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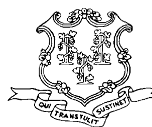

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CONNECTICUT REPORTS

Vol. 332

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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DEPARTMENT OF TRANSPORTATION *v.* WHITE OAK CORPORATION (SC 20131)

Palmer, McDonald, Mullins, Kahn and Ecker, Js.

Syllabus

Pursuant to statute (§ 12-39g [a]) "[u]pon notification . . . that any taxes . . . are (1) due to the state from any person and unpaid . . . and (2) are not the subject of a timely filed administrative appeal . . . the Comptroller shall withhold any . . . payment of any amount payable by the state to such person unless the amount so payable is reduced by the amount of such taxes, penalties and interest . . . ."

The defendant contractor, W Co., which had obtained a judgment against the plaintiff Department of Transportation awarding money damages but subsequently received a payment that had been reduced by the comptroller pursuant to § 12-39g, appealed from the trial court's denial of its postjudgment motion seeking a determination as to whether that judgment had been fully satisfied. Specifically, W Co. claimed that the comptroller was collaterally estopped from withholding the taxes owed to the state in the present case because the plaintiff had failed to prove a claim it had made relating to the existence of the same tax debt in a separate arbitration proceeding. The trial court denied W Co.'s motion, concluding that the doctrine of collateral estoppel did not preclude a reduction pursuant to § 12-39g because that issue had never been fully and fairly litigated. The trial court further concluded that § 12-39g imposed a separate statutory obligation on the comptroller to reduce the payment to W Co. by the amount of taxes it owed. On appeal, W Co. claimed that the trial court improperly concluded that the comptroller's reduction pursuant to § 12-39g was proper. *Held* that the trial court properly denied W Co.'s motion seeking a determination as to whether that judgment had been fully satisfied, the comptroller having properly exercised his statutorily created obligation to reduce the payment to W Co. by the amount of taxes owed: pursuant to the plain language of § 12-39g, the comptroller had a mandatory obligation to reduce the payment by the amount of taxes owed, unless they were the subject of a timely filed administrative appeal, and because the comptroller's obligation pursuant to § 12-39g is part of a comprehensive scheme for the collection of taxes that allowed W Co. to file a timely administrative appeal to challenge those taxes, which W Co. failed to do, the comptroller was required to reduce the payment by the amount of taxes owed; moreover, W Co.'s claim that the doctrine of collateral estoppel barred the comptroller from reducing the payment by the amount of taxes owed was unavailing, as that doctrine was not applicable to the present case, where W Co. could have filed a timely administrative appeal to

challenge those taxes but did not avail itself of that opportunity, and to allow W Co. to avoid the payment of those taxes through a mechanical application of collateral estoppel would frustrate the well recognized social policy underlying this state's system of tax collection.

Argued November 8, 2018—officially released August 20, 2019

Procedural History

Application to vacate, correct or modify an arbitration award, brought to the Superior Court in the judicial district of Hartford, where the defendant filed an application to confirm the award; thereafter, the case was tried to the court, *Hon. Richard M. Rittenband*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment denying the application to vacate, correct or modify, and granting the application to confirm, from which the plaintiff appealed to the Appellate Court, *Gruendel*, *Beach* and *Peters*, *Js.*, which reversed the judgment of the trial court and remanded the case with direction to vacate the arbitration award, and the defendant, on the granting of certification, appealed to this court; subsequently, this court reversed the judgment of the Appellate Court and remanded the case to that court with direction to affirm the judgment of the trial court; thereafter, the court, *Robaina*, *J.*, denied the defendant's motion seeking a determination as to whether the judgment had been satisfied, and the defendant appealed. *Affirmed.*

Kerry M. Wisser, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (defendant).

Christine Jean-Louis, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (plaintiff).

Opinion

MULLINS, J. After an arbitration proceeding, the defendant, White Oak Corporation (White Oak), was awarded a money judgment against the plaintiff, the

Department of Transportation (department) in the amount of $8,362,308.41 plus interest. In paying that judgment on behalf of the department, the Office of the State Comptroller (comptroller) withheld $1,642,312.14 for taxes White Oak had owed to the state. As a result of this withholding, White Oak filed a motion with the trial court seeking a determination as to whether the judgment had been satisfied. In its motion, White Oak asserted that the department did not fully satisfy its judgment because, during a prior arbitration proceeding between the parties, the department had alleged but failed to prove its claim for taxes owed to the state and that, thus, the doctrine of collateral estoppel precluded the comptroller from reducing the payment by any amount for taxes owed.

The trial court rejected White Oak's claim and determined that the judgment had been satisfied. The defendant now appeals from the trial court's determination, again alleging that collateral estoppel precluded the comptroller from withholding the taxes owed to the state. We agree with the trial court that the department satisfied its judgment to White Oak because General Statutes § 12-39g imposed a mandatory obligation on the comptroller to reduce the amount paid to White Oak by the amount of taxes owed to the state as those taxes were not the subject of a timely filed administrative appeal. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts and procedural history. In 1994, the parties, White Oak and the department, entered into a contract for construction of the Tomlinson Bridge in New Haven. Nearly three years later, the parties entered into a second contract for reconstruction of the Yellow Mill Pond Bridge in Bridgeport. Both projects were beset by considerable delays and conflicts between the parties. As a result, in 2000, the parties entered into an agreement to reassign the

contracts to a different contractor. Thereafter, White Oak filed notices of claims and corresponding demands for arbitration for each project pursuant to General Statutes § 4-61 (b)[1] claiming, inter alia, wrongful termination of each contract.

The matter relating to the Tomlinson Bridge was the first to proceed to arbitration (Tomlinson arbitration). In its answer to White Oak's revised amended demand, the department asserted various setoffs and counterclaims, only one of which is relevant here. The relevant counterclaim alleged that "[White Oak] presently has a tax debt due and owing to the state." During arbitration, no evidence was adduced regarding the tax claim and neither party addressed it during oral argument. In 2004, the Tomlinson arbitration panel issued its award, rejecting White Oak's wrongful termination claim and awarding the department $1,169,648.33 in damages. With regard to the department's claim for a tax debt owed to the state, the panel ruled that "[the department] introduced no credible evidence of a tax debt due to the [state] and therefore failed to carry its burden of proof."

The matter relating to the Yellow Mill Pond Bridge subsequently proceeded to arbitration (Bridgeport arbi-

[1] General Statutes § 4-61 provides in relevant part: "(a) Any person, firm or corporation which has entered into a contract with the state, acting through any of its departments, commissions or other agencies, for the design, construction, construction management, repair or alteration of any highway, bridge, building or other public works of the state or any political subdivision of the state may, in the event of any disputed claims under such contract or claims arising out of the awarding of a contract by the Commissioner of Administrative Services, bring an action against the state to the superior court for the judicial district of Hartford for the purpose of having such claims determined . . . .

"(b) As an alternative to the procedure provided in subsection (a) of this section, any such person, firm or corporation having a claim under said subsection (a) may submit a demand for arbitration of such claim or claims for determination under (1) the rules of any dispute resolution entity, approved by such person, firm or corporation and the agency head and (2) the provisions of subsections (b) to (e), inclusive, of this section . . . ."

tration). In 2009, the panel issued an award to White Oak in the amount of $8,362,308.41 plus interest. In response, the department filed an application to vacate, correct or modify that award pursuant to General Statutes §§ 52-418, 52-419, and 52-420, and White Oak filed an application to confirm the arbitration award pursuant to General Statutes § 52-417. The trial court denied the department's application to vacate, correct or modify the award and granted White Oak's application to confirm the award. The department appealed from the judgment of the trial court to the Appellate Court. The Appellate Court reversed the judgment of the trial court and remanded the case with direction to vacate the arbitration award. White Oak then filed a petition for certification to appeal to this court, which was granted. In *Dept. of Transportation* v. *White Oak Corp.*, 319 Conn. 582, 623, 125 A.3d 988 (2015), this court reversed the judgment of the Appellate Court and remanded the case to that court with direction to affirm the judgment of the trial court, thereby confirming the arbitration award in favor of White Oak.

Following this court's decision, White Oak sought payment of the judgment from the comptroller. The comptroller complied with White Oak's request for payment, however, when issuing the payment on behalf of the department, the comptroller reduced the amount paid by $1,642,312.14 for taxes owed to the state pursuant to § 12-39g.[2] Specifically, the comptroller reduced

[2] General Statutes § 12-39g (a) provides: "Upon notification to the Comptroller by the Commissioner of Revenue Services that any taxes, including penalties and interest related thereto, are (1) due to the state from any person and unpaid and a period in excess of thirty days has elapsed following the date on which such taxes were due and (2) are not the subject of a timely filed administrative appeal to said commissioner or of a timely filed appeal pending before any court of competent jurisdiction, the Comptroller shall withhold any order upon the Treasurer for payment of any amount payable by the state to such person unless the amount so payable is reduced by the amount of such taxes, penalties and interest, provided any such amount payable by the state shall not be so reduced if such amount payable is a payment of salary or wages, or any payment in lieu of or in addition

the amount paid by $1,231,350.36 for taxes White Oak owed to the Department of Revenue Services and by $410,961.78 for taxes it owed to the Department of Labor.

Thereafter, White Oak filed a motion seeking a determination as to whether the judgment had been satisfied. In that motion, White Oak asserted that the department did not fully satisfy its judgment because the comptroller reduced the amount paid by the amount of taxes owed. White Oak claimed that, because the Tomlinson arbitration panel determined that the department had not proven its claim for taxes owed to the state, the doctrine of collateral estoppel precluded the comptroller from reducing the payment by any amount for taxes.

In its memorandum of decision on White Oak's motion, the trial court concluded that the department had not failed to satisfy its judgment to White Oak. The court determined that the doctrine of collateral estoppel did not preclude the comptroller from reducing the payment to White Oak by the amount of taxes owed because that issue was never fully and fairly litigated in the Tomlinson arbitration. It further determined that § 12-39g imposed a separate statutory obligation on the comptroller to reduce the payment to White Oak by the amount of taxes owed. Thus, the trial court denied White Oak's motion seeking a determination that the prior money judgment had not been satisfied. In accordance with that denial, the trial court amended the judgment file to indicate that the department had fully satisfied the judgment against it. This appeal followed.[3]

to such salary or wages, to a state employee. The Comptroller shall promptly notify the Commissioner of Revenue Services of any payment reduced under the provisions of this section."

[3] White Oak appealed to the Appellate Court, and we transferred that appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199.

We begin by setting forth the standard of review and the relevant principles of law governing White Oak's claims. Until a judgment has been satisfied, courts have jurisdiction over all parties in an action. General Statutes § 52-350d (a). Moreover, parties may request a determination from the court as to whether a judgment has been satisfied. Practice Book § 6-5. In making that determination, a trial court must consider whether the following prerequisites have been met. "First, the judgment creditor must have obtained a valid money judgment against the judgment debtor. Second, the judgment debtor must have paid the amount of that judgment. In so doing, the court must find that the judgment debtor either made actual payment to the judgment creditor or a payment equivalent thereto." *Coyle Crete, LLC* v. *Nevins*, 137 Conn. App. 540, 552, 49 A.3d 770 (2012).

In the present case, the parties do not dispute whether White Oak obtained a valid money judgment against the department. See *Dept. of Transportation* v. *White Oak Corp.*, supra, 319 Conn. 582. Instead, the issue in the present appeal is whether the comptroller's reduction of the payment by the amount of taxes owed by White Oak to the state caused the department to fail to satisfy the judgment.

Our resolution of this question requires us to interpret the statutory scheme by which the state effectuates the payment of judgments against it, which "presents a question of statutory construction over which we exercise plenary review. . . . 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 . . . § 1-2z directs us

first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 704, 200 A.3d 1118 (2019).

We turn next to examining the relevant statutory scheme. As this court previously has explained, a plaintiff must either have an explicit statutory waiver of sovereign immunity or seek a waiver from the claims commissioner before bringing an action for monetary damages against the state in the Superior Court. See *Miller* v. *Egan*, 265 Conn. 301, 318, 828 A.2d 549 (2003). Once a party either receives a waiver from the claims commissioner or proceeds under an explicit statutory waiver, the action against the state proceeds pursuant to the statutory scheme set forth in chapter 53 of the General Statutes, which is entitled "Claims Against the State."

If the action results in a judgment against the state, that statutory scheme provides a process by which payment of the judgment is made by the state. See General Statutes § 4-160 (j).[4] Specifically, the statutory scheme

[4] General Statutes § 4-160 (j) provides: "The clerk of the court in which judgment is entered against the state shall forward a certified copy of such judgment to the Comptroller. The Attorney General shall certify to the Comptroller when the time allowed by law for proceeding subsequent to final judgment has expired and the Attorney General shall designate the state agency involved in the action. Upon receipt of such judgment and certification the Comptroller shall make payment as follows: Amounts directed by law to be paid from a special fund shall be paid from such special fund; amounts awarded upon contractual claims for goods or services furnished or for property leased shall be paid from the appropriation of the agency which received such goods or services or occupied such property; all other amounts shall be paid from such appropriation as the General Assembly may have made for the payment of claims."

directs that the comptroller, not the specific state agency involved in the litigation, makes payments of all judgments against the state. The statute explicitly instructs that "the clerk of the court in which judgment is entered against the state shall forward a certified copy of such judgment to the Comptroller. The Attorney General shall certify to the Comptroller when the time allowed by law for proceeding subsequent to final judgment has expired and the Attorney General shall designate the state agency involved in the action. Upon receipt of such judgment and certification the Comptroller shall make payment . . . ." General Statutes § 4-160 (j).

In carrying out its obligation to make such payments on behalf of the state, the comptroller is guided by a related statute, § 12-39g. That statute, which is contained within chapter 202 of the General Statutes, entitled "Collection of State Taxes," imposes specific requirements on the comptroller when undertaking the payment of judgments against the state. Thus, this taxing statute must also be considered part of the statutory scheme governing the payment of judgments against the state.

Section 12-39g (a) provides in relevant part: "Upon notification to the Comptroller by the Commissioner of Revenue Services that any taxes, including penalties and interest related thereto, are (1) due to the state from any person and unpaid and a period in excess of thirty days has elapsed following the date on which such taxes were due and (2) are not the subject of a timely filed administrative appeal to said commissioner or of a timely filed appeal pending before any court of competent jurisdiction, the Comptroller shall withhold any order upon the Treasurer for payment of any amount payable by the state to such person unless the amount so payable is reduced by the amount of such taxes, penalties and interest . . . ."

The plain language of § 12-39g provides that, once the comptroller is notified that taxes are owed and that the taxes are not the subject of a timely filed administrative appeal, he must reduce any amount payable to the person or entity owing taxes by the amount of taxes owed. Indeed, § 12-39g provides that "the Comptroller *shall* withhold any order upon the Treasurer for payment of any amount payable by the state to such person *unless* the amount so payable is reduced by the amount of such taxes, penalties and interest . . . ." (Emphasis added.) Put a different way, the plain language of § 12-39g thus provides the comptroller with two choices—either withhold payment of the judgment in its entirety or reduce the payment by the amount of taxes owed.

The use of the term "shall" in § 12-39g is noteworthy. "In interpreting statutory text, this court has often stated that the use of the word shall, though significant, does not invariably create a mandatory duty. . . . The usual rule, however, is that [t]he . . . use of the word shall generally evidences an intent that the statute be interpreted as mandatory." (Internal quotation marks omitted.) *DeMayo* v. *Quinn*, 315 Conn. 37, 43, 105 A.3d 141 (2014), quoting *Stewart* v. *Tunxis Service Center*, 237 Conn. 71, 78, 676 A.2d 819 (1996). Therefore, although not dispositive, the use of the phrase "[t]he Comptroller *shall* withhold" in § 12-39g suggests a mandatory obligation on the part of the comptroller to either reduce the payment by the amount of taxes owed or to withhold such payment entirely. (Emphasis added.) The fact that § 12-39g uses the term "shall" in conjunction with the term "unless" provides further support for our understanding that it creates a mandatory obligation on the part of the comptroller to reduce the payment by taxes owed. See *Pereira* v. *State Board of Education*, 304 Conn. 1, 15, 37 A.3d 625 (2012) (concluding that General Statutes [Rev. to 2011] § 10-223e [h], which combined use of the terms shall and unless, "con-

veys a mandatory procedure to be followed" by State Board of Education); cf. *Caulkins* v. *Petrillo*, 200 Conn. 713, 717, 513 A.2d 43 (1986) (concluding that General Statutes [Rev. to 1985] § 20-429 [a], which uses both shall and unless, created mandatory requirement).

"The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words." (Internal quotation marks omitted.) *Katz* v. *Commissioner of Revenue Services*, 234 Conn. 614, 617, 662 A.2d 762 (1995). As we have explained previously in this opinion, § 12-39g is a part of the statutory scheme to collect taxes. Indeed, the collection of taxes is the essence of the comptroller's duty under § 12-39g. On the basis of the foregoing, we conclude that § 12-39g not only is an independent statutory basis by which the comptroller can reduce a payment by the amount of taxes owed, but creates a mandatory obligation on the part of the comptroller either to do so or to not issue a payment at all.

In the present case, White Oak brought its action pursuant to § 4-61, which is a specific statutory waiver of the state's sovereign immunity with respect to certain claims arising under public works contracts. See footnote 1 of this opinion. Once White Oak obtained a judgment against the state, it proceeded to follow the statutory scheme set forth in chapter 53 of the General Statutes, which is entitled "Claims Against the State." Specifically, pursuant to § 4-160 (j), White Oak

requested that the clerk issue a certified copy of the judgment to the comptroller, and the clerk did so.

The comptroller, having been notified that White Oak owed taxes to the Department of Labor and the Department of Revenue Services and that those taxes were not the subject of a timely filed administrative appeal, paid the judgment after reducing the amount payable by the amount of taxes owed in accordance with § 12-39g.

As we have explained previously in this opinion, the comptroller is obligated to reduce the payment by the amount of taxes owed, unless they are the subject of a timely filed administrative appeal. In the present case, White Oak does not assert that the taxes withheld by the comptroller were the subject of a timely filed administrative appeal. Instead, White Oak asserts that the Tomlinson arbitration resulted in a determination that it did not owe any taxes. Nonetheless, nothing in the plain language of § 12-39g allows the comptroller to not reduce the payment to White Oak by taxes owed because those taxes were not the subject of a timely filed administrative appeal. Accordingly, we conclude that the comptroller properly exercised his statutorily created obligation to reduce the payment to White Oak by the amount of taxes owed.

White Oak asserts that, under the doctrine of collateral estoppel, the comptroller was barred from reducing the payment to White Oak by the amount of taxes owed. We disagree. "Application of the doctrine of collateral estoppel is neither statutorily nor constitutionally mandated. The doctrine, rather, is a judicially created rule of reason that is enforced on public policy grounds." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 58–59, 808 A.2d 1107 (2002). We also have explained that "[c]ourts should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he doctrines of pre-

clusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citation omitted; internal quotation marks omitted.) Id., 59–60. The application of the doctrine of collateral estoppel is a legal question, over which we exercise plenary review. See, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 345, 15 A.3d 601 (2011).

Because we conclude that, pursuant to § 12-39g, the comptroller was obligated to reduce the payment to White Oak by the amount of taxes owed because they were not the subject of a timely filed administrative appeal, we decline to apply the doctrine of collateral estoppel in the present case. As we have explained previously in this opinion, the comptroller's obligation pursuant to § 12-39g is part of a comprehensive scheme for the collection of taxes and that scheme allowed White Oak to file a timely administrative appeal to challenge those taxes. White Oak did not avail itself of that opportunity and allowing it to avoid its tax obligation now through a mechanical application of collateral estoppel would frustrate the well recognized social policy of tax collection.

The judgment is affirmed.

In this opinion the other justices concurred.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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KATHRYNNE S. *v.* STANLEY SWETZ*
(AC 41143)

Alvord, Bright and Bear, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the application for relief from abuse filed by the plaintiff, pursuant to statute (§ 46b-15), and issuing a domestic violence restraining order against him. At the time she filed her application, the plaintiff resided with her life partner and his son, the defendant. In her affidavit, the plaintiff averred, inter alia, that the defendant verbally attacked her, followed her throughout the house, opened windows on cold days, used derogatory language against her, threatened to sabotage her car and barged into her room to take photographs of her in her nightwear, and at the hearing on her application she described his conduct as constant intimidation, threatening and stalking. Following the hearing, the trial court granted the application for a restraining order, and the defendant appealed to this court. *Held:*

1. There was sufficient evidence to support the trial court's finding that the defendant presented a continuous threat of present physical harm or injury to the plaintiff: that court found that a restraining order was warranted on the basis of the plaintiff's affidavit, her testimony, and the testimony of a social worker, as the plaintiff testified that she was intimidated and bullied, and that her physical safety was in jeopardy with the defendant in the home, there were at least two prior incidents

* In accordance with our policy of protecting the privacy interests of an applicant for a restraining order, we decline to identify the applicant or others through whom the applicant's identity may be ascertained.

in which the defendant made physical contact with the plaintiff, and the defendant admitted he was charged with disorderly conduct after one of those incidents; moreover, the court, as the sole arbiter of the credibility of the witnesses, was free to credit the plaintiff's testimony that while at the same residence, the defendant constantly screamed into her left ear, told her that she did not belong in certain parts of the house, ranted at her and threatened her with physical harm, which caused her to tremble, and that testimony was corroborated by the testimony of the social worker.

2. The defendant could not prevail on his claim that the trial court was improperly influenced by his invocation of his right against self-incrimination pursuant to the fifth amendment of the United States constitution, which occurred after he objected to the admission of a certain audio recording and the court informed him that the recording had been shared with the Manchester Police Department, that there might be a criminal investigation, that the restraining order hearing was being recorded and that he had a fifth amendment right against self-incrimination, which the defendant subsequently invoked; the court, which advised the defendant that he had a right not to incriminate himself, did not specifically state that it was drawing an adverse inference against the defendant because he objected to the admission of the recording into evidence, and even if the trial court did draw an erroneous adverse inference from the defendant's objection to the admission of evidence, it was harmless error because there was other sufficient evidence of the defendant's conduct.
3. The trial court properly applied the preponderance of the evidence standard of proof to weigh the evidence at the hearing for the domestic violence restraining order; because the plaintiff applied for a civil restraining order under § 46b-15, which is silent as to the applicable standard of proof, the preponderance of the evidence standard applied, and it is the common and correct practice for trial courts to employ that standard of proof in cases involving domestic violence restraining orders.

Argued May 20—officially released August 20, 2019

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of Hartford, where the court, *Bozzuto*, *J.*, granted the application and issued a restraining order, from which the defendant appealed to this court. *Affirmed.*

Stanley Swetz, self-represented, the appellant (defendant).

Opinion

PER CURIAM. The self-represented defendant, Stanley Swetz, appeals from the judgment of the trial court granting the application of the self-represented plaintiff, Kathrynne S., for relief from abuse and issuing a domestic violence restraining order pursuant to General Statutes § 46b-15.[1] On appeal, the defendant claims that the court improperly (1) determined that there was evidence of imminent physical harm or threat, (2) considered his invocation of his right against self-incrimination pursuant to the fifth amendment of the United States constitution as evidence (fifth amendment right), and (3) applied an incorrect standard of proof in granting the application.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On November 17, 2017, the plaintiff filed an application for relief from abuse against the defendant pursuant to § 46b-15. At the time of her application, the plaintiff resided with her life partner and his son, the defendant.[3] In her application, the plaintiff averred under oath that the defendant screamed in her left ear, verbally attacked her so forcefully that she would be covered in his spit, followed her throughout the house, opened windows on cold days, used derogatory language directed at her, threatened to sabotage her car, and barged into her room to take photographs

[1] General Statutes § 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening . . . by another family or household member may make an application to the Superior Court for relief under this section. . . ."

[2] The plaintiff failed to file a brief with this court. We, therefore, have considered the appeal solely on the basis of the defendant's brief, oral argument, and the record. See *Schettino* v. *Labarba*, 82 Conn. App. 445, 446 n.2, 844 A.2d 923 (2004).

[3] The plaintiff's life partner, the defendant's father, passed away on December 14, 2017.

of her in her nightwear, and that the defendant had been arrested for assaulting her in 2015.

At the hearing on the plaintiff's application, on November 30, 2017, the plaintiff described the defendant's conduct as "constant intimidation and threatening and stalking . . . ." The plaintiff also testified that the defendant struck her on two occasions, once in 2010 and again in 2015. In support of her claims, the plaintiff offered into evidence, to which the defendant objected,[4] a flash drive containing an audio recording of the defendant allegedly engaging in an eighteen minute "verbal rant" against the plaintiff. The plaintiff further testified that she had gone to the Manchester police with the recording. The court then asked the defendant if he objected to its hearing of the recording given to the police and advised the defendant of his fifth amendment right. After the court's advisement, the defendant invoked his fifth amendment right with respect to the contents of the recording.[5] The court then stated that it inferred "that there is stuff on that tape he doesn't want this court to hear." The tape was not admitted into evidence.

The plaintiff also presented the testimony of Brooke Clemons, a social worker for Manchester Protective Services for the Elderly. Clemons testified that the plaintiff had provided a video from her phone about the emotional abuse she received and that the plaintiff had told her that the defendant stole food and repeatedly stood right behind her and yelled in her ear. Clemons further testified that because of the plaintiff's disclosure, she opened two protective service cases: one on the plaintiff and one on her life partner. She also

[4] The basis of the defendant's objection was: "Well, I reject being—having anything of my voice recorded surreptitiously."

[5] Although the defendant invoked his fifth amendment right with respect to the contents of the recording, he continued to testify about matters other than the recording.

testified that she met with the plaintiff's life partner and he "supported everything that [the plaintiff] was telling [her] that was happening in the home" and that "he would like to see his son leave."[6] The defendant did not object to any of Clemons' testimony.

In response, the defendant argued at the hearing that the plaintiff had not made any accusations of imminent physical harm in her application for the restraining order or in her presentation to the court. He also argued that the plaintiff had presented "no concrete day, time" associated with her claims.

At the conclusion of the hearing, the court orally rendered its decision granting the plaintiff's application for a restraining order. The court stated: "I do believe [the plaintiff], that she feels that her safety is at risk with [the defendant] being present in the home. I do believe that she feels intimidated and bullied and that her physical safety is in jeopardy. So, I think it's entirely appropriate to grant the relief requested." The court issued a full no-contact order for one year. This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we note that although the restraining order expired on November 30, 2018, the defendant's appeal is not moot. In *Putman* v. *Kennedy*, 279 Conn. 162, 164–65, 900 A.2d 1256 (2006), our Supreme Court concluded that "the expiration of a domestic violence restraining order does not render an appeal from that order moot because it is reasonably possible that there will be significant collateral consequences for the person subject to the order." Accordingly, we proceed to the merits of the defendant's appeal.

[6] According to both parties, at the time of the hearing, the defendant was appealing an eviction order by the housing court.

I

On appeal the defendant first claims that the court erroneously determined that he had threatened and bullied the plaintiff and that he had caused her to fear for her personal safety. More specifically, he claims that "[t]he judge made her decision based on feelings and on no actual facts brought into evidence."

We first set forth the standard of review and applicable legal principles that guide our analysis. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014).

Section 46b-15 (a), which governs this case, authorizes the court to issue a restraining order upon a finding that a "household member . . . has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening . . . ." Because the court granted the plaintiff's application on the basis of its finding that there existed a continuous threat of present physical pain or injury, we proceed

under that part of § 46b-15, and not under the stalking or pattern of threatening portion of the statute. With respect to the defendant's claim as considered by the court, "[t]he plain language of § 46b-15 clearly requires a continuous threat of present physical pain or physical injury before a court can grant a domestic violence restraining order. . . . [D]omestic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a continuous threat of present physical pain or physical injury to the applicant." (Citation omitted; internal quotation marks omitted.) *Jordan M.* v. *Darric M.*, 168 Conn. App. 314, 319, 146 A.3d 1041, cert. denied, 324 Conn. 902, 151 A.3d 1287 (2016). As this court held in *Putman*, after remand from our Supreme Court, "*one* incident [of physical injury], combined with a finding that a respondent presently poses a continuous threat, is sufficient to satisfy § 46b-15." (Emphasis in original.) *Rosemarie B.-F.* v. *Curtis P.*, 133 Conn. App. 472, 477, 38 A.3d 138 (2012); see *Putman* v. *Kennedy*, 104 Conn. App. 26, 32–34, 932 A.2d 434 (2007), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008).

In *Putman*, as in the present case, the defendant argued that the trial court abused its discretion because there was no factual basis to support its finding that the defendant presented a continuous threat of physical pain or injury to support the issuance of a restraining order under § 46b-15. *Putman* v. *Kennedy*, supra, 104 Conn. App. 33–34. Specifically, the defendant in *Putnam* argued that there was only an isolated altercation with his son and that there was no history of violence. Id., 33–34. This court held that "neither a pattern of abuse nor the son's subjective fear of the defendant is a requirement for the finding of a continuous threat. . . . It would defy the prophylactic purpose of the statute to impose an absolute bar on relief until the person for whom protection was sought has suffered multiple

physical abuses." (Citations omitted.) Id., 34. The trial court had found, and this court affirmed, that the altercation between the father and the son, along with the father's refusal to accept responsibility, was sufficient to find that the son was subject to a continuous threat of present physical pain or injury, despite the fact that the son did not state that he was afraid of his father. Id., 34–35. To have held otherwise would have restricted "the necessarily broad discretion trial courts must retain in dealing with such sensitive and fact specific matters." Id., 35.

In the present case, the court found that a restraining order was warranted on the basis of the plaintiff's affidavit, her testimony, and the testimony of the social worker. The court believed the plaintiff's testimony that she was intimidated and bullied, and that her physical safety was in jeopardy with the defendant present in the home. "In pursuit of its fact-finding function, [i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Margarita O.* v. *Fernando I.*, 189 Conn. App. 448, 461–62, 207 A.3d 548, cert. denied, 331 Conn. 930, 207 A.3d 1051 (2019).

In the case at bar, the court also had before it evidence of at least two prior incidents when the defendant made physical contact with the plaintiff. The plaintiff testified about an incident in 2010 in which the defendant hit

her. Later in the hearing, the plaintiff testified about another incident in 2015 in which the defendant struck her, which resulted in the defendant's arrest, and a subsequent court order for him to complete anger management classes. The defendant admitted to being charged, after the 2015 incident, with disorderly conduct.

Additionally, the plaintiff described in her testimony the conduct of the defendant while they lived at the same residence, including that the defendant constantly screamed into her left ear, told the plaintiff that she did not belong in certain parts of the house, ranted at her for long periods of time, and threatened her with physical harm. According to the plaintiff, the defendant's actions caused her to tremble. The court also heard the testimony of Clemons, which corroborated the plaintiff's claims.

The court, as the sole arbiter of credibility, was free to credit the plaintiff's testimony. See *Jayne S.* v. *Kyle S.*, 116 Conn. App. 690, 692, 978 A.2d 94 (2009). Contrary to the defendant's claim that "[t]he judge made her decision based on feelings and on no actual facts brought into evidence," we conclude that there was sufficient evidence to support the court's finding that the defendant presented a continuous threat of present physical harm or injury to the plaintiff.

II

The defendant next claims that "[t]he judge was influenced by the defendant's invoking of the fifth amendment and used it as evidence against him."

"The plaintiff's claim involves a question of law, over which our review is plenary. See *Rhode* v. *Milla*, 287 Conn. 731, 737, 949 A.2d 1227 (2008) (whether invocation of fifth amendment privilege constitutes admissible evidence is question of law over which our review is

plenary)." *Greenan* v. *Greenan*, 150 Conn. App. 289, 298 n.7, 91 A.3d 909, cert. denied, 314 Conn. 902, 99 A.3d 1167 (2014).

First, we note that the defendant's claim rests upon a seeming misunderstanding of the law involving the fifth amendment right. Although a criminal defendant's invocation of the fifth amendment right prevents a court from drawing an adverse inference, because of the defendant's refusal to testify, of the existence of a fact, or facts, relating to the defendant's guilt, such a prohibition does not apply to civil matters, unless there exists an express statutory provision to the contrary. See *In re Samantha C.*, 268 Conn. 614, 635, 847 A.2d 883 (2004) ("The privilege does not . . . forbid the drawing of adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. The prevailing rule is that the fifth amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." [Internal quotation marks omitted.]). This reflects "the longstanding principle that the trier of fact is entitled to draw all fair and reasonable inferences from the facts and circumstances [that] it finds established by the evidence, which consist both of what was said, and what naturally would have been." (Internal quotation marks omitted.) Id., 636.

As noted previously, the plaintiff sought to introduce an audio recording that she had made of the defendant purportedly engaged in a "verbal rant" against her for eighteen minutes. The defendant objected to the court hearing the recording, claiming that he did not know he was being recorded at the time and that he objected to having his voice recorded "surreptitiously," but he, at that point, did not invoke his fifth amendment right. In response, the court informed the defendant that he should keep in mind that the plaintiff had testified that she had shared the recording with the Manchester

Police Department, that they directed her to the trial court, and that there might be a criminal investigation by the Manchester Police Department. The court further informed the defendant that the restraining order hearing was being recorded and that a prosecutor could ask the court reporter for a transcript or recording of his testimony, and informed him of his fifth amendment right against self-incrimination. The defendant then invoked his fifth amendment right. The court later stated: "I advised him of his fifth amendment right not to incriminate himself, and I infer from his objection that there is stuff on that tape he doesn't want this court to hear." The court did not specifically state that it was drawing any adverse inference against the defendant because he objected to the admission of the recording into evidence.[7] Even if we were to conclude that the court did draw an erroneous adverse inference from the defendant's objection to the admission of evidence, it was harmless error because there also was other sufficient evidence of the defendant's conduct, including the plaintiff's testimony and the testimony of Clemons.

III

Finally, the defendant claims that the court applied an incorrect standard of proof in granting the restraining order. Specifically, he argues that the court improperly used the standard of "just tipping the scales" in determining that the plaintiff was entitled to a restraining order pursuant to § 46b-15.

"The issue of whether the court held the parties to the proper standard of proof is a question of law. When issues in [an] appeal concern questions of law, this court reviews such claims de novo." (Internal quotation

[7] Our Supreme Court has determined that "an adverse inference cannot supply proof of a material fact; it merely allows the fact finder to weigh facts already in evidence." *In re Samantha C.*, supra, 268 Conn. 665.

marks omitted.) *Satti* v. *Kozek*, 58 Conn. App. 768, 771, 755 A.2d 333, cert. denied, 254 Conn. 928, 761 A.2d 755 (2000).

In a civil dispute, the usual standard of proof employed by the trier of fact is the preponderance of the evidence. *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 819, 955 A.2d 15 (2008) ("in this state, proof by preponderance of the evidence is the ordinary civil standard of proof" [internal quotation marks omitted]); see *State* v. *Davis*, 229 Conn. 285, 295–96, 641 A.2d 370 (1994) ("our determination is guided by the general rule that when a civil statute is silent as to the applicable standard of proof, the preponderance of the evidence standard governs factual determinations required by that statute"). In the present case, the plaintiff applied for a civil restraining order under § 46b-15. Because § 46b-15 is silent as to the applicable standard of proof, the preponderance of the evidence standard applies. Indeed, it is the common and correct practice for our trial courts to employ the preponderance of the evidence standard in cases involving domestic violence restraining orders. See, e.g., *Faticanti* v. *Faticanti*, Superior Court, judicial district of Tolland, Docket No. FA-18-4024765-S (May 11, 2018) (in order to be entitled to domestic violence restraining order under § 46b-15 [a], applicant must establish continuous threat of present physical pain or injury by preponderance of evidence); *State* v. *Hollander*, Superior Court, judicial district of New London, Docket No. CR-12-0119114-S (April 6, 2015) (60 Conn. L. Rptr. 85) ("[a] civil restraining order is premised on a finding of what is in the best interests of the victim given threatening or assaultive behavior of the defendant as established by a fair preponderance of the evidence").

At the conclusion of the hearing, the court informed the parties that, because it was a civil proceeding, the

plaintiff was required to "tip the scales"—a colloquialism often used by our courts to refer to the preponderance of the evidence standard of proof.[8] We conclude as a matter of law that the court properly used the preponderance of the evidence standard to weigh the evidence in the hearing for a domestic violence restraining order.

The judgment is affirmed.

D'ANNA WELSH *v.* WILLIAM V. MARTINEZ
(AC 41115)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant, W, appeals from the judgment of the trial court holding him in contempt for violating the terms of an asset standstill order. The plaintiff had brought an action against W seeking to recover damages for, inter alia, tortious invasion of privacy. The matter was tried to a jury, which returned a verdict in favor of the plaintiff in the amount of $2 million, and the court awarded punitive damages in the amount of $360,000. Thereafter, the court ordered that W was enjoined from voluntarily transferring or encumbering any assets except business assets in the ordinary course of business and personal assets for ordinary living expenses, including court-ordered alimony and child support, and also granted the plaintiff's application for a prejudgment remedy. The plaintiff subsequently filed a motion for contempt alleging that W transferred more than $2 million to his then-wife, C, by depositing all of his wages directly into her bank account for the purpose of defeating the asset standstill order. The trial court granted the motion for contempt and imposed a compensatory fine of $2.2 million payable to the plaintiff in the amount of $25,000 per month. From the judgment rendered thereon, W appealed to this court. *Held:*

1. W's claim that the trial court improperly found him in contempt because the asset standstill order lacked sufficient clarity and was ambiguous was unavailing: the plain language of the order prohibited W from depositing the entirety of his income to C's bank account over several years,

[8] See, e.g., *In re Samantha C.*, supra, 268 Conn. 666 ("[a]lthough it is true that the respondents faced a difficult choice in the present case, namely, choosing whether to expose themselves to cross-examination or risking that an adverse inference might tip the scales in the petitioner's favor, that choice was preferable to no choice at all").

after his own bank account into which his wages previously were deposited was frozen, for the purpose of shielding those assets from the reach of a judgment creditor, the asset standstill order provided sufficient notice to a reasonable person that the wholesale transfer of wages to the account of a third party was not permitted, and evidence in the record supported the court's determination that W wilfully had violated the order, including evidence that C's bank account was opened for the express purpose of placing the entirety of W's wages outside the reach of a judgment creditor; accordingly, the trial court did not abuse its discretion in holding W in contempt.

2. W could not prevail in his claim that the trial court failed to consider his ability to pay in imposing a compensatory fine: that court found that W had sufficient income and other assets that rendered him financially able to pay the monthly amount ordered, and that finding was substantiated by evidence in the record, which included W's testimony that he earned a gross annual income of $1.2 million and that he had no other long-term debt aside from monthly mortgage payments and certain divorce related obligations, and statements from individual retirement accounts held by W were admitted into evidence as full exhibits, and, therefore, the court reasonably could have concluded that W had not proven a financial incapacity to comply with its fine, and its finding that W possessed sufficient income and other assets to pay that fine was not clearly erroneous.

3. Although the trial court properly concluded that the plaintiff was harmed by W's contemptuous conduct, the court abused its discretion in imposing a compensatory fine without the necessary factual basis: even though the court properly found that the principal loss sustained by the plaintiff was the inability to employ statutory collection procedures against W, including the remedy of attachment as to the $2,220,400.67 in wages that W deposited into C's bank account, compensatory fines must be confined to actual losses sustained as a result of noncompliance with a court order, the ability to attach an asset is distinct from the ability to execute on an attachment to satisfy an outstanding judgment, and the court failed to furnish an adequate factual basis to support its determination that the plaintiff had proven $2.2 million in actual pecuniary losses, as an attachment merely provides security for a judgment creditor, who may execute on the attachment depending on a number of factors, including the extent to which the judgment has been satisfied and the existence of other attachments on the assets of the judgment debtor, the court made no findings, apart from finding that the plaintiff's ability to attach such assets was impaired, to provide the requisite factual basis for its compensatory fine and, in the absence of such findings, could not ensure that the fine was confined to actual losses sustained; accordingly, the case was remanded to the trial court for a new hearing limited solely to the issue of damages to determine the measure of loss that occurred as a result of W's contemptuous conduct in violation of the court's order.

Argued February 4—officially released August 20, 2019

Procedural History

Action to recover damages for, inter alia, the defendant's alleged invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Robaina, J.*; verdict and judgment for the plaintiff, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the plaintiff filed a motion to prevent fraudulent transfer of property; subsequently, the court, *Graham, J.*, entered an order enjoining the defendant from transferring certain assets; thereafter, the court, *Robaina, J.*, granted the plaintiff's application for a prejudgment remedy; subsequently, the court, *Moll, J.*, granted the plaintiff's motion for contempt and rendered judgment thereon, from which the defendant appealed to this court; thereafter, the court, *Moll, J.*, denied the defendant's motion for articulation; subsequently, the defendant filed a motion for review with this court, which granted the defendant's motion for review but denied the relief requested. *Reversed in part; further proceedings.*

Jeffrey J. Mirman, with whom were *David A. DeBassio* and, on the brief, *Thomas J. Farrell*, for the appellant (defendant).

Irve J. Goldman, with whom, on the brief, was *Timothy G. Ronan*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, William V. Martinez, Jr.,[1] appeals from the judgment of the trial court holding

[1] William V. Martinez, Jr., was the sole defendant in the underlying civil action commenced by the plaintiff in 2010. See *Welsh* v. *Martinez*, 157 Conn. App. 223, 114 A.3d 1231, cert. denied, 317 Conn. 922, 118 A.3d 63 (2015). The plaintiff subsequently commenced a fraudulent transfer action against Martinez's then-wife, Cristina Martinez (Cristina), and other family members in the fall of 2016, which later was consolidated with the underlying civil action by order of the court in 2017. Because the contempt motion at issue in this appeal pertains solely to William V. Martinez, Jr., for purposes of clarity, we refer to him as the defendant in this opinion.

him in contempt for violating the terms of an asset standstill order. On appeal, the defendant claims that the court improperly (1) found him in contempt because that order lacked sufficient clarity and was ambiguous, (2) failed to consider the defendant's ability to pay in imposing a compensatory fine, and (3) abused its discretion in imposing that fine. We affirm in part and reverse in part the judgment of the trial court.

In 2010, the plaintiff, D'Anna Welsh, commenced a civil action (underlying action) against the defendant, in which she alleged tortious invasion of privacy, negligence per se, intentional infliction of emotional distress, and negligent misrepresentation. At trial, the jury was presented with "undisputed evidence" that the defendant "conducted extensive covert surveillance of the plaintiff over the course of several years. That surveillance included intimate video transmissions from her bedroom and shower, daily reports as to every notation made on her computer, and GPS monitoring of her vehicle. The jury also had before it evidence that although the defendant swore under oath before the [Superior Court] at [an] accelerated rehabilitation hearing . . . that the plaintiff 'had nothing to worry about' and that no further surveillance equipment remained in the plaintiff's home, the transmissions from her bedroom thereafter continued and the defendant continued to receive daily e-mail reports from the spyware on the plaintiff's computer. The jury also was presented with evidence that despite her request for the defendant to leave her alone, he continued to appear unannounced and uninvited at her home. His behavior terrified the plaintiff, particularly when he informed her that 'I can hear you from outside your house.' In addition, the defendant's angry and violent conduct left the plaintiff scared for her life."[2] *Welsh* v. *Martinez*, 157 Conn. App.

[2] For a more detailed account of the conduct that gave rise to this litigation, see *Welsh* v. *Martinez*, supra, 157 Conn. App. 225–34.

223, 241, 114 A.3d 1231, cert. denied, 317 Conn. 922, 118 A.3d 63 (2015). The jury thereafter returned a verdict in favor of the plaintiff on all counts and awarded her $2 million in damages, the propriety of which this court affirmed on appeal. See id., 240–46.

After the jury returned a verdict in her favor, the plaintiff filed a motion with the trial court seeking punitive damages in the amount of her attorney's fees. The trial court, *Robaina, J.*, granted that motion over the defendant's objection and awarded "the sum of $360,000 as punitive damages in favor of the plaintiff."[3] As a result, the plaintiff had an outstanding judgment against the defendant in the amount of $2,360,000 as of December, 2012.[4]

On the same day that the jury delivered its verdict, the plaintiff filed two pleadings relevant to this appeal. The first was an application for a prejudgment remedy.[5] In the second, which was titled "Plaintiff's Motion to Prevent Defendant's Fraudulent Transfer of Property," the plaintiff alleged that she had "a reasonable belief that [the] defendant will attempt to fraudulently transfer property in violation of [the Uniform Fraudulent Transfer Act, General Statutes § 52-552a et seq.]."

On July 9, 2012, the court, *Graham, J.*, held a hearing on the latter motion. At its conclusion, the court entered an order that stated: "The [defendant] is enjoined from

[3] The defendant did not challenge the propriety of that supplemental award on appeal.

[4] On April 23, 2013, the trial court granted the plaintiff's motion for postjudgment interest and ordered that "interest at the rate of 3.5 percent per annum is awarded as of December 25, 2012."

[5] We note that "[d]espite the apparent contradiction in terms, a prejudgment remedy may be granted after the entry of judgment but before appellate disposition in order to protect assets to satisfy the judgment." *Tadros* v. *Tripodi*, 87 Conn. App. 321, 335 n.9, 866 A.2d 610 (2005); see also *Gagne* v. *Vaccaro*, 80 Conn. App. 436, 454, 835 A.2d 491 (2003) ("a prejudgment remedy is available to a party who has prevailed at the trial level and whose case is on appeal"), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004).

voluntarily transferring or encumbering any assets except business assets in the ordinary course of business and personal assets for ordinary living expenses, including court-ordered alimony and child support" (asset standstill order).[6]

Weeks later, on July 31, 2012, Judge Robaina granted the plaintiff's application for a prejudgment remedy. In so doing, the court ordered: "[The] plaintiff is allowed to attach up to $2 million of the defendant's property and [the] defendant is to provide a disclosure of assets by August 10, 2012. No wage garnishment to be sought at this time." On June 24, 2013, in response to a motion by the plaintiff, the court entered an additional order requiring the periodic disclosure of assets by the defendant (asset disclosure order).[7]

On May 2, 2017, the plaintiff filed a postjudgment motion for contempt and an accompanying memorandum of law. In that motion, the plaintiff alleged that the defendant voluntarily had transferred more than $2 million to Cristina Martinez (Cristina) "by depositing his monies directly into her bank account for no valid purpose but for the purpose of defeating [the] asset standstill order." The plaintiff also alleged that the

[6] We refer to the court's July 9, 2012 order as the "asset standstill order" both for convenience and because that is the nomenclature employed by the parties and the trial court in this case.

[7] The asset disclosure order required the defendant to provide quarterly asset disclosures to the plaintiff under penalty of false statement. In those disclosures, the defendant was obligated to identify: "(a) Any and all real property, personal property, title, rights, and thing of value whatsoever, in which [the defendant] has an interest from the period of July 9, 2012 through the date of the disclosure; (b) Any and all wages paid to [the defendant], including amounts, formulas, and their scheduled dates of disbursement, from the period of July 9, 2012 through the date of the disclosure; (c) The financial institution, location, account number, and monthly balances of all bank or trading accounts ever held by, in the name of, or for the benefit of [the defendant] from the period of July 9, 2012 through the date of the disclosure; and (d) Any and all debts due and owing to [the defendant] from the period of July 9, 2012 through the date of the disclosure."

defendant had "concealed and refused to disclose his personal property, financial bank and trading accounts, and debts due and owing to him" in violation of the asset disclosure order. The defendant filed an objection to the plaintiff's motion, to which the plaintiff filed a reply.

The court, *Moll, J.*, held an evidentiary hearing on the plaintiff's motion for contempt on August 2, 2017. The plaintiff called three witnesses: David Baker, the vice president of corporate security at Farmington Bank; Jamie Cook, the custodian of records at People's United Bank; and the defendant.[8] At that hearing, the court received undisputed documentary and testimonial evidence indicating that, at the time that the verdict was rendered in the underlying action in 2012, the defendant was the sole holder of an account with Farmington Bank, into which he regularly deposited his wages. When that account became frozen in October, 2012, as a result of collection actions undertaken by the plaintiff, the defendant began depositing his wages in their entirety into an account with People's United Bank held solely by his then-wife, Cristina.[9] By his own admission, the defendant made those deposits in a deliberate attempt to avoid the freezing of those funds. The court found, and the defendant does not dispute, that he deposited $2,220,400.67 into Cristina's account between October, 2012, and March, 2016.

In his testimony, the defendant confirmed that, at all relevant times, he was employed as a heart surgeon. His gross annual income at the time of the contempt hearing was $1.2 million; after taxes, the defendant

[8] The defendant did not call any witnesses during the contempt hearing.

[9] At the contempt hearing, the defendant testified that although the account was in Cristina's name alone, she provided him with full access to the account, including an ATM card with her name on it and her password information to access the account online.

earned approximately $700,000. With respect to his liabilities, the defendant testified that he made monthly mortgage payments of $7500 and monthly payments of $14,000 for his "divorce-related obligations." Beyond that, the defendant acknowledged that he had no other long-term debt. The defendant further testified that, after depositing his wages into Cristina's account, those funds later were used to pay ordinary living expenses, including court-ordered alimony and child support.[10]

In its memorandum of decision, the court concluded that the defendant's failure to disclose certain assets—namely, a retirement account, a $50,000 promissory note, three motor vehicles and a gun collection—did not constitute a wilful violation of the asset disclosure order. At the same time, the court found that the defendant's conduct in "depositing the entirety of his wages into Cristina's People's United Bank account for the period October 30, 2012 through March 24, 2016, constitutes a series of wilful violations of the asset standstill order. Because the *entirety* of his income was deposited to an account held in the name of Cristina alone, he is deemed to have 'voluntarily transferr[ed] or encumber[ed]' his income (i.e., a personal asset) beyond what was necessary 'for ordinary living expenses, including court-ordered alimony and child support.' [The defendant] engaged in such conduct knowingly, with full knowledge of the asset standstill order, and for the

[10] The evidence adduced at the contempt hearing includes statements from Cristina's account at People's United Bank. Although those statements provide specificity as to certain transactions, such as utility payments, they provide no explanation for numerous other transactions. For example, the November 27, 2014 statement includes a withdrawal of $6660 on October 28, 2014, for "Check 387," a withdrawal of $13,382 on October 31, 2014, for "Check 389," a withdrawal of $48,867.47 on November 3, 2014, for "Check 390," a withdrawal of $851.01 on November 6, 2014, for "Check 392," a withdrawal of $1550 on November 7, 2014, for "Check 393," a withdrawal of $1484.45 on November 18, 2014, for "Check 398," and a withdrawal of $2217.76 on November 18, 2014, for "Check 399."

express purpose of placing the entirety of such funds outside the reach of the plaintiff (i.e., with the intention of depriving the plaintiff of significant statutory postjudgment procedures authorized by chapter 906 of the General Statutes). The court therefore finds [the defendant] in civil contempt." (Emphasis in original.) The court thus imposed a "compensatory fine" of $2.2 million "payable directly to [the plaintiff] in an amount of $25,000 per month, until such fine is paid in full," which amount the court found represented "the plaintiff's proven, actual losses as a result of [the defendant's] wilful violations of the asset standstill order." From that judgment, the defendant appealed to this court.

The defendant subsequently filed a motion to stay enforcement of the $2.2 million compensatory fine pending resolution of the present appeal. In denying that request, the court clarified that the compensatory fine was not intended to supplement the $2,360,000 award that the plaintiff had received in the underlying action. Rather, the court explained that "[a]ny payment [the defendant] makes to the plaintiff in compliance with the contempt order serves to offset the amount of the judgment due."

I

The defendant contends that the court abused its discretion in holding him in contempt because the asset standstill order lacked sufficient clarity and was ambiguous. We disagree.

Before addressing the merits of the defendant's claim, we set forth certain general principles that govern our review. "[O]ur analysis of a [civil] judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review.

. . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693–94, 935 A.2d 1021 (2007).

"As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of an [order or] judgment may involve the circumstances surrounding [its] making . . . . Effect must be given to that which is clearly implied as well as to that which is expressed." (Internal quotation marks omitted.) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010). Furthermore, it is a fundamental tenet of construction that the question of ambiguity is resolved by considering the language in question as applied to the particular facts of the case. See, e.g., *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, 327 Conn. 467, 473, 174 A.3d 791 (2018) (concluding that statute in question "is ambiguous as applied to the facts of the present case"); *State* v. *Crespo*, 317 Conn. 1, 10 n.10, 115 A.3d 447 (2015) ("[a] statute may be clear and unambiguous as applied in one context but not in another"); *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 42, 84 A.3d 1167 (2014) (language in contract must be construed in circumstances of particular case and cannot be found ambiguous in abstract).

With those principles in mind, we begin by noting the context in which the asset standstill order arose. Weeks prior to its issuance, a jury returned a $2 million

verdict against the defendant. Immediately thereafter, the plaintiff filed a "Motion to Prevent the Defendant's Fraudulent Transfer of Property," in which she averred in relevant part that she had "a reasonable belief that [the] defendant will attempt to fraudulently transfer property . . . ." Following a hearing, the court issued the asset standstill order, stating in relevant part that the defendant "is enjoined from voluntarily transferring or encumbering any assets except . . . personal assets for ordinary living expenses, including court-ordered alimony and child support."

The plaintiff concedes that the defendant initially complied therewith, as his wages were deposited into his Farmington Bank account in the months subsequent to the issuance of the asset standstill order.[11] When that bank account was frozen in October, 2012, the defendant began depositing *all* of his wages into the People's United Bank account held solely by Cristina in an effort to shield them from a judgment creditor.[12] That undisputed fact lies at the heart of the court's decision in the present case.

In its memorandum of decision, the court acknowledged that the asset standstill order permitted the defendant to utilize his personal assets to make payments on ordinary living expenses and to satisfy family court judgments. The court nevertheless held that the

[11] The court found, and the parties do not dispute, that the defendant's wages constituted "personal assets" as that term is used in the asset standstill order. (Internal quotation marks omitted.)

[12] The record before us includes a copy of a writ and attachment that the plaintiff served on the main office of People's United Bank for the purpose of attaching Cristina's bank account in connection with the present litigation. The record also includes a copy of the January 2, 2014 letter that Norma Jurnack, a legal service of process representative at People's United Bank, sent to the plaintiff's counsel, in which she stated: "This letter is in response to the Writ and Attachment . . . served on People's United Bank . . . . We have researched our records and found that [the defendant] [does] not maintain accounts at [People's] United Bank."

plain language of that order prohibited the defendant from depositing the entirety of his income to Cristina's bank account over the course of several years. We agree.

As our Supreme Court has explained, "[c]ivil contempt is committed when a person violates an order of court which requires that person in *specific and definite language* to do or refrain from doing an act or series of acts. . . . One cannot be placed in contempt for failure to read the court's mind. . . . [A] person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Leah S.*, supra, 284 Conn. 695.

On appeal, the defendant argues that the asset standstill order "may fairly be read to mean that [he] was permitted to transfer or encumber personal assets for ordinary living expenses and court-ordered alimony and support payments." We do not quarrel with that contention. To the extent that the defendant made any voluntary transfers of his personal assets to pay such expenses, including ones made from funds contained in his Farmington Bank account in 2012, those transfers certainly complied with the terms of the asset standstill order. This case, however, is not about transfers of the defendant's personal assets to pay qualifying expenses. Rather, this case is about the transfer[13] of the defendant's wages (1) in their entirety, (2) into the bank

[13] In construing the asset standstill order, we accord the language contained therein its common meaning. See *Barnard* v. *Barnard*, 214 Conn. 99, 115, 570 A.2d 690 (1990). To "transfer" ordinarily means "to convey from one person, place, or situation to another." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1328; see also Black's Law Dictionary (9th Ed.

account of a third party, (3) subsequent to the freezing of the defendant's own bank account into which his wages previously were deposited, (4) for the purpose of shielding those assets from the reach of a judgment creditor. We reiterate that ambiguity is determined by considering the language in question as applied to the particular facts of the case. Guided by that precept, we agree with the trial court that the voluntary transfer of the defendant's wages in their entirety into Cristina's account contravened the plain intent of the asset standstill order, irrespective of how those funds later were dispersed.

Ambiguity arises if the language in question, when read in context, is susceptible to multiple reasonable interpretations. See, e.g., *Francis* v. *Fonfara*, 303 Conn. 292, 300, 33 A.3d 185 (2012). In the context of the facts of this case, we conclude that the defendant's interpretation of the asset standstill order is not a reasonable one. The asset standstill order provided sufficient notice to a reasonable person that the wholesale transfer of wages to the bank account of a third party was not permitted. We therefore reject the defendant's claim that the asset standstill order, as applied to the facts of this case, lacked sufficient clarity or was ambiguous.

We further conclude that the court's determination that the defendant wilfully violated the asset standstill order is supported by the evidence in the record before us. The defendant testified that his Farmington Bank account became frozen in October, 2012, at which time the defendant and Cristina responded by opening a People's United Bank account solely in Cristina's name.

2009) p.1636 (defining "transfer" as "[t]o convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control"). Application of that common meaning compels the conclusion that the defendant transferred personal assets when he deposited his wages into a third party's bank account in which he concededly had no legal interest.

The court found, and the evidence reflects, that her account was opened for the express purpose of placing the entirety of the defendant's wages outside the reach of a judgment creditor. By so doing, the court found that the defendant "engaged in a gross exercise of self-help, which the law disallows, and wilfully disobeyed the asset standstill order by depositing the entirety of his wages . . . into Cristina's bank account, outside the reach of the plaintiff." The court thus concluded that "[t]o exonerate [the defendant's] wages-related conduct would be an undue inducement to litigants' exercise of self-help." (Internal quotation marks omitted.) We concur with that assessment.

In rendering a judgment of contempt, the court recognized that contempt is a drastic measure, but emphasized that "this case, which does not involve the collection of a 'routine debt,' falls well outside the parameters of 'normal circumstances,' where the defendant has gone to great lengths to deprive the plaintiff of the ability to use statutory collection procedures. The court concludes that extraordinary circumstances warrant the court's use of the contempt power in the present case." We agree and, therefore, conclude that the court did not abuse its discretion in holding the defendant in contempt.

II

The defendant claims that the court failed to consider the defendant's ability to pay in imposing a compensatory fine. We do not agree.

In *Ahmadi* v. *Ahmadi*, 294 Conn. 384, 397, 985 A.2d 319 (2009), our Supreme Court addressed a similar claim, as the defendant in that case argued that "the trial court's contempt order was improper because the court failed to elicit evidence of the defendant's financial ability before crafting a payment order." In response, the court clarified that it was the defendant

who bore the burden "to prove any financial incapacity." Id., 397. The court then articulated the standard applicable to appellate review of such claims, stating: "Whether the defendant established his inability to pay the order by credible evidence is a question of fact. Questions of fact are subject to 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. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) Id., 397–98.

After finding the defendant in contempt of the asset standstill order, the court in the present case imposed a compensatory fine of $2.2 million "payable directly to [the plaintiff] in an amount of $25,000 per month, until such fine is paid in full." On appeal, the defendant submits that "[t]here is no mention in the trial court's memorandum of decision that suggests, let alone finds, that [the defendant] has an ability to pay the contempt fine." He is mistaken. On page sixteen of its memorandum of decision, the court plainly states: "The court finds that [the defendant] has sufficient income and other assets that render him financially able to pay the monthly amount ordered herein."

That finding is substantiated by the evidence in the record before us. At the contempt hearing, the defendant testified that he continued to earn a gross annual income of $1.2 million from St. Francis Hospital, which resulted in a net income after taxes in excess of $700,000, or almost $60,000 per month.[14] Also admitted

[14] A copy of the defendant's December 26, 2015 pay stub was admitted into evidence at the contempt hearing. That document reflects a net annual income of $707,522.83. The record also contains the defendant's July 3, 2017 affidavit, in which he averred in relevant part that he currently was "paid one hundred thousand ($100,000) dollars per month."

into evidence as full exhibits were statements from certain individual retirement accounts held by the defendant. A statement from an account with Charles Schwab & Co., Inc., specifies an "account value" of $802,888.19 as of May 31, 2017. A statement from an account with American Funds, administered by Capital Group, specifies an "[e]nding value" of $464,910.48 as of June 30, 2017. Furthermore, with respect to his liabilities, the defendant testified that he made monthly mortgage payments of $7500 and monthly payments of $14,000 for his "divorce-related obligations." Beyond those obligations, the defendant testified that he had no other long-term debt.

In light of the foregoing, the court reasonably could conclude that the defendant had not proven a financial incapacity to comply with the court's fine of $25,000 per month. The court's finding that the defendant possessed "sufficient income and other assets" to pay that fine is supported by evidence in the record and, therefore, is not clearly erroneous.

III

The defendant also claims that the court abused its discretion in imposing the $2.2 million compensatory fine. Although we agree with the court's conclusion that the plaintiff was harmed by the defendant's contemptuous conduct, we disagree with its measure of the resulting damages. A new hearing on damages, therefore, is warranted in the present case.

As this court recently observed, "[w]e review the propriety of the fines imposed [for civil contempt] pursuant to an abuse of discretion standard." *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 202, 167 A.3d 967 (2017). With respect to subordinate findings of fact, "we review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. . . . A factual finding is clearly erroneous

when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 653, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).

The following additional facts are relevant to this claim. In its memorandum of decision, the court found that the defendant wilfully deposited a total of $2,220,400.67 into Cristina's bank account in contravention of the asset standstill order and with the intent to deprive the plaintiff of statutory collection procedures. As the court found, "[b]y directing the deposit of his wages [into Cristina's bank account], [the defendant] made it impossible for the plaintiff to attach" those assets. On that basis, the court held the defendant in contempt and imposed a compensatory fine of $2.2 million. In so doing, the court found that "[t]he amount of the fine represents the plaintiff's proven, actual losses as a result of [the defendant's] wilful violations of the asset standstill order." The court made no other factual findings with respect to the plaintiff's actual pecuniary losses.

In response, the defendant filed a motion to reargue, in which he alleged that the plaintiff had failed to present "evidence of what particular damages she sustained as a result" of his noncompliance with the asset standstill order. The defendant further alleged that the court "without explanation, apparently used as a basis for the amount of the fine of contempt the total amount deposited into the subject account. This amount is not the proper measure of damages to be used in an order of contempt. Rather, the amount must be specifically related to the damages caused by the purported contempt of the asset standstill order." By order dated

November 30, 2017, the court denied that motion, stating: "The [defendant] has failed to demonstrate that the court overlooked a controlling decision or legal principle, that the court misapprehended the facts, that the court's decision contains inconsistencies, and/or that the court failed to address a legal claim raised previously."

After commencing the present appeal, the defendant filed a motion for articulation with the trial court, in which he sought, inter alia, an articulation of the factual basis of the court's finding that the compensatory fine "represents the plaintiff's proven, actual losses as a result of [the defendant's] wilful violations of the asset standstill order." In denying that motion, the court stated that it had "re-reviewed the memorandum and order. Based on that review, the court concludes that the requested articulations are not necessary for the proper presentation of the issues." The defendant then filed a motion for review with this court, in which he requested appellate review of the court's denial of his motion for articulation. In its March 21, 2018 order, this court granted review, but denied the relief requested therein.

Our analysis begins with the well established principle that "a trial court possesses inherent authority to make a party whole for harm caused by a violation of a court order, even when the trial court does not find the offending party in contempt." *O'Brien* v. *O'Brien*, 326 Conn. 81, 96, 161 A.3d 1236 (2017). As this court recently observed, "it has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes. . . . [I]n a contempt proceeding . . . a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with a court order." (Citation omitted; internal

quotation marks omitted.) *Nappo* v. *Nappo*, 188 Conn. App. 574, 596, 205 A.3d 723 (2019).

A close reading of its memorandum of decision indicates that the court endeavored to do precisely that. The contemptuous conduct in this case involves a deliberate attempt on the part of the defendant to thwart the plaintiff's ability to utilize statutory collection procedures by depositing the entirety of his wages into the account of a third party in contravention of the asset standstill order over the course of several years. In addition, the compensatory fine that the court imposed was intended to offset, rather than augment, the plaintiff's recovery in the underlying action, as the court made clear in its ruling on the defendant's motion for stay. The court, in short, sought to make the plaintiff whole in the present case. Its decision to do so was both a proper exercise of the court's discretion and understandable given the facts of this case.

We nevertheless disagree with the measure of damages set forth in the court's memorandum of decision. Under our law, compensatory fines must be narrowly circumscribed, and must be "confined" to the actual losses sustained by a contemnee as a result of noncompliance with a court order. *DeMartino* v. *Monroe Little League, Inc.*, 192 Conn. 271, 279–80, 471 A.2d 638 (1984). As our Supreme Court explained, "[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed . . . to compensate the complainant for losses sustained. . . . Where compensation is intended, a fine is imposed, payable to the complainant. *Such fine must of course be based upon evidence of [the] complainant's actual loss* . . . . Civil contempt proceedings are not punitive—i.e., they are not imposed for the purpose of vindicating the court's authority—but are purely remedial. . . . [I]t is well settled . . . that the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to

an aggrieved litigant as compensation for the special damages he may have sustained by reason of the contumacious conduct of the offender. . . . [S]uch a compensatory fine *must necessarily be limited to the actual damages suffered by the injured party as a result of the violation* . . . ." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 278–79. Moreover, the court must furnish an adequate factual basis to substantiate its actual loss determination. See *Medeiros* v. *Medeiros*, supra, 175 Conn. App. 203–204; *DPF Financial Holdings, LLC* v. *Lyons*, 129 Conn. App. 380, 387, 21 A.3d 834 (2011).

The facts of this case plainly indicate, and the court so found, that the principal loss sustained by the plaintiff was the inability to employ statutory collection procedures against the defendant, and the remedy of attachment in particular.[15] See General Statutes § 52-279 et seq. Nonetheless, the ability to attach an asset is both conceptually and procedurally distinct from the ability to execute on an attachment to satisfy an outstanding judgment.

The writ of attachment is an instrument intended to secure the assets of a judgment debtor. See *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 557, 944 A.2d 329 (2008) ("[t]he purpose of the prejudgment remedy of attachment is security for the satisfaction of the plaintiff's judgment" [internal quotation marks omitted]); *Rhode Island Hospital Trust National Bank* v. *Trust*, 25 Conn. App. 28, 40, 592 A.2d 417 (*Foti, J.*, dissenting) ("remedy of attachment provides necessary security for the creditor by protecting it from the uncertainties of future events"), cert. granted, 220 Conn. 904, 593 A.2d 970 (1991) (appeal

[15] As the court found in its memorandum of decision, "[b]y directing the deposit of his wages [into Cristina's People's United Bank account], [the defendant] made it impossible for the plaintiff to attach" those assets.

withdrawn July 10, 1992); *Cerna* v. *Swiss Bank Corp.*, 503 So. 2d 1297, 1298 (Fla. App.) ("a writ of attachment . . . serves as a lien upon property which may be the subject of execution upon a later-obtained judgment"), review denied, 513 So. 2d 1060 (Fla. 1987); *Northwestern National Ins. Co.* v. *William G. Wetherall, Inc.*, 267 Md. 378, 384, 298 A.2d 1 (1972) ("[a]n attachment on a judgment is a tool by which a judgment creditor can reach the assets of a judgment debtor in the hands of a third party").

At the same time, a properly served writ of attachment does not, in and of itself, establish a judgment creditor's entitlement to liquidate or possess the asset in question, but rather "enables a creditor to gain priority over any subsequent claim to the attached property," and impairs the judgment debtor's ability to dispose of the asset. *Mac's Car City, Inc.* v. *DiLoreto*, 238 Conn. 172, 179–80, 679 A.2d 340 (1996). As our Supreme Court explained long ago, an attachment "has no effect but to take the [asset in question] into the custody of the law, to secure it against the alienation of the debtor, and the attachment of other creditors, and to hold it to be levied upon by an execution . . . ." *Lacey* v. *Tomlinson*, 5 Day 77, 80 (1811); accord *Camp* v. *Bates*, 11 Conn. 50, 54 (1835) (when asset is attached "the hand of the law is upon it"). Furthermore, as with any prejudgment remedy, a defendant whose assets are the subject of an attachment is entitled to a hearing, at which the court must take into account "any defenses, counterclaims or set-offs" asserted by the defendant. See General Statutes § 52-278d; *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 141, 943 A.2d 406 (2008) ("it is well settled that, in determining whether to grant a prejudgment remedy, the trial court must evaluate both parties' evidence as well as any defenses, counterclaims and setoffs").

We agree with the plaintiff that, had the defendant deposited his wages into an account like the one he maintained with Farmington Bank, she very likely would have been able to avail herself of the collection procedures codified in our General Statutes. For that reason, the court properly found that the plaintiff was deprived of the ability to utilize statutory collection procedures as a result of the defendant's contemptuous conduct. The court found, and the record substantiates, that the plaintiff lost the ability to attach $2,220,400.67 in wages that the defendant deposited into Cristina's bank account.

The court nevertheless failed to furnish an adequate factual basis to support its determination that the plaintiff had proven $2.2 million in actual pecuniary losses as a result thereof. An attachment merely provides security for a judgment creditor; whether that judgment creditor ultimately may execute on the attachment, in whole or in part, to obtain satisfaction of an outstanding judgment is an altogether different question, and one that is dependent on a number of factors, including the extent to which the judgment has been satisfied and the existence of other attachments on the assets of the judgment debtor.[16] Furthermore, a judgment debtor

[16] The court's memorandum of decision contains no finding as to whether the plaintiff had attached any other assets of the defendant besides his Farmington Bank account. For example, the court made no finding as to whether the plaintiff had filed an attachment on the defendant's real property known as 92 Northgate in Avon, despite the fact that Judge Robaina, in granting the plaintiff's application for a prejudgment remedy on July 31, 2012, ordered that the plaintiff was "allowed to attach property of the defendant to the amount of $2 million including, but not limited to property located at 92 Northgate, Avon, Connecticut . . . ." The defendant's quarterly disclosures of assets were admitted into evidence as full exhibits at the contempt hearing. Exhibit 10 (Q) is his July, 2017 disclosure, in which the defendant acknowledged his 100 percent interest in the 92 Northgate property. That disclosure also included a copy of his separation agreement with Cristina, which was incorporated into the judgment of dissolution rendered by the Superior Court on May 5, 2017, and which provides in relevant part that the defendant "shall retain the marital home located at 92 Northgate, Avon, Connecticut, free and clear of any claim by [Cristina]. . . ."

who believes that a particular attachment constitutes an excessive levy may petition for relief from the court.[17] As a result, a judgment creditor's ability to execute on an attachment remains a possibility, not a certainty. We therefore fundamentally disagree with the plaintiff's contention that her actual losses are "equivalent to the total amount of deposits that were redirected by [the] defendant to [Cristina's] account" and rendered immune from attachment.

Apart from impairing the plaintiff's ability to attach such assets, the court made no findings that provide the requisite factual basis for its $2.2 million compensatory fine, such as the amount of attorney's fees expended by the plaintiff in pursuing the contempt motion. Absent such findings, the court could not ensure that its compensatory fine was confined to the actual loss sustained by the plaintiff, as required under Connecticut law. See *DeMartino* v. *Monroe Little League, Inc.*, supra, 192 Conn. 279–80; *DPF Financial Holdings, LLC* v. *Lyons*, supra, 129 Conn. App. 386–88.

It is axiomatic that this court, as an appellate tribunal, cannot find facts. See *State* v. *Edwards*, 314 Conn. 465,

The court also made no factual findings as to whether the plaintiff had obtained any recovery on the underlying judgment in the five years that had passed since the jury rendered a verdict in her favor, or the specific amount thereof. In its memorandum of decision, the court found that Farmington Bank notified the plaintiff on October 22, 2012, that it "was holding $26,717.83" in response to the attachment filed by the plaintiff. The court nevertheless made no finding as to whether the plaintiff recovered those funds in the years between that attachment and the contempt hearing.

[17] See, e.g., *Glanz* v. *Testa*, 200 Conn. 406, 411 n.3, 511 A.2d 341 (1986) ("[a] defendant who perceives that an attachment is excessive is free" to bring claim to court's attention); *E. J. Hansen Elevator, Inc.* v. *Stoll*, 167 Conn. 623, 629, 356 A.2d 893 (1975) (discussing case involving "an application for the reduction or dissolution of a claimed excessive attachment made in an action brought to the Superior Court"); *Hodgen* v. *Roy*, 169 P. 1143, 1144 (Kan. 1918) ("[a] court has authority to protect a defendant . . . by preventing an excessive levy" in attachment of property); 6 Am.Jur.2d 700, Attachment and Garnishment § 286 (2019) ("[a] debtor is entitled to relief from an excessive levy upon proper application to the court").

478, 102 A.3d 52 (2014). "[T]his appellate body does not engage in fact-finding. Connecticut's appellate courts cannot find facts; that function is, according to our constitution, our statute, and our cases, exclusively assigned to the trial courts." (Internal quotation marks omitted.) *Hogan* v. *Lagosz*, 124 Conn. App. 602, 618, 6 A.3d 112 (2010), cert. denied, 299 Conn. 923, 11 A.3d 151 (2011). We therefore are not at liberty to resolve the question of precisely what actual pecuniary losses the plaintiff suffered as a result of the defendant's contemptuous conduct.

Because the court's finding that the plaintiff sustained an actual loss of $2.2 million lacks the necessary factual basis, we conclude that the court abused its discretion in imposing a compensatory fine in that amount. The parties thus "are entitled to a hearing on damages to determine [the precise measure of the loss that] occurred as a result of the defendant's contemptuous conduct in violation of the court's order." *DPF Financial Holdings, LLC* v. *Lyons*, supra, 129 Conn. App. 388. Accordingly, a remand to the trial court for a new hearing limited solely to the issue of damages is necessary.

We are mindful of our Supreme Court's admonition that "a trial court in a contempt proceeding may do more than impose penalties on the offending party; it also may remedy any harm to others caused by a party's violation of a court order." *O'Brien* v. *O'Brien*, supra, 326 Conn. 99. In determining whether a compensatory fine is warranted, the trial court on remand must consider the question of actual pecuniary loss resulting from the defendant's contemptuous conduct, such as attorney's fees. The court should also consider the impairment of the plaintiff's ability to utilize statutory collection procedures and fashion whatever relief that the court, in its discretion, deems appropriate under the facts of this case. Such relief may include the issuance

of an order requiring the defendant to return the $2,220,400.67 in deposited funds to an account that may be attached by the plaintiff.

The judgment is reversed only as to the order of damages and the case is remanded for a hearing on damages with respect to the court's judgment of contempt. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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Landlord-tenant; guarantee of commercial lease; whether trial court properly granted motion for summary judgment; whether guarantor's letters to plaintiff created genuine issue of material fact as to whether guarantor was liable to plaintiff lessor for debts of lessee.
Sack Properties, LLC *v.* Martel Real Estate, LLC 383
Quiet title; claim that trial court improperly rejected quiet title and trespass claims on ground that plaintiff failed to prove that it exclusively owned pipe through which drainage easement ran; claim that trial court's findings that there was

no evidence of exclusive ownership and that plaintiff failed to prove exclusive ownership was clearly erroneous; claim that trial court's finding that plaintiff failed to prove that defendant had overburdened drainage easement by using pipe to drain excess stormwater was clearly erroneous.

Scott *v.* CCMC Faculty Practice Plan, Inc. 251
Medical malpractice; claim that trial court improperly permitted defendants to introduce evidence that, after surgery, plaintiff's pain substantially resolved due to syrinx that had developed within his spinal cord to establish reduction in damages; claim that syrinx evidence had to be categorized as "benefits evidence" under Restatement (Second) of Torts (§ 920) that was outside pleadings and contrary to public policy; whether trial court erred when it failed to give plaintiff's requested jury instructions regarding syrinx evidence; claim that trial court's rulings were harmful because syrinx evidence permeated case; claim that trial court's rulings were harmful because jury could have considered syrinx evidence in its determination of liability.

Seward *v.* Administrator, Unemployment Compensation Act 578
Unemployment compensation benefits; whether Employment Security Board of Review properly affirmed decision of appeals referee finding that plaintiff was not entitled to certain unemployment benefits; claim that trial court exceeded scope of its authority by making factual findings not in record and relying on its own factual findings in determining that board had abused its discretion by denying plaintiff's motion to open.

Smith *v.* Marshview Fitness, LLC 1
Fraudulent transfer; motion for summary judgment; claim that trial court improperly concluded that transfer of certain property to defendant company was not fraudulent under common law or Uniform Fraudulent Transfer Act (§ 52-552a et seq.) on ground that property did not constitute "assets" because it was encumbered by valid lien in excess of its value; claim that trial court improperly rendered summary judgment on claim alleging violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) because underlying conduct on which plaintiff claimed defendant company violated CUTPA was broader than facts supporting his fraudulent transfer claims; whether trial court abused its discretion in denying motion to reargue motion for summary judgment.

State *v.* Alicea 421
Assault in first degree; whether verdict of guilty of intentional assault in violation of statute (§ 53a-59 [a] [1]) and reckless assault in violation of § 53a-59 (a) (3) was legally inconsistent; claim that defendant's right to due process was violated because he was unaware that he could be convicted of both intentional assault and reckless assault; whether trial court abused its discretion by excluding from evidence defendant's statement to police; claim that defendant's statement to police was admissible under spontaneous utterance exception to rule against hearsay; whether evidence was sufficient to disprove beyond reasonable doubt defendant's claim of self-defense.

State *v.* Burton 808
Murder; criminal possession of firearm; carrying pistol without permit; motion to suppress; hearsay; claim that trial court improperly denied motion to suppress certain evidence seized by police from bedroom of defendant's girlfriend; whether trial court's finding that defendant's girlfriend and girlfriend's mother voluntarily consented to search of bedroom was clearly erroneous; credibility of witnesses; claim that trial court improperly excluded certain testimony and documents concerning inability of two eyewitnesses to identify defendant in photographic array as shooter; whether trial court improperly determined that § 8-5 (2) of Connecticut Code of Evidence was hearsay exception applicable to nonidentification evidence; whether business records exception to hearsay rule set forth in § 8-4 (a) of Connecticut Code of Evidence did not apply to inference that eyewitnesses could not identify defendant from photographic array; whether trial court abused its discretion in concluding that video recording of interview between an eyewitness and police was not sufficiently reliable or trustworthy to support its admission under residual exception to hearsay rule set forth in § 8-9 of Connecticut Code of Evidence.

State *v.* Carrasquillo 665
Murder; criminal possession of firearm; unpreserved claim that defendant was deprived of rights to due process and to jury trial because trial court applied improper pressure on jury to reach verdict; claim that jury would have believed it would not be excused at end of day if it did not reach verdict after receiving

Chip Smith instruction; claim that trial court did not respond to note from juror that alerted court to existence of family emergency that would require juror's absence beginning on certain date; claim that trial court sanctioned pressure that juror was under from other members of jury; claim that two hours of jury deliberation after trial court gave jury Chip Smith instruction suggested that court coerced jury to reach unanimous verdict; claim that trial court abused its discretion in denying motion for mistrial; claim that defendant was denied fair trial because trial court failed to conduct inquiry of juror at time of trial as to note from juror; waiver of claim that trial court failed to canvass juror at time it received note; unpreserved claim that defendant was denied right to due process because trial court's response to note from jury about accessorial liability as to murder charges created reasonable possibility that jury was misled about state's burden of proof; waiver of objection to jury instructions concerning accessorial liability; claim that jury instruction on accessorial liability as to murder charge constituted plain error; claim that jury instruction on accessorial liability as to murder charge created possibility of confusion in minds of jurors as to what evidence state relied on in support of murder counts or with respect to mental state required for commission of murder as accessory.

State *v.* Chavez. 184
Manslaughter in first degree; claim that trial court improperly deprived defendant of constitutional right to fair trial when it failed to instruct jury, sua sponte, about inherent shortcomings of simultaneous foreign language interpretation of trial testimony; claim that trial court improperly deprived defendant of constitutional right to fair trial when it instructed jury that it could consider as consciousness of guilt evidence that defendant changed shirt shortly after victim was stabbed; whether defendant was presented with meaningful opportunity to review and comment on trial court's jury instructions; whether defendant waived right to challenge constitutionality of jury instruction under State *v.* Golding *(213 Conn. 233); whether jury reasonably could have found from evidence that defendant's act of changing shirt was motivated by desire to avoid detection by law enforcement.*

State *v.* Clark. 191
Assault in second degree; whether trial court properly denied motion to suppress oral statement defendant made to police officer during alleged custodial interrogation in defendant's apartment before defendant was advised of constitutional rights pursuant to Miranda *v.* Arizona *(384 U.S. 436); whether trial court properly determined that defendant was not in custody at time statement was made; whether reasonable person in defendant's position would have believed that her freedom of movement was restrained to degree associated with formal arrest.*

State *v.* Daniels 33
Intentional manslaughter in first degree; reckless manslaughter in first degree; misconduct with motor vehicle; claim that jury's guilty verdicts were legally inconsistent in that each of alleged crimes required mutually exclusive mental state; claim that trial court erred when it failed to exclude certain testimonial hearsay; whether verdicts required findings that defendant simultaneously acted intentionally and recklessly with respect to different results; whether jury reasonably could have found that defendant specifically intended to cause serious physical injury to victim and that, in doing so, consciously disregarded substantial and unjustifiable risk that actions created grave risk of death to victim; whether defendant's conviction required jury to find that defendant acted intentionally and criminally negligent with respect to different results; whether defendant could have intended to cause serious physical injury to victim while, at same time, failing to perceive substantial and unjustifiable risk that manner in which defendant operated vehicle would cause victim's death; whether mental state element for crimes of reckless manslaughter and misconduct with motor vehicle, or criminally negligent operation of motor vehicle, were mutually exclusive when examined under facts and state's theory that two strikes of victim's vehicle by defendant was one continuous act; whether defendant could have consciously disregarded substantial and unjustifiable risk that actions would cause victim's death while simultaneously failing to perceive substantial and unjustifiable risk that actions would cause victim's death; whether mental states required for reckless manslaughter and criminally negligent operation related to same result; whether admission of out-of-court statement for purposes other than its truth raised confrontation clause issue and was of constitutional magnitude under

second prong of State *v.* Golding *(213 Conn. 233); whether statement at issue was hearsay.*
State *v.* Francis 101
Motion to correct illegal sentence; whether trial court properly denied motion to correct illegal sentence; claim that sentence was imposed in illegal manner because sentencing court substantially relied on materially inaccurate information in presentence investigation report concerning defendant's prior criminal history; whether record demonstrated that sentencing court did not substantially rely on certain inaccuracies in presentence investigation report in imposing sentence; whether disputed fact that victim sustained graze wound prior to sustaining fatal stab wound substantially relied on by sentencing court; claim that sentencing court misconstrued evidence concerning manner in which underlying crime of murder was committed.
State *v.* Juan V. 553
Risk of injury to child; claim that trial court committed plain error by permitting jury during its deliberations and in jury room to view, without limitation, video recording of victim's forensic interview, which had been admitted into evidence as full exhibit; whether trial court correctly submitted video exhibit to jury as required by applicable rule of practice (§ 42-23) and in manner consistent with our Supreme Court's stated preference for juries to receive all exhibits, when feasible, in jury room; reviewability of claim that trial court improperly instructed jury on inferences; waiver of right to challenge trial court's jury instruction; whether trial court's instruction constituted impermissible two-inference instruction that improperly diluted state's burden of proof; whether inferences instruction constituted obvious and undebatable error so as to establish manifest injustice or fundamental unfairness pursuant to plain error doctrine; claim that trial court erred in failing to disclose victim's school records following in camera review; whether victim's undisclosed school records contained information that was exculpatory or probative of victim's credibility.
State *v.* Kerlyn T. 476
Aggravated sexual assault in first degree; home invasion; risk of injury to child; assault in second degree with firearm; unlawful restraint in first degree; threatening in first degree; assault in third degree; whether trial court erred when it determined that defendant knowingly, intelligently, and voluntarily waived his right to jury trial; whether trial court abused its discretion when it determined that defendant had not demonstrated substantial reason that warranted either discharge of defense counsel or more searching inquiry into that request; claim that colloquy between court and defendant regarding waiver of right to jury trial was constitutionally inadequate because it failed to elicit information regarding defendant's background, experience, conduct, and mental and emotional state.
State *v.* Mercer. 288
Sexual assault in first degree; unlawful restraint in first degree; claim that defendant was deprived of constitutional rights to due process and effective assistance of counsel during plea bargaining stage of proceedings because state initially charged defendant with crime predicated on misunderstanding of victim's age; whether record was adequate to conduct meaningful review of defendant's claim.
State *v.* Porfil. 494
Possession of narcotics with intent to sell by person who is not drug-dependent; sale of narcotics within 1500 feet of school; possession of drug paraphernalia; possession of narcotics; interfering with officer; claim that there was insufficient evidence to support defendant's conviction; whether state failed to produce sufficient evidence to prove beyond reasonable doubt that defendant had constructive possession of narcotics recovered by police in common area of certain house; whether defendant's reliance on State *v.* Nova *(161 Conn. App. 708) for contention that state failed to establish, in addition to his spatial and temporal proximity to subject narcotics, existence of other incriminating statements or circumstances linking him to them was misplaced; whether state relied solely on two hand-to-hand exchanges observed by police officer and defendant's proximity to narcotics to prove constructive possession of narcotics; whether, on basis of evidence presented, jury reasonably could have inferred that defendant had been selling subject narcotics from porch of house during time in question; whether jury reasonably could have concluded that defendant was aware of nature and presence of narcotics and had dominion and control over them; claim that trial court committed evidentiary error and deprived defendant of his constitutional right to present defense by improperly excluding certain photographs of front and back of house;*

whether exclusion of photograph of front of house rose to level of constitutional violation or substantially affected jury's verdict; whether trial court properly excluded photograph of rear of house on ground that defendant failed to authenticate it; claim that trial court improperly prevented defendant from showing scar on his back to jury, thereby depriving him of his constitutional right to present misidentification defense; whether trial court abused its discretion by excluding demonstration of scar as needlessly cumulative.

State *v.* Scott 315

Robbery in first degree; whether trial court denied defendant right to due process under federal and state constitutions when court denied motion to suppress out-of-court and subsequent in-court identifications of defendant by victim; whether trial court properly determined that out-of-court identification of defendant at arraignment proceeding was sufficiently reliable under federal constitution on basis of factors in Neil *v.* Biggers *(409 U.S. 188); whether trial court's findings as to* Biggers *factors were supported by evidence; claim that victim's failure to identify defendant in police photographic arrays undermined reliability of subsequent identification at arraignment; whether trial court correctly denied motion to suppress victim's in-court identification of defendant; whether trial court improperly failed to suppress victim's identifications of defendant under article first, § 8, of state constitution on basis of Supreme Court's modification in* State *v.* Harris *(330 Conn. 91) of reliability standard in* Biggers *with respect to admissibility of eyewitness identification testimony; whether trial court's application of* Biggers *factors was harmless; claim that unconscious transference—mistaken identity of face seen in one context as face seen in another context—was fatal to trial court's application of* Biggers*; whether evidence was sufficient to support defendant's conviction as against deceased victim; claim that jury could not have reasonably inferred that second victim knew that deceased victim had cash and cell phone in car prior to search of vehicle by defendant and accomplice, and that defendant, his accomplice or both had taken deceased victim's cash and cell phone; claim that defendant could have been convicted of robbery in first degree only as accessory; whether evidence was sufficient to prove that defendant acted as principal during robbery; whether trial court abused its discretion in denying motion to disqualify trial judge, who had presided at prior trial of defendant's accomplice, ruled on accomplice's motion to suppress and indicated admiration for victim who testified against accomplice and against defendant.*

Stone *v.* East Coast Swappers, LLC 63

Unfair trade practices; alleged violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); attorney's fees; claim that this court should recognize rebuttable presumption in context of attorney's fees for CUTPA violations, whereby prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such award unjust; whether trial court abused its discretion in declining to award plaintiff attorney's fees pursuant to statute (§ 42-110g [d]); claim that trial court erred by conflating analyses for awarding attorney's fees and punitive damages under CUTPA.

Welsh *v.* Martinez 862

Contempt; claim that trial court improperly found defendant in contempt because asset standstill order lacked sufficient clarity and was ambiguous; claim that trial court failed to consider defendant's ability to pay in imposing compensatory fine; claim that court abused its discretion in imposing compensatory fine without necessary factual basis; whether trial court properly concluded that plaintiff was harmed by defendant's contemptuous conduct; whether trial court furnished adequate factual basis to support compensatory fine.

White *v.* Latimer Point Condominium Assn., Inc. 767

Permanent injunction; claim that trial court rendered judgment that was neither legally correct nor factually supported by record; whether record could be read to support court's conclusion that plaintiff failed to meet burden; whether trial court properly found that plaintiff did not prove case; claim that trial court disregarded case law; failure of plaintiff to seek articulation of bases of trial court's decision.

Wilton Campus 1691, LLC *v.* Wilton. 712

Tax appeals; whether, pursuant to statute (§ 12-63c [d]), plaintiff property owners were required to provide assessor with annual income and expense reports regarding properties by certain date; whether assessor improperly imposed late filing penalties under § 12-63c (d) on plaintiffs retroactively, after assessor signed

grand list, pursuant to statute (§ 12-60) that governs corrections to grand list due to clerical omission or mistake; whether trial court improperly concluded that although assessor had violated statute (§ 12-55 [b]) that requires assessor to make any assessment required by law prior to signing grand list, only redress for assessor's failure to comply with provisions of § 12-55 (b) was to postpone right of plaintiffs to appeal action to assessor until succeeding grand list, and that penalty prescribed for in § 12-63c (d) makes no provision for removal of penalty imposed by legislature, regardless of action taken by assessor; whether, pursuant to § 12-55 (b), imposition of late filing penalty constitutes assessment required by law and, as such, it must be made by assessor prior to taking oath; whether assessor lacked statutory authority to impose late filing penalties after he took oath; whether late adjustments were invalid and prevented any recovery of taxes based thereon; claim that language in § 12-55 (a) demonstrated legislative intent to exclude, by implication, late penalties under § 12-63c (d) as required assessment; whether trial court improperly concluded that delayed imposition of late filing penalties did not correct clerical omission or mistake, rendering § 12-60 inapplicable; claim that plaintiffs were not harmed by assessor's imposition of late filing penalties because plaintiffs were able to seek review of assessor's imposition of penalties by appealing to board.
Wilton River Park North, LLC *v.* Wilton (See Wilton Campus 1691, LLC *v.* Wilton) 712
Wilton River Park 1688, LLC *v.* Wilton (See Wilton Campus 1691, LLC *v.* Wilton) 712

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

WELLS FARGO BANK, N.A. *v.* SANDRA CALDRELLO (AC 41074)

Keller, Elgo and Harper, Js.

Syllabus

The plaintiff bank, W Co., sought to foreclose a mortgage on certain real property owned by the defendant, who had executed a promissory note in the amount of $480,000 in favor of S Co., which was secured by a mortgage on the subject property. In its complaint, W Co. alleged that it was entitled to collect the debt evidenced by the note and to enforce the mortgage as S Co.'s successor by merger, that the defendant was in default on her obligations under the note and that it had exercised its right to accelerate the debt. The defendant filed an answer and a thirty-two count revised counterclaim, alleging, inter alia, violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.). The trial court granted the plaintiff's motion to strike the revised counterclaim, striking the CUTPA and TILA counts on ground that the applicable statutes of limitations barred those claims. Thereafter, W Co. filed a motion for summary judgment as to liability and presented to the court the original promissory note, which had not been endorsed and remained payable to S Co., and the recorded mortgage. In support of its motion, W Co. submitted an affidavit from S, its vice president for loan documentation, who, on the basis of her examination of W Co.'s business records, averred that following the execution of the note and mortgage, S Co. merged and changed its name to M Co., that M Co. converted to F Co. and that F Co. merged into W Co., thereby making W Co. the successor by merger to S Co. and the holder of the subject note. S attached to her affidavit supporting documentation. The plaintiff also submitted an affidavit of H, its implementation consultant, who, on the basis of his examination of W Co.'s business records, averred that W Co. was properly identified on the loan transfer history as the investor entity that

owned the defendant's note. The defendant filed an objection to the motion for summary judgment asserting that W Co. failed to provide any documents that proved that it had met its burden to prove standing. The defendant's primary argument concerned a transaction whereby S Co. transferred or sold the note to its subsidiary, L Co. She asserted that M Co. could not have reacquired ownership of the note without L Co. having first endorsed the note and that there was no endorsement attached to the note at the time W Co. commenced the foreclosure action. In her affidavit in support of her objection, the defendant averred, inter alia, that she had personal knowledge of W Co.'s lack of standing. The trial court granted W Co.'s motion for summary judgment as to liability, concluding that W Co.'s affidavits and attached documentation had established that it was the successor to S Co. and entitled to enforce the note, and that the defendant's submissions in opposition to the motion lacked an adequate evidentiary foundation. Thereafter, W Co. filed a notice of supplemental document production that included a copy of the note with an allonge blank endorsement. The defendant then filed a motion for summary judgment, challenging W Co.'s standing on the basis of the note endorsed in blank. She renewed her claim that L Co. could not have transferred the note back to M Co. without an endorsement. The trial court denied the defendant's motion for summary judgment, treating it as a motion to reargue. The defendant subsequently filed a cross motion for summary judgment and a motion for a new trial, again requesting that the court address the reasons for W Co.'s endorsement of the note in blank, which she considered to be newly discovered evidence that undermined W Co.'s standing as the holder of the note at the time the foreclosure action was commenced. The defendant also filed an application for issuance of subpoenas for two witness, who had signed affidavits of debt on behalf of W Co., stating that she was seeking information related to the blank endorsement. Thereafter, the trial court, held a hearing on W Co.'s motion for a judgment of strict foreclosure, during which it marked off the defendant's cross motion for summary judgment, motion for a new trial and application for subpoenas. The trial court then rendered a judgment of strict foreclosure, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that the trial court erred in concluding that no genuine issue of material fact existed with respect to W Co.'s standing and in rendering summary judgment as to liability in W Co.'s favor: W Co. met its evidentiary burden and raised the presumption that it was the holder of the note and rightful owner of the debt, as the production of the original note, W Co.'s detailed affidavits, and statutory and case law established that W Co. was the successor to S Co. and entitled to enforce the note, the undisputed evidence having indicated that after L Co. converted to a limited liability company and transferred the note back to M Co., M Co. maintained its status as holder

of the note when it reacquired the note pursuant to statute (§ 42a-3-207), and the later possession of the note by any successor in title to S Co., including W Co., entitled the successor to stand in the shoes of S Co. and to assume its rights as holder of the note, and, under federal banking law (12 U.S.C. § 215a [e]), all of S Co.'s rights in the note automatically transferred to W Co. without the need for any endorsement; moreover, the defendant's submissions in opposition to W Co.'s motion for summary judgment failed to satisfy her burden to rebut, with competent evidence, the presumption that W Co., as the holder of the note, was also the rightful owner of the debt and had standing to bring the action, as she failed to establish an adequate foundation to support the admission of her personal interpretation of the various banking documents that she referred to in her affidavit or that were submitted by her in opposition to the motion, and she presented no evidence that some entity other than W Co. owned the note at the time this action was commenced or at any time thereafter.

2. This court declined to review the defendant's claim that, after the trial court granted W Co.'s motion for summary judgment with respect to liability but prior to the time that it rendered the judgment of strict foreclosure, it deprived her of her right to conduct additional discovery and her right to a new trial: the record was inadequate to review the defendant's claim that she was denied a new trial, as the trial court marked off her cross motion for summary judgment and her motion for a new trial, and, therefore, there was no ruling on the motion for a new trial for this court to review, and the defendant failed to provide this court with a transcript of the proceedings related to the trial court's denial of her motion for summary judgment; moreover, the defendant failed to adequately brief or to provide an adequate record for review of her claim that she was denied discovery in order to properly undermine W Co.'s claim of standing as a result of the attachment of the blank endorsement to the subject note after summary judgment was rendered in favor of W Co.

3. The defendant's claim that the trial court erred in striking the counts of her counterclaim alleging CUTPA and TILA violations was not reviewable, the defendant having failed to brief that claim adequately; the portions of the defendant's principal and reply briefs that address the stricken counts of her counterclaim under CUTPA and TILA failed to address, much less analyze, the standard of review with respect to motions to strike, the application of the second limitation to the rule that a statute of limitations must be pleaded as a special defense, or the precise nature of the allegations pleaded in her revised counterclaim that rendered her claims legally sufficient to refute the court's conclusion that the statutes of limitations relevant to her TILA and CUTPA claims had expired, and she improperly alluded to additional facts concerning an alleged denial of her right to a mortgage modification or other relief programs as a violation of CUTPA, which were not alleged in the revised counterclaim.

Argued February 5—officially released August 20, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendant filed a counterclaim; thereafter, the court, *Cosgrove*, *J.*, granted the plaintiff's motion to strike the defendant's revised counterclaim; subsequently, the court granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, denied the defendant's motion for summary judgment; subsequently, the court, *Calmar*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, the court, *Calmar*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Sandra Caldrello, self-represented, the appellant (defendant).

William J. Hanlon, with whom, on the brief, was *David M. Bizar*, for the appellee (plaintiff).

Opinion

KELLER, J. The self-represented defendant,[1] Sandra Caldrello, appeals from the judgment of strict foreclosure rendered in favor of the plaintiff, Wells Fargo Bank, N.A. The defendant claims that[2] (1) the court erred in concluding that a genuine issue of material fact did not exist with respect to the plaintiff's standing to foreclose the mortgage and rendering summary judgment as to liability in favor of the plaintiff, (2) after the court granted the motion for summary judgment with respect

[1] The defendant was self-represented during the proceedings at trial and during the present appeal.

[2] The defendant makes four separate claims of error in her appellate brief, but we have combined her first two claims, as they both relate to whether the plaintiff had standing to initiate the foreclosure action.

to liability but prior to the time that it rendered judgment of strict foreclosure, the court deprived her of her right to conduct additional discovery and her right to a new trial related to the fact that, following the rendition of summary judgment, the plaintiff attached a blank endorsement to the note at issue in this action, and (3) the court erred in granting the plaintiff's motion to strike two counts of her counterclaim alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Truth in Lending Act (TILA),[3] 15 U.S.C. § 1601 et seq. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On September 12, 2012, the plaintiff commenced this foreclosure action. The complaint alleged that on February 9, 2007, the defendant signed a promissory note in the amount of $480,000 in favor of the World Savings Bank, FSB (World Savings). The note was secured with a mortgage on property owned by the defendant known as 939 Pequot Avenue in New London. The plaintiff alleged that it was the party entitled to collect the debt evidenced by the note and the party entitled to enforce the mortgage, as it is the successor by merger to the original mortgagee, World Savings, that the defendant was in default on her obligations under the note, and that it had exercised its right to accelerate the debt and to commence this action.

Prior to rendering summary judgment as to liability in favor of the plaintiff, the court, *Cosgrove, J.*,[4] granted

[3] "[TILA], as amended in particular by the Truth-in-Lending Simplification Reform Act of 1980, was enacted as part of the Consumer Credit Protection Act of 1968, and is codified at 15 U.S.C. § 1601 et seq. The purpose of TILA is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. See 12 C.F.R. § 1026.1." *Cheshire Mortgage Services, Inc.* v. *Montes*, 223 Conn. 80, 96–97, 612 A.2d 1130 (1992). In order to carry out this purpose, "Regulation Z," codified at 12 C.F.R. 226.1 et seq., was promulgated. Id., 97.

[4] Several judges issued relevant rulings in this case. We are identifying them by name for purposes of clarity.

the plaintiff's motion to strike the defendant's revised counterclaim. The circuitous procedural journey to the striking of the defendant's counterclaim commenced on February 11, 2015, when the defendant filed her first of many sets of counterclaims and associated "supplements" and "addenda." On May 20, 2015, after the plaintiff had previously filed a series of requests for the defendant to revise her counterclaim, the defendant filed a revised counterclaim containing thirty-two counts.

On August 4, 2015, the plaintiff moved to strike all thirty-two counts of the revised counterclaim. On October 23, 2015, the defendant filed a "Defendant's Addendum to Counterclaims." The plaintiff moved to strike the addendum, arguing that the defendant had failed to satisfy the requirements of Practice Book § 10-60 and had improperly amended her revised counterclaim. Judge Cosgrove granted the plaintiff's motion to strike the addendum on December 4, 2015, simultaneously overruling the defendant's objection to the plaintiff's motion to strike her addendum.

On January 5, 2016, Judge Cosgrove issued a memorandum of decision striking the defendant's revised counterclaim. On January 20, 2016, the defendant filed a counterclaim containing thirty-one repleaded counts. The plaintiff again moved to strike all of the counts of the counterclaim. On May 3, 2016, Judge Cosgrove granted in part the plaintiff's motion, striking all but one of the defendant's repleaded counts as legally insufficient or as asserting claims on which relief may not be granted in the form of a judgment on a counterclaim. The court did not strike count twenty-nine, however, which alleged breach of contract.[5]

In its January 5, 2016 memorandum of decision, the court agreed with the plaintiff's argument that in ruling

[5] Judge Cosgrove ultimately rendered summary judgment in favor of the plaintiff on the defendant's counterclaim alleging breach of contract.

on the motion to strike, it could address the plaintiff's argument that the statutes of limitations applicable to the CUTPA and TILA causes of action barred those claims. Although a claim that an action is barred by the lapse of the statute of limitations usually must be pleaded as a special defense, and not raised by a motion to strike; see *Forbes* v. *Ballaro*, 31 Conn. App. 235, 239, 624 A.2d 389 (1993); see also Practice Book § 10-50; the court determined that the issues in this case met one of the two limited situations where the use of a motion to strike to raise the defense of the statute of limitations is permissible. See *Forbes* v. *Ballaro*, supra, 239–40 ("where a statute gives a right of action which did not exist at common law, and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone" [internal quotation marks omitted]).

Noting that the execution of the note and mortgage occurred on February 9, 2007, Judge Cosgrove, after reviewing the defendant's myriad allegations pertaining to violations of the two statutes,[6] determined that "[c]ounts eight through ten [of the counterclaim] allege inaccurate material disclosures, as opposed to a failure to provide material disclosures [and], therefore, the defendant's right to rescind expired three years from the date of consummation or delivery of all material disclosures. While counts eight through ten allege inaccurate material disclosures, count seven alleges that the closing agent failed to provide copies of the signed closing documents. Even taking this fact in the light most favorable to the defendant—that the closing agent is an agent of the plaintiff and the closing documents are material disclosures as defined by 12 C.F.R. § 1026.23 (a) (3) (ii)—the defendant's claim is still

[6] See paragraphs 7, 8, 9, 10 and 30 of the defendant's revised counterclaim.

barred by 15 U.S.C. § 1635 (f)'s statute of limitation[s].[7] The [defendant] fails to allege any facts in [counts] seven or thirty regarding the transfer of all of the defendant's interest in the property or the sale of the property, so the date of consummation remains the time measure. More than three years elapsed between February 9, 2007 and August 31, 2012. Further, while the defendant alleged that she has the right of rescission under recoupment pursuant to TILA, she has not alleged recoupment as a matter of defense, pursuant to 15 U.S.C. § 1640 (e), but rather, as a counterclaim. Finally, equitable tolling does not apply to [count] thirty because '[§] 1635 (f) completely extinguishes the right of rescission at the end of the [three] year period.' *Beach* v. *Ocwen Federal Bank*, [523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998)]." (Footnote added.) Judge Cosgrove concluded that the statute of limitations pursuant to TILA expired on February 9, 2010. He applied the same expiration date in striking counts eight through ten alleging CUTPA violations, noting that CUTPA, a statutory cause of action that did not exist at common law, also has a limitation period of three years after the occurrence of a violation. See General Statutes § 42-110g (f). Judge Cosgrove further concluded that the defendant had failed to plead facts sufficient to demonstrate fraudulent concealment, which might otherwise toll the statute of limitations.

On January 20, 2016, the defendant filed a thirty-one count amended counterclaim, which she corrected by

[7] Civil liability under TILA is codified at 15 U.S.C. § 1640 (e), which limits actions under this section to within one year from the date of the occurrence of the violation, except in an action to collect the debt that was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action. The right of a person to bring a civil action for liability against a creditor that does not comply with the requirements imposed by TILA is not a right that existed at common law. Therefore, Judge Cosgrove concluded that he could consider the plaintiff's statute of limitations arguments regarding TILA as to counts seven through ten and thirty of the counterclaim on its motion to strike.

changing a date, on January 25, 2016. The plaintiff again moved to strike the counterclaim. Judge Cosgrove struck all of the counts of the amended counterclaim except a single breach of contract claim, agreeing with the plaintiff that the legal insufficiencies in the defendant's prior counterclaim had not been cured and that the defendant improperly had used her opportunity of pleading over pursuant to Practice Book § 10-44 to add additional claims.[8]

On June 15, 2016, the plaintiff filed a motion for summary judgment as to liability on its complaint and as to the defendant's counterclaim for breach of contract. In its memorandum of law in support of the motion, the plaintiff argued that there were no genuine issues of material fact regarding the defendant's liability under the note and the mortgage, and that summary judgment was proper because the defendant's counterclaim was legally insufficient.

During the course of this litigation, the plaintiff presented to the court and to the defendant the original promissory note and the recorded mortgage. The original note is an adjustable rate mortgage note, "pick-a-payment" loan signed by the defendant and payable to World Savings. Prior to the rendering of summary judgment, the original note had not been endorsed in any manner and remained payable by its express terms to "[World Savings], a federal savings bank, its successor and/or assignees, or anyone to whom this Note is transferred." The recorded mortgage references this promissory note.

In support of its motion for summary judgment as to liability, the plaintiff submitted an affidavit from Shae Smith, the vice president for loan documentation for the plaintiff. In her affidavit, Smith averred that she is

[8] Judge Cosgrove also noted that the defendant had misapprehended the distinction between counterclaims and special defenses.

familiar with the business records maintained by the plaintiff, which records were made at or near the time of the event recorded by the plaintiff, that it was a regular practice for the plaintiff to make those records and that her knowledge was acquired from the examination of these business records. Smith stated that the defendant executed and delivered an adjustable rate mortgage note dated February 9, 2007, in the amount of $480,000 to World Savings. She further stated that the plaintiff is the successor by merger to the mortgagee. Specifically, Smith stated that on December 31, 2007, ten months after the making of the note and mortgage, World Savings merged and changed its name to Wachovia Mortgage, FSB (Wachovia). This transaction is documented by correspondence annexed to Smith's affidavit from the Office of Thrift Supervision within the United States Department of the Treasury. Smith further stated, on the basis of her examination of the plaintiff's business records, that, on November 1, 2009, Wachovia converted to a National Bank named Wells Fargo Bank, Southwest, N.A., and that on the same date Wells Fargo Bank Southwest, N.A., merged into Wells Fargo Bank, N.A., the plaintiff in this action. These conversions of corporate names and status were documented by correspondence from the Office of the Comptroller of the Currency annexed to the affidavit. Smith further averred that the plaintiff's attorney was in possession of the note at the time this litigation was commenced and that the note had been in default since December, 2011. Also annexed to Smith's affidavit was a copy of a "Notice to Cure and Intent to Accelerate" document sent to the defendant. Finally, Smith stated that the plaintiff had not received funds sufficient to cure the default on the defendant's promissory note.

Given that the plaintiff claimed to hold the note by virtue of a series of corporate mergers, name changes and conversions, the plaintiff provided an additional

affidavit from Paul Hoff, the plaintiff's implementation consultant, to support its motion for summary judgment. Hoff averred that his affidavit was based on his examination of the business records maintained by the plaintiff and, specifically, his interpretation of the electronic records relating to the defendant's February 9, 2007 note and mortgage to World Savings. Hoff concluded that the plaintiff is properly identified on the loan transfer history as the investor entity that owned the defendant's note.

In its memorandum of law in support of its motion for summary judgment, the plaintiff argued that it had established with competent evidence a prima facie case of liability in a mortgage foreclosure action through the affidavits of Smith and Hoff, and the documentation attached to them, which established that (1) there was a loan, evidenced by the note, payable to World Savings; (2) the plaintiff was and, since prior to the commencement of the foreclosure action, had been the party entitled to collect the debt evidenced by that note; (3) the defendant was in default; and (4) the indebtedness due under the note had been accelerated. The plaintiff asserted that it had standing to foreclose on the mortgage because, as evidenced by the Hoff affidavit and its supporting exhibits, the plaintiff not only was in possession of the original note, but had the rights of the original holder of the note, World Savings, by operation of the federal merger statute, 12 U.S.C. § 215a (e) 2006.[9]

[9] Title 12 of the United States Code, § 215a (e) provides in relevant part: "The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and

In her objection to the plaintiff's motion for summary judgment, relevant to standing, the defendant argued that the plaintiff failed to provide any documents that proved it was the owner of the note and had not met its burden to prove standing. She claimed that the plaintiff was defrauding the court with false assertions of ownership of the note. She questioned whether the affiants, Smith and Hoff, actually had personal knowledge of the facts to which they had attested.[10] Her primary argument concerned a transaction whereby World Savings transferred or sold the note to its subsidiary, World Loan Company (World Loan), on May 3, 2007. She asserted that Wachovia, which formerly was known as World Savings, could not have reacquired ownership of the note without World Loan having first endorsed the note, and that there was no endorsement attached to the note at the time the plaintiff commenced the foreclosure action. She also claimed that there was no evidence that World Savings or Wachovia had transferred the note. She further argued that the Federal Home Loan Bank of San Francisco took title to and

enjoy all rights of property, franchises, and interests . . . in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger . . . ."

[10] The defendant filed a motion to strike the affidavits of Smith and Hoff that were submitted by the plaintiff in support of its motion for summary judgment. The court denied this motion to strike, citing "settled law" in Connecticut that affidavits based on a review of business records are properly relied on by a court to resolve summary judgment issues. See *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 235–36, 32 A.2d 307 (2011) ("[u]nder General Statutes § 52-180, to be competent to testify, the affiant need only have personal knowledge of the relevant business records . . . and not the act, transaction or occurrence recounted therein" [citation omitted; footnote omitted]), overruled in part by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.8, 71 A.3d 494 (2013); *American Home Mortgage Servicing, Inc.* v. *Reilly*, 157 Conn. App. 127, 136, 117 A.3d 500 ("it is well established that a court may rely on an affidavit when the affiant acquired personal knowledge from a review of underlying business records"), cert. denied, 317 Conn. 915, 117 A.3d 854 (2015). The denial of the defendant's motion to strike these affidavits is not challenged on appeal.

owned the note by virtue of a Uniform Commercial Code financing statement, which was filed to establish a security interest in the assets of World Loan. The defendant argued, as well, that she had received a letter on May 2, 2012, from the plaintiff's counsel, stating in relevant part: "This office has been retained by Wachovia Mortgage, a Division of [the plaintiff], the mortgage servicer of the above-referenced mortgage loan, to commence a foreclosure." On the basis of this letter, the defendant claimed that the plaintiff did not own the note because "the foreclosure was requested by Wachovia . . . with [the plaintiff] named as the servicer."

The plaintiff argued that the transfers between World Savings and its subsidiary, World Loan, did not affect its standing to enforce the note because after World Loan converted from a corporation to a limited liability company, World Loan Company, LLC, it transferred the note back to World Savings, which was renamed Wachovia, in 2009. Thus, the plaintiff argued, Wachovia maintained World Savings' status as a holder upon reacquiring the note from World Loan under Connecticut law pursuant to General Statutes § 42a-3-207.[11] The plaintiff also argued that when Wachovia, the renamed original payee of the note, converted and changed its name to Wells Fargo Bank Southwest, N.A., and on the same day, Wells Fargo Bank Southwest, N.A., merged into the plaintiff, the plaintiff, under the federal merger statute, obtained all of World Savings' rights in the note without need of an endorsement.

[11] General Statutes § 42a-3-207 provides: "Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel endorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An endorser whose endorsement is cancelled is discharged, and the discharge is effective against any subsequent holder."

After considering the defendant's objection to the plaintiff's motion for summary judgment as to liability, Judge Cosgrove granted the motion, concluding that "[i]n this case, the plaintiff has provided to the court . . . the original note executed by the defendant. It is not endorsed but it need not be endorsed if the plaintiff can demonstrate that [it] is the corporate successor to the original mortgage[e], [World Savings]. The plaintiff's affidavits and cited statutes and case law establish that it is the successor to [World Savings] and entitled to enforce the note. . . . There is no dispute that the note has not been paid in accordance with it terms and that the defendant was give[n] notice of the intent to accelerate the debt." The court observed that the defendant's submissions in opposition to the motion for summary judgment, despite lacking an adequate evidentiary foundation to be considered, nonetheless "would be consistent with the plaintiff's affidavits."[12] (Emphasis omitted.)

Before the court rendered the judgment of strict foreclosure, the plaintiff filed a "Notice of Supplemental Document Production" on June 22, 2017, that included a copy of the note with an allonge blank endorsement dated February 8, 2017. The defendant, asserting that this recent endorsement was an attempt by the plaintiff to circumvent what she considered to be a valid objection to its standing (based on her allegation that the note, as a matter of law, needed an endorsement because at one point it had been sold by World Savings to its subsidiary, World Loan), filed a motion for summary judgment. Therein, she renewed her claim that World Loan Company, LLC, could not have transferred the note back to Wachovia without an endorsement.[13]

[12] In the same memorandum of decision, the court also rendered summary judgment in favor of the plaintiff on the defendant's counterclaim for breach of contract. The propriety of the court's summary judgment ruling on the counterclaim for breach of contract is not a subject of this appeal.

[13] In its appellate brief, the plaintiff discusses, at length, the defendant's vigorous and extensive discovery pursuits in which she sought information

In this motion, relative to standing, she referred to an affidavit of debt supplied by Diane F. Duckett, which was filed in court on April 20, 2017, and which indicated that the note was now endorsed in blank. She accused the plaintiff of fraud and deceit in order to fabricate a ground on which it had standing. The plaintiff filed an objection on June 22, 2017, noting that after Judge Cosgrove had rendered summary judgment in its favor, the plaintiff recalled the note from its foreclosure counsel, endorsed it in blank and returned it to foreclosure counsel. This sequence of events is described in an amended affidavit of debt by Kimberly A. Mueggenberg that was attached to the plaintiff's objection. The plaintiff also argued that all of the issues raised in the defendant's motion for summary judgment dated May 8, 2017, already had been adjudicated by Judge Cosgrove in that they had been raised in the defendant's objection to the plaintiff's motion for summary judgment as to liability or in a motion for reconsideration of his order filed by the defendant on December 22, 2016, which had been denied by Judge Cosgrove on January 9, 2017.

from it related to sale of the note five years before the plaintiff commenced this action. The plaintiff maintains that, prior to moving for summary judgment, it complied with these efforts by producing documentation as to the note's history. Several months prior to the date on which the court heard the plaintiff's motion for summary judgment, the court sustained the plaintiff's objection to the defendant's supplemental requests for documents and its objection to two motions filed by the defendant to compel discovery. In its first order, the court concluded: "There has been good faith compliance with the defendant's discovery request relating to the financial transaction at issue." In its memorandum of decision granting the plaintiff's motion for summary judgment, the court, in denying the defendant a continuance requested by affidavit for additional discovery as to the sale of the note in order to oppose the motion, stated: "The defendant raises as an additional issue that the plaintiff has not complied with discovery that she had filed. This dispute was the subject of numerous motions and hearings before the court. The court previously indicated that it was satisfied that the plaintiff had complied with the discovery requests and provided the defendant with the documentation as to the ownership of her loan. The defendant has not made a persuasive case now or in the hearings on the prior discovery motions that information was being withheld improperly."

On August 17, 2017, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, denied the defendant's motion for summary judgment dated May 8, 2017, stating, "[t]he motion termed 'Motion for Summary Judgment' is denied. A previously granted motion to reargue occasioned the hearing of August 17, 2017, at which it became apparent that the self-represented defendant's motion was in reality an attempt to reargue a summary judgment granted by *Cosgrove, J.*, in favor of plaintiff . . . . Notwithstanding the procedural irregularities, the court heard extensive presentations from both parties. The court is of the opinion that the motion for summary judgment was correctly decided the first time."

Subsequent to Judge Koletsky's decision, the defendant filed a cross motion for summary judgment and a motion for a new trial, again demanding that the court address the reasons for the plaintiff's endorsement of the note in blank, which she considered to be newly discovered evidence that undermined the plaintiff's standing as the holder of the note at the time the foreclosure action was commenced.

Prior to the hearing on the plaintiff's motion for a judgment of strict foreclosure, the defendant applied, pursuant to Practice Book § 7-19, for issuance of subpoenas directed at the plaintiff's lawyers. Before the plaintiff could file its objection to the defendant's subpoena request, the court granted it. The plaintiff sought reconsideration and moved to quash the subpoenas. The court, *Nazzaro, J.*, conducted a hearing on April 24, 2017, and granted the plaintiff's motions to reconsider and to quash on May 8, 2017.

After the plaintiff reclaimed its motion for a judgment of strict foreclosure, the court set a hearing date of August 14, 2017. The defendant filed another request to subpoena the plaintiff's lawyers. Judge Cosgrove denied her subpoena request but rescheduled the August 14

hearing for September 11, 2017. On September 6, 2017, the defendant filed a third application for the issuance of subpoenas directed at two out-of-state witnesses, Duckett and Mueggenberg, who both signed affidavits of debt on behalf of the plaintiff, and which were filed in support of its motion for a judgment of strict foreclosure. The defendant stated that she was seeking information on the "surprise" blank endorsement that was first mentioned in Duckett's affidavit that had been filed in court on April 20, 2017.

During the hearing on the plaintiff's motion for a judgment of strict foreclosure on September 11, 2017, counsel for the plaintiff represented to the court, *Calmar, J.*, that the plaintiff had "[p]ulled back" the note from counsel, endorsed it in blank, and returned it to counsel, and that counsel had informed Judge Koletsky about the endorsement before he denied the defendant's motion for summary judgment. Judge Koletsky determined that the defendant's motion for summary judgment was, in reality, an attempt to reargue the summary judgment that had been rendered in the plaintiff's favor by Judge Cosgrove. The defendant claimed she had not become aware of the endorsement until June 22, 2017.[14] After determining that Judge Koletsky had been made aware of the issue concerning the newly attached endorsement to the note, Judge Calmar marked the defendant's cross motion for summary judgment and her motion for a new trial off, ruling, "[a]s to the cross motion for summary judgment and the motion for a new trial, no action is necessary because

[14] The Duckett affidavit, filed on April 20, 2017; the defendant's motion for summary judgment dated May 8, 2017; the plaintiff's objection to it on June 22, 2017; and the plaintiff's notice of supplemental document production, also filed on June 22, 2017, clearly demonstrate that the defendant was on notice that there had been a blank endorsement attached to the note well before Judge Koletsky considered her motion for summary judgment. The plaintiff maintains that the endorsement did nothing to change the plaintiff's status as the holder of the note.

there is no issue. First of all, Judge Koletsky had denied essentially a motion to reargue, so [the issue of liability is] resolved. And there's, therefore, no basis to have a motion for summary judgment pending. And whereas [the motion for a new trial] also was a motion to reargue effectively as to the issue of liability, he essentially denied a motion to retry the issues." Judge Calmar also marked off as moot the defendant's application for subpoenas for Duckett and Mueggenberg because the application was part of an effort to explore the issue of the creation of the blank endorsement, which he believed Judge Koletsky had addressed.

Judge Calmar then proceeded to conduct an evidentiary hearing on the plaintiff's motion for a judgment of strict foreclosure. He granted the plaintiff's motion on September 11, 2017.

On September 21, 2017, the defendant filed a motion to open the judgment of strict foreclosure. The court denied the motion, noting that the "[d]efendant lacks good cause to open and vacate this court's judgment of strict foreclosure. She asserts the same arguments that this court has repeatedly rejected in denying [the] defendant's motion to dismiss, three motions for summary judgment, as well as in a myriad of other motions and filings. [The] defendant cannot challenge issues that have already been decided."[15] This appeal followed.

Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that the court erred in concluding that a genuine issue of material fact did not exist with respect to the plaintiff's standing to foreclose

[15] The defendant has not appealed from the denial of her motion to open the judgment.

the mortgage and the rendering of summary judgment as to liability in its favor. We disagree.

We begin with our standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 620, 72 A.3d 394 (2013). "In deciding a motion for summary judgment, the trial court must view 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 fact which, under applicable principles of substantive law, entitle him to 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." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 190–91, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014). This court's review of a trial court's decision to grant a motion for summary judgment is plenary. Id., 191.

Evidence, for the purposes of a summary judgment motion, means affidavits made upon personal knowledge of "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Practice Book § 17-46. Any other material submitted in support of or opposition to the motion must demonstrate that

the proffer would be admissible under the rules of evidence. "The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 358, 143 A.3d 638 (2016).

To make out a prima facie case in a mortgage foreclosure action, the foreclosing party must show "that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

"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." (Internal quotation marks omitted.) *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 758, 6 A.3d 726 (2010). "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 730, 205 A.3d 716 (2019).

The original note before Judge Cosgrove was unendorsed and payable to the plaintiff's predecessor, World Savings. The defendant asserts that five years before this action was commenced, the note was sold by the World Savings to its subsidiary, World Loan. According to the defendant, the plaintiff bore the burden of proving that it owned the note when it commenced this action by presenting evidence that the original note was sold back to its parent corporation. This would have required the attachment of a specific endorsement from World Loan Company, LLC, back to one of the plaintiff's merged predecessors, World Savings, Wachovia, or Wells Fargo Bank Southwest, N.A., or the plaintiff, or by the attachment of a blank endorsement.

The defendant cites to a variety of different cases in her appellate brief in an attempt to support her argument. For example, the defendant cites to a decision of the Florida Supreme Court, *Wright* v. *JPMorgan Chase Bank, N.A.*, 169 So. 3d 251 (Fla. 2015), in support of her contention that ownership of a note by a subsidiary does not give a parent corporation, *which is a distinct legal entity*, the right to enforce the note absent evidence that the parent corporation acquired such a right through, for example, a purchase or servicing agreement. The facts of that case, however, are markedly different from the present case. In *Wright*, the court concluded that there was no evidence of any transfer from the wholly owned subsidiary of JPMorgan Chase Bank, N.A., Chase Bank, USA, N.A., back to its parent corporation. Id. Here, however, the plaintiff presented undisputed evidence of a transfer from the subsidiary, World Loan Company, LLC, back to the parent corporation, Wachovia.

The affidavit of the plaintiff's implementation consultant, Hoff, filed with the plaintiff's motion for summary judgment, explains the history of the note subsequent to its February 9, 2007 execution and refers to exhibits

annexed to Hoff's affidavit. Hoff reviewed the plaintiff's business records and established the corporate and transactional history—a history that the plaintiff claims the defendant failed to rebut with any admissible evidence of her own.

Hoff discussed the history of both the note and the mergers that resulted in the plaintiff's right to assert ownership of the note, averring: "The note was assigned loan number *******4985. . . . In the regular course of business, [the plaintiff] maintains an electronic record relating to the note called the Loan Transfer History and it is [the plaintiff's] practice to update this record at or near the time of the event recorded.[16] . . . In the regular course of its business, [the plaintiff] maintains the Investor/Category Matrix, which is used to code events recorded in the Loan Transfer History.[17] . . . On November 19, 2007, [World Savings] changed its name to [Wachovia]. On November 1, 2009, [Wachovia] changed its name to Wells Fargo Bank Southwest, FSB, and merged into [the plaintiff]. These entities were consistently coded as investor '010' on the Investor/Category Matrix. . . . On the Investor/Category Matrix, [World Loan] and its successors in interest have been assigned the Asset Investor Number of '050'. . . . [O]n December 31, 2008, [World Loan] converted from a corporation to a limited liability corporation. These entities were consistently coded as investor '010' on the Invertor/category Matrix. . . . On the Investor/Category Matrix, the assignment of an asset investor number indicates that the investor has maintained ownership of the loan. Similarly, the entity and its successor in interest identified in the 'Risk' column indicate

[16] A screenshot of the "Loan Transfer History" is annexed to Hoff's affidavit as exhibit B.

[17] A copy of the "Investor/Category Matrix," redacted to show only title, headings and the investors identified on the "Loan Transfer History," is attached to Hoff's affidavit as exhibit C.

ownership of the loan. 'Non-asset investor numbers' are assigned when the loan is securitized or transferred to a non-affiliated third party. . . . On May 3, 2007, [World Savings] transferred the note to [World Loan]. This transfer was recorded in the Loan Transfer History relating to the Note on the line marked '5/03/07' and bearing the description 'sale to [World Loan]' in the field for 'additional transfer information.' The entry on the Loan Transfer History dated 05/03/07 shows an old investor ('Old INV') of '010' and a new investor ('New Inv') of '050', i.e. a transfer from [World Savings] to [World Loan]. . . . *The 1/23/09 entry reversed the 05/03/07 transfer*. The 01/23/09 entry on the Loan Transfer History shows an old investor . . . of '050' and a new investor . . . of '010, i.e., a transfer from World Loan Company LLC, [formerly known as World Loan][18] to [Wachovia]. The 01/23/09 entry also displays the notation 'Maint Investor' in the field for 'additional transfer information,' which means the Loan Transfer History record is being maintained, and the field of the Loan Transfer History being maintained is the identity of the investor. . . . The 01/28/09 entry 'Maint Service Fee and Investor Loan' indicates the elimination of a servicing fee, which is consistent with the transfer of ownership from the World Loan Company [LLC] subsidiary to its corporate parent/servicer. . . . On the Loan Transfer History record each of the entries following 01/23/09 identify the investor as '010', which is [World Savings] and its successors in interest. [The plaintiff] has been [World Savings'] successor in interest since November 1, 2009. . . . [The plaintiff] is properly identified on the Loan Transfer History as the 'investor', which is the entity that owns the note." (Emphasis added; footnotes added.)

In Judge Cosgrove's memorandum of decision on the plaintiff's motion for summary judgment, he noted that

[18] There was evidence that, on December 31, 2008, World Loan was renamed to World Loan Company, LLC.

the plaintiff previously had produced for the court's review the original unendorsed note, which was made payable to its corporate predecessor, World Savings. Smith's affidavit stated that, on or about May 2, 2012, the plaintiff transferred possession of the note to its attorney in order to initiate this action. In its complaint, the plaintiff alleged that on or before May 2, 2012, it "became and at all times since then has been the party entitled to collect the debt evidenced by said note and is the party entitled to enforce said mortgage."

With respect to the defendant's documentary submissions in opposition to summary judgment, in an affidavit dated August 15, 2016, the defendant claimed to have personal knowledge of the plaintiff's lack of standing as "the note was clearly sold and transferred to numerous parties all the while lacking endorsement essential to prove ownership." Appended to her affidavit, but not specifically referenced therein, are numerous other documents. The defendant appended the acceleration and notice of default letter that she received prior to the commencement of this action. She asserted that the letter, written on behalf of "Wachovia Mortgage, a Division of Wells Fargo Bank, NA, the mortgage servicer," proved that the plaintiff did not own the note because the foreclosure was requested by Wachovia with the plaintiff named as the servicer. The letter, apparently sent to the defendant by the plaintiff's counsel, however, is not evidence concerning whether the plaintiff owned the note. Moreover, by its terms, the letter clearly reflects that "Wachovia Mortgage, a Division of Wells Fargo Bank, N.A.," was the entity initiating the foreclosure action. The defendant also alleged that the plaintiff did not acquire the assets of World Loan, but this is not material because Hoff's affidavit states that the plaintiff had acquired the assets of Wachovia on November 1, 2009, after World Loan Company, LLC, formerly known as World Loan, transferred the note

back to Wachovia on January 23, 2009. There was evidence that, on November 1, 2009, about nine months after the transfer of the note back to Wachovia, Wachovia merged into the plaintiff.

The defendant also presented evidence to demonstrate that the Federal Home Loan Bank of San Francisco (Federal Home) took title to and owned the note, which she claims had been securitized, by virtue of a Uniform Commercial Code financing statement, but such a statement is filed to establish a security interest in the assets of World Loan. The defendant is unable to demonstrate that having a security interest in collateral is the equivalent of taking title to the underlying collateral. See *Fidelity Mutual Life Ins. Co.* v. *Harris Trust & Savings Bank*, 71 F.3d 1306, 1309 (7th Cir. 1995) ("[a] security interest is not only not title; it is not a possessory interest"). The financing statement serves as notice to third parties of Federal Home's security interest in World Loan's assets, but it is not a transfer of assets or a prohibition on transfer. There is no persuasive evidence to support the defendant's claim that World Loan sold the note to Federal Home.

The defendant also claims, in the alternative, that, absent an endorsement, World Loan Company, LLC, retained title to the note sold to World Loan by Wachovia, and that World Loan Company, LLC, had gone out of business. The plaintiff's proof of this fact is a copy of a "Certificate of Termination" from the Office of the Secretary of State of Texas, which is an attachment to her objection to the plaintiff's motion for summary judgment. This certificate provides that World Loan Company, LLC, was "terminated" in 2012. As Judge Cosgrove noted, some of the defendant's submissions were consistent with the plaintiff's position. This document, if legitimate, merely establishes that it is

quite unlikely that World Loan Company, LLC, will make any claim that it currently owns the note.[19]

Having thoroughly reviewed the affidavits and other documentation submitted by the plaintiff in support of its motion for summary judgment, we are satisfied that the plaintiff met its evidentiary burden and raised the presumption that it is the rightful owner of the debt. The plaintiff demonstrated its standing through affidavit testimony, documentation of regulatory approvals of the mergers, and the history of transfers related to the note, as well as the production of the original note itself. In showing that it was the successor by merger to the payee on the note, World Savings, the plaintiff also became the payee by operation of law and was the holder and presumptive owner of the note.

The undisputed evidence before the court reflects that, in 2007, World Savings transferred the note to its subsidiary, World Loan. After World Loan converted to a limited liability company, it transferred the note back to World Savings, then renamed Wachovia, in 2009.[20] Wachovia maintained its status as holder because it reacquired the note pursuant to the Uniform Commercial Code, § 42a-3-207. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." If the entity that was the original named payee on the note reacquires it, there is no cloud on that entity's title. See General Statutes Annotated § 42a-3-207, comment (West 2018). This statute applied to reestablish

[19] The defendant also attached case law, articles and federal regulations to her objection to the plaintiff's motion for summary judgment, which she asked the court to use in the adjudication of the motion for summary judgment. It suffices to observe that none of these submissions gives rise to a genuine issue of material fact as to whether the plaintiff is entitled to summary judgment in its favor.

[20] As a result of the name change, any interest that World Savings had in the defendant's note "inure[d] to the association under its new name [Wachovia]." 12 U.S.C. § 31 (2017).

Wachovia, as the holder following the intercorporate transfer from World Loan Company, LLC, which resulted in Wachovia's reacquisition of the note. It allows a prior holder of a negotiable instrument to become a person entitled to enforce the instrument upon reacquiring such instrument without having to be burdened with any endorsements that might have occurred between the time of the first undertaking of liability and the reacquisition of the instrument. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." "Holder" is defined in General Statutes § 42a-1-201 (21) (A) as "[t]he person in possession negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

As the comment to the Uniform Commercial Code explains, § 42a-3-207 implements "a rule of convenience" that relieves the reacquirer, a former holder, of "the burden of obtaining an indorsement that serves no substantive purpose." General Statutes Annotated § 42a-3-207, comment (West 2018); see also *Wells Fargo Bank, N.A.* v. *Sheikha*, 221 So. 3d 657, 659 (Fla. App. 2017).

Under the circumstances here, the later possession of the note by any successor in title to World Savings, including the plaintiff, entitled the successor to stand in the shoes of World Savings and to assume to the rights of a holder of the note. Under federal banking law, all of World Savings' rights in the note automatically transferred to the plaintiff without the need for any endorsement. See 12 U.S.C. § 215a (e). A federal bank merger transfers to and vests in the surviving bank "[a]ll rights, franchises and interests . . . in and to every type of property (real, personal, and mixed) and choses in action . . . by virtue of such merger with any deed or other transfer." Id. These broad transfers by merger of all rights and interests "in and to every type of property" included World Savings' rights as the note's

holder. "[S]uch receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger." Id. After a merger with a creditor bank, the surviving corporation stands in the shoes of the original creditor under § 215a (e) and becomes the note's owner. By operation of federal law, the plaintiff became the owner and holder of both the note and mortgage at the time it merged with Wachovia,[21] which then held the note. No assignment, document transfer, or court action was necessary for the plaintiff or Wachovia to acquire the loan and to enforce it. "[A]fter a merger with a creditor bank, the surviving corporation . . . *is* the original creditor." (Emphasis in original.) *Dues* v. *Capital One*, *N.A.*, Docket No. 11-CV-11808 (CEB) (E.D. Mich. August 8, 2011); see also *Sprague* v. *Neil*, United States District Court, Docket No. 1:05-CV-1605 (SHR) (M.D. Pa. October 19, 2007) ("By way of merger, Universal Bank transferred all of its rights and property to Citibank, including its property interest in [p]laintiff's debt. Citibank assumed all rights and property, including [p]laintiff's debt, as its own and thus stands in the shoes of the previous two banks."). As the successor to the bank named as the original payee on the note, the plaintiff is considered its owner. Hence, the plaintiff, as the original creditor under the note, has standing to enforce it and standing to foreclose the mortgage under General Statutes § 49-17.[22]

[21] Prior to merging with the plaintiff, Wachovia was converted into Wells Fargo Bank, Southwest, N.A., which retained Wachovia's interest in the note pursuant to 12 C.F.R. § 5.24 (i) (2019).

[22] The record reflects that the mortgage has not been assigned to the plaintiff. Section 49-17, however, "codifies the well established common-law principle that the mortgage follows the note, pursuant to which only the rightful owner of the note has the right to enforce the mortgage. . . . Our legislature, by adopting § 49-17, created a statutory right for the rightful owner of a note to foreclose on real property regardless of whether the mortgage has been assigned to him." (Citations omitted.) *RMS Residential Properties*, *LLC* v. *Miller*, 303 Conn. 224, 230, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties*, *LLC*, 309 Conn. 307, 325 n.8, 71 A.3d 492 (2013).

Applying merger principles, numerous courts have rejected claims similar to that raised by the defendant and have concluded that the plaintiff is the successor to Wachovia and World Savings. See, e.g., *Park* v. *Wells Fargo Bank*, United States District Court, Docket No. C 12-2065 (PHJ) (N.D. Cal. August 13, 2012).

As a result of the plaintiff's having proven its status as a holder of the note, the burden shifted to the defendant, as the maker of the note, to rebut the presumption that the plaintiff, as the holder of the note, was also the rightful owner of the debt. See *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 146–47, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). "That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that might give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must prove that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis omitted; footnote omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150–51, 125 A.3d 262 (2015).

The defendant's submissions to counter the plaintiff's status as the holder of the note and, therefore, its status as the presumptive owner of the debt, fall short, as she failed to establish an adequate foundation to support the admission of her personal interpretation of the various banking documents she referred to in her affidavit or that were submitted by her in opposition to the plaintiff's motion for summary judgment. She also presented

no evidence that some entity other than the plaintiff owned the note at the time this action was commenced or at any time thereafter.

In summary, the prior production of the original note, the plaintiff's detailed affidavits, and statutory and case law establish that the plaintiff is the successor to World Savings and entitled to enforce the note. For all the foregoing reasons, we conclude that the court properly found that the plaintiff had standing to foreclose on the note and mortgage in granting the motion for summary judgment as to liability. The defendant's submissions in opposition to summary judgment fail to satisfy her burden to overcome, with competent evidence, the presumption that the plaintiff, as the holder of the note, is also the owner and is entitled to enforce the note.

II

Next, the defendant claims that, after the court granted the plaintiff's motion for summary judgment with respect to liability but prior to the time that it rendered the judgment of strict foreclosure, it deprived her of her right to conduct additional discovery and her right to a new trial related to the fact that, following the rendition of summary judgment, the plaintiff attached a blank endorsement to the note at issue in this action. We will address each aspect of this claim separately.

A

We first address the defendant's claim that she was denied a "new" trial, which we decline to review because the record is inadequate for review.[23]

[23] The defendant's motion for a new trial is inaptly named because there never was any trial at all. Moreover, the defendant, in her appellate brief, asserts that she was denied a new trial on the basis of newly discovered evidence under General Statutes § 52-270, but she did not file a proper petition pursuant to that statute.

The following additional facts are relevant to this claim. The defendant filed a motion for summary judgment on May 8, 2017, in which she focused on the significance of the fact that the note was not endorsed in favor of the plaintiff. On June 22, 2017, the plaintiff filed a notice of supplemental document production, in which it included a copy of the note with an allonge blank endorsement dated February 8, 2017. When Judge Koletsky subsequently considered the defendant's motion, he treated it as a motion to reargue and, after a hearing, denied it on August 17, 2017, indicating that he had heard "extensive presentations from both parties."

The defendant later filed a motion for a new trial on September 8, 2017, and a cross motion for summary judgment on August 24, 2017, both of which focused on the issue of whether the blank endorsement that the plaintiff had added to the note, postsummary judgment, was newly discovered evidence material to the issue of the plaintiff's standing. As she did before the trial court, she asserts on appeal that the emergence of the blank endorsement raised the suspicion that the plaintiff was not the holder of the note when it commenced the action.

On September 11, 2017, prior to ruling on the plaintiff's motion for a judgment of strict foreclosure, Judge Calmar addressed the defendant's motion for a new trial and her cross motion for summary judgment. After concluding that Judge Koletsky had been made aware of and considered the defendant's claim regarding the new blank endorsement that had been added to the note, Judge Calmar marked both the defendant's cross motion for summary judgment and her motion for a new trial off, ruling, "[a]s to the cross motion for summary judgment and the motion for a new trial, no action is necessary because there is no issue. First of all, Judge Koletsky had denied essentially a motion to reargue,

which he termed a motion to reargue, so liability's resolved. And there's, therefore, no basis to have a motion for summary judgment pending. And whereas [the motion for a new trial] also was a motion to reargue effectively as to the issue of liability, he essentially denied a motion to retry the issues."

As a result of Judge Calmar's marking these two motions off, there is no ruling on the motion for a new trial by Judge Calmar that we can review. The law of the case, as determined by Judge Calmar, was the decision of Judge Koletsky denying the defendant's motion for summary judgment. The defendant has failed to provide this court with a transcript of the proceedings before Judge Koletsky. Whether Judge Calmar was correct in determining that Judge Koletsky had considered the defendant's claim of newly discovered evidence on the basis of the blank endorsement, or whether Judge Koletsky properly heard and rejected that claim, cannot be determined without reviewing the transcript of the proceedings before Judge Koletsky prior to August, 17, 2017, the date on which he denied the defendant's motion. Accordingly, the record is inadequate to review this particular claim.

B

The defendant also claims that she was denied "discovery" in order to properly undermine the plaintiff's claim of standing as a result of the attachment of the blank endorsement to the plaintiff's note after summary judgment was rendered in favor of the plaintiff. We decline to review this claim because it is inadequately briefed and unsupported by an adequate record.

In the context of this claim, which is related to the denial of the defendant's right to discovery and a new trial, the defendant refers only to Judge Calmar's denial of her application for issuance of subpoenas by a self-represented party. The plaintiff, in its appellate brief,

has interpreted the defendant's claim as being related to this ruling. Presumably, out of an abundance of caution, the plaintiff has briefed the issue of whether the court abused its discretion in not permitting the defendant to subpoena its attorneys prior to the hearing on the motion for a judgment of strict foreclosure. The denial of those applications, however, are not encompassed in the defendant's stated claim or discussed in her brief. Moreover, it was two different judges, Judge Nazzaro, in granting the plaintiff's motion to quash, and Judge Cosgrove, in denying her second application for subpoenas, who denied the defendant's request to subpoena the plaintiff's attorneys.

In addressing her claim for a denial of "discovery," the defendant briefly refers to the court's failure to allow her to issue subpoenas "for interrogatories" and then specifically refers only to the transcript of the hearings on the motion for a judgment of strict foreclosure before Judge Calmar on October 30, 2017, as the source for this ruling. First, we note that subpoenas are not used for discovery or for the purpose of posing interrogatories. Judge Calmar, during the hearing on the motion for a judgment of strict foreclosure, denied the defendant's application to subpoena Duckett and Mueggenberg as witnesses as "moot" because the defendant's request was relevant to the issue concerning the blank endorsement, which he determined Judge Koletsky already had addressed.

Construing the defendant's "discovery" claim to encompass Judge Calmar's ruling on her September 6, 2017 application for subpoenas, we note that the rationale for his ruling—that Judge Koletsky had fully considered her claims as to the late emergence of a blank endorsement to the note—is not referred to in the defendant's brief. The issue of whether Judge Calmar's ruling on her application for subpoenas was an abuse of discretion is not even discussed except for her bare conclusory assertion that "the court, in an abuse of

discretion, denied the defendant discovery on the blank endorsement . . . .'' We, therefore, conclude that any claim with respect to the denial of her application for subpoenas has been inadequately briefed. ''Although we are solicitous of the rights of pro se litigants . . . [s]uch a litigant is bound by the same rules . . . and procedure as those qualified to practice law. . . . [W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.'' (Citation omitted; internal quotation marks omitted.) *Thompson* v. *Rhodes*, 125 Conn. App. 649, 651, 10 A.3d 537 (2010); see also *Packard* v. *Packard*, 181 Conn. App. 404, 405 n.3, 186 A.3d 795 (2018).

In addition, as we previously determined relative to the defendant's claim regarding the denial of her motion for a new trial, whether Judge Calmar's denial of her application for subpoenas as moot was an abuse of discretion would necessitate a review of the transcript of the proceedings that occurred before Judge Koletsky, and the defendant has failed to provide us with a transcript of those proceedings. Because the defendant has failed to adequately brief her claim or to provide this court with an adequate record to review it, we are unable to consider its merits.

III

The defendant's final claim is that the court erred in striking two counts of her counterclaim alleging CUTPA and TILA violations.[24] Relying on the reasons explained and the authority set forth in part II B of this opinion,

[24] The defendant also claims that the court improperly ''dismissed'' her special defenses. Although she filed a series of counterclaims, she never filed any special defenses, only a disclosure of defenses on February 2, 2015. There are no special defenses included in her answer to the complaint. Moreover, she does not identify any particular ruling wherein the court ''dismissed'' her special defenses.

we decline to review this claim because it is inadequately briefed.

"Claims are . . . inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Citation omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208, cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

Those portions of the defendant's principal and reply briefs that address the stricken counts of her counterclaim under CUTPA and TILA fail to address, much less analyze, the standard of review with respect to motions to strike, the application of the second limitation to the rule that a statute of limitations must be pleaded as a special defense, as set forth in *Forbes* v. *Ballaro*, supra, 31 Conn. App. 239, on which the trial court relied, or the precise nature of the allegations pleaded in her revised counterclaim that rendered her claims legally sufficient to refute the court's conclusion that the statutes of limitations relevant to her TILA and CUTPA claims had expired. In her principal and reply briefs, the defendant also improperly alludes to additional facts concerning an alleged denial of her right to a mortgage modification or other relief programs as a violation of CUTPA, which were not alleged in the operative revised counterclaim.[25]

The judgment is affirmed and the case is remanded for the purpose of setting a new law day.

In this opinion the other judges concurred.

[25] The defendant also failed to include copies of the relevant pleadings and the court's memorandum of decision striking her counterclaim in her appendices, in violation of Practice Book § 67-8 (b) (1).

NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD AND SONS, INC., ET AL. (AC 41464)

Lavine, Keller and Elgo, Js.

Syllabus

The petitioner, N Co., filed a petition for a writ of habeas corpus on behalf of three elephants that it alleged were being illegally confined by the named respondents, C Co., a zoo, and C Co.'s president, W. N Co. alleged that elephants are autonomous beings who live complex emotional, social and intellectual lives, and possess complex cognitive abilities that are sufficient for common-law personhood. N Co. challenged the respondents' detention of the elephants and sought the common-law right to bodily liberty for them, but did not challenge the conditions of their confinement or the respondents' treatment of them. The habeas court declined to issue a writ of habeas corpus pursuant to the applicable rule of practice (§ 23-24 [a] [1] and [2]). The court concluded that it lacked subject matter jurisdiction because N Co. lacked standing to bring the habeas petition on behalf of the elephants. The court also determined that N Co., which failed to allege that it possessed any relationship with the elephants, did not satisfy the prerequisites for establishing next friend standing, and that the petition was wholly frivolous on its face. On N Co.'s appeal to this court, *held*:

1. The habeas court properly concluded that it lacked subject matter jurisdiction over N Co.'s habeas petition and declined to issue a writ of habeas corpus; because the elephants, not being persons, lacked standing to file a habeas petition in the first instance, N Co. could not establish that it had next friend standing to file a petition for a writ of habeas corpus on behalf of the elephants, as the real party in interest for whom a next friend seeks to advocate must have standing, and there was no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in interest.
2. The habeas court properly declined to issue a writ of habeas corpus, as elephants do not have standing to file a habeas petition, they have no legally protected interest that can be adversely affected, and they are incapable of bearing legal duties, submitting to societal responsibilities or being held legally accountable for failing to uphold those duties and responsibilities: there are profound implications for a court to conclude that an elephant, or any nonhuman animal, is entitled to assert a claim in a court of law, as there is a lack of authority for recognizing a nonhuman animal as a person for purposes of habeas corpus, which would upend this state's legal system, our habeas corpus jurisprudence contains no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics, there is no instance in our common law in

which a nonhuman animal or representative for it has been permitted to bring a lawsuit to vindicate the animal's own purported rights, and animals under Connecticut law, as in all other states, have generally been regarded as personal property; moreover, because an elephant is incapable of bearing duties and social responsibilities, as required under the social compact theory of article first, § 1, of the state constitution, and the legislature has statutorily (§ 52-466 [a]) authorized only a person to file an application for a writ of habeas corpus when the person claims to be illegally confined or deprived of liberty, and the term person has never been defined in our General Statutes as a nonhuman animal, this court would not disturb the common law concerning who may seek habeas relief in light of habeas corpus legislation, the lack of any indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, and the lack of precedent recognizing that animals can possess their own legal rights.

Argued April 22—officially released August 20, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the court, *Bentivegna, J.*, rendered judgment declining to issue a writ of habeas corpus, from which the petitioner appealed to this court; thereafter, the court, *Bentivegna, J.*, denied the petitioner's motion to reargue and for leave to amend its petition, and issued an articulation of its decision. *Affirmed.*

Steven M. Wise, pro hac vice, with whom were *David B. Zabel* and, on the brief, *Barbara M. Schellenberg*, for the appellant (petitioner).

Thomas R. Cherry filed a brief for Laurence H. Tribe as amicus curiae.

Thomas R. Cherry filed a brief for Justin Marceau et al. as amici curiae.

Mark A. Dubois filed a brief as amicus curiae.

Jessica S. Rubin filed a brief for The Philosophers as amici curiae.

Opinion

KELLER, J. The petitioner, Nonhuman Rights Project, Inc., appeals from the judgment of the habeas court declining[1] to issue a writ of habeas corpus that it sought on behalf of three elephants, Beulah, Minnie, and Karen (elephants), who are alleged to be confined by the named respondents, R.W. Commerford & Sons, Inc. (also known as the Commerford Zoo), and its president, William R. Commerford, at the Commerford Zoo in Goshen.[2] The petitioner argues that the court erred in (1) dismissing its petition for a writ of habeas corpus on the basis that it lacked standing, (2) denying its subsequent motion to amend the petition, and (3) dismissing the habeas petition on the alternative ground that it was "wholly frivolous." For the reasons discussed herein, we agree with the habeas court that the petitioner lacked standing.[3] Accordingly, we affirm the judgment of the habeas court.

On November 13, 2017, the petitioner filed a verified petition for a common-law writ of habeas corpus on behalf of the elephants pursuant to General Statutes § 52-466 et seq. and Practice Book § 23-21 et seq. The petitioner alleged that it is a not-for-profit corporation with a mission of changing "the common law status of at least some nonhuman animals from mere things,

[1] Although the habeas court stated in its memorandum of decision that it was dismissing the petition, it explicitly relied on Practice Book § 23-24 in doing so. Because that provision authorizes the habeas court to decline to issue the writ, we construe the court's disposition of the petition to be a decision to decline to "issue the writ." See *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 80 n.3, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

[2] The named respondents are not parties to the action. The petitioner alleged in its petition: "As this action is instituted ex parte pursuant to Practice Book § 23-23, respondents have not been served with this petition. The [petitioner] will promptly serve the petition upon the respondents upon the issuance of the writ or as otherwise directed by the court." (Emphasis omitted.)

[3] Given our resolution of the petitioner's first claim, we need not address the petitioner's other claims. See footnote 7 of this opinion.

which lack the capacity to possess any legal rights, to persons, who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." (Internal quotation marks omitted.) The petitioner alleged that the named respondents are illegally confining the elephants.

The petition makes clear that it "challenges neither the conditions of [the elephants'] confinement nor [the] respondents' treatment of the elephants, but rather the fact of their detention itself . . . ." It is "not seeking any right other than the common-law right to bodily liberty" for the elephants. The petition states that determining "[w]ho is a 'person' is the most important individual question that can come before a court, as the term person identifies those entities capable of possessing one or more legal rights. Only a 'person' may invoke a common-law writ of habeas corpus, and the inclusion of elephants as 'persons' for that purpose is for this court to decide." The petition further alleges that "[t]he expert affidavits submitted in support of [the] petition set forth the facts that demonstrate that elephants . . . are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives, and who possess those complex cognitive abilities sufficient for common-law personhood and the common-law right to bodily liberty protected by the common law of habeas corpus, as a matter of common-law liberty, equality, or both."

On December 26, 2017, the habeas court issued a memorandum of decision. Therein, pursuant to Practice Book § 23-24 (a) (1),[4] it declined to issue a writ of habeas corpus because it concluded that the petitioner lacked

[4] Practice Book § 23-24 provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

standing to bring the petition on behalf of the elephants. The court concluded that the petitioner failed to satisfy next friend standing "[b]ecause the petitioner . . . failed to allege that it possesses any relationship with the elephants . . . ." (Emphasis omitted.) Additionally, pursuant to Practice Book § 23-24 (a) (2), the court declined to issue a writ for the elephants because it concluded that the petition was wholly frivolous on its face. On January 16, 2018, the petitioner filed a motion to reargue and for leave to amend its petition. The court denied those motions in a memorandum of decision dated February 27, 2018. This appeal followed.[5]

I

The petitioner first claims that the court erred in concluding that it lacked subject matter jurisdiction on the ground that the petitioner did not have standing to bring the petition on behalf of the elephants. It contends that "Connecticut law permits even strangers to file habeas corpus petitions on another's behalf," and neither § 52-466 (a) (2) nor Practice Book § 23-40 (a) limit who may bring a habeas corpus petition. It argues that although the "court correctly stated that '[o]utside the context of child custody, a petitioner deemed to be a "next friend" of a detainee has standing to bring a petition for [a] writ of habeas on the detainee's behalf,' "

"(1) the court lacks jurisdiction; [or]

"(2) the petition is wholly frivolous on its face . . . ."

As we explained in *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 82–83, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018), "Practice Book § 23-24 is intended to permit a habeas court to conduct a preliminary review of a petition prior to further adjudication of the writ to weed out those petitions the adjudication of which would be a waste of precious judicial resources either because the court lacks jurisdiction over it, the petition is wholly frivolous, or it seeks relief that the court simply cannot grant."

[5] After commencing this appeal, the petitioner filed with the habeas court a motion for articulation, which the court denied in part on May 23, 2018. The petitioner filed a motion for review with this court on June 5, 2018. On July 25, 2018, this court granted review but denied the relief requested by the petitioner.

the court erroneously relied on our Supreme Court's decision in *State* v. *Ross*, 272 Conn. 577, 597, 863 A.2d 654 (2005), which cited to *Whitmore* v. *Arkansas*, 495 U.S. 149, 163, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990), concluding that the petitioner could not serve as next friend to the elephants because it had failed to allege a "significant relationship" with the elephants. In the petitioner's view, Connecticut has neither adopted the second prong of the next friend test set forth in *Whitmore*, nor its dicta regarding "significant relationship."

We begin by setting forth our standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 127–28, 836 A.2d 414 (2003).

On the basis of our plenary review of the issue of standing in this case, we conclude that the trial court's determination that the petitioner lacked standing to file a petition for a writ of habeas corpus on behalf of the elephants was correct. We need not, however, reach the issue of whether the court correctly determined that the petitioner was required, and failed, to allege a significant relationship with the elephants because we conclude that the petitioner lacked standing for a more fundamental reason—the elephants, not being persons, lacked standing in the first instance.[6] We briefly explain.

[6] Although we resolve the legal issue of standing on a slightly different basis than that on which the habeas court relied, we nonetheless are satisfied that, in its appellate brief, the petitioner extensively has addressed the ground on which we rely. Indeed, the petitioner addresses in at least ten pages of its brief why the elephants, which it argues are autonomous beings, should be afforded personhood status for purposes of habeas corpus.

Next friend standing essentially allows a third party to advance a claim in court on behalf of another when the party in interest is unable to do so on his or her own. See *Phoebe G.* v. *Solnit*, 252 Conn. 68, 77, 743 A.2d 606 (1999) ("the general rule is that a next friend may not bring an action for a competent person"); see also *El Ameen Bey* v. *Stumpf*, 825 F. Supp. 2d 537, 559 (D. N.J. 2011) ("[u]nder the 'next friend' doctrine, standing is allowed to a third person so this third person [can] file and pursue a claim in court on behalf of someone who is unable to do so on his or her own"). The "next friend" does not himself become a party to the action in which he participates, but simply pursues the action on behalf of the real party in interest. See *State* v. *Ross*, supra, 272 Conn. 597 ("a person who seeks next friend status by the very nature of the proceeding will have no specific personal and legal interest in the matter"); see also *Whitmore* v. *Arkansas*, supra, 495 U.S. 163 ("[a] 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest"). Thus, it is apparent that the real party in interest for whom the "next friend" seeks to advocate for, must have standing in the first instance. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 603 (4th Cir. 2002) (noting that "a person who does not satisfy Article III's standing requirements may still proceed in federal court if he meets the criteria to serve as next friend of someone who does"). As we will discuss in part II of this opinion, we conclude that the elephants do not have standing to file a petition for a writ of habeas corpus. It follows inexorably that the petitioner cannot satisfy the prerequisites for establishing next friend standing, for there is no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in inter-

est.[7] Accordingly, we conclude that the court properly determined that it lacked subject matter jurisdiction.

II

We explained in part I of this opinion that the petitioner could not establish next friend status without first demonstrating that the elephants had standing in the first instance. We now address why the elephants lack standing.

Our Supreme Court has long held that "[s]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for

[7] Because we conclude that the petitioner cannot establish next friend standing on the ground that the elephants lacked standing in the first instance, we need not address whether the petitioner met the other two prerequisites our Supreme Court has said are necessary to establish next friend status. In *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 653, 659, 866 A.2d 542 (2005), our Supreme Court explained that it evaluated the evidence in the case according to the standards set forth in *Whitmore* v. *Arkansas*, supra, 495 U.S. 163–64, which establishes two prerequisites for demonstrating next friend status. In particular, our Supreme Court explained: "In *Whitmore* v. *Arkansas*, [supra, 149], the United States Supreme Court noted that, to establish next friend status, a person: (1) 'must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . [and] must have some significant relationship with the real party in interest'; id., 163–64; and (2) 'must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.' Id., 163." *In re Application for Writ of Habeas Corpus by Dan Ross*, supra, 659–60 n.7.

As we explained in footnote 3 of this opinion, we need not address the petitioner's claims that the court erred (1) in denying its motion to amend its petition, and (2) dismissing the habeas petition for being wholly frivolous. Even had the petitioner been given the opportunity to amend its petition to add an allegation that the petitioner had a significant relationship with the elephants or that the elephants had no significant relationships to allege, such amendment would not have overcome the fact that the elephants lack standing in the first instance.

determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 207, 994 A.2d 106 (2010).

Only a limited number of courts have addressed the issue of whether a nonhuman animal who allegedly has been injured has standing to bring a claim in a court of law. There are even fewer cases addressing whether a nonhuman animal can challenge its confinement by way of a petition for a writ a habeas corpus. The petitioner asserts that this case "turns on whether [the elephants] are 'persons' solely for the purpose of the common-law right to bodily liberty that is protected by the common law of habeas corpus." In its view, the elephants are entitled to a writ of habeas corpus as a matter of common-law liberty because the writ of habeas corpus is deeply rooted in our cherished ideas of individual autonomy and free choice. It essentially invites this court to expand existing common law. This case, however, is more than what the petitioner purports it to be. Not only would this case require us to recognize elephants as "persons" for purposes of habeas corpus, this recognition essentially would require us to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law. At this juncture, we decline to make such sweeping pronouncements when there exists so little authority for doing so.

Our examination of our habeas corpus jurisprudence, which is in accord with the federal habeas statutes and English common law; see *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 815, 786 A.2d 1091 (2002); reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, 124 App. Div. 3d 148, 150, 998 N.Y.S.2d 248 (2014) ("animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law"), leave to appeal denied, 26 N.Y.3d 902, 38 N.E.3d 828, 17 N.Y.S.3d 82 (2015). Further, a thorough review of our common law discloses no instance in which a nonhuman animal, or a representative for that animal, has been permitted to bring a lawsuit to vindicate the animal's own purported rights. Instead, animals under Connecticut law, as in all other states, have generally been regarded as personal property. See, e.g., *Griffin* v. *Fancher*, 127 Conn. 686, 688–89, 20 A.2d 95 (1941) (recognizing dogs as property and right of action against one who negligently kills or injures them, so long as dog was properly registered).

Although the lack of precedent in support of the petitioner's action is not necessarily dispositive of this claim, we note, as has another court in addressing a similar claim, that "ascription of rights has historically been connected with the imposition of societal obligations and duties." *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 151. Indeed, article first, § 1, of the Connecticut constitution describes our constitution as a "social compact . . . ." Our Supreme Court has noted that "[t]he social compact theory posits that all individuals are born with

certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.' J. Locke, 'Two Treatises of Government,' book II (Hafner Library of Classics Ed. 1961) ¶ 123, p. 184; see also 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) pp. 12–13." *Moore* v. *Ganim*, 233 Conn. 557, 598, 660 A.2d 742 (1995). One academic has also remarked: "Our society and government are based on the ideal of moral agents coming together to create a system of rules that entail both rights and duties. Being . . . subject to legal duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government." R. Cupp, "Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals," 33 Pace Envtl. L. Rev. 517, 527 (2016). Despite the petitioner's asseverations for why the elephants should be afforded liberty rights, it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities required by such social compact.

Moreover, it would be remiss of this court not to acknowledge that "[a]lthough the writ of habeas corpus has a long common-law history, the legislature has enacted numerous statutes shaping its use . . . ." (Footnote omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 565–66, 153 A.3d 1233 (2017). Our Supreme Court has stated that "statutes are a useful source of policy for common-law adjudication, particularly when there is a close relationship between the statutory and common-law subject matters. . . . Statutes are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time . . . ." (Internal quotation marks omitted.) Id., 566, quoting *C & J Builders & Remodelers, LLC* v. *Geisenheimer*, 249 Conn. 415, 419–20, 733 A.2d 193 (1999).

Section 52-466, which governs the litigation of the writ as a civil matter, provides in relevant part: "(a) (1) An application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the *person* whose custody is in question is claimed to be illegally confined or deprived of such *person's* liberty." (Emphasis added.) Thus, § 52-466 (a) (1) unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus in the judicial district in which that *person* whose custody is in question is claimed to be illegally confined. We have found no place in our General Statutes where the term "person" has ever been defined as a nonhuman animal.[8] See, e.g., General Statutes § 53a-3 (1) ("'[p]erson' means a human being, and, where appropriate, a public or private corporation, a limited liability company, an unincorporated association, a partnership, a government or a governmental instrumentality").

In light of both established habeas corpus legislation and the recent legislative activity in the field; see *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn. 567–69; id., 566 (noting that "the legislature recently

[8] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

Black's Law Dictionary (11th Ed. 2019) defines "person" as "[a] human being," "[t]he living body of a human being," or as "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." Id., pp. 1378–79.

General Statutes § 1-1 (k) instructs: "The words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations."

We note that entities to which personhood has been ascribed by law are formed and governed for the benefit of human beings. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 152 (noting that "[a]ssociations of human beings, such as corporations and municipal entities, may be considered legal persons, because they too bear legal duties in exchange for their legal rights").

engaged in comprehensive habeas reform''); which contain no indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, in addition to the lack of precedent recognizing that animals can possess their own legal rights, we stay our hand as a matter of common law with respect to disturbing who can seek habeas corpus relief. See id., 568 (''given recent legislative activity in the field with no indication that the General Assembly intended to eliminate the use of the common-law habeas corpus remedy to vindicate the statutory right under [General Statutes] § 51-296 (a) . . . we stay our hand as a matter of common law with respect to disturbing the availability of that remedy'').

There are profound implications for a court to conclude that an elephant, or any nonhuman animal for that matter, is entitled to assert a claim in a court of law. In the present case, we have little difficulty concluding that the elephants—who are incapable of bearing legal duties, submitting to societal responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities—do not have standing to file a petition for a writ of habeas corpus because they have no legally protected interest that possibly can be adversely affected. See *Gold* v. *Rowland*, supra, 296 Conn. 207 (''[a]ggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected'' [internal quotation marks omitted]). Accordingly, we conclude that the court properly declined to issue a writ of habeas corpus on standing grounds.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] Our conclusion that the petitioner in this case lacks standing, however, does not restrict it, or others, from advocating for added protections for elephants or other nonhuman animals at the legislature. We acknowledge that elephants are magnificent animals who naturally develop social structures and exhibit emotional and intellectual capacities. They are deserving of humane treatment whether they exist in the wild or captivity. Our law

STATE OF CONNECTICUT *v.* KRIS MARSAN (AC 40396)

Prescott, Elgo and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crimes of burglary in the third degree and larceny in the sixth degree, the defendant appealed to this court. The defendant, who had worked for the elderly victim as a home aide, assisting her with various daily activities, was convicted in connection with her conduct in taking money and jewelry from the victim's bedroom, while the victim was away at a facility rehabilitating injuries that she had sustained in a fall in her home. During that time, the victim's son had placed a hidden camera in the victim's bedroom, which recorded the defendant rummaging through the victim's dressers and removing cash from an envelope and a tin. The son filed a complaint with the police and provided them with a copy of the video recording. Thereafter, T and M, detectives, visited the defendant at her home to discuss the complaint and the video recording. The defendant invited the detectives into her home, and her minor son who was present was asked to leave the room before they discussed the matter. The detectives then proceeded to play the video on a laptop computer for the defendant, who immediately identified herself as the person depicted in the victim's bedroom removing money from the envelope and the tin, and, thereafter, admitted to taking jewelry from the victim's home. At trial, the defendant filed a motion to suppress all statements she made to T and M at her home on the ground that the statements were the result of a custodial investigation without her being provided with warnings pursuant to *Miranda* v. *Arizona* (384 U.S. 436). Following an evidentiary hearing, the trial court denied the motion to suppress, concluding that the defendant was not in custody for purposes of *Miranda* when she was questioned by the detectives at her home. *Held*:

recognizes—as any pet owner knows—that animals are sentient beings and an entirely different kind of property than a chair or a table. We note that our legislature has enacted comprehensive laws prohibiting abusive behaviors toward animals, which carry penalties that are based on the severity of the abuse and the abuser's intent. See, e.g., General Statutes § 53-247. With respect to elephants, the legislature has passed legislation that gives the Commissioner of Energy and Environmental Protection regulatory power to adopt regulations to regulate trade in Connecticut if such trade of elephant ivory or products manufactured or derived from elephant ivory contributes to the extinction or endangerment of elephants. See General Statutes § 26-315. Whether, as a matter of public policy, nonhuman animals, such as elephants, should possess individual rights and be permitted to bring a claim in a court of law are issues for the legislature to address, if it is so inclined.

1. There was insufficient evidence to support the defendant's conviction of burglary in the third degree, as she was licensed and privileged to be in the victim's home at the time she committed the crime of larceny and at no time was the license either explicitly or implicitly revoked, and this court declined the state's invitation to extend to the facts of this case the narrow exception that a license to remain in a premises is implicitly revoked upon the commission of a crime in a manner that is likely to terrorize its occupants; although the state relied on that exception in support of its contention that there was sufficient evidence for the jury to conclude that the defendant's license to remain in the victim's home was implicitly revoked the moment she committed the larceny, to extend the exception would enlarge the crime of burglary to an untenable degree, and the state presented no evidence from which the jury reasonably could have concluded that that the defendant committed larceny in a manner likely to terrorize the victim or occupants in the victim's home, which evidence was necessary to prove that the defendant's license to be in the victim's home had been revoked and that she had remained in the home unlawfully, as it was undisputed that only the defendant was present in the victim's home when she committed the larceny, and she could not have committed a larceny in a manner likely to terrorize a victim who was not in the home at the time.
2. The defendant could not prevail on her claim that the trial court improperly denied her motion to suppress the statements she made to T and M while watching the video recording in her home, that court having reasonably concluded that the defendant was not in custody for purposes of *Miranda* when she was questioned by the detectives; no reasonable person in the defendant's position would have felt that she was in custody for purposes of *Miranda*, as the record revealed that throughout her encounter with T and M, the defendant was in her home, free to move around and not restrained, that T and M were dressed in plain clothes and were invited by the defendant into her home to discuss the complaint, that although there was a dispute as to who asked the defendant's son to leave the room, the defendant continued to engage in small talk with the detectives in her kitchen as she put away her groceries, that there were no threats of arrest at any point during the encounter, which lasted no more than one hour, and that the defendant remained in the home after the detectives left, and the fact that the defendant was a suspect at the time of the encounter did not transform the encounter into a custodial interrogation.

Argued March 11—officially released August 20, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of burglary in the third degree and with the crime of larceny in the third degree, brought to the Superior Court in the judicial district

of Fairfield, geographical area number two, where the court, *Holden, J.*, denied the defendant's motion to suppress certain statements; thereafter, the matter was tried to the jury; verdict and judgment of guilty of one count of burglary in the third degree and of the lesser include offense of larceny in the sixth degree, from which the defendant appealed to this court. *Reversed in part; judgment directed; further proceedings.*

James B. Streeto, senior assistant public defender, with whom was *Declan J. Murray*, former certified legal intern, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Richard L. Palumbo, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Kris Marsan, appeals from the judgment of conviction, rendered after a jury trial, of one count of burglary in the third degree in violation of General Statutes § 53a-103, and one count of larceny in the sixth degree in violation of General Statutes § 53a-125b. On appeal, the defendant claims that (1) the evidence was insufficient to establish that she "unlawfully remained" on the victim's property with respect to burglary in the third degree, and (2) the trial court improperly denied her motion to suppress statements she had made to police officers during an interview in her home without being provided with *Miranda*[1] warnings. We agree with the defendant's first claim and, therefore, reverse in part the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. The defendant began working as a home aide for the widowed eighty-six year old victim, Eleanor Beliveau,

[1] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

in May, 2014. The defendant was hired to assist the victim with grocery shopping, cleaning, laundry, and various other daily activities. The victim's long-term insurance plan required that she first pay the defendant directly before seeking reimbursement from her insurer by submitting a form detailing the defendant's work. At all relevant times, the victim's son, Ronald Beliveau,[2] had power of attorney over his mother's affairs and continued to assist with his mother's finances.

In January, 2015, the victim sustained serious injuries from a fall in her home. After her hospitalization, the victim subsequently began her rehabilitation at a facility for the elderly where she would remain until February 13, 2015. As a result, the defendant's work hours were reduced. Nevertheless, she continued to perform tasks at the victim's home and remained in frequent contact with Beliveau. The defendant, however, soon became concerned about the reduction in her hours. At first, she asked Beliveau to submit reimbursement request forms to the victim's provider to frontload her hours so that she could be paid up front. Beliveau declined the offer, believing that to do so would amount to fraud. Frustrated with his answer, the defendant threatened to quit.

From those conversations, Beliveau became suspicious of the defendant's behavior and grew concerned about the valuables that remained in the victim's vacant home. In late January, 2015, his suspicions intensified after he noticed both a discrepancy in the amount of money that the victim kept in an envelope for emergencies and missing jewelry from her dresser. That discovery prompted Beliveau to set up a hidden camera, known as a nanny cam, in the victim's bedroom to capture a dresser containing an envelope with exactly $100 in twenty dollar bills.

[2] For clarity, in this opinion we refer to Eleanor Beliveau as the victim, and to her son, Ronald Beliveau, as Beliveau.

On January 30, 2015, the defendant entered the victim's home and notified Beliveau that she intended to perform various chores. Later that same day, Beliveau and the defendant signed the required insurance form to provide to the victim's insurance provider, which reflected that the defendant had worked from 10:00 a.m. to 1:00 p.m. that day. The following day, Beliveau entered the victim's home to check on the envelope of cash and immediately noticed that $40 was missing. Upon reviewing the nanny cam footage, Beliveau observed the defendant rummaging through the victim's dressers and removing cash from both the envelope in question and a tin in a separate dresser drawer. With this evidence in hand, Beliveau filed a complaint with the Fairfield Police Department and provided the police with a copy of the video recording.

On February 2, 2015, Detectives Jason Tackacs and Kevin McKeon visited the defendant's house to discuss Beliveau's complaint and the footage he had provided to them. When the defendant answered the door, the detectives asked whether she would be willing to speak about the complaint they had received. The defendant agreed and invited Tackacs and McKeon into her home. Upon entering, Tackacs, McKeon, and the defendant eventually made their way into her kitchen, where Tackacs played the recording to the defendant on a laptop computer. As Tackacs played the nanny cam footage, the defendant immediately identified herself as the person depicted in the victim's bedroom removing money from the envelope and the tin, providing various explanations for doing so. Initially, the defendant explained that she was taking the money for the victim to use at the rehabilitation facility. After Tackacs dismissed her account, the defendant next claimed that she took the money because she was upset over not receiving a Christmas bonus. The defendant then offered a third explanation, stating that she was upset over her hours

being cut as a result of the victim's temporary stay at the rehabilitation facility.

As the conversation progressed, the defendant admitted to taking jewelry from the victim's home, including a pin, a necklace and a bracelet, but claimed to have returned the necklace and bracelet after feeling remorseful. When Tackacs asked whether the pin could be located, the defendant claimed to have sold it to a consignment shop that was owned by a friend. Upon leaving the defendant's house, Tackacs provided her with his contact information.

Sometime after the encounter at her home, the defendant contacted Tackacs by telephone to arrange for the return of $80 that she claimed was the total amount taken from the victim's home and the pin she had recovered from the consignment shop. On February 8, 2015, the defendant arrived at the Fairfield Police Department and met with Tackacs in his office. The defendant turned over a money order in the amount of $80 and the pin she claimed belonged to the victim. Thereafter, Tackacs met with Beliveau to discuss his encounter with the defendant and to ascertain whether the pin could be identified. Beliveau was provided with the $80 money order but was unable to identify the pin as belonging to the victim.

On October 31, 2016, the state charged the defendant with two counts of burglary in the third degree in violation of § 53a-103 and a third count of larceny in the third degree in violation of General Statutes §§ 53a-119 and 53a-124. A jury trial was held on November 7, 8, 9, 10, and 14, 2016. On November 7, 2016, the defendant filed a motion to suppress all statements, admissions and confessions made by her to the police and any evidence of the $80 and the pin she returned to the Fairfield Police Department. Following an evidentiary

hearing, the court denied that motion. The jury thereafter found the defendant guilty of one count of burglary in the third degree and the lesser included offense of larceny in the sixth degree. The court sentenced the defendant to a total effective term of five years of incarceration, execution suspended after eighteen months, followed by three years of probation. This appeal followed.

I

The defendant first claims that there was insufficient evidence adduced at trial to support her conviction of burglary in the third degree. Specifically, she argues that she was licensed and privileged to be in the victim's home at the time she committed the crime of larceny and that at no time was the license either explicitly or implicitly revoked. In response, the state argues that there was sufficient evidence for the jury to conclude that the defendant's license to remain in the victim's home was implicitly revoked the moment she committed larceny. We agree with the defendant.

A

Although the defendant characterizes this issue as a claim of insufficient evidence, the critical question is the viability of the legal theory advanced by the state. Therefore, before we can address whether the evidence was sufficient to sustain the defendant's conviction, we must first resolve the legal issue raised by the state regarding the elements of the offense of burglary. Because that issue presents a question of law, our review is plenary. See *State* v. *Hayward*, 116 Conn. App. 511, 515, 976 A.2d 791, cert. denied, 293 Conn. 934, 981 A.2d 1077 (2009).

A person is guilty of burglary in the third degree when he or she "enters or remains unlawfully in a building with intent to commit a crime therein." General Statutes

§ 53a-103 (a). "A person 'enters or remains unlawfully' in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so." General Statutes § 53a-100 (b). "[T]o remain unlawfully means that the initial entering of the building . . . was lawful but the presence therein became unlawful because the right, privilege or license to remain was extinguished." (Internal quotation marks omitted.) *State* v. *Stagnitta*, 74 Conn. App. 607, 612, 813 A.2d 1033, cert. denied, 263 Conn. 902, 819 A.2d 838 (2003).

"A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. . . . Generally, a license to enter premises is revocable at any time by the licensor. . . . It is exercisable only within the scope of the consent given. . . . The term, privilege, is more general. It is a right or immunity granted as a peculiar benefit, advantage, or favor; special enjoyment of a good or exemption from an evil or burden; a peculiar or personal advantage or right esp. when enjoyed in derogation of common right; prerogative. . . . The phrase, licensed or privileged, as used in [our burglary statutes], is *meant as a unitary phrase, rather than as a reference to two separate concepts*." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Grant*, 6 Conn. App, 24, 29–30, 502 A.2d 945 (1986).

On appeal, the defendant asserts that the nonviolent nature of her criminal conduct inside the home did not constitute an implicit waiver of her license. It is undisputed that the defendant had permission to be in the victim's home. The state contends that the defendant's license or privilege to remain in the victim's home was implicitly revoked once she engaged in larcenous

conduct, thus constituting "unlawful remaining" for purposes of third degree burglary. In particular, the state contends that the defendant's larcenous conduct went beyond the scope of the consent granted to her and, therefore, constituted an implicit revocation of her privilege to remain in the victim's home. According to the state, because the defendant did not have permission to steal items from the victim's home, she exceeded the scope of her license and, consequently, that license was implicitly revoked by operation of law.[3]

In support of its novel legal theory, the state relies heavily on a narrow exception carved out in a handful of cases that hold that a license to remain within a premises is implicitly revoked upon the commission of a crime committed in a manner that is likely to terrorize its occupants. See *State* v. *Allen*, 216 Conn. 367, 384, 579 A.2d 1066 (1990); *State* v. *Bharrat*, 129 Conn. App. 1, 25–26, 20 A.3d 9, cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011); *State* v. *Morocho*, 93 Conn. App. 205, 218–19, 888 A.2d 164, cert. denied, 277 Conn. 915, 895 A.2d 792 (2006); *State* v. *Reyes*, 19 Conn. App. 179, 192–93, 562 A.2d 27 (1989), cert. denied, 213 Conn. 812, 568 A.2d 796 (1990); *State* v. *Grant*, supra, 6 Conn. App. 29–31. The state is correct that there is support for the proposition that "even if one is lawfully admitted into a premises, the consent of the occupant may be implicitly withdrawn if the entrant terrorizes the occupants." *State* v. *Henry*, 90 Conn. App. 714, 726, 881 A.2d 442, cert. denied, 276 Conn. 914, 888 A.2d 86 (2005). Such

[3] As we understand its argument, the state would have this court rule that *any* larceny committed by a person who is lawfully permitted to be in a building would constitute a felony, irrespective of the manner in which the underlying crime was committed. For instance, a person who takes an unattended $100 bill during a friend's dinner party would mean that her license would have been implicitly revoked by operation of law, and she would therefore be subject to felony prosecution. We decline the state's invitation. To hold otherwise would enlarge the crime of burglary to an untenable degree.

cases, however, are inapposite to the underlying facts of the present matter. Significantly, the factual circumstances in each of the cases relied on by the state concern a defendant who—while lawfully on the premises—committed a crime in a manner that was likely to terrorize its occupants.

For instance, in *State* v. *Reyes*, supra, 19 Conn. App. 191–92, this court rejected the defendant's argument that he had not unlawfully remained where, after being invited into the victim's home, the defendant drew a gun on the victim and stole a radio from her bedroom. This court noted that "[a] drawn gun creates an inherently threatening situation. Evidence that a defendant subsequently pointed a gun at one who had the right to admit him to the premises, and did admit him to the premises, clearly can form the basis for the inference that consent to remain was implicitly withdrawn and thus that the individual 'unlawfully remained' within the meaning of the [burglary] statute." Id., 192–93.

In *State* v. *Allen*, supra, 216 Conn. 380–81, our Supreme Court rejected the defendant's argument that he had not unlawfully remained in a condominium after accompanying an assailant who had been invited by the victim. When the defendant accompanied the assailant into the victim's condominium, the defendant encountered the victim upstairs, naked, gagged, and tied up. Id., 381–82. Our Supreme Court explained that even if he was privileged to be in the victim's home, "it is clear that consent to remain was implicitly withdrawn and thus that the [defendant] unlawfully remained within the meaning of the statute." (Internal quotation marks omitted.) Id., 382, citing *State* v. *Reyes*, supra, 19 Conn. App. 193.

Similarly, in *State* v. *Bharrat*, supra, 129 Conn. App. 3–4, this court rejected the defendant's argument that because he had been invited into the victim's home

before viciously stabbing him in his sleep, he was licensed to be on the premises and, therefore, had not "unlawfully remained" for purposes of his burglary conviction. In rejecting this assertion, this court noted that "even if one is lawfully admitted into a premises, the consent of the occupant may be implicitly withdrawn if the entrant terrorizes the occupants. . . . Here, there was ample evidence that the defendant, having entered the victim's residence lawfully, had engaged in the type of conduct likely to cause terror to an occupant." (Citations omitted; internal quotation marks omitted.) Id., 25–26.

In *State* v. *Morocho*, supra, 93 Conn. App. 208–209, 217, this court rejected the argument that because the defendant received a key and permission from the landlord to enter a basement where another tenant was living, he was licensed to be there when he sexually assaulted the tenant in the middle of the night. In rejecting that assertion outright, the court noted that "[t]he original and basic rationale of the crime [of burglary] is the protection against invasion of premises likely to terrorize occupants. . . . [W]hatever possible license the defendant thought he had to enter the victim's bedroom . . . that license was withdrawn when he refused to identify himself, charged toward the victim, lay on top of her and attempted to kiss and to touch her all over her body." (Citations omitted; internal quotation marks omitted.) Id., 218–19.[4]

[4] As many of these cases have noted, the rationale of the burglary statute concerning likelihood of terror "does not mean . . . that an initial lawful entry followed by an unlawful remaining would be excused. For example, A enters an office building during business hours—a lawful entry since the building is open to the public—and remains, perhaps hidden, after the building is closed with intent to steal. A is guilty of burglary." (Internal quotation marks omitted.) *State* v. *Morocho*, supra, 93 Conn. App. 218–19; see *State* v. *Allen*, supra, 216 Conn. 384 (analyzing purposes of revised burglary statutes); *State* v. *Thomas*, 210 Conn. 199, 207–208, 554 A.2d 1048 (1989) (same). It is undisputed in the present case, however, that the conduct at issue occurred during a time at which the defendant was properly within

In each case cited by the state, a defendant's privilege to remain lawfully on the premises was implicitly revoked because the nature of the defendant's conduct was inherently likely to terrorize occupants.[5] There is a strong rationale for this limited but important exception, because a victim is either unlikely or incapable of withdrawing consent in the face of potential or actual harm. As the state candidly acknowledged at oral argument before this court, to apply the exception to the facts in this case would broaden its application. We decline the state's offer.

Alternatively, the state argues that, notwithstanding the absence of terrorizing conduct, the defendant had exceeded the scope of the consent granted to her because her larceny "was demonstrably outside the scope of the defendant's employment." According to the state, this constituted a separate and distinct basis on which the defendant's license was implicitly revoked.

This court has stated, in dictum, that even if a defendant's conduct was not likely to cause terror to the victim, "the jury could consider the scope of the license or privilege that the victim granted the defendant and, specifically, whether the defendant's remaining in the premises became unlawful because he had exceeded the scope of the victim's consent to remain in the prem-

the victim's residence, as evidenced by the insurance documentation Beliveau submitted to the victim's insurance provider.

[5] See *State* v. *Berthiaume*, 171 Conn. App. 436, 447–48, 157 A.3d 681 (defendant unlawfully remained in victim's home after physically attacking victim), cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017); *State* v. *Stagnitta*, supra, 74 Conn. App. 615–16 (defendant remained unlawfully in his place of employment after displaying large knife and demanding money from his superior, thus satisfying "terror element"); *State* v. *Gelormino*, 24 Conn. App. 563, 571–72, 590 A.2d 480, (even if victim's implicit consent allowed defendant onto premises, that privilege was extinguished upon his vicious assault on victim), cert. denied, 219 Conn. 911, 593 A.2d 136 (1991).

ises."[6] *State* v. *Bharrat*, supra, 129 Conn. App. 26, citing *State* v. *Allen*, supra, 216 Conn. 380. For the reasons already discussed with respect to the state's first argument, we decline to extend this doctrine to the facts presented here.

B

Having resolved the standard to be applied to the element in dispute, we now turn to the defendant's claim of insufficient evidence. "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 [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 816, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

"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

[6] In *State* v. *Bharrat*, supra, 129 Conn. App. 26, the court relied solely on *Allen* for this proposition. On closer reading, the court in *Allen* simply reiterated the analysis set out in *Grant*, outlining the differences between "privilege" and "license" within the context of property law. See *State* v. *Allen*, supra, 216 Conn. 380, quoting *State* v. *Grant*, supra, 6 Conn. App. 29–30. In particular, this court in *Grant* noted that unlike a privilege, a license "is exercisable only within the scope of the consent given." *State* v. *Grant*, supra, 6 Conn. App. 29–30. In contrast, "licensed or privileged" as used in our burglary statutes was meant "as a unitary phrase, rather than as a reference to [these] two separate concepts." Id., 30. Therefore, it seems more plausible that the "scope of consent" theory was specific to the distinct concept of a license, and not necessarily the "unitary" concept of "licensed or privileged." Although we have declined to extend the "scope of consent" theory for abrogating a license or privilege as applied to the facts in this case, we do not reach whether this theory is well-founded.

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. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011). "We also note that our sufficiency review does not require initial consideration of the merits of [the defendant's evidentiary claims] . . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.) *State* v. *Coyne*, 118 Conn. App. 818, 825–26, 985 A.2d 1091 (2010).

"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. . . . Once analysis is complete as to what the particular statute requires to be proved, we then review the evidence in light of those statutory requirements." (Citation omitted; internal quotation marks omitted.) *State* v. *Berthiaume*, 171 Conn. App. 436, 445, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017).

Viewing the evidence in the light most favorable to sustaining the verdict, the state has adduced no evidence from which a jury reasonably could conclude

that the larceny committed by the defendant was undertaken in a manner likely to terrorize the victim or any occupants in the victim's home.[7] Rather, the evidence established quite the contrary. Undermining the state's argument is the undisputed fact that no one but the defendant was present in the home at the time she committed the larceny at issue. Although we acknowledge the fact specific nature of this inquiry, it is, nevertheless, difficult to imagine a scenario where a person could be terrorized by a defendant's conduct absent the person's presence in the home at the time the crime is committed. On the basis of the facts of this case, we conclude that the defendant could not have committed a larceny in a manner likely to terrorize the victim who was not home at the time of the crime.

In sum, for her license to have been implicitly revoked in order to have "remained unlawfully" for purposes of burglary, the defendant must have committed larceny in a manner likely to terrorize occupants of the victim's home. The state has presented no evidence that such circumstances existed here. Accordingly, we conclude that there was insufficient evidence to sustain the defendant's conviction of burglary in the third degree.[8]

II

The defendant also claims that the court improperly denied her motion to suppress the inculpatory statements she made to Tackacs and McKeon in her home

[7] The state argues in the alternative that "[e]ven if some level of terror is necessary, it is difficult to imagine a more terrifying event for such a victim to have a trusted employee steal from her home while the victim was admitted to a medical facility." Although we do not diminish the seriousness of the defendant's crime of stealing from an elderly person's unattended home that she was entrusted to maintain, surely her conduct does not rise to the level of stabbing a victim in his sleep; *State* v. *Bharrat*, supra, 129 Conn. App. 3–4, 20; pointing a gun at a victim; *State* v. *Reyes*, supra, 19 Conn. App. 192–93; or sexually assaulting a victim in the middle of the night. *State* v. *Morocho*, supra, 93 Conn. App. 218–19.

[8] On appeal, the defendant also claims that the court improperly instructed the jury that her larcenous conduct exceeded the scope of her privilege and

on February 2, 2015. Specifically, she argues that her statements made to the detectives while watching the recording of her larceny were the result of a custodial interrogation without her being provided with *Miranda* warnings. The court rejected this argument, finding that the defendant was not in custody for purposes of *Miranda*. We agree with the court.

The following additional facts are relevant to this issue on appeal. On November 7 and 8, 2016, the court held an evidentiary hearing on the motion to suppress and heard testimony from Tackacs, McKeon, the defendant, and the defendant's minor son, D. Tackacs testified that he and McKeon approached the defendant's home on February 2, 2015 dressed in plain clothes with their guns and badges displayed on the outside of their attire. When the defendant answered the door, Tackacs and McKeon identified themselves and asked whether she would be willing to speak to them about Beliveau's complaint. The defendant agreed and invited Tackacs and McKeon inside. Upon entering, Tackacs and McKeon noticed D, and, according to their testimony, suggested to the defendant that D leave the room. Tackacs and McKeon explained that they made the suggestion to make the defendant more comfortable considering the nature of what they intended to discuss with her. The defendant and D both testified that D was ordered to leave as soon as Tackacs and McKeon entered the home. Notwithstanding this point of contention, D did leave the home near the beginning of the encounter. The defendant, Tackacs, and McKeon eventually made their way into the defendant's kitchen. The three engaged in small talk and discussed Beliveau's complaint while the defendant continued to put away her groceries. After McKeon finished setting up

constituted an implicit revocation of her status as a licensee. Because we agree with the defendant that the evidence was insufficient to sustain her burglary conviction, we need not address that issue.

the laptop computer to play the video recording, the defendant sat down next to Tackacs.[9] Upon Tackacs playing the video, the defendant immediately identified herself in the recording, admitted to taking $80 from the victim, and further admitted to taking jewelry from the victim's home.

Before leaving, Tackacs provided the defendant with his contact information in the event she had any more questions about the complaint. The entire encounter lasted no more than one hour, during which the defendant was not given *Miranda* warnings. At no point was the defendant restrained, placed in handcuffs, had her movements restricted, or subjected to any type of force. According to Tackacs and McKeon, they did not make any threatening comments to the defendant, and the defendant did not seem nervous at any time during the encounter. The defendant would thereafter contact Tackacs on a number of occasions with questions, and she eventually returned $80 and the pin to Tackacs at the Fairfield Police Department on February 9, 2015. Tackacs testified that he found the defendant to be very cooperative and pleasant to deal with throughout the process.

We begin by setting forth the applicable standard of review. "On appeal, we apply a familiar standard of review to a trial court's findings and conclusions in connection with a motion to suppress. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . The conclusions drawn by the trial court will be upheld unless they are legally and logically inconsistent with the evidence." (Internal quotation marks omitted.) *State* v. *Janulawicz*, 95 Conn. App. 569, 574, 897 A.2d 689 (2006).

[9] Because there were only two seats available at the defendant's kitchen table, McKeon remained standing to allow the defendant to sit down with Tackacs.

"Our Supreme Court has set forth the following principles regarding the requirement of *Miranda* warnings . . . . Although [a]ny [police] interview of [an individual] suspected of a crime . . . [has] coercive aspects to it . . . only an interrogation that occurs when a suspect is *in custody* heightens the risk that statements obtained therefrom are not the product of the suspect's free choice. . . . Consequently, police officers are not required to administer *Miranda* warnings to everyone whom they question . . . rather, *they must provide such warnings only to persons who are subject to custodial interrogation*. . . . To establish entitlement to *Miranda* warnings, therefore, the defendant must satisfy two conditions, namely, that (1) he was in custody when the statements were made, and (2) the statements were obtained in response to police questioning." (Emphasis in original; internal quotation marks omitted.) *State* v. *Castillo*, 165 Conn. App. 703, 713–14, 140 A.3d 301 (2016), aff'd, 329 Conn. 311, 186 A.3d 672 (2018).

"A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. . . . The ultimate inquiry [therefore] is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (Internal quotation marks omitted.) *State* v. *Richard S.*, 143 Conn. App. 596, 614, 70 A.3d 1110, cert. denied, 310 Conn. 912, 76 A.3d 628 (2013).

"Among the factors that a court may consider in determining whether a suspect was in custody for purposes of *Miranda*, are the following: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview;

(6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 165 Conn. App. 715. "The defendant bears the burden of proving custodial interrogation." (Internal quotation marks omitted.) Id., 716.

We conclude that, in light of the court's subordinate findings and the testimony provided at the evidentiary hearing, it was reasonable for the trial court to conclude that the defendant was not in custody for purposes of *Miranda* when she was questioned by Tackacs and McKeon at her home. After a careful review of the record, there is scant evidence suggesting that the defendant was questioned in a manner that amounted to a custodial interrogation. The court found that throughout the encounter, the defendant was in her home, free to move about, and at no point restrained. Tackacs and McKeon, both dressed in plain clothes, were invited into the defendant's home after she agreed to respond to questions about Beliveau's complaint. Although there is a dispute as to who asked D to leave, the defendant continued to engage in small talk with the detectives in her kitchen as she put away her groceries. There were no threats of arrest at any point during the encounter, which lasted no more than one hour, and the defendant remained in the home after the detectives left. Simply because the defendant was a suspect at the time of the encounter does not transform it into a custodial interrogation. See *State* v. *Turner*, 267 Conn. 414, 440, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004). We therefore conclude that no reasonable person in the defendant's position would have felt that she was in custody for purposes of *Miranda*.

The judgment is reversed only as to the conviction of burglary in the third degree and the case is remanded with direction to render a judgment of acquittal on that charge and for resentencing according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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RULES OF APPELLATE PROCEDURE

NOTICE

Notice is hereby given that the following amendments to the Rules of Appellate Procedure were adopted to take effect January 1, 2020. The amendments were approved by the Appellate Court on June 27, 2019, and by the Supreme Court on July 23, 2019, except that the amendment to § 61-7 was approved by the Appellate Court on May 8, 2019, and by the Supreme Court on April 17, 2019, and the amendment to § 63-10 was approved by the Appellate Court on July 30, 2019, and by the Supreme Court on July 31, 2019.

Attest:

Carolyn C. Ziogas
Chief Clerk Appellate

INTRODUCTION

Contained herein are amendments to the Rules of Appellate Procedure. These amendments are indicated by brackets for deletions and underlined text for added language.

This material should be used as a supplement to the Connecticut Practice Book until the 2020 edition of the Practice Book becomes available.

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RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

CHAPTER 61
REMEDY BY APPEAL

Sec. 61-7. Joint and Consolidated Appeals

(a) (1) Two or more plaintiffs or defendants in the same case may appeal jointly or severally. Separate cases heard together and involving at least one common party may as of right be appealed jointly, provided all the trial court docket numbers are shown on the appeal form (JD-SC-033).

(2) Prior to the filing of an appeal, the trial court, on motion of any party or on its own motion, may order that a joint appeal be filed in any situation not covered by the preceding paragraph.

(3) In the case of a joint appeal, only one entry fee is required. The appellant filing the appeal shall pay the entry fee. [and any] When additional appellants are represented by other counsel or are self-represented, a single [shall file a signed] joint appeal consent form (JD-SC-035) signed by all joint appellants shall be filed on the same business day the appeal is filed[within ten days of the filing of the appeal].

(b) (1) The Supreme Court, on motion of any party or on its own motion, may order that appeals pending in the Supreme Court be consolidated.

(2) When an appeal pending in the Supreme Court involves the same cause of action, transaction or occurrence as an appeal pending in the Appellate Court, the Supreme Court may, on motion of any party or on its own motion, order that the appeals be consolidated in

the Supreme Court. The court may order consolidation at any time before the assignment of the appeals for hearing.

(3) The Appellate Court, on motion of any party or on its own motion, may order that appeals pending in the Appellate Court be consolidated.

(4) There shall be no refund of fees if appeals are consolidated.

(c) Whenever appeals are jointly filed or are consolidated, all appellants shall file a single, consolidated brief and appendix. All appellees shall file a single, consolidated brief or, if applicable, a single, consolidated brief and appendix. If the parties cannot agree upon the contents of the brief and appendix, or if the issues to be briefed are not common to the joint parties, any party may file a motion for permission to file a separate brief and appendix.

COMMENTARY: The purpose of this amendment is to require that a joint appeal consent form be filed on the same business day that the appeal is filed.

Sec. 61-11. Stay of Execution in Noncriminal Cases

(a) **Automatic stay of execution**

Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. If the case goes to judgment on appeal, any stay thereafter shall be in accordance with Section 71-6 (motions for reconsideration), Section 84-3 (petitions for certification by the Connecticut Supreme Court), and Section 71-7 (petitions for certiorari by the United States Supreme Court).

(b) **Matters in which no automatic stay is available under this rule**

Under this section, there shall be no automatic stay in actions concerning attorneys pursuant to chapter 2 of these rules, in juvenile matters brought pursuant to chapters 26 through 35a, or in any administrative appeal except as otherwise provided in this subsection.

Unless a court shall otherwise order, any stay that was in effect during the pendency of any administrative appeal in the trial court shall continue until the filing of an appeal or the expiration of the appeal period, or any new appeal period, as provided in Section 63-1. If an appeal is filed, any further stay shall be sought pursuant to Section 61-12.

For purposes of this rule, "administrative appeal" means an appeal filed from a final judgment of the trial court or the Compensation Review Board rendered in an appeal from a decision of any officer, board, commission, or agency of the state or of any political subdivision thereof. In addition to appeals filed pursuant to the Uniform Administrative Procedure Act, "administrative appeal" includes, among other matters, zoning appeals, teacher tenure appeals, tax appeals and unemployment compensation appeals.

(c) **Stays in family matters and cases involving orders of civil protection, and appeals from decisions of the Superior Court in family support magistrate matters**

Unless otherwise ordered, no automatic stay shall apply to orders of relief from physical abuse pursuant to General Statutes § 46b-15, to orders of civil protection pursuant to General Statutes § 46b-16a, to orders for exclusive possession of a residence pursuant to General Statutes § **[**§ **]** 46b-81 or § 46b-83 or to orders of periodic alimony,

support, custody or visitation in family matters brought pursuant to chapter 25, or to any decision of the Superior Court in an appeal of a final determination of a support order by a family support magistrate brought pursuant to chapter 25a, or to any later modification of such orders. The automatic orders set forth in Section 25-5 (b) (1), (2), (3), (5) and (7) shall remain in effect during any appeal period and, if an appeal is filed, until the final determination of the cause unless terminated, modified or amended further by order of a judicial authority upon motion of either party.

Any party may file a motion to terminate or impose a stay in matters covered by this subsection, either before or after judgment is rendered, based upon the existence or expectation of an appeal. Such a motion shall be filed in accordance with the procedures in subsection (e) of this rule or Section 61-12. The judge hearing such motion may terminate or impose a stay of any order, pending appeal, as appropriate, after considering (1) the needs and interests of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not entered or is terminated; (3) if the appeal is from a judgment of dissolution, the need to preserve, pending appeal, the mosaic of orders established in the judgment; (4) the need to preserve the rights of the party taking the appeal to obtain effective relief if the appeal is successful; (5) the effect, if any, of the automatic orders under Section 25-5 on any of the foregoing considerations; and (6) any other factors affecting the equities of the parties.

The judge who entered the order in a family matter from which an appeal lies may terminate any stay in that matter upon motion of a

party as provided in this subsection or sua sponte, after considering the factors set forth in this subsection or if the judge is of the opinion that an extension of time to appeal is sought or the appeal is filed only for delay. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

(d) **Termination of stay**

In all cases not governed by subsection (c), termination of a stay may be sought in accordance with subsection (e) of this rule. If the judge who tried the case is of the opinion that (1) an extension to appeal is sought, or the appeal is filed, only for delay or (2) the due administration of justice so requires, the judge may at any time, upon motion or sua sponte, order that the stay be terminated. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

(e) **Motions to terminate stay**

A motion to terminate a stay of execution filed before judgment is entered shall be filed with the trial court, and the judge who tried or presided over the matter may rule upon the motion when judgment is entered. If such a motion is filed after judgment but before an appeal is filed, the motion shall be filed with the clerk of the trial court and may be ruled upon by the trial judge thereafter. After an appeal is filed, such a motion shall be filed with the appellate clerk and shall be forwarded by the appellate clerk to the trial judge for a decision. If the judge who tried or presided over the case is unavailable, the motion shall be forwarded to the clerk of the trial court in which the case was tried, who shall assign the motion for a hearing and decision to any judge of the Superior Court.

Upon hearing and consideration of the motion, the trial court shall file with the clerk of the trial court its written or oral memorandum of decision that shall include the factual and legal basis therefor. If oral, the decision shall be transcribed by the court reporter and signed by the trial court. If an appeal has not been filed, the clerk shall enter the decision on the trial court docket and shall send notice of the decision to counsel of record. If an appeal has been filed, the clerk of the trial court shall enter the decision on the trial court docket and send notice of the decision to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record.

(f) **Motions to request stay**

Requests for a stay pending appeal where there is no automatic stay shall be governed by Section 61-12.

(For stays of execution in criminal cases, see Section 61-13; for stays in death penalty cases, see Section 61-15.)

(g) **Strict foreclosure—motion rendering ineffective a judgment of strict foreclosure**

In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. Such affidavit shall recite the specific facts relied on in support of the moving party's claim of good cause. If, notwithstanding the submission of such an affidavit of good cause, the plaintiff contends that there is no good cause to stay the court's judgment of strict foreclosure pending resolution of the appeal, the plaintiff may seek termination of the automatic stay by filing a motion

requesting such relief accompanied by an affidavit stating the basis for the plaintiff's claim. In the event such a motion to terminate stay is filed, it shall be set down for argument and the taking of evidence, if necessary, on the second short calendar next following the filing of the motion. There shall be no automatic appellate stay in the event that the court grants the motion to terminate the stay and, if necessary, sets new law dates. There shall be no automatic stay pending a motion for review of an order terminating a stay under this subsection.

(h) **Foreclosure by sale—motion rendering ineffective a judgment of foreclosure by sale**

In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period.

COMMENTARY: The purpose of this amendment is to eliminate automatic appellate stays in cases involving orders of civil protection.

CHAPTER 63

FILING THE APPEAL; WITHDRAWALS

Sec. 63-7. Waiver of Fees, Costs and Security—Criminal Cases

Any defendant in a criminal case who is indigent and desires to appeal**[**, and has not previously been determined to be indigent,**]** may, within the time provided by the rules for taking an appeal, make written application to the trial court for relief from payment of fees, costs and

expenses. The application must be under oath and recite, or it must be accompanied by an affidavit reciting, the grounds upon which the applicant proposes to appeal and the facts concerning the applicant's financial status.

The application must be sent to the public defender's office for investigation. The judicial authority shall assign the request for waiver of fees, costs and expenses for hearing within twenty days after filing, and the trial counsel, the trial public defender's office to which the application had been sent for investigation and the chief of legal services of the public defender's office shall be notified in writing by the clerk's office of the date of such hearing.

The judicial authority shall act promptly on the application following the hearing. Upon determination by the judicial authority that a defendant in a criminal case is indigent, the trial court may (1) waive payment by the defendant of fees specified by statute and of taxable costs, (2) order that the necessary expenses of prosecuting the appeal be paid by the state, and (3) appoint appellate counsel and permit the withdrawal of the trial attorney's appearance provided the judicial authority is satisfied that that attorney has cooperated fully with appellate counsel in the preparation of the defendant's appeal as set forth in Section 43-33.

When the judicial authority has appointed an attorney in private practice to represent the defendant upon appeal, the attorney shall obtain the approval of the judicial authority who presided at the trial before incurring any expense in excess of $100, including the expense of obtaining a transcript of the necessary proceedings or testimony. The judicial authority shall authorize a transcript at state expense only of the portions of proceedings or testimony which may be pertinent to the issues on appeal.

The sole remedy of any defendant desiring the court to review an order concerning the waiver of fees, costs and security or the appointment of counsel shall be by motion for review under Section 66-6.

COMMENTARY: The purpose of this amendment is to make the language of this section consistent with Section 43-33.

Sec. 63-10. Preargument Conferences

The chief justice or the chief judge or a designee may, in cases deemed appropriate, direct that conferences of the parties be scheduled in advance of oral argument. All civil cases are eligible for preargument conferences except habeas corpus appeals, appeals involving juvenile matters, including child protection appeals as defined in Section 79a-1, summary process appeals, foreclosure appeals, and appeals from the suspension of a motor vehicle license due to operating under the influence of liquor or drugs. **[**A party in an exempt case may file a request for a preargument conference with the appellate clerk explaining why the case should not be exempt.**]**

In any exempt case, all parties appearing and participating in the appeal may file a joint request for a preargument conference. In a foreclosure case, the request for a preargument conference is sufficient if jointly submitted by the owner of the equity and the foreclosing party. In any exempt case, however, the chief justice or the chief judge or a designee may, if deemed appropriate, order a preargument conference.

The chief justice may designate a judge trial referee or senior judge to preside at a conference. The scheduling of or attendance at a preargument conference shall not affect the duty of the parties to adhere to the times set for the filing of briefs. Failure of counsel of

record to attend a preargument conference may result in the imposition of sanctions under Section 85-2. Unless other arrangements have been approved in advance by the conference judge, parties shall be present at the conference site and available for consultation. When a party against whom a claim is made is insured, an insurance adjuster for such insurance company shall be available by telephone at the time of such preargument conference unless the conference judge, in his or her discretion, requires the attendance of the adjuster at the conference. The conference proceedings shall not be brought to the attention of the court by the presiding officer or any of the parties unless the conference results in a final disposition of the appeal.

The following matters may be considered:

(1) Possibility of settlement;

(2) Simplification of issues;

(3) Amendments to the preliminary statement of issues;

(4) Transfer to the Supreme Court;

(5) Timetable for the filing of briefs;

(6) En banc review; and

(7) Such other matters as the conference judge shall consider appropriate.

All matters scheduled for a preargument conference before a judge trial referee are referred to that official by the chief court administrator pursuant to General Statutes § 52-434a, which vests judge trial referees with the same powers and jurisdiction as Superior Court judges and senior judges, including the power to implement settlements by opening and modifying judgments.

COMMENTARY: This amendment changes the procedure for requesting a preargument conference in an exempt case. Appeals in foreclosure cases are now exempt from a preargument conference unless a joint request for a conference is submitted by the owner of the equity and the foreclosing party.

CHAPTER 70

ARGUMENTS AND MEDIA COVERAGE OF COURT PROCEEDINGS

Sec. 70-4. Time Allowed for Oral Argument; Who May Argue

Unless the court grants a request for additional time made before oral argument begins, argument of any case shall not exceed one-half hour on each side. The time allowed may be apportioned among counsel on the same side of a case as they may choose. The court may terminate the argument whenever in its judgment further argument is unnecessary.

Prior to the date assigned for hearing, counsel of record may file a request with the appellate clerk to allow more than one counsel to present oral argument for one party to the appeal.

<u>In cases in which there is a firm appearance, or in which there are multiple appearances for the same party, if an attorney from the appearing firm or who already has an appearance wishes to argue the appeal but is not identified as the arguing attorney on the brief, the attorney who will be arguing the appeal shall file a letter notifying the court of the change as soon as possible prior to argument.</u>

No argument shall be allowed any party who has not filed a brief or who has not joined in the brief of another party.

COMMENTARY: The purpose of this amendment is to require that counsel arguing the appeal notify the court of any change to arguing counsel as soon as possible prior to argument.

CHAPTER 72
WRITS OF ERROR

Sec. 72-1. Writs of Error; In General

(a) Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the **[**Supreme Court**]** Appellate Court in the following cases: (1) a decision binding on an aggrieved nonparty; (2) a summary decision of criminal contempt; (3) a denial of transfer of a small claims action to the regular docket; and (4) as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

(b) No writ of error may be brought in any civil or criminal proceeding for the correction of any error where (1) the error might have been reviewed by process of appeal, or by way of certification, or (2) the parties, by failure timely to seek a transfer or otherwise, have consented to have the case determined by a court or tribunal from whose judgment there is no right of appeal or opportunity for certification.

COMMENTARY: The amendment to this rule of practice is consistent with §§ 9 and 10 of No. 19-64 of the 2019 Public Acts, which amended General Statutes §§ 51-197a and 51-199, respectively, to require that writs of error be filed in the Appellate Court effective January 1, 2020.

Sec. 72-3. Applicable Procedure

(a) The writ of error, if in proper form, shall be allowed and signed by a judge or clerk of the court in which the judgment or decree was rendered. The writ of error shall be presented for signature within twenty days of the date notice of the judgment or decision complained of is given but shall be signed by the judge or clerk even if not presented in a timely manner. Failure without cause to present the writ of error in a timely manner may be a ground for dismissal of the writ of error by the court having appellate jurisdiction[Supreme Court].

(b) The writ of error shall be served and returned as other civil process, except that the writ of error shall be served at least ten days before the return day and shall be returned to the appellate clerk at least one day before the return day. The return days [of the Supreme Court] are any Tuesday not less than twelve nor more than thirty days after the writ of error is signed by a judge or clerk of the court.

(c) The writ of error shall be deemed filed the day it is properly returned to the appellate clerk. The plaintiff in error shall return the writ of error to the appellate clerk by (1) complying with Sections 60-7 or 60-8 by paying the required fee, submitting a signed application for waiver of fees and the order of the trial court granting the fee waiver, or certifying that no fees are required; (2) submitting the matter in accordance with the provisions of Section 63-3; and (3) submitting the allowed and signed writ of error and the signed marshal's return to the appellate clerk.

(d) An electronically filed writ of error will be docketed upon the submission of the matter in accordance with Section 63-3 but will be

rejected upon review by the appellate clerk if the plaintiff in error fails to comply with Section 60-7 or to submit an allowed and signed writ of error and the signed marshal's return on the same business day the matter is submitted in accordance with the provisions of Section 63-3. The writ of error may also be returned upon review by the appellate clerk for noncompliance with the Rules of Appellate Procedure. The appellate clerk shall forthwith give notice to all parties of the filing of the writ of error.

(e) If the writ of error is brought against a judge of the Superior Court to contest a summary decision of criminal contempt by that judge, the defendant in error shall be the Superior Court. In all other writs of error, the writ of error shall bear the caption of the underlying action in which the judgment or decision was rendered. All parties to the underlying action shall be served in accordance with chapter 8 of these rules.

(f) Within twenty days after filing the writ of error, the plaintiff in error shall file with the appellate clerk such documents as are necessary to present the claims of error made in the writ of error, including pertinent pleadings, memoranda of decision and judgment file, accompanied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

(g) In the event a transcript is necessary, the plaintiff in error shall follow the procedure set forth in Sections 63-8 and 63-8A.

(h) Within ten days of the filing by the plaintiff in error of the documents referred to in subsections (f) and (g) of this rule, the defendant in error may file such additional documents as are necessary to defend

the action, accompanied by a certification that a copy thereof has been served on each counsel of record in accordance with Section 62-7.

(i) Answers or other pleas shall not be filed in response to any writ of error.

COMMENTARY: The amendment to this rule of practice is consistent with §§ 9 and 10 of No. 19-64 of the 2019 Public Acts, which amended General Statutes §§ 51-197a and 51-199, respectively, to require that writs of error be filed in the Appellate Court effective January 1, 2020.

CHAPTER 77

PROCEDURES CONCERNING COURT CLOSURE AND SEALING ORDERS OR ORDERS LIMITING THE DISCLOSURE OF FILES, AFFIDAVITS, DOCUMENTS OR OTHER MATERIAL

Sec. 77-1. Petition for Review Seeking Expedited Review of an Order concerning Court Closure, or an Order That Seals or Limits the Disclosure of Files, Affidavits, Documents or Other Material

(a) Except as provided in subsection (b), any person affected by a court order which prohibits the public or any person from attending any session of court, or any order that seals or limits the disclosure of files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding, may seek review of such order by filing a petition for review with the Appellate Court within seventy-two hours after the issuance of the order. The petition shall fully comply with Sections 66-2 and 66-3. The petition shall not exceed ten pages in length, exclusive of the appendix, except with special

permission of the Appellate Court. An appendix containing the information or complaint, the answer, all motions pertaining to the matter, the opinion or orders of the trial court sought to be reviewed, a list of all parties with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris number of their counsel, the names of all judges who participated in the case, and a transcript order acknowledgment form (JD-ES-38), shall be filed with the petition for review.

Any person filing a petition for review pursuant to this rule shall deliver a copy of the petition and appendix to (1) all parties to the case and (2) any nonparty who sought the closure order or order sealing or limiting disclosure in compliance with the provisions of Section 62-7 on the same day as the petition is filed. Any party or nonparty who sought such order may file a response to the petition for review within ninety-six hours after the filing of the petition for review. Failure to file a response shall not preclude the party or nonparty who sought the order under review from participating in the hearing on the petition. Within one business day of the receipt of the transcript and the certificate of completion provided for by Section 63-8 (c), the person filing the petition for review shall file the transcript and the certificate of completion with the Appellate Court.

The filing of any petition for review of a court order which prohibits the public or any person from attending any session of court shall stay the order until the final determination of the review. The filing of any petition for review of an order that seals or limits the disclosure of

files, affidavits, documents or other material on file with the court shall not stay the order during the review.

After the receipt of the transcript and the response to the petition, if any, the Appellate Court shall hold an expedited hearing on any petition for review. The appellate clerk will notify the petitioner, the parties and any nonparties who sought the closure order or order sealing or limiting disclosure of files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding of the date and time of the hearing. After such hearing the Appellate Court may affirm, modify or vacate the order reviewed.

(b) This section shall not apply to court orders concerning any session of court conducted pursuant to General Statutes § **[**§ **]** 46b-11, § 46b-49, § 46b-122, § 54-76h**[**, and any order issued pursuant to a rule that seals or limits the disclosure of any affidavit in support of an arrest warrant,**]** or any other provision of the General Statutes under which the court is authorized to close proceedings. This section also shall not apply to any order issued pursuant to General Statutes § 46b-11 or § 54-33c or any other provision of the General Statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents or materials and any order issued pursuant to a court rule that seals or limits the disclosure of any affidavit in support of an arrest warrant.

COMMENTARY: The purpose of this amendment is to clarify this rule and make it consistent with the exceptions set forth in General Statutes § 51-164x.

CHAPTER 81

APPEALS TO APPELLATE COURT BY CERTIFICATION FOR REVIEW IN ACCORDANCE WITH GENERAL STATUTES CHAPTERS 124 AND 440

Sec. 81-2. Form of Petition

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.

(2) A statement of the basis for certification identifying the specific reasons why the Appellate Court should allow the extraordinary relief of certification. These reasons may include but are not limited to the following:

(A) The court below has decided a question of substance not theretofore determined by the Supreme Court or the Appellate Court or has decided it in a way probably not in accord with applicable decisions of the Supreme Court or the Appellate Court.

(B) The decision under review is in conflict with other decisions of the court below.

(C) The court below has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by any other court, as to call for an exercise of the Appellate Court's supervision.

(D) A question of great public importance is involved.

(3) A summary of the case containing the facts material to the consideration of the questions presented, reciting the disposition of

the matter in the trial court, and describing specifically how the trial court decided the questions presented for review in the petition.

(4) A concise argument amplifying the reasons relied upon to support the petition. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix containing a table of contents, the operative complaint, all briefs filed by all parties, the opinion or order of the trial court sought to be reviewed, a copy of the order on any motion which would stay or extend the time period for filing the petition, and a list of all parties to the appeal in the trial court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their counsel. The appendix shall be paginated separately from the petition with consecutively numbered pages preceded by the letter ''A.''

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two typefaces, of 12 point or larger size, are approved for use in petitions: arial and univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The purpose of this amendment is to require that a table of contents be included in an appendix filed with a petition for certification to appeal to the Appellate Court.

CHAPTER 84

APPEALS TO SUPREME COURT BY CERTIFICATION FOR REVIEW

Sec. 84-5. Form of Petition

(a) A petition for certification shall contain the following sections in the order indicated here:

(1) A statement of the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The Supreme Court will ordinarily consider only those questions squarely raised, subject to any limitation in the order granting certification.

(2) A statement of the basis for certification identifying the specific reasons, including but not limited to those enumerated in Section 84-2, why the Supreme Court should allow the extraordinary relief of certification.

(3) A summary of the case containing the facts material to the consideration of the questions presented, reciting the disposition of the matter in the Appellate Court, and describing specifically how the Appellate Court decided the questions presented for review in the petition.

(4) A concise argument amplifying the reasons relied upon to support the petition. No separate memorandum of law in support of the petition will be accepted by the appellate clerk.

(5) An appendix, which shall be paginated separately from the petition with consecutively numbered pages preceded by the letter ''A,'' containing:

(A) a table of contents,

[A](B) the opinion or order of the Appellate Court sought to be reviewed,

[B](C) if the opinion or order of the Appellate Court was per curiam or a summary affirmance or dismissal, a copy of the trial court's memorandum of decision that was entered in connection with the claim raised by the petitioner before the Appellate Court, or, if no memorandum was filed, a copy of the trial court's ruling on the matter,

[C](D) a copy of the order on any motion which would stay or extend the time period for filing the petition,

[D](E) a list of all parties to the appeal in the Appellate Court with the names, addresses, telephone numbers, e-mail addresses, and, if applicable, the juris numbers of their trial and appellate counsel.

(b) The petition shall not exceed ten pages in length, exclusive of the appendix, except with special permission of the appellate clerk. The petition shall be typewritten and fully double spaced, and shall not exceed three lines to the vertical inch or twenty-seven lines to the page. Footnotes and block quotations may be single spaced. Only the following two typefaces, of 12 point or larger size, are approved for use in petitions: arial and univers. Each page of a petition shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch.

COMMENTARY: The purpose of this amendment is to require that a table of contents be included in an appendix filed with a petition for certification to appeal to the Supreme Court, and to require appellate

counsel to include a copy of the trial court's memorandum of decision with any petition for certification when the Appellate Court opinion from which certification is sought is a per curiam opinion.

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Issuance of a Certificate of Affordable Housing Project Completion to the City of Milford

In accordance with C.G.S. 8-30g, the Department of Housing (DOH) has issued a Certificate of Affordable Housing Project Completion to the City of Milford. The effective date of this Moratorium shall be the date of publication in the Connecticut Law Journal, and will remain in effect, unless revoked in accordance with the statute, for a four year period. 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

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF LITCHFIELD

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Litchfield (PCN 4858). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position please visit our website at:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at:
https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.
A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Litchfield JD (PCN 4858) and must be postmarked no later than **September 10, 2019**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Suspension of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on July 30, 2019 in docket number UWY-CV17-6033986-S, Alan M. Giacomi, juris number 418185, of Waterbury, CT was suspended from the practice of law for a period of 20 years with the following conditions:

1. The respondent shall comply with all terms and conditions of Practice Book § 2-47B; Restrictions on the Activities of Deactivated Attorneys;

2. Prior to any application for reinstatement, the respondent shall pay restitution in the amount of $45,000 to the complainant in grievance complaint #17-0205 as more fully set forth in count 10 of the Third Amended Presentment of Attorney.

3. Prior to any application for reinstatement, the respondent shall reimburse the Client Security Fund for all claims paid on behalf of respondent.

4. Should the respondent seek reinstatement to the Connecticut bar, he must do so pursuant to Practice Book § 2-53.

Mark H. Taylor
Judge