material fact as to whether U Co.'s guarantee covered the optional extension period of the lease agreement; there was no language in the first letter that supported the plaintiff's claim that it served to create a new guarantee, as the unambiguous language of the letter did nothing more than assure the plaintiff that U Co.'s guarantee would not be unenforceable as a result of the lease assignment to G Co., there was no indication in the second letter that the guarantee was being modified in consideration of the plaintiff's consent to the acquisition of G Co. by P Co., as there was no reference to G Co.'s exercise of its option to extend the lease, and the plaintiff's contention that U Co.'s reference to a future transaction referred to the extension of the lease term was at best speculation, which alone was not sufficient to overcome a motion for summary judgment.

Argued February 14—officially released June 25, 2019

Procedural History

Action to recover damages for, inter alia, breach of a guarantee of a commercial lease, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, where the named defendant et al. were defaulted for failure to plead; thereafter, the court, *Rodriguez*, *J.*, granted the motion for summary judgment filed by the defendant United Natural Foods, Inc., and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Robert D. Russo, for the appellant (plaintiff).

Robert C. Hinton, for the appellee (defendant United Natural Foods, Inc.).

Opinion

DiPENTIMA, C. J. The plaintiff, 1916 Post Road Associates, LLC, appeals from the summary judgment rendered in favor of the defendant United Natural Foods, Inc.[1] The plaintiff contends that the trial court improperly rendered summary judgment because two separate letters sent by the defendant create a genuine issue of material fact as to whether the defendant's guarantee of the terms of a commercial lease continued through an optional extension period following the expiration of the original lease term. We disagree and, accordingly, affirm the judgment of the trial court.

Viewed in the light most favorable to the plaintiff as the nonmoving party, the record reveals the following facts and procedural history. The plaintiff is the owner of real property located at 1916 Post Road in Fairfield, Connecticut. On May 24, 1996, the plaintiff entered into a fifteen year lease agreement (lease) with Sweetwater Associates, Inc. (Sweetwater), and on May 1, 1997, the lease term began.[2] Five months later, on November 7, 1997, Sweetwater assigned the lease to Natural Retail Group, Inc. (Natural Retail), and, on the same day, the defendant guaranteed "the payment and performance by the [a]ssignee of all of its obligations under the [l]ease and all of the obligations of the [t]enant as defined under the [l]ease effective as of the date hereof." On April 4, 1999, Natural Retail subsequently assigned

[1] Mrs. Green's of Fairfield, Inc., Planet Organic Holding Corp. and Planet Organic Health Corp. also were named as defendants in the underlying action. They were defaulted for failure to plead and have not participated in the present appeal. Accordingly, we refer to United Natural Foods, Inc., as the defendant.

[2] The original fifteen year term, therefore, was set to expire on May 1, 2012.

its interest to Mrs. Green's of Fairfield, Inc. (Mrs. Green's); in a letter dated May 13, 1999, the defendant confirmed that its guarantee would remain in effect despite the assignment of the lease to Mrs. Green's.[3]

At some point during the original lease term, the shareholders of Mrs. Green's sold all interest in the business to Planet Organic Health Corp. Prior to this sale, the defendant sent a second letter, dated June 28, 2007, to the plaintiff indicating that it had "no objection to the acquisition of the shares of [Mrs. Green's] by Planet Organic Health Corp. or its affiliates . . . ." In addition to communicating that it had no objection to the acquisition of Mrs. Green's, the defendant also requested that the plaintiff "irrevocably waive its option to cancel the [l]ease as a result of the [a]cquisition . . . without prejudice to [the plaintiff's] right to exercise such option in connection with a future transaction."[4]

[3] The May 13, 1999 letter provides in relevant part: "Reference is made to . . . a certain [l]ease [a]greement dated as of May 24, 1996 . . . between [the plaintiff] and [National Retail], as assignee of Sweetwater Associates, Inc. . . . and . . . a certain [a]ssignment of [the] [l]ease of even date . . . relating to the assignment of the [l]ease to Mrs. Green's . . . . [The defendant] has guaranteed [National Retail's] obligations under the [l]ease. This letter will confirm the agreement of [National Retail] and [the defendant] that, in order to induce [the plaintiff] to execute a certain [c]onsent to [a]ssignment of even date . . . [National Retail] and [the defendant] expressly agree that [the plaintiff's] consent to the [a]ssignment shall not release [National Retail] or [the defendant] from any obligation with respect to the [l]ease, except to the extent paid or performed by [the] [a]ssignee."

[4] Section 15.2 of the lease provides in relevant part: "If [t]enant is a corporation . . . and if at any time after execution of this [l]ease any part of all of the corporate shares shall be transferred by sale, assignment, bequest, inheritance, operation of law or other disposition . . . so as to result in a change in the present control of said corporation by the person or persons now owning a majority of said corporate shares, [t]enant shall give the landlord notice of such event within fifteen (15) days prior to the date of such transfer. In such event and whether or not [t]enant has given such notice, [l]andlord may elect to terminate this [l]ease at any time thereafter by giving [t]enant notice of such election, in which event this [l]ease and the rights and obligations of the parties hereunder shall cease as of a date set forth in such notice which date shall not be less than sixty (60) days after the date of such notice."

Finally, the defendant stated that "neither the [a]cquisition nor the [c]ancellation [w]aiver shall in any way limit [the defendant's] obligations under the existing guarant[ee] made by [the defendant] in favor of [the plaintiff]."

On July 3, 2007, in connection with Planet Organic Health Corp.'s acquisition of Mrs. Green's, the plaintiff received a letter from Mrs. Green's with several enclosures. Among those enclosures was a notice from Mrs. Green's that it was exercising its option to extend the lease term from the original termination date through April 30, 2017.[5] Also included were a copy of the defendant's June 28, 2007 letter to the plaintiff and lease guarantees from Planet Organic Health Corp. and Planet Organic Holding Corp. Sometime after receiving the July 3, 2007 letter from Mrs. Green's, the plaintiff consented to the acquisition of Mrs. Green's by Planet Organic Health Corp. and waived its option to cancel the lease.

During the extension period, Mrs. Green's failed to pay the rent owed for November, 2016.[6] Thereafter, on January 5, 2017, the plaintiff served Mrs. Green's with a notice to quit the premises and, on February 15, 2017, commenced a summary process action to evict Mrs. Green's. Judgment in the summary process action was rendered in favor of the plaintiff on March 1, 2017,

[5] Section 21.1 of the lease provides in relevant part: "At the expiration of the original [t]erm hereof, and provided [t]enant is not in material default of its part hereunder, [l]andlord hereby grants to [t]enant an option to renew this [l]ease for three (3) separate additional five (5) year [t]erms . . . commencing at the expiration of the [i]nitial [t]erm. Tenant must notify [l]andlord of its intention to renew under this option at least six (6) months prior to the expiration of the [i]nitial [t]erm."

Further, the lease provided that the terms of the option period would be the same as the terms for the original lease period, with the exception of changes to the yearly rental cost.

[6] Mrs. Green's also failed to pay the rent for each of the months remaining on the lease until its expiration on April 30, 2017.

and Mrs. Green's was evicted on March 17, 2017. The plaintiff claims that, despite diligent efforts, it was unable to re-lease the premises prior to the expiration of the extended lease term, April 30, 2017.

On April 24, 2017, the plaintiff commenced the present action against the defendant. The complaint alleges that the defendant is liable for the debts of Mrs. Green's pursuant to the terms of the November 7, 1997 guarantee, as confirmed by the May 13, 1999 letter. On July 31, 2017, the defendant filed an answer and special defenses, in which it admitted that it had entered into a written guarantee of the lease obligations of Mrs. Green's, but denied that it was liable for that company's debts to the plaintiff. Then, on September 20, 2017, the defendant filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to whether the guarantee extended through the optional extension period beyond the original lease term and, on the basis of the language in the guarantee, the defendant could not be held liable for a breach that occurred after the expiration of the original lease term. The plaintiff filed an opposition to the defendant's motion, contending that the defendant's guarantee did apply to the optional extension period or, "[a]t the very least," there was a factual dispute as to this issue. On December 18, 2017, the court granted the defendant's motion for summary judgment.[7] This appeal followed.

On appeal, the plaintiff claims that the trial court improperly granted the defendant's motion for summary judgment because there is a genuine issue of material fact that the defendant's guarantee continued through the optional extension period following the expiration of the original lease term. We disagree and, therefore, affirm the judgment of the trial court.

[7] On January 2, 2018, the plaintiff filed a motion to reargue, which was summarily denied by the court on January 5, 2018.

We begin by setting forth the relevant standard of review and legal principles that govern our review. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Cruz* v. *Schoenhorn*, 188 Conn. App. 208, 214–15, 204 A.3d 764 (2019).

The standard of review for contract interpretation is also well established. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . Where the language of an agreement is susceptible to more than one reasonable interpretation, however, it

is ambiguous. . . . [T]he determination . . . whether contractual language is plain and unambiguous is itself a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 632–33, 143 A.3d 1193 (2016). "Furthermore, a presumption that the language used is definitive arises when . . . the contract at issue is between sophisticated parties and is commercial in nature." (Internal quotation marks omitted.) *Allstate Life Ins. Co.* v. *BFA Ltd. Partnership*, 287 Conn. 307, 314, 948 A.2d 318 (2008). It is undisputed that the parties to this case are corporations and that the transaction was commercial in nature.

"[Guarantees] are . . . distinct and essentially different contracts; they are between different parties, they may be executed at different times and by separate instruments, and the nature of the promises and the liability of the promisors differ substantially . . . . The contract of the guarantor is his own separate undertaking in which the principal does not join." (Internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 675–76, 94 A.3d 622 (2014); see also *Wolthausen* v. *Trimpert*, 93 Conn. 260, 265, 105 A. 687 (1919) ("[a] guaranty is a collateral undertaking to pay a debt or perform a duty, in case of the failure of another person, who is in the first instance liable to such payment or performance" [internal quotation marks omitted]).

This court previously has addressed whether a guarantor of a lease can be held liable for a default that occurred during an extension period following the expiration of the original lease term. See *Village Linc Corp.* v. *Children's Store, Inc.*, 31 Conn. App. 652, 626 A.2d 813 (1993). In *Village Linc Corp.*, the plaintiff appealed from the trial court's denial of an application for a prejudgment remedy against defendants who had guaranteed a rental lease. Id., 652–53. The trial court denied

the prejudgment remedy on the ground that the plaintiff had failed to adduce sufficient evidence to show that the defendants' guarantee was intended to secure the renewed lease period in which the default had occurred. Id., 658. On appeal, this court affirmed the judgment of the trial court. Id., 660. In reaching that decision, this court noted that the guarantee did not refer to any lease renewal and that the lease renewal itself did not include any indication that the guarantee would continue to apply. Id., 659–60. Further, the court contrasted the language in the defendants' guarantee with those cases in which the parties clearly intended a continuing guarantee to have been created. Id. For example, in *Connecticut National Bank* v. *Foley*, 18 Conn. App. 667, 560 A.2d 475 (1989), the guarantee provided that the guarantor could be held "responsible for everything the borrower owes . . . *now and in the future*." (Emphasis in original; internal quotation marks omitted.) Id., 670. Similarly, in *LeCraw* v. *Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972), the language of the guarantee provided that if a default occurred " 'at any time' " during the lease, the guarantor would assume responsibility for the tenant's obligations. Id., 657; see also *Zero Food Storage, Inc.* v. *Udell*, 163 So. 2d 303, 304–305 (Fla. App. 1964). Conversely, the guarantee in *Village Linc Corp.* provided that it applied to the original lease term and made no mention of its applicability to any potential lease renewals. In light of this evidence, the court concluded that the decision to deny the application for a prejudgment remedy against the guarantor was not clearly erroneous. *Village Linc Corp.* v. *Children's Store, Inc.*, supra, 660.

Here, the defendant claims that the present case is similar to *Village Linc Corp.* because the November 7, 1997 guarantee contains no indication that it was intended to continue in the event the tenant exercised its option to extend the lease term. In support of this

argument, the defendant cites the provision of the guarantee that specifies it is limited to the payment and performance of the tenant's obligations under the lease "effective as of the date hereof." The defendant contends that this provision unambiguously limits the guarantee to the obligations that the tenant had under the lease when the guarantee went into effect, which did not include the optional lease term. In response, the plaintiff does not dispute that the November 7, 1997 guarantee references the original lease term and, thus, was not intended to cover the optional extension period.[8] Instead, the plaintiff rests its argument on the May 13, 1999 letter and the June 28, 2007 letter, arguing that the language in these letters creates a genuine issue of material fact as to whether the guarantee was expanded or modified to cover the optional lease term.

With respect to the May 13, 1999 letter, the plaintiff argues that, in confirming that its guarantee would remain in effect despite the assignment of the lease to Mrs. Green's, the defendant did not indicate that the guarantee was limited to the original lease term. In essence, the plaintiff infers that this letter served to create a new guarantee—one that was not limited to the original lease term—in consideration of the plaintiff's consent to the assignment of the lease. As to the June 28, 2007 letter, the plaintiff contends that it was sent

[8] In its principal brief to this court, the plaintiff acknowledged that "[t]he first guarantee, dated November 7, 1997, like in *Village Linc Corp.* . . . did refer only to the initial term of the lease. . . . The [November 7, 1997 guarantee] stated the commencement date and the expiration date of the lease." At oral argument, however, the plaintiff's counsel claimed that the November 7, 1997 guarantee itself was not expressly limited to the original lease term. To the extent that the plaintiff takes the position that the November 7, 1997 guarantee is ambiguous with respect to whether the parties intended it to cover the optional extension period, we decline to address this contention, as it runs afoul of our well settled rule that "claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." (Internal quotation marks omitted.) *Bridgeport* v. *Grace Building, LLC*, 181 Conn. App. 280, 294, 186 A.3d 754 (2018).

in contemplation not only of the acquisition of Mrs. Green's by Planet Organic Health Corp. but also of the lease extension, and was intended to modify the guarantee to cover this period in consideration of the plaintiff waiving its right to cancel the lease. We do not read these two letters to the same effect.

First, as to the May 13, 1999 letter, there is no language in the document that supports the plaintiff's claim that it served to create a new guarantee. Rather, the letter merely confirms that the obligations of the defendant, as guarantor, would not change as a result of the plaintiff's consent to the assignment of the lease to Mrs. Green's. See footnote 3 of this opinion. Those obligations were created by the November 7, 1997 guarantee, which the plaintiff does not dispute was limited to the original lease term. As such, the unambiguous language of the May 13, 1999 letter does nothing more than assure the plaintiff that the defendant's guarantee would not be unenforceable as a result of the lease assignment. See *Meeker* v. *Mahon*, supra, 167 Conn. App. 635–36 (holding that "unambiguous language of the guarantee, read in conjunction with the unambiguous language of the lease," supported legal conclusion that defendants' liability for any of the tenants' lease obligations did not include any of those obligations occurring on dates after the lease expired).

Second, in reviewing the defendant's June 28, 2007 letter to the plaintiff, we can discern no indication that the guarantee was being modified in consideration of the plaintiff's consent to the acquisition of Mrs. Green's by Planet Organic Health Corp. As stated previously in this opinion, the June 28, 2007 letter: (1) provides that the defendant has no objection to the acquisition of Mrs. Green's by Planet Organic Health Corp.; (2) requests that the plaintiff waive its right to cancel the lease; and (3) confirms that the plaintiff's consent to the acquisition of Mrs. Green's by Planet Organic Health Corp. would not affect the defendant's obligations

under its existing guarantee. There is no reference to Mrs. Green's exercising its option to extend the lease; thus, it can hardly be surmised that the letter was sent in contemplation of such an action. Moreover, the contention that the defendant's reference to a "future transaction" referred to the extension of the lease term is at best speculation, which alone is not sufficient to overcome a motion for summary judgment. See *Escourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 829–30, 92 A.3d 1025 (2014). Accordingly, having concluded that the unambiguous language in the May 13, 1999 letter and the June 28, 2007 letter did not change the defendant's obligations under the November 7, 1997 guarantee, we further conclude there is no genuine issue of material fact as to whether the defendant's guarantee covered the optional extension period of the lease agreement.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIA W. *v.* ERIC W.*
(AC 41284)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and from the court's order, made in connection with a postjudgment motion for contempt filed by the plaintiff, requiring him to make certain payments to satisfy his child support and alimony arrearages. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion by admitting the plaintiff's testimony that he previously had been arrested and charged with certain criminal offenses, which he claimed improperly and adversely influenced the court's opinion of him; even if the admission of the testimony was erroneous, the defendant failed to demonstrate how he was harmed by its admission.

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

2. This court lacked jurisdiction over the defendant's challenge to the trial court's findings and order related to the plaintiff's postjudgment motion for contempt; the trial court had found that the defendant was in arrears on his child support and alimony obligations and ordered the defendant to make payments to the plaintiff on the arrearage, but continued the matter to a later date to make the necessary determination of whether the defendant's failure to pay was wilful or due to his inability to pay, and, therefore, given that the court resolved some, but not all, of the issues in the motion for contempt, the order from which the defendant appealed was not final, and this court was without jurisdiction to entertain the defendant's claim due to the lack of a final judgment.

Argued April 16—officially released June 25, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Hon. Lloyd Cutsumpas*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the plaintiff filed a motion for contempt and the court issued certain orders, and the defendant appealed to this court. *Affirmed in part*; *appeal dismissed in part.*

Eric W., self-represented, the appellant (defendant).

Opinion

PER CURIAM. The self-represented defendant, Eric W., appeals from the judgment of dissolution and the court's order related to the postjudgment motion for contempt filed by the plaintiff, Maria W.[1] On appeal, the defendant has raised numerous claims,[2] which we

[1] The plaintiff neither filed a brief nor appeared for oral argument in this court. Consistent with an order from this court dated January 28, 2019, rendered pursuant to Practice Book § 85-1, we consider this appeal solely on the basis of the record, as defined by Practice Book § 60-4, and the defendant's brief.

[2] The defendant, in his brief, expresses several concerns that are mentioned but not briefed adequately and, therefore, do not merit our review. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("[c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion" [internal quotation marks omitted]).

have distilled to his claims that the court (1) abused its discretion by admitting evidence at the dissolution trial of his arrest and (2) with respect to the plaintiff's motion for contempt, improperly found him to be in arrears on his child support and alimony obligations and ordered him to make certain weekly payments to the plaintiff to cover his current and delinquent child support and alimony obligations. We affirm the judgment of dissolution and dismiss the appeal with respect to the motion for contempt for lack of a final judgment.

The record reveals the following relevant facts and procedural history. The parties were married on March 17, 2000, and are the parents of one minor child. The plaintiff initiated the underlying dissolution proceeding in June, 2016. The trial lasted five days, commencing on May 11, 2017, and concluding on June 9, 2017. At trial, the plaintiff testified as to an April 5, 2016 incident in which the police arrested and charged the defendant.[3] The charges were risk of injury to a child, assault in the third degree, resisting arrest, and disturbance of the peace. The defendant objected to this testimony on the ground that the charges had been dismissed. The court overruled the defendant's objection.

On June 26, 2017, the court dissolved the parties' marriage. In its judgment of dissolution, the court found the plaintiff's evidence "far more credible" than that of the defendant. The court found that the plaintiff acted as the primary caregiver to the child and that the defendant, despite having been afforded supervised parenting time with the child, had failed to visit the child in more

[3] In its pendente lite orders of June 30, 2016, related to the plaintiff's motions for sole custody, child support, and exclusive possession and use of the family residence, the court stated that "[t]he defendant is subject to a criminal protective order stemming from his arrest on domestic violence charges" and that he also is "subject to a temporary restraining order issued by [the] court on May 17, 2016, pursuant to General Statutes § 46b-15. That order will remain in effect until August 17, 2016."

than one year. The court granted the parties joint legal custody of the child and further ordered that the child's "primary residence and physical custody will be with the [plaintiff] . . . ." Finding that the defendant's pendente lite child support and alimony payments were in arrears in the amount of $1008 and $1200, respectively, the court ordered the defendant to make weekly payments of $16 toward the child support arrearage and $10 toward the alimony arrearage. It additionally ordered the defendant to pay the plaintiff weekly child support in the amount of $82 and weekly alimony in the amount of $25.

On November 29, 2017, the plaintiff filed a motion for contempt, alleging that the defendant owed her $3857 for past due child support and alimony. Following a January 2, 2018 hearing on the matter, the court found that the defendant owed the plaintiff $5739 and ordered him to make payments on that amount.[4]

On appeal, the defendant asks this court to reverse the court's dissolution orders in their entirety and to remand the matter for a new trial. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the [evidence] presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the

[4] The court initially found the defendant in arrears totaling $4389. The court subsequently issued a "Findings Correction" in which it found the defendant in arrears of $5739. In its "Findings Correction" memorandum, the court recounted that the defendant had been subject to court ordered weekly payments on child support and alimony arrears, and indicated that the defendant "is urged to make every effort . . . to make payment on the orders in place . . . . The orders are fixed and not subject to relitigation."

correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis omitted; internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 726, 197 A.3d 1000 (2018).

The defendant first contends that the court's orders improperly were predicated on the criminal charges that were dismissed. He argues that the admission of this testimony adversely influenced the court's opinion of him, as demonstrated by the court's decision to credit the plaintiff's evidence. We review the court's evidentiary ruling for an abuse of discretion. *Senk* v. *Senk*, 115 Conn. App. 510, 518, 973 A.2d 131 (2009). "A party claiming error in an evidentiary ruling of the court must carry the burden of demonstrating that the error was harmful before a new trial may be granted. . . . In a civil case, the standard for determining whether such an improper ruling is harmful is whether the ruling would likely affect the result." (Citation omitted.) Id., 520.

In the present case, despite the defendant's objection on the ground that the charges have since been dismissed, the court did not specify its reason for permitting this testimony. Even if we assume that the court erroneously admitted the evidence, however, the defendant has not demonstrated how the admission of this testimony harmed him. Accordingly, we reject the defendant's claim.

Additionally, the defendant challenges the court's January 2, 2018 findings and order related to the plaintiff's motion for contempt. The court's January 2, 2018 order, finding an arrearage and ordering payments, from which the defendant appealed, however, left open the issue as to whether the defendant's failure to pay was wilful or due to his inability to pay.[5]

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeals that [they lack] jurisdiction to hear." (Citations omitted; internal quotation marks omitted.) *Khan* v. *Hillyer*, 306 Conn. 205, 209, 49 A.3d 996 (2012). "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary." (Internal quotation marks omitted.) Id.

The court, in its January 2, 2018 "Findings Correction" memorandum on the plaintiff's motion for contempt, stated in relevant part: "The court has not made a determination of the defendant's wilfulness or ability to pay the [alimony and child support] orders and the matter is *continued to April 9, 2018, for that purpose.* . . . The only contempt issue remaining is wilfulness and ability to pay." (Emphasis added.)

Consequently, the court's arrearage finding and payment orders did not constitute a complete resolution of the contempt motion and, therefore, were not an appealable final judgment. See *Bucy* v. *Bucy*, 19 Conn.

[5] To determine whether to hold a party in contempt of an order of court, the court must find, inter alia, that the party's violation of the order was "wilful or excused by a good faith dispute or misunderstanding." (Internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, 150 Conn. App. 419, 437, 91 A.3d 497, cert. denied, 314 Conn. 935, 102 A.3d 1112 (2014).

App. 5, 6–8, 560 A.2d 483 (1989) (not appealable final judgment because court declined to find defendant in contempt and left open issues of whether parties could arrange for payment of medical bills between themselves and terms by which defendant was obligated to make certain required payments). The court continued the contempt hearing to address the necessary element of wilfulness. The defendant's appeal from the court's January 2, 2018 order, therefore, is dismissed.

The judgment of dissolution is affirmed; the appeal is dismissed in part only with respect to the motion for contempt.

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NOTICES OF CONNECTICUT STATE AGENCIES

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-AB: Community First Choice Pursuant to Section 1915(k) of the Social Security Act – Rate Increase for Home-Delivered Meals

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

In accordance with section 17b-8 of the Connecticut General Statutes, DSS gives notices that the Commissioner of DSS intends to amend the Medicaid State Plan provisions regarding the Community First Choice State Plan Option Pursuant to Section 1915(k) of the Social Security Act. Effective on or after July 1, 2018, SPA 19-AB will amend Attachment 4.19-B of the Medicaid State Plan to update the effective date of the fee schedule for Community First Choice Services in order to implement a ten percent (10%) rate increase for home-delivered meals. This SPA is necessary to comply with section 308 of House Bill 7424, which has been adopted by the General Assembly and is anticipated to be signed into law by the Governor.

Fiscal Impact

Based on the information that is available at this time, DSS estimates that this SPA will increase annual aggregate expenditures by approximately $14,000 in State Fiscal Year (SFY) 2020 and $33,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at the following 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: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-AB: Community First Choice Pursuant to Section 1915(k) of the Social Security Act – Rate Increase for Home-Delivered Meals''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than July 25, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment

SPA 19-Z: Chemical Maintenance Clinics – Establishment of Minimum Weekly Rate

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-Z will amend Attachment 4.19-B of the Medicaid State Plan to change the reimbursement methodology for chemical maintenance clinics by establishing a minimum weekly rate for seven daily doses of $88.55. That minimum rate will become the new provider-specific weekly rate for any provider that was previously paid at a rate lower than $88.55. In addition, effective on or after July 1, 2020, payment to chemical maintenance clinics will be contingent on meeting quality performance measures determined by DSS. Failure to meet these standards will result in a rate reduction of up to five percent for the quarters ending September 30, 2020 and December 31, 2020 and up to ten percent beginning January 1, 2021. This SPA is necessary to comply with section 311 of House Bill 7424, which was adopted by the General Assembly and is anticipated to be signed into law by the Governor.

Fiscal Information

Based on available information, DSS estimates that this SPA will increase annual aggregate expenditures by approximately $2.3 million in State Fiscal Year (SFY) 2020 and $2.6 million 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-Z: Chemical Maintenance Clinics – Establishment of Minimum Weekly Rate''.

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 10, 2019.

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed Application for a Moratorium in the City of Milford

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (June 10, 2019) for a Moratorium of Applicability for the City of Milford. A copy of this completed application is available for viewing at the Connecticut Department of Housing during normal business hours. For additional information please call or write to Laura Watson, Economic and Community Development Agent, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8169.

NOTICES

NOTICE OF SUSPENSION

DOCKET NO. CV-19-6091460-S. DISCIPLINARY COUNSEL VS. COREY HEIKS. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, JUNE 5, 2019.

ORDER: The foregoing matter having been heard, the Court hereby finds that the Respondent, Corey Heiks, Juris No. 432852, failed to fully comply with the Continuing Legal Education (''CLE'') order of the Statewide Grievance committee dated April 27, 2018, as set forth in the presentment complaint herein.

Accordingly, it is hereby ORDERED:

1. The interim suspension ordered on May 29, 2019, is terminated as of June 5, 2019; however, the Respondent shall be suspended from the practice of law from June 5, 2019 through and including June 30, 2019.

2. Attorney Karen Miller, Juris No. 429326, of 203 Campbell Avenue, West Haven, CT 06516, was previously appointed as Trustee, and shall continue as Trustee, to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondent's files, and to take control of the Respondent's 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 complete 10 credit hours of CLE in criminal law and may do so online. The Respondent shall provide evidence of compliance with this order to Disciplinary Counsel on or before 12:00 noon on June 28, 2019.

6. On or before June 14, 2019, the Respondent shall provide to Disciplinary Counsel evidence that he completed the 2 credit hours of CLE in legal ethics pursuant to the order of the Statewide Grievance Committee dated April 27, 2018, as set forth in the presentment complaint herein.

7. On or before June 14, 2019, the Respondent shall provide to Disciplinary Counsel evidence that he completed his 2018 MCLE requirements.

8. On or before January 31, 2020, the Respondent shall provide to Disciplinary Counsel evidence that he completed his 2019 MCLE requirements.

9. The Respondent shall immediately update his registration with the Statewide Grievance Committee.

10. The Respondent shall pay any outstanding Client Security Fund fees on or before June 17, 2019.

11. A hearing is scheduled for June 28, 2019, at 2:00 p.m. If Disciplinary Counsel receives timely compliance with the conditions set forth herein, and no other issued have arisen which need to be addressed by the Court, a Caseflow Request may be filed by Disciplinary Counsel indicating that the hearing may

be canceled. If the hearing is canceled, the Respondent shall be automatically reinstated to the practice of law on July 1, 2019.

12. The Court shall retain jurisdiction with regard to Paragraph 8 of this Order.

By the Court,

Abrams, *Judge,*

STATE OF CONNECTICUT

DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
New Haven Judicial District
G.A. 7 in Meriden

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 54 West Main Street, Meriden, CT 06451

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $70,008 - $146,160 Yearly

PCN: 5202

CLOSING DATE: July 12, 2019

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

Examples of Duties

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

Knowledge, Skill and Ability

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

Minimum Qualifications – General Experience

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

Application Procedure

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

1. Cover letter

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

3. Resume

4. Copy of law school transcript

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

By e-mail to: DCJ.HR@ct.gov, cc: DCJ.NewHaven@ct.gov.

All documents must be combined into a single pdf

Please include the PCN on the subject line

(This is the Preferred Method)

Or

Office of the Chief State's Attorney

300 Corporate Place

Rocky Hill, CT 06067

Attn: Human Resources, PCN 5202

Application packages must be received or postal stamped no later than the closing date

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.