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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JONATHAN S. METCALF *v.* MICHAEL FITZGERALD ET AL.
(SC 20227)

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

Syllabus

The plaintiff brought an action in Superior Court, seeking to recover damages from the defendants under state law. The plaintiff, who had previously filed a bankruptcy petition in the United States Bankruptcy Court, asserted claims of vexatious litigation and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the defendants' actions during the bankruptcy proceeding. The plaintiff claimed, inter alia, that, after he filed his bankruptcy petition, one of the defendants initiated an adversary proceeding in the Bankruptcy Court on the basis of certain alleged improprieties that the plaintiff had committed in connection with the bankruptcy proceeding. After the plaintiff presented evidence to contradict the allegations against him, the Bankruptcy Court dismissed the adversary proceeding. In the present action, the trial court dismissed the plaintiff's state law vexatious litigation and CUTPA claims, concluding that it lacked subject matter jurisdiction over those claims because they were preempted by federal bankruptcy law. The trial court rendered judgment dismissing the plaintiff's action, from which the plaintiff appealed. *Held* that the trial court properly dismissed the plaintiff's state law vexatious litigation and

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

CUTPA claims for lack of subject matter jurisdiction, those claims having been preempted by federal Bankruptcy Code provisions relating to sanctions for abuse of process: although there was no provision in the Bankruptcy Code that explicitly precluded the plaintiff's vexatious litigation and CUTPA claims and, thus, those claims were not expressly preempted by the Bankruptcy Code, the plaintiff's claims were implicitly preempted, as Congress enacted a comprehensive bankruptcy scheme, inclusive of provisions for sanctions and remedies for abuse of the bankruptcy process, so as to occupy the entire field of penalties and sanctions, leaving no room for state law to supplement federal bankruptcy law, and the federal interest in uniformity was so dominant that federal law was assumed to preclude enforcement of state laws that threaten the uniformity and finality of the bankruptcy process for both debtors and creditors; moreover, the plaintiff could not prevail on his claim that, because a successful cause of action for vexatious litigation or unfair trade practices under state law affords relief that potentially is more extensive than that contemplated under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, such a cause of action falls outside of the field that Congress intended to occupy, as the difference in remedies did not warrant an inference that Congress intended to permit independent abuse of process actions outside the bankruptcy process; furthermore, although compliance with both the Bankruptcy Code and state law would not be impossible, permitting parties to bring abuse of process actions in state court would hinder Congress' objective of uniformly defining the scope and availability of remedies for abuse of the bankruptcy process.

Argued March 29—officially released September 3, 2019

Procedural History

Action to recover damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the motion to dismiss filed by the defendant Myles H. Alderman, Jr., et al. and rendered judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

Bruce L. Elstein, with whom was *John J. Ribas*, for the appellant (plaintiff).

Joshua A. Yahwak, for the appellees (named defendant et al.).

Cristin E. Sheehan, with whom were *Timothy J. Holzman* and, on the brief, *Robert W. Cassot*, for the appellees (defendant Alderman & Alderman, LLC, et al.).

Opinion

D'AURIA, J. In this appeal, we are asked to determine whether the United States Bankruptcy Code provisions permitting bankruptcy courts to assess penalties and sanctions preempt state law claims for vexatious litigation and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff, Jonathan S. Metcalf, brought state law claims against the defendants, Michael Fitzgerald, Ion Bank (bank), Myles H. Alderman, Jr., and Alderman & Alderman, LLC (law firm), for alleged vexatious litigation and for unfair and deceptive business acts or practices during the plaintiff's underlying bankruptcy proceeding. The plaintiff appeals from the trial court's granting of the motion to dismiss filed by Alderman and the law firm, for lack of subject matter jurisdiction on the ground that federal bankruptcy law preempts the claims. The trial court determined that the outcome of the motion was controlled by the Appellate Court's decision in *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, 86 Conn. App. 596, 862 A.2d 368 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1079 (2005). The court in *Lewis* held that the Bankruptcy Code preempted CUTPA and vexatious litigation claims for alleged abuse of the bankruptcy process. Id., 605–607. The plaintiff contends that the court in *Lewis* did not properly evaluate each of the three types of preemption by which Congress manifests its intent to preempt state law and failed to consider the relevant Bankruptcy Code provisions. See 11 U.S.C. § 105 (2012); Fed. R. Bankr. P. 9011. We disagree and affirm the judgment of the trial court.

The following facts, as set forth in the plaintiff's complaint, and procedural history are relevant to our review of the plaintiff's claim. The plaintiff's business, Metcalf Paving Company, filed a chapter 11 bankruptcy petition in 2009. See 11 U.S.C. § 1101 et seq. (2012). The Metcalf Paving Company bankruptcy thereafter was converted

to a case under chapter 7 of the Bankruptcy Code. See 11 U.S.C. § 701 (2012). The plaintiff then filed individually for bankruptcy under chapter 7. The bank, one of the plaintiff's creditors in the bankruptcy proceeding, subsequently commenced an adversary proceeding against the plaintiff under §§ 523 (a) and 727 (a) (7) of the Bankruptcy Code. Under these provisions, the bank objected to the discharge of the plaintiff's debt, asserting, among other allegations, that the plaintiff had failed to deliver a check, failed to provide documents, failed to disclose a website that he allegedly used for a new business, took possession of expensive machinery, unlawfully transferred property, destroyed property of the estate, defrauded creditors, and fraudulently withheld information from the chapter 7 trustee. In response, the plaintiff presented evidence to the Bankruptcy Court to contradict the allegations and moved for summary judgment. Upon reviewing the plaintiff's evidence, the bank moved to dismiss the adversary proceeding. The Bankruptcy Court granted the motion to dismiss.

The plaintiff subsequently commenced this action in the Superior Court. In his complaint, the plaintiff set forth claims for vexatious litigation against all the defendants, and CUTPA claims against Fitzgerald and the bank. In support of the vexatious litigation claims, the plaintiff alleged that the defendants had initiated the adversary proceeding without probable cause and with malice, maintained the proceeding without probable cause and with malice, and, as a result, caused him to suffer damages. The plaintiff claimed that the defendants knew or should have known that the allegations they made during the adversary proceeding were without factual merit and were barred by the applicable statute of limitations. In support of the CUTPA claims, the plaintiff alleged that Fitzgerald and the bank repeatedly engaged in unfair and deceptive acts or practices

during the bankruptcy proceeding, and that their conduct had been so frequent as to constitute a general business practice. The plaintiff claimed damages that included attorney's fees, losses from an inability to manage his business affairs, emotional distress, expenditures of time, effort and resources, and injuries to his business and professional reputation. The plaintiff alleged that he was entitled to damages and costs under the common law, double damages and treble damages under Connecticut's vexatious litigation statute, General Statutes § 52-568, and punitive damages and attorney's fees under CUTPA. See General Statutes § 42-110g.

Alderman and the law firm moved to dismiss the vexatious litigation claims on the ground that the claims arose from conduct that allegedly had taken place within a bankruptcy proceeding and were, therefore, preempted by the Bankruptcy Code. The trial court agreed, granted the motion to dismiss the vexatious litigation claims and, on its own motion and for the same reason, dismissed the remaining counts of the complaint, including the CUTPA claims, for lack of subject matter jurisdiction. The trial court cited *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 596, in support of its decision.

In *Lewis*, the Appellate Court held that bankruptcy law preempted state law CUTPA and vexatious litigation claims. Id., 605–607. The Appellate Court reasoned that "[t]he exclusivity of federal jurisdiction over bankruptcy proceedings, the complexity and comprehensiveness of Congress' regulation in the area of bankruptcy law and the existence of federal sanctions for the filing of frivolous and malicious pleadings in bankruptcy must be read as Congress' implicit rejection of alternative remedies such as those the plaintiff seeks." Id., 605. Accordingly, the court in *Lewis* remanded the

case to the trial court with direction to dismiss the action. Id., 607.

Upon the trial court's dismissal of the present action, the plaintiff timely appealed to the Appellate Court. The appeal was then transferred from the Appellate Court to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

On appeal, the plaintiff's sole claim is that the trial court incorrectly concluded that federal bankruptcy law preempted his state law claims for vexatious litigation and violations of CUTPA.[1] Specifically, the plaintiff argues that this court should not follow the holding in *Lewis* because that court failed to conduct a proper preemption analysis. Additionally, the plaintiff argues that his state law claims are neither expressly nor implicitly preempted and do not conflict with Congress' objectives in the Bankruptcy Code. We disagree.

We begin with our well established standard of review for reviewing a trial court's decision on a motion to dismiss: "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to

[1] Count seven of the plaintiff's complaint alleged that Fitzgerald and the bank violated CUTPA. Fitzgerald and the bank moved to dismiss counts eight through thirteen of the complaint, which alleged vexatious litigation. On its own motion, the trial court dismissed the CUTPA claim on the same ground as it dismissed the vexatious litigations claims—lack of subject matter jurisdiction.

In his brief to this court, the plaintiff did not specifically identify or analyze the CUTPA claim but, rather, referred to it only generally by stating that the "vexatious litigation claims *and the like* were not intended to be preempted by the Bankruptcy Code and its rules" and that, "[a]ccordingly, it should be held that *no claim brought here* was preempted or intended to be preempted by the federal rules applicable." (Emphasis added.) Although the plaintiff's brief is imprecise, because the defendants have not argued that the plaintiff has waived the CUTPA claims, we consider the plaintiff's argument as applying to both the vexatious litigation claims and the CUTPA claims.

dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

Turning to the legal principles at issue, we note that the supremacy clause of the United States constitution; see U.S. Const., art. VI, cl. 2; provides that federal law "shall be the supreme Law of the Land; and the Judges in every [S]tate shall be bound thereby, any Thing in the Constitution or Laws of any [S]tate to the Contrary notwithstanding. . . . Under this principle, Congress has the power to pre-empt state law." (Citation omitted; internal quotation marks omitted.) *Arizona* v. *United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

The bankruptcy clause of the United States constitution grants Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. Const., art. I, § 8, cl. 4. District courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334 (a) (2012). Through title 11 of the United States Code, Congress provided "a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *Eastern Equipment & Services Corp.* v. *Factory Point*

National Bank, 236 F.3d 117, 120 (2d Cir. 2001); see 11 U.S.C. § 101 et seq. (2012). As for sanctions for abuse of the bankruptcy process, the Bankruptcy Code provides a variety of remedies. See, e.g., 11 U.S.C. § 105 (a) (2012) (authority to prevent abuse of process);[2] 11 U.S.C. § 303 (i) (2) (2012) (bad faith filing of involuntary petitions);[3] 11 U.S.C. § 930 (a) (2) (2012) (dismissal for unreasonable delay);[4] see also Fed. R. Bankr. P. 9011 (b) and (c) (sanctions for frivolous and harassing filings).[5] The question before this court is whether the Bankruptcy Code preempts vexatious litigation and CUTPA actions brought in state court that provide for penalties and sanctions, as well as damages for abuse of process.

[2] Section 105 (a) of title 11 of the 2012 edition of the United States Code provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

[3] Section 303 (i) of title 11 of the 2012 edition of the United States Code provides in relevant part: "If the court dismisses a petition under this section other than on consent of all petitioners and the debtor . . . the court may grant judgment . . . (2) against any petitioner that filed the petition in bad faith for . . . (A) . . . any damages proximately caused by such filing; or (B) punitive damages."

[4] Section 930 (a) of title 11 of the 2012 edition of the United States Code provides in relevant part: "After notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (2) unreasonable delay by the debtor that is prejudicial to the creditors . . . ."

[5] Rule 9011 of the Federal Rules of Bankruptcy Procedure provides in relevant part: "(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . (c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. . . ."

This court has explained that there are three types of preemption: (1) express preemption, whereby Congress has through clear statutory language manifested its intent to preempt state law; (2) implied preemption, whereby Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law (occupy the field preemption); and (3) conflict preemption, whereby state law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives. See, e.g., *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 592–93, 89 A.3d 841 (2014); see also *English* v. *General Electric Co.*, 496 U.S. 72, 78–79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). The plaintiff contends that the Bankruptcy Code does not preclude his state court claims under express, implied, or conflict preemption. He further argues that this court should overrule the Appellate Court's holding in *Lewis* that the Bankruptcy Code preempts these claims because the Appellate Court failed to properly address the three types of preemption. Had it done so, according to the plaintiff, the court would have concluded that federal bankruptcy law does not preempt the state law claims at issue.

Before addressing the three types of preemption in turn, it is important to note that the question of preemption turns on Congress' intent. We therefore "begin as we do in any exercise of statutory [construction] with the text of the provision in question, and move on, as need be, to the structure and purpose of the [federal law] in which it occurs." (Internal quotation marks omitted.) *Air Transport Assn. of America, Inc.* v. *Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008).

I

Regarding express preemption, the plaintiff argues that the Bankruptcy Code does not contain an express

provision preempting the causes of action brought in this case. We agree. "Express preemption occurs when 'Congress . . . withdraw[s] specified powers from the [s]tates by enacting a statute containing an express preemption provision.' " *Trikona Advisers Ltd.* v. *Chugh*, 846 F.3d 22, 35 (2d Cir. 2017); accord *Arizona* v. *United States*, supra, 567 U.S. 399. An express preemption provision "expressly directs that state law be ousted to some degree from a certain field." *Assn. of International Automobile Manufacturers, Inc.* v. *Abrams*, 84 F.3d 602, 607 (2d Cir. 1996). We find no provision of the Bankruptcy Code that explicitly precludes a state law CUTPA or vexatious litigation claim.[6]

This conclusion is not at odds with the conclusion the Appellate Court reached in *Lewis*.[7] The court in *Lewis* did not evaluate express preemption because the parties did not raise the issue. The defendant in *Lewis* argued that bankruptcy law preempted vexatious litigation and CUTPA claims under the theory of implied

[6] As an example of express preemption, the Medical Device Amendments of 1976, 21 U.S.C. § 360c et seq. (2012), provides in relevant part that, "[e]xcept as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C. § 360k (a) (2012); see also *Mullin* v. *Guidant Corp.*, 114 Conn. App. 279, 285, 970 A.2d 733, cert. denied, 292 Conn. 921, 974 A.2d 722 (2009).

[7] Having determined that Congress impliedly preempted the state law claims by occupying the field, the court in *Lewis* did not need to analyze express preemption. See *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111, 125 (2d Cir.) (not addressing conflict preemption after holding that express preemption applied), vacated on other grounds sub nom. *Pattullo* v. *Resolution Trust Corp.*, 513 U.S. 801, 115 S. Ct. 43, 44, 130 L. Ed. 2d 5 (1994); *Depot, Inc.* v. *Caring for Montanans, Inc.*, Docket No. 16-74-M-DLC, 2017 WL 3687339, *5 (D. Mont. February 14, 2017) (not reaching issue of conflict preemption because plaintiffs' claims were expressly preempted). In the present case, we analyze all three types of preemption to add clarity and because the parties addressed each of them on appeal in this court.

preemption (occupy the field). See *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 600. The court, therefore, did not reach the issue of express preemption.[8] "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial." *Southport Congregational Church-United Church of Christ* v. *Hadley*, 320 Conn. 103, 119 n.21, 128 A.3d 478 (2016); see id. (declining to address risk of loss provision raised for first time in brief).

Express *preemption* is not the only method by which Congress can address the role that state law plays in bankruptcy—it can affirmatively utilize state law and has done so. For example, § 522 of the Bankruptcy Code expressly permits debtors to choose either the bankruptcy property exemption scheme under federal law or the nonbankruptcy property exemption schemes available under state law. See 11 U.S.C. § 522 (b) (2012); see also *In re Pruitt*, 401 B.R. 546, 554 (Bankr. D. Conn. 2009). The plaintiff interprets Congress' utilization of state law as evidence that Congress "clearly intended for the bankruptcy courts to abstain from hearing certain matters involving state law and interests." We agree that when Congress affirmatively permits the operation of state law, state law can play a role. However, the operation of state law is conditional upon Congress' inclusion of state law. "State [l]aw has a role to play in bankruptcy only if Congress affirmatively permits

[8] Neither the parties nor the trial court in *Lewis* performed a separate analysis of the three types of preemption. The defendant in *Lewis* argued generally, in its motion for summary judgment, that bankruptcy law preempted state law claims. The trial court granted the defendant's motion for summary judgment, stating that "[the] court is preempted by federal law from acting on a claim intended to sanction a party for its participation in a bankruptcy proceeding." *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, Superior Court, judicial district of Waterbury, Docket No. X06-CV-96-0154801-S (January 22, 2003) (34 Conn. L. Rptr. 5, 7), rev'd, 86 Conn. App. 596, 862 A.2d 368 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1079 (2005).

it." *In re Pruitt*, supra, 554. Here, Congress did not affirmatively permit state law actions for abuse of the bankruptcy process, and, consequently, we conclude that the plaintiff's argument fails.

II

Second, the plaintiff argues that Congress did not intend to occupy the field of sanctions and remedies for abuse of the bankruptcy process. The plaintiff states that, by enacting the Bankruptcy Code, Congress intended only to provide a uniform and orderly administration of bankruptcy estates and payments to creditors. As to his claims for vexatious litigation, specifically, he contends that permitting such state law claims would not affect the equitable distribution of a debtor's assets, and, therefore, they are not preempted. We disagree.

To determine whether Congress has occupied a field, we look to the overriding purpose of bankruptcy law to infer Congress' intent. "[A]bsent an explicit statement that Congress intends to preempt state law, courts should infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the [s]tates to supplement federal law . . . ." (Internal quotation marks omitted.) *Barbieri* v. *United Technologies Corp.*, 255 Conn. 708, 717, 771 A.2d 915 (2001). "[O]ften, an [a]ct of Congress may touch a field of law in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120.

We conclude that the Bankruptcy Code impliedly preempts the plaintiff's state law CUTPA and vexatious litigation claims for two main reasons: (1) Congress legislated so comprehensively as to occupy the entire field of penalties and sanctions for abuse of the bankruptcy process, leaving no room for state law to supple-

ment; and (2) the federal interest in uniformity is so dominant that we assume it precludes enforcement of state laws that threaten the uniformity and finality of the bankruptcy process for debtors and creditors alike.

A

We agree with the defendants that Congress has occupied the field of penalties and sanctions for abuse of the bankruptcy process, thereby implicitly preempting state law CUTPA and vexatious litigation claims. Our conclusion is consistent with the majority of federal as well as state courts that have analyzed whether the Bankruptcy Code occupies the field of penalties and sanctions. These courts have concluded that, because Congress has enacted such a comprehensive statutory scheme, inclusive of provisions for sanctions and remedies for abuse of the bankruptcy process, Congress has implicitly occupied the field, leaving no room for state law. See id., 121 (concluding that preemption precludes state law damages claims for violating automatic stay provision of Bankruptcy Code because Congress created lengthy, complex and detailed Bankruptcy Code to achieve uniformity); *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996) (precluding state law claim for malicious prosecution because "the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal"); *Astor Holdings, Inc.* v. *Roski*, 325 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) (barring state law claims for filing papers in bankruptcy proceeding in bad faith or for improper purpose because Bankruptcy Code contains remedies for misuse of process, and "thus such misuse is governed exclusively by that Code"); *Glannon* v. *Garrett & Associates, Inc.*, 261 B.R. 259, 263 (D. Kan. 2001) ("the Bankruptcy Code permits no state law remedies for abuse of the bankruptcy provisions"); *Raymark Industries, Inc.* v. *Baron*, Docket No. CIV 96-7625, 1997 WL 359333, *10 (E.D. Pa. June 23, 1997) (justifying pre-

emption on ground that Congress expressed intent that bankruptcy matters be handled in federal forum by placing bankruptcy jurisdiction exclusively in district courts); *Koffman* v. *Osteoimplant Technology, Inc.*, 182 B.R. 115, 125 (D. Md. 1995) (holding that state law tort actions are preempted by Bankruptcy Code); *Idell* v. *Goodman*, 224 Cal. App. 3d 262, 271, 273 Cal. Rptr. 605 (1990) (holding that malicious prosecution action was preempted by federal law because "[t]he existence of federal sanctions for the filing of frivolous and malicious bankruptcy pleadings must be read as an implicit rejection of state court remedies"); *Smith* v. *Mitchell Construction Co.*, 225 Ga. App. 383, 386, 481 S.E.2d 558 (1997) (" 'state tort suits are preempted by the federal Bankruptcy Code' "), cert. denied, Docket No. 597C1344, 1997 Ga. LEXIS 858 (Ga. October 3, 1997); *Sarno* v. *Thermen*, 239 Ill. App. 3d 1034, 1047, 608 N.E.2d 11 (1992) (precluding state law conspiracy claim arising out of involuntary bankruptcy proceeding); *Longnecker* v. *Deutsche Bank National Trust Co.*, Docket No. 12-2304, 2013 WL 6700312, *4 (Iowa App. December 18, 2013) ("we conclude the federal bankruptcy code preempts Iowa tort claims premised on litigants' conduct in bankruptcy court"); *Mason* v. *Smith*, 140 N.H. 696, 701, 672 A.2d 705 (1996) (holding that plaintiff's state law tort claims based on allegedly wrongful filing of involuntary bankruptcy petition were impliedly preempted by Bankruptcy Code); *Stone Crushed Partnership* v. *Kassab Archbold Jackson & O'Brien*, 589 Pa. 296, 314, 908 A.2d 875 (2006) (concluding that sanctions in Bankruptcy Code provide inference that Congress intended to preempt state law remedies for frivolous claims in field of bankruptcy).

For example, in *Eastern Equipment & Services Corp.*, the plaintiff-debtor brought state law claims in the United States District Court alleging that, during the bankruptcy proceeding, creditors wilfully violated

the automatic stay provision of the Bankruptcy Code by pursuing foreclosure actions in state court. *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 119. The District Court granted the creditors' motion for judgment on the pleadings, concluding that the Bankruptcy Code preempted the state law claims, which should have been brought in the Bankruptcy Court. Id. On appeal, the United States Court of Appeals for the Second Circuit explained that a conclusion of preemption was compelled by (1) Congress' establishment of bankruptcy jurisdiction exclusively in the district courts under 28 U.S.C. § 1334 (a), (2) Congress' creation of a lengthy, complex and detailed Bankruptcy Code to achieve uniformity, (3) the constitution's grant to Congress of exclusive power over bankruptcy law, and (4) the Bankruptcy Code's provision of several remedies designed to deter the misuse of the bankruptcy process. Id., 121.

In a case that is directly on point with the present case, the United States Court of Appeals for the Ninth Circuit in *MSR Exploration, Ltd.*, addressed the question of whether federal law preempts state law malicious prosecution actions for events that had occurred in connection with Bankruptcy Court proceedings. *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 912. In *MSR Exploration, Ltd.*, the plaintiff debtor filed a chapter 11 bankruptcy proceeding. Id. In response, the defendant creditors filed claims against the debtor, to which the debtor objected. Id. The Bankruptcy Court entered an order disallowing the creditors' claims. The debtor did not pursue abuse of process sanctions or penalties in the Bankruptcy Court. Id. Instead, the debtor brought a state law malicious prosecution action in the United States District Court. Id.

The Ninth Circuit concluded that the Bankruptcy Code preempted the state law action for two main reasons. Id., 913. "First, Congress has expressed its intent

that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts . . . .'' Id. Second, the complex, detailed, and comprehensive Bankruptcy Code demonstrates Congress' intent to provide uniform and centralized adjudication of all of the rights and duties of debtors and creditors alike. Id., 914. ''It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process. . . . [T]he highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy process from even slight incursions and disruptions brought about by state malicious prosecution actions.'' (Citations omitted.) Id. Accordingly, the Ninth Circuit concluded that the malicious prosecution action should have been brought in the Bankruptcy Court and upheld the District Court's determination that it lacked subject matter jurisdiction over the action. Id., 916.

We agree with the holdings of the majority of courts that have analyzed the issue and concluded that the Bankruptcy Code occupies the field of penalties and sanctions for abuse of the bankruptcy process. The plaintiff, however, disputes our conclusion and argues that a closer analysis of the Bankruptcy Code provisions that permit penalties and sanctions reveals that Congress did not intend to preempt his state law claims. Performing the analysis the plaintiff advocates for only further supports our conclusion that Congress occupied the field of penalties and sanctions.

We first examine 11 U.S.C. § 105,[9] which grants bankruptcy courts broad equitable powers to ''implement

[9] Section 105 (a) of title 11 of the 2012 edition of the United States Code provides: ''The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall

the provisions of Title 11 and to prevent an abuse of the bankruptcy process." *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997), citing *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir. 1996), and *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994). The grant of equitable powers under § 105 broadly authorizes bankruptcy courts to issue *any* process, order, or judgment necessary to prevent abuse of the bankruptcy process. Congress did not limit or carve out from this broad grant a vexatious litigation exception for the states to legislate within. In practice, bankruptcy courts have sanctioned parties for vexatious litigation under that very provision. In *In re Volpert*, supra, 497, for example, the United States Court of Appeals for the Seventh Circuit upheld a Bankruptcy Court's imposition of a $1000 sanction against an attorney who had "abuse[d] the judicial process." Id., 501. *In re Volpert* illustrates that bankruptcy courts have the authority, and in practice use that authority under § 105, to achieve a purpose similar to that of a state law remedy. *In re Volpert* supports our conclusion that Congress intended to occupy the field of penalties and sanctions for abuse of the bankruptcy process and left no room for state law to operate. Additionally, we are reassured by the fact that the Bankruptcy Code provides remedies for the kind of abuse of process of which the plaintiff complains. The plaintiff is not left without a remedy, even after the bankruptcy proceeding concludes.[10]

The plaintiff argues that, because a cause of action for vexatious litigation under Connecticut law provides relief that is different from the sanctions contemplated

be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

[10] Bankruptcy policy provides for cases to be "reopened on motion of the debtor . . . ." Fed. R. Bankr. P. 5010. By opening the case, the Bankruptcy Court has discretion to "administer assets [and] to accord relief to the debtor . . . ." 11 U.S.C. § 350 (b) (2012).

under 11 U.S.C. § 105, it falls outside the field that Congress intended to occupy. We agree that the penalties and damages available under a successful state law claim for vexatious litigation are potentially more extensive than those available under the Bankruptcy Code. In Connecticut, a plaintiff can recover double damages for an action brought without probable cause, and treble damages for an action brought with malicious intent to vex and trouble. General Statutes § 52-568. Similarly, CUTPA permits a plaintiff to recover actual and punitive damages. General Statutes § 42-110g (a).

In contrast, 11 U.S.C. § 105 grants bankruptcy courts the discretion to issue any judgment necessary to prevent abuse of the bankruptcy process. Although Congress' grant of such discretion is broad, the practical effects of it may be that bankruptcy courts impose sanctions less frequently, and for lesser dollar amounts, than if the bankruptcy provisions more closely mirrored the language of the Connecticut statutes. But this potential distinction in frequency and in kind does not warrant an inference that Congress did not contemplate penalties and sanctions. Rather, § 105 indicates that Congress indeed considered penalties and sanctions, and adopted a statutory scheme. "[I]t is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized." *Gonzales* v. *Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987).

Another provision furnishing bankruptcy courts with authority to issue penalties and sanctions is rule 9011 of the Federal Rules of Bankruptcy Procedure. See footnote 5 of this opinion. Under rule 9011 (b) and (c), a court may sanction parties who file documents in bad faith or for an "improper purpose, such as to harass or to cause unnecessary delay or . . . cost . . . ." Fed. R. Bankr. P. 9011 (b) (1). The plaintiff analogizes rule

9011 to rule 11 of the Federal Rules of Civil Procedure[11] and argues that, on the basis of their similarity, rule 9011 does not preempt a state law vexatious litigation action. And it is true that the language of the two rules is nearly identical. The plaintiff correctly points out that the 1993 advisory committee notes to rule 11 provide that the rule "does not preclude a party from initiating an independent action for malicious prosecution or abuse of process." Fed. R. Civ. P. 11, advisory committee notes, 28 U.S.C. app., p. 783 (2012). Additionally, the 1983 advisory committee notes to rule 7001 of the Federal Rules of Bankruptcy Procedure, which pertains to adversary proceedings, provide that the bankruptcy rules "either incorporate or are adaptations of most of the Federal Rules of Civil Procedure." Fed. R. Bankr. P. 7001, advisory committee notes, 11 U.S.C. app., p. 723 (2012). The plaintiff therefore argues that, because the rules are similar, this court should conclude that rule 9011 incorporates the advisory committee notes from rule 11, permitting a party to bring an independent vexatious litigation or abuse of process action. We are unpersuaded.

Although courts often look to advisory committee notes for interpretive guidance; e.g., *In re Old Carco, LLC*, 406 B.R. 180, 209 n.40 (Bankr. S.D.N.Y. 2009); they do not constitute binding authority. *In re Bressler*, 600 B.R. 739, 744 (S.D.N.Y. 2019) (discussing advisory committee notes to rules 4004 and 4007 of the Federal Rules of Bankruptcy Procedure). Committee notes are a product of the rules advisory committee, not Congress.

[11] Rule 11 (b) of the Federal Rules of Civil Procedure provides in relevant part: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . ."

United States v. *Vonn*, 535 U.S. 55, 64 n.6, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002). And while advisory committee notes can be "a reliable source of insight into the meaning of a rule"; (internal quotation marks omitted) *Hall* v. *Hall*, U.S. , 138 S. Ct. 1118, 1130, 200 L. Ed. 2d 399 (2018); the insight here speaks to rule 11, not rule 9011. Rule 9011 is silent as to the application or inclusion of the advisory committee note. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991). Here, in the context of the Bankruptcy Code, congressional intent is clear—the creation of "a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120; see 11 U.S.C. § 101 et seq. (2012). Given this clear intent, it would be contrary to textual and contextual evidence that Congress intended to permit independent abuse of process actions outside the bankruptcy process.

In view of the provisions that address penalties and sanctions for abuse of the bankruptcy process, namely, 11 U.S.C. § 105 and rule 9011, it is clear that Congress occupied the field by legislating comprehensively as to penalties and sanctions for abuse of that process. Accordingly, we conclude that Congress impliedly preempted state law CUTPA and vexatious litigation claims.

The Appellate Court in *Lewis* came to the same conclusion, and we agree with Judge DiPentima's cogent analysis in that case. The Appellate Court explained that "[t]he code contains remedies for the misuse of the [bankruptcy] process . . . ." (Internal quotation marks omitted.) *Lewis* v. *Chelsea G.C.A. Realty Partnership*,

L.P., supra, 86 Conn. App. 602. "Although it is true that the federal remedies provided for in the bankruptcy context do not offer the substantial damages available under Connecticut's vexatious litigation statute and CUTPA, that is an insufficient basis on which to preclude preemption." Id., 603–604. "The exclusivity of federal jurisdiction over bankruptcy proceedings, the complexity and comprehensiveness of Congress' regulation in the area of bankruptcy law and the existence of federal sanctions for the filing of frivolous and malicious pleadings in bankruptcy must be read as Congress' implicit rejection of alternative remedies . . . ." Id., 605.

B

In addition to concluding that Congress implicitly preempted state law actions by occupying the field of bankruptcy law, we conclude that, in that field of law, the federal interest is so dominant that federal law is assumed to preclude enforcement of state laws on the subject. E.g., *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120. Nothing less than the constitution of the United States persuades us that Congress' interest in uniformity in the bankruptcy process is so dominant as to preempt collateral attacks through state law vexatious litigation and CUTPA claims. The constitution grants Congress the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. Const., art. I, § 8, cl. 4. As described by Justice Joseph Story, the reasons for conferring bankruptcy power upon the United States "result from the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states. It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its

own local interests and pursuits. Under such circumstances no uniformity of system or operations can be expected. . . . There can be no other adequate remedy than giving a power to the general government to introduce and perpetuate a uniform system." 2 J. Story, Commentaries on the Constitution of the United States (2d Ed. 1851) § 1107.

We approach the question of uniformity within the bankruptcy process cognizant of the fact that state courts can be hesitant to conclude that federal law preempts state law claims. On this point, the United States Supreme Court has stated that federal regulation "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1968). Yet, against this backdrop, state courts have concluded, as we do, that permitting state law claims for abuse of the bankruptcy process threatens the uniformity of the bankruptcy system. See, e.g., *Smith* v. *Mitchell Construction Co.*, supra, 225 Ga. App. 386 ("[a]llowing state tort actions based on allegedly bad faith bankruptcy filings . . . would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme . . . threaten[ing] the uniformity of federal bankruptcy law"); *Mason* v. *Smith*, supra, 140 N.H. 700 ("[a]llowing plaintiffs to pursue alternative remedies in state courts for wrongful filings would frustrate the uniformity of bankruptcy law intended by Congress by allowing each [s]tate to establish its own definition of 'bad faith' with regard to the filing of involuntary petitions").

Our concerns with respect to the uniformity of bankruptcy law are twofold. First, state courts evaluating

claims that involve abuse of the bankruptcy process would need to develop adjudication standards for matters such as probable cause, bad faith, and malicious prosecution, to name a few. Those standards may be different from, and at odds with, the standards that have developed in the bankruptcy courts. See *Sarno* v. *Thermen*, supra, 239 Ill. App. 3d 1044 (explaining that it would be inconsistent with Congress' intent for state courts to develop different, more liberal tradition of bad faith for malicious prosecution purposes than that developed in federal system). It is foreseeable that states might disagree over the extent of an available remedy for abuse of process and the standard to be met. "State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating." *Gonzales* v. *Parks*, supra, 830 F.2d 1035. Varying standards for recovery from state to state would serve to undermine the federal interest in uniformity.

Second, permitting state law actions would allow parties to collaterally attack the bankruptcy process, threatening the finality of the proceedings as well as the ability of the parties—debtors and creditors alike—to make a fresh start once the bankruptcy proceeding concludes. One of the overriding purposes of the Bankruptcy Code is to provide debtors with a fresh start. "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibili-

ties consequent upon business misfortunes." *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554–55, 35 S. Ct. 289, 59 L. Ed. 713 (1915); accord *In re Renshaw*, 222 F.3d 82, 86 (2d Cir. 2000).

Creditors benefit as well by having "a single forum where debts and priorities can be determined in an orderly manner, a forum where those debts can be collected in whole or (more likely) in part." *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 916. The potential threat of state court actions following on the heels of a bankruptcy proceeding may well interfere with the necessary actions that creditors take within the bankruptcy process. Id. "[T]he mere threat of state tort actions could prevent individuals from exercising their rights in bankruptcy, thereby disrupting the bankruptcy process." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 121, citing *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 913–16. For example, the threat of a state law action could deter a creditor from filing an adversary proceeding in the Bankruptcy Court challenging the discharge of a debt. We face that exact circumstance in the present case. The threat is then compounded when the state law action provides for substantial damage awards, as is also the case at hand. See, e.g., *Idell* v. *Goodman*, supra, 224 Cal. App. 3d 269 ("[t]he additional risk that substantial damage awards in state courts would create a material disincentive to those seeking to use the bankruptcy laws only exacerbates the problem" [internal quotation marks omitted]). Both of these uniformity concerns fortify our conclusion that the Bankruptcy Code impliedly preempts state law CUTPA and vexatious litigation claims. The Bankruptcy Code provides the forum, incentives, penalties, and sanctions that apply uniformly to debtors and creditors nationwide.

In response, the plaintiff urges this court to adopt the minority approach for evaluating implied preemption articulated by the Supreme Court of Texas in *Graber* v. *Fuqua*, 279 S.W.3d 608 (Tex.), cert. denied, 558 U.S. 880, 130 S. Ct. 288, 175 L. Ed. 2d 136 (2009). In *Graber*, the court considered whether the Bankruptcy Code preempted a state law malicious prosecution claim that arose out of an adversary action in a bankruptcy proceeding. Id., 609–10. Similar to the facts of this case, in *Graber*, a law firm had initiated an adversary proceeding against a debtor who had filed a voluntary chapter 7 petition in the Bankruptcy Court. Id. The petition resulted in a criminal investigation, an indictment for bank fraud and tax fraud, and then ultimately a trial in state court in which a jury found the debtor not guilty on all charges. Id., 610. The debtor then sued the law firm in state court, alleging civil malicious prosecution. Id. The law firm argued that the court lacked subject matter jurisdiction because federal bankruptcy law preempted the state law claim. The trial court agreed and granted the motion to dismiss the action. Id. On appeal, the Texas Supreme Court held that Congress did not intend for the Bankruptcy Code to preempt a state law malicious prosecution claim. Id., 620.

The Texas Supreme Court in *Graber* approached the preemption issue by analyzing each provision in the Bankruptcy Code to determine whether Congress intended to occupy the field of sanctions and penalties. The court reasoned that where Congress "custom-built" certain provisions of the Bankruptcy Code—unique provisions without analogues in general federal litigation—those provisions are more likely to preempt state law causes of action because Congress "built" or created a unique remedial provision. Id., 612–13. Conversely, the court reasoned, where Congress imported provisions from existing federal law without any significant changes, preemption of state law causes of action is "improbable," and those provisions should incorporate common practices under those existing federal laws.

Id., 613. The court concluded that 11 U.S.C. § 105 and rule 9011 do not preempt state law claims for malicious prosecution because they are imported from existing federal law and represent Congress' implicit acceptance of state law malicious prosecution claims.[12] Id. Although that is still a minority view, some courts, in light of *Graber*, similarly have held that the Bankruptcy Code does not preempt state law causes of action providing damages for abuse of the bankruptcy process. See, e.g., *U.S. Express Lines, Ltd.* v. *Higgins*, 281 F.3d 383, 393 (3d Cir. 2002) (holding that state law claim for malicious prosecution was not preempted); *R.L. LaRoche, Inc.* v. *Barnett Bank of South Florida, N.A.*, 661 So. 2d 855, 857 (Fla. App. 1995) (concluding that federal bankruptcy law did not preempt state law abuse of process and malicious prosecution claims).

We disagree with the minority approach to the preemption analysis. Notably, the court in *Graber* did not cite any case law as authority for categorizing provisions of federal law as either "custom-built" or imported when determining whether those provisions are more or less likely to preempt state law causes of action. Rather, the court effectively adopted its own "custom-built" method to analyze individual provisions of the Bankruptcy Code. By adopting this analysis, the court failed to consider the structure and purpose of the Bankruptcy Code and, consequently, failed to recognize that Congress legislated so comprehensively as to occupy the entire field of regulation. See, e.g., *Longnecker* v. *Deutsche Bank National Trust Co.*, supra, 2013 WL 6700312, *6 (rejecting *Graber* approach and determining that state court did not err in "ruling, consistently

[12] The Texas Supreme Court decided *Graber* by a five to four margin. The dissenters concluded, as we have and as the Appellate Court did in *Lewis*, that federal law occupied the field and that permitting state law actions for malicious prosecution would undermine the uniformity of bankruptcy law mandated by the United States constitution. See *Graber* v. *Fuqua*, supra, 279 S.W.3d 620–21 (Wainwright, J., dissenting).

with the majority of state and federal courts, that it lacked subject matter jurisdiction over claims alleging abuse of bankruptcy proceedings"); *PNH, Inc.* v. *Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 285, 958 N.E.2d 120 (2011) (rejecting *Graber* approach and concluding that federal law preempts state law causes of action for misconduct of litigants in bankruptcy proceedings), cert. denied, 565 U.S. 1262, 132 S. Ct. 1764, 182 L. Ed. 2d 533 (2012).

Like the substantial majority of federal and state courts that have concluded that the Bankruptcy Code preempts state law claims for abuse of process, we conclude that Congress clearly has "considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 915. As previously stated, Congress decides what penalties are appropriate within the bankruptcy process, not state courts. *Gonzales* v. *Parks*, supra, 830 F.2d 1036. Accordingly, we interpret Congress' grant of exclusive jurisdiction over bankruptcy petitions to the district courts, and the federal interest in uniform laws on bankruptcy, as occupying the field and implicitly rejecting state law claims for abuse of process.

III

Finally, the plaintiff argues that there is little similarity between the penalties, sanctions, and damages available under Connecticut law for his CUTPA and vexatious litigation claims, and the sanctions for abuse of process available under the Bankruptcy Code. The plaintiff asks this court to conclude that, because the remedies are different, there is no conflict, and, therefore, his claims are not preempted.[13] We agree with the

[13] Courts addressing the issue of preemption that we are faced with in the present case often combine the analysis for occupy the field preemption and conflict preemption, both of which are types of implied preemption, without significant distinction. See, e.g., *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120–21; *MSR Explora-*

plaintiff that state law actions are not in conflict with bankruptcy law because a party can comply with both state and federal law. However, we conclude that those actions are still preempted under a conflict preemption analysis because they are an obstacle to accomplishing Congress' purpose within the Bankruptcy Code.

"Conflict preemption exists when compliance with both state and federal law is impossible, and a subset of conflict preemption referred to as obstacle preemption applies when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . State law is in irreconcilable conflict with federal law, and hence preempted by federal law, when compliance with the state statute would frustrate the purposes of the federal scheme." (Internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 593, quoting *Sosnowy* v. *A. Perri Farms, Inc.*, 764 F. Supp. 2d 457, 464 (E.D.N.Y. 2011). Therefore, we must determine whether compliance with state and federal law would be impossible and then consider whether the plaintiff's vexatious litigation and CUTPA claims would be an obstacle to Congress' objectives.

We agree with the plaintiff that compliance with both the Bankruptcy Code and Connecticut law would not

tion, Ltd. v. *Meridian Oil, Inc.*, supra, 77 F.3d 913–15, *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 601–605. As a practical matter, it often will be the case that, when Congress has occupied the field, a state law cause of action likely will obstruct Congress' purpose, resulting in conflict preemption. We note that courts often have held that if one kind of preemption exists, the others need not be addressed. See, e.g., *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111, 125 (2d Cir.) (not addressing conflict preemption after holding that express preemption applied), vacated on other grounds sub nom. *Pattullo* v. *Resolution Trust Corp.*, 513 U.S. 801, 115 S. Ct. 43, 44, 130 L. Ed. 2d 5 (1994); *Depot, Inc.* v. *Caring for Montanans, Inc.*, Docket No. 16-74-M-DLC, 2017 WL 3687339, *5 (D. Mont. February 14, 2017) (not reaching issue of conflict preemption because plaintiffs' claims were expressly preempted). Because the plaintiff in the present case sets forth arguments unique to conflict preemption that warrant separate analysis, we have not combined our analysis of these two types of implied preemption.

be impossible. "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, supra, 373 U.S. 142. Connecticut's vexatious litigation statute strives to deter parties from bringing claims without probable cause and with malicious intent. See General Statutes § 52-568. CUTPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. See General Statutes § 42-110b (a). To comply with Connecticut law, a party need only refrain from bringing claims without probable cause, and compete fairly and without deception. Obviously, no provision in the Bankruptcy Code mandates that a party bring claims without probable cause or compete unfairly or deceptively. Connecticut law can be enforced without impairing the federal superintendence. Therefore, the state statutes do not conflict with the Bankruptcy Code such that it would be impossible to comply with both.

However, our obstacle preemption analysis implicates many of the same factors that drove our implied (or occupy the field) preemption analysis and leads us to conclude that the plaintiff's state law abuse of process actions are preempted. Congress enacted the Bankruptcy Code inclusive of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights. Permitting parties to bring abuse of process actions in state court hinders Congress' objective of uniformly defining the scope and availability of remedies for abuse of the bankruptcy process.

We can imagine a myriad of claims that would lend themselves to vexatious litigation actions, including debtors' petitions, creditors' claims, disputes over reorganization plans, and disputes over pending discharges, to name a few. If such claims were not preempted by federal law, redress for them would depend on the law

of the state in which the plaintiff brought the action. *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 914. "Permitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would [stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Internal quotation marks omitted.) *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000). Accordingly, the plaintiff's state law CUTPA and vexatious litigation claims are in conflict with the Bankruptcy Code provisions regarding sanctions for abuse of process and, thus, are preempted. The trial court properly dismissed these claims for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other justices concurred.

MARINELIS SENA, ADMINISTRATRIX (ESTATE OF TYRONE O. TILLMAN), ET AL. *v.* AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC., ET AL.
(SC 19971)

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

Syllabus

Pursuant to statute (§ 28-13 [a]), "[n]either the state nor any political subdivision of the state . . . complying with or attempting to comply with [civil preparedness statutes] or any order or regulation promulgated pursuant to [those statutes] . . . shall be liable for the death of or injury to persons . . . as a result of any such activity."

The plaintiff, both individually and as administratrix of the estate of the decedent, T, sought to recover damages from, among others, the defendant city alleging, inter alia, that the city was negligent in responding to a medical emergency involving T. Specifically, the plaintiff alleged that the city had improperly failed to dispatch a fire truck with an emergency medical technician in response to T's emergency call and

had impeded prompt arrival of an ambulance by allowing snow to remain in certain public roadways following a statewide winter snowstorm. Before the storm began, the city's mayor declared a state of emergency and activated the local emergency operations center. Shortly thereafter, the governor declared a statewide civil preparedness emergency pursuant to statute (§ 28-9). Snowfall during the storm was so significant that both city and state roads were temporarily closed to the public, and plowing and ambulance service were temporarily suspended. After the storm, clearing roads proved unusually difficult, and the city requested that the state summon the assistance of the National Guard, which arrived the following day. Two days after the storm concluded, only certain roads were open to emergency vehicles and several hundred secondary roads, including the road on which T lived, remained impassable. On that day, T called 911 complaining of severe breathing difficulty. An ambulance arrived approximately twenty minutes later and subsequently transported T to the hospital, where he was pronounced dead. Three days after the storm concluded, at least one lane was open on each of the city's roads. The city's emergency operations center maintained command over storm response and snow removal for approximately five days after the storm passed and remained staffed for approximately three days thereafter. More than one month later, the governor issued an executive order ending the statewide civil preparedness emergency. The plaintiff subsequently commenced the present action, and the city filed a motion for summary judgment, claiming immunity pursuant to § 28-13. The trial court denied that motion, concluding that there was a genuine issue of material fact as to whether the city was still actively experiencing a civil preparedness emergency at the time of the city's response to T's emergency call, and the plaintiff appealed. *Held*:

1. This court had subject matter jurisdiction over the city's appeal, as the trial court's denial of the city's motion for summary judgment constituted a final judgment because the city's motion was based on a colorable claim that § 28-13 (a) affords the city sovereign immunity from actions taken in response to declared emergencies; although the plain text of § 28-13 (a) does not clearly define the nature of the immunity afforded under that statute, an examination of relevant legislative history indicated that the legislature had intended that statute to extend the state's own sovereign immunity, including both its immunity from suit and liability, to political subdivisions such as the city.
2. The trial court improperly denied the city's motion for summary judgment on the basis of the court's conclusion that a genuine issue of material fact existed as to whether the city was still actively experiencing a civil preparedness emergency at the time of T's death, the trial court having incorrectly concluded that immunity under § 28-13 applies only during a civil preparedness emergency; the city's command and control of storm response and snow removal, including decisions regarding snow plowing and the circumstances in which a fire truck should respond to

an emergency call, unambiguously fell within the statutory (§ 28-1 [4]) definition of civil preparedness, which explicitly includes measures taken in preparation of, during, and following major disasters and emergencies, and, therefore, evidence relating to whether the civil preparedness emergency had ended at the time of the city's response to T's emergency medical call did nothing to contradict the ample evidence in the record that the city was still engaged in activities afforded immunity by § 28-13 at that time.

Argued October 18, 2018—officially released September 3, 2019

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful death of the named plaintiff's decedent as a result of the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, denied the motion for summary judgment filed by the defendant city of Bridgeport, and the defendant city of Bridgeport appealed. *Reversed*; *judgment directed.*

J. Christopher Rooney, with whom were *Alan Bowie* and, on the brief, *Anne Peterson*, for the appellant (defendant city of Bridgeport).

Alan Scott Pickel, with whom, on the brief, was *Anthony L. Cenatiempo*, for the appellees (plaintiffs).

Opinion

ROBINSON, C. J. This appeal requires us to consider the nature and scope of the immunity provided to the state and its political subdivisions by General Statutes § 28-13 (a)[1] for actions taken in connection with a civil

[1] General Statutes § 28-13 (a) provides: "Neither the state nor any political subdivision of the state nor, except in cases of wilful misconduct, the agents or representatives of the state or any political subdivision thereof nor any member of the civil preparedness forces of the state nor any person authorized by such civil preparedness forces or by any member of such civil preparedness forces complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state nor any person employed by or authorized to assist any agency of the

preparedness emergency declared by the governor pursuant to General Statutes § 28-9,[2] which, in the present case, related to a blizzard that occurred in February, 2013. The defendant city of Bridgeport (city)[3] appeals[4] from the trial court's denial of its motion for summary judgment in the present case, which was commenced by the plaintiff, Marinelis Sena, both individually and as administratrix of the estate of Tyrone O. Tillman.[5] The operative complaint alleges, inter alia, that the city was negligent in (1) not following its usual practice of sending a fire truck with an emergency medical technician in addition to an ambulance to render medical care to Tillman when he experienced severe breathing difficulty on February 11, 2013, and (2) preventing the ambulance from arriving promptly by allowing snow to remain on certain public roadways. On appeal, the city claims, inter alia, that it was immune for its actions

federal government in the prevention or mitigation of any major disaster or emergency, shall be liable for the death of or injury to persons or for damage to property as a result of any such activity. The Attorney General shall appear for and defend the state, any political subdivision of the state and the agents or representatives of the state or any political subdivision thereof or any member of the civil preparedness forces of the state or any other person exempted from liability for his acts under this section in any civil action brought for the death of or injury to persons or for damage to property as a result of any civil preparedness activity."

[2] General Statutes § 28-9 (a) provides in relevant part: "In the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof, the Governor may proclaim that a state of civil preparedness emergency exists, in which event the Governor may personally take direct operational control of any or all parts of the civil preparedness forces and functions in the state. Any such proclamation shall be effective upon filing with the Secretary of the State. . . ."

[3] The plaintiff also named American Medical Response of Connecticut, Inc., and two of its employees, Brian Walts and William T. Ostroff, as defendants. These additional defendants are not participating in the present appeal.

[4] The city appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[5] For the sake of simplicity, we refer to Sena in both capacities as the plaintiff.

pursuant to § 28-13, and that the trial court improperly determined that a genuine issue of material fact existed as to whether the civil preparedness emergency remained in effect on the date of Tillman's death. We conclude that (1) an appealable final judgment exists because the city's claims of immunity pursuant to § 28-13 implicate an extension of the state's sovereign immunity to the city, and (2) the trial court should have granted the city's motion for summary judgment because there was no genuine issue of material fact with respect to the applicability of § 28-13. Accordingly, we reverse the judgment of the trial court.

The record reveals the following relevant facts[6] and procedural history. On February 8 and 9, 2013, a blizzard, verified by the National Weather Service, occurred in nearly all of southern Connecticut. In anticipation of the blizzard, on February 7, 2013, at 1 p.m., representatives from the city's various departments and the local emergency preparedness board convened a meeting of the Bridgeport Emergency Planning Group, which was held at the city's emergency operations center (EOC). At that meeting, the members from the city's departments reviewed the city's emergency preparedness plan, designated representatives who would attend civil emergency planning sessions, and began to identify essential personnel who would be assigned during the expected emergency.

On February 8, 2013, beginning at 7 a.m., the city began to implement its emergency preparedness plan. Full operations at the EOC were initiated that morning, and numerous city officials conducted a conference

[6] Given the summary judgment posture of this appeal, we present the facts in the light most favorable to the nonmoving party, which, in the present case, is the plaintiff. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018); *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 337, 179 A.3d 201 (2018); *Doe* v. *West Hartford*, 328 Conn. 172, 191, 177 A.3d 1128 (2018).

call with the statewide emergency operations center in order to ensure that the city's storm response was coordinated with the state's efforts. At 11 a.m., Mayor Bill Finch held a press conference and announced his intention to declare a civil preparedness emergency for the city, which included the institution of a citywide ban on driving so that plows could keep the roads clear. At 11:45 a.m., Governor Dannel Malloy held a press conference and declared a civil preparedness emergency pursuant to § 28-9.[7] Shortly thereafter, the EOC activated its response at level 4 and assumed centralized control over the city's response to the blizzard.[8]

By 5 p.m. on February 8, 2013, Governor Malloy had issued a statewide travel ban of all vehicles on any state road. By 8 p.m., snowfall was so severe that the EOC determined that it was unsafe for all vehicles other than

[7] A copy of Governor Malloy's letter to Secretary of the State Denise Merrill declaring a state of emergency pursuant to § 28-9 was attached as an exhibit to the city's motion for summary judgment. Governor Malloy ended that state of civil preparedness emergency and rescinded Executive Order 30, which also pertained to the February storm, on March 18, 2013, through Executive Order 33. Executive Order 33 also ended the civil preparedness emergency previously declared by Governor Malloy on October 27, 2012, in anticipation of Hurricane Sandy, and rescinded Executive Orders 21 through 28, which also pertained to Hurricane Sandy.

[8] An affidavit from Scott Appleby, the city's director of Emergency Management and Homeland Security, describes level 4 as "a 'full scale' response during which time the EOC takes complete control over the planning for and response to the emergency. . . . The goal at a full scale response is to centralize command and control over storm response in the hands of a unified command in one location. This group has overriding authority over department heads, who in general were sent home due to storm conditions. This control would include dispatching police, fire and ambulances in response to [911] calls. . . . Because the emergency call center is just down the hall, we have a supervisor from that area of the building permanently in the EOC room. In the case of this storm, Assistant Fire Chief Dominic Carfi (or his replacement) became the liaison with the call center and would give them instructions on how to handle calls. Occasionally, the supervisor from the emergency call center would come to us to discuss an issue or seek advice. The call center could also contact police and fire battalion chiefs by radio or telephone for instructions and an update on whether units could respond."

plows to be on the city's roads. Whiteout conditions later that night required the recall of all plows. The EOC then restricted the response of municipal fire and police departments. Decisions regarding whether those departments would respond to reported emergencies were made by their representatives at the EOC, rather than by emergency communications employees. William Schietinger, the representative at the EOC from the city's ambulance contractor, American Medical Response of Connecticut, Inc. (AMR), similarly suspended ambulance service temporarily because of whiteout conditions. As visibility improved, the EOC decided that AMR could resume providing ambulance service, and, at 3 a.m. on February 9, 2013, plows returned to the streets.

Beginning midday on February 9, 2013, the EOC shifted its attention from storm response to snow removal. The snow removal process was unusually difficult because snow accumulation reached a level higher than the typical dump truck with plow attached could move, and many cars had not been removed from public streets, despite the parking bans in effect. This resulted in vehicles having to be dug out and towed before streets could be plowed. Because of the substantial snow accumulation, the EOC requested that the state send national guard personnel and equipment to assist with snow removal and emergency responses. That additional snow removal equipment did not begin to arrive until February 10, 2013. Given the paralyzing snow accumulation, most of the city's residents were confined to their homes.

The limited ability of the fire and police departments to respond to calls for assistance continued in the wake of the storm because most police and fire stations had not yet dug out. On February 10, 2013, at 2 a.m., Brian Rooney, the city's fire chief, and Dominic Carfi, a deputy fire chief who had been the fire department's represen-

tative at the EOC during the storm, determined that, in the case of medical emergencies, the only response would be through AMR because it was not physically possible for the city's fire trucks to leave the stations. Carfi conveyed that decision to the city's 911 emergency communications employees via their supervisor. Once fire headquarters was cleared of snow by approximately 10 a.m. that day, the fire department was able to use a limited number of four wheel drive sport utility vehicles that could be driven on plowed streets to respond to emergencies. In consultation with AMR's representative in the EOC, a deputy fire chief who had relieved Carfi would authorize the dispatch of one of these sport utility vehicles to emergency medical calls depending on road conditions, the location of the call, and the severity of the medical condition.

On Monday, February 11, 2013, twelve front end loaders arrived and provided assistance in the clearing of the city's primary roads. However, city offices remained closed, no regular city employees reported for work, and schools would remain closed for the remainder of the week. As of 8 p.m. that day, a citywide driving ban remained in effect, and only 100 roads were open to emergency vehicles. Most of those were primary roads. Several hundred secondary roads were still closed or impassible, and tow trucks were still in the process of removing abandoned vehicles.

At approximately 7:18 p.m. on February 11, 2013, Tillman called 911 complaining of severe breathing difficulty. At 7:27 p.m., AMR dispatched an ambulance to assist Tillman. The fire department did not respond. According to an affidavit submitted by Scott Appleby, the city's Director of Emergency Management and Homeland Security, Stevens Street, on which Tillman lived, had not yet been plowed at that time. Brian Walts and William T. Ostroff, emergency medical technicians employed by AMR, reached Tillman at 7:36 p.m. and

rendered emergency care until 8:04 p.m. Tillman was subsequently transported to a local hospital, where he was pronounced dead upon arrival.

The efforts to clear at least one lane on each of the city's roads continued until February 12, 2013. It took an additional week for the city's roads to be cleared to the point where traffic could pass normally. The EOC maintained command over storm response and snow removal through February 14, 2013, after which operational control over the various city departments, including the fire department, was returned to the normal operating procedure. The EOC remained staffed and active through February 17, 2013, at which point the operational period ended, the response was terminated, and the EOC was vacated by all personnel except Appleby.

The plaintiff subsequently brought the present action against the city, AMR, Ostroff, and Walts. In counts twenty and twenty-one of the operative complaint, the plaintiff claims the city negligently failed to follow the local emergency service plan and permitted a highway defect to exist pursuant to General Statutes § 13a-149. On September 27, 2016, the city moved for summary judgment on immunity grounds. On November 16, 2016, the plaintiff filed an objection to that motion together with an accompanying memorandum of law.

On March 8, 2017, the trial court issued a memorandum of decision denying the city's motion for summary judgment. The trial court first rejected the city's argument that the present action is barred by common-law governmental immunity. The trial court next addressed the city's argument that it is absolutely immune from liability pursuant to § 28-13. The trial court concluded that, although the city had met its initial burden of producing evidence sufficient to support a judgment in its favor on the issue of § 28-13 immunity, the plaintiff

had submitted evidence contradicting the city's evidence concerning whether the city was still experiencing a civil preparedness emergency at the time of Tillman's death. The trial court also observed that the relevant statutes do not prescribe how to determine when an emergency has ended for purposes of § 28-13 immunity and suggested that a "workable 'end date' is needed." Accordingly, the trial court concluded that, on the basis of the evidence before it, the city could not invoke the protections of § 28-13 immunity because a genuine issue of material fact existed as to whether the city was still actively experiencing a civil preparedness emergency at the time of Tillman's death. This appeal followed. See footnote 4 of this opinion.

On appeal, the city argues that the trial court incorrectly concluded that the end date of a civil preparedness emergency has statutory significance under § 28-13, and incorrectly concluded that there was a genuine issue of material fact concerning the issue of § 28-13 immunity. The plaintiff disagrees and also argues that the trial court's denial of the city's motion for summary judgment does not constitute an appealable final judgment.

I

As a threshold issue, we must determine whether the trial court's denial of the city's motion for summary judgment is a final judgment over which we have subject matter jurisdiction.[9] Relying on *Shay* v. *Rossi*, 253 Conn. 134, 749 A.2d 1147 (2000), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003), the city argues that there is an appealable final

[9] Prior to oral argument in this appeal, we ordered, sua sponte, that the parties file supplemental briefs addressing the following question: "Is the order denying the . . . city's motion for summary judgment, which claimed that the city was immune from liability pursuant to . . . § 28-13 (a), a final judgment such that the Supreme Court has jurisdiction over the appeal? See *Vejseli* v. *Pasha*, [282 Conn. 561, 923 A.2d 688] (2007)."

judgment because its motion for summary judgment was grounded on a colorable claim that § 28-13 grants the city and its police and fire departments sovereign immunity for actions taken in response to declared emergencies. In response, the plaintiff relies on *Vejseli* v. *Pasha*, 282 Conn. 561, 923 A.2d 688 (2007), and contends that we lack jurisdiction over the city's appeal because the city's motion for summary judgment under § 28-13 was founded on governmental, rather than sovereign, immunity. Additionally, the plaintiff argues that an issue of material fact still exists regarding whether the city was undergoing a state of emergency at the time of Tillman's death and, thus, whether the immunity afforded by the statute applies. We agree with the city and conclude that the trial court's denial of its motion for summary judgment was an appealable final judgment because § 28-13 extends the state's sovereign immunity to political subdivisions, such as municipalities.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review is plenary. . . .

"Neither the parties nor the trial court . . . can confer jurisdiction upon [an appellate] court. . . . The right of appeal is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . It is equally axiomatic that, except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review . . . appellate jurisdiction is limited to final judgments of the trial court." (Citation omitted; internal quotation marks omitted.) *Ledyard* v.

WMS Gaming, Inc., 330 Conn. 75, 84, 191 A.3d 983 (2018); see also General Statutes § 52-263.[10]

"As a general rule, an interlocutory ruling may not be appealed pending the final disposition of a case. . . . We previously have determined [however] that certain interlocutory orders have the attributes of a final judgment and consequently are appealable under . . . § 52-263. . . . In *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)], we explicated two situations in which a party can appeal an otherwise interlocutory order: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.[11] . . .

"The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that the defendant will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . .

[10] General Statutes § 52-263 provides: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as provided in sections 8-8 and 8-9."

[11] Neither party argues that the first prong of the *Curcio* test is applicable to the present appeal.

"In *Shay* v. *Rossi*, supra, 253 Conn. 165–67, we concluded that [t]he nature of sovereign immunity is such a right. It protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable. Therefore, unless the state is permitted to appeal a trial court's denial of its motion to dismiss, filed on the basis of a colorable claim of sovereign immunity, the state's right not to be required to litigate the claim filed against it would be irretrievably lost.

"We have in the past phrased the underlying rationale of the doctrine of sovereign immunity in theoretical terms. For example, in *Horton* v. *Meskill*, 172 Conn. 615, 623–24, 376 A.2d 359 (1977), we noted, as . . . Justice [Oliver Wendell Holmes, Jr.] wrote: A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . The modern rationale for the doctrine, however, rests on the more practical ground that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property. . . . This rationale suggests that the doctrine protects the state from unconsented to litigation, as well as unconsented to liability.

"Although we have never explicitly delineated this particular aspect of the doctrine in final judgment terms, our sovereign immunity cases implicitly have recognized that the doctrine protects against suit as well as liability—in effect, against having to litigate at all. In *Bergner* v. *State*, 144 Conn. 282, 286, 130 A.2d 293 (1957), we recognized the distinction between immunity from suit and from liability, and held that a statutory waiver of sovereign immunity constituted a

waiver of suit and provided a remedy to enforce such liability as the general law recognizes. . . . [T]he state's waiver of its immunity from liability only arises after a prior determination that it has waived its immunity from suit, and that a waiver of immunity from suit does not necessarily imply a waiver of immunity from all aspects of liability.

"Thus . . . the state's sovereign immunity right not to be required to litigate at all, as opposed to its right not to be ultimately subjected to liability, is analogous to that facet of the criminal defendant's constitutional double jeopardy right not to be tried twice for the same offense. Because that constitutional right includes the right not even to be tried for the same offense, the denial of a motion to dismiss criminal charges, filed on the basis of a colorable claim of double jeopardy, is an immediately appealable final judgment under the second prong of *Curcio*. . . . Similarly, therefore, in a civil case the denial of a motion to dismiss, filed on the basis of a colorable claim of sovereign immunity, must be regarded under *Curcio* as an immediately appealable final judgment." (Citation omitted; footnotes added and omitted; internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 568–71; see also *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (partial denial of defendants' motion for summary judgment, which had colorable claim of absolute immunity for participation in judicial and quasi-judicial proceedings, constituted appealable final judgment for same reason that rejection of colorable claim of sovereign immunity gives rise to immediately appealable final judgment, namely, to protect against threat of suit).

Within our final judgment jurisprudence, we have held that judgments affecting a right of governmental immunity are treated differently under the second prong of *Curcio* than those affecting a right of sovereign

immunity. "[W]hereas [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss . . . the doctrine of governmental immunity implicates no such interest. . . . Indeed, we expressly have recognized that, [u]nlike the state, municipalities have no sovereign immunity from suit. . . . Rather, municipal governments have a limited immunity from liability. . . .

"Governmental immunity, which applies to municipalities, is different in historical origin, scope and application from the sovereign immunity enjoyed by the state. A suit against a municipality is not a suit against a sovereign. Towns have no sovereign immunity, and are capable of suing and being sued . . . in any action. . . . Municipalities do, in certain circumstances, have a governmental immunity from liability. . . . But that is entirely different from the state's sovereign immunity from suit. . . . Accordingly . . . municipalities are immune from liability only, and not from suit. . . .

"Because municipalities are immune from liability, but not from suit, the concerns that justify the availability of an immediate appeal from the denial of a motion to dismiss based on sovereign immunity are not implicated in the context of governmental immunity. Put differently, municipalities have no immunity from suit that potentially might be rendered meaningless without the opportunity for immediate appellate review before being forced to defend, even successfully, a case at trial. . . . Accordingly . . . the denial of a motion to dismiss or to strike based on governmental immunity is not an appealable final judgment under the second prong of *Curcio*." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 572–75.

In contrast to *Shay*, a case in which there was no dispute that the defendants' claim of sovereign immu-

nity was colorable; *Shay* v. *Rossi*, supra, 253 Conn. 168; the parties in the present case disagree as to whether the city has presented a colorable claim of sovereign immunity. In determining whether a claim is colorable for purposes of whether a "decision constitutes a final judgment that provides this court with jurisdiction to consider the merits of that decision," we emphasize that a "colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . ." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 209, 990 A.2d 853 (2010). "For a claim to be colorable, the defendant need not convince the . . . court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Emphasis in original; internal quotation marks omitted.) *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017).

Although it is now axiomatic that a political subdivision may not ordinarily claim sovereign immunity as a defense to a claim against it; see, e.g., *Vejseli* v. *Pasha*, supra, 282 Conn. 572; the city contends that the trial court's denial of its motion for summary judgment is an appealable final judgment because § 28-13 extends to it the state's sovereign immunity under the circumstances of this case. We, therefore, turn to § 28-13 to determine the nature of the immunity afforded to political subdivisions. This presents a question of statutory construction.

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

statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *In re Henrry P. B.-P.*, 327 Conn. 312, 324–25, 173 A.3d 928 (2017).

We begin with the text of § 28-13 (a), which provides: "Neither the state *nor any political subdivision* of the state nor, except in cases of wilful misconduct, the agents or representatives of the state or any political subdivision thereof nor any member of the civil preparedness forces of the state nor any person authorized by such civil preparedness forces or by any member of such civil preparedness forces complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state nor any person employed by or authorized to assist any agency of the federal government in the prevention or mitigation of any major disaster or emergency, shall be liable for the death of or injury to persons or for damage to property *as a result of any such activity*. The Attorney General shall appear for and defend the state, *any political subdivision of the state* and the agents or representatives of the state or any political subdivision thereof or

any member of the civil preparedness forces of the state or any other person exempted from liability for his acts under this section in any civil action brought for the death of or injury to persons or for damage to property *as a result of any civil preparedness activity*." (Emphasis added.)

By its plain language, the statute provides that several actors, including political subdivisions of the state, shall not be "liable for the death of or injury to persons or for damage to property as a result of any such activity." "[S]uch activity" refers to "complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." General Statutes § 28-13 (a). The statute unambiguously provides immunity to political subdivisions for death or injury to persons that result from, inter alia, attempted compliance with chapter 517 of the General Statutes. What is unclear from the plain language of the statute, however, is the nature of that immunity. Because the statute uses the word "liability," it could reasonably be interpreted as implicating governmental immunity—an immunity from liability, but not from suit. But the statute could also reasonably be read as conferring statutory immunity akin to sovereign immunity—an immunity from suit as well as liability. That reading finds support in the second half of § 28-13 (a), which requires the attorney general to "appear for and defend" political subdivisions. That dedication of state resources in the form of representation by the attorney general to matters typically handled by the corporation counsel of a political subdivision can reasonably be read as an attempt to shield political subdivisions from the cost and defense of lawsuits altogether. Because the statute is susceptible to more than one reasonable

interpretation, we conclude that it is ambiguous and, therefore, consider extratextual evidence of legislative intent, including the statute's legislative history and the policy objectives the statute was intended to implement. See *In re Henrry P. B.-P.*, supra, 327 Conn. 324–25.

The relevant legislative history, although scant, supports the city's argument that § 28-13 immunity constitutes an extension of sovereign immunity to political subdivisions. The statutory scheme at issue, which was originally enacted in 1949, addressed civil defense concerns and contemplated new forms of warfare, including the atomic bomb. See Conn. Joint Standing Committee Hearings, Judiciary, 1950 Spec. Sess., pp. 6–7. Wesley A. Sturges, a former administrator of the State Defense Council, testified before the Judiciary Committee during a 1950 public hearing concerning the reenactment of the statutory scheme, and opined as follows on the issue of immunity: "My other suggestion concerns [the provision of the] bill which has to do with granting of immunity to personnel engaged in Civil Defense Service and except for cases of [wilful] misconduct there should be no liability as to tort liability or under the [c]ivil [d]efense law. I recommend you consider that the [s]tate and political subdivisions make available defense counsel for these personnel members. It is well to say he shall not be liable for acts necessary in performance of duty but the opportunity for suit still obtains. When a suit is brought against me it costs me money and I believe it is worthy of consideration as a check for costs and payment for services." Id., pp. 7–9. Sturges' testimony highlighted the concern that suits might still be brought against civil defense personnel by requesting that the cost of representation in such a suit be borne by the state, effectively protecting personnel from one of the key costs of litigation. This testimony suggests that the legislature intended the lan-

guage at issue to address the difficulties faced by civil defense personnel as a result of such suits, even in cases in which people are ultimately immune from liability, thus indicating that the early intent of the legislation was to provide immunity from suit altogether.[12] See *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314, 819 A.2d 260 (2003) ("[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or purposes for which the legislature used the language in question." [Internal quotation marks omitted.]); see also, e.g., *State* v. *Bush*, 325 Conn. 272, 290–91, 157 A.3d 586 (2017); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 351 and n.11, 21 A.3d 737 (2011).

Legislative history from debates on certain alterations to the statutory scheme in 1979 resolves any lingering questions as to the legislature's intentions. In 1979, the legislature aligned the definitions of state law with the federal statutory scheme, in order to allow for a seamless response from federal, state, and local forces under a unity of command.[13] On the immunity provision

[12] Although this testimony could also be read to suggest that the early intent of the legislation was merely to provide immunity from liability, given that Sturges appears to have suggested that the opportunity for suit "still obtains," we decline to adopt such a reading because there is no colloquy suggesting that Sturges used "liability" and "suit" as terms of art, as contemplated by subsequent case law. This buttresses our more purposive interpretation of his testimony.

[13] The proponent of the relevant bill in the House of Representatives, Representative Michael R. Colucci, described the change as follows: "The intent of this bill is to align the [s]tate laws with the [f]ederal laws. The Disaster Relief Act of [1974] . . . has become the guideline in dealing with natural disasters and [General Statutes (Rev. to 1979) § 28-1] is amended by the addition of 'or a disaster' following the phrase 'by any such attack.' This is added purely for clarification purposes. Further, [the bill] inserts

specifically, a proponent of the relevant bill in the Senate, Senator Clifton A. Leonhardt, remarked: "[W]hat this [b]ill basically would do is bring certain aspects of our [c]ivil [p]reparedness [s]tatutes into line with federal statutes and federal guidelines in five areas. First of all, the [b]ill would distinguish between major disasters on the one hand and emergencies on the other so that the [state] could qualify for federal aid in emergencies that are less than federal disasters; less than major disasters. *It would also clarify that civil preparedness personnel, including federal employees, are protected from liability for actions related to their civil preparedness actions*." (Emphasis added.) 22 S. Proc., Pt. 7, 1979 Sess., p. 2121. Senator Leonhardt then expanded on what it meant to be "protected from liability" in an exchange with Senator Russell Lee Post, Jr.

"Senator Post: [Am] I correct Senator Leonhardt, that a person now who is authorized by the [s]tate as the result of a snowstorm occurring anywhere in the country, could come onto your property . . . and do damage, and *you would not have the right to sue them*? . . .

"Senator Leonhardt: As long as they are executing a civil preparedness function and they're not engage in a situation of [wilful] misconduct. That's the case. . . .

"Senator Post: If a person . . . is authorized by the [s]tate [and] comes onto your property and does damage, *it's not that that person is held harmless by the [s]tate and would recover any expenses of suit, but rather the property owner under this, has no recourse against the [s]tate or the town or any local official, operating under this [provision]?* Is that correct?

two new definitions for major disasters and emergency, while repealing the old definition for disaster. Again, this is done to align [f]ederal and [s]tate legislation. Having [f]ederal and [s]tate legislation say the same thing facilitates the administration of these laws." 22 H.R. Proc., Pt. 5, 1979 Sess., p. 1648.

"Senator Leonhardt: [*That*] *is correct. And I think this is very much in keeping with the long-standing tradition that in situations of civil emergency, the* [*s*]*tate has certain extraordinary powers that have to be executed and this statute is not changing the concept there at all*, except to extend it to federal officials who are assisting the [s]tate. *We're really building on a very long-time, well established concept and only saying that the same, very same concepts that we, for a long time had for local and state officials we're now going to extend to federal officials* who come into the [s]tate . . . at our request, to help us in times of civil emergency." (Emphasis added.) Id., pp. 2127–29.

This colloquy establishes that the bill's proponent in the Senate believed that the statute, as it previously existed, included the "very long-time, well established concept" that the immunity provided in the statute was immunity from suit and not from liability alone. Given the ambiguity of the statutory text, this language suggests that the legislature intended to provide to certain federal officials the same immunity from suit that it believed political subdivisions already enjoyed under the statute. Moreover, this construction is consistent with the purpose of the 1979 amendments to the statute, namely, bolstering a seamless unity of command whereby political subdivisions and local officials may be effectively conscripted into service on the state's behalf at the order of the governor. In such a situation, it is entirely reasonable that the legislature would wish to provide these local actors with the same immunity from suit that the state itself enjoys. See, e.g., *Cahill* v. *Board of Education*, 187 Conn. 94, 101–102, 444 A.2d 907 (1982) (municipal boards of education are "agents of the state responsible for education in the towns" entitled to sovereign immunity if board's "action would operate to control the activities of the state or subject it to liability"); see also *Vejseli* v. *Pasha*, supra, 282

Conn. 575 n.12. Although the city does not possess common-law sovereign immunity, it is clear from the salient legislative history that the legislature intended for § 28-13 to provide political subdivisions, like the city, with immunity from suit and not just immunity from liability. We conclude, therefore, that § 28-13 extends the state's sovereign immunity, including both its immunity from suit and liability, to political subdivisions. Accordingly, we further conclude that the city has a colorable claim of sovereign immunity, and, therefore, the trial court's denial of the city's motion for summary judgment constitutes a final judgment over which we have jurisdiction.

II

We now consider whether the trial court properly denied the city's motion for summary judgment on the basis of its determination that a genuine issue of material fact existed as to whether the civil preparedness emergency was still in effect on the date of the allegations of the plaintiff's complaint. The city's principal contentions are that the trial court improperly construed the statutes at issue and that the dispute of fact identified by the trial court, namely, whether the civil preparedness emergency was still in effect, is not a dispute of *material* fact. The plaintiff argues in response that the trial court properly construed the statutes, insofar as the city's failures to follow its local emergency service plan and to clear its roads are not activities for which the city is afforded immunity under § 28-13, and that, even if such activities are covered by § 28-13, the trial court correctly concluded that an issue of material fact still exists. We conclude that the trial court improperly construed the nature and scope of § 28-13 immunity and also incorrectly determined that there remains a genuine issue of material fact pertaining to the application of § 28-13 immunity.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy [this] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

Given our conclusion in part I of this opinion that § 28-13 represents an extension of the state's sovereign immunity to political subdivisions, we note that it is well established that "[s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we

exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 64–65, 23 A.3d 668 (2011). Accordingly, our standard of review over the trial court's legal construction of the statutory immunity provided for in § 28-13 is plenary.

As previously stated, our construction of a statute is governed by § 1-2z. See, e.g., *In re Henrry P. B.-P.*, supra, 327 Conn. 324–25. As we observed in part I of this opinion, by its plain language, § 28-13 (a) provides a number of actors, including political subdivisions of the state, with immunity from suit "for the death of or injury to persons or for damage to property *as a result of any such activity*," with "such activity" defined as "complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." (Emphasis added.) General Statutes § 28-13 (a). The statute unambiguously affords political subdivisions immunity for death or injury to persons that *result* from the "activity" delineated in § 28-13.

Our conclusion that this "activity" includes the EOC's command and control of storm response and snow removal, as well as decisions made during that process, such as those regarding which streets to plow and whether to send a fire truck in response to an emergency, finds further support in the plain text of § 28-13 (a). The first sentence of § 28-13 (a) immunizes political subdivisions, such as the city, from suit for the "death of or injury to persons or for damage to property" that results from "complying with or attempting to comply with this chapter or any order or regulation promul-

gated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . .'' The second sentence of § 28-13 (a) executes the immunity provided by the first sentence by requiring the attorney general to ''appear for and defend'' those entities and individuals described in the first sentence ''in any civil action brought for the death of or injury to persons or for damage to property as a result of any *civil preparedness activity*.'' (Emphasis added.)

General Statutes § 28-1 (4) defines civil preparedness broadly to include ''*all those activities and measures designed or undertaken* (A) *to minimize or control the effects upon the civilian population of major disaster or emergency*, (B) to minimize the effects upon the civilian population caused or which would be caused by an attack upon the United States, (C) *to deal with the immediate emergency conditions which would be created by any such attack, major disaster or emergency*, and (D) to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such attack, major disaster or emergency. *Such term shall include, but shall not be limited to, (i) measures to be taken in preparation for* anticipated attack, major disaster or emergency, including the establishment of appropriate organizations, operational plans and supporting agreements; the recruitment and training of personnel; the conduct of research; the procurement and stockpiling of necessary materials and supplies; the provision of suitable warning systems; the construction and preparation of shelters, shelter areas and control centers; and, when appropriate, the nonmilitary evacuation of the civilian population, pets and service animals; (ii) *measures to be taken during* attack, major disaster or emergency, including the enforcement of passive defense regula-

tions prescribed by duly established military or civil authorities; the evacuation of personnel to shelter areas; the control of traffic and panic; and the control and use of lighting and civil communication; and (iii) *measures to be taken following* attack, major disaster or emergency, *including activities for firefighting; rescue, emergency medical, health and sanitation services*; monitoring for specific hazards of special weapons; unexploded bomb reconnaissance; essential debris clearance; emergency welfare measures; and immediately essential emergency repair or restoration of damaged vital facilities." (Emphasis added.) The scope of activity included within § 28-13 is broad, as the types of activity listed in § 28-1 (4) include, but are not limited to, measures to be taken "in preparation for," "during," and "following" a major disaster or emergency.[14] General Statutes § 28-1 (4). Measures undertaken "to minimize or control the effects upon the civilian population of major disaster or emergency" and measures taken "following [a] major disaster or emergency," such as "activities for firefighting" and "rescue, emergency medical, health and sanitation services"; General Statutes § 28-1 (4); unambiguously include the EOC's command and control of storm response and snow removal, as well as decisions made during that process, such as decisions regarding which roads to clear and the circumstances in which a fire truck should respond to an emergency call.

The trial court concluded, however, that § 28-13 affords various state entities immunity from liability

[14] In emphasizing the breadth of the immunity afforded by § 28-13, we note that the activity prescribed by the statute includes "complying with *or attempting to comply with* this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." (Emphasis added.) Our broad interpretation of § 28-13 immunity is bolstered by the legislature's decision to immunize political subdivisions for even *attempting* to comply with the statutory scheme at issue.

only *during* a civil preparedness emergency. In so concluding, the trial court relied on the catchline of § 28-13: "Immunity from liability. Penalty for denial of access to property during civil preparedness emergency." We observe, however, that catchlines such as this one "are prepared, and from time to time changed, by the Revisors [of the General Statutes] and are intended to be informal brief descriptions of the contents of the [statutory] sections. . . . These boldface catchlines should not be read or considered as statements of legislative intent since their sole purpose is to provide users with a brief description of the contents of the sections." Preface to the General Statutes, p. vii; see also *Clark* v. *Commissioner of Correction*, 281 Conn. 380, 389 n.14, 917 A.2d 1 (2007). We conclude, therefore, that the trial court incorrectly concluded that § 28-13 immunity applies only *during* a civil preparedness emergency. Instead, as we have discussed, § 28-13 immunity, by the plain language of the statute, applies to the activities discussed in the statute, which include measures to be taken "in preparation for," "during," and "following" a major disaster or emergency. General Statutes § 28-1 (4).

Despite its construction of the statute, the trial court nevertheless concluded that the city had "met its [initial] burden of putting forth evidence sufficient to support a judgment in its favor on the ground of § 28-13 (a) immunity" and pointed to the following evidence to support its conclusion: (1) evidence showing that a civil preparedness emergency was declared for the state by Governor Malloy pursuant to § 28-9, and for the city by Mayor Finch, on February 8, 2013; (2) the testimony of Appleby that the EOC was in full operation by 8 a.m. on February 8, 2013, despite neither Governor Malloy's nor Mayor Finch's having yet officially declared a civil preparedness emergency; (3) evidence showing that, although snow stopped falling around noon on February

9, 2013, the EOC retained command and control of storm response and snow removal through February 14, 2013, and remained staffed and active through February 17, 2013, when the operational period ended, response was terminated, and the office was vacated by all personnel except Appleby; (4) a declaration from the United States Department of Homeland Security's Federal Emergency Management Agency that federal disaster aid had been made available to the state to supplement state, tribal, and local recovery efforts in the area affected by a severe winter storm and snowstorm from February 8 through 11, 2013; (5) evidence demonstrating that the relevant "incident period" occurred between February 8 and 12, 2013, and that a "major disaster" had been declared on March 21, 2013; and (6) the testimony of Brenda M. Bergeron, principal attorney for the Division of Emergency Management and Homeland Security within the Connecticut Department of Emergency Services and Public Protection, that Governor Malloy's declaration of a civil preparedness emergency was still in effect on February 11 and 12, 2013, and was not formally revoked until March 18, 2013, pursuant to Executive Order No. 33.

The trial court observed, however, that "the plaintiff has presented evidence contradicting the [city's] evidence with respect to whether [it] was still experiencing a civil preparedness emergency, for purposes of § 28-13 (a) immunity, at the time of [Tillman's] death." As contradicting evidence, the trial court cited the following: (1) "[w]ith respect to Mayor Finch's declaration, Appleby initially testified that he believe[d] it was revoked on February 16, 2013, but then subsequently stated that the EOC time line for the operational period designated a termination of the emergency operations response on February 17, 2013," and also testified "that he was unaware of any official declaration by [Mayor Finch] revoking the state of emergency"; (2) "with

respect to the city's . . . fire response protocol during the period in question, Appleby testified that, late in the day on February 8, 2013, the EOC issued a directive . . . that response of the police and fire departments would be restricted," Carfi testified "that the fire response protocol restriction was lifted prior to the evening of February 11, 2013," and Rooney testified that "fire engines and fire trucks could get out and respond to calls [on February 11, 2013], if necessary." (Internal quotation marks omitted.) We conclude that none of these facts is "[a] material fact . . . which will make a difference in the result of the case." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191–92, 177 A.3d 1128 (2018).

First, with respect to Appleby's testimony regarding the revocation of Mayor Finch's declaration, any dispute concerning the date of the revocation is not material because February 16 and 17, 2013, both came *after* the events at issue in this case. Most saliently, the revocation of Mayor Finch's declaration does nothing to dispute the ample evidence in the record showing that the city was "complying with or attempting to comply with [the civil preparedness statutes] or any order or regulation promulgated pursuant to the [the civil preparedness statutes]" on the date that the conduct at issue occurred. Specifically, the record contains evidence that the EOC retained command and control of storm response and snow removal through February 14, 2013, and remained staffed and active through February 17, 2013, evidence that a civil preparedness emergency was ongoing at that time pursuant to Governor Malloy's declaration, and evidence that efforts to clean city roads continued until at least February 12, 2013. Second, whether the partial lifting of the fire response protocol restriction occurred prior to the date of the allegations in the plaintiff's complaint likewise does not give rise to a material fact because that distinction does

nothing to contradict the ample evidence in the record that the city was still engaged in activities afforded immunity by § 28-13 on the date relevant to the plaintiff's allegations. Consequently, we conclude that the trial court incorrectly concluded that the city had failed to meet its ultimate burden of showing the absence of a genuine issue of material fact. The trial court, therefore, improperly denied the city's motion for summary judgment.[15]

The judgment is reversed and the case is remanded with direction to grant the city's motion for summary judgment and to render judgment thereon.

In this opinion the other justices concurred.

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[15] In her brief, the plaintiff also raises two constitutional issues, arguing that, if this court concludes "that immunity under § 28-13 is solely determined by the existence of a civil preparedness emergency, the statute is unconstitutional as applied." Because we do not conclude that the application of § 28-13 immunity is solely determined by the existence of a civil preparedness emergency, we need not address the plaintiff's constitutional claims. See, e.g., *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813, 12 A.3d 852 (2011) (court has "duty to eschew unnecessarily deciding constitutional questions" [internal quotation marks omitted]).

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CONNECTICUT APPELLATE REPORTS

Vol. 192

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A BETTER WAY WHOLESALE AUTOS, INC. *v.* JAMES SAINT PAUL ET AL. (AC 40014)

DiPentima, C. J., and Lavine, Sheldon, Keller, Elgo, Bright, Moll and Lavery, Js.*

Syllabus

The plaintiff motor vehicle dealer sought to vacate an arbitration award that was issued in favor of the defendants in connection with their purchase of a vehicle from the plaintiff. The parties had entered into a financing agreement that contained an arbitration provision stating that any arbitration would be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration. The defendants thereafter filed a demand for arbitration, claiming that the plaintiff had violated, inter alia, the Truth in Lending Act (15 U.S.C. § 1601 et seq.) when it required them to purchase certain contracts as a condition of the financing agreement. After the arbitrator awarded the defendants damages, attorney's fees and costs, the plaintiff filed in the trial court an application to vacate the award within the three month limitation period set forth in 9 U.S.C. § 12 to file an application to vacate, but beyond the thirty day limitation period permitted under state law (§ 52-420 [b]). The defendants thereafter filed an application to confirm the award, which the plaintiff did not oppose, and for an award of supplemental attorney's fees. The defendants also sought to dismiss the plaintiff's application to vacate on the ground that the trial court lacked subject matter jurisdiction because the application to vacate was not timely filed pursuant to § 52-420 (b). The trial court dismissed the plaintiff's application to vacate as untimely, granted the defendants' applica-

* This appeal originally was argued on May 21, 2018, before a panel of this court consisting of Chief Judge DiPentima, and Judges Moll and Lavery. Subsequently, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, Judges Lavine, Sheldon, Keller, Elgo and Bright were added to the panel, and additional oral argument was heard en banc on October 10, 2018. See footnote 3 of this opinion.

tion to confirm the award and awarded the defendants supplemental attorney's fees. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's appeal was not moot despite the plaintiff's failure to file an opposition to the defendants' application to confirm the award or to address the application to confirm in its brief to this court; this court could afford the plaintiff practical relief by reversing the trial court's dismissal of the application to vacate pursuant to statute (§ 52-417), as the question of mootness was inextricably intertwined with the plaintiff's claim that its application to vacate was improperly dismissed on timeliness grounds.
2. The trial court properly dismissed the plaintiff's application to vacate the arbitration award as untimely: the parties could not, as a matter of law, agree to have the three month limitation period in 9 U.S.C. § 12 apply to a vacatur proceeding in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b), which is subject matter jurisdictional in nature and applicable to any application to vacate an arbitration award brought in Connecticut state court; accordingly, this court's decision in *Doctor's Associates, Inc.* v. *Searl* (179 Conn. App. 577) was overruled insofar as it stands for the proposition that parties can, as a matter of law, agree, by way of a choice of law provision, to apply the three month limitation period in 9 U.S.C. § 12 to a vacatur proceeding brought in Connecticut state court.
3. Although the trial court erred when it reviewed the substance of the application to vacate the arbitration award after it ruled that the application should be dismissed, as the court lacked subject matter jurisdiction over the application to vacate, any error in its consideration of the plaintiff's application's in connection with its consideration of the defendants' application to confirm was harmless, as the court properly dismissed the plaintiff's application as untimely and confirmed the award.
4. The trial court did not abuse its discretion in awarding the defendants supplemental attorney's fees; that court was not required to adopt the findings of another trial court regarding the reasonableness of the hourly rates that were requested by the defendants' counsel, and the plaintiff's claim that no reasonable client would consider paying the hourly fee charged by the defendants' counsel was unavailing, as that argument lacked any citation to the record or to legal authority and was little more than the ipse dixit of the plaintiff's counsel.

(*Two judges dissenting in one opinion*)

Argued May 21 and October 10, 2018—officially released September 3, 2019

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury,

The listing of the judges reflects their seniority status on this court as of the date of oral argument on October 10, 2018.

where the defendants filed motions to confirm the award and for attorney's fees, and to dismiss the application to vacate the award; thereafter, the matter was tried to the court, *M. Taylor*, *J.*; judgment dismissing the application to vacate, and granting the motions to confirm and for attorney's fees, from which the plaintiff appealed to this court. *Affirmed.*

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

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court dismissing its application to vacate an arbitration award issued in favor of the defendants, James Saint Paul and Julie J. Saint Paul, and granting the defendants' application to confirm the arbitration award. On appeal, the plaintiff contends that the court improperly (1) dismissed its application to vacate as untimely, (2) engaged thereafter in a review of the substance of the plaintiff's application to vacate and concluded that the arbitration award did not manifest an egregious or patently irrational application of the law, and (3) awarded the defendants $2185 in supplemental attorney's fees. We conclude that the court properly dismissed the plaintiff's application to vacate as untimely and did not abuse its discretion in awarding supplemental attorney's fees. In light of our conclusion that the court properly dismissed the plaintiff's application to vacate as untimely, we also conclude that the court erred by reviewing the substance of the application but that such error was harmless. Accordingly, we affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. In early 2015, the defendants purchased a motor vehicle from the plaintiff, a

motor vehicle dealer located in Naugatuck. To finance their purchase, the defendants entered into a financing agreement with the plaintiff. The agreement contains an arbitration provision that provides, in part, that any dispute arising out of or relating to the purchase of the defendants' vehicle shall be resolved by binding arbitration. The agreement also contains a general choice of law clause, which provides that "[f]ederal law and the law of the state of our address shown on the front of this contract apply to this contract." The front of the financing agreement shows an address in Naugatuck. The arbitration section of the financing agreement contains a specific choice of law provision, which provides in relevant part: "[1] Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act [(FAA)] (9 U.S.C. § 1 et seq. [2012]) and not by any state law concerning arbitration. [2] Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the [FAA]." The arbitration section further provides in part that "[a]ny court having jurisdiction may enter judgment on the arbitrator's award."

On December 15, 2015, the defendants filed an arbitration demand with the American Arbitration Association, claiming that the plaintiff required the defendants to purchase an oil change contract and a service contract as a condition of financing in violation of the federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. (2012), and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On July 21, 2016, following an evidentiary hearing,[1] the arbitrator issued a so-called "unreasoned award" in favor of the defendants in the amount of $8797.81, which included $2297.81 in actual damages, $2000 in statutory damages under TILA, and $4500 in attorney's fees and costs. The arbitrator concluded that the plaintiff violated TILA by

[1] We note that the parties chose not to have the hearing transcribed.

failing to include the oil change contract and the service contract in the finance charge disclosure provision of the agreement.

On August 26, 2016, the plaintiff filed in the Superior Court an application to vacate the arbitration award pursuant to the FAA, claiming therein that the arbitrator exceeded his powers. On September 28, 2016, pursuant to General Statutes § 52-417,[2] the defendants filed an omnibus "motion to confirm arbitration award, opposition to plaintiff's application to vacate arbitration award, and motion for supplemental attorney's fees" (application to confirm). On November 9, 2016, the defendants filed a supplemental memorandum of law in opposition to the plaintiff's application to vacate, arguing therein that the plaintiff's application to vacate should be dismissed for lack of subject matter jurisdiction because it was not timely filed pursuant to General Statutes § 52-420 (b) ("[n]o motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion"). On December 7, 2016, the plaintiff filed a memorandum of law in support of its application to vacate, which did not address the timeliness issue raised by the defendants.

On December 30, 2016, following a hearing, the trial court dismissed the plaintiff's application to vacate as untimely filed pursuant to § 52-420 (b) and granted the

[2] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

defendants' application to confirm, including the defendants' request therein for $2185 in supplemental attorney's fees under TILA. This appeal followed.[3] Additional facts will be set forth as necessary.

I

As a threshold matter, we address the defendants' claim that the plaintiff's appeal should be dismissed as moot. The defendants argue that, because the plaintiff failed to file in the Superior Court an opposition to their application to confirm and did not address in this court the application to confirm, this court can no longer grant the plaintiff any practical relief. We disagree.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . A case is considered moot if [the] court cannot grant . . . any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 333, 179 A.3d 201 (2018). "Because mootness implicates our subject matter jurisdiction . . . it is a proper basis upon which to seek the dismissal of an appeal."

[3] A three judge panel of this court heard oral argument on May 21, 2018. Following argument, this court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the appeal would be considered en banc and ordered the parties to file supplemental briefs addressing the following questions:

"1. As a matter of law, with respect to an application to vacate an arbitration award filed in the Superior Court, can parties agree to an application of the three month limitation period set forth in the Federal Arbitration Act, 9 U.S.C. § 12?

"2. Does our Supreme Court's holding that the thirty day limitation period set forth in General Statutes § 52-420 (b) is subject matter jurisdictional; e.g., *Wu* v. *Chang*, 264 Conn. 307, 312 [823 A.2d 1197] (2003); *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344 [623 A.2d 55] (1993); affect the analysis under question [one]?

"3. What effect, if any, does this court's decision in *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577 [180 A.3d 996] (2018), have on your answers to questions one and two?"

The court heard oral argument en banc on October 10, 2018.

(Citation omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 96–97, 172 A.3d 1263 (2017).

In the present case, the question of mootness is inextricably intertwined with the principal substantive issue that the plaintiff raises on appeal, namely, whether the trial court improperly dismissed the plaintiff's application to vacate on timeliness grounds. See *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575–76, 953 A.2d 868 (2008). Notwithstanding the plaintiff's failure to file an opposition to the application to confirm in the Superior Court and its failure to address such application in its appellate brief, this court could afford the plaintiff practical relief by reversing the court's dismissal of the plaintiff's application to vacate on timeliness grounds. See General Statutes § 52-417 ("[t]he court or judge shall grant such an order confirming the award *unless the award is vacated*, modified or corrected as prescribed in sections 52-418 and 52-419" [emphasis added]). Therefore, we conclude that the plaintiff's appeal is not moot.[4]

II

We turn now to the merits of the plaintiff's claims on appeal. The plaintiff first claims that the court erred in dismissing its application to vacate as untimely under our state law on the ground that it was filed beyond the thirty day limitation period set forth in § 52-420 (b).[5] According to the plaintiff, the arbitration provision contained in the parties' financing agreement requires the application of the FAA in all respects, including its three month limitation period to file an application to

[4] We note that this court previously has rejected the identical argument in a similar appeal. See *A Better Way Wholesale Autos, Inc.* v. *Gause*, 184 Conn. App. 643, 646–47, 195 A.3d 747, cert. denied, 330 Conn. 940, 195 A.3d 693 (2018).

[5] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

vacate. See 9 U.S.C. § 12 (2012).[6] The defendants maintain that our state law governs the timeliness question presented, and, therefore, the trial court properly dismissed the plaintiff's application to vacate as untimely under § 52-420 (b). We agree with the defendants.

In the present case, it is uncontested that the plaintiff filed its application to vacate after the expiration of the thirty day limitation period set forth in § 52-420 (b) but within the three month limitation period set forth in 9 U.S.C. § 12. Whether the court properly dismissed the plaintiff's application to vacate as untimely depends on whether state or federal law controls the limitation period in which the plaintiff was required to file such application. Therefore, the question before us is a legal one. "[W]e review a [trial] court's decision to confirm or vacate an arbitration award de novo on questions of law . . . ." (Internal quotation marks omitted.) *Henry* v. *Imbruce*, 178 Conn. App. 820, 828, 177 A.3d 1168 (2017).

A

We first turn our attention to the fundamental question of whether parties can, *as a matter of law*, agree to have the FAA's three month limitation period set forth in 9 U.S.C. § 12 apply to a vacatur proceeding filed in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b). For the reasons that follow, we conclude that they cannot.

We begin with a brief review of the purposes and limitations of the FAA. In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration"; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); and

[6] Section 12 of title 9 of the 2012 edition of the United States Code provides in relevant part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . ."

to declare " 'a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston* v. *Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In that connection, § 2 of the FAA provides that arbitration agreements in contracts "involving commerce" are "valid, irrevocable, and enforceable." 9 U.S.C. § 2 (2012). The FAA was designed to place agreements to arbitrate "upon the same footing as other contracts . . . ." (Citation omitted; internal quotation marks omitted.) *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (*Volt*). The FAA " 'creates a body of federal substantive law,' " and "the substantive law the [FAA] created [is] applicable in state and federal courts." *Southland Corp.* v. *Keating*, supra, 12, quoting *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The United States Supreme Court has stated that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citation omitted; internal quotation marks omitted.) *Volt*, supra, 477.

The FAA does not create independent federal jurisdiction. The United States Supreme Court has described the nonjurisdictional nature of the FAA as follows: "As for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being 'something of an anomaly in the field of federal-court jurisdiction' in bestowing no

federal jurisdiction but rather requiring an independent jurisdictional basis." *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581–82, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), citing *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, supra, 460 U.S. 25 n.32. "While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland Corp.* v. *Keating*, supra, 465 U.S. 15 n.9.

"Given the substantive supremacy of the FAA, but [its] nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden* v. *Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009), superseded by statute in part on other grounds as stated in *Vermont* v. *MPHJ Technology Investments, LLC*, 803 F.3d 635, 643–44 (Fed. Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1658, 194 L. Ed. 2d 766 (2016), and cert. denied, *MPHJ Technology Investments, LLC* v. *Vermont*, U.S. , 136 S. Ct. 1660, 194 L. Ed. 2d 766 (2016). Accordingly, despite its expansive reach, the FAA does not extend so far as to preempt the procedural rules governing state court proceedings in the absence of an actual conflict with the purposes of Congress. That is because, as the United States Supreme Court has made clear, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, supra, 489 U.S. 476.

We now turn to our state law procedures governing an application to vacate an arbitration award brought in Connecticut state court. "A proceeding to vacate an arbitration award is not a civil action, but is rather a special statutory proceeding. . . . Section 52-420(b) requires that a motion to vacate an arbitration award

be filed within thirty days of the notice of the award to the moving party." (Citations omitted.) *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993).

Our Supreme Court repeatedly has held that the thirty day limitation period set forth in § 52-420 (b) is subject matter jurisdictional. See id. ("[i]f the motion is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the motion"); see also *Wu* v. *Chang*, 264 Conn. 307, 312, 823 A.2d 1197 (2003); *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 471, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 640–41, 79 A.3d 895 (2013), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014). Indeed, in *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 267–68, 193 A.3d 520 (2018), our Supreme Court recently reaffirmed the principle of legislative acquiescence, which, as applied to the present case, serves to buttress the court's long-standing interpretation of the limitation period set forth in § 52-420 (b) as subject matter jurisdictional. See id., 268 ("the legislature has never seen fit to overrule our conclusion that compliance with the repose period [in General Statutes § 52-555, this state's wrongful death statute] is a jurisdictional prerequisite to suit").[7] "[A]s an intermediate appellate court, we are

[7] In *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 266–69, our Supreme Court discussed its decision in *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 150 A.3d 1109 (2016). In *Blakely*, our Supreme Court asked the parties to submit supplemental briefs on the following question: "Should this court continue to characterize limitation periods contained within statutorily created rights of action as jurisdictional in nature . . . or should this court apply a presumption in favor of subject matter jurisdiction to statutory time limitations for all other actions and determine whether strong evidence of legislative intent exists to overcome that presumption?" (Citation omitted; internal quotation marks omitted.) Id., 749 n.5. In *Angersola*, our Supreme Court stated that its request for supplemental briefing in *Blakely* reflected "the tension we previously have perceived between our characterization of limitation periods contained

bound by Supreme Court precedent and are unable to

within statutorily created rights of actions as subject matter jurisdictional and the distinction we have repeatedly drawn between a trial court's jurisdiction and its authority to act under a particular statute." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 267. The court, in both cases, concluded that because § 52-555 created a cause of action that did not exist at common law, and because the legislature had acquiesced to the court's description of the statute of limitations contained therein as a limit on the court's subject matter jurisdiction, it would continue to treat it as such.

The same analysis applies here. "Arbitration proceedings, including court proceedings to compel arbitration, are creatures of statute in Connecticut and are not common law actions." (Internal quotation marks omitted.) *Bennett* v. *Meader*, 208 Conn. 352, 357, 545 A.2d 553 (1988). Furthermore, "[t]he right to review an arbitration award is wholly encompassed within the parameters of [General Statutes] § 52-418. [Section] 52-418 goes beyond the common law and provides additional grounds upon which to vacate an award." (Footnote omitted; internal quotation marks omitted.) Id., 356–57. In addition, it has been more than twenty-five years since the Supreme Court stated in *Middlesex Ins. Co.* v. *Castellano*, supra, 225 Conn. 344, that the failure to file a motion to vacate in state court within the thirty day time limit of § 52-420 (b) deprived the court of subject matter jurisdiction. Yet, the legislature has not chosen to amend the statute to say that it is not subject matter jurisdictional.

Although the foregoing analysis compels the conclusion that we must continue to view the time limit in § 52-420 (b) as jurisdictional, we can perceive of reasons why the legislature might consider amending the statute to permit parties to agree to waive the time limit. In particular, the right or obligation to arbitrate is a creature of the parties' agreement. If they so agree, they can construct the arbitration process in virtually any manner they wish. They can set the number and qualification of arbitrators. They can decide where and when the arbitration proceedings will take place, whether any rules of evidence will apply, whether there will be a transcript of the proceedings, whether the arbitrator will issue a reasoned or unreasoned award, and who will bear the costs of the arbitration proceedings. Given the freedom the parties have to construct their extrajudicial dispute resolution process as they see fit, it is fair to ask why the parties should not also be able to agree on the time to file a challenge to an award of the arbitrator. In fact, there may be good reasons for them to choose a period of time different from that set forth in § 52-420 (b). For example, the parties, particularly if they are in a long-term relationship, may wish to give themselves time to negotiate a resolution of their dispute after the arbitrator issues his or her award, or they may need time to negotiate how best to implement the award. Requiring them to file a motion to vacate within thirty days may impede their ability to reach an amicable resolution on such issues. An amendment to § 52-420 (b) that allows parties, by explicit written agreement,

modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018).

It is, of course, a bedrock principle that parties cannot agree to confer subject matter jurisdiction on a court, nor can they waive the lack of subject matter jurisdiction. *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 265–66 (statutory time limitation that is jurisdictional may not be waived); *Rayhall* v. *Akim Co.*, 263 Conn. 328, 337, 819 A.2d 803 (2003) ("[a]lthough both parties agree that this court has jurisdiction, a subject matter jurisdictional defect may not be waived . . . [or] conferred by the parties, explicitly or implicitly" [internal quotation marks omitted]); *Manning* v. *Feltman*, 149 Conn. App. 224, 236, 91 A.3d 466 (2014) ("subject matter jurisdiction cannot be conferred by waiver or consent").

The foregoing well settled principles require us to conclude that, as a matter of law, parties cannot contract around, by way of a choice of law provision, the subject matter jurisdictional nature of § 52-420 (b), applicable to any application to vacate an arbitration award brought in Connecticut state court. Therefore, the limitation period set forth in § 52-420 (b) applies to the plaintiff's application to vacate. It is not disputed that, if § 52-420 (b) is deemed to be the applicable limitation period, the plaintiff's application was untimely. Accordingly, we affirm the trial court's dismissal of the

to extend the date for filing motions to vacate would preserve the presumptive statutory deadline while providing a mechanism for avoiding judicial intervention that would be consistent with the general contractual nature of arbitration.

plaintiff's application to vacate as untimely under § 52-420 (b).[8]

B

In light of the foregoing conclusion, we deem it necessary to discuss a recent decision of this court, *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577, 180 A.3d 996 (2018).[9] By way of background, in *Doctor's Associates, Inc.*, the trial court had granted the plaintiff's application to confirm an arbitration award entered in its favor and concluded that the defendants' objection to that application, which the parties treated as a motion to vacate the award, was untimely filed under § 52-420 (b). Id., 579–82. On appeal to this court, the defendants claimed that, pursuant to the terms of the parties' arbitration agreement, either federal law or New York law governed the limitation period in which they had to file their motion to vacate the arbitration award. Id., 582–83. Specifically, the parties' agreement provided in relevant part: "Any disputes concerning the enforceability . . . of the arbitration clause shall be resolved pursuant to the [FAA] . . . *and the parties agree that the* [*FAA*] *preempts any state law restrictions . . . on the enforcement of the arbitration clause in this Agreement.*" (Emphasis altered.) Id., 585. Thereupon, this

[8] We recognize that if the plaintiff had filed its application to vacate in federal court, the thirty day limitation in § 52-420 (b) likely would not have applied, and the application would have been timely filed under the FAA, 9 U.S.C. § 12. Although at first glance, this may seem anomalous, it is simply an example of how the statutory procedures between two independent court systems can differ. Furthermore, this particular difference exists in virtually every case, regardless of the language of the arbitration agreement, where, as here, both the federal and state courts have jurisdiction over a motion to vacate the arbitration award.

[9] Following the trial court's December, 2016 decision in the present case, this court rendered its decision in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577. Prior to the initial oral argument in the present case on May 21, 2018, the parties were "ordered to be prepared to address, at oral argument, the applicability of *Doctor's Associates, Inc.* v. *Searl*, [supra, 179 Conn. App. 577] to this appeal."

court reasoned: "By agreeing that the [FAA] preempts any state law restrictions on the enforcement of the arbitration clause, the parties have made clear that federal law governs the procedures by which the arbitration clause contained in the franchise agreement is to be enforced. It necessarily follows that the procedure for moving to vacate an arbitration award is governed by federal law. Application of Connecticut's statute of limitations for filing a motion to vacate, pursuant to § 52-420 (b), would contradict the parties' contractual intent to use federal law, as expressly agreed to in the franchise agreement." (Footnote omitted.) Id., 585–86. Relatedly, this court also held that "the parties expressly agreed in [their] agreement that federal law preempted the state law procedures used to enforce the arbitration clause. Therefore, federal law should have been used to determine whether the defendants timely filed their motion to vacate." Id., 585–86 n.7. This court went on to note that the agreement contained a general choice of law provision, which provided that Connecticut law governed the agreement: "The Agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, *except as may otherwise be provided in this Agreement.*" (Emphasis altered.) Id., 586. However, this court reasoned that "[w]hen the general choice of law clause of the franchise agreement is read in light of the arbitration clause, it becomes clear that although, generally, Connecticut law governs the terms of the agreement, federal law governs the procedures used to enforce the arbitration clause." Id., 587. The court noted: "[W]e do not deviate from the established precedent that holds that the [FAA] does not preempt state law where the parties agreed to abide by state arbitration rules. In this case, the parties expressly intended and contracted that federal

law would apply to any disputes regarding the enforcement of the arbitration clause." Id., 586 n.8. Accordingly, this court reversed the judgment of the trial court, concluding that the defendants were entitled to a hearing to determine whether they timely moved to vacate the arbitration award pursuant to the FAA, and that, if so, the trial court was required to reach the merits of their motion. Id., 588.

We have provided the foregoing summary because in *Doctor's Associates*, *Inc.*, the parties did not raise, and this court did not address, the legal issues we have considered in part II A of this opinion, namely, the subject matter jurisdictional nature of the thirty day limitation period set forth in § 52-420 (b), or the related question of whether a choice of law clause in an arbitration agreement that purports to "preempt" the vacatur procedure under Connecticut law, specifically, § 52-420 (b), violates the principle that parties cannot agree to confer subject matter jurisdiction on the court. That is, *Doctor's Associates*, *Inc.*, assumed that parties could, as a matter of law, agree, by way of a choice of law provision, to an application of the FAA's three month limitation period set forth in 9 U.S.C. § 12 to a vacatur proceeding brought in Connecticut state court. The conclusion reached in part II A of this opinion, however, requires us to overrule this court's decision in *Doctor's Associates*, *Inc.* v. *Searl*, supra, 179 Conn. App. 577, insofar as it stands for the proposition that, as a matter of contract interpretation, parties can agree to have "the procedure for moving to vacate an arbitration award [in Connecticut state court] governed by federal law."[10] Id., 585–86.

[10] "[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." *Consiglio* v. *Transamerica Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999).

III

The plaintiff next claims that the court erred by reviewing the substance of the plaintiff's application to vacate after ruling that the application should be dismissed. We agree but conclude that any error was harmless.

"[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . Once it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiff['s] complaint, any further discussion of the merits is pure dicta. . . . Lacking jurisdiction, the court should not deliver an advisory opinion on matters entirely beyond [its] power to adjudicate." (Citations omitted; internal quotation marks omitted.) *Shockley* v. *Okeke*, 92 Conn. App. 76, 85, 882 A.2d 1244 (2005), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007).

In its memorandum of decision, the court dismissed the plaintiff's application to vacate and subsequently reviewed the substantive grounds of the plaintiff's application in connection with its consideration of the defendants' application to confirm.[11] Thereafter, the court granted the defendants' application to confirm, concluding that "[a]lthough the award was not vacated . . . had the application to vacate survived the motion to dismiss, there was no substantive basis set forth in [the plaintiff's] application to vacate the award . . . ."

Although the court lacked subject matter jurisdiction over the plaintiff's application to vacate, in light of our conclusion that the court properly dismissed the application as untimely and confirmed the arbitration award, any error inherent in the court's consideration of the

[11] The court stated that "[a]lthough [the plaintiff's] application to vacate has been dismissed, the court will briefly review the substance of its claim, as set forth in its brief dated December 7, 2016."

arguments made in the plaintiff's application to vacate was harmless.

IV

The plaintiff's final claim on appeal is that the court's award of $2185 in supplemental attorney's fees, pursuant to TILA, on the basis of a $400 hourly rate for Attorney Daniel S. Blinn, counsel for the defendants, is excessive. The defendants contend, to the contrary, that the court's award of supplemental attorney's fees was within the court's broad discretion. We agree with the defendants.

"It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 752, 170 A.3d 100 (2017).

In its memorandum of decision, the court applied the following presumptively reasonable fee standard, which the plaintiff does not challenge on appeal, stating: " 'To determine reasonable attorneys' fees, the [United States Court of Appeals for the] Second Circuit has historically implemented the lodestar method of examining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. . . . However, in 2008, the Second Circuit determined that [t]he meaning of the term "lodestar" has shifted over time, and its value as a metaphor has deteriorated to the

point of unhelpfulness.' *Arbor Hill Concerned Citizens Neighborhood Assn.* v. *County of Albany*, 522 F.3d 182, 190 (2d Cir. 2008). In place of the lodestar method, the court used the "presumptively reasonable fee" standard. . . .

" 'The presumptively reasonable fee standard is predicated on the same basic analysis as the lodestar method: the multiplication of the hours reasonably expended by a reasonable hourly rate. . . . Using the presumptively reasonable fee standard, the . . . court must engage in a four-step process: (1) determine the reasonable hourly rate; (2) determine the numbers of hours reasonably expended; (3) multiply the two to calculate the presumptively reasonable fee; and (4) make any appropriate adjustments to arrive at the final fee award. . . . As part of the reasonableness analysis, the . . . court should consider the factors enumerated in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)[12] . . . and may adjust the presumptively reasonable fee based on the degree of success of the prevailing party.' . . . *Negron* v. *Mallon Chevrolet, Inc.*, Civil No. 3:08-CV-182 (TPS), 2012 WL 435864 (D. Conn. September 24, 2012)." (Footnote in original.)

Applying the foregoing presumptively reasonable fee standard, the court concluded that the defendants are

[12] "'The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.' *Negron* v. *Mallon Chevrolet, Inc.*, Civil No. 3:08-CV-182 (TPS), 2012 WL 435864, *1 n.1 (D. Conn. September 24, 2012)."

entitled to a supplemental attorney's fee of $2185. The court reasoned: "Attorney Blinn is a highly experienced consumer affairs lawyer. He has provided the court with a detailed account of the hours billed in this case, his customary fee in this and similar matters, as well as hourly rates approved by courts in other cases. Although his hourly rate of $400 is relatively high, the court finds his briefs and other filings, totaling 175 pages, to have been produced in a highly professional and efficient manner. The court reaches this conclusion in light of the 6.4 hours of time billed by Attorney Blinn and his paralegal, at [her] lower hourly rate of $150, to produce one brief of sixteen pages in length, as well as a second brief, three pages in length. Attorney Blinn also appeared at two court proceedings in this matter. His efficiency appears to be the result of his experience in this area of the law and, thus, his hourly rate is appropriate in this case. Moreover, he has received a good disposition for his client in this case."

With regard to this claim on appeal, the plaintiff first contends that no reasonable paying client would consider paying an attorney $400 per hour to prosecute the claims brought in this relatively simple matter and that the client would inevitably spend more in attorney's fees than any anticipated gains from litigation would justify. Made without any citation to the record or any legal authority, the plaintiff's argument in this regard is little more than the ipse dixit of counsel and, thus, is unavailing. The plaintiff next contends that the trial court "ignored precedent" by awarding an hourly rate different from that awarded in *Freeman* v. *A Better Way Wholesale Autos, Inc.*, Docket No. CV-13-6045900-S, 2016 WL 1397704, *3 (Conn. Super. March 18, 2016), dismissed in part and aff'd in part, 174 Conn. App. 649, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017), in which the court, *Huddleston, J.*, described

the $400 hourly rate requested therein by Attorney Blinn (as counsel for the defendants in that case) as "somewhat high" and instead found $375 to be a reasonable hourly rate. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 651–52 n.1, 166 A.3d 857 (dismissing that portion of appeal contesting award of attorney's fees for failure to amend appeal to include such order), cert. denied, 327 Conn. 927, 171 A.3d 60 (2017). We reject this argument because it is well settled that "[t]rial court cases do not establish binding precedent"; *McDonald* v. *Rowe*, 43 Conn. App. 39, 43, 682 A.2d 542 (1996); and the court in this case simply was not required to adopt the findings of the court in *Freeman* regarding the reasonableness of the hourly rates requested.[13]

In sum, we conclude that the court did not abuse its discretion in awarding the defendants $2185 in supplemental attorney's fees.

The judgment is affirmed.

In this opinion DiPENTIMA, C. J., and LAVINE, KELLER, ELGO and BRIGHT, Js., concurred.

LAVERY, J., with whom SHELDON, J., joins, dissenting. I respectfully dissent from the majority's conclusion that the thirty day limitation period set forth in General Statutes § 52-420,[1] rather than the parties' contractual agreement to follow the three month period contained in the Federal Arbitration Act (FAA), 9 U.S.C.

[13] We further note that the plaintiff argued to the court that, for purposes of awarding any supplemental attorney's fees, Attorney Blinn's hourly rate should be capped at $300 per hour. Thus, the plaintiff's challenge to the award of supplemental attorney's fees, had it been meritorious, would have reduced the award by $490.

[1] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

§ 12 (2012),[2] controls the time frame within which the plaintiff, A Better Way Wholesale Autos, Inc., may file its application to vacate the arbitration award issued in favor of the defendants, James Saint Paul and Julie J. Saint Paul. Such a conclusion is contrary to the terms set forth in the parties' privately agreed upon arbitration clause in the parties' automobile financing agreement. Because I would hold that the terms of the parties' arbitration agreement govern, I respectfully dissent. See *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577, 585–86, 180 A.3d 996 (2018) (in accordance with parties' contractually agreed upon terms, FAA governed time period for filing motion to vacate arbitration award).

The facts are undisputed and aptly stated by the majority. I emphasize, however, that the parties' financing agreement contains a choice of law provision specifying that "[a]ny arbitration . . . shall be governed by the [FAA] (9 U.S.C. § 1 et seq. [2012]) and not . . . any state law concerning arbitration." Despite the clear language of the parties' contract, the trial court applied, and the majority affirms, the thirty day limit to file a motion to vacate, pursuant to state law.[3]

[2] Section 12 of title 9 of the 2012 edition of the United States Code provides in relevant part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . ."

[3] In its memorandum of decision, the court incorrectly stated that § 12 of the FAA did not apply because the plaintiff, pursuant to § 9 of the FAA, "was free to bring this application in the Connecticut federal district court where the longer, three month limitation applies." Section 9 of the FAA provides in relevant part that "[i]f no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . ." Section 9 of the FAA, however, does not confer subject matter jurisdiction in federal courts but, instead, "provide[s] an additional procedure and remedy . . . where jurisdiction already exists." (Internal quotation marks omitted.) *Metal Products Workers Union, Local 1645, UAW-AFL-CIO* v. *Torrington Co.*, 242 F. Supp. 813, 819 (D. Conn. 1965), aff'd, 358 F.2d 103 (2d Cir. 1966).

On this point, the United States Supreme Court has characterized the FAA as an "anomaly" in the area of federal jurisdiction, as "[the FAA] creates a body of federal substantive law establishing and regulating the duty to

Moreover, the parties agreed to be bound by the FAA in its entirety. Namely, the parties' agreement includes § 2 of the FAA, which binds state courts to render agreements to arbitrate "valid, irrevocable, and enforceable."[4] 9 U.S.C. § 2 (2012); see also *Vaden* v. *Discover Bank*, 556 U.S. 49, 71, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (in accordance with § 2 of FAA, both state and federal courts are obligated to honor and enforce agreements to arbitrate), superseded by statute in part on other grounds as stated in *Vermont* v. *MPHJ Technology Investments, LLC*, 803 F.3d 635, 643–44 (Fed. Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1658, 194 L. Ed. 2d 766 (2016), and cert. denied, *MPHJ Technology Investments, LLC* v. *Vermont*, U.S. , 136 S. Ct. 1660, 194 L. Ed. 2d 766 (2016). The majority's decision undercuts the arbitration terms as agreed upon by the parties.

The United States Supreme Court has recognized that it is incumbent upon states to honor the terms that the

honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction . . . ." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Accordingly, the court mistakenly referred to § 9 of the FAA as the source of federal jurisdiction in the present case.

Instead, the parties had federal question jurisdiction by virtue of their claim under the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. (2012). The parties otherwise did not have federal question or diversity jurisdiction. Accordingly, if the parties did not have their Federal Truth in Lending Act claim, then the court's decision not to enforce their agreement to follow § 12 of the FAA would have left them without the option to bring a motion to vacate after thirty days, despite their clearly agreed upon three month time frame.

[4] Section 2 of title 9 of the 2012 edition of the United States Code provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

parties set forth in their arbitration agreement. See, e.g., *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 n.27, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the United States Supreme court concluded that the FAA preempts application of state laws that render arbitration agreements unenforceable. The court determined that arbitration is strictly a matter of contract and, therefore, parties should be "at liberty to choose the terms under which they will arbitrate." (Internal quotation marks omitted.) Id., 472. "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." (Citation omitted.) Id., 479. The court, in essence, emphasized that the overarching national policy goal behind the FAA was not just to enforce the parties' contractual right to arbitrate, but, moreover, was to uphold the enforcement of stipulated obligations in the parties' arbitration agreement itself.

Following *Volt Information Sciences, Inc.*, the United States Supreme Court continually has recognized contractual freedom as the FAA's bedrock principle. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (parties' arbitration agreement contractual provisions govern which entity, court or arbitrator, shall decide whether condition precedent to arbitration has been fulfilled); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (question of whether court or arbitrator has primary ability to

decide arbitrability is determined by contractual agreement); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (contract between securities brokerage firm and customers permitted arbitration panel to award punitive damages to customers when arbitration clause was governed by rules of National Association of Securities Dealers, which permitted such award, despite agreement that New York law, prohibiting award of punitive damages, otherwise governed contract). Parties, therefore, generally are free to tailor their arbitration contract as they see fit. This court's decision in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577, was consistent with that principle.[5]

Accordingly, I would not hold that state law governs the arbitration agreement unless the parties express "a clear intent to incorporate state law rules for arbitration." (Internal quotation marks omitted.) *Fidelity Federal Bank, FSB* v. *Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004); see also *Martis* v. *Dish Network Service, L.L.C.*, 597 Fed. Appx. 301, 304 (6th Cir. 2015) (whether FAA or Michigan law applied resolved in favor of federal standard even though Michigan law governed arbitrator's substantive decision); *Johnson* v. *Gruma Corp.*, 614 F.3d 1062, 1067 (9th Cir. 2010) ("where the FAA's rules control arbitration proceedings, a reviewing court must also apply the FAA standard for vacatur"); see *Kim-C1, LLC* v. *Valent Biosciences Corp.*, 756 F. Supp. 2d 1258, 1261–62 (E.D. Cal. 2010); *New England Utilities* v. *Hydro-Quebec*, 10 F. Supp. 2d 53, 60–61 (D. Mass. 1998).

I do not mean to say that the FAA preempts the General Statutes regarding arbitration. That would be contrary to clear United States Supreme Court precedent. See *Volt Information Sciences, Inc.* v. *Board of*

[5] In *Doctor's Associates, Inc.*, the parties, in their contract, agreed that the FAA governed disputes concerning the enforceability of the arbitration clause therein. *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 585. This court upheld the parties' agreement to apply the FAA. Id., 585–86.

Trustees of Leland Stanford Junior University, supra, 489 U.S. 477. The parties, however, chose the FAA as the governing law. Because an "arbitration provision in an agreement is effectively an agreement that is separate and distinct from the broader contract"; *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 386, 926 A.2d 1035 (2007); and we must give effect to the parties' intent; *Levine* v. *Advest, Inc.*, 244 Conn. 732, 745–46, 714 A.2d 649 (1998); I cannot see how we would not enforce the parties' agreement that § 12 of the FAA governs the time limit to file a motion to vacate.

The majority, however, declines to enforce § 12 of the FAA, reasoning that our state courts must follow state procedural rules. Although acknowledging that the substantive law of the FAA applies in both state and federal court; see *Vaden* v. *Discover Bank*, supra, 556 U.S. 59; the majority maintains that the FAA does not preempt state procedural rules. Reasoning that our courts have considered § 52-420 (b) to be procedural and subject matter jurisdictional, the majority concludes that the thirty day limitation period set forth therein is not preempted by the FAA.

In support of its conclusion that § 52-420 (b) is procedural, the majority cites to a string of cases in which our courts have understood § 52-420 in the context of subject matter jurisdictional claims, but none of which involved a choice of law claim or a dispute as to which law governed the given arbitration agreement. See *Wu* v. *Chang*, 264 Conn. 307, 308, 823 A.2d 1197 (2003) ("sole issue raised by this appeal is whether a claim of fraud tolls the thirty day period within which a motion to vacate an arbitration award must be filed pursuant to General Statutes § 52-420 [b]"); *Vail* v. *American Way Homes, Inc.*, 181 Conn. 449, 450, 435 A.2d 993 (1980) (sole issue was enforceability of arbitration award ordering specific performance of construction contract for private dwelling); *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 470, 139 A.3d 774 (rejecting claims that court incorrectly concluded that

application to vacate was untimely under § 52-420 [b] on basis of due process deprivation; allegation that arbitration panel failed to consider defendant's testimony and evidence; erroneous factual findings; and award was contrary to public policy), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 633, 79 A.3d 895 (2013) (rejecting claim that court erred in concluding that it lacked subject matter jurisdiction under § 52-410), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014). Operating under the assumption that § 52-420 is procedural, the majority then reasons that parties cannot waive or otherwise contract around this statute. I do not agree with the majority's distinction between procedure and substance.

The mere fact that § 52-420 sets a time limitation does not compel the conclusion that it is procedural and, therefore, subject matter jurisdictional. The United States Supreme Court has characterized such provisions differently. Namely, in *Scarborough* v. *Principi*, 541 U.S. 401, 413–14, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004), the United States Supreme Court concluded that the time bar for filing a fee application set forth under the Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (1) (B) (2012), did not concern the federal courts' subject matter jurisdiction. The court reasoned that the time limitation pertained to postjudgment proceedings auxiliary to a matter already within the court's adjudicatory authority. *Scarborough* v. *Principi*, supra, 414.

Following this rationale, at least one court has set forth a compelling argument that the time limitation set forth in § 12 of the FAA is substantive, not procedural or jurisdictional. In *Equitas Disability Advocates, LLC* v. *Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d 197, 218 (D.D.C.), aff'd, 672 Fed. Appx. 13 (D.C. Cir. 2016), the court considered, in relevant part, whether an application to vacate was timely served under § 12 of the FAA. In light of United States Supreme Court precedent

indicating that "time prescriptions, however emphatic, are not properly typed jurisdictional in the sense of restricting courts' subject-matter jurisdiction," the court concluded that a question as to the timeliness for filing the motion to vacate the arbitral award did not concern the court's jurisdiction. (Internal quotation marks omitted.) Id., quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); see also *Craig* v. *Southwest Securities, Inc.*, Docket No. 05-16-01378-CV (BLG), 2017 WL 6503213, *2 (Tex. App. December 18, 2017) ("[s]ection 12 [of the FAA] provides a substantive three-month limitations period").

Additionally, *Equitas Disability Advocates, LLC*, noted that Congress has not specifically qualified the FAA as jurisdictional and, therefore, courts should treat any restrictions as to timeliness set forth therein as nonjurisdictional. *Equitas Disability Advocates, LLC* v. *Daley, Debofsky & Bryant, P.C.*, supra, 177 F. Supp. 3d 218; see also *Arbaugh* v. *Y & H Corp.*, supra, 546 U.S. 516 (threshold number of employees set forth in statute not jurisdictional in nature).

Applying these principles to § 52-420, I am not convinced that this statute necessarily is procedural and, therefore, subject matter jurisdictional. The majority acknowledges that "[a]rbitration proceedings, including court proceedings to compel arbitration are creatures of statute in Connecticut and are not common law actions"; (internal quotation marks omitted) *Bennett* v. *Meader*, 208 Conn. 352, 357, 545 A.2d 553 (1988); and that "[t]he right to review an arbitration award is wholly encompassed within the parameters of [General Statutes] § 52-418 . . . [which] goes beyond the common law and provides additional grounds upon which to vacate an award." Id., 356–57. If we accept those premises, then the thirty day limitation could be considered

an element necessary to establish a right, and, therefore, substantive in nature. See *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 340–41, 644 A.2d 1297 (1994); id., 340 ("[a] limitation period is considered 'one of the congeries of elements necessary to establish the right,' and therefore characterized as substantive, only when it applies to a new right created by statute"); but see *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 529, 294 A.2d 633 (1972) ("the general rule [is] that a time limitation on the enforcement of a right, created by statute and not existing at common law, is a part of the right and must be met in order to provide a court with jurisdiction to hear the cause of action"); see also *Ecker* v. *West Hartford*, 205 Conn. 219, 233, 530 A.2d 1056 (1987) (deeming wrongful death action jurisdictional under this general rule). Further, in *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995), the court, citing to our state precedent, held that § 52-420 is substantive because "[u]nder Connecticut law . . . jurisdictional time limits are not subject to waiver . . . ." It remains uncertain, therefore, that § 52-420 (b) is procedural.

The majority, nonetheless, posits that the principle of legislative acquiescence compels the conclusion that § 52-420 properly may be considered procedural. As support, the majority cites *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 193 A.3d 520 (2018). In *Angersola*, our Supreme Court directed the parties to file supplemental briefs to address the question, inter alia, of whether strong evidence existed as to legislative intent to overcome the presumption that the statutorily created rights under General Statutes § 52-555 were jurisdictional in nature. Id., 266. The court, in reaching its decision on this question, acknowledged that tension exists "between a trial court's jurisdiction and its authority to act under a particular statute." (Internal quotation marks omitted.) Id., 267.

In accordance with the principle of legislative acquiescence, the court reasoned that "[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision . . . ." (Citation omitted; internal quotation marks omitted.) Id., 267–68. Noting that the legislature had never, in thirty years, seen fit to overrule the court's conclusion that compliance with the repose period is a jurisdictional requirement, the court concluded that the legislature had acquiesced to such characterization, and, therefore, the court concluded that it was appropriate to consider § 52-555 as a jurisdictional requirement. Id., 268.

The majority's analysis, and that provided in *Angersola*, presume that the legislature's inactivity is sufficient to establish legislative acquiescence. That analysis, however, is incomplete. "[T]he legislative acquiescence doctrine requires actual acquiescence on the part of the legislature. [Thus] [i]n most of our prior cases, we have employed the doctrine not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not to amend the specific provision of the statute at issue. . . . In other words, [l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute." (Citation omitted; quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 525, 949 A.2d 1092 (2008); see also *Berkley* v. *Gavin*, 253 Conn. 761, 777 n.11, 756 A.2d 248 (2000) (legislative acquiescence requires actual acquiescence by legislature), superseded by statute in part on other grounds as stated in *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 716, 159 A.3d 1149 (2017).

Here, there is no evidence in the record that the legislature affirmatively has amended § 52-420 without choosing to address whether it is jurisdictional or substantive in nature. Moreover, it is not clear that any characterization of this statute as procedural and subject matter jurisdictional is accurate. I, therefore, would not conclude that the legislature has acquiesced to any language from the precedent the majority cites for the proposition that the time limitation in § 52-420 is procedural and subject matter jurisdictional.

In honoring the contractual freedom afforded to parties under the FAA, I would enforce the terms set forth in the parties' arbitration agreement. I, therefore, would hold that § 12 of the FAA, rather than § 52-420 of the General Statutes, governs the parties' motion to vacate and that our precedent in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577, be upheld.

Accordingly, I respectfully dissent.

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.
(AC 41208)

Sheldon, Elgo and Lavery, Js.*

Syllabus

The plaintiff appealed to the trial court from the decision by the defendant zoning board of appeals granting the application of the defendant P, filed on behalf of the defendant P Co., for approval of the location of a used car dealer on certain real property. The plaintiff claimed, inter alia, that the board failed to conduct the requisite suitability analysis, as required by the applicable statute (§ 14-55). The court agreed with the plaintiff's argument that § 14-55 applied and acknowledged that the board's certificate of approval looked and read like a variance, but concluded that the board gave due consideration to the suitability of

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

the proposed use and that the board's decision was, thus, akin to an approval under § 14-55. The trial court subsequently rendered judgment denying the plaintiff's appeal from the board's decision, from which the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that although published editions of the General Statutes have stated that § 14-55 has been repealed, in actuality, it has not been repealed, and that had the board properly followed § 14-55, it would have considered the suitability factors set forth therein. Although Public Acts 2003, No. 03-184, § 10 (P.A. 03-184), repealed § 14-55, effective October 1, 2003, Public Acts 2003, No. 03-265, § 9 (P.A. 03-265), which also became effective October 1, 2003, repealed and replaced § 14-55. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly concluded that the named applicant, P, had standing to apply to the board for location approval and, accordingly, was a proper party, which was based on its claim that P Co., in its business capacity, sought a used car dealer's license from the Department of Motor Vehicles, but the certificate of approval of the location application and subsequent hearing notification listed P as the applicant and, thus, the board's approval of P's application was improper because its decision was rendered in favor of a person rather than in the name of the proposed licensee; the record revealed that although P Co. was not the named applicant on the certificate of approval application, the totality of the circumstances sufficiently linked P to P Co., such that no one was misled or misunderstood the nature of the application, and, thus, the trial court did not err in concluding that P, as a representative of P Co., had standing to apply to the board for location approval.
2. Because § 14-55 has not been repealed, the board should have reviewed P's application under the standard set forth therein; given that there was no mention in P.A. 03-265, which repealed and replaced § 14-55, effective October 1, 2003, of P.A. 03-184, which ostensibly repealed § 14-55, effective October 1, 2003, and it was impossible to simultaneously give effect to both of those public acts, they were in irreconcilable conflict, and, thus, pursuant to statute (§ 2-30b), the later public act, P.A. 03-265, was deemed to have repealed and replaced the older public act, P.A. 03-184.
3. The board mistakenly treated P's application as if it were an application for a variance and, thus, failed to comply with the requirements set forth in § 14-55 in granting that application; even though P's application was a matter to which § 14-55 applied and even though the board heard evidence and issued several conditions of approval that, to some extent, could pertain to suitability, the record revealed that on several occasions P's application was referred to and treated as an application for a variance, the reasons that the board provided in its certificate of approval and the conditions provided therein were made with reference to an application for a variance, the board issued only one factual finding, in which it expressly applied variance standards provided in the local

zoning regulations, and the board issued no findings as to the suitability factors enumerated under § 14-55.

4. The trial court erred in searching beyond the board's stated reason for approval to find a basis for the board's decision and improperly upheld the board's decision on alternative grounds; because the board had stated its reason for approval, the trial court was not permitted to search the record for evidence that could support alternative grounds on which the board could have granted P's application, and, thus, when the court reviewed the record to determine whether the evidence could support a conclusion that the suitability requirement of § 14-55 was satisfied, even though the board did not make any findings on that point, the court was incorrect in substituting its own judgment for that of the board.

Argued February 13—officially released September 3, 2019

Procedural History

Appeal from the decision by the named defendant granting the application of the defendant Pasquale Pisano for approval of the location of a used car dealer on certain real property, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the plaintiff's appeal, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Jeffrey P. Nichols, with whom was *John W. Knuff*, for the appellant (plaintiff).

James V. Minor, special corporation counsel, with whom was *Kathryn Emmett*, director of legal affairs, for the appellee (named defendant).

Gerald M. Fox III, for the appellees (defendant Pasquale Pisano et al.).

Opinion

LAVERY, J. The plaintiff, One Elmcroft Stamford, LLC, appeals from the judgment of the Superior Court denying its appeal from the decision of the defendant Zoning Board of Appeals of the City of Stamford

(board), approving the application of the defendant Pasquale Pisano (defendant) to locate the defendant used car business, Pisano Brothers Automotive, Inc. (Pisano Brothers), at 86 Elmcroft Road in Stamford. On appeal, the plaintiff claims that the court improperly (1) determined that the defendant had standing to apply to the board for approval of the application, (2) upheld the board's decision, despite the board's failure to review the application in accordance with General Statutes § 14-55,[1] and (3) searched beyond the board's stated reason for approval of the application.[2] We disagree with the plaintiff's first claim but agree with the plaintiff's second and third claims. Accordingly, we reverse the judgment of the Superior Court.

The following facts and procedural history are relevant. Pisano Brothers is the lessee of the 6500 square foot parcel located at 86 Elmcroft Road in Stamford (property), in a General Industrial (M-G) zone. The plaintiff owns abutting property at 126 Elmcroft Road.

In June, 2016, the defendant, on behalf of Pisano Brothers, applied for a used car dealer license from the Department of Motor Vehicles, listing himself as vice president and his brother as president. Pursuant to General Statutes § 14-54, a license for "dealing in or repairing motor vehicles" requires a "certificate of approval of the location" (certificate of approval) from the appropriate local board. Accordingly, the defendant additionally applied to the board for its approval of a "used car dealer" on the M-G zoned property (Pisano application).

[1] Although § 14-55 is reported as "repealed," effective October 1, 2003, in our official state statute books, the parties dispute whether § 14-55 has been repealed. This matter will be discussed in part II A of this opinion.

[2] The plaintiff advances a number of additional claims that are collateral or inconsequential to our decision. Accordingly, we do not address them. See footnote 10 of this opinion.

The board referred the Pisano application to various city agencies and boards. The record contains advisements from the Planning Board of the City of Stamford (planning board) and the Engineering Bureau of the City of Stamford (engineering bureau). In a letter to the board dated September 8, 2016, the planning board "unanimously recommended denial of [the Pisano application]," opining "that the proposed application does not keep with the character of the neighborhood and . . . [is] not consistent with the 2015 Master Plan Category #9 (Urban Mixed-Use)." The engineering bureau advised that it found the proposal "will not result in any adverse drainage impacts" and, further, that approval of the Pisano application should be conditioned on the installation of a "[n]ew concrete curb and sidewalk . . . along the frontage of the property."

On September 14, 2016, the board held a public hearing on the Pisano application. The board posed several questions to the defendant and his attorney, Gerald M. Fox III. Two individuals spoke against the Pisano application. They were concerned about the inability to conceal the building and parking lot on the property with fencing, the lack of sidewalks, and the potential for a crowded parking lot. The plaintiff did not offer comment. The board, during its deliberations, noted that the defendant seemed amenable to complying with various conditions of approval that would make the property compatible with the local neighborhood. The board unanimously voted to approve the Pisano application. Subsequently, on September 29, 2016, the board issued a letter to the defendant, stating its approval and setting forth several conditions.

Pursuant to General Statutes § 14-57 and the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183 et seq., the plaintiff appealed to the Superior Court. The plaintiff advanced three claims: (1) the defendant was not a proper party and lacked standing

to apply to the board for location approval, (2) the board did not comply with hearing notice requirements, and (3) the board failed to conduct the requisite suitability analysis, as prescribed in § 14-55. As to the first two claims, the court disagreed. As to the third claim, the court agreed with the plaintiff's argument that § 14-55 applied and further acknowledged that "the board's certificate of approval looks and reads like a variance." Upon its review of the transcript from the September 14, 2016 public hearing, however, the court concluded that the board, nonetheless, gave due consideration to the suitability of the proposed use. It, therefore, reasoned that the board's decision was akin to an approval under § 14-55.[3] Accordingly, the court, in its memorandum of decision dated December 13, 2017, denied the plaintiff's appeal. Subsequently, pursuant to General Statutes § 4-184, the plaintiff appealed to this court.[4] Additional facts and procedural history will be set forth as necessary.

[3] The court, in its memorandum of decision, indicated: "[T]he court finds that the [board] properly considered the suitability of locating the Pisano business at 86 Elmcroft Road. The court has reviewed the full transcript of the [board] hearing and subsequent deliberations of the board on September 14, 2016 . . . and finds more than substantial evidence of the board's careful scrutiny of, and resulting conditions on, the Pisano application." (Citation omitted.) The court then referenced instances in which "board members questioned [the defendant] about the scope of his towing operation, the hours of operation and the location and the type of his repair work," the board noted that Pisano Brothers was "not a general towing operation," and that "repairs would take place inside the building." Additionally, the court noted that, during deliberations, the board considered that other businesses within the parameters of M-G zoning "could move in tomorrow" without board approval, considered several conditions of approval that would make the use more "acceptable to neighbors," and that the board even issued several conditions of approval. (Internal quotation marks omitted.) The court concluded that the board's conditions of approval constituted "stark evidence of the careful attention paid by the [board] to the issue of suitability."

[4] General Statutes § 4-184 provides: "An aggrieved party may obtain a review of any final judgment of the Superior Court under this chapter. The appeal shall be taken in accordance with section 51-197b."

I

We first address the plaintiff's claim that the court improperly concluded that the named applicant, the defendant, had standing to apply to the board for location approval and, accordingly, was a proper party. The plaintiff notes that Pisano Brothers, in its business capacity, sought a used car dealer's license from the Department of Motor Vehicles, but the certificate of approval application and the subsequent hearing notification listed the defendant as the applicant. Accordingly, the plaintiff contends that the board's approval of the Pisano application was improper because its decision was rendered in favor of a person rather than in the name of the proposed licensee. The plaintiff cited no authority in support of this proposition. We are not persuaded.

"[T]he standard for determining whether a party has standing to apply in a zoning matter is less stringent [than the standard that applies to a determination of whether a party is aggrieved]. A party need have only a sufficient interest in the property to have standing to apply in zoning matters. . . . [I]t is not possible to extract a precise comprehensive principle which adequately defines the necessary interest . . . ." (Internal quotation marks omitted.) *RYA Corp.* v. *Planning & Zoning Commission*, 87 Conn. App. 658, 663, 867 A.2d 97 (2005). Here, the issue is not whether Pisano Brothers has standing but, instead, whether standing, in effect, was voided by virtue of a technical glitch in listing the defendant as the applicant.

RYA Corp. v. *Planning & Zoning Commission*, supra, 87 Conn. App. 658, presented similar circumstances as in the present case. In that case, the applicable zoning regulations required that an applicant be a "record owner or developer . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 669. Although the plaintiff subdivision applicant, The RYA Corporation (RYA), did not qualify as such, the plaintiff record

owner, Myers Nursery, Inc. (Myers, Inc.), consented in writing to RYA filing the application. Id., 667–68. The defendant planning and zoning commission claimed that the trial court improperly concluded that Myers, Inc., had standing to appeal the planning and zoning commission's decision, arguing that RYA had not "established definitively by the terms of the consent form" that it was acting under the authority of Myers, Inc. Id., 668.

This court concluded that the property owner requirement set forth in the applicable zoning regulations was satisfied, stating: "As a matter of law, we are not persuaded that the trial court was required to read these documents as narrowly as do[es] the [planning and zoning commission]. Taking into account the totality of the relationship between Myers, Inc., and RYA, the court had the authority to conclude that the physical linkage between the application and the consent form gave Myers, Inc., a sufficient interest to have standing to contest the denial of the proposed subdivision. This conclusion is supported not only by the nature of the documentation itself but because, as noted previously, the court reasonably might have found that RYA was acting as Myers, Inc.'s agent in filing the subdivision application." Id.; see also *Loew* v. *Falsey*, 144 Conn. 67, 73–74, 127 A.2d 67 (1956) (fact that owner of corporation, E. M. Loew, applied for permit in his own name, rather than in name of his corporation, E. M. Loew, Inc., did not mislead anyone and there was no reason why permit could not have been granted under name provided, and, accordingly, no jurisdictional defect resulted simply by incorrectly using name of owner in permit application).

Similarly, the record in the present case reveals that although Pisano Brothers was not the named applicant on the certificate of approval application, the totality of the circumstances sufficiently link the defendant to Pisano Brothers, such that no one was misled or misunderstood the nature of the application. The application

for a used car dealer license from the Department of Motor Vehicles lists "Pisano Brothers Automotive Inc." as the name under which the business was to be conducted, with the defendant and his brother identified as officers of the company. The proposed improvement location survey identified "Pisano Brothers Automotive, Inc.," as the prospective user. Additionally, at the outset of the public hearing, the defendant was introduced as one of the owners of Pisano Brothers, along with his brother. Accordingly, we conclude that the court did not err in concluding that the defendant, as a representative of Pisano Brothers, had standing to apply to the board for location approval.

II

The plaintiff claims that the court erred in upholding the board's decision, despite the board's failure to apply the standard set forth in § 14-55. Although the plaintiff did not offer comment or argument before the board during the public hearing, the plaintiff argued before the trial court that despite the fact that the then current edition of the General Statutes provided that § 14-55 had been repealed, in actuality, it had not been repealed. The plaintiff contended that had the board properly followed § 14-55, it would have considered the suitability factors set forth therein, namely, "due consideration to [the proposed use's] location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel." The plaintiff, therefore, contended that the board not only failed to issue any findings as to these suitability factors, but, further, it improperly treated the Pisano application as one for a variance. The court concluded that the record reflected that the board gave due consideration to the requisite suitability factors. The court, therefore, denied the plaintiff's appeal.

Before this court, the plaintiff maintains that, despite the fact that published editions of the General Statutes

have stated that § 14-55 has been repealed, in actuality, it has not been repealed. The board agrees that the statute has not been repealed but argues, nonetheless, that it substantially complied with the statute's requirements in granting the Pisano application. The defendant and Pisano Brothers argue that § 14-55 was repealed but that, even if it was not repealed, the board substantially complied with the statute. We conclude that (1) § 14-55 had not been repealed at the time of the board's action on the Pisano application, and (2) the board mistakenly treated the Pisano application as if it were an application for a variance and, thus, failed to comply with the requirements set forth in § 14-55 in granting that application. We will address both matters in turn.

A

As a threshold matter, we address whether § 14-55 had been repealed at the time of the board's action. This precise issue was addressed by our Superior Court in 2011 in an opinion authored by the court, *D. Tobin*, *J.*, which concluded that § 14-55 was not repealed. See *East Coast Towing, Ltd.* v. *Zoning Board of Appeals*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6003028-S (March 2, 2011) (51 Conn. L. Rptr. 572). The plaintiff submits that the court's decision in *East Coast Towing, Ltd.*, was sound and, accordingly, that the court correctly concluded that § 14-55 remained in effect, despite its apparent repeal. We agree with Judge Tobin's well reasoned decision in *East Coast Towing, Ltd.*, and, accordingly, conclude that § 14-55 has not been repealed.

"The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual

evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z. Following the apparent repeal of § 14-55, we are left with no text to consider. Accordingly, to determine whether this statute remains in effect, we will look to extratextual evidence, such as the legislative history. See *State* v. *Russo*, 259 Conn. 436, 447–48, 790 A.2d 1132 (process of statutory interpretation involves, inter alia, searching legislative history to discern legislative intent), cert. denied, 537 U.S. 879, 123 S. Ct. 79, 154 L. Ed. 2d 134 (2002). Although compilations of the General Statutes list § 14-55 as having been "repealed," this fact is not dispositive of the issue at hand.[5]

Judge Tobin's decision in *East Coast Towing, Ltd.*, provides a well reasoned and principled basis upon which we also conclude that § 14-55 has not been repealed. Judge Tobin's reasoning was as follows. In 2003, the legislature made a series of changes to § 14-55. First, in Public Acts 2003, No. 03-184, § 10 (P.A. 03-184), the legislature ostensibly repealed § 14-55 of our General Statutes, effective October 1, 2003. *East Coast Towing, Ltd.* v. *Zoning Board of Appeals*, supra, 51 Conn. L. Rptr. 575. The legislature then, in Public Acts 2003, No. 03-265, § 9 (P.A. 03-265), repealed and replaced § 14-55, also effective October 1, 2003.[6] Id.,

[5] This court has held that compilations of public acts prepared by the Legislative Commissioners' Office do not constitute the actual law of this state: "[T]he compilations of the public acts are not published on the day a law effective on passage is approved by both houses and signed by the governor, allowed to become law without signature of the governor or repassed by a two-thirds majority of the legislature following a gubernatorial veto. . . . [I]t is not the publication of these acts in the [p]ublic [a]cts compilations that makes them effective against members of the public, but their lawful passage by the General Assembly." *Figueroa* v. *Commissioner of Correction*, 123 Conn. App. 862, 870, 3 A.3d 202 (2010), cert. denied, 299 Conn. 926, 12 A.3d 570 (2011).

[6] P.A. 03-265, § 9, provides: "Section 14-55 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2003):

"In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval

575–76. Finally, in Public Acts 2003, No. 03-278, § 40, which took effect from passage on July 9, 2003, the legislature repealed and replaced the then current version of § 14-55, making a minor, technical correction to it without any mention of either P.A. 03-184, § 10, or P.A. 03-265, § 9, both of which were to become effective on October 1, 2003.[7] See id., 576.

Pursuant to General Statutes § 2-30b (a), "[w]hen two or more acts passed at the same session of the General Assembly amend the same section of the general statutes, or the same section of a public or special act, and

referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing. The applicant may consent to one or more extensions of any period specified in this section, provided the total extension of any such period shall not be for longer than the original period as specified in this section. The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel. *In any case in which such approval has been previously granted for any location, the local authority may waive the requirement of a hearing on a subsequent application. In addition, the local authority may waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property.*" (Emphasis added.) The italicized sentences indicate the portions that were added to the 2003 revision of § 14-55.

[7] Because this amendment to § 14-55 was effective on July 9, 2003, and P.A. 03-265, § 9, took effect on October 1, 2003, we conclude that P.A. 03-265, § 9, replaced the July amendment on October 1, 2003.

reference to the earlier adopted act is not made in the act passed later, each amendment shall be effective except in the case of irreconcilable conflict, in which case the act which was passed last in the second house of the General Assembly shall be deemed to have repealed the irreconcilable provision contained in the earlier act . . . .'' Our Supreme Court has held that the term ''amendment,'' as used in § 2-30b, applies ''to all acts which expressly change existing legislation,'' including public acts. (Internal quotation marks omitted.) *State* v. *Kozlowski*, 199 Conn. 667, 676, 509 A.2d 20 (1986).

In the present case, there is no mention in P.A. 03-265 of P.A. 03-184, and it is impossible to give effect to both public acts, simultaneously. Accordingly, P.A. 03-184 and P.A. 03-265 are in ''irreconcilable conflict.'' Thus, pursuant to § 2-30b, the later public act must be deemed to have repealed and replaced the older public act. See also footnote 7 of this opinion.

Public Act 03-184 was passed by the House of Representatives on May 13, 2003, then by the Senate on June 2, 2003, and, subsequently was signed into law by the governor on June 26, 2003. Public Act 03-265 was passed by both houses of the legislature on June 4, 2003, and, subsequently was signed into law by the governor on July 9, 2003. With both public acts being in irreconcilable conflict, and with P.A. 03-265 being enacted last, P.A. 03-265 sets forth the version of the statute that went into effect.

We are aware of no laws that have been passed to repeal or otherwise amend § 14-55 since Judge Tobin's decision in *East Coast Towing, Ltd.* Additionally, no appeal was taken from Judge Tobin's decision and, otherwise, there have been no appellate decisions addressing whether the version of § 14-55 set forth in P.A. 03-265 has been repealed. We are persuaded that

Judge Tobin's analysis is correct, and, therefore, we adopt his reasoning.

Accordingly, we conclude, in accordance with the language of P.A. 03-265, § 9, that the current revision of § 14-55 of the General Statutes, which remains in effect to this date, provides: "In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing. The applicant may consent to one or more extensions of any period specified in this section, provided the total extension of any such period shall not be for longer than the original period as specified in this section. The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway

and effect on public travel. In any case in which such approval has been previously granted for any location, the local authority may waive the requirement of a hearing on a subsequent application. In addition, the local authority may waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property."

In light of the foregoing analysis, we conclude that § 14-55 was not repealed. Accordingly, the board should have reviewed the Pisano application under the standard set forth therein.

B

We now address whether the board, despite erroneously treating the Pisano application as one for a variance, complied with the requirements of § 14-55. The plaintiff claims that the board approved the Pisano application under the wrong standard. It contends that the board mistakenly treated the Pisano application as though it was an application for a variance and, in so doing, applied a set of criteria that did not comport with the analysis required under § 14-55. The board contends that the court correctly determined that the board gave due consideration to the necessary factors. The defendant and Pisano Brothers essentially contend that the use of variance language by the board was merely a clerical error. We agree with the plaintiff.

The record reveals that on several occasions the Pisano application was referred to and treated as an application for a variance. On his certificate of approval application, the defendant requested a variance for the following section of the Stamford zoning regulations: "APA TAB II #55 to allow a used car dealer to [b]e [l]ocated in . . . [M-G] zone." In reviewing the Pisano application, the engineering bureau referred to the application as a "variance to allow for a used car dealer

to be located in the M-G [z]one . . . .'' At the outset of the public hearings, a board member further stated, without correction, that ''[t]he engineering bureau has reviewed the plans for a variance to allow for a used car dealer to be located in the [M-G] zone . . . .'' Further, the board's certificate of decision regarding the Pisano application certified that it granted ''the application . . . for a variance of Motor Vehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the Zoning Regulations . . . .''

In approving the Pisano application, the board issued one finding, in which it directly quoted the following variance standard provided in the Stamford zoning regulations: ''[S]trict application of the provisions of these Regulations would deprive the applicant of the reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building.''[8] Stamford Zoning Regs., art. v, § 19

[8] The board's certificate of decision stated: ''THE BOARD FINDS:

''1. That the aforesaid circumstances of conditions is/are such that the strict application of the provisions of these Regulations would deprive the [defendant] of the reasonable use of such land or building(s) and the granting of the application is necessary for the reasonable use of the land or building(s).

''The [b]oard GRANTS a Motor Vehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the Zoning Regulations in order to allow a Used Car Dealer to operate and be located in an [M-G] zone. This application is exempt from Coastal Area Management Approval, Exemption Number 10C, subject to the following restrictions:

''1. All concerns of the [e]ngineering [bureau] shall be adhered to.

''2. There shall be no more than [six] cars parked in the front.

''3. The [defendant] shall make an effort to contact the [e]ngineering [b]ureau and discuss having [it] add sidewalks to the area.

''4. The hours of operation shall be [8 a.m. to 6 p.m.], Monday through Saturday.

''5. There shall be no vehicular parking between the front property line and the curb on Elmcroft Road.

''6. There shall be one tow truck only on the premises.

''7. There shall be year round evergreen screening around the property.

''8. There shall be no auto body shop or painting of cars on the premises.

''9. All cars belonging to visitors, patrons or employees shall be parked on the site at all times.

(2.2) (a) (2). In so finding, as the plaintiff contends, the board expressly (1) applied variance standards provided in the local zoning regulations, instead of certificate of approval standards provided in § 14-55, and (2) based its decision on the defendant's private "deprivation," instead of basing its decision on the suitability of the proposed use. We agree with the court that "the board's certificate of approval looks and reads like a variance."[9]

"[W]here a board is acting pursuant to a statute or an ordinance which requires a specific finding made after a consideration of enumerated factors, the minutes of the board should show that due consideration was given to those factors and that the conclusion reached was within the power given to the board." *Dubiel* v. *Zoning Board of Appeals*, 147 Conn. 517, 522–23, 162 A.2d 711 (1960); see also *New Haven College, Inc.* v. *Zoning Board of Appeals*, 154 Conn. 540,

"10. No vehicle repairs shall be permitted outside of the building.

"11. No impact tools shall be used outside of the building.

"12. No storage of inoperative vehicles shall be permitted outside of the building.

"13. Outside visible storage of any automotive equipment, including tires, batteries, auto parts, etc., shall not be permitted.

"14. The location, size, and appearance of the building and improvements shall be as per plan depicted on IMPROVEMENT LOCATION SURVEY, dated revised [July 15, 2016], copies of which are on file in the office of the [board].

"The applicant is allowed one year from the effective date of approval in which to obtain a building permit." (Emphasis omitted.)

[9] During the pendency of the plaintiff's appeal to the Superior Court, the board issued a "Revised Certificate of Decision" (revised decision), stating: "NOTE—This corrected Certificate eliminates 'variance' language on the original Certificate of Decision . . . since [the Pisano application] . . . is an application for [certificate of approval] of a Used Car Dealership." This revised decision was submitted to the Superior Court in a supplemental return of record. The record contains no indication as to how this revised decision was made, and it does not appear to have been issued in accordance with the modification procedures set forth in General Statutes § 4-181a et seq. It does not appear that the Superior Court considered the revised decision when rendering its judgment. We also have not considered it in rendering our opinion.

543–44, 227 A.2d 427 (1967); *Ferreira* v. *Zoning Board of Appeals*, 48 Conn. App. 599, 603–604, 712 A.2d 423 (1998).

Pursuant to § 14-55; see P.A. 03-265; the board must consider a number of suitability factors: "No [certificate of approval] shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel." See *New Haven College, Inc.* v. *Zoning Board of Appeals*, supra, 154 Conn. 543 (zoning board of appeals should consider "suitability of the proposed location in view of the proximity of schools, churches, theaters, or other places of public gatherings, intersecting streets, traffic conditions, width of the highway and the effect of public travel . . . [and should also indicate] that use of the proposed location will not imperil the safety of the public"). Although the board need not "exalt technicality" in the manner in which it states its findings, it is in the interests of "facilitat[ing] judicial review . . . assur[ing] a more careful administrative consideration, and . . . keep[ing] the administrative agency within the bounds of its functions and powers"; *Dubiel* v. *Zoning Board of Appeals*, supra, 147 Conn. 523; to ensure that the record evinces the board's due consideration of the requisite suitability factors.

Although the suitability factors prioritize public concerns, a variance application does not require the board to consider those same factors. "[T]he authority of a zoning board of appeals to grant a variance . . . requires the fulfillment of two conditions: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the

general purpose of the zoning plan." (Internal quotation marks omitted.) *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 368, 537 A.2d 1030 (1988).

In this case, the board issued only one factual finding, in which it referenced the need to permit the defendant to make reasonable use of the land. Although the board heard evidence that, to some extent, could pertain to suitability, and also issued several conditions of approval that accommodate potential concerns within the neighborhood, the board issued no findings as to the suitability factors enumerated under § 14-55. The reasons that the board provided in its certificate of approval and the conditions provided therein were made with reference to an application for a variance, even though the Pisano application was a matter to which § 14-55 applies. We, therefore, direct the board on remand to consider the Pisano application in accordance with § 14-55.[10]

III

The plaintiff claims that the court erred in searching beyond the board's stated reason for approval to find a basis for the board's decision. It argues that the court improperly upheld the board's decision on alternative grounds, not stated in the board's decision. In response, the defendant and Pisano Brothers essentially maintain that the court's reasoning and conclusion were sound. We agree with the plaintiff.

"When considering [an] application for [a certificate of approval] . . . [a] zoning board of appeals act[s] as

[10] Our conclusion that § 14-55 was not repealed and sets forth the applicable certificate of approval application procedures, in effect, resolves several of the plaintiff's remaining claims. Therefore, we do not reach their merits. See *First Church of Christ, Scientist* v. *Friendly Ice Cream*, 161 Conn. 223, 228–29, 286 A.2d 320 (1971) ("The plaintiffs have pursued several other assignments of error. We need not review these conclusions, however, since they would not affect the final result.").

a special agent of the state. . . . When receiving, hearing and eventually deciding whether to grant the application, the [board] does not act pursuant to either the municipal zoning ordinance or the zoning statutes. . . . Thus, the [board] does not act as the voice of the people . . . . Rather, it acts in a special capacity, serving as the local agency named by the General Assembly to determine whether a certificate of approval should be issued . . . .

"As an agent of the state, the [board] must follow the statutory criteria in determining whether to issue the certificate of approval. . . . [Section] 14-55 sets forth the criteria to be followed by an agency when making its decision. The [board] cannot grant a certificate until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway, and effect on public travel. . . .

"Because the [board] acts as a special agent of the state in issuing certificates of approval, the trial court's scope of review of the [board's] decision is governed by the [UAPA]." (Citations omitted; internal quotation marks omitted.) *Vicino* v. *Zoning Board of Appeals*, 28 Conn. App. 500, 504–505, 611 A.2d 444 (1992). Section 4-183 (j) provides in relevant part that the trial court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." "When a [board] states its reasons in support of its decision on the record, the court goes no further, but if the [board] has not articulated its reasons, the

court must search the entire record to find a basis for the [board's] decision." (Internal quotation marks omitted.) *Azzarito* v. *Planning & Zoning Commission*, 79 Conn. App. 614, 618, 830 A.2d 827, cert. denied, 266 Conn. 924, 835 A.2d 471 (2003). "Neither this court nor the trial court may retry the case . . . ." (Internal quotation marks omitted.) *Okeke* v. *Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012).

In this case, the board found that strict application of the municipal zoning regulations would deprive the defendant of reasonable use of the land and that granting the Pisano application would be necessary to afford the defendant such reasonable use. Because the board stated its reason for approval, the court was not permitted to search the record for evidence that could support alternative grounds on which the board could have granted the Pisano application. See *Azzarito* v. *Planning & Zoning Commission*, supra, 79 Conn. App. 618.

In the present case, having concluded that § 14-55 applied, the court, thereafter, provided its own inferences as to how the board might have classified and weighed the public hearing testimony. On the basis of the transcript of the September 14, 2016 public hearing, the court was satisfied that the board had given due consideration to the effect the proposal would have on neighboring residences, and, accordingly, the court concluded that the proposal would constitute a suitable use.

Although the board heard testimony that, to some extent, could pertain to the suitability of operating a business at the given location, the board did not make any findings on that point. When the court reviewed the record to determine whether the evidence, nonetheless, could support a conclusion that the suitability requirement was satisfied, the court was incorrect in substituting its own judgment for that of the board. See id. By

reviewing the evidence beyond the board's finding, the court conducted its own de novo review of the Pisano application rather than reviewing the board's decision under the appropriate abuse of discretion standard. Moreover, it was incumbent upon the board to make the requisite suitability findings. See *New Haven College, Inc.* v. *Zoning Board of Appeals*, supra, 154 Conn. 543–44 (concluding that trial court did not err in sustaining plaintiff's appeal where board failed to consider specific suitability factors). We, therefore, conclude that the court employed an incorrect standard of review.

The judgment is reversed and the case is remanded to the trial court with direction to remand the case to the board for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

TYRONE D. CAROLINA *v.* COMMISSIONER OF CORRECTION (AC 41500)

Bright, Devlin and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of multiple counts of risk of injury to a child, sought a writ of habeas corpus, claiming, inter alia, that his right to due process was violated when the respondent Commissioner of Correction wrongly classified him as a sex offender with treatment needs. The petitioner claimed that there was no basis for his classification as a sex offender because he was never convicted of a sexual assault and that he was not afforded sufficient procedural protections before being classified as a sex offender. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the respondent was entitled to rely on the petitioner's conviction in classifying him as a sex offender; although the petitioner sufficiently alleged that he had a protected liberty

interest, he was on notice that he could be classified as a sex offender because he was convicted of risk of injury to a child, which included the necessary element that he had had intimate contact with a child under the age of sixteen in a sexual and indecent manner, and the petitioner failed to present any evidence to prove that his right to due process had been violated.

Argued May 28—officially released September 3, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Kwak*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Tyrone D. Carolina, self-represented, the appellant (petitioner).

Edward Wilson, *Jr.*, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Tyrone D. Carolina, appeals, following the denial of his petition for certification, from the judgment of the habeas court denying his petition for a writ of habeas corpus in which he claimed that he was wrongly classified as a sex offender. On appeal, the petitioner claims that the habeas court improperly concluded that the classification by the respondent, the Commissioner of Correction, did not violate his constitutional right to due process. We dismiss the appeal.

The following facts and procedural history are relevant to this appeal. The petitioner was convicted, following a jury trial, of two counts of risk of injury to a

child in violation of General Statutes § 53-21 (a) (2),[1] two counts of risk of injury to a child in violation of § 53-21 (a) (1),[2] and one count of tampering with a witness in violation of General Statutes § 53a-151.[3] See *State* v. *Carolina*, 143 Conn. App. 438, 440 and n.1, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013).[4] The petitioner appealed to this court, which affirmed his conviction on direct appeal and determined that the jury reasonably could have found the following facts: "The [petitioner] was close friends with [the parents of the victim, K]. . . . On May 11, 2009, when K returned home from school, W, a family friend, noticed that K's behavior was unusual. K's cousin and her sister also were present at that time. They began questioning K, and she reluctantly revealed that the [petitioner] had had sexual contact with her. A few hours later, K's older brother, L, arrived at the house and saw that K was upset and shaking. He asked her to accompany him in his car so that they could talk in private. In response to L's questions, K told him of a recent incident in which the [petitioner] had sexually molested her. The Danbury

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[3] General Statutes § 53a-151 provides in relevant part: "(a) A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding . . . ."

[4] The jury found the petitioner not guilty of three charges of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1).

police department was contacted and officers arrived at K's house later that evening. Thereafter, the [petitioner] was arrested and charged with offenses related to his sexual contact with K." (Footnote omitted.) Id., 441.

While the petitioner was incarcerated, the respondent classified him as a sex offender and recommended that he participate in sex treatment education pursuant to the Department of Correction's offender classification manual.[5] On August 27, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus. In his petition, he claimed that his incarceration is illegal because the respondent improperly classified him as a sex offender. The petitioner appeared to claim, in the habeas trial, that he was not afforded sufficient procedural protections before being classified as a sex offender. Following a trial on the merits, the habeas court rejected the petitioner's claims by way of a memorandum of decision filed on December 13, 2017. The habeas court concluded that "[a]lthough the petitioner protests [the respondent's] classification of him as a sex offender with treatment needs, the petitioner has failed to present any evidence and [to] prove that his right to due process has been violated," and, thus, failed to meet his burden of proof. Accordingly, the habeas court denied the petitioner's petition for a writ of habeas

[5] The offender classification manual "explains the State of Connecticut Department of Correction inmate classification system and procedures for usage of the classification instrument." The respondent created the offender classification manual pursuant to his authority under General Statutes § 18-81 to "establish rules for the administrative practices and custodial rehabilitative methods . . . in accordance with recognized correctional standards." The offender classification manual defines classification as "the ongoing process of collecting and evaluating information about each inmate to determine the inmate's risk and need level for appropriate confinement location, treatment, programs, and employment assignment whether in a facility or the community." Consistent with the initial classification procedures, the respondent considers seven factors to determine the inmate's "[n]eeds [a]ssessment," including "[s]ex treatment need."

corpus and rendered judgment in favor of the respondent. The court then denied the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly denied his petition for a writ of habeas corpus. Specifically, he argues that the respondent violated his right to due process when he improperly classified the petitioner as a sex offender. In support of this claim, the petitioner argues that he was never convicted of a sexual assault and, therefore, there was no basis for his classification as a sex offender. The respondent argues in response that he appropriately classified the petitioner as a sex offender. We agree with the respondent.

We initially note that the petitioner, "[f]aced with a habeas court's denial of a petition for certification to appeal . . . can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 162 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the *underlying claim* involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 4, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002). In order to determine if the habeas court abused its

discretion we must consider the merits of the petitioner's claim.

"In order to state a claim for a denial of procedural due process . . . a prisoner must allege that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest. . . . A petitioner has no right to due process . . . unless a liberty interest has been deprived . . . . Our first inquiry, therefore, is whether the petitioner has alleged a protected liberty interest. That question implicates the subject matter jurisdiction of the habeas court." (Citation omitted; internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 674–75, 166 A.3d 614 (2017).

In support of his claim, the petitioner argues that, just as in *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 668, the improper classification as a sex offender violated his due process rights. In *Anthony A.*, the petitioner "claim[ed] that he was incorrectly classified as a sex offender . . . ." Id., 670. The petitioner in that case "had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. Our Supreme Court, applying the stigma plus test, asked "whether the allegations of the petition demonstrate that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." Id., 680–81. Our Supreme Court stated that the petitioner met the "stigma" prong of the test because the classification as a sex offender is "uniquely stigmatizing."[6] Id., 681.

[6] Our Supreme Court previously has stated: "Constitutional privacy interests are implicated . . . because . . . [t]he damage to [citizens'] reputations resulting from [disclosure] stigmatizes them as currently dangerous sex offenders, can harm their earning capacities, and can cause them to be objects of derision in the community." (Internal quotation marks omitted.)

Ultimately, our Supreme Court in *Anthony A.* concluded that the petitioner met the jurisdictional threshold to confer jurisdiction because he sufficiently alleged a protected liberty interest. Id., 686.

As in *Anthony A.*, we conclude that the petitioner in the present case sufficiently alleged a protected liberty interest under the stigma plus test because he was classified as a sex offender, which implicates a liberty interest. The question then is whether the petitioner was provided constitutionally sufficient process in connection with his classification. The court in *Anthony A.* did not address what process was required before an inmate is classified as a sex offender because the only issue in that case was whether the petitioner had a protected liberty interest in his classification. We note, however, that the facts and circumstances in *Anthony A.* are distinguishable from the present case. In *Anthony A.*, "[t]he department classified the petitioner as a sex offender, despite the fact that he had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. By contrast, in the present case, the petitioner was convicted of offenses that included the necessary element that the petitioner had intimate contact with a child under the age of sixteen in a sexual and indecent manner.

We also note that in *Anthony A.*, our Supreme Court stated that the petitioner alleged that he was not provided notice that he could be classified as a sex offender in light of the underlying charges. Id., 672 n.4. By contrast, in the present case the petitioner was on notice that he could be classified as a sex offender because

State v. *Misiorski*, 250 Conn. 280, 295, 738 A.2d 595 (1999); see also *State* v. *Elias V.*, 168 Conn. App. 321, 344, 147 A.3d 1102 (recognizing "stigmatizing effects of this [sex offender] classification"), cert. denied, 323 Conn. 938, 151 A.3d 386 (2016).

he was convicted of risk of injury to a child in violation of § 53-21 (a) (2).[7]

Unlike in *Anthony A.*, where there was no conviction of a sex related offense on which to base the sex offender classification, in this case the respondent was entitled to rely on the petitioner's conviction in classifying him as a sex offender. The petitioner, on the facts of this case, was due no other process. On the basis of the foregoing, we cannot conclude that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

MAYA BOREEN *v.* KEVIN A. BOREEN
(AC 41155)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion to terminate alimony, to determine overpayments and to set a repayment schedule. The trial court found that the plaintiff was living with R, her boyfriend, within the meaning of the applicable statute (§ 46b-86 [b]), and, therefore, that the defendant's alimony obligation terminated under the terms of the parties' separation agreement, which had been incorporated into the dissolution judgment and provided that the defendant's alimony obligation would terminate on the date the court determined that the plaintiff commenced "living with another person." *Held:*

1. The trial court did not err in finding that the plaintiff was "living with another person" for purposes of § 46b-86 (b): although the plaintiff claimed that she and R maintained separate residences and were together less than all of the time, ample evidence supported the court's finding that the plaintiff was living with R, including evidence that the couple resided under the same roof for approximately half the week,

[7] Section 53-21 (a) (2) involves contact with the intimate parts of a child under sixteen years of age or contact by a child under the age of sixteen with the intimate parts of the petitioner in a sexual and indecent manner. See footnote 1 of this opinion.

took many meals together, regularly communicated by cell phone, and frequently traveled together, and that R provided for the plaintiff's health insurance coverage under his own policy as a result of the couple holding themselves out as being in a domestic partnership, and allowed the plaintiff to keep a rent-free art studio in his home, and even though the plaintiff and R maintained separate homes and did not sleep in the same residence every night, the plaintiff's living arrangements changed such that she no longer needed the same financial support as at the time of the original alimony order; moreover, the court properly relied on the fact that R provided the plaintiff with health insurance coverage in concluding that the plaintiff was living with him, as the plaintiff and R held themselves out as a couple who were in a nonmarital union as domestic partners when R added the plaintiff to his health insurance policy, and the court properly considered the attendant financial benefits the plaintiff received as a result of the free health insurance coverage when determining whether her financial needs changed as a result of her living with R such that the defendant's alimony obligation should be terminated.

2. The trial court did not err in finding that the only remedy available under the terms of the separation agreement, upon a finding that the plaintiff was "living with another person," was to terminate the defendant's alimony obligation: the provision of the separation agreement stating that the plaintiff shall be deemed to have been living with another person in the event a court makes a finding that the alimony should terminate or be reduced "pursuant to" § 46b-86 (b) did not reflect an intent to broadly incorporate all aspects of § 46b-86 (b), as the only remedy explicitly provided in the agreement upon a finding that the plaintiff commenced living with another person was to terminate alimony, the language in the agreement that alimony "shall" terminate when the plaintiff commenced living with another person was mandatory in nature, and the separation agreement treated cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation; moreover, a finding that alimony could be modified upon a finding of cohabitation, as opposed to terminated, would be inconsistent with the structure of the separation agreement as a whole, which contained provisions governing discrete circumstances in which one or both parties could seek to modify the alimony obligation.

Argued April 23—officially released September 3, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted the motion

filed by the defendant to terminate alimony, to determine overpayments and to set a repayment schedule, and the plaintiff appealed to this court; subsequently, the court, *Hon. Michael E. Shay*, judge trial referee, denied the motion for articulation filed by the plaintiff; thereafter, the plaintiff filed a motion for review with this court, which granted the plaintiff's motion for review but denied the relief requested. *Affirmed.*

James H. Lee, for the appellant (plaintiff).

Thomas M. Shanley, for the appellee (defendant).

Opinion

DIANA, J. The plaintiff, Maya Boreen, appeals from the judgment of the trial court granting the postjudgment motion filed by the defendant, Kevin A. Boreen, to terminate alimony, to determine overpayments, and to set a repayment schedule on the ground that, under the parties' separation agreement, the defendant's alimony obligation terminated upon the court's finding that the plaintiff was "living with another person." The plaintiff claims that the court (1) erred in finding that she was "living with another person" pursuant to General Statutes § 46b-86 (b),[1] and (2) improperly concluded that the only remedy available upon a finding that she was "living with another person" was to terminate the defendant's alimony obligation. We disagree and, accordingly, affirm the judgment of the trial court.

[1] General Statutes § 46b-86 (b) provides in relevant part: "In an action for divorce, dissolution of marriage, legal separation or annulment brought by a spouse, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other spouse, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party."

The following procedural history and facts, as found by the trial court, are relevant to this appeal. The twenty-four year marriage between the parties was dissolved on September 29, 2009. The parties executed a separation agreement, which was approved by the court and incorporated in the dissolution decree by reference. The separation agreement provides that the defendant was to pay alimony to the plaintiff "until the earliest of the [defendant's] death, the [plaintiff's] death, the [plaintiff's] remarriage or 'living with another person' as defined in [Article] 2.2 [of the separation agreement]." Article 2.2 of the agreement provides in relevant part: "The [defendant's] obligation to pay alimony shall terminate on the date . . . the [c]ourt determines [the plaintiff] commenced 'living with another person.' . . . For purposes of this Agreement, the [plaintiff] shall be deemed to have been 'living with another person' in the event a court of competent jurisdiction makes a finding that the alimony should terminate or be reduced pursuant to the provisions of [General Statutes] § 46b-8[6] (b)."[2]

In December, 2009, the plaintiff began dating Robert Rodriguez. On March 13, 2017, the defendant filed a motion to terminate alimony, to determine overpayments, and to set a repayment schedule, claiming that, although the plaintiff still maintained her own home, she had been living with Rodriguez within the meaning of § 46b-86 (b) since July, 2013, such that her financial needs had been altered. At the hearing on the defendant's motion, Rodriguez testified that, although he began dating the plaintiff in 2009, he had only owned and maintained a home in Wilton since July, 2013. The

[2] Article 2.2 of the separation agreement references General Statutes § 46b-84 (b), titled "Parents' obligation for maintenance of minor child. Order for health insurance coverage." Although neither party mentions this apparent error, § 46b-84 (b) is irrelevant to the subject of Article 2.2, alimony, and both parties refer to § 46b-86 (b) throughout their appellate briefs. We, therefore, correct the quoted provision to reflect the correct statutory reference.

plaintiff's home, which she purchased in August, 2011, is also located in Wilton. Rodriguez testified that the couple spends "between three and four" nights together each week at one of their respective homes, but that neither of them contribute to the maintenance of the other's residence. He further testified that the plaintiff typically cooks for the couple twice per week and that he pays for their meals when they eat out more than half, and possibly as much as 75 percent of the time. Further, the plaintiff, who works part-time as an artist, keeps a rent-free art studio at Rodriguez's home in Wilton.

Importantly, Rodriguez admitted that in approximately January, 2015, he added the plaintiff to his health insurance policy and indicated on the enrollment form that the plaintiff was his "domestic partner." Before receiving health insurance coverage as a domestic partner under Rodriguez' policy, the plaintiff's insurance company required her to pay annually a $6000 deductible and a 20 percent copay. Under Rodriguez' health insurance policy, the deductible is $750 per incident. The plaintiff's total estimated share of the health insurance premium payments that had been made on her behalf by Rodriguez was, at the time of trial, in excess of $26,000. Although Rodriguez testified that the plaintiff had agreed to reimburse him for her portion of the health insurance premium, that agreement was not reduced to writing and the plaintiff had made no reimbursement payments to Rodriguez at the time of the hearing on the defendant's motion.

The court granted the defendant's motion in a memorandum of decision dated October 31, 2017, finding that "at least since January, 2015, the parties have been living together, and that the arrangement has altered the financial needs of [the plaintiff] within the meaning of General Statutes § 46b-86 (b)." On that basis, the court terminated the defendant's alimony obligation.

The court further determined that from January 1, 2015, until October 31, 2017, the defendant had paid alimony to the plaintiff in the amount of $358,216, and ordered the plaintiff to repay the overage in full in semiannual installments of $30,000 each without interest. On November 20, 2017, the plaintiff filed a motion for reargument and reconsideration, which the court denied on November 30, 2017. This appeal followed. Additional facts and circumstances will be set forth as necessary.

I

The plaintiff first claims that the court erred in finding that she had been "living with another person" within the meaning of § 46b-86 (b). Specifically, the plaintiff argues that the court erred in finding that she was living with Rodriguez because (1) they maintain separate residences and "are together less than all the time" and (2) the court improperly considered that Rodriguez had provided for her health insurance coverage under his own policy in making its determination about her living arrangements.[3] We are not persuaded.

[3] The plaintiff also argues that the court improperly considered the romantic nature of the plaintiff's relationship with Rodriguez in finding that the plaintiff was living with another person pursuant to § 46b-86 (b). The plaintiff urges us to adopt the reasoning of this court in *Spencer* v. *Spencer*, 177 Conn. App. 504, 520, 173 A.3d 1 (2017), ("because the definition of cohabitation in § 46b-86 (b) has only two elements, neither of which is evidence of a romantic or sexual relationship, the defendant was not required, pursuant to the dissolution judgment, to present evidence of a romantic or sexual relationship"), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018). On January 31, 2018, our Supreme Court granted the plaintiff's petition for certification to appeal. *Spencer* v. *Spencer*, 328 Conn. 903, 177 A.3d 565 (2018). One of the issues certified by our Supreme Court was: "Did the Appellate Court properly affirm the trial court's finding of cohabitation on the basis of a definition of cohabitation that does not require a romantic or sexual relationship between the alimony recipient and the individual with whom they reside?" (Internal quotation marks omitted.) Id. On August 5, 2019, our Supreme Court dismissed the appeal following the death of the plaintiff and the failure of the administrator to file a motion to substitute pursuant to Practice Book § 62-5.

We, however, need not reach this issue in the present case. Whether the plaintiff was "living with another person" is a factual determination to be

The court made the following additional findings relevant to this claim: "In this case, the testimony and evidence clearly support a finding that [Rodriguez] and [the plaintiff] have entered into a long-time, committed, and monogamous relationship that meets their emotional needs, and comes with significant financial benefits for the latter. The couple resides under the same roof for approximately half the week, take many of their meals together, regularly communicate by cell phone, and frequently travel together. Both described the relationship as exclusive, and [Rodriguez] called [the plaintiff] his 'best friend.' More importantly, he also described her as his 'domestic partner,' and, since January, 2015, he has made provision for her health insurance coverage under his own policy at no cost to her. For her part, on her Facebook page she has referred to the workshop at [Rodriguez'] home in Wilton as 'her studio' and posted photos of it and her artwork. Accordingly, the court finds that at least since January, 2015, the parties have been living together, and that the arrangement has altered the financial needs of [the plaintiff] within the meaning of General Statutes § 46b-86 (b)."

"The 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

made by the trial court that will not be disturbed on appeal unless the finding is clearly erroneous in light of the evidence and the pleadings in the record as a whole. See, e.g., *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 678 A.2d 469 (1996). As discussed in part I of this opinion, we conclude that there was ample evidence in the record for the court to have concluded that the plaintiff was living with Rodriguez, regardless of the nature of the relationship between them.

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. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

A

The plaintiff first argues that the court erred in finding that she was living with Rodriguez within the meaning of § 46b-86 (b) because they maintain separate residences and are together "less than all the time." We disagree.

Section 46b-86 (b) provides, in relevant part, that a court may modify a dissolution judgment and "suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party." Thus, "a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement caused a change of circumstances so as to alter the financial needs of the alimony recipient." *Fazio* v. *Fazio*, 162 Conn. App. 236,

240 n.1, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

Whether an individual is "living with another person" is a fact specific determination. *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 486, 678 A.2d 469 (1996). "The fact-finding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us. Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court. . . .

"A factual finding may not be rejected on appeal merely because the reviewing judges personally disagree with the conclusion or would have found differently had they been sitting as the factfinder. . . . A factual finding may be rejected by this court only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Kaplan* v. *Kaplan*, 186 Conn. 387, 391–92, 441 A.2d 629 (1982).

In *Kaplan*, our Supreme Court considered whether the trial court properly found that a couple was not living together pursuant to § 46b-86 (b) where, "(a)lthough at times the defendant slept in [her significant other's] bedroom . . . and, [he] would often take meals with the defendant and her children, they maintained completely separate households . . . ." (Internal quotation marks omitted.) Id., 390. Our Supreme Court concluded that, because the question of whether an individual is living with another person is a fact specific determination, it could not reject the trial court's finding that the couple was not living together as defined by § 46b-86 (b) because there was ample

evidence in the record to support such a finding. Id., 392. Our Supreme Court, however, noted that there was ample evidence in the record to support the opposite finding as well, and that § 46b-86 (b) was "clearly intended by the General Assembly to apply to the situation alleged by the plaintiff." Id., 390–91. Indeed, the stated purpose of the bill which was eventually enacted as Public Acts 1977, No. 77-394, now § 46b-86 (b), was "[t]o correct the injustice of making a party pay alimony when his or her ex-spouse is living with a person of the opposite sex, without marrying, to prevent the loss of support." H.B. 6174, 1977 Sess.

In the present case, we conclude that the trial court had ample evidence to support its finding that the plaintiff had been living with Rodriguez within the meaning of § 46b-86 (b) since January, 2015. The couple resided under the same roof for approximately half the week, took many of their meals together, regularly communicated by cell phone, and frequently traveled together. Rodriguez, moreover, provided for the plaintiff's health insurance coverage under his own policy as a result of the couple holding themselves out as being in a domestic partnership. Further, Rodriguez allows the plaintiff to keep a rent-free art studio at his home. The totality of these facts form a reasonable basis to support the court's finding that the plaintiff has been "living with another person" pursuant to § 46b-86 (b) since January, 2015. As our Supreme Court stated in *Kaplan*, § 46b-86 (b) was written broadly and was clearly intended by the legislature to encompass a factual situation such as the present case where, although the plaintiff and Rodriguez maintain separate homes and do not sleep in the same residence every night, the plaintiff's living arrangements have changed such that she no longer needs the same financial support as at the time of the original alimony order. See *Kaplan* v. *Kaplan*, supra, 186 Conn. 389.

B

The plaintiff next argues that the court improperly relied on the fact that Rodriguez provided her health insurance coverage in concluding that the plaintiff was living with him. We disagree.

In order to decide the merits of the defendant's motion, the court was required to perform a two part analysis to determine whether alimony should be terminated under the separation agreement. See *Fazio* v. *Fazio*, supra, 162 Conn. App. 240 n.1 (finding of cohabitation requires finding that alimony recipient was living with another person and living arrangement caused change of circumstances so as to alter financial needs of alimony recipient). The court enumerated the facts that it had found, which supported both a finding that the plaintiff was living with Rodriguez and a finding that that living arrangement had altered the plaintiff's financial needs. The court did not distinguish which facts it had found supported a finding under each prong of the analysis required by § 46b-86 (b).

There is no indication that the court conflated or misunderstood the factual findings that it was required to make in order to determine whether the couple was living together pursuant to § 46b-86 (b). See *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 687, 205 A.3d 704 ("[w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will . . . assume that the trial court acted properly" [internal quotation marks omitted]), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019). Rather, it appears from the memorandum of decision that the court properly considered that the plaintiff and Rodriguez were holding themselves out as a couple who were in a nonmarital union as domestic partners, as they indicated when Rodriguez added the plaintiff to his

health insurance policy, in finding that the couple was living together pursuant to § 46b-86 (b).

The court also properly considered the attendant financial benefits that the plaintiff received as a result of this free health insurance coverage, among other pertinent facts, when determining whether the plaintiff's financial needs were changed as a result of her living with Rodriguez such that the defendant's alimony obligation should be terminated. We, therefore, conclude that the court did not err in considering the couple's health insurance policy when making its finding that the plaintiff was living with another person. For the foregoing reasons, we conclude that the trial court did not err in finding that the plaintiff was living with Rodriguez pursuant to § 46b-86 (b).

II

The plaintiff next claims that the court improperly determined that, upon finding that the plaintiff was living with another person, the only remedy available under the terms of the separation agreement was to terminate the defendant's alimony obligation. We agree with the trial court that the sole remedy available under the terms of the separation agreement upon a finding that the plaintiff was living with another person was to terminate alimony.

The following additional facts are relevant to this claim. Article 2 of the separation agreement between the parties is titled "Alimony." Article 2.1 (a) of the separation agreement provides that the defendant's alimony obligation continues "until the earliest of the [defendant's] death, the [plaintiff's] death, the [plaintiff's] remarriage or living with another person as defined in [Article] 2.2 . . . ." (Internal quotation marks omitted.) Article 2.2 of the agreement provides in relevant part: "The [defendant's] obligation to pay alimony shall terminate on the date . . . the [c]ourt

determines [the plaintiff] commenced 'living with another person.' . . . For purposes of this Agreement, the [plaintiff] shall be deemed to have been 'living with another person' in the event a court of competent jurisdiction makes a finding that the alimony should terminate or be reduced pursuant to the provisions of [General Statutes] § 46b-8[6] (b)." Articles 2.3, 2.4, and 2.6 provide for discrete circumstances in which the defendant or the plaintiff may bring a motion to modify the defendant's alimony obligation, none of which include a finding that the plaintiff is living with another person.[4]

After concluding that the plaintiff was living with Rodriguez under circumstances that altered her financial needs, the court then turned to the relief available to the defendant under the agreement. The trial court concluded that "together as a whole, Articles 2.1 (b) and 2.2 are clear and unambiguous and provide that where a court finds that the recipient of the alimony is 'living with another person' as defined by General Statutes § 46b-86 (b), the obligation to pay alimony terminates effective as of the date that the living with another person commenced . . . and that neither party has claimed any ambiguity in the agreement itself

[4] Article 2.3 (b) provides in relevant part that the defendant "shall not be entitled to bring any motion . . . the effect of which is to downward modify his obligation to pay alimony . . . unless [the plaintiff] shall have gross annual earned income of at least forty thousand . . . dollars . . . in any calendar year . . . ." Article 2.3 (d) provides that "[a]ny decrease in the [defendant's] income resulting from his unilateral change of employment shall not constitute a significant change in circumstances justifying a modification of alimony." Article 2.4 provides in relevant part that "[u]pon motion of either party, the court shall retain jurisdiction to modify the definition of 'gross annual earned income' . . . ." Finally, Article 2.6 provides in relevant part: "In the event the [defendant] is terminated from his employment and receives a severance package, which caused his gross annual earned income to exceed $775,000 . . . the [plaintiff] shall have the right to move to modify the earning cap subject to alimony of $775,000 in the year in which the severance package is received." (Internal quotation marks omitted.)

or requested an opportunity [to] offer any credible extrinsic evidence as to the meaning of the relevant provisions thereof." (Citation omitted.)

The court reasoned that "[w]hile the language of the last sentence of Article 2.2 is somewhat imprecise (i.e. 'should terminate or be reduced'), nevertheless, given the preceding language, the court finds that the only logical explanation is that [the reference] is merely [intended to direct] the court to apply both the factual and financial analysis called for in General Statutes § 46b-86 (b). Any other reading would simply fly in the face of the clear intent of the parties to terminate alimony in such circumstances, and that it was never intended to give the court the option to modify the alimony award. Were the court to apply that literal reading, it would render those remedial provisions of the agreement that call for the termination of the alimony and the triggering of obligation to repay alimony meaningless." (Emphasis omitted.)

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

evidence is always admissible, however, to explain an ambiguity appearing in the instrument." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180–81, 972 A.2d 228 (2009).

"If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law [and our review is plenary]. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 355, 999 A.2d 713 (2010).

Accordingly, "[t]he threshold determination in the construction of a separation agreement . . . is whether, examining the relevant provision in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . The proper inquiry focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation. . . . It must be noted, however, that the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . ." (Citations omitted; internal quotation marks omitted.) *Isham* v. *Isham*, supra, 292 Conn. 181–82.

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language

of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383–84, 107 A.3d 920 (2015).

The plaintiff contends that the parties intended to incorporate the entirety of § 46b-86 (b) into the separation agreement, including the alternative remedial measures provided for in the statute, when they used the language "alimony should terminate or be reduced pursuant to the provisions of General Statutes § 46b-8[6] (b)." (Emphasis omitted.)

In *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 187–88, 112 A.3d 144 (2015), our Supreme Court rejected a similar argument from the plaintiff, who argued that "the agreement's reference to § 46b-86 (b) means that the alimony award is not terminated upon cohabitation, although that is the sole remedy set forth in the agreement, because any reference to § 46b-86 (b) in the agreement means that the court has the authority in the event of cohabitation to modify the amount of, to suspend or to terminate alimony, despite any limitation of or delineation of a remedy in the agreement." (Internal quotation marks omitted.) The provision at issue in *Nation-Bailey* read as follows: "Unallocated alimony and child support shall be paid until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by . . . § 46b-86 (b), or until August 1, 2011." (Internal quotation marks omitted.) Id., 185.

Our Supreme Court rejected the plaintiff's argument and found that "the trial court lacked any remedial

powers to suspend the defendant's unallocated support obligation for the duration of the plaintiff's cohabitation because the plain language contained within . . . the agreement permanently terminated the defendant's unallocated support obligation upon that cohabitation." Id., 191. Our Supreme Court reasoned that "given the provision's use of the word until without further qualification," while requiring the payment of unallocated support "until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by . . . § 46b-86 (b), or until August 1, 2011," the agreement was clear and unambiguous, and provided for "permanent termination of the unallocated support obligation [as] the sole remedy upon cohabitation by the plaintiff . . . . [T]he use of the word until, standing alone, indicates that the defendant's unallocated support obligation was terminated upon the plaintiff's cohabitation because the obligation cease[d] to exist at that point of time or . . . event. Black's Law Dictionary (6th Ed.1990); see also *In re Marriage of Schu*, 231 Cal. App. 4th 394, 396, 179 Cal. Rptr. 3d 886 (2014) (interpreting marital settlement agreement reserving court's jurisdiction to award spousal support until wife is released from prison and holding that jurisdiction did not expire immediately after wife's release where motion was filed prior to her release and hearings on that motion had been continued) . . . ." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 93–94.

The plaintiff urges us to adopt the reasoning of this court in *Fazio* v. *Fazio*, supra, 162 Conn. App. 245, in which we concluded that the language from a similar provision in the parties' separation agreement did not convey the clear and precise intent of the parties. In *Fazio*, the provision at issue was substantially similar to the language from the present case, stating, in relevant part: "Commencing on June 1, 2006, the [defendant] shall pay to the [plaintiff] unallocated alimony

and child support in cash until the death of either party, the remarriage or cohabitation of the [plaintiff] *pursuant to* Section 46b-86 (b) of the . . . General Statutes, or May 31, 2013, whichever event shall first occur . . . .'' (Emphasis added; internal quotation marks omitted.) Id., 238. In concluding that the agreement was ambiguous, this court reasoned that ''our Supreme Court has indicated, albeit in dicta, that the use of the phrase 'pursuant to' in a virtually identical provision of a separation agreement might be reflective of an intent to broadly incorporate all aspects of § 46b-86 (b), not just the definitional language. Conversely, if the parties had intended to reference § 46b-86 (b) solely for definitional purposes, they could have used the phrase 'as defined by.' Thus, our Supreme Court has suggested that the use of 'pursuant to' may show an intent by the parties to incorporate more than the definition of 'cohabitation' from § 46b–86 (b).'' Id., 246.

We conclude that, unlike the provision at issue in *Fazio*, the provision's use of ''pursuant to'' in the present case does not reflect an intent to broadly incorporate all aspects of § 46b-86 (b) and, thus, agree with the trial court that the parties clearly and unambiguously intended for the defendant's alimony obligation to terminate upon a court's finding that the plaintiff had commenced living with another person. The only remedy explicitly provided for in the separation agreement upon such a finding is to terminate the defendant's alimony obligation. We are unpersuaded, moreover, that the agreement's use of the words ''pursuant to'' conveys an intent to incorporate the remedial provisions of § 46b-86 (b) as suggested in *Fazio*. As we noted in *Fazio*, the broader language *may* indicate an intent to incorporate the statute. We cannot conclude, however, that the parties in the present case intended for the words ''pursuant to'' to incorporate the statute into the provision in its entirety.

In the present case, the language employed by the parties in the separation agreement to direct terminating the alimony obligation is mandatory, not permissive. The parties first agreed that alimony shall continue "until" the plaintiff commences living with another person. The word "until" suggests that the obligation ceases to exist at a certain point in time, specifically, when the plaintiff begins living with another person. Further, the agreement provides that alimony "shall" terminate when the plaintiff commenced living with another person. The use of the word "shall" usually connotes a requirement, unlike the word "may," which implies some degree of discretion. See *Kingdomware Technologies, Inc.* v. *United States*, U.S. , 136 S. Ct. 1969, 1977, 195 L. Ed. 2d 334 (2016). Thus, like the separation agreement in *Nation-Bailey*, the agreement in the present case "treats cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation absent an express provision to the contrary in the court's decree or incorporated settlement agreement." *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 195.

Further, as noted by the trial court, a finding that alimony could be modified upon a finding of cohabitation, as opposed to terminated, would be inconsistent with the structure of the separation agreement as a whole, which contains separate provisions governing discrete circumstances in which one or both parties could seek to modify the alimony obligation. We, therefore, agree with the trial court that the parties clearly and unambiguously intended that the defendant's alimony obligation be terminated upon a court's finding that the plaintiff is living with another person.

The judgment is affirmed.

In this opinion the other judges concurred.

TOBY A. BERTHIAUME *v.* STATE OF CONNECTICUT (AC 41496)

Lavine, Devlin and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of the crime of burglary in the first degree, filed a petition for a new trial on the basis of newly discovered evidence regarding the alleged ulterior motives of a witness for the respondent state of Connecticut for testifying at the petitioner's criminal trial. Following his conviction, the petitioner filed a motion for a new trial on the basis of newly discovered evidence in his criminal case pursuant to the applicable rule of practice (§ 42-53). The criminal court denied the motion, concluding that the petitioner's evidence was insufficient to support his motion because, although the evidence was newly discovered, it was immaterial, cumulative and unlikely to produce a different result at trial. Thereafter, the petitioner brought the present action by filing in the trial court the subject petition for a new trial pursuant to statute (§ 52-270). The trial court granted the state's motion for summary judgment and rendered judgment in favor of the state, concluding that the petitioner's claim of newly discovered evidence had been fully and fairly litigated in the criminal proceeding, and, therefore, his petition was barred by res judicata. Subsequently, the petitioner, on the granting of certification, appealed to this court. *Held* that the trial court improperly rendered summary judgment in favor of the state on the basis of the preclusive effect of the proceeding in the criminal court, as the criminal court lacked the authority under the applicable rule of practice (§ 42-55) to rule on the petitioner's claim of newly discovered evidence; because § 42-55 requires that a petition for a new trial based on newly discovered evidence be brought only in civil court, the criminal court lacked the authority to rule on such a claim or to award the petitioner the relief he requested of a new trial, and, therefore, because the criminal court could not have rendered a valid, final decision on the petitioner's motion for a new trial, res judicata did not preclude the petitioner's petition for a new trial in the civil action.

Argued May 28—officially released September 3, 2019

Procedural History

Petition for a new trial following the petitioner's conviction of the crime of burglary in the first degree, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey*, *J.*, granted the

respondent's motion for summary judgment and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and *Thomas Garcia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. This is an appeal from the summary judgment rendered by the trial court in favor of the respondent, the state of Connecticut, on a civil petition for a new criminal trial filed by the petitioner, Toby A. Berthiaume. This case presents an issue that our courts have not previously addressed: Whether res judicata precludes a civil petition for a new trial based on a claim of newly discovered evidence when that same claim previously was litigated before the criminal court that had jurisdiction over the criminal matter but nonetheless lacked the authority to adjudicate the claim under our rules of practice. We conclude that, because the criminal court lacked the authority to rule on such a claim, it could not have issued a valid final decision, and, thus, the court's rendering summary judgment on the basis of the preclusive effect of that proceeding was improper. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings.[1]

[1] On appeal, the petitioner raised the following five alternative reasons for reversing the court's judgment: (1) The state failed to meet its burden of proof for summary judgment, (2) structural error in the trial court resulted in prejudice per se, (3) because of public policy concerns, there should be an exception to res judicata to protect against the type of errors that occurred here, (4) this error was so pervasive and significant that the petitioner is entitled to a new criminal trial, and (5) the criminal court violated the petitioner's due process rights. Because the improper application of res judicata is dispositive, we need not address these additional claims.

Following a jury trial, the petitioner was convicted of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), and his conviction was affirmed on direct appeal. *State* v. *Berthiaume*, 171 Conn. App. 436, 438, 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).

On direct appeal, this court set forth the following relevant facts. "In mid-2013, the victim, Simone LaPointe, was ninety-three years old and resided at 126 Windsor Street in Enfield, her home for over four decades. She suffered from dementia and short term memory loss, and although she lived alone, was accompanied by either a friend or one of her surviving eleven children 'most of the time.' Typically, the victim's friend stayed with her overnight, and her children took turns visiting her throughout the day. Despite this visitation schedule, there were gaps of time throughout the day in which the victim was home alone. Because the victim neither drove nor owned a car, her driveway would be empty during these gap periods, thus indicating that she was alone.

"On May 6, 2013, Marita Cunningham, one of the victim's daughters, arrived at 126 Windsor Street around noon, and departed, leaving the victim home alone, at approximately 12:50 p.m. When Cunningham left 126 Windsor Street, nothing inside the residence looked out of order and the victim was uninjured. About one hour later, Jessica Navarro-Gilmore, while passing by in a motor vehicle, saw the [petitioner] and another white man 'walking suspiciously' on a road near the victim's home while carrying what appeared to be 'a twenty inch flat screen . . . TV or monitor . . . .' The two men were 'walking quickly and looking over their shoulder[s] suspiciously.' Drawing on her own experience committing theft offenses, Navarro-Gilmore immediately suspected that the two men had stolen something

from a home in the neighborhood. After doubling back to get a better look at the men, Navarro-Gilmore called the police at 1:53 p.m. and reported what she had seen.

"At approximately 3 p.m., the victim called Norma Shannon, another of her daughters, and told Shannon that her knee was bleeding. Shannon went to 126 Windsor Street in response to the call, and upon entering, noticed that 'the house had been ransacked . . . .' Various drawers and cabinets inside the house had been left open, jewelry and other items were lying on the victim's bed and dresser 'as if they had been dumped there,' and the dining room chandelier was broken. There was blood on the floor of the dining room, and the phone line in the living room, which was adjacent to the dining room, had been cut. The victim's knee was bandaged, and she had sustained a 'mark on her nose,' a bruise on her face, and a chipped tooth. A search of the home revealed that the victim's ring, which contained fourteen birthstones, and her nineteen inch flat screen television, had been stolen.

"At 3:44 p.m., the [petitioner] sold what was later determined to be the victim's ring and television at the Money Shop, a pawn shop and jewelry store located in Springfield, Massachusetts. In order to make the sales, the [petitioner] provided Jeffrey Fiske, the owner of the pawn shop, with his identification and had his photograph taken. The [petitioner] also provided his address, 116 Windsor Street, and telephone number. Fiske identified the [petitioner] as the person who received the sales proceeds.

"Thereafter, police showed Navarro-Gilmore a sequential photographic array that did not include a photograph of the [petitioner], and she did not identify anyone as one of the men she saw carrying the television on May 6, 2013. After developing the [petitioner] as a suspect, Detective Brian Callaghan of the Enfield Police

Department searched the New England State Police Information Network, a database wherein local pawn shops record their daily transactions, which returned information on the Money Shop. On June 11, 2013, Fiske provided Detective Callaghan with sales slips, the [petitioner's] photograph, and the victim's television and ring.

"The [petitioner] was arrested on July 3, 2013, and charged with burglary in the first degree and several other offenses. Two days later, the [petitioner's] booking photograph, along with an article referencing the burglary, was published in the Enfield Patch, a local online newspaper. While browsing online, Navarro-Gilmore saw the [petitioner's] photograph and immediately recognized him as one of the men she saw carrying the television on May 6, 2013. Thereafter, Detective Callaghan contacted Navarro-Gilmore to request that she view another photographic array. Navarro-Gilmore indicated that she already had seen the [petitioner's] photograph in the Enfield Patch and therefore could not fairly participate in an identification procedure." (Footnotes omitted.) Id., 438–41.

On June 10, 2014, after the jury's verdict, the trial court in the petitioner's criminal case, *Mullarkey*, *J.*, held a hearing originally intended for sentencing. Instead, the prosecutor notified the court that one of the state's witnesses, Navarro-Gilmore, recently had contacted the prosecutor's office seeking assistance regarding an arrest warrant for the witness' daughter. In response to this new information, the court postponed the sentencing and scheduled a subsequent hearing to allow the parties to question Navarro-Gilmore about this newly discovered information. Defense counsel then requested additional time to file a motion for a new trial.

On June 27, 2014, the court convened the first of a series of hearings regarding Navarro-Gilmore's telephone call to the prosecutor. Although defense counsel had not yet filed a motion for a new trial, she presented a number of witnesses to testify in support of this anticipated motion. Then, on August 8, 2014, defense counsel filed a petition for a new trial pursuant to Practice Book § 42-55 and General Statutes § 52-270. The petitioner sought a new trial on the basis of newly discovered evidence regarding Navarro-Gilmore's alleged ulterior motives in testifying. This prompted a lengthy colloquy in which the court discussed whether this petition was proper:

"The Court: All right. So, as we discussed before court, this [petition] needs to be filed with the civil clerk's office because it is a civil action. . . .

"[The Prosecutor]: Is it a civil motion for a new trial since he hasn't been sentenced yet?

"The Court: Well, [he's] filed a petition for new trial.

"[Defense Counsel]: I filed the petition under . . . Practice Book [§] 42-55, which is under the Superior Court rules for criminal matters and—which does not make any reference to its being a civil action. . . .

"The Court: Well, I wished it were under the criminal rules, or it remained under the criminal rules, but it doesn't. . . . All I'm telling you is the [rules of] practice [require] you to file it across the street, and I will go forward with whatever evidence you have today. And if you both agree, I will use the evidence that we have already heard on this issue. . . . And as long as the state goes along with that, we will treat it as evidence. All I can say to you is that I have no expertise in these civil concerns, but I have two or three others of these pending, and they are all filed across the street. . . .

"[Defense Counsel]: I will try to learn as soon and as much as I can about the proper way to file the motion. I'd just like to be clear—

"The Court: My—my job is to make the decisions based on the evidence, and the arguments, and the law, which I'm prepared to go forward with today, and you go over and square up whatever you have to do with those people. I don't interfere with them or their processes. . . .

"[The Prosecutor]: Your honor, I think the more appropriate motion is filed under [Practice Book §] 42-53, which is a motion for new trial.

"The Court: I'm not saying I disagree with you, but the [petitioner] has filed this motion. I cannot tell [him] what to file.

"[The Prosecutor]: I understand. But I think if it comes in as a petition for new trial, they don't have a perfected record for you to even entertain it because no—it's—it's not a disposed of matter. He hasn't even been sentenced yet. I believe the petitions require just that, and that's why it is separated from one to the other. And I think the court holds exclusive jurisdiction over a matter that is not yet sentenced. So, it wouldn't even be a civil filing where we would agree to this court hearing this.

"The Court: Well, there are a bunch of cases concerning this and there's a law annotation after . . . [§] 52-[2]70. But we'll worry about that at a later date. For now, there's a witness here subpoenaed by the defense and—or whatever you're gonna call it. I'd like to hear what the evidence is."

Subsequently, on November 26, 2014, defense counsel withdrew the petition for a new trial and, on December 17, 2014, filed a motion for a new trial pursuant to Practice Book § 42-53. The motion relied on the same

evidence and same claims as the petition, i.e., that the petitioner was entitled to a new trial on the basis of newly discovered evidence regarding Navarro-Gilmore's alleged ulterior motives. After recognizing the new motion before it, the court granted defense counsel's motion to consider the testimony in the hearings prior to the filing of this new motion. At the close of testimony at this hearing, the parties offered their arguments on the motion for a new trial.

In the course of these arguments, there was a dispute over what legal standard should apply to decide a motion for a new trial. The prosecutor argued that "what the court needs to do is analyze the situation in the rubric provided by *Asherman* [v. *State*, 202 Conn. 429, 521 A.2d 578 (1987)]." Defense counsel argued that a "motion for [a] new trial shall be granted for any other error which the defendant can establish was materially injurious to him or her" under Practice Book § 42-53 (a) (2). On February 5, 2015, the court issued an oral decision denying the motion for a new trial. In its subsequent written memorandum of decision, the court applied the *Asherman* standard, as proffered by the prosecutor, to determine whether a new trial was warranted. The court concluded that the evidence, though newly discovered, was immaterial, cumulative, and unlikely to produce a different result at trial. On the basis of these findings, the court determined that the petitioner's evidence was insufficient to support the motion for a new trial and denied the motion.

On May 19, 2015, the petitioner commenced the present action by filing a petition for a new trial pursuant to § 52-270 in the civil trial court. Like the motions previously filed in the criminal court, this petition alleged that the new information regarding Navarro-Gilmore constituted newly discovered evidence that warranted a new trial. The state moved for summary judgment, asserting that the claim of newly discovered

evidence had been fully and fairly litigated in the criminal proceeding such that the petition was barred by res judicata. The trial court, *Dewey, J.*, agreed and rendered summary judgment in favor of the state. This appeal followed.

Before addressing the merits of the petitioner's claim, we first set forth the proper standard of this court's review and certain well settled principles that guide our resolution of res judicata claims. The issue of whether res judicata applies "is a question of law subject to plenary review." *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 712, 200 A.3d 1118 (2019). "[W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *Stamford Hospital* v. *Schwartz*, 190 Conn. App. 63, 97, 209 A.3d 1243 (2019).

"The doctrine of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the same claim or demand. . . . Res judicata prevents a litigant from reasserting a claim that has already been decided on the merits. . . . Stated another way, res judicata is based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 712–13.

The petitioner claims on appeal that, because Practice Book § 42-55 requires that petitions for a new trial

on the ground of newly discovered evidence may be brought only in the civil court, the criminal court lacked either the authority or jurisdiction to rule on a petition for a new trial and, consequently, its ruling can have no res judicata effect on the civil proceeding. This court has held that the improper filing of a petition for a new trial with the criminal court "[does] not deprive the court of subject matter jurisdiction . . . ." *State* v. *Gonzalez*, 106 Conn. App. 238, 261, 941 A.2d 989, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008). This court further explained, however, that "the trial court should not exercise its authority in cases . . . where a party fails properly to serve a writ of summons and complaint on the adverse party in accordance with Practice Book § 42-55." (Emphasis omitted; internal quotation marks omitted.) Id. Thus, the criminal court in this case had jurisdiction, but lacked the authority, to hear the petitioner's claim of newly discovered evidence. That determination, however, does not end our inquiry. We must now determine whether the lack of authority in the criminal court, in which the petitioner's claim for a new trial undisputedly was fully litigated,[2] deprives a petitioner of the opportunity to bring the same claim in a second court with the authority to decide the petition.

To resolve this complex issue, which has not been specifically addressed in Connecticut law, we begin with an examination of why the criminal court lacked the authority to grant the petitioner a new trial on the basis of a claim of newly discovered evidence. In the context of a petition for a new trial, courts are granted authority by statute. See, e.g., *Wojculewicz* v. *State*, 142 Conn. 676, 677, 117 A.2d 439 (1955) ("[p]roceedings in this state for procuring a new trial, whether in a civil or a criminal case, are controlled by statute"). General Statutes § 54-95 (a) authorizes defendants in criminal

[2] We note that the criminal court was well-intentioned in its efforts to immediately address the claim of witness bias.

cases to file petitions for new trials in the same manner as in civil cases, and § 52-270 (a), which governs new trials in civil actions, provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence . . . or for other reasonable cause, according to the usual rules in such cases. . . ."

Relatedly, Practice Book § 42-55 provides: "A request for a new trial on the ground of newly discovered evidence shall be called a petition for a new trial and shall be brought in accordance with General Statutes § 52-270. The judicial authority may grant the petition even though an appeal is pending." When claiming newly discovered evidence, a party cannot obtain a new trial except under Practice Book § 42-55. "*It is well established that to obtain a new trial on the ground of newly discovered evidence, a defendant must bring a petition under Practice Book § 42-55* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 106 Conn. App. 260. Alternatively, a motion for a new trial brought pursuant to Practice Book § 42-53 is limited to trial errors and cannot be based on newly discovered evidence. Id., 262.

Procedurally, a petition for a new trial is always brought in a separate civil proceeding, while a motion for a new trial is filed in the court in which the original proceeding was held. "The petition [for a new trial] is instituted by a writ and complaint served on the adverse party; although such an action is collateral to the action in which a new trial is sought, it is by its nature a distinct proceeding. The judgment on the petition terminates the suit which renders it final. On the contrary, a motion for a new trial is filed in a case then in progress or pending and is merely a gradation in that case leading to a final judgment." *State* v. *Asherman*, 180 Conn. 141, 144, 429 A.2d 810 (1980). For this reason, we have particularly stressed in the past that "the distinction

between a petition and a motion is not one of mere nomenclature"; (internal quotation marks omitted] *State* v. *Gonzalez*, supra, 106 Conn. App. 262; and that "*the trial court should not exercise its authority in cases . . . where a party fails properly to serve a writ of summons and complaint on the adverse party in accordance with Practice Book § 42-55.*" (Emphasis in original; internal quotation marks omitted.) Id., 261.

Compliance with the summons and complaint requirements is not enough. We have held previously that even when a petitioner properly served a writ of summons and complaint in connection with a petition for a new trial, the petition was actually a motion for a new trial because the process was served under the same docket number as the original proceeding and "failed to institute a separate and distinct proceeding for the purpose of having the court determine whether a new trial was warranted . . . ." *Redding* v. *Ellfire*, 98 Conn. App. 808, 820, 911 A.2d 1141 (2006). Similarly, when the original trial court concludes that a motion for a new trial is brought on the basis of "newly discovered evidence, it lack[s] authority to consider the relief sought by the defendant in his motion pursuant to Practice Book § 42-53." *State* v. *Bennett*, 324 Conn. 744, 776–77, 155 A.3d 188 (2017).

Furthermore, it is never proper to bring a petition for a new trial based on a claim of newly discovered evidence in the criminal court. The procedural requirements of a writ of summons and complaint are not available in the criminal courts; this service is filed pursuant to the procedures of the civil courts. See Practice Book § 10-12. Relatedly, we have previously elaborated that "[i]n an action on a petition for a new trial, a petitioner is not a criminal defendant but rather is a *civil* petitioner. . . . A proceeding on a petition for a new trial, therefore, is not a criminal action. Rather, it

is a distinct proceeding that is commenced by the service of civil process and is prosecuted as a civil action." (Citation omitted; emphasis in original.) *Small* v. *State*, 101 Conn. App. 213, 217, 920 A.2d 1024 (2007), appeal dismissed, 290 Conn. 128, 962 A.2d 80, cert. denied, 558 U.S. 842, 130 S. Ct. 102, 175 L. Ed. 2d 68 (2009).

In the absence of controlling precedent on the specific issue with which we are now faced, we turn to cases in which a court's authority has been discussed in conjunction with its jurisdiction and cases presenting analogous circumstances. Our Supreme Court has recognized the delineation between authority and jurisdiction and, moreover, that both are necessary for a valid decision. "Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999). Stated differently, although a court may properly exercise its subject matter jurisdiction in a given matter, its decision could nevertheless be invalid for want of authority if it exceeds its authority in awarding a remedy. *See New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 336, 857 A.2d 348 (2004) ("Under [General Statutes] § 52-422, a trial court is empowered to grant injunctive relief during an ongoing arbitration proceeding only when such relief is 'necessary' to protect the rights of a party prior to the rendering of an award. Conversely, if such relief is not 'necessary' to protect a party's rights during the pendency of the arbitration proceeding, the trial court is not authorized to grant relief under § 52-422.").

Moreover, underlying the concept of res judicata are principles of finality and validity. 1 Restatement (Second), Judgments § 12, comment (a), p. 116 (1982). There is a strong jurisprudential interest in according finality to a decision in a proceeding where the parties have had a full opportunity to litigate the controversy on its merits. Id. Yet, the principle of finality rests on the premise that the proceeding had the sanction of law. Id. "The essential problem is therefore one of selecting which of the two principles [finality or validity] is to be given greater emphasis." Id., p. 117.

Our Supreme Court previously has addressed the distinction between authority and jurisdiction in the framework of res judicata, albeit specifically in the context of the family court. In *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 587–88, 674 A.2d 1290 (1996), the family court certainly had subject matter jurisdiction to adjudicate the dissolution matter; however, it did not have the authority to award certain remedies. In particular, the plaintiff sought punitive, double, and treble damages for fraud committed by her husband during their marriage. Id., 585. These claims required a jury trial, which was a procedure that was not available to the plaintiff in her dissolution action. Id., 593. Thus, the plaintiff subsequently brought a second action in the civil court seeking these civil tort damages. Id. The civil court applied res judicata, reasoning that the tort claims could have been brought in the family court. Id., 586–87. Our Supreme Court, however, disagreed, concluding that "because there are significant differences between a tort action and a dissolution action, the maintenance of a separate tort action will not subject the courts and the defendant to the type of piecemeal litigation that [res judicata] was intended to prevent." Id., 592. The court stressed that the primary distinction between these actions was the difference in remedies. Id. "A tort action, the purpose of which is to redress a legal wrong by an award of damages, is not

based on the same underlying claim as an action for dissolution, the purpose of which is to sever the marital relationship, to fix the rights of the parties with respect to alimony and child support, and to divide the marital estate. Although in a dissolution action, the trial court must consider the conduct of the parties, the judgment in a dissolution action does not provide direct compensation as such to a party for injuries suffered during the marriage. Alimony is intended to provide economic support for a dependent spouse, and the division of marital property is intended to recognize and equitably recompense the contributions of the parties to the marital partnership." (Footnote omitted.) Id., 592–93. In short, because the plaintiff in *Delahunty* could not obtain the same remedies in her dissolution action as she could in her tort action, she was not precluded by res judicata from bringing her second claim.

As in *Delahunty*, the petitioner in the present case could not obtain the relief that he requested from the criminal court—a new trial based on a claim of newly discovered evidence. To be sure, the hearings and the legal analysis that the petitioner seeks in the civil court may well be nearly identical to the proceedings in the criminal court. Moreover, having fully litigated his claim in the criminal court, the petitioner may arguably be a "litigant who is undeserving of the accompanying benefit that will redound to him." 1 Restatement (Second), supra, § 12, comment (d), p. 122. Nonetheless, the criminal court did not have the authority to decide the motion on its merits, nor to award the petitioner a new trial, and it, therefore, could not have rendered a valid, final decision on the motion for a new trial. For these reasons, res judicata does not preclude the petitioner's petition for a new trial here.[3]

[3] The state argues that, even if res judicata does not apply, the petitioner should nonetheless be precluded from challenging res judicata because (1) the petitioner induced the erroneous ruling from the criminal court, and (2) the petitioner has procedurally defaulted on this claim. We conclude that neither of these doctrines apply to the present case.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

CHARLES H. GADDY *v.* MOUNT VERNON FIRE INSURANCE COMPANY ET AL.
(AC 41130)

Bright, Devlin and Eveleigh, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court granting the motion for summary judgment filed by the defendants. The plaintiff claimed that the trial court improperly concluded that his claims were barred by the applicable statute of limitations. *Held* that the trial

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First, "[t]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 724.

Notably, the doctrine of induced error is premised on fault for the error lying solely with the challenging party. This element is not present in the current case. To be sure, the petitioner filed the petition in the wrong court. However, the petitioner subsequently corrected this error and properly filed a motion for a new trial instead. Additionally, the state effectively argues that, by bringing a motion for a new trial based on new evidence, the petitioner induced the criminal court to unwittingly hold pointless hearings. However, from the time that the petitioner initially filed a petition for a new trial with the criminal court, the criminal court openly recognized that this type of petition is solely filed in the civil court. Overall, it appears that there is no single party at fault for the errors of the criminal court; instead, the inertia of these hearings and the mutual mistake of all the parties involved are the most likely culprits of these errors.

Second, procedural default does not apply, because the petitioner could not have properly brought his claim of newly discovered evidence on direct appeal. Procedural default applies where the "petitioner could have filed such a motion 'at any time,' including the present time . . . [but] failed to follow the proper procedures by which to correct his sentence or to preserve his challenge to the sentence before having filed this petition . . . ." (Citation omitted.) *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 39–40, 779 A.2d 80, 86 (2001). The petitioner had no right to the remedy he seeks on direct appeal; it is only available through a collateral petition. Thus, the petitioner could not have filed this petition at any time and has not procedurally defaulted. See id., 39.

court properly granted the defendants' motion for summary judgment and rendered judgment for the defendants; the claims that the plaintiff raised on appeal were essentially the same claims that he raised in the trial court and, because those issues were properly resolved in the trial court's thoughtful and comprehensive memorandum of decision, this court adopted that court's well reasoned memorandum of decision as a statement of the facts and the applicable law on those issues.

Argued May 28—officially released September 3, 2019

Procedural History

Action seeking, inter alia, to recover proceeds allegedly due under an insurance policy issued by the defendants, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment, and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Mario Cerame, with whom, on the brief, were *Juri E. Taalman*, *Joseph R. Serrantino* and *Timothy Brignole*, for the appellant (plaintiff).

Beverly Knapp Anderson, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Charles H. Gaddy, appeals from the summary judgment rendered by the trial court in favor of the defendants, Mount Vernon Fire Insurance Company and United States Liability Insurance Group. On appeal, the plaintiff claims that the court improperly concluded that his claims were barred by the applicable statute of limitations. We disagree.

The claims raised by the plaintiff on appeal essentially are the same claims he raised in the trial court when he opposed the defendants' motion for summary judgment and argued in favor of his own motion for summary

judgment. We have examined the record on appeal, including the briefs and arguments of the parties, and we conclude that the judgment of the trial court should be affirmed. The issues raised by the plaintiff were resolved properly in the thoughtful and comprehensive memorandum of decision filed by the trial court, *Noble, J.* Because Judge Noble's memorandum of decision also fully addresses the arguments raised in the present appeal,[1] we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues. See *Gaddy* v. *Mount Vernon Fire Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-16-6066237-S (October 16, 2017) (reprinted at 192 Conn. App. 340, A.3d). It would serve no useful purpose for us to repeat those facts or the discussion here. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011).

The judgment is affirmed.

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[1] In addition to the claims he raised before the trial court, the plaintiff, on appeal, also argues that a recent case, *Cadle Co.* v. *Ogalin*, 175 Conn. App. 1, 167 A.3d 402, cert. denied, 327 Conn. 930, 171 A.3d 454 (2017), establishes that, pursuant to General Statutes § 52-598, he, as a judgment creditor, has twenty-five years to bring suit against the defendants, which he claims are judgment debtors. We disagree that *Cadle Co.* applies to the plaintiff's situation. Because the plaintiff has never obtained a judgment against these defendants, they, as a matter of law, are not judgment debtors in this case. In an attempt to avoid this obvious conclusion, the plaintiff argued, for the first time in a motion for reargument and reconsideration, that the defendants are the "alter ego" of their insured, the actual judgment debtor. The court denied the plaintiff's motion, and the plaintiff has not argued on appeal that it was error for the court to do so. Furthermore, other than a bald assertion that the defendants are the alter ego of their insured, neither the plaintiff's principal brief nor his reply brief contain any analysis of such a claim. For these reasons, any such claim is deemed abandoned. See *NRT New England, LLC* v. *Jones*, 162 Conn. App. 840, 856, 134 A.3d 632 (2016).

APPENDIX

CHARLES H. GADDY *v.* MOUNT VERNON FIRE INSURANCE COMPANY ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-16-6066237-S

Memorandum filed October 16, 2017

Proceedings

Memorandum of decision on motions for summary judgment. *Defendants' motion granted*; *plaintiff's motion denied.*

Juri E. Taalman and *Joseph R. Serrantino*, for the plaintiff.

Beverly Knapp Anderson and *Carmine Annunziata*, for the defendants.

Opinion

NOBLE, J. Before the court are motions for summary judgment by each party. For the reasons set forth below, the defendants' motion for summary judgment is granted, and the plaintiff's motion for summary judgment is denied.

FACTS

On February 19, 2016, the plaintiff, Charles Gaddy, commenced the present action against the defendants, the Mount Vernon Fire Insurance Company (Mount Vernon) and the United States Liability Insurance Group (USLI).[1] In the amended complaint dated March 6, 2017, the plaintiff alleges that his former insurance agent, the Hunt Group, LLC (Hunt Group), was insured by Mount Vernon and USLI. The plaintiff owned property, which was insured under a policy of insurance (policy) for

* Affirmed. *Gaddy* v. *Mount Vernon Fire Ins. Co.*, 192 Conn. App. 337, A.3d (2019).

[1] USLI is Mount Vernon's parent company. USLI and Mount Vernon will be collectively referred to as the defendants.

property and casualty loss with the Scottsdale Insurance Company (Scottsdale.) On May 19, 2003, the plaintiff provided the Hunt Group with funds for the renewal of the policy. On or before June 14, 2003, the Hunt Group failed to timely forward the funds to Scottsdale, which caused the policy to lapse. On that date, the plaintiff experienced a fire loss to the property that was to have been insured by Scottsdale.

The plaintiff brought suit in 2006 against the Hunt Group, claiming negligence. See *Gaddy* v. *Hunt Group, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-06-05003718-S. The defendants thereafter filed a complaint against Hunt Group in the United States District Court for the District of Connecticut (District Court action) seeking a declaratory judgment that it had no duty to indemnify or defend the Hunt Group for its failure to cooperate with the defendants. See *Mount Vernon Fire Ins. Co.* v. *Hunt Group, LLC*, United States District Court, Docket No. 3:06 CV-02006 (CFD) (D. Conn. 2006). In the District Court action, service of process was made on "Mr. Michael Hunt, as agent for Hunt Group, Inc.," and not "Hunt Group, LLC."

On March 29, 2007, the District Court entered a default judgment for failure to appear. See *Mount Vernon Fire Ins. Co.* v. *Hunt Group, LLC*, supra, United States District Court, Docket No. 3:06 CV-02006 (CFD). On April 4, 2007, the District Court entered an amended default judgment (federal declaratory judgment) for failure to appear, and held that Mount Vernon had no duty to defend or indemnify Hunt Group for the plaintiff's fire loss in the underlying Superior Court action. See id. The defendants successfully moved to withdraw their defense of the Hunt Group in the Superior Court action. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. On January 26, 2009, the plaintiff recovered a judgment against Hunt Group in the amount of $823,919.99 for the plaintiff's

fire loss. See id. The plaintiff commenced the current action against the defendants pursuant to General Statutes § 38a-321,[2] and is, by law, subrogated to the Hunt Group's rights to enforce the policy.

On May 19, 2017, both parties filed motions for summary judgment. The plaintiff's motion asserts that the federal court's declaratory judgment was null and void ab initio because it was obtained by the defendants without proper service on the Hunt Group, and thus, in a manner that amounted to a fraud on the court. The defendants' motion is based on the ground that the plaintiff's claims are time barred under all applicable statutes of limitation and submits the following: (1) the District Court's amended default judgment, dated April 4, 2007; (2) the District Court's default judgment, dated March 29, 2007; (3) the District Court's case docket; (4) the marshal's return of service to "Mr. Michael Hunt of Hunt Group, Inc.," for the District Court action (return of service), dated December 20, 2006; (5) the underlying Superior Court's docket entries; (6) certified Secretary of the State record on Hunt Group; (7) Secretary of the State's Commercial Recording Service (C.O.N.C.O.R.D.) record for Hunt Group; (8) the underlying Superior Court motion to withdraw appearance hearing transcript (*Tanzer*, *J.*); and (9) the signed and sworn affidavit of Beverly Knapp Anderson, the defendants' attorney.

[2] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied *within thirty days* after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment." (Emphasis added.)

On June 19, 2017, the plaintiff filed an opposition to the defendants' motion for summary judgment. In his opposition, the plaintiff incorporated his motion for summary judgment, dated May 19, 2017, and submits the following: (1) the signed and sworn affidavit of Robert Enos;[3] (2) the signed and sworn affidavit of Mary Hemsley;[4] (3) the underlying Superior Court judgment; (4) the District Court's complaint, dated December 15, 2006; (5) the District Court's appearance of counsel for Mount Vernon; (6) the return of service; (7) C.O.N.-C.O.R.D. business inquiry; (8) the District Court's motion for entry of default, dated January 10, 2007; (9) the District Court's motion for entry of default, dated January 30, 2007; (10) Mount Vernon's memorandum of law regarding service of process in the District Court action, dated March 26, 2007; (11) the District Court action civil docket; (12) the signed and sworn affidavit of Attorney Joseph R. Serrantino;[5] (13) the District Court default judgment, dated March 29, 2007; (14) the District Court amended default judgment, dated April 4, 2007; (15) the District Court motion to withdraw as counsel; and (16) the plaintiff's amended complaint, dated March 6, 2017. On June 19, 2017, the defendants submitted an objection to the plaintiff's summary judgment motion. On July 5, 2017, the plaintiff submitted a reply to the defendants' objection. The court heard oral argument at short calendar on July 10, 2017.

I

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any

[3] Robert Enos is the New England district manager of Custard Insurance Adjusters, Inc.

[4] Mary Hemsley is a second vice president/claims examiner for USLI.

[5] Attorney Joseph R. Serrantino is an attorney for Brignole & Bush, LLC.

material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534, 51 A.3d 367 (2012). "Summary judgment may be granted where the claim is barred by the statute of limitations. . . . Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute . . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013).

The defendants argue that their motion for summary judgment should be granted on the grounds that (1) counts one and two of the amended complaint are time barred under the six year statute of limitations in General Statutes § 52-576 (a);[6] and (2) counts three and four are time barred under the three year statute of limitations in General Statutes § 52-577.[7] In the alternative, the defendants argue that the plaintiff cannot demonstrate that the scrivener's error in the summons or marshal's return of service rendered the federal declaratory judgment void ab initio. In support of their argument, the defendants argue that under the reasoning of *Grannis* v. *Ordean*, 234 U.S. 385, 395, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), they are entitled to summary judgment because "if a person is sued by a wrong name, and he fails to appear and plead the misnomer in abatement, the judgment binds him." See also *Morrel* v. *Nationwide Mutual Fire Ins. Co.*, 188 F.3d 218, 224 (4th Cir. 1999) (absence of Inc. in corporate name of defendant in affidavit of service did not render default

[6] General Statutes § 52-576 (a) provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

[7] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

judgment defective where any confusion would have been dispelled by allegations in other documents); *Barsten* v. *Dept. of Interior*, 896 F.2d 422, 423 (9th Cir. 1990) (technical misnaming of defendant is insignificant, as accompanying documents made defendant's identity clear); *United States* v. *A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947) (inclusion of Inc. in corporate name of defendant and Lumber in other case did not make complaint defective).

In response, the plaintiff argues that the defendants' motion for summary judgment should be denied and his motion granted because (1) the federal declaratory judgment was null and void ab initio, and was obtained by the defendants in a manner that amounted to fraud on the court; (2) the defendants fraudulently and in bad faith presented the declaratory judgment as the basis for their request to be withdrawn from the underlying Superior Court case; and (3) the defendants' claimed statute of limitations does not apply because the plaintiff's amended complaint is based upon a judgment that can be brought within twenty-five years of the date upon which judgment was entered pursuant to General Statutes § 52-598.[8]

[8] General Statutes § 52-598 (a) provides in relevant part: "[N]o action based upon such a judgment may be instituted after the expiration of twenty-five years from the date the judgment was entered . . . ."

The parties disagree on the applicable statute of limitations. The defendants argue that the statute of limitations for tort cases under § 52-577 is three years, and the statute of limitations for breach of contract cases under § 52-576 (a) is six years. The plaintiff argues that this is an action to collect a prior judgment, and therefore, the statute of limitations is twenty-five years under § 52-598. The court rejects the plaintiff's argument that the twenty-five year statute of limitations in § 52-598 applies in the present action because the plaintiff does not have a judgment against either of the defendants to enforce, and the defendants received a declaratory judgment, which discharged their duty to indemnify and defend Hunt Group. Our courts have previously reasoned that § 52-598 is applicable when the plaintiff has proven that the defendants are the alter ego of the entity that was subject to the previous judgment, which the plaintiff has not demonstrated here. See *Wm. Passalacqua Builders, Inc.* v. *Resnick Developers South, Inc.*, 933 F.2d 131, 142–43 (2d Cir. 1991); *Pullicino* v. *Jensen*, Superior Court,

A

Service of Process

The only defect in the service of process that the plaintiff identifies is the naming of "Hunt Group, Inc.," as the defendant, rather than "Hunt Group, LLC." However, "[a] defendant who is clearly identified by a summons and complaint and who has been served with those documents may not avoid the jurisdiction of the district court merely because he is incorrectly named in them." *Tremps* v. *Ascot Oils, Inc.*, 561 F.2d 41, 44 (7th Cir. 1977). Service is proper despite a misnomer if the complaint is "not susceptible to any reasonable doubt or confusion about who it was the plaintiff intended to sue." (Internal quotation marks omitted.) *Conner-Cooley* v. *AIG Life Brokeradge*, 282 F.R.D. 431, 435 (E.D. Wis. 2012).

In support of their argument, the defendants argue that the return of service naming "Hunt Group, Inc.," rather than "Hunt Group, LLC," was a scrivener's error and that there is no evidence that Hunt Group was misled or confused in any way from the misnomer. The plaintiff counters that the District Court did not have personal jurisdiction over the Hunt Group, as it was never properly served with process.

In the present case, service of process in the District Court was made upon "Mr. Michael Hunt as agent for Hunt Group, Inc., at 71 Barbonsel Road, East Hartford." This error could not have created reasonable doubt or confusion about the identity of the intended defendant because there is no "Hunt Group, Inc.," registered in Connecticut, the proper authorized agent for service of process of Hunt Group, "Mr. Michael Hunt at 71 Barbonsel Road, East Hartford," was served, and Hunt

judicial district of Waterbury, Docket No. CV-13-6019108-S (December 27, 2013) (*Roche, J.*) (57 Conn. L. Rptr. 372, 374).

Group was the named defendant on the complaint and on both the summons and complaint's captions. On December 20, 2006, Mount Vernon's process server delivered a copy of the summons and complaint to Hunt, who was Hunt Group's authorized agent for service of process. Accordingly, the District Court had personal jurisdiction over Hunt Group, as Hunt Group was properly served with the summons and complaint on December 20, 2006.[9]

II

STATUTES OF LIMITATIONS

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

The defendants argue that counts one and two of the amended complaint are time barred under the six year statute of limitations in § 52-576 (a), and counts three and four are time barred under the three year statute of limitations in § 52-577. The plaintiff counters that the statutes of limitations were tolled by the continuing course of conduct doctrine or by the doctrine of equitable estoppel. Specifically, the plaintiff argues that the defendants acted fraudulently when Mount Vernon

[9] The defendant does not argue, and this court does not consider, whether this court has authority or jurisdiction to find that an action brought, and judgment rendered, in the United States District Court, is void ab initio.

obtained the federal declaratory judgment because Hunt Group was never served with process, and therefore, the District Court did not have personal jurisdiction over Hunt Group. The plaintiff further argues that the defendants acted fraudulently when they submitted the original declaratory judgment, instead of the amended declaratory judgment, to the Superior Court. At no time has the plaintiff moved to open or vacate the judgment of the District Court.

A

Section 52-576 (a)

The defendants argue that counts one and two are time barred under § 52-576 (a) because the plaintiff became subrogated to the Hunt Group's rights on February 25, 2009, and therefore, was required to commence suit within six years of that date. Section 52-576 (a) provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ." "[Our Appellate Court] and our Supreme Court have held that, in the absence of some other controlling statutory or contractual provision, § 52-576 (a) is the applicable statute of limitation for bringing claims under insurance policies." *Gohel* v. *Allstate Ins. Co.*, 61 Conn. App. 806, 821, 768 A.2d 950 (2001).

In the present case, it is undisputed that the Superior Court in the underlying action entered judgment against Hunt Group on January 26, 2009. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. Pursuant to § 38a-321, the plaintiff became subrogated to the Hunt Group's rights thirty days after the judgment was rendered. The plaintiff could have brought a subrogation action beginning on February 25, 2009, and therefore, was required to commence suit within six years from that date. Because the only statute

of limitations applicable to the plaintiff's claim was that set forth in § 52-576 (a), namely, six years, and because the plaintiff brought suit on that claim after six years, on February 17, 2016, the defendants' motion for summary judgment as to counts one and two should be granted unless the statute of limitations is tolled under one of the exceptions.

B

Section 52-577

Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "[S]ection 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 139, 965 A.2d 582 (2009). "When conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Internal quotation marks omitted.) Id.

In the present case, the District Court issued the amended judgment on April 4, 2007. The plaintiff argues that the defendants acted fraudulently when they submitted the motion to withdraw their appearance in the underlying Superior Court action. The Superior Court granted the motion to withdraw the appearance on June 6, 2007. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. Therefore, the plaintiff was required to commence suit by June 6, 2010, at the latest. The plaintiff, however, did not commence suit until February 17, 2016. Therefore, the defendants' motion for summary judgment as to counts three and four should be granted unless the statute of limitations

is tolled under one of the exceptions argued by the plaintiff.

C

Continuing Course of Conduct Doctrine

One of the exceptions to toll the statute of limitations is the continuing course of conduct doctrine. The defendants argue, inter alia, that the continuing course of conduct doctrine does not apply because the plaintiff cannot establish that the defendants committed an initial wrong against the plaintiff since service of process on "Hunt Group, Inc.," instead of "Hunt Group, LLC," did not make the federal declaratory judgment void ab initio, and therefore, the defendants did not have a duty to defend and indemnify Hunt Group. The plaintiff, however, argues that the federal declaratory judgment that relieved the defendants from their continuing duty to defend and indemnify Hunt Group was void ab initio, and therefore, the defendants had a continuing duty to defend and indemnify, which the defendants breached.

"[W]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 311. "[I]n deciding . . . the defendant's motion for summary judgment, [the court] must determine if there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) Id., 313.

In the present case, the plaintiff has failed to produce evidence that the defendants have committed an initial

wrong upon the plaintiff. "[A] precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an initial wrong upon the plaintiff." (Internal quotation marks omitted.) Id., 312.

Simply put, there is no evidence that the defendants committed common-law fraud, or any fraud, on the court. The federal declaratory judgment was not void ab initio because service of process was proper, and therefore, it was not fraudulent for the defendants to present this court with the federal declaratory judgment. As the plaintiff has failed to demonstrate the precondition for the operation of the continuing course of conduct doctrine, it does not apply to the present case.

D

Doctrine of Equitable Estoppel

A second exception to toll the statute of limitations is the doctrine of equitable estoppel. "The doctrine of equitable estoppel is well established. [W]here one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is [precluded] from averring a different state of things as existing at the time. . . . In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and that the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *Coss* v. *Steward*, 126 Conn. App. 30, 41, 10 A.3d 539 (2011). "[T]here must generally

be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury." (Internal quotation marks omitted.) Id., 41–42. "In the absence of prejudice, estoppel does not exist." (Internal quotation marks omitted.) Id., 42.

The defendants argue that the doctrine of equitable estoppel does not apply here because there is no evidence that the defendants induced the plaintiff to refrain from bringing the action prior to the expiration of the statute of limitations. The defendants further argue that equitable estoppel does not apply because the service of process on "Hunt Group, Inc.," was not intentional and was a mere scrivener's error, and there is no evidence that Hunt Group was confused or misled by such misnomer. To counter, the plaintiff argues that the defendants are equitably estopped from asserting the statute of limitations defense because Mount Vernon fraudulently obtained a withdrawal of representation of Hunt Group in the underlying Superior Court case on the basis of a federal declaratory judgment that was void ab initio for lack of service of process on Hunt Group.

In the present case, similar to *Carroll* v. *Safeco Ins.*, Superior Court, judicial district of Waterbury, Docket No. 117750 (April 5, 1994) (*Sullivan*, *J.*) (11 Conn. L. Rptr. 271, 273), "[t]he plaintiff has neither alleged nor shown any facts that the defendant misrepresented or misled [him] about the state of limitations." A mere mistake, such as a misnomer, does not afford a basis for estoppel. See *Krupa* v. *Kelley*, 5 Conn. Cir. Ct. 127, 132, 245 A.2d 886 (1968). The doctrine of equitable estoppel, therefore, is not applicable.

III

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied.

STATE OF CONNECTICUT *v.* JAMES HENRY WATSON
(AC 41299)

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

Syllabus

Convicted, following a jury trial, of the crimes of strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree, the defendant appealed to this court. The defendant's conviction resulted from an incident in which the defendant, who had been hanging out and drinking beer with the victim, accompanied the victim to his apartment, where he restrained, assaulted and choked her over the course of several hours, in different areas of the apartment. On appeal, he claimed, inter alia, that the trial court improperly made the determination of whether the charges of assault and unlawful restraint were "upon the same incident" as the strangulation charge for purposes of the statute ([Rev. to 2015] § 53a-64bb [b]) that provides that no person shall be found guilty of strangulation in the second degree and unlawful restraint or assault "upon the same incident," but that such person may be charged and prosecuted for all three offenses upon the same information. *Held*:

1. The defendant's unpreserved claim that the determination of whether the charges were "upon the same incident" was a question of fact for the jury, not the court, to determine was unavailing; this court has determined previously, under similar factual circumstances, that it was proper for the trial court, rather than the jury, to determine whether the charges were "upon the same incident" for purposes of § 53a-64bb (b), and denied the defendant's request that the present case be heard en banc in order to overturn that prior case law.
2. The defendant could not prevail on his claim that the trial court violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault, unlawful restraint and strangulation, which was based on his claim that the separate charges of assault and unlawful restraint, as charged in the information and based on the evidence, were not established as wholly separate claims from the strangulation:

although the defendant claimed that the fact that the information, which alleged that all of the crimes occurred in the defendant's apartment at approximately 2 a.m., indicated that the charges arose from the same incident, the record revealed numerous criminal acts committed over the course of a longer period of time that demonstrated that the charges did not arise from the same act or transaction, including evidence that the victim informed the police that the defendant kept her in his apartment against her will for approximately nine hours and that the defendant assaulted and chocked the victim in different areas of the apartment for a few hours of this approximately nine hour period; moreover, the victim's testimony established that the assault and the unlawful restraint did not arise from the same incident as the strangulation, because even though the conduct constituting assault and strangulation in the present case did not occur in distinct locations, the fact that the assault and strangulation involved distinct violent acts that resulted in distinct types of physical injury supported the trial court's conclusion that those charges did not arise out of the same act or transaction, and the defendant's conduct toward the victim established unlawful restraint on a separate basis from his acts of strangulation, as the defendant restrained the victim in his apartment for approximately nine hours by taking the victim's cell phones from her, restricting her movement to smaller areas of the apartment and physically preventing her from escaping, none of which occurred while the defendant was strangling the victim; accordingly, because the defendant's double jeopardy claim was contingent on whether the charges arose from the same act or transaction, and because this court concluded that they did not, the defendant's double jeopardy claim necessarily failed.

3. The defendant could not prevail on his claim that the trial court violated his constitutional rights to confrontation and to present a defense by restricting his cross-examination of the victim, which was based on his claim that he should have been allowed to question the victim regarding past conduct, including a call she had made to the police in May, 2017, concerning an incident of assault separate from that underlying the charges in this case; although the defendant couched his claim in terms of his constitutional rights, those rights entitled him only to elicit relevant evidence, and the trial court properly determined that the evidence regarding the May, 2017 police call was not relevant for the purposes of impeachment, and, therefore, the defendant's constitutional rights to confrontation and to present a defense were not violated.

Argued May 21—officially released September 3, 2019

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, strangulation in the second degree, assault in the third degree,

unlawful restraint in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion to admit evidence regarding the sexual conduct of the victim; verdict of guilty of strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree; subsequently, the court denied the defendant's motion for a judgment of acquittal as to the charges of assault in the third degree and unlawful restraint in the first degree and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, James Henry Watson, appeals from the judgment of conviction, rendered following a jury trial, of assault in the third degree in violation of General Statutes § 53a-61 (a) (1), unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), strangulation in the second degree in violation of General Statutes (Rev. to 2015) § 53a-64bb (a),[1] and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). The defendant claims that the trial court (1) improperly determined whether the charges of assault in the third degree and unlawful restraint in the first degree were "upon the

[1] Hereinafter, unless otherwise indicated, all references to § 53a-64bb in this opinion are to the 2015 revision of the statute.

same incident" as the charge of strangulation in the second degree for the purposes of § 53a-64bb (b); (2) violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault in the third degree, unlawful restraint in the first degree and strangulation in the second degree; and (3) violated his right to confrontation when it restricted his cross-examination of the victim. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On October 19, 2016, at approximately 3 p.m., the defendant and the victim were "hanging out" and drinking beer on the front porch of an apartment building at 850 Hancock Avenue in Bridgeport wherein the defendant resided. The victim stated that she needed to use the bathroom, and the defendant stated that she could use the bathroom in his apartment. The defendant accompanied the victim to his apartment, which was on the second floor of the building, and the victim went into the bathroom. When the victim tried to exit the bathroom, the defendant blocked the door and stated, "I'm going to get some of your fucking pussy."

The defendant ultimately allowed the victim to leave the bathroom, but he then blocked the victim's access to the front door, forcing the victim into the living room. The defendant closed the curtains in the living room and increased the volume on the radio that was playing. The victim later testified that she did not try to leave the apartment at this point because there was a "certain way" to open the front door, and she did not know how to do so.

The defendant then grabbed the victim and pushed her onto the couch in the living room while stating that he "wanted to get [the victim's] pussy." The victim attempted to push the defendant off of her, but the

defendant held her down on the couch and began to rip off her pants and underwear. The defendant also punched and hit the victim in the face.[2]

Additionally, the defendant continually choked the victim and hit her in the face. Periodically, the choking would cause the victim to have difficulty breathing. Whenever this happened, the victim would kick her feet at the defendant, and the defendant would briefly let go of her throat. Thereafter, the defendant would resume choking her. At one point during this episode, the defendant stated "I want to kill you" and "I know I'm going to pay for this." The victim asked the defendant to return her cell phones,[3] which he had taken from her prior to the first episode where he attacked her, so that she could call her son. The defendant did not return the victim's cell phones to her and continued to hit her repeatedly. In an attempt to resist the defendant, the victim bit his pinky finger. The victim also tried to run toward the door in order to escape from the apartment, but the defendant prevented her from doing so by grabbing the hood of the sweatshirt she was wearing.

After attacking the victim in the living room, the defendant brought her into his bedroom, threw her onto the bed, and commenced a second attack, continuing to hit and choke her. The defendant also ripped the victim's T-shirt off of her body and used it to choke her. Throughout this second episode, the defendant stated repeatedly that he wanted to kill the victim.

The defendant then took the victim back into the living room and threw her onto a different couch than he had thrown her onto earlier. During this third attack,

[2] The victim testified that during each of the three episodes in which she was attacked, the defendant had nonconsensual vaginal intercourse with her. We note that the jury acquitted the defendant of the charge of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1).

[3] The victim had two cell phones, however, one was out of prepaid minutes and, therefore, was inoperable.

the defendant "beat [the victim] some more" and choked her. Sometime thereafter, the defendant stopped attacking the victim. Even after the defendant stopped attacking the victim, he would not allow her to leave the apartment.

Sometime in the early morning, on October 20, 2016, the victim was able to convince the defendant to allow her to leave the apartment by begging him to let her go to the store to purchase a drink and promising that she would return to the apartment afterward. The defendant accompanied the victim outside of the apartment building, but she was able to run away from him.

The victim ran to a nearby gas station, where she asked an employee if she could use the phone to call the police because she had just been raped. The employee did not allow the victim to use the phone, so the victim left the gas station and continued walking down the street away from the defendant's apartment. While she was walking down the street, the victim saw an ambulance driving toward her. She waved down the ambulance and told the paramedics in the vehicle that she had been raped. One of the paramedics observed that the victim "had an abrasion of approximately four inches [on] the neck," as well as abrasions and swelling on her left eye and left ear.

The paramedics parked the ambulance at the intersection of Fairfield Avenue and Norman Street in Bridgeport and contacted the police. The police arrived at approximately 2:30 a.m. and spoke with the victim. One of the police officers observed that the victim "had some red marks around her neck and some bruising to the face." The victim directed the police to 850 Hancock Street and informed them that the assault had occurred in an apartment on the second floor of the building. The police entered the building and spoke with the defendant in his apartment. The defendant admitted

that he and the victim had sexual intercourse but claimed that it had been consensual. While the police were in the defendant's apartment, they noticed a pair of ripped women's underwear in the garbage can and took possession of them for evidentiary purposes. The police also asked the defendant whether he had in his possession the victim's cell phones and charging cord, because she had stated that they were "missing." The defendant gave the police the victim's cell phones and charger.

The police then brought the defendant down to the front of the building, where the victim was waiting. The victim identified the defendant as the individual who had attacked her, and the police placed him under arrest.

The victim then was transported to Bridgeport Hospital, where a nurse examined her and administered a sexual assault kit. The nurse observed that the victim "had ligature marks on her neck and some red marks and abrasions on her neck and chest." The victim complained of a headache and dizziness and stated that she had been punched in the face. The victim was prescribed Tylenol and Ibuprofen, as well as Meclizine for dizziness and Zofran or Ondansetron for nausea.

The defendant thereafter was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) (sexual assault), assault in the third degree in violation of § 53a-61 (a) (1) (assault), unlawful restraint in the first degree in violation of § 53a-95 (a) (unlawful restraint), strangulation in the second degree in violation of § 53a-64bb (a) (strangulation), and threatening in the second degree in violation of § 53a-62 (a) (1) (threatening). The substitute information alleged that all of the crimes of which he was accused had occurred on October 20, 2016, at approximately 2 a.m.

The defendant's case was tried before a jury in September, 2017. The jury returned a verdict in which it found the defendant guilty of the charges of strangulation, assault, unlawful restraint, and threatening, and not guilty of the charge of sexual assault. Before sentencing, the court ordered that the parties "submit a memorandum of law concerning whether and to what extent [§ 53a-64bb (b)] applies in the present case and, if so, the appropriate remedy to be implemented by the court at the time of sentencing."

On October 3, 2017, in response to the court's order, the defendant filed a motion for a judgment of acquittal as to the charges of assault and unlawful restraint. On October 25, 2017, the state filed a response to the court's order, in which it requested that the court impose separate sentences on each of the charges of which the defendant was found guilty and deny the defendant's October 3, 2017 motion for a judgment of acquittal. The state argued that § 53a-64bb (b) did not prohibit punishment for each offense "because the jury reasonably could have found the defendant guilty of unlawful restraint and assault for discrete acts that were separate from the act of strangling the victim."

On December 1, 2017, the court heard argument on the defendant's motion for a judgment of acquittal. Defense counsel argued: "[I]t's our position that the incident itself that took place at . . . 850 Hancock Avenue was one transaction. Even though the transaction may have occurred over a time period extending an hour, two hours, three hours . . . . [T]herefore, [the defendant] should receive acquittals on [the counts of assault and unlawful restraint] pursuant to [§ 53a-64bb (b)] and be sentenced on the guilty verdict on the other two counts." In response, the state argued that the evidence presented at trial indicated that the assault and unlawful restraint were separate from the strangulation.

The court denied the defendant's motion for a judgment of acquittal and concluded that, based on the evidence presented at trial, the assault and unlawful restraint were not "upon the same incident" as the strangulation and, therefore, that § 53a-64bb (b) did not preclude the imposition of punishment for the counts at issue. The court sentenced the defendant on all the charges of which the jury had found him guilty, for a total effective term of twelve years of incarceration, execution suspended after seven years of mandatory incarceration, followed by three years of probation.[4] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly determined whether the charges of assault and unlawful restraint were "upon the same incident" as the charge of strangulation for the purposes of § 53a-64bb (b). Specifically, the defendant argues that whether the crimes were "upon the same incident" was a question of fact that should have been properly submitted to and decided by the jury, not the court.[5] We disagree.

[4] Specifically, the court sentenced the defendant on the assault to one year of incarceration, execution suspended, followed by three years of probation; on the unlawful restraint to five years of incarceration, execution suspended after three years of mandatory incarceration, followed by three years of probation; on the strangulation to five years of incarceration, execution suspended after four years of mandatory incarceration, followed by three years of probation; and on the threatening to one year of incarceration, execution suspended, followed by three years of probation. The court imposed all of the sentences to run consecutively.

[5] The defendant also appears to argue, as part of this claim, that the court's determination of whether the charges were "upon the same incident" involved instructional error in that the trial court should have instructed the jury on § 53a-64bb (b), so that the jurors could have made the determination themselves. The defendant in *State* v. *Morales*, 164 Conn. App. 143, 156 n.7, 157 n.8, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016), made a similar argument, contending that, by failing to instruct on § 53a-64bb (b), the court committed instructional error. In *Morales*, this court concluded that the defendant waived any claim of instructional error under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). *State* v. *Morales*,

Section 53a-64bb (b) provides in relevant part: "No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. . . ."

We note that the defendant argues that this claim is preserved and, in the alternative, that it can be reviewed

supra, 156 n.7, 159–60 n.9. Similarly, in the present case, we conclude that, to the extent that the defendant has raised a claim of instructional error on appeal, he has waived this claim under *Kitchens*; see *State* v. *Kitchens*, supra, 482–83 ("when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal").

In the present case, the defendant never requested that the jury be instructed on § 53a-64bb (b). The court first provided counsel with a copy of its proposed draft charge on September 27, 2017. The draft charge, like the court's final charge delivered to the jury, did not contain an instruction pursuant to § 53a-64bb (b). The next day, the court twice solicited comments from counsel regarding the proposed charge. Defense counsel did not object to the proposed charge at either point that day. Thereafter, when the court instructed the jury, defense counsel again failed to object to the instructions as given or request that the court instruct the jury on § 53a-64bb (b).

On appeal, the defendant argues that he did not request that the jury be instructed on § 53a-64bb (b) or object to the instructions as given because the case was tried shortly after this court's decision in *Morales* was officially released and "the trial court would not have charged the jury that it was to determine whether the charges occurred 'upon the same incident,' even if the defendant had made such a request." The defendant, however, has failed to provide any support for his argument that because he believed the court would refuse to instruct the jury on § 53a-64bb (b), his failure to object does not support a *Kitchens* waiver. To the contrary, this court previously has recognized that "[a] trial court has no independent obligation to instruct, sua sponte, on general principles of law relevant to all issues raised in evidence . . . . Rather, it is the responsibility of the parties to help the court in fashioning an appropriate charge." (Internal quotation marks omitted.) *State* v. *Crawley*, 93 Conn. App. 548, 568, 889 A.2d 930, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). As such, we conclude that any instructional error claimed by the defendant was waived under *Kitchens*.

under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[6] We conclude that the claim was not preserved because the defendant never objected to the court determining whether the charges of assault and unlawful restraint were "upon the same incident" as the charge of strangulation. Thus, we assess whether *Golding* review is appropriate. We conclude that the record is adequate for review, as the trial court's remarks are set forth in the transcript of the sentencing hearing, and that the issue is of a constitutional magnitude because it implicates the defendant's right to a jury trial. See *State* v. *Morales*, 164 Conn. App. 143, 160, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016). We conclude, however, that the defendant cannot prevail on his claim because there was no constitutional violation.[7] See id.

[6] "Under [the *Golding*] test, [a] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 644–45, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

[7] The defendant also argues that, even if this court declines to review this claim under *Golding*, it should do so under the plain error doctrine or this court's supervisory authority. We disagree.

We first note that plain error is a doctrine of reversibility, not reviewability. See *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016). For the reasons set forth in part I of this opinion, we conclude that it was not error, let alone obvious error, for the court to determine that the charges of assault and unlawful restraint were not "upon the same incident" as the charge of strangulation. See id. Thus, the defendant has failed to demonstrate that this court should afford him relief under the plain error doctrine.

We likewise decline to exercise our supervisory authority to review this claim because we conclude that the defendant has failed to demonstrate

In support of his claim, the defendant argues that *State* v. *Morales*, supra, 164 Conn. App. 159–61, wherein this court concluded that *a jury* is not required to determine whether crimes are "upon the same incident" for the purposes of § 53a-64bb (b), is "incorrect on both constitutional and statutory grounds." After filing his reply brief in this appeal, the defendant filed a motion in which he requested that the present case be heard en banc and that the panel overturn *Morales*. See, e.g., *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 68 n.9, 6 A.3d 213 (2010) ("[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." [Internal quotation marks omitted.]), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). A panel of this court denied the motion. Thereafter, at oral argument before this court, the defendant conceded that the present case is controlled by *Morales*. We conclude that *Morales* controls our resolution of this issue.

In *Morales*, as in the present case, the trial court made factual findings as to whether the defendant's convictions of strangulation, unlawful restraint, and assault were "upon the same incident" and, therefore, whether the defendant could be sentenced on all three crimes under § 53a-64bb (b). See *State* v. *Morales*, supra, 164 Conn. App. 159, 160 n.10. The defendant in *Morales* claimed that the trial court's finding that the convictions were not upon the same incident violated *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), wherein the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

that this claim is one that is relevant to the perceived fairness of the judicial system as a whole. See *State* v. *Elson*, 311 Conn. 726, 771, 91 A.3d 862 (2014).

doubt." (Internal quotation marks omitted.) *State* v. *Morales*, supra, 159–60. In *Morales*, this court concluded that the trial court's finding did not violate *Apprendi* because the court "did not find any fact that enhanced the defendant's sentence beyond the statutory maximum permitted by the jury's verdict." Id., 161. Pursuant to our decision in *Morales*, we conclude that, in the present case, it was proper for the trial court, rather than the jury, to determine whether the charges were "upon the same incident" for the purposes of § 53a-64bb (b).

II

The defendant next claims that the trial court violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault, unlawful restraint and strangulation. Specifically, the defendant argues that "[t]he separate charges of assault and unlawful restraint, as charged in the information and based on the evidence in this case, were not established as wholly separate claims from the strangulation." We disagree.

We begin by noting that the defendant preserved this claim for appeal by filing a posttrial motion for a judgment of acquittal on October 3, 2017, in which he argued: "[T]o be compliant with [§ 53a-64bb (b)], the court should modify the verdict according to required law and direct acquittals to [the charges of assault and unlawful restraint]." See *State* v. *Brown*, 118 Conn. App. 418, 422, 984 A.2d 86 (2009) ("motion for judgment of acquittal on specific charge preserves charge for appeal"), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010). Additionally, the defendant preserved this claim with regard to his right to be free from double jeopardy when, on October 26, 2017, he filed a memorandum in support of his motion for a judgement of acquittal, wherein he stated: "Pursuant to . . . [§] 53a-64bb (b)

. . . *and* the double jeopardy protections provided through the fifth and fourteenth amendments [to] the United States constitution, and the Connecticut constitution, the defendant requests that this court enter acquittals on the convictions rendered on the counts of unlawful restraint . . . and assault . . . .'' (Emphasis added.)

We next assess the defendant's claim with regard to § 53a-64bb (b). Whether the defendant's punishment for these charges violated § 53a-64bb (b) is a question of statutory construction over which this court has plenary review. *State* v. *Miranda*, 142 Conn. App. 657, 661–62, 64 A.3d 1268 (2013), appeal dismissed, 315 Conn. 540, 109 A.3d 452 (2015) (certification improvidently granted). ''When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and its relationship to exiting legislation and to [common-law] principles governing the same general subject matter . . . .'' (Internal quotation

marks omitted.) *State* v. *Buckland*, 313 Conn. 205, 224, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015).

The relevant text of § 53a-64bb, in which the phrase "the same incident" appears, provides as follows: "(a) A person is guilty of strangulation in the second degree when such person restrains another person by the neck or throat with the intent to impede the ability of such other person to breathe or restrict blood circulation of such other person and such person impedes the ability of such other person to breathe or restricts blood circulation of such other person.

"(b) No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. For the purposes of this section, 'unlawful restraint' means a violation of section 53a-95 . . . and 'assault' means a violation of section . . . 53a-61 . . . ."

"The manifest purpose of § 53a-64bb, so written, is to make an act of strangulation in the second degree, as defined in subsection (a) of the statute, separately punishable as a class D felony, whether that act, as committed in the circumstances of a given case, also supports a conviction for assault or unlawful restraint in any degree, or both, but not to enhance the punishment for that act beyond the five year maximum for a class D felony even if, as proven, it is also sufficient to constitute assault and/or unlawful restraint. By that logic, the same incident to which the statute refers is an incident of strangulation, necessarily involving restraint of another person by the neck or throat either with the intent to impede the ability of that person to breathe or to restrict the blood circulation of such other person and which, in fact, either impedes the ability

of such other person to breathe or restricts his blood circulation, not an event or course of conduct in which an act of strangulation occurs, but is preceded, followed or even accompanied by other, separate acts of assault or unlawful restraint not based, in whole or in part, upon one or more acts of strangulation. . . .

"[T]he question that must be answered in ruling on the defendant's challenge to his sentence is whether the factual basis on which he [was charged with assault and unlawful restraint] demonstrated conduct by the defendant, wholly separate from his strangulation of the victim . . . that established his guilt of [assault and] unlawful restraint . . . . If there is such conduct, then the defendant's separate convictions and sentences in this case did not violate § 53a-64bb." *State* v. *Miranda*, supra, 142 Conn. App. 663–64.

In support of his claim, the defendant argues that the fact that the information alleged that all of the crimes occurred in the same location, at the same time, indicates that the charges arose from the same incident. "[W]e [however] are not limited to a review of the state's information in order to determine whether the defendant's crimes arose from the same act or transaction. Our review of the case law leads us to conclude that the fact that the state charged him in the information with committing the subject crimes on the same date and at approximately the same time and place does not dispose of this portion of the . . . analysis; rather, we are permitted to look at the evidence presented at trial." *State* v. *Morales*, supra, 164 Conn. App. 152.

In the present case, although the state alleged in the information that the crimes occurred in the defendant's apartment at approximately 2 a.m. on October 20, 2016, the record reveals numerous criminal acts committed over the course of a longer period of time. In fact, there was evidence that the victim informed the police that the defendant kept her in his apartment against her will for approximately nine hours. For "[a] few hours" of

this approximately nine hour period, the defendant assaulted the victim in different areas of the apartment, specifically, the living room and the bedroom. The assault consisted of the defendant hitting and punching the victim in the head and face. In addition to assaulting the victim, the defendant repeatedly choked her with his hands and, later, a T-shirt, which he had ripped off of the victim's body, making it difficult for the victim to breathe. While the defendant was choking the victim, he stated, "I want to kill you."

The defendant also argues that the victim's testimony "described actions that were wholly intertwined with the actions of . . . strangulation, not separate and discrete crimes." We are unpersuaded by this argument and conclude that the victim's testimony established that the assault and unlawful restraint did not arise from the same incident as the strangulation.

First, we assess whether the defendant's conduct toward the victim established assault on a separate basis from his act of strangulation. Section 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . ." The assault in the present case, which was comprised of the defendant punching and hitting the victim in the head and face, caused the victim physical injury, as demonstrated by the bruising on her face and the abrasions and swelling on her left eye and ear. The victim complained of a headache and dizziness as a result of being punched in the face and the head. Although the assault and strangulation occurred relatively close in time, "[i]t is not dispositive in a double jeopardy analysis that multiple offenses were committed in a short time span and during a course of conduct that victimized a single person." *State* v. *Urbanowski*, 163 Conn. App. 377, 393, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

In support of his argument that the acts constituting assault were intertwined with the strangulation, the defendant attempts to distinguish the facts of the present case from those in *State* v. *Urbanowski*, supra, 163 Conn. App. 391. In *Urbanowski*, "the defendant threw the victim across a room in his residence, causing her to strike her head on a wall in the kitchen. Next, the defendant threw the victim into a porch area near the kitchen of the residence, causing further injury to her head. While the victim was still on the porch, the defendant repeatedly punched her in the face. Next, the defendant dragged the victim by her feet outdoors, down the driveway, at which time he punched and kicked the victim about the face and head. Finally, the defendant positioned the victim inside of her automobile, where he held her down and repeatedly strangled her by wrapping his hands around her neck and pushing." Id. This court concluded that the fact that the assault and strangulation involved distinct violent acts that resulted in distinct types of physical injury supported the trial court's conclusion that the charges did not arise out of the same act or transaction. Id., 392. As in *Urbanowski*, in which the assault caused the victim a brain injury and the strangulation caused the victim to be unable to breathe; id.; in the present case, the assault caused the victim a headache, dizziness, bruising on her face and abrasions and swelling on her left eye and ear, whereas the strangulation caused the victim to be unable to breathe and resulted in ligature marks around her neck. Thus, although the conduct constituting assault and strangulation in the present case did not occur in distinct locations, as it did in *Urbanowski*, we conclude that the state presented sufficient evidence to demonstrate that the charges did not arise upon the same act or transaction.

Next, we assess whether the defendant's conduct toward the victim established unlawful restraint on a

separate basis from his acts of strangulation. Section 53a-95 (a) provides: "A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." "A person restrains another person, within the meaning of § 53a-95, when, inter alia, he restrict[s] a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty . . . by confining him . . . in the place where the restriction commences . . . without consent." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 142 Conn. App. 664.

In the present case, the defendant restrained the victim in his apartment for approximately nine hours, during which time the victim could not leave because she did not know how to open the front door. Moreover, the defendant had taken the victim's cell phones from her and would not allow the victim to call her son or otherwise seek help. During that nine hour period, the defendant also restricted the victim's movement to smaller areas of the apartment. Specifically, when the victim initially came up to the apartment to use the bathroom, the defendant stood in front of the bathroom door, making it impossible for her to leave the room. When the defendant finally moved aside and allowed the victim to exit the bathroom, he blocked the front door, forcing the victim to remain in the living room. When the victim tried to escape from the apartment, the defendant prevented her from leaving by grabbing the hood of the sweatshirt she was wearing. None of this conduct occurred while the defendant was strangling the victim.

The defendant argues that *Miranda* and *Morales*, wherein this court concluded that there was sufficient evidence to support a charge of unlawful restraint on a separate basis from a charge of strangulation, are distinguishable from the present case. In *Miranda*, there was evidence that the defendant confined the

victim to a bathroom by pointing a flame in her direction. Id., 664–65. In *Morales*, the defendant restrained the victim by "grabb[ing] her" when she tried to escape through the front door. *State* v. *Morales*, supra, 164 Conn. App. 156. Although the defendant in the present case used his body, rather than a flame, to block the victim's exit, his actions, like those of the defendant in *Miranda*, made it impossible for her to leave the bathroom. Thus, contrary to the defendant's argument, we conclude that *Miranda* is factually similar to the present case. Additionally, like the defendant in *Morales*, who grabbed the victim when she tried to escape, there was evidence that the defendant in the present case physically prevented the victim's attempt to escape the apartment through the front door by grabbing the hood of the sweatshirt she was wearing. Thus, we find the defendant's attempts to distinguish these cases unavailing and conclude that the evidence presented at trial was sufficient to support the court's finding that the charges of assault and unlawful restraint were based on separate acts.

We next turn to an evaluation of the defendant's argument that the court violated his right to be free from double jeopardy when it sentenced him for assault, unlawful restraint, and strangulation.

"A defendant's double jeopardy challenge presents a question of law over which we have plenary review. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Urbanowski*, supra, 163 Conn. App. 387–88.

The defendant's double jeopardy claim, like his claim that the court violated § 53a-64bb (b), is contingent upon whether the charges arose from the same act or transaction. See *State* v. *Miranda*, supra, 142 Conn. App. 665–66. Because we have concluded that the charges at issue in the present case did not arise from the same act or transaction, namely the incident of strangulation, the defendant's double jeopardy claim necessarily fails. The assault and unlawful restraint could have been established through acts distinct from the throttling of the victim.

III

Finally, the defendant claims that the court violated his constitutional rights to confrontation and to present a defense by restricting his cross-examination of the victim. Specifically, the defendant argues that he should have been allowed to question the victim regarding past conduct, including a call she made to the police in May, 2017, concerning a separate incident of assault from that underlying the charges in this case. We disagree.

The following additional facts are relevant to the present claim. On September 19, 2017, the defendant filed a motion to admit evidence regarding the sexual conduct of the victim pursuant to General Statutes § 54-86f.[8] The defendant argued that the evidence he sought

[8] Although the defendant's motion was titled "Motion to Admit Evidence of Sexual Conduct," and cited § 54-86f, which contains the exceptions to the rape shield statute, the evidence he sought to introduce did not relate specifically to the victim's sexual conduct. In fact, at argument on the motion, defense counsel stated "I don't really intend to focus on . . . [the victim's]

to introduce was being "[o]ffered on the issue of the credibility of the [victim]" and was "[s]o relevant and material to a critical issue in the case that excluding it would violate [his] constitutional rights."

On September 25, 2017, before the victim began her testimony, the court heard argument on the motion. At this time, defense counsel proffered: "During some of our investigation of the [victim] in this case, it's come to our knowledge [that] there have been situations in the recent past where [the victim] has done this kind of conduct before, where she has basically lived with individuals for a couple of weeks with the lifestyle that [involves] a lot of drinking and drugs, and once the drinking and drugs sort of run out, there's a dispute between the parties who are engaged in the drinking and drugs, and sometimes the police are called and charges are filed. I have one incident—it's not an incident report but just a teletype where she called the police [in May, 2017]." Defense counsel clarified that the May, 2017 incident did not involve the defendant. The court stated that it would defer ruling on the motion until the state completed its direct examination of the victim.

After the state completed its direct examination of the victim, the defendant renewed his motion outside of the presence of the jury. At this point, defense counsel proffered that he had obtained a copy of the police dispatch report of the victim's May, 2017 police call. Defense counsel further stated: "[The victim] called the police and . . . told [the police dispatcher] that she was punched two days ago and bitten by a party she knows . . . . [T]he [police] dispatcher indicated that she sounded . . . intoxicated. . . . [The victim]

sexual history." Moreover, when the victim called the police in May, 2017, she did not allege that she had been sexually assaulted. Rather, she alleged that someone had punched and bitten her.

call[ed] twenty minutes later, indicating that she was okay and didn't want an officer [dispatched]." Defense counsel argued that the evidence "goes to [the victim's] credibility."

The state objected to the admission of the evidence, and the court sustained the state's objection, stating: "I don't think that it is relevant in any respect to the issues the jury has to determine in this case. It's well after the fact here, and it's just . . . putting her in the light of somebody who drinks, calls the police, maybe changes her mind. It just has nothing to do with anything in this case. . . . And I just don't see the value of it for purposes of the jury deciding what the facts are here and its prejudicial value compared to any probative value . . . [is] extremely high."

As a preliminary matter, we set forth the applicable standard of review. "When a trial court improperly excludes evidence in a criminal matter, the defendant's constitutional rights may be implicated. It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . .

"Nevertheless, [i]t is well established that a trial court has broad discretion in ruling on evidentiary matters, including matters related to relevancy. . . . Accordingly, the trial court's ruling is entitled to every reasonable presumption in its favor . . . and we will disturb the ruling only if the defendant can demonstrate a clear

abuse of the court's discretion. . . . Further, [w]e have emphasized in numerous decisions . . . that the confrontation clause does not give the defendant the right to engage in unrestricted cross-examination. . . . A defendant may elicit only relevant evidence through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable." (Citations omitted; internal quotation marks omitted.) *State* v. *Thomas*, 177 Conn. App. 369, 384–85, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017); see also *State* v. *Rivera*, 169 Conn. App. 343, 380, 150 A.3d 244 (2016) ("[a] defendant . . . may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right [to present a defense] is not violated" [internal quotation marks omitted]), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017).

We now turn to our analysis of the defendant's claim. As previously mentioned, he claims that the court violated his constitutional rights to confrontation and to present a defense by excluding evidence of the victim's prior conduct. Although the defendant couches his claim in terms of his constitutional rights, those rights entitle the defendant only to elicit relevant evidence, and thus, we begin this inquiry by assessing whether the evidence at issue in the present case was relevant for the purposes of impeachment, as the defendant argued at trial.

We conclude that the evidence sought regarding the victim's May, 2017 police call was not relevant for the purposes of impeachment. Contrary to the defendant's argument that this call showed that the victim engaged in a pattern of accusing individuals of assault and subsequently recanting such accusations, we observe that there was no proffered evidence that the victim

recanted her statement to the police concerning the May, 2017 incident. When the victim called back the police shortly after her initial report, she stated that she was "okay" and did not want a police officer to be dispatched. In stating that she did not want the police to respond to her call, the victim did not, in any way, deny that the assault had happened or state that she had fabricated her earlier report. Rather, the victim indicated that she had changed her mind about pursuing the matter with law enforcement.[9]

"It is axiomatic that the defendant bears the burden of establishing the relevance of the proffered testimony and that unless a proper foundation is established, the evidence is not relevant." (Internal quotation marks omitted.) *State* v. *Grant*, 68 Conn. App. 351, 358, 789 A.2d 1135 (2002). We conclude that the defendant failed to meet that burden and, therefore, that the court properly determined the evidence regarding the May, 2017 police call to be irrelevant. Thus, the defendant's constitutional rights to confrontation and to present a defense were not violated.

The judgment is affirmed.

In this opinion the other judges concurred.

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[9] The state also argues in its brief that the May, 2017 police call was irrelevant to the facts at issue in the case because it occurred almost seven months after the events giving rise to the present case and because it involved an individual other than the defendant. We, however, note that we must evaluate relevancy in accordance with the theory of admissibility and/or relevancy argued at trial, not on appeal. See *State* v. *Papineau*, 182 Conn. App. 756, 769–70, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). Thus, we must assess the relevance of the May, 2017 police call exclusively for the purposes of impeachment.

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NOTICES OF CONNECTICUT STATE AGENCIES

STATE ELECTIONS ENFORCEMENT COMMISSION

State Elections Enforcement Commission advisory opinions are published herein pursuant to General Statutes Section 9-7b (14) and are printed exactly as submitted to the Commission on Official Legal Publications.

DECLARATORY RULING 2019-03:

Secondary Payees and Polling Expenditures

On February 26, 2019, the State Elections Enforcement Commission (the ''Commission'' or ''SEEC'') received a request for a Declaratory Ruling from Attorney Derek E. Donnelly (the ''Petitioner'') regarding the reporting of expenditures when a campaign is paying a provider for campaign services and the campaign knows that the provider is paying a subvendor on behalf of the committee. These subvendors are referred to as secondary payees.

Campaign finance laws entrust the control of committee funds to the treasurer and require effective and accurate disclosure by treasurers of both monies raised and monies spent. The Petitioner focuses on the language in General Statutes § 9-608 (c) (l) (B) which includes a requirement for the treasurer to report ''***an itemized accounting of each expenditure***, if any, including the full name and complete address of each payee***, including secondary payees whenever the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity***, ***the amount and the purpose of the expenditure*** . . . .''

On March 20, 2019, the Commission voted to initiate a declaratory ruling proceeding responsive to this Petition. This Declaratory Ruling answers the Petitioner's questions and advises treasurers and committees regarding disclosure of secondary payee information.

Executive Summary:

The over-arching principle informing our guidance in this Ruling—that disclosure needs to be real and meaningful—is prescribed in the provisions governing *all* candidate committees: treasurers must report expenditures and keep certain internal records for four years, including, but not limited to, contemporaneous invoices, receipts, bills, statements, itineraries, or other written or documentary evidence showing the campaign or other lawful purpose of the expenditure. The keeping of detailed, contemporaneous records of services performed is of even greater importance when spending public funds. The financial disclosure statements that report campaign expenditures and contributions are the backbone of the campaign finance system in Connecticut.

One of the developments that has become apparent since the SEEC began reviewing candidate committees post-election a decade ago is the proliferation of *service* providers that are enlisted to procure other products or other services. For

example, a consultant may be hired to design and direct a campaign's communications program and, in that role, may procure lawn signs, or have mailers printed, or hire a web designer. The fact that a consultant (a service provider) is used does not free a treasurer from the responsibility of keeping and reporting detailed records of the services provided. In fact, one detail is explicitly required by statute in such situations: disclosure of the *secondary payee*.

When must the treasurer do this? To the extent that the treasurer has knowledge that a consultant or other service provider has hired a subvendor on behalf of the committee, disclosure is required. If the treasurer is not sure whether a subvendor was hired on the committee's behalf, she has a duty to inquire.

In most circumstances it would be enough to ask for and to rely on the response from a consultant; however, in some instances a good faith effort to obtain secondary payee information might involve more. The Commission is reasonable and applies the same common sense principles used generally in the marketplace.

Just as a homeowner might hire a student to whitewash her fence once with far less inquiry than would be used when hiring a contractor for a $100,000 renovation of her home, in some circumstances a good faith inquiry by a treasurer may involve more than a single question. Such situations may include:

- When the amount being paid to the campaign services provider, relative to overall campaign expenditures, is substantial;
- When the treasurer or candidate can gain the information easily due to a close relationship with the campaign services provider or its employees, such as when former colleagues or family members of the treasurer or candidate are involved with the campaign service provider being hired;
- When the treasurer can find the information or should know to ask for it based on other reports that the treasurer had filed or other invoices that the treasurer has received;
- When the treasurer has been put on notice of problems as a result of media coverage questioning their committee's prior filings, advice given as part of the Commission's post-election review of a previous committee for which he was treasurer, or via an enforcement action involving that campaign service provider; and
- When there are indications in the campaign service provider's contracts or documentation that they are likely using secondary payees.

The treasurer is required by law to disclose secondary payees and it is currently the treasurer that bears liability for failure to do so. While a campaign services provider who does not accurately disclose secondary payees may not be directly liable for penalties under the campaign finance law, such provider may subject its clients to increased liability or lose clients whose due diligence reveals that the treasurer cannot both comply with campaign finance statutes and continue to approve payments to the provider due to the provider's refusal to accurately disclose secondary payee information.

This Declaratory Ruling responds to specific questions asked by the petitioner. Additional guidance regarding compliance with documentation and reporting requirements for campaigns using consultants or other service providers who use secondary payees on behalf of the campaign may also be found in the application of those rules through consent orders and findings and conclusions, which are searchable on our website.

Pertinent Law and Precedent:

Only a treasurer may authorize committee expenditures. General Statutes § 9-607 (a). Furthermore, payments by committees must be made in accord with that authorization. General Statutes § 9-607 (d). Treasurers are charged with certain duties including making and reporting expenditures and keeping certain internal records for four years, including, but not limited to, contemporaneous invoices, receipts, bills, statements, itineraries, or other written or documentary evidence showing the campaign or other lawful purpose of the expenditure. General Statutes §§ 9-606 (a) & 9-607 (f).

In addition, the law strictly forbids siphoning campaign funds for personal use. General Statutes § 9-607 (g) (4); Regs. Conn. State Agencies §§ 9-706-2 (b) (1) & (2) (prohibiting Citizens' Election Program (''CEP'') grant recipients from using campaign funds for personal use as well as the candidate's ''personal support or expenses . . . even if such personal items . . . are used for campaign related purposes'').

Treasurers of CEP candidates whose committees are approved for a grant have stricter limitations, and may only spend their funds ''for campaign-related expenditures made to directly further the participating candidate's nomination for election or election.'' Regs. Conn. State Agencies § 9-706-1 (a). Moreover, for CEP grant recipients: ''The absence of contemporaneous detailed documentation indicating that an expenditure was made to directly further the participating candidate's nomination for election or election shall mean that the expenditure was not made to directly further the participating candidate's nomination for election or election, and thus was an impermissible expenditure.'' Regs. Conn. State Agencies § 9-706-1 (b). An expenditure is also impermissible if it is in excess of the usual and normal charge for such goods and services. Regs. Conn. State Agencies § 9-706-2 (b) (6). If a consultant or vendor provides goods or services for free or at a special discount, this would result in an impermissible contribution. General Statutes §§ 9-601a (a) (1) & 9-613 (a).

Candidate committees may spend campaign funds to pay for campaign workers and professional services. General Statutes § 9-607 (g) (2) (P); *see also* Regs., Conn. State Agencies § 9-706-2 (a) (4). This includes services of pollsters, graphic or web designers, strategists, consultants providing campaign management services such as selecting and managing vendors, attorneys, accountants, or other professional persons assisting with campaign activities. Agreements with campaign service providers are required to be made in writing, ahead of time and spell out the amount to be paid, as well as the nature, scope and duration of the duties to be performed. Regs. Conn. State Agencies § 9-607-1.

Treasurers must report all expenditures, including those for campaign service providers such as pollsters or consultants with ''an itemized accounting of each expenditure, if any, including the full name and complete address of each payee, including secondary payees whenever the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity, the amount and the purpose of the expenditure, the candidate supported or opposed by the expenditure, whether the expenditure is made independently of the candidate supported or is an in-kind contribution to the candidate, and a statement of the balance on hand or deficit, as the case may be . . . .'' General Statutes § 9-608 (c) (l) (B).

These laws all work together to not only require treasurers to perform a duty but also to assist them in doing so. For example, gathering the back-up documentation

such as receipts allows a treasurer to confirm that a payment to a campaign worker or consultant is for a permissible purpose. Obtaining information about secondary payees serves a similar purpose in some situations and in others allows the treasurer to confirm that the committee is being charged market value or that costs are not being defrayed through improper discounts.

The Commission has had cases involving failure to itemize expenditures and disclose secondary payees and to provide the proper expenditure code for a poll. *See In the Matter of a Complaint by Karen Solich*, File No. 2006-264, Agreement Containing Consent Order and Payment of a Civil Penalty (November 15, 2006) (henceforth order for failure to report secondary payees involving a poll paid for by a committee worker). Pollsters are merely one sort of campaign services provider and the disclosure rules are not limited to pollsters. *See e.g., In the Matter of a Complaint by Wilm Donath and Carola Cammann*, Stamford, File No. 2013-008, Agreement Containing Consent Order (July 17, 2013) (finding violation where treasurer paid $4,000 to a direct mail vendor but failed to include secondary payee reporting). The guidance offered by the Commission therefore applies to reporting of ***all*** secondary and primary payees.

Responses to Petitioner's Questions:

With this initial background in mind, we turn to the Petitioner's questions.

(1) Does the use of a call center (a subcontractor, subvendor, or entity) not owned by the primary payee (polling company) require disclosure by the treasurer in the listing of secondary payee?

If a political polling company contracts with a call center on behalf of the committee to perform data collection for their polls, the call center would be a secondary payee. If, on the other hand, the polling company utilizes its own employees to gather data then it would not have secondary payees.

The Commission has long advised of the necessity of disclosing secondary payees. Even before the legislature codified the secondary payee disclosure requirement in Public Act 04-91, the SEEC and the Secretary of the State both interpreted the expenditure disclosure language requiring a treasurer to itemize each expenditure and to attribute the appropriate expenditure code to mean that the treasurer must disclose the underlying purpose and ultimate beneficiary, or secondary payee, as the case may be, of the expenditure.[1] In the 1990s, the SEEC guidebooks began explicitly stating that secondary payee disclosure is required where a committee pays a consultant who makes payments to other vendors on behalf of the committee. *See e.g., A Guide for Ongoing Political Committees Established by a Business Entity, Organization, or Two or More Individuals for Political Activities)* (rev. July 1996) (''If a consultant is paid by the committee to provide services, the disclosure of each payment to the consultant must also include an attached itemized schedule of the payments the consultant has made to other vendors on behalf of the committee.''). The 1997 SEEC versions of *A Guide for Candidates for State Office, General Assembly, Sheriff and Judge of Probate* (rev. July 1997) and *A Guide for Municipal Candidates* (rev. June 1997) contained the same language, and added the term ''secondary payee.'' The 1998 SEEC guide, *A Guide for Party Committees* (rev. June 1998), contained this same language.

[1] At this time, the language required disclosure including: ''an itemized accounting of each expenditure, if any, inclu440ztding the full name and complete address of each payee, the amount and the purpose of the expenditure . . . '' General Statutes § 9-333j (c) (l) (C) (rev. 1995).

Starting in 1998, the Secretary of the State's Form ED-45 (disclosure statement for candidate, party, and political committees) mirrored this interpretation.[2] The forms contained a column for secondary payee disclosure, and provided clear instructions for secondary payee disclosure and purpose codes (so that the ultimate campaign purpose of each expenditure is transparent).[3] Also in 1998, SEEC staff issued an opinion of counsel to a state central party chair opining that disclosure of secondary payees is required when committees utilize consultants who pay subvendors:

> The secondary payee requirements typically apply to reimbursements made by any committee to a committee worker, reimbursements made by a candidate or exploratory committee to the candidate who established the committee, committee payments to credit card companies and to expenditures by any committee to a professional consultant or similar person where the consultant has paid a third party for goods or services which benefited the committee and which comprised the original expenditure made by the committee. For example, if Connecticut Republicans paid a consultant who, in turn, paid the Hartford Courant for an advertisement in the course of rendering services to the State Central Committee (and the cost was $100 or more), the treasurer would be required to disclose both the payment to the consultant, and the payment to the Hartford Courant as a secondary payee to comply with Section 9-333j.

SEEC Opinion of Counsel 1998-31 (June 25, 1998); *see also In a Matter of a Complaint by Tim Wrightington*, West Haven, File No. 2001-107, Agreement Containing Consent Order to Henceforth Comply with General Statutes *§ 9-333j(c)(1)(D) and 9-333j(c)(1)(C)* (Apr. 27, 2001) (finding violation of requirement to itemize expenditures and use the ultimate underlying purpose code where treasurer failed to disclose secondary payees/beneficiaries related to disclosure of primary credit card payment and reimbursement to committee worker); *In the Matter of a Complaint by Henry J. Zuella*, Oxford, File No. 2003-171, Agreement Containing Consent Order and Payment of a Civil Penalty (Oct. 29, 2003) (assessing civil penalty relating to numerous violations of the statutes, including failure to disclose secondary payees for reimbursements to committee workers).

In 2004, the legislature codified the interpretation that requires treasurers to disclose secondary payees where the principal or primary payee pays another person or entity (a secondary payee) for committee goods or services. *See* Public Act 04-91, *An Act Prohibiting Personal Use of Campaign Funds and Concerning Retention of Internal Records and Reporting Requirements Regarding Party-Building Activi-*

[2] Prior to December 31, 2006, the Office of the Secretary of the State (''SOTS'') was in charge of promulgating disclosure forms and was the filing repository for certain types of committees.

[3] The 1998 Secretary of State disclosure form contained the following instructions:

> PC PROFESSIONAL CONSULTANTS. Use ''PC'' for salaries, fees, and commissions to professional consultants, including attorneys, accountants, advertising similar professionals. If the payment to the professional consultant includes known charges which the professional consultant has already made or will make to a secondary payee, that is, to another vendor (such as a pollster or commercial advertiser), following completion of all of the information contained in this horizontal row, go immediately to the next and succeeding horizontal row(s) and follow the instructions for a secondary payee ''SP'' (see below).
>
> SP-SECONDARY PAYEE OR BENEFICIARY. Use ''SP'' as a coded purpose for an expenditure whenever the reported expenditure to the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity. . . . For example, if a professional consultant made a payment to the Hartford Courant for a full page ad, the Hartford Courant, Broad Street, Hartford will be set forth in the name & address column, and the purpose of the expenditure column will be ''SP-A'' (reflecting the fact that a payment was made by the professional consulting firm to the Hartford Courant for an advertisement).. . . .

ties. This amendment to the law stemmed, in part, from a SEEC investigation, in which it was found that Governor Rowland charged approximately $6,000 worth of personal expenses on the State Republican Party committee credit card. *See* House Tr. April 22, 2004 (comments of Rep. O'Rourke) at 287; *see Complaint of Tom Swan*, Coventry, File Nos. 2003-147 & 2003-147.1, Stipulated Agreements and Orders to Resolve Complaint Concerning the Use of the State Republican Party Credit Card by Party Officials (Aug. 27, 2003) (finding violations where state central committee provided committee credit card to Governor Rowland because, although the itemization on the monthly credit card statements was sufficient for secondary payee disclosure purposes, backup documentation to substantiate the lawful purpose of each expenditure, for travel hotel, food and beverage and entertainment expenses, was missing or inadequate). The legislative history indicates that one core purpose of this codification was to require treasurers to obtain and maintain internal records to substantiate the lawful purpose of expenditures made via a primary payee to a secondary payee. *See* House Tr. April 22, 2004 (comments of Rep. O'Rourke) at 288.[4]

Thus, to the extent there is knowledge that a subvendor has been hired on behalf of the committee, secondary payee disclosure is required. If the treasurer is not sure whether a subvendor was hired on the committee's behalf, she should inquire, as further discussed in the response to Question 3. *See, e.g., In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006) (assessing a penalty for, among other things, failing to disclose the secondary payee information or reflect the ''original purpose'' of the expenditures for gas and cell phones that resulted in reimbursements to candidates).

(2) How is the phrase ''known to include'' defined under General Statutes § 9-608 (c) (1) (B)? Does it include common knowledge?

The Commission has interpreted the language ''known to include'' in General Statutes § 9-608 (c) (1) (B) to mean ''known or should have known.'' *See, e.g., In re: SEEC Initiated Investigation of the Working Families Campaign Committee*, *et al.*, File No. 2013-094, Agreement Containing a Consent Order (Feb. 19, 2014) (''The [Respondent] agrees and understands that, for purposes of the reporting requirements of General Statutes § 9-608 (c) (1) (B), known secondary payees shall include, but not be limited to: . . . any and all persons known or that should be known by [committee] officers or agents to be secondary payees . . . .''); *In the Matter of Government Action Fund*, File Nos. 2008-003 & 2008-003.1, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (May 6, 2009)

[4] The legislature also strengthened the requirements for receiving and preserving internal records to substantiate the lawful purpose of each expenditure:

> (f) The campaign treasurer shall preserve all internal records of transactions required to be entered in reports filed pursuant to section 9-333j, as amended by this act, for four years from the date of the report in which the transactions were entered. Internal records required to be maintained in order for any permissible expenditure to be paid from committee funds include, but are not limited to, contemporaneous invoices, receipts, bills, statements, itineraries, or other written or documentary evidence showing the campaign or other lawful purpose of the expenditure. If a committee incurs expenses by credit card, the campaign treasurer shall preserve all credit card statements and receipts for four years from the date of the report in which the transaction was required to be entered.

Section 1 of Public Act 04-94 amending General Statutes § 9-607 (f) (formerly § 9-333i (f) (the underlined language indicates the language added in the Public Act). This requirement means that a treasurer is required to obtain sufficient documentation from a primary payee, such as a consultant, to substantiate any payments made by the primary payee to a third party vendor or entity items or services purchased on behalf of the committee.

(finding violations for failure to disclose secondary payees, and that based on previous newspaper articles questioning the committee's substantial credit card bills, as well as post-election reviews of previous committees on which the treasurer served, put the respondents on notice that they ''knew or should have known'' the requirements to disclose expenditures, including secondary payees, for credit card expenditures).

There is similar language in General Statutes § 9-608 (c) (1) (F) which provides: ''Each statement filed under subsection (a), (e) or (f) of this section shall include, but not be limited to: . . . (F) for each individual who contributes in excess of one hundred dollars but not more than one thousand dollars, in the aggregate, ***to the extent known***, the principal occupation of such individual and the name of the individual's employer, if any . . . .'' The Commission and staff have also interpreted this language to have a ''knew or should have known'' element as well. *See, e.g.,* SEEC Opinion of Counsel 1998-31 (June 25, 1998); *In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006).

Treasurers are therefore required to make a good faith effort or best effort to obtain secondary payee information.[5]

For the purposes of this declaratory ruling request, the Commission would consider the phrase ''common knowledge'' (which is the language used by the Petitioner in his request) to be synonymous with the phrase ''known or should have known''.

(3) Does a treasurer have an affirmative obligation to determine whether secondary payees exist? If so, what are the requirements to do so?

As just discussed, General Statutes § 9-608 (c) (1) (B) requires the treasurer to disclose secondary payees when she knew or should have known that the primary payee made or will make such secondary payments. To that end, the treasurer is required to make a good faith effort to obtain secondary payee information. In other words, treasurers should perform reasonable due diligence to determine whether a campaign service provider has hired secondary payees on behalf of their committee. In order to comply with the disclosure requirements regarding the purpose of the expenditure and payments to secondary payees, treasurers cannot just hand off funds to the campaign service provider, disclose a single lump sum expenditure to the provider, and be done. Rather, treasurers must exercise care to make sure that all

[5] Other jurisdictions with subvendor/secondary payee disclosure provisions apply similar standards. *See* California Fair Political Practices *Advice Letter* File No. I-90-107 (instructing treasurers must use reasonable diligence to obtain and disclose subvendor information, and that merely sending a letter to a consultant requesting subvendor information does not satisfy this duty if the consultant fails to reply or provide the requested information, and that subvendor disclosure is not required for payments made by a printer for items such ink, paper, or staff to produce the printing because such items are part of the printer's normal operating expenses); Massachusetts Office of Campaign and Political Finance, *Interpretive Bulletin OCPF-IB-10-04* (instructing that if consultant does not provide subvendor information, the committee must contact the consultant in writing to inquire whether the consultant has used subvendors, and the consultant must either provide subvendor information or provide a written statement to the committee stating that no subvendors were used); New York City Campaign Finance Board, Guidelines for Staff Recommendations for Penalty Assessments for Certain Violations, 2017 Citywide Elections (rev. Oct. 18, 2018) ''(Compliance with [the New York City subvendor disclosure and recordkeeping] requirement is accomplished by either submitting a subcontractor disclosure form completed by the vendor (whether or not the vendor in fact subcontracted goods or services of more than $5,000), or by submitting evidence of a good-faith attempt to contact the vendor to request that the vendor complete the form.''); *see, e.g.,* Baez 2009, Final Determination (N.Y.C. Campaign Fin. Bd Oct. 18, 2012) *available at* https://www.nyccfb.info/PDF/reports/FBD/FBD-2009-mbaez-591.pdf (assessing penalty when campaign knew or should have known vendor paid a subcontractor but did not provide subcontractor disclosure form for the vendor or evidence of good faith attempt to obtain such information).

committee funds are being spent for the committee's lawful purpose, market value is being paid, and that they receive the required backup documentation to substantiate such payments made on behalf of the committee and confirm the proper expenditure code.

The Commission is reasonable and applies common sense to these situations and the resolution of cases involving these provisions. By way of comparison, a homeowner hiring a contractor for a $100,000 renovation might talk with a building inspector who will know which home renovation contractors routinely meet code requirements, check in with their state's consumer protection agency and local Better Business Bureau to make sure the contractor does not have a history of disputes with clients, and visit a current job site to see how the contractor works and verify that the job site is neat and safe and workers are courteous and careful with the homeowner's property.[6] That same homeowner would be justified in simply paying $20 to a passing student to shovel the driveway on a snowy afternoon with no further inquiry but a quick conversation.

So too would the level of inquiry necessary for a treasurer approving the payment of a single $1,000 poll be significantly different from that expected of a treasurer paying a majority of a CEP grant to a single service provider. The amount of inquiry that is necessary depends on the situation.[7]

First and foremost, if the amount being paid to a campaign services provider, relative to the campaign's overall expenditures, is high, and there has been no mention of secondary payees from the campaign services provider, the treasurer would want to inquire further.

If a treasurer or candidate should be able to obtain the information easily due to a close relationship with the campaign services provider or its employees, such as when former colleagues or family members of the treasurer or candidate are involved with the campaign service provider being hired, then it is expected that the treasurer will have the information necessary to report accurately. *See, e.g., In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006) (assessing fines and forfeitures for violations including failure to report employer and occupation to the extent known when the information was held by candidates and their own relatives).

Similarly, if the treasurer should have known to ask for the information based on other reports that the treasurer has filed or other invoices that the treasurer has received, then the treasurer would be expected to marshal the information available to them and follow up to ensure accurate reporting. *Id*. (noting the treasurer could

[6] https://www.thisoldhouse.com/ideas/top-8-pro-tips-how-to-hire-contractor.

[7] *Cf. In the Matter of a Complaint by Steven Sheinberg*, File No. 2016-077B, Agreement Containing a Consent Order (December 20, 2017) (henceforth but no penalties assessed where failure to report secondary payees was honest mistake due to fact that expense was made before he took over from very ill treasurer*), In the Matter of a Complaint by Elizabeth Rhoades*, Stafford Springs, File No. 2009-051, Findings and Conclusions (September 22, 2010) (taking no further action where the treasurer failed to report secondary payees for reimbursements to committee workers but investigation showed every expenditure was for permissible purpose and the treasurer had documents supporting the payment*); In the Matter of a Complaint by Carl Ruggerio*, East Haven, File No. 2007-368, Agreement Containing Consent Order (May 14, 2008) (assessing penalties where treasurer reported nine mailers as approximately $25,000 lump sum and failed to report $22,500 to printer as secondary payee with the expenditure code appropriate to the ultimate underlying purpose for each separate mailing); *Complaints of Tom Kelly*, Bridgeport, File Nos. 2011-090 and 097, Agreement Containing Consent Order (Feb. 15, 2012) (assessing fines and forfeitures for failure to disclose secondary payees where over 50% of the committee expenditures involved inconsistent and often missing secondary payee reporting).

also have found some of the information necessary to report employer and occupation when the information for some contributors could be found on other reports).

Other facts that might indicate that greater diligence in compliance is required include when a treasurer has been put on notice of problems. For example, the Commission has found that a treasurer should have known to correct disclosure issues, including the reporting of secondary payees, as a result of media coverage questioning their committee's prior filings. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty re: Ceneviva (May 6, 2009) (newspaper article questioning prior 2003 late reporting of credit card bills put the Respondent on notice that he ''knew or should have known to be more attentive to the expenditures and reporting requirements'').

Similarly, if the campaign services provider being considered was given advice as part of the Commission's post-election review of the candidate's prior campaign or that of another campaign which used the same provider and with which the candidate or treasurer was involved, that would provide the treasurer with notice that she ought to have a heightened level of diligence with respect to those reporting issues. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty re: Ceneviva (May 6, 2009) (finding significant penalties warranted when treasurer failed to show good faith in attempting to comply after receiving two post-election reviews citing many of the violations repeated in the campaign under investigation); *In the Matter of a Complaint by Joseph Pinto III*, File No. 2006-190, Agreement Containing Consent Order (April 11, 2007) (assessing penalties for reporting errors including failure to disclose secondary payees when earlier municipal audit program findings had instructed treasurer on secondary payee requirements).

In addition, irregularities in paperwork, such as late billing, may also indicate the need for an increased inquiry, as that may indicate a lag time as the primary campaign services provider waits to be billed by the secondary payee so that he can add his own charges and pass on the costs. A refusal to quote prices of certain items to be provided ahead of time or an odd structuring or layering of contracts so that the amount to be paid for some services is clear but the amount to be paid for other services is not may also indicate that the contracting primary provider is going out to market to identify secondary subvendors.

Treasurers should seek the information necessary to make the required reports accurately. In some cases, more than a written request for the information may be required. *See In the Matter of a Complaint by James W. Bruno*, File No. 2006-153, Agreement Containing Consent Order and Payment of a Civil Penalty (August 6, 2008) (penalties assessed where treasurer claimed he had made written requests for information but there were multiple and repeated failures to provide employer and occupation information to the extent known). Sometimes, as with consultants providing strategy and communications advice and receiving a large portion of the overall funds spent, a heightened level of care may be necessary to assure accurate disclosure. For example, Commission staff has provided sample contract language to assist treasurers in obtaining secondary payee information from consultants, particularly when the consultant is being paid a majority of the campaign funds to essentially function as a campaign manager designing and implementing communications strategies.

As with the aforementioned homeowner hiring a contractor for a $100,000 renovation who talks with building inspectors, checks for complaints with the state's

consumer protection agency and local Better Business Bureau, or visits a current job site to see how the contractor works, a treasurer preparing to pay a large percentage of the campaign's funds to one campaign services provider may look at reports on file with eCRIS to see if the provider is reported as using secondary payees, check with SEEC for complaints against the provider, and/or visit the provider's offices.

At other times, as when a treasurer approves a single expenditure to a polling company for a relatively small amount, a simple inquiry as to whether they will be hiring a call center on the committee's behalf would be enough.

(4) Is a primary payee such as a pollster required by law to disclose a secondary payee such as a call center, when asked by a treasurer?

The treasurer is required by law to disclose secondary payees and it is currently the treasurer that bears liability for failure to do so.[8] It would, however, be an aggravating circumstance in assessing penalties if a treasurer continues to approve payments to a campaign services provider after such treasurer knew or should have known that the campaign services provider intentionally lied or misrepresented information in response to inquiries as to secondary payee information. Thus, while a campaign services provider who does not disclose accurately secondary payees may not be directly liable for penalties under the campaign finance law, such provider may subject its clients to increased liability or lose clients whose due diligence reveals that the treasurer cannot both comply with campaign finance statutes and continue to approve payment to the consultant due to the consultant's refusal to disclose secondary payee information.

While there may not be direct liability on the part of a campaign services provider providing false information regarding secondary payees to a treasurer, there are other campaign finance violations that may apply to a given set of facts. For example, in one instance involving a poll, the Commission found the poll provider liable for defraying the costs of a polling effort on behalf of a candidate. *See Complaints of Jonathan Pelto*, File No. 2009-104, Agreement Containing Consent Order and Payment of a Civil Penalty (January 26, 2011) (penalty issued for pollster utilizing his graduate students who were being paid with public funds without informing the treasurer of his defrayal). An honest discussion regarding secondary payees to be used and services being provided might have prevented this violation. The Commission has also indicated that in some circumstances, there could be liability if the treasurer delegates his duties to approve expenditures to another person to such an extent that the other person is acting as treasurer. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (May 6, 2009) (noting that it was improper for the treasurer to delegate storage responsibilities (of backup documentation) to a political committee chair (the Respondent), noting that the only delegation allowed is to a candidate of a candidate committee); *Complaints of Tom Kelly*, Bridgeport, File Nos. 2011-090 and 097, Agreement Containing Consent Order (Feb. 15, 2012) (finding violations of secondary payee disclosure relating to committee worker reimbursements and noting that someone other than the treasurer was substantially involved in authorizing committee expenditures).

[8] The Commission realizes that it is the campaign services provider who ultimately knows for certain whether secondary payees were hired on behalf of a committee, and in response to an escalating problem revealed by post-election reviews since the passage of the Citizens' Election Program, the Commission has asked the legislature to make certain campaign services providers directly liable for failure to disclose to treasurers the secondary payee information that treasurers need to fulfill their reporting requirements.

This constitutes a declaratory ruling pursuant to General Statutes § 4-176. A declaratory ruling has the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of General Statutes § 4-183, pursuant to General Statutes § 4-176 (h). Notice has been given to all persons who have requested notice of declaratory rulings on this subject matter. This declaratory ruling is only meant to provide general guidance and addresses only the issues raised.

Adopted this ____ day of _____ 2019 at Hartford, Connecticut by a vote of the Commission.

_____

Anthony J. Castagno, Chairman

NOTICE

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of August 16, 2019:

Jacob Comer	Cipher Technologies Management LP
Theodore Francis	Citizens Bank, N.A.
Christopher Updike	Bankruptcy Management Solutions, Inc.

Certified as of August 19, 2019:

Jeffrey Mazzola	Travelers

Hon. Patrick L. Carroll III
Chief Court Administrator