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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ELMER G.*
(SC 20031)

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

Syllabus

Convicted of two counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and three counts of the crime of criminal violation of a restraining order, the defendant appealed to the Appellate Court. The defendant, his wife, A, and the minor victim, their daughter, came to the United States from Guatemala. While living in Connecticut, the defendant sexually abused the victim and was verbally and physically abusive toward A and the couple's other children. A eventually reported the defendant's physical abuse of her to the police while the defendant was out of the country and obtained an ex parte restraining order, which was served on him when he returned to the United States. The ex parte order, inter alia, prohibited the defendant from contacting A and her children, and denied the defendant visitation rights pending a hearing. After the hearing, which the defendant attended with his counsel, the trial court issued a temporary restraining order that prohibited the defendant from contacting A and contained additional orders providing that A's children also were protected by the order. The order also allowed the defendant weekly, supervised visitation with the children. Other parts of the order reiterated its terms and stated that violation of the order was a criminal offense and that contacting a protected person could violate the order. The order also contained a Spanish translation of its terms on a separate page. At the hearing, during which the defendant, whose primary language is Spanish, required an interpreter, the trial court explained the terms of the temporary restraining order to the defendant. The court stated, inter alia, that the order prohibited the defendant from assaulting, threatening, abusing or harassing A and the children and that he was not to have any contact with A in any manner. The court further stated that the defendant could have supervised, weekly contact with the children. The defendant thereafter contacted the victim on three occasions, sending her two text

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

Additionally, in accordance with the Violence Against Women and Department of Justice Reauthorization Act of 2005, § 106 (c), Pub. L. No. 109-162, 119 Stat. 2960, 2982 (2006), codified as amended at 18 U.S.C. § 2265 (d) (3) (2012), we decline to identify the party protected under a restraining order or others through whom that party's identity may be ascertained.

messages and a letter that he had one of the victim's siblings deliver to the victim. The Appellate Court upheld the defendant's convictions. In his certified appeal from the Appellate Court's judgment, the defendant claimed that the evidence was insufficient to support his conviction of criminal violation of a restraining order and that the prosecutor committed certain improprieties while questioning two witnesses and during closing argument. *Held*:

1. The evidence was sufficient to support the defendant's conviction of three counts of criminal violation of a restraining order:

a. The defendant could not prevail on his claim that there was insufficient evidence from which the jury reasonably could conclude that he knew that the terms of the restraining order prohibited his contact with the children except during weekly, supervised visitation: although the court did not expressly state during the hearing that the no contact term applied to both A and the children, the court specified, immediately after stating that the no contact term applied to A, that the defendant could have contact with his children but that it must be supervised and then clarified that it would be "weekly and supervised," and the victim advocate similarly characterized the order at the hearing with respect to contact with the children as being limited to weekly, supervised visits; moreover, although it was possible for the jury to infer that the court and the victim advocate meant visitation when they referred at the hearing to contact in light of subsequent references to visitation, it also was entitled to infer that the court and the victim advocate meant what they said when they said contact, and the written temporary restraining order, the actions of A and the victim in reporting the defendant's contacts to the police, and the prior, ex parte order all supported the latter inference.

b. This court found unavailing the defendant's claim that he lacked knowledge of the terms of the restraining order on the ground that the record failed to show he was informed in Spanish that he was prohibited from contacting the children by text or letter: the evidence demonstrated that the defendant was fully apprised of the terms of the order in Spanish by defense counsel, the court, and the victim advocate, as defense counsel confirmed with the court that he was fluent enough in Spanish to make the defendant understand what was said in English, counsel stated that he had gone over the proposed order with the defendant in private in a meeting attended by the defendant's sister and the victim advocate, and the defendant was assisted by a Spanish language interpreter during a portion of the hearing and by defense counsel, who acted as an interpreter during the remainder of the hearing; moreover, the fact that the defendant asked the victim's sibling to deliver the letter to the victim rather than delivering it to the victim himself indicated that the defendant knew he was not permitted to contact the children outside of the weekly, supervised visits.

c. The defendant could not prevail on his claim that there was insufficient evidence to establish that he had sent the letter to the victim while the temporary restraining order was in effect and, therefore, that this instance of contact was not in violation of that order; the victim testified that she received the letter during the time the restraining order was in effect, there was evidence that the defendant had given the letter to the victim's sibling for delivery to the victim during one of the supervised visits that was authorized under the order, and the defendant's pleas in the letter for the victim to meet with him suggested that it was written in response to the victim's refusal to attend the court-approved visits.

2. The defendant was not deprived of a fair trial as a result of certain alleged improprieties committed by the prosecutor: the prosecutor's questions to the victim and another witness about whether certain of their testimony was truthful were not improper, as defense counsel put the victim's credibility squarely before the jury throughout the trial, information about the witnesses' motivations to lie was the type of information a jury requires to assess their credibility, the prosecutor's questions were unlikely to confuse the issues for the jury, and, because the evidentiary rule against preemptive bolstering of a witness' testimony has its roots in efficiency rather than fairness, this court declined to rely on it as a basis on which to adjudicate a claim of prosecutorial impropriety; moreover, the prosecutor did not make a golden rule argument when, during closing argument, he asked the jurors to consider their own perspectives in considering certain of the victim's testimony, as the prosecutor's comment was not an attempt to encourage the jurors to believe the victim out of passion or sympathy but was directed at her credibility, which was squarely at issue, and was a permissible attempt to encourage the jurors to infer that the victim was not fabricating her testimony; furthermore, the prosecutor did not improperly evoke sympathy for the victim when he referenced her credibility in light of the psychological, social and physical barriers she faced in accusing the defendant of sexual assault, and the prosecutor's comment asking the jurors whether other individuals in circumstances similar to those of the victim would fabricate sexual assault accusations was not improper, as the comment was a permissible, rhetorical device to encourage the jury to infer that the victim had no motive to fabricate her testimony.

Argued February 22—officially released September 17, 2019

Procedural History

Substitute informations charging the defendant, in the first case, with three counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and, in the second case, with three counts of the crime of criminal violation of a restraining order, brought to the Superior Court in the judicial district of

Danbury, where the cases were consolidated and tried to the jury before *Pavia*, *J.*; verdicts and judgments of guilty of two counts each of sexual assault in the second degree and risk of injury to a child, and three counts of criminal violation of a restraining order, from which the defendant appealed to the Appellate Court, *Alvord*, *Prescott* and *Pellegrino*, *Js.*, which affirmed the trial court's judgments, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Warren C. Murray*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. A jury found the defendant, Elmer G., guilty of several offenses stemming from the sexual assault of his minor daughter, including three counts of criminal violation of a restraining order in violation of General Statutes § 53a-223b.[1] The Appellate Court upheld his convictions. *State* v. *Elmer G.*, 176 Conn. App. 343, 383, 170 A.3d 749 (2017). On further appeal to this court, the defendant claims that the state presented insufficient evidence to convict him of any of the counts of criminal violation of a restraining order. In addition, he claims that he was deprived of a fair trial as a result of certain improprieties committed by the prosecutor. We disagree with both claims and affirm the judgment of the Appellate Court.

[1] General Statutes § 53a-223b (a) provides in relevant part: "A person is guilty of criminal violation of a restraining order when (1) (A) a restraining order has been issued against such person pursuant to section 46b-15 . . . and (2) such person, having knowledge of the terms of the order . . . (B) contacts a person in violation of the order. . . ."

The jury reasonably could have found the following facts. The victim's parents—the defendant and his former wife, A.N.—originally are from Guatemala. The victim was born to the couple in 1996, and, two years later, the defendant immigrated to the United States. A.N. came to the United States two years after that, leaving the victim in Guatemala with relatives. The defendant and A.N. had four other children after they arrived in the United States.

The defendant would visit Guatemala about once a year. During one of these visits, in 2007, when the victim was about ten years old, the defendant began sexually abusing her. In 2010, when the victim was thirteen years old, the defendant had relatives smuggle her into the United States and to the family's Connecticut home. About two weeks after she arrived, the defendant again started sexually abusing her. The defendant also verbally and physically abused the victim, A.N., and the victim's younger siblings "[a]ll the time."

The Department of Children and Families (department) twice investigated allegations that the defendant had abused family members. In June, 2011, it investigated a report that the defendant had physically abused one of the victim's younger brothers. In January, 2012, the defendant left the United States for a planned visit to Guatemala. Soon after he left, one of the victim's brothers complained to school officials about a recent incident in which the defendant threatened A.N. and cut her with a knife.[2] The department opened a second investigation at this point. Although the victim had not

[2] A.N. acknowledged that her son had inaccurately reported that the defendant actually cut her with the knife. She described the incident as follows: "[Our son], the little kid, he didn't want to eat, so [the defendant] got upset and grab a knife. I got in the middle of it, and he was gonna kill me, so [the victim] got in the middle . . . ." The defendant injured the victim with a knife on a separate occasion, however, and held a knife to her neck on another occasion.

yet disclosed the sexual abuse to anyone, the department was aware of "continuous domestic violence complaints . . . ."

In early March, 2012, while the investigation was ongoing and a few days before the defendant was to arrive back in the United States, the victim encouraged A.N. to report the defendant's physical abuse to the police, which she did. Although the police indicated that they were unable to help the family at that time, the department immediately began to assist the family. Among other things, it moved the family to another town and helped A.N. secure an ex parte restraining order against the defendant.

In relevant part, the ex parte order (1) prohibited the defendant from contacting A.N. and her children, (2) granted A.N. custody of the children, (3) denied the defendant visitation rights, and (4) scheduled a hearing on the matter for March 15, 2012. Days later, the defendant returned from Guatemala and was served personally with the order. The court held a temporary restraining order hearing as scheduled, which the defendant attended with his counsel. As a result of the hearing, the court issued a temporary restraining order that, in relevant part, retained the same contact restrictions but granted the defendant "[w]eekly, supervised" visitation with the children. Defense counsel advised him of the order's terms in private, the judge and a victim advocate informed him of the terms in open court, and he received a physical copy of the order. The defendant, who primarily speaks Spanish, had the proceedings translated for him by either a court-appointed interpreter or by his bilingual attorney.[3]

[3] The facts concerning the conduct at the temporary restraining order hearing derive from a transcript of the hearing admitted into evidence as exhibit 51 and submitted to the jury. Except for the referenced remarks, most of the transcript of that hearing—including any testimony the court heard in support of the order—was redacted, as agreed to by the parties, and therefore was not submitted to the jury.

After the order was in place, the defendant contacted the victim on at least three occasions. First, on March 28, 2012, he sent the victim a text message. The victim "felt unsafe" after receiving it and reported it to the police the same day. Second, at some point between April 1 and 9, 2012, the defendant sent the victim a letter. On April 9, 2012, the victim again went to the police, reported the letter and, for the first time, disclosed that the defendant had sexually abused her. Finally, on April 10, 2012, the defendant sent the victim another text message, which the victim reported to the police. Additional facts will be set forth as necessary.

The record also reflects the following procedural history. In addition to alleging the three counts of criminal violation of the restraining order, the state charged the defendant with three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). Following a trial, a jury found the defendant guilty of two counts of sexual assault in the second degree, two counts of risk of injury to a child, and all three counts of criminal violation of a restraining order. The jury found the defendant not guilty of one count of sexual assault in the second degree and one count of risk of injury to a child. The court denied the defendant's posttrial motions for a judgment of acquittal, to set aside the jury's verdict, and for a new trial. On the sexual assault and risk of injury counts, the defendant received a total effective sentence of forty years of imprisonment, execution suspended after twenty-five years, followed by twenty-five years of probation. On the restraining order violation counts, the defendant received a sentence of five years imprisonment on each count, to run concurrently with the sexual assault and risk of injury sentences.

The defendant appealed to the Appellate Court, which affirmed the judgments of conviction. *State* v. *Elmer G.*, supra, 176 Conn. App. 383. He then petitioned this court for certification to appeal, which we granted, limited to the following issues: (1) "Did the Appellate Court properly conclude that there was sufficient evidence to support the defendant's conviction for criminal violation of a restraining order?" And (2) "[d]id the Appellate Court properly conclude that the defendant was not deprived of his right to a fair trial by prosecutorial impropriety?" *State* v. *Elmer G.*, 327 Conn. 971, 173 A.3d 952 (2017).[4]

I

The defendant first claims that the state presented insufficient evidence for a reasonable jury to have concluded that he contacted the victim in violation of the temporary restraining order against him. We disagree.

In reviewing a claim of insufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the verdict. E.g., *State* v. *Moreno-Hernandez*, 317 Conn. 292, 298, 118 A.3d 26 (2015). We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt. Id. A defendant is guilty of a criminal violation of a restraining order if he (1) had a restraining order issued against him, (2) had "knowledge of the terms of the order," and (3) "contact[ed] a person in violation of the order . . . ." General Statutes § 53a-223b (a).

On appeal, the defendant does not dispute that he had a restraining order issued against him and that he contacted the victim twice by text message and once by letter. Rather, he argues that the state presented insufficient evidence that (1) he had "knowledge of the terms of the order" because the court's explanation of

[4] We declined to certify a question regarding whether there was sufficient evidence to support the defendant's conviction of sexual assault.

the order to him was unclear, and (2) because he does not read or understand English and the terms were not translated for him, and (3) the contact via letter with the victim was "in violation of the order" because it occurred before the order was in place.

We first set forth the terms of the order. The temporary restraining order the court entered against the defendant consisted of four standardized Judicial Branch forms stapled together. The first was a single page form titled "Order of Protection." That form required the issuing court to identify a "[p]rotected [p]erson" (A.N.) and a "[r]espondent" (the defendant), who were to be the subjects of the order's protections and prohibitions, respectively. It then listed several terms the defendant had to follow, two of which are relevant to this appeal. The first term prohibited the defendant from contacting A.N. and certain people close to her: "Do not contact the protected person in any manner, including by written, electronic or telephone contact, and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." The second term notified the defendant that he would find "[a]dditional terms" on a form titled "Additional Orders of Protection."

That single page form, "Additional Orders of Protection," contained a different list of terms, one of which extended A.N.'s protection to her children: "This order also protects the protected person's minor children." Below that appeared a section labeled "Temporary Child Custody and Visitation," in which the court permitted the defendant visitation as follows: "Weekly, supervised visits with children. The first three visits are to be supervised by Visitation Solutions, Inc., and thereafter by [the defendant's sister]."

Two other single page forms were also attached. On one, titled "Ex Parte Restraining Order/Restraining

Order: Worksheet Only," the previously referenced terms—the contact restriction, the protection of A.N.'s children, and visitation—were reiterated. The other form, titled "General Restraining Order Notifications (Family)," contained basic information about the order, including that these documents constituted a restraining order, that violating the order was a criminal offense, that the recipient must comply with both the "Order of Protection" and "Additional Orders of Protection" forms, and that contacting a protected person could violate the order. The final form was a Spanish language translation of the notifications form.

From these forms, a reasonable jury could have found that the temporary restraining order limited the defendant's contact with his children to weekly, supervised visits and, thus, that by initiating unsupervised contact with the victim via text message and letter, the defendant "contact[ed] a person in violation of the order . . . ." General Statutes § 53a-223b (a).[5] The "Order of

[5] The defendant's appellate counsel discussed at oral argument before this court an inconsistency, which was not discussed in the briefs, between the no contact term and the term granting visitation: the former prohibited "contact . . . in any manner" with the children, whereas the latter permitted "visits" with them. This arguably rendered the order ambiguous. Because this argument was raised for the first time at oral argument, however, we are not obligated to consider it. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

We emphasize that, although our courts generally examine an order of another court as a question of law subject to plenary review and construe it "in the same fashion as other written instruments"; (internal quotation marks omitted) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010); the defendant has never before challenged the scope or clarity of the terms of the order as a matter of law (or, even, of fact). Rather, on appeal, he challenges only his *knowledge* of the order's terms as an insufficiency claim. Appellate counsel specified at oral argument that even the inconsistency of the written order only "goes to his knowledge." If the defendant had wanted to argue to this court, as a matter of law, that the order failed to adequately inform him that this kind of contact was prohibited, then we would agree with the well reasoned opinion of the concurring Appellate Court judge that he could have done so via a vagueness challenge. See *State* v. *Elmer G.*, supra, 176 Conn. App. 391 (*Prescott*, *J.*, concurring).

Protection" form plainly provides: "Do not contact the protected person in *any* manner, including by written, electronic or telephone contact . . . ." (Emphasis added.) The minor children term made this contact restriction applicable to A.N.'s children: "This order

Similarly, at trial, the defendant evidently elected "to have the jury decide, as a factual question, whether he had knowledge of the terms of the orders." Id. He "never moved to dismiss the counts of the information on the ground that they were insufficient as a matter of law . . . ." Id. Nor did he even place the scope or clarity of the order squarely before the jury by "submit[ting] any particular request to charge that would seek . . . a jury determination regarding the question of whether the restraining orders were sufficiently clear and unambiguous." Id.

In any case, the defendant's argument fails as an insufficiency claim because the no contact and visitation terms are reconcilable under a reasonable reading of the order. In reviewing an insufficiency claim, we ask "whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Moreno-Hernandez*, supra, 317 Conn. 299. Each inference of fact supporting the verdict "need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). When the terms are read together, a reasonable view of them supports the jury's verdict of guilty because the visitation term was a limited modification of the contact restriction. In other words, the defendant was not to contact his children, except for weekly, supervised visits.

The inference that the defendant was not to contact the children outside of court-approved visitation is further supported by (1) the court's explanation of the order to the defendant ("you can have contact with your children but for now we need it supervised" and "[i]t's to be weekly and supervised"), (2) the victim advocate's characterization of the order to the court ("[c]ontact with the kids [will] be limited to weekly, supervised visits"), (3) the no contact term itself, which prohibits contact with anyone "likely to cause annoyance or alarm to" A.N. and, thus, also reasonably could be found to prohibit contact with the children, (4) the fact that A.N. and the victim interpreted the order to prohibit contact with the children (they immediately reported contact to the police as violations of the order), and (5) the absence of this inconsistency in the ex parte restraining order, which did not grant visitation and therefore unequivocally restricted contact with the children.

We also note that an alternative reading of these terms, in which they are read to conflict, would render one of them meaningless. If the defendant can "visit" with the children but also has an absolute restriction on "contact" with them, exercising his right under the visitation provision would result in a violation of the no contact provision. Conversely, absolute respect for the no contact provision would make the visitation provision pointless. Although the order is not a model of clarity, reading these terms in harmony is not just *a* reasonable way to interpret the order, it is the *only* reasonable interpretation.

also protects the protected person's minor children." Although this language does not expressly state that the defendant could not contact the children, a jury reasonably could infer it from the "Additional Orders of Protection" form. The language, "[t]his order *also* protects," indicates that the terms on the primary form "also" apply to the protected person's minor children. (Emphasis added.)

The no contact term itself also applies not only to the protected person, but to "others with whom the contact would be likely to cause annoyance or alarm to the protected person." A reasonable jury therefore could find that unsupervised contact with the children "would be likely to . . . alarm" A.N. on the basis of the defendant's history of verbally and physically abusing family members, which included the events that directly precipitated the order: his threats to A.N. with a knife, which occurred in front of her children, and hitting A.N. when she would get between him and the children in an effort to protect them when he was hitting the children, after which she went to the police and was taken to a shelter by the department along with her children in an effort to keep the children away from the defendant.

A

The defendant first argues that there was insufficient evidence from which the jury could conclude that he had "knowledge of the terms of the order"; General Statutes § 53a-223b (a); because the court's explanation of the order at the temporary restraining order hearing "created an ambiguity" about its scope. We disagree. The court expressly instructed the defendant to limit "contact" with the children to weekly, supervised visits.

"A person acts 'knowingly' with respect to . . . a circumstance described by a statute defining an offense when he is aware . . . that such circumstance exists . . . ." General Statutes § 53a-3 (12). Knowledge is typically inferred. E.g., *State* v. *Simino*, 200 Conn. 113, 119,

509 A.2d 1039 (1986) ("[o]rdinarily, guilty knowledge can be established only through an inference from other proved facts and circumstances" [internal quotation marks omitted]).

The temporary restraining order hearing proceeded as follows. Defense counsel stated that he had reviewed the order with the defendant and his sister, and that the victim advocate had also been present to answer questions. Defense counsel also confirmed that he would "make [the defendant] understand" the proceedings. The victim advocate and the court then had the following discussion:

"The Victim Advocate: What we've agreed upon is that *it would be considered a no contact restraining order*.

"The Court: *As far as mom is concerned*?

"The Victim Advocate: *As far as mom is concerned*.

"The Court: Right.

"The Victim Advocate: *Contact with the kids* [*will*] *be limited to weekly, supervised visits*.

"The Court: *Contact with minor children weekly, supervised. Yes*?

"The Victim Advocate: To fully cooperate with all of [the department's] recommendations.

"The Court: Yes?

"The Victim Advocate: The first three visits will be through Visitation Solutions [Inc.]

"The Court: Okay.

"The Victim Advocate: The following visits will be through the sister . . . ." (Emphasis added.)

Thereafter, the court addressed the defendant directly: "I am going to order a temporary restraining order. *Now, as to* [*A.N.*] *and the five children*, sir, you are not to assault, threaten, abuse, harass, follow, interfere with or stalk. You are to stay away from the home of [A.N.] or wherever she's residing, and *you're not to contact her in any manner*. As far as the children are concerned, *you can have contact with your children but for now we need it supervised. It's to be weekly and supervised*. The first three visits you have with the children will take place at Visitation Solutions, Inc., and you will pay the fee. That's for the first three visits, starting next week. After that, your weekly visitation will be supervised by your sister . . . . Any contact that you need to have with your wife, or that your wife needs to have with you, will go through a third party . . . ." (Emphasis added.) We conclude that the court's explanation was not so unclear that the jury could not reasonably have determined that the defendant knew he was prohibited from contacting the children, outside of weekly, supervised visits.

The defendant relies primarily on the fact that the court specified that the no *assault* term applied to both A.N. and her minor children, but did not likewise specify that the no *contact* term applied to both A.N. and the children. We are not persuaded. Immediately after mentioning the no contact term as applied to A.N., the court specified to the defendant: "[Y]ou can have *contact* with your children but for now we need it supervised." (Emphasis added.) The court clarified that contact would be "weekly and supervised." Previously, in the presence of the defendant, the victim advocate similarly characterized the order, stating: "*Contact* with the kids [will] be limited to weekly, supervised visits." (Emphasis added.)

It is possible to infer that the court and the victim advocate each meant "visitation" when they said "con-

tact," given the references to visitation that followed. If the jury drew this inference, then it would have concluded that neither actually mentioned a restriction on contact between the defendant and the children. Defense counsel made this argument to the jury: "I think what you'll see when you review this transcript is not much by the way of clear. And I say this because I think when you read it, it's going to be evident to you that, at best, what this was, was that the court and everybody talking about these things didn't really think about what to do with communication with the children because all of the other children were so young, so they didn't contemplate it. . . . *What's supervised contact mean? They were referring to the supervised visitation*." (Emphasis added.) The jury rejected this argument, however. Certainly, it was entitled to infer that the court and the victim advocate each "[thought] about what to do with communication" and meant what they said—"contact" with the children was prohibited, with the exception of weekly, supervised visits. The written order, the actions of A.N. and the victim, and the ex parte order supported this conclusion. See footnote 5 of this opinion.

B

The defendant also notes that he does not read or understand English and argues that the record does not show that he was informed, in his primary language, Spanish, that he was prohibited from contacting the children by text or letter. Therefore, he contends that he lacked "knowledge of the terms of the order . . . ." General Statutes § 53a-223b (a). We disagree. On at least three occasions, the defendant heard Spanish language translations of the terms of the order. The jury also reasonably could have found that the letter he sent to the victim was evidence that he knew he was not permitted to contact the children outside of court-approved visits.

The defendant is a native of Guatemala and required a Spanish language interpreter at the restraining order hearing.[6] There was evidence, however, that he was fully apprised of the terms of the order in Spanish by his attorney, the court and the victim advocate.

First, defense counsel privately advised the defendant of the terms of the order. Counsel confirmed to the court that he was "fluent enough in Spanish that [he] could make [the defendant] understand what is said in English in this court . . . ." Defense counsel also stated that he had "looked at all the papers" and had "gone over that proposed [order] with [the defendant] . . . ." The defendant's sister had attended that meeting, and the victim advocate also had been present to answer questions.

The second and third instances of the defendant's receiving a Spanish language interpretation of the terms of the restraining order were through the on-the-record descriptions of the order by the court and the victim advocate. For a portion of the hearing, the defendant had the assistance of a Spanish language interpreter provided by the court. For the remainder of the hearing, including during the comments of the victim advocate and the court set forth previously, defense counsel served as the defendant's interpreter. Although defense counsel argued to the jury that "things get lost in translation" and that "we have no idea what was understood [by the defendant]," there was no evidence that the translations were inaccurate or that the order entered by the court differed from the proposed order the defendant had reviewed with his attorney. Thus, the jury reasonably could have inferred that each of these three translations was an accurate description of the order.

Finally, the defendant asked the victim's sibling to deliver the letter to the victim, rather than delivering

[6] At the defendant's criminal trial, the victim also testified that the defendant only "knew a little bit" of English.

it himself. As the Appellate Court aptly reasoned, this "suggests that the defendant knew that he could not have contact with the victim outside of their weekly, supervised visits, which the victim was refusing to attend." *State* v. *Elmer G.*, supra, 176 Conn. App. 361.[7]

[7] There was also evidence that the defendant received a physical copy of the order. A court clerk testified that it is the court's usual procedure to mail a temporary restraining order to a defendant after a hearing. Although we cannot say that the defendant's receipt of these orders would have itself been sufficient to establish his knowledge of the specific terms of the order, neither can we conclude that it was irrelevant to the jury's determination.

As noted in part I A of this opinion, one of the forms was printed in Spanish. It told the defendant that the documents he had received were a restraining order, a violation of the order was a criminal offense, and contacting a protected person might violate the order. The other forms also contained some material information that did not require translation, such as the names of his wife and children. Thus, it was entirely reasonable for the jury to infer that the defendant knew he was under some type of contact restriction with his wife and children on the basis of the forms alone.

For some courts, if a defendant receives a restraining order, he is deemed to have knowledge of its contents. E.g., *People* v. *Williams*, 118 App. Div. 3d 1295, 1296, 987 N.Y.S.2d 772 ("defendant's signature acknowledging receipt of the order of protection establishes that it was served and that [s]he was on notice as to its contents" [citations omitted; internal quotation marks omitted]), appeal denied, 24 N.Y.3d 1090, 25 N.E.3d 354, 1 N.Y.S.3d 17 (2014); see *Smith* v. *State*, 999 N.E.2d 914, 917 (Ind. App. 2013) (rejecting defendant's argument that officer "had to inform him of every specific term" in protective order to establish knowledge of its terms); see also *Commonwealth* v. *Delaney*, 425 Mass. 587, 592, 682 N.E.2d 611 (1997) ("[c]learly, a showing that a defendant was served with a copy of a court order is strong evidence that a defendant had knowledge that certain conduct . . . could result in a criminal conviction"), cert. denied, 522 U.S. 1058, 118 S. Ct. 714, 139 L. Ed. 2d 655 (1998). In at least one jurisdiction, this presumption applies even if the order is written in English and English is not the defendant's primary language. See *Cardenas-Najarro* v. *Commonwealth*, Record No. 0699-13-4, 2014 WL 820544, *4 (Va. App. March 4, 2014) ("Once an order is served on a litigant, the litigant is deemed to have notice of the document . . . . [The] [a]ppellant cites no authority, and we find none to say, that the process server must explain the document to the recipient in order for him to have knowledge of the terms of the order. . . . If the litigant is properly served, it is incumbent upon the recipient to learn the import of the order." [Citations omitted.]).

We do not rely on the defendant's receipt of a physical copy of the order in this case, however, because of the other evidence that the defendant had knowledge of its terms. Cf. *State* v. *Wiggins*, 159 Conn. App. 598, 605 n.7, 124 A.3d 902 (2015) (declining to decide whether defendant had sufficient knowledge of protective order under General Statutes § 53a-223 based on presumed receipt of order), cert. denied, 327 Conn. 908, 170 A.3d 4 (2017).

Therefore, we conclude that the state presented sufficient evidence that the defendant had "knowledge of the terms of the order" prohibiting him from having unsupervised contact with his children via text message or letter.[8] General Statutes § 53a-223b (a).

C

Finally, regarding the third count of criminal violation of a restraining order, the defendant argues that the state presented insufficient evidence that he sent a letter to the victim while the order was in effect, and, thus, this instance of contact was not in violation of

[8] By affirming the defendant's conviction on these counts, we simply conclude that, given the record in this case and the defendant's arguments on appeal, we cannot say that no reasonable jury could have found the defendant guilty of the charges of violating the restraining order. Looking beyond the facts of this case, we understand that the Judicial Branch is committed to ensuring that persons who appear before our state's courts receive the tools necessary to understand the proceedings in which they participate and the orders issued therein, consistent with the Judicial Branch's mission to serve "the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient and open manner." To facilitate "meaningful access to the court system and its programs and services," the Judicial Branch has committed to robust efforts to overcome language barriers that limited English proficient (LEP) litigants face when appearing in court, which are implemented via the comprehensive Language Access Plan. See State of Connecticut, Judicial Branch, Language Access Plan (Rev. 2019) p. 2, available at https://jud.ct.gov/LEP/LanguageAccessPlan.pdf (last visited September 9, 2019). The Language Access Plan requires, for example, that the forms provided by the Judicial Branch and regularly used by the public in our court system are made available in the languages most often spoken by those who use them; see id., p. 9; and that interpreters and translation services are available "at no cost, for LEP parties and other LEP individuals, such as witnesses and victims, whose presence or participation is appropriate to the justice process." Id., p. 7. We urge all state judicial officers and Judicial Branch employees to continue to take pains to make certain that those appearing before our courts have been afforded the available interpreting and translation services necessary to enhance their understanding of matters involving them. And, even when any language barrier has been addressed, we emphasize that our trial courts must make certain that the orders they issue are clear, such as by making sure that restraining orders are specific about what forms of contact are being prohibited so there can be no misunderstanding. We can only expect confidence in our courts and respect for court orders that is commensurate with the efforts on the part of the entire Judicial Branch to ensure greater understanding and meaningful participation by those who come before us.

the order. We disagree. The victim testified that she received the letter at some point between April 1 and 9, 2012, while the order was in effect. There was also evidence that the defendant had given the letter to one of her siblings at one of the visits permitted under the order, which, of course, would have occurred while the order was in effect. Finally, the contents of the letter—the defendant's pleas to the victim to meet with him—suggest that it was written in response to the victim's refusal to attend the court-approved visits, which, again, would have occurred while the order was in effect.

II

The defendant next claims that the prosecutor committed several improprieties. Specifically, he argues that the prosecutor improperly (1) bolstered the credibility of two witnesses during questioning, (2) vouched for the victim during closing argument to the jury, and (3) attempted to evoke sympathy for the victim during closing argument.[9] We disagree with each of the defendant's arguments.

We apply a two step analysis for claims of prosecutorial impropriety. *State* v. *Warholic*, 278 Conn. 354, 361, 897 A.2d 569 (2006). First, we determine whether any impropriety occurred. Id. Second, we determine whether any impropriety deprived the defendant of his due process right to a fair trial, relying on the factors enumerated in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). *State* v. *Warholic*, supra, 361. It is the defendant's burden to show that the prosecutor's conduct was improper and that it constituted a denial of due process. *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). If a prosecutor's remark is ambiguous,

[9] The defendant also notes other comments made by the prosecutor and offers other grounds as to why they were improper. He did not, however, object to those comments at trial or raise them on appeal to the Appellate Court. Therefore, we do not consider them. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 26 n.1, 917 A.2d 978 (2007).

this court should not " 'lightly infer' " that it is improper. Id. Upon our review of the challenged remarks, we do not find any of them to be improper.

A

The defendant first argues that the prosecutor's questioning improperly bolstered the credibility of two witnesses. We disagree. This court has held that similar conduct by prosecutors is not improper. Moreover, the defendant alleges evidentiary violations and fails to identify any harm of a constitutional nature, upon which claims of prosecutorial impropriety rest. We therefore conclude that the prosecutor's conduct was not improper.

The defendant specifically challenges two lines of questioning between the prosecutor and the state's witnesses. The first line of questioning occurred at the end of the direct examination of the victim:

"[The Prosecutor]: [*A*]*re you making this stuff up*?

"The Victim: No.

"[The Prosecutor]: *Has anybody put you up to testifying the way that you have testified here today in court*?

"The Victim: No.

"[The Prosecutor]: In your own words, why are you doing it?

"The Victim: Because I wanted to get out of the life that I had with him." (Emphasis added.)

The second line of questioning occurred on redirect examination of Lourdes Lopez, a pastor at the victim's church, to whom the victim had disclosed the defendant's sexual abuse. On direct examination, Lopez had testified that she had observed the victim crying and, on that basis, decided to talk to her about her home life, which ultimately led to the victim's disclosure. On

cross-examination, defense counsel questioned Lopez' motives for approaching the victim—whether it was her own idea to talk to the victim or whether she had been convinced to do so by Altagracia Lara, a social worker who was helping the family. Lopez conceded that Lara had asked her to ask the victim about whether "anything was happening" with the defendant.[10] On redirect examination, the prosecutor attempted to rehabilitate Lopez during the following colloquy:

"[The Prosecutor]: You were asked a series of questions about a conversation you had with Altagracia Lara. Do you recall those?

"[Lopez]: It was just a phone call.

"[The Prosecutor]: And Alta [Lara] asked you to do something, didn't she?

"[Lopez]: She only said to me that, since I was closer to [the victim], probably, I should ask her about what was going on with her and her dad.

"[The Prosecutor]: So, when you asked [the victim] about what was happening, in your mind, when you asked that question, you had planned to ask that question. Correct?

"[Lopez]: Yes.

[10] The following colloquy occurred between defense counsel and Lopez:

"[Defense Counsel]: And you said this was a decision on your own [to talk to the victim about her father]?

"[Lopez]: Oh, you're just trying to confuse me.

"[Defense Counsel]: Do you know a woman named Altagracia—Altagracia Lara?

"[Lopez]: Yes. When she called me just to—asking me that, that was a confirmation of what I already observed based on [the victim's] attitude. But that didn't have anything to do with the church. . . .

"[Defense Counsel]: It was Altagracia Lara who asked you to ask [the victim] . . . if anything was happening with her dad. Isn't that true?

"[Lopez]: Yes.

"[Defense Counsel]: And that is, in fact, why you asked [the victim] about whether anything was happening with her father. True?

"[Lopez]: Yes."

"[The Prosecutor]: And you said earlier you chose that moment because you felt she was weak?

"[Lopez]: Yes.

"[The Prosecutor]: In addition to Altagracia [Lara] telling you to ask that question, did you have any intention [of] asking that question yourself?

"[Lopez]: Yes.

"[The Prosecutor]: *Is that the truth*?

"[Lopez]: Yes. . . .

"[The Prosecutor]: Were you considering asking [the victim] even before Alta [Lara] called you?

"[Lopez]: Yes.

"[The Prosecutor]: And why was—why were you intending to do that?

"[Lopez]: Because of the way [the victim] was behaving." (Emphasis added.)

Under our evidence code, evidence bolstering a witness' credibility generally is inadmissible but may become admissible if the witness' credibility first has been attacked. See Conn. Code Evid. § 6-6 (a). Viewed in isolation, the prosecutor's questions, emphasized previously, which attempted to bolster the witnesses' credibility, might appear to violate this rule. However, defense counsel's cross-examination of the victim and Lopez at least arguably constituted attacks on their credibility. Because defense counsel did not object to any of the prosecutor's questions, we have no ruling from the trial court on whether defense counsel in fact had placed the witnesses' credibility at issue. Therefore, the issues the defendant raises are unpreserved. See, e.g., *State* v. *Edwards*, 99 Conn. App. 407, 412, 913 A.2d 1103, cert. denied, 281 Conn. 928, 918 A.2d 278 (2007). The defendant nonetheless seeks review of these ques-

tions under the rubric of prosecutorial impropriety, which implicates a constitutional right and is therefore subject to review despite the absence of an objection at trial. See, e.g., *State* v. *Angel T.*, 292 Conn. 262, 274–75, 973 A.2d 1207 (2009) (unpreserved claim of prosecutorial impropriety subject to review, although methodology of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 [1989], is inapplicable).[11] We conclude, however, that the prosecutor's conduct was not improper.

The defendant primarily relies on *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002). In that case, this court held that it was improper to ask a witness to comment on another witness' veracity. Id., 712. We offered two reasons for the conclusion. First, we stated that "determinations of credibility are for the jury, and not for witnesses." (Internal quotation marks omitted.) Id., 707. These questions lack probative value because whether another witness had lied is beyond the competence of the testifying witness. Id., 708. Second, we were concerned that these questions could confuse the jury: "[Q]uestions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . A witness' testimony, however, can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved . . . such as misrecollection, failure of recollection or other

[11] The Appellate Court "decline[d] to review [the claim] under the prosecutorial impropriety framework." *State* v. *Elmer G.*, supra, 176 Conn. App. 371. Instead, it treated the claim as evidentiary and dismissed it as unpreserved. Id. We address the claim under the prosecutorial impropriety framework because we have addressed similar issues under that framework in the past. E.g., *State* v. *Maguire*, 310 Conn. 535, 562, 78 A.3d 828 (2013) ("because the state's case rested entirely on the victim's credibility, any improper remarks by the prosecutor that tended to bolster [the victim's] credibility, or to diminish that of the defendant, may very well have had a substantial impact on the verdict"); see also *State* v. *Taft*, 306 Conn. 749, 764, 51 A.3d 988 (2012); *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002).

innocent reason." (Citations omitted; internal quotation marks omitted.) Id. "This risk was especially acute" when a government agent testified because a government agent often is perceived to have " 'heightened credibility,' " and, thus, a jury might hesitate to find that the government agent lied. Id.

This court subsequently clarified that a question about the witness' *own* veracity was not necessarily improper. See *State* v. *Taft*, 306 Conn. 749, 764–65, 51 A.3d 988 (2012). In *Taft*, a witness gave an account of an event on direct examination but admitted on cross-examination that she previously had given a different account. Id. On redirect examination, the prosecutor asked the witness whether she was now lying. Id., 765. This question was not improper because "the prosecutor merely provided the jury with information relevant to determining why [the witness] may have changed her story and whether it should believe the version of events that she testified to at trial." Id. We distinguished *Singh* on the ground that "[s]uch testimony . . . did not improperly invade the province of the jury in determining whether [the witness] was credible. Indeed, exploring [the witness'] motivation for lying and her awareness of the ramifications of not telling the truth is exactly the type of information a jury requires to make an appropriate determination regarding a witness' credibility." Id.

As in *Taft*, both concerns identified by *Singh* are inapplicable to this case. First, information about the victim's and Lopez' *own* "motivation for lying . . . is exactly the type of information a jury requires" to assess their credibility. Id. Although the challenged question in *Taft* occurred on redirect examination, its reasoning applies equally to the prosecutor's questions on direct examination of the victim here because the questions went to her own credibility. Further, as we will describe more fully, defense counsel would go on to put the

victim's credibility squarely before the jury throughout the trial, including in his cross-examination of her.[12] E.g., *State* v. *Thomas*, Docket No. M2010-01394-CCA-R3CD, 2011 WL 5071917, *8 (Tenn. Crim. App. October 4, 2011) (not improper to ask "victim if she had been truthful" before defendant "cross-examined the victim extensively" on credibility).

Second, the prosecutor's questions were unlikely to confuse the issues for the jury. In no uncertain terms, defense counsel told the jury: "This didn't happen." His theory of the case was that the victim and Lopez were lying: "[The defendant] didn't do the things that he's being accused of. And it comes in the form of fabrication. Because at the end of the day, that's what this is." Defense counsel also offered a motive for them to lie: serious allegations against the defendant would secure financial aid from state agencies, give A.N. grounds for divorce, and give A.N. and the victim a basis for legal status in the United States. These issues also had been explored at length during examination of the witnesses. Moreover, the victim's graphic depictions of sexual, verbal, and physical abuse were especially unlikely to result from " 'misrecollection [or] failure of recollection,' " and neither witness was a government agent. *State* v. *Singh*, supra, 259 Conn. 708.

Our conclusion is further supported by consideration of the concerns underlying both a prosecutorial impropriety claim and the evidentiary rule prohibiting ques-

[12] We also note that *Taft* relied on *State* v. *Vazquez*, 79 Conn. App. 219, 231 n.10, 830 A.2d 261, cert. denied, 266 Conn. 918, 833 A.2d 468 (2003), which involved questions on cross-examination. In that case, the Appellate Court stated: "We interpret the remarks in question as inquiries into their potential motivation for lying and their awareness of the ramifications of not telling the truth. We have long held that [a]n important function of cross-examination is the exposure of a witness' motivation in testifying. . . . We conclude that this is equally true of direct examination. Those questions, therefore, were not improper." (Citation omitted; internal quotation marks omitted.) Id.; see *State* v. *Taft*, supra, 306 Conn. 764.

tions bolstering a witness' credibility before an attack on that witness' credibility. Due process and fundamental fairness underlie prosecutorial impropriety claims. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 571, 849 A.2d 626 (2004) ("[t]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial" [internal quotation marks omitted]). The evidentiary rule underlying the defendant's claim, on the other hand, exists to promote judicial efficiency: "As of the time of the direct examination, it is uncertain whether the cross-examiner will attack the witness's credibility . . . . If the opposing counsel [does not attack the witness' credibility], all the time devoted to the bolstering evidence on direct examination will have been wasted." 1 C. McCormick, Evidence (7th Ed. 2013) § 33, pp. 204–205; see also Fed. R. Evid. 608, advisory committee notes ("enormous needless consumption of time which a contrary practice would entail justifies the limitation"). Because the evidentiary rule against preemptive bolstering of a witness' testimony has its roots in efficiency, rather than fairness, we will not in the present case rely on it as a basis on which to adjudicate a claim of prosecutorial impropriety. Cf. *State* v. *Ruffin*, 144 Conn. App. 387, 399, 71 A.3d 695 (2013) ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature" [internal quotation marks omitted]), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015). Therefore, we conclude that the prosecutor's questions to the victim and Lopez about their truthfulness were not improper.

B

The defendant points to three comments the prosecutor made during closing argument and argues that each was an improper attempt to evoke sympathy for the victim. We disagree and address each comment in turn.

"[A] prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim . . . ." *State* v. *Long*, 293 Conn. 31, 59, 975 A.2d 660 (2009). This kind of argument "invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) Id.

The prosecutor, in the first challenged comment, asked the jurors to consider their own perspectives: "[The victim was] asked . . . why are you saying these things about your father? And here's what she said: 'I had to get out of the life I had with him.' *If you were in her position, would you feel the same way*?" (Emphasis added.) The defendant argues that this was an improper "golden rule" argument.[13] We disagree.

"[A] golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 53–54. But we have repeatedly recognized that "not every use of rhetorical language or device is improper." (Internal quotation marks omit-

[13] The Appellate Court addressed the prosecutor's comment but did so on different grounds without mentioning the defendant's "golden rule" argument. See *State* v. *Elmer G.*, supra, 176 Conn. App. 378–79 and 378 n.12; see also *State* v. *Long*, supra, 293 Conn. 53–54 ("[a] golden rule argument is one that urges jurors to put themselves in a particular party's place . . . or into a particular party's shoes" [internal quotation marks omitted]). Although we do not address several of the defendant's other arguments, which were not discussed by the Appellate Court; see footnote 5 of this opinion; we address this one. Unlike the defendant's other arguments, which are raised for the first time on appeal to this court, the defendant raised this argument, albeit in passing, in his brief to the Appellate Court.

ted.) *State* v. *Warholic*, supra, 278 Conn. 366. Specific to golden rule arguments, we have acknowledged that the "animating principle behind the prohibition . . . is that jurors should be encouraged to decide cases on the basis of the facts as they find them, and reasonable inferences drawn from those facts, rather than by any incitement to act out of passion or sympathy for or against any party." *State* v. *Long*, supra, 57–58. In this light, a prosecutor may ask jurors to place themselves in the shoes of a victim, so long as he does so only as a rhetorical device "to encourage the jurors to draw inferences from the evidence . . . on the basis of . . . how a reasonable [person] would act under the circumstances." Id., 58; see also, e.g., *State* v. *Stephen J. R.*, 309 Conn. 586, 607, 72 A.3d 379 (2013) ("by having the jurors put themselves in [the victim's] place . . . the prosecutor was arguing that [the victim's] statements . . . were consistent with how a reasonable child her age would react under the specific circumstances"); *State* v. *Campbell*, 141 Conn. App. 55, 64–65, 60 A.3d 967 ("prosecutor used 'you' in a way that the jurors could distinguish as a request for them to view evidence as a reasonable person, and not as an appeal for them to empathize with the victim"), cert. denied, 308 Conn. 933, 64 A.3d 331 (2013).

Here, the challenged comment was directed at the victim's credibility, which, as discussed in part II A of this opinion, was squarely at issue. It was preceded by a litany of evidence that the victim was credible, including prior consistent statements and the various psychological, social and physical barriers she had to overcome in order to testify.[14] The prosecutor specified

[14] In full, the prosecutor's argument was: "[The victim] told the story [to] Lourdes Lopez. She told it to her mom. She told it to the police. She told it to [a forensic pediatrician]. She told it to Julia Jiminez [the victim's school guidance counselor], and she told it to this jury. Remember what she's had to do. She's [gone] through counseling. She's [gone] through medical exams. She's [gone] through interviews. She's [gone] through court appearances. And she's gone through cross-examination. And after all that, I am arguing

that the jury could infer that she was credible on the basis of this evidence and not on the basis of emotion: "And after all that, I am arguing to you that *this evidence shows* she's not fabricating these things." (Emphasis added.) He immediately followed the challenged statement by stating that the victim's conduct was consistent with how "a person" would react under these circumstances. See footnote 14 of this opinion. We conclude that the prosecutor's comment was a permissible attempt to encourage the jury, on the basis of how a reasonable person would view this evidence, to infer that the victim was not fabricating her testimony. The comment was not an improper attempt to encourage the jury to believe the victim out of passion or sympathy.

In the second challenged comment, the prosecutor referenced the victim's credibility, in light of the various psychological, social and physical barriers she faced in accusing the defendant of sexual assault: "[R]emember what the judge says about credibility. You [have] seen how a young woman who makes up a claim of sexual assault kind of has to come through and run the legal gauntlet. Even the members of her family can testify against her. But I think the evidence shows you that [the victim's] testimony has endured, it's remained intact in the core. . . . Remember what she's had to do. She's [gone] through counseling. She's [gone] through medical exams. She's [gone] through interviews. She's [gone] through court appearances. And she's gone through cross-examination. And after all that, I am arguing to you that this evidence shows she's not fabricating these things." These types of comments are permitted in Connecticut, and we decline the defendant's invitation to

to you that this evidence shows she's not fabricating these things. Defense focused on all of the supposed reasons she's fabricating these claims except for one. There's one they left out. . . . [The victim was] asked . . . why are you saying these things about your father? And here's what she said: 'I had to get out of the life I had with him.' *If you were in her position, would you feel the same way*? This is exactly what a person would say that was in this position." (Emphasis added.)

overrule this precedent. E.g., *State* v. *Felix R.*, supra, 319 Conn. 10 (not improper to "[recount] the difficulties that the victim faced during the investigation and trial"); *State* v. *Long*, supra, 293 Conn. 48 (not improper to ask jury "to infer that [the victim's] complaint was more credible because it required her to undergo an uncomfortable medical examination and embarrassing conversations with both her family members and complete strangers"); *State* v. *Warholic*, supra, 278 Conn. 377 (not improper to ask jury "to assess [the minor victim's] credibility by recognizing the emotional difficulty that [he] subjected himself to by making the allegations of sexual assault").

The prosecutor, in the third challenged comment, asked the jury whether other individuals in circumstances similar to the victim would fabricate sexual assault accusations: "[I]f a young girl such as [the victim] wanted to fabricate a lie, is this the lie they would fabricate? I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude." The defendant argues that this comment invited the jury to rely on extraneous matters because it is "irrelevant whether most young girls would make up such allegations—the issue was whether [the victim] did." "[A] prosecutor should not inject extraneous issues into the case that divert the jury from its duty to decide the case on the evidence." (Internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 376. As stated previously, however, "not every use of rhetorical language or device is improper." (Internal quotation marks omitted.) Id., 366. Moreover, "the state may argue that a witness has no motive to lie"; id., 365; and may ask the jurors to draw inferences that are based on their "common sense and life experience." Id., 378. In this instance, the prosecutor's comment rebutted defense counsel's arguments that the victim fabricated her testimony. Although the prosecutor literally asked the jury how other young girls would respond

in similar circumstances, which is irrelevant, he did so as a rhetorical device to encourage the jury to infer that the victim was not fabricating her testimony on the basis of how the jurors, in their life experience, would believe a reasonable person in similar circumstances would respond. Therefore, the prosecutor's comment was not improper.

C

Finally, the defendant highlights four comments the prosecutor made about the victim during closing argument to the jury and argues that each was an improper expression of the prosecutor's personal opinion about the victim's credibility as a witness. For the reasons stated by the Appellate Court, we disagree. See *State* v. *Elmer G.*, 176 Conn. App. 375–77.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

CONNECTICUT INTERLOCAL RISK MANAGEMENT AGENCY *v.* CHRISTOPHER JACKSON ET AL.
(SC 19946)

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

Syllabus

Pursuant to the alternative liability doctrine, when the conduct of two or more actors is tortious and it is proven that the plaintiff's injuries have been caused by only one of those actors but it is unclear which one, the burden of proving causation shifts from the plaintiff to each actor to prove that he did not cause those injuries.

The plaintiff appealed from the trial court's judgment in favor of the defendants, three teenagers who had entered an abandoned mill in the town of Somers and discarded multiple cigarette butts without extinguishing them, thereby causing a fire that destroyed the mill and a sewage line in the mill's basement. While the defendants were exploring inside the mill for about forty-five minutes, each of them smoked approximately five cigarettes and discarded their unextinguished cigarettes by tossing them onto the mill's wooden floor. Experts later determined that the

likely cause of the fire was the defendants' careless disposal of the cigarettes. After the plaintiff paid the town for the cost of replacing the sewage line, it brought the present subrogation action against the defendants. The trial court granted the defendants' motions for summary judgment, concluding that the plaintiff could not prevail on the element of causation because it was unable to establish which of the defendants' cigarettes caused the fire. The trial court also declined the plaintiff's request to apply the alternative liability rule, reasoning that it would have the effect of significantly changing the negligence standards in this state and that adoption of the rule was a policy decision to be made by an appellate court or the legislature, none of which previously had endorsed the rule. On appeal, the plaintiff claimed that the trial court improperly failed to apply the alternative liability rule in granting the defendants' motions for summary judgment. *Held* that the plaintiff should have received the benefit of the alternative liability rule for the purpose of proving its case against the defendants, and, therefore, this court reversed the trial court's judgment and remanded the case for further proceedings: faced with the choice of leaving an injured plaintiff without a remedy, on the one hand, and requiring multiple wrongdoers, all of whom acted negligently toward the plaintiff and created the situation in which the plaintiff was injured, to bear the burden of absolving themselves, on the other, this court concluded that the latter approach, which has been adopted in at least some form in nearly all jurisdictions, represented the fairer, more sensible alternative, and, accordingly, this court adopted the alternative liability rule for application in cases in which the plaintiff can demonstrate that all of the defendants acted negligently and the plaintiff suffered harm, all possible tortfeasors have been named as defendants, and the tortfeasors' negligent conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm; moreover, all of the requirements for the rule to apply were satisfied in the present case, as the plaintiff had adduced evidence demonstrating that all three of the defendants acted negligently, that all possible tortfeasors had been named as defendants, and that the tortious conduct of those defendants was substantially simultaneous and of the same character; furthermore, this court's adoption of the alternative liability rule was not incompatible with this state's statutory apportionment of liability scheme, the defendants identified no facts or circumstances that would render retroactive application of the alternative liability rule in the present case unfair or unduly harsh, and there was no basis for the defendants' claim that applying the rule to them would violate or compromise any legitimate reliance interest that they may have had.

Argued November 9, 2018—officially released September 17, 2019

Procedural History

Action to recover damages to certain real property sustained as a result of the defendants' alleged negli-

gence, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Cobb*, *J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Heather J. Adams, with whom was *Sarah F. D'Addabbo*, for the appellant (plaintiff).

James P. Sexton, with whom were *Danielle J.B. Edwards*, *Sergio C. Deganis* and *Erin M. Field*, for the appellees (defendants).

Opinion

PALMER, J. To prevail in a negligence action, a plaintiff ordinarily must establish all of the elements of that cause of action, namely, duty, breach, causation, and damages. See, e.g., *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 742, A.3d (2019). In this appeal, which presents an issue of first impression for this court, we must decide whether to adopt the alternative liability doctrine, which was first articulated in *Summers* v. *Tice*, 33 Cal. 2d 80, 85–87, 199 P.2d 1 (1948), and later endorsed by the Restatement (Second) of Torts. That rule provides that, when "the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." 2 Restatement (Second), Torts § 433 B (3), pp. 441–42 (1965).[1] We are persuaded that the doctrine is a sound one and therefore adopt it.

[1] The alternative liability doctrine also has been adopted in the Third Restatement of Torts. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 28 (b), p. 399 (2010). Because the treatment of the doctrine in the Restatement (Third) is materially identical to the treatment of the doctrine contained in the Restatement (Second), we refer to the Restatement (Second) for purposes of our analysis.

The plaintiff, Connecticut Interlocal Risk Management Agency, as subrogee of its insured, the town of Somers (town), brought this action against the defendants, Christopher Jackson, Wesley Hall, and Erin Houle, claiming that their negligent disposal of cigarettes inside an abandoned, privately owned mill in the town ignited a fire that destroyed both the mill and a public, aboveground sewage line in the basement of the mill. The trial court granted the defendants' motions for summary judgment on the ground that the plaintiff could not establish which of the defendants' cigarettes had sparked the blaze and, therefore, could not establish causation, an essential element of its cause of action. In doing so, the trial court declined the plaintiff's request that it adopt the alternative liability doctrine as set forth in § 433 B (3) of the Restatement (Second), concluding, inter alia, that whether to do so was a decision only this court, the Appellate Court or the legislature properly should make. We reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. At approximately 1 a.m. on June 2, 2012, the defendants, all of whom were teenagers at the time, entered an abandoned mill located in the town. Once inside, the defendants proceeded to explore the multistory structure while drinking alcohol and smoking cigarettes. Each of them smoked approximately five cigarettes, and each discarded the cigarette butts by tossing them onto the wooden floor of the mill without extinguishing them. The defendants left the mill at approximately 1:45 a.m. By about 2:20 a.m., the property was engulfed in flames, and the Somers Fire Department had been dispatched to the scene. The fire destroyed both the mill and the sewage line.

The plaintiff compensated the town for the loss of the sewage line and, subsequently, commenced the present

subrogation action against the defendants to recover the cost of replacing the sewage line. For purposes of this action, the plaintiff retained the services of two forensic fire experts, Detective Scott J. Crevier and Trooper Patrick R. Dragon, both of the Connecticut Department of Public Safety. Crevier and Dragon each opined that the likely cause of the fire was the careless disposal of the cigarettes.

The trial court thereafter granted the defendants' motions for summary judgment, concluding that the plaintiff could not prevail on the element of causation because it admittedly was unable to establish which of the defendants' cigarettes had caused the fire. In reaching its conclusion, the trial court declined the plaintiff's request to apply the alternative liability rule because to do so "would result in . . . a significant change in the negligence standards of this state," as reflected in "long-standing and binding" legal precedent, "by shifting the burden of proof to the defendants," such that the policy decision to adopt the rule was "better left to the legislature, the Appellate Court or [this] [c]ourt," none of which previously had endorsed the rule. The court also expressed concern that the adoption of such a rule "would be inconsistent with the tort reforms of the 1980s pursuant to which joint and several liability was abolished in favor of apportionment."

On appeal,[2] the plaintiff renews its claim that, under the unusual circumstances presented, it is only fair that the burden of proof on causation be shifted to the defendants so that they are required to establish that their negligence in discarding the cigarettes *did not* cause the fire. Otherwise, the plaintiff contends, it will be left

[2] The defendants 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.

without a remedy because, through no fault of its own, it will be unable to prove causation even though it is undisputed that all of the defendants were negligent in discarding the cigarettes and that that conduct by at least one or more of the defendants caused the fire. The plaintiff supports this argument with the observation that the fire, for which it bears no responsibility, resulted in the destruction of evidence that the plaintiff otherwise might have used to establish which of the defendants started the fire. For their part, the defendants maintain that the trial court properly declined to apply the alternative liability rule, first, because the plaintiff cannot establish the threshold requirements of the rule and, second, because the rule is incompatible with our modern tort system, which is predicated on apportionment of liability rather than joint and several liability. Finally, the defendants argue that, even if we were to adopt the alternative liability doctrine, we should apply it prospectively only and not retroactively to the defendants' conduct.

We begin our analysis of the plaintiff's claim by setting forth the standard of review. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005). Because the plaintiff claims that the trial court failed to apply the appropriate legal principle, namely, the alternative liability doctrine, in granting the defendants' motions for summary judgment, our review is plenary.

As we previously noted, the alternative liability doctrine, which was first articulated and adopted in *Summers* v. *Tice*, supra, 33 Cal. 2d 80, is an exception to the general rule that a plaintiff in a negligence action carries the burden of establishing that the defendant's tortious conduct caused the plaintiff's injury. In *Summers*, the plaintiff, Charles A. Summers, was injured when the defendants, two fellow hunters who knew Summers' approximate location, negligently shot at the same time in his direction. Id., 82–83. Following a bench trial, the court found for Summers, and, thereafter, the hunters appealed, claiming, among other things, that there was insufficient evidence to establish which of them had caused Summers' injuries. See id., 82–84. The California Supreme Court affirmed the trial court's judgment; id., 88; and, in so doing, adopted a burden shifting rule pursuant to which each of the hunters, in order to avoid liability on the issue of causation, was required to prove that his shot was not the cause of Summers' injuries. Id., 86–87.

The court reasoned: "When two or more persons by their acts are possibly the sole cause of a harm . . . and the plaintiff has introduced evidence that . . . one of the two persons . . . is culpable, then the defendant has the burden of proving that the other person . . . was the sole cause of the harm." (Internal quotation marks omitted.) Id., 85. The court explained that "[t]he real reason for the rule . . . is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves." (Internal quotation marks omitted.) Id., 85–86. "When [the court] consider[s] the relative position of the parties and the results that would flow if [Summers] was required to pin the injury on one of the [hunters] only, a requirement that the burden of proof on that subject be shifted

to [the hunters] becomes manifest. They are both wrongdoers—both negligent toward [Summers]. They brought about a situation [in which] the negligence of one of them injured [Summers] . . . [and thus] it should rest with . . . each [hunter] to absolve himself if he can. The injured party has been placed by [the hunters] in the unfair position of pointing to which [hunter] caused the harm. If one can escape the other may also and [Summers] is remediless." Id., 86. The court further observed that the rule found additional support in the fact that, "[o]rdinarily defendants are in a far better position to offer evidence to determine which one caused the injury." Id.

In reaching its conclusion, the court rejected the hunters' assertion that such a burden shifting rule conflicted with that court's established precedent that, "[when] two or more [tortfeasors] acting independently of each other cause an injury to [a] plaintiff, they are not joint [tortfeasors] and [the] plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each." Id., 87. The court explained, rather, "that the same reasons of policy and justice" that militated in favor of adopting the burden shifting rule as to the issue of causation also justified "relieving the wronged person of the duty of apportioning the injury to a particular defendant . . . . If [the] defendants are independent [tortfeasors] and thus each [is] liable for the damage caused by him alone, [then], at least, [when] the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. [Instead] [t]he wrongdoers should be left to work out between themselves any apportionment."[3] Id., 88.

[3] In embracing the alternative liability doctrine, the Restatement (Second) provided the following illustration, which mirrors the facts of *Summers*: "A and B, independently hunting quail, both negligently shoot at the same time in the direction of C. C is struck in the face by a single shot, which could have come from either gun. In C's action against A and B, each of the

Although this court previously has not had occasion to consider the alternative liability rule, it appears that at least some version of the doctrine "has been accepted by virtually all jurisdictions." M. Geistfeld, "The Doctrinal Unity of Alternative Liability and Market-Share Liability," 155 U. Pa. L. Rev. 447, 447 (2006); see also 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 28, comment (f), p. 476 (2010) ("[o]nly two jurisdictions have rejected the concept of alternative liability since the . . . Restatement [Second]"); 1 D. Dobbs, The Law of Torts (2000) § 175, p. 428 ("most courts appear to regard [*Summers*] as established law on its facts"). Our research confirms that the vast majority of jurisdictions to have considered the issue have adopted the doctrine. See, e.g., *Bowman* v. *Redding & Co.*, 449 F.2d 956, 967–68 (D.C. Cir. 1971) (construing law of District of Columbia); *Abel* v. *Eli Lilly & Co.*, 418 Mich. 311, 329, 343 N.W.2d 164, cert. denied sub nom. *E.R. Squibb & Sons, Inc.* v. *Abel*, 469 U.S. 833, 105 S. Ct. 123, 83 L. Ed. 2d 65 (1984); *Estate of Chin ex rel. Chin* v. *St. Barnabas Medical Center*, 160 N.J. 454, 464, 734 A.2d 778 (1999); *Roderick* v. *Lake*, 108 N.M. 696, 701, 778 P.2d 443 (App.) (overruled in part on other grounds by *Heath* v. *La Mariana Apartments*, 143 N.M. 657, 180 P.2d 664 [2008]), cert. denied, 108 N.M. 681, 777 P.2d 1325 (1989); *Silver* v. *Sportsstuff, Inc.*, 130 App. Div. 3d 907, 909, 14 N.Y.S.3d 421 (2015); *Trapnell* v. *Sysco Food Services, Inc.*, 850 S.W.2d 529, 539–40 (Tex. App. 1992), aff'd, 890 S.W.2d 796 (Tex. 1994); see also *Snoparsky* v. *Baer*, 439 Pa. 140, 144–45, 266 A.2d 707 (1970).[4]

defendants has the burden of proving that the shot did not come from his gun, and if he does not do so is subject to liability for the harm to C." 2 Restatement (Second), supra, § 433 B, illustration (9), p. 447.

[4] Unlike other courts that have been urged to adopt the alternative liability rule, the Oregon Supreme Court declined to do so, primarily because, as that court maintained, "the adoption of any theory of alternative liability requires a profound change in fundamental tort principles of causation, an adjustment rife with public policy ramifications" that are better left to the judgment of the legislature. *Senn* v. *Merrell-Dow Pharmaceuticals, Inc.*,

As both the Restatement (Second) and those courts have explained, the rule applies only when the plaintiff can demonstrate, first, that all of the defendants acted negligently and harm resulted, second, that all possible tortfeasors have been named as defendants, and, third, that the tortfeasors' negligent conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm. See 2 Restatement (Second), supra, § 433 B, comments (f) and (g), p. 446; see also, e.g., *Goldman* v. *Johns-Manville Sales Corp.*, 33 Ohio St. 3d 40, 45, 46, 47, 514 N.E.2d 691 (1987) ("the burden shifts to the defendant only if the plaintiff can demonstrate that [1] all defendants acted tortiously and that the harm resulted from conduct of one of them," [2] "the defendants' conduct creates a substantially similar risk of harm," and [3] "all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants").

The reasons for these requirements are evident. With respect to the first requirement, a plaintiff must establish by a preponderance of the evidence that all defendants acted negligently before the burden of proof on causation shifts because the rationale for the exception is the unfairness inherent in permitting multiple tortfeasors, acting simultaneously, to escape liability merely because their conduct and the resulting harm has made it difficult, if not impossible, for the plaintiff to demonstrate which of them caused the harm. See 2 Restatement (Second), supra, § 433 B, comment (f), p. 446; see also *Bowman* v. *Redding & Co.*, supra, 449 F.2d 968 (reasoning that alternative liability rule serves interests of justice and is so limited in applicability that it does

305 Or. 256, 271, 751 P.2d 215 (1988). The Oregon Supreme Court stands virtually alone in categorically rejecting the rule. For the reasons set forth in this opinion, we disagree with that court's concerns that the exception, when applied in the limited and unusual circumstances for which it was intended, contravenes or otherwise undermines fundamental tort principles.

not conflict with settled negligence principles). Thus, if a plaintiff fails to prove that all of the defendants committed tortious acts that may have caused the harm, the doctrine does not apply. See, e.g., *Porterie* v. *Peters*, 111 Ariz. 452, 456, 532 P.2d 514 (1975) (declining to apply alternative liability rule because "the proof [was] not clear as to which of the defendants, if any . . . committed an act of negligence [that] produced [the] plaintiff's injury"); *Cuonzo* v. *Shore*, 958 A.2d 840, 844 (Del. 2008) (declining to apply rule because plaintiff injured in automobile accident "never contended" that both of the defendant drivers were negligent); *Goldman* v. *Johns-Manville Sales Corp.*, supra, 33 Ohio St. 3d 46 ("[T]his theory relaxes only the traditional requirement that the plaintiff demonstrate that a specific defendant [or defendants] caused the injury. But the relaxation is . . . warranted [only when the] plaintiff shows that all defendants acted tortiously.").

With respect to the second requirement, a plaintiff must establish that all possible tortfeasors have been named as defendants "to eliminate from the jury's consideration the theory that some other cause, besides a joined [defendant's] conduct, caused the injury." *Trapnell* v. *Sysco Food Services, Inc.*, supra, 850 S.W.2d 539 n.7. Otherwise, it simply would not be fair and equitable to relieve the plaintiff of the responsibility of proving which tortfeasor or tortfeasors caused the harm. And, finally, with respect to the third requirement, a plaintiff must demonstrate that the tortious conduct was substantially simultaneous in time and of the same character so as to create the same risk of harm because it would be unreasonable to require defendants to absolve themselves from liability unless "the likelihood that any one of them injured the plaintiff is relatively high." (Internal quotation marks omitted.) *Silver* v. *Sportsstuff, Inc.*, supra, 130 App. Div. 3d 910.

We agree with our sister states that, when these three threshold requirements have been met, the alternative liability doctrine should be recognized as a limited exception to the general rule that the plaintiff in a negligence action must prove that each of the defendants caused the plaintiff's harm, in addition to all of the other elements of that tort. Faced with the choice of leaving an injured plaintiff without a remedy, on the one hand, or requiring "two wrongdoers, both of whom had acted negligently toward the plaintiff and had created the situation [in which the] plaintiff was injured, [to] bear the burden of absolving themselves"; *Abel* v. *Eli Lilly & Co.*, supra, 418 Mich. 326; on the other, it seems clear that the latter approach represents the fairer, more sensible alternative. See, e.g., 2 Restatement (Second), supra, § 433 B, comment (f), p. 446 (application of alternative liability rule is warranted by virtue of unfairness that would exist if multiple, proven tortfeasors were allowed to avoid liability merely because manner in which they were negligent and nature of resulting harm have precluded plaintiff from establishing which of them caused that harm); *Wysocki* v. *Reed*, 222 Ill. App. 3d 268, 278, 583 N.E.2d 1139 (1991) ("[w]e believe it is more unjust that the injured party receive nothing from two admitted wrongdoers"), appeal denied, 144 Ill. 2d 644, 591 N.E.2d 32 (1992); *Roderick* v. *Lake*, supra, 108 N.M. 701 (alternative liability rule is "fairest and most logical way to determine the amount of fault of two or more tortfeasors in the unusual circumstances . . . [in which the] plaintiff can prove [that the] defendants were negligent . . . but cannot prove which defendant's negligence caused the injury, or which defendant was more at fault").

The three requirements for application of the alternative liability doctrine are satisfied in the present case. The plaintiff has adduced evidence demonstrating that all three of the defendants acted negligently in the

manner in which they disposed of their cigarettes in the mill, that all possible tortfeasors have been named as defendants, and that the tortious conduct of those defendants was substantially simultaneous in time and of the same character so as to give rise to the same risk of harm. We therefore agree with the plaintiff that we must reverse the trial court's decision to grant the defendants' motions for summary judgment and that the plaintiff is entitled to the benefit of the alternative liability doctrine for the purpose of proving its case at trial.

The defendants argue against application of the doctrine for three reasons: (1) the plaintiff has failed to satisfy the rule's requirements; (2) the rule is inconsistent with our statutory apportionment scheme; and (3) even if this court were to adopt the rule, it should not be applied retroactively to the defendants' conduct in this case. None of these contentions is persuasive.

First, the defendants claim that the plaintiff has not produced sufficient evidence to create a triable issue as to all of the necessary conditions for the alternative liability rule to apply. Although conceding that the plaintiff appears to have named all possible tortfeasors as defendants and presented evidence sufficient to establish that the defendants' tortious conduct was substantially simultaneous and similar in nature, the defendants nevertheless assert that there are three *additional* requirements that the plaintiff must meet before the rule may be applied. Specifically, they maintain that the plaintiff must demonstrate that (1) one, and only one, of the defendants possibly could have caused the harm, (2) the defendants have better information about causation than the plaintiff, and (3) the plaintiff is completely innocent with regard to the loss. We disagree that the plaintiff is entitled to the benefit of the rule only upon satisfaction of these three requirements.

To support their contention that the plaintiff must prove that only one defendant caused the harm in order to avail itself of the rule, the defendants rely on *Thodos* v. *Bland*, 75 Md. App. 700, 542 A.2d 1307, cert. denied, 313 Md. 689, 548 A.2d 128 (1988). In *Thodos*, the plaintiff, Patricia Thodos, was a passenger in a car driven by the defendant Alton Linsey Thacker that collided with a car driven by the other defendant, Brian Bland. Id., 703. The Maryland Court of Special Appeals declined to recognize the applicability of the alternative liability rule under the circumstances, which involved Thodos' failure to convince the jury that either Bland or Thacker or both of them were negligent and that such negligence caused Thodos' injuries. Id., 712. *Thodos* does not stand for the proposition advanced by the defendants in the present case; rather, the court in *Thodos* rejected the applicability of the rule because Thodos failed to prove that *both* Bland and Thacker were negligent, that Thodos' injuries were caused by the negligence of only one of them, and that there was uncertainty as to which one. Id., 715–17. More to the point, conditioning the application of the doctrine on proof that only one defendant caused the harm conflicts with the core rationale underlying the rule, namely, to address the unfairness that arises when, as a consequence of the simultaneous negligence of multiple defendants, it is impossible for the plaintiff "to pin the injury on one of the defendants only . . . ." *Summers* v. *Tice*, supra, 33 Cal. 2d 86.

The defendants also contend that the doctrine should be applied only upon a showing by the plaintiff that the defendants have better access to information concerning the actual cause of the harm sustained by the plaintiff. It is true that, in *Summers*, the court recognized that, as a general matter, when the negligent conduct of multiple tortfeasors is more or less simultaneous, each such tortfeasor is likely to be better situated than the plaintiff to know who among them caused the plain-

tiff's injury. See id. As other courts have observed, however, the court in *Summers* made this point only by way of explaining the justifications underlying the alternative liability rule, and there is nothing in the court's decision in *Summers* to suggest that a plaintiff must demonstrate, in any particular case, that the tortfeasors have better access than the plaintiff to information concerning the cause of the plaintiff's injuries. See, e.g., *Abel* v. *Eli Lilly & Co.*, supra, 418 Mich. 333–34 (noting that defendants' access to evidence of causation is not required); *Silver* v. *Sportsstuff, Inc.*, supra, 130 App. Div. 3d 910 ("[A]lthough *Summers* indicated that defendants are [o]rdinarily . . . in a far better position to offer evidence to determine which one caused the injury, the [decision] in *Summers* did not conclude that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury . . . . Thus, in [*Summers*] the paradigm case for alternative liability, the defendants did not have greater access to information that might establish the identity of the tortfeasor . . . ." [Citations omitted; internal quotation marks omitted.]). Indeed, adopting the requirement advocated by the defendants may only encourage those defendants to adopt a strategy of wilful ignorance or to remain silent to avoid liability. See id., 910–11 ("failure to apply the [burden shifting] doctrine of alternative liability to circumstances such as those presented . . . might encourage products distributors to remain silent by failing to adequately label or track their products, and thereby shielding their identity, as a means of avoiding liability" [internal quotation marks omitted]).

The defendants also maintain, in reliance on *Leuer* v. *Johnson*, 450 N.W.2d 363 (Minn. App. 1990), that, to take advantage of the doctrine, the plaintiff must prove it was innocent of all wrongdoing. *Leuer*, however, is inapposite to the present case because it involved

the issue of whether the doctrine of *res ipsa loquitur* applied, not the alternative liability doctrine. See id., 363–66. Indeed, even if we agreed—and we do not—with the defendants' unsupported claim that the alternative liability doctrine applies only if the plaintiff can prove that it was altogether free of blame for its injuries, the defendants have offered no evidence that the town breached any duty in regard to the mill.

The defendants next argue that, even if the plaintiff has satisfied all three of the requirements that we have identified as necessary prerequisites for application of the rule, the rule is incompatible with this state's enactment of tort reform, pursuant to which the legislature replaced the common-law rule of joint and several liability with apportioned liability, whereby each tortfeasor is liable for his or her proportionate share of the plaintiff's damages. Specifically, the defendants argue that the rule "[c]annot [w]ork" without joint and several liability because, in its absence, defendants "have no incentive" to meet their burden of disproving that their negligence caused the plaintiff's injury, thereby "mak[ing] it impossible for a fact finder to apportion liability" without resort to impermissible speculation. We find no merit in this argument.

We disagree that, under the alternative liability rule, defendants "have no incentive" to establish that their negligence was not a cause of the injuries because it is only by doing so that they will be able to avoid liability. This is true under a system that holds tortfeasors jointly and severally liable for their negligence or under a system based on apportionment of liability: under either scheme, the alternative liability rule places the burden on the tortfeasors to demonstrate that they did not cause the damages, and, if they fail to meet that burden, they will be held liable.

We acknowledge, as the defendants assert, that the rule deviates from established negligence principles by

allowing the fact finder, in the absence of evidence to the contrary, to conclude that all three defendants caused the plaintiff's injury and, therefore, that all three defendants are equally liable for the plaintiff's damages. Contrary to the defendants' assertions, however, use of this presumption to address the evidentiary lacuna created by the tortfeasors' simultaneous negligence is not a disqualifying feature but, rather, the sine qua non of the rule. As one court aptly stated in addressing a similar contention, "[§ 433 B (3) of the Restatement (Second)] is an exception to the general rule that the plaintiff must establish by a preponderance of evidence that his injury was caused by defendant's tortious conduct. [T]he reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury [on] the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.

"The provisions of [§ 433 B] (3) are not to be gainsaid on the ground that they are contrary to the doctrine requiring [the plaintiff to prove all the elements of the cause of action]. They are set forth as limited exceptions to that doctrine. These exceptions are supported by the interest of justice and are so limited and structured that it is [evident] that they do not represent a disguised overturning or undermining of the main doctrine. So far as [§ 433 B] (3) is concerned [the court is] satisfied that it is fairly supported by precedents reaching the indicated result as in the interest of justice and consonant with sound common law.

"The effect of shifting the burden of proof to the defendants will . . . arise [only] if the jury should decide that it is satisfied that [the] plaintiff has established by a preponderance of the evidence that both defendants were wrongdoers . . . and that one or another was the cause of [the plaintiff's injury], but is unable to find from a preponderance of the evidence

which defendant [caused the injury]. Then the burden will shift to each defendant to absolve itself of liability, either for the purpose of avoiding a verdict for the plaintiff or for avoiding a claim of contribution by the other defendant. If neither defendant can prove [that] it did not cause the [plaintiff's injury], they would both be liable." (Footnotes omitted; internal quotation marks omitted.) *Bowman* v. *Redding & Co.*, supra, 449 F.2d 967–68.

We therefore see no reason why our adoption of the alternative liability rule should be understood as a return to our past system of joint and several liability, pursuant to which any one of the defendants could have been liable for the entire judgment at the option of the plaintiff. It is not. To the contrary, we view the rule as being fully compatible with our modern apportionment scheme. Indeed, when subject to the alternative liability rule, the defendants fare *better* under the apportionment approach because, in the event they are unable to absolve themselves of liability, the law requires that the plaintiff's damages be apportioned equally among them, with each defendant liable for only his or her proportionate share. See General Statutes § 52-572h (c).

Finally, the defendants assert that, if we adopt the alternative liability doctrine for cases involving fact patterns like the present one, we nevertheless should not apply it retroactively to their conduct because they were not on notice that we would recognize the doctrine and because it would impose a substantial hardship on them. We disagree.

"Traditionally . . . in cases of civil tort liability in which new causes of action are recognized, the new theory of liability is applied to the parties in the case"; *Clohessy* v. *Bachelor*, 237 Conn. 31, 57, 675 A.2d 852 (1996); see also *Campos* v. *Coleman*, 319 Conn. 36, 62, 123 A.3d 854 (2015) (judicial decisions generally apply

retroactively to pending cases); and only in exceptional circumstances will we deviate from that general rule. See *Campos* v. *Coleman*, supra, 62. Thus, to establish that the alternative liability doctrine should be applied prospectively only, the defendants must demonstrate that applying the doctrine retroactively to them "would produce substantial inequitable results, injustice or hardship." *Ostrowski* v. *Avery*, 243 Conn. 355, 378 n.18, 703 A.2d 117 (1997). The defendants have identified no such facts or circumstances that would render the retroactive application of the alternative liability rule in the present case unfair or unduly harsh, and, importantly, there is no basis for a claim that applying the rule retrospectively would violate or compromise any legitimate reliance interest of the defendants. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 655–56, 95 A.3d 1011 (2014); *Clohessy* v. *Bachelor*, supra, 57 and n.15; *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 495–96 and n.5, 408 A.2d 260 (1979). In fact, it would be facetious to suggest that any of the defendants, each of whom carelessly disposed of their cigarettes, would have acted any differently if the law had been different. Because the defendants have identified no persuasive reason why the alternative liability rule that we adopt today should not be applied to them, we reject their claim that the rule should be applied prospectively only.

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

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 192

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JILL GILBERT CALLAHAN *v.* JAMES CALLAHAN
(AC 40723)

Alvord, Moll and Pellegrino, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court resolving certain postjudgment motions that the parties had filed. The plaintiff claimed, inter alia, that the trial court improperly granted the defendant's motion to modify his alimony obligation and ordered that the modification apply retroactively. The dissolution court had granted the defendant's motion to open the dissolution judgment and issued substitute financial orders. This court thereafter reversed the dissolution court's granting of the motion to open and remanded the matter to the trial court with direction to reinstate the original financial orders. The plaintiff thereafter filed a motion for contempt, claiming that the defendant had failed to pay her certain amounts set forth in the dissolution court's original financial orders. The trial court declined to find the defendant in contempt and determined that the effective date for the running of interest on the amounts at issue was the date on which the parties' appeals to this court were finally determined. The court subsequently granted the defendant's motion to modify alimony, and

the plaintiff appealed to this court. The trial court thereafter determined that it lacked jurisdiction over a motion that the plaintiff had filed requesting that the court order the defendant to endorse certain insurance checks for damage to the parties' former marital home. The court also denied another motion for contempt that the plaintiff filed regarding documents necessary to transfer to the defendant the plaintiff's interest in certain companies that the parties owned, and the plaintiff filed an amended appeal with this court. *Held*:

1. The trial court did not abuse its discretion in granting the defendant's motion to modify his alimony obligation and determining that the defendant had established a substantial change in circumstances due to his lower earning capacity: that court's finding that the defendant's earning capacity had decreased, which it based on the companies' profits, was not clearly erroneous, as the court credited testimony by the defendant's expert witness about the companies' financial statements, the defendant testified that he would not be able to obtain a job with a Wall Street bank or hedge fund, the court found it significant that the defendant had not worked on Wall Street in twenty years, and the transfer of the plaintiff's interest in the companies to the defendant, which had been ordered by the dissolution court, had not yet occurred and prevented the defendant from selling the companies; moreover, the court was not required to determine the defendant's earning capacity on the basis of what he might theoretically earn if he were to sell the companies and pursue employment opportunities in the marketplace, and the court used the same formula that the dissolution court had used to determine the defendant's earning capacity.
2. The trial court did not abuse its discretion in ordering that the modification of the defendant's alimony obligation be retroactive three years and requiring the plaintiff to repay him certain sums of alimony that she had received; that court found it equitable and appropriate under the circumstances to modify the defendant's alimony obligation, pursuant to statute (§ 46b-86 [a]), retroactive to the date that the original motion was served on the plaintiff three years earlier because there had been a substantial delay in hearing the motion, which was pending when the court treated an amended motion to modify that the defendant had filed as a continuation of his original motion to modify, until the court issued its decision.
3. The plaintiff's claim that the trial court lacked the authority to suspend the defendant's alimony payments was moot; a reversal of the court's suspension of alimony payments would not afford the plaintiff any practical relief, as the trial court had factored the suspension of the payments into its calculation of the defendant's overpayment of alimony and reduced the overpayment by the amount of alimony that accrued during the suspension.
4. The plaintiff could not prevail on her claim that the trial court, on remand, improperly failed to determine that the reinstated financial orders were effective as of the date of the dissolution judgment, which thereby

reduced the value of her property award by depriving her of accrued interest on the defendant's debt to her: the trial court properly interpreted this court's remand order in determining that the judgment was effective as of September 8, 2015, the date on which the parties' appeals to this court were finally determined, as the date employed in the remand order identified which financial orders were to be reinstated, the remand order constituted a reversal of a judgment, which commanded a new effective date, and because the original financial orders were superseded by those contained in the dissolution court's intervening judgment, which this court reversed, the judgment subsequently directed, which mandated a reinstatement of the superseded financial orders, was not effective retroactively; moreover, it was not reasonable to interpret the remand order as direction to the trial court to reinstate the original financial orders retroactive to the date of the dissolution judgment, and if this court intended to direct the trial court to reinstate the original financial orders retroactive to the date of the dissolution judgment, it would have included language directing the trial court accordingly; furthermore, because the sums set forth in the dissolution court's financial orders were no longer payable once that court opened the dissolution judgment, the plaintiff's claim that she should be compensated for the loss of the use of that money was without foundation.

5. This court found unavailing the plaintiff's claim that the trial court erred in ordering her to execute certain documents to transfer to the defendant her interest in the companies: contrary to the plaintiff's claim that the court improperly required her to execute a certain complex commercial document, the court properly credited the testimony of the defendant's expert witness that a transfer of the plaintiff's interest in the companies would require fulsome representations and warranties in order to preserve the fair market value of the companies, both parties and the court envisaged a potential sale of the companies, as the amount of the promissory note correlated with the value of the plaintiff's 50 percent interest in the companies, the inclusion of a release in the documents did not constitute a modification of the dissolution judgment, and the plaintiff presented no evidence to refute the testimony of the defendant's expert witness that such a release was customary; moreover, the plaintiff presented no evidence to demonstrate her claimed inability to make particular representations in the documents, and although there were inconsistencies in the documents, for which the trial court acknowledged that amendments were required prior to the execution of the documents, the plaintiff neither set forth the particular provisions in her motion for contempt nor identified them to the trial court.

6. The plaintiff could not prevail on her claim that the trial court improperly concluded that it lacked subject matter jurisdiction to require that the defendant endorse two insurance checks for postdissolution property damage to the parties' former marital home, which the dissolution court had awarded to the plaintiff; the trial court lacked authority to revisit its

property distribution orders or to enter additional property distribution orders to compensate the plaintiff for the alleged postjudgment reduction in value of the home, and, to the extent that the proceeds of the insurance checks were viewed as a new asset that was acquired pursuant to a contract of insurance that was in effect after the parties' marriage had been dissolved, such proceeds would not be marital property distributable under the statute (§ 46b-81) governing the distribution of marital property.

Argued April 18—officially released September 17, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Munro*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Munro*, *J.*, granted the defendant's motion to open the judgment and entered certain financial orders, and the plaintiff appealed to this court, which reversed in part the trial court's judgment and remanded the case to that court for further proceedings; subsequently, the court, *Hon. Michael E. Shay*, judge trial referee, granted the defendant's motion to modify alimony and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, *Diana*, *J.*, denied the plaintiff's motions for contempt and for an order regarding certain insurance checks, and the plaintiff filed an amended appeal. *Appeal dismissed in part; affirmed.*

Laura W. Ray, for the appellant (plaintiff).

Campbell D. Barrett, with whom were *Jon T. Kukucka* and, on the brief, *Johanna S. Katz*, for the appellee (defendant).

Opinion

ALVORD, J. In this postjudgment dissolution matter, the plaintiff, Jill Gilbert Callahan, appeals from the judgments of the trial court, rendered on remand from this court, granting a motion to modify alimony filed by the defendant, James Callahan, and issuing additional

postjudgment orders. On appeal, the plaintiff claims that the court (1) erred in granting the defendant's motion to modify alimony, (2) abused its discretion in modifying alimony retroactively, (3) lacked the legal authority to suspend the defendant's alimony payments to her as a condition of granting her motion for a continuance, (4) erred in determining the effective date of financial orders that this court mandated be reinstated, (5) erred in ordering her to execute certain documents to transfer her interest in the companies owned by the parties, and (6) improperly concluded that it lacked subject matter jurisdiction to require the defendant to endorse two insurance checks. We dismiss as moot the plaintiff's third claim regarding the suspension of alimony payments and affirm the judgments of the trial court in all other respects.[1]

The following facts and procedural history are relevant to our resolution of the appeal. The parties were married in 1987 and raised three children, all adults at the time of the dissolution trial. In 2009, the plaintiff filed a complaint seeking dissolution of her marriage to the defendant. The matter was tried to the court, *Munro*, *J.*, in March, 2012. On May 8, 2012, the court issued a memorandum of decision rendering judgment dissolving the parties' marriage on the ground of irretrievable breakdown, and entering property division and alimony orders (May, 2012 dissolution judgment). On June 15, 2012, the defendant filed a motion to open the judgment of dissolution and attendant financial orders, which was granted on November 6, 2012. The court then held an evidentiary hearing and, in a February 27, 2014 memorandum of decision, issued substitute financial orders (February, 2014 decision).

[1] With respect to the plaintiff's sixth claim, although the court used the term "jurisdiction," we note that the postdissolution distribution of property does not implicate the court's subject matter jurisdiction but, rather, its statutory authority. See *Reinke* v. *Sing*, 328 Conn. 376, 391–92, 179 A.3d 769 (2018) (General Statutes § 46b-86 [a] does not deprive trial court of subject matter jurisdiction to modify property distribution order).

Both parties filed appeals. This court, on May 5, 2015, issued a decision reversing the trial court's granting of the motion to open the judgment and remanded the matter with direction to reinstate the May, 2012 financial orders. *Callahan* v. *Callahan*, 157 Conn. App. 78, 101, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015).

Following this court's resolution of the parties' prior appeals, the plaintiff filed, among several motions, a motion for contempt dated July 6, 2015. In her motion, she argued, inter alia, that the defendant had refused to comply with the judgment in that he had failed to pay amounts set forth in the May, 2012 financial orders, plus interest, which she contended had begun accruing in 2012. On May 4, 2016, the court, *Hon. Michael E. Shay*, judge trial referee, issued a memorandum of decision declining to find the defendant in contempt, in which it concluded that "the effective date for the running of interest is September 8, 2015," the date that, the court determined, the defendant had exhausted all the appellate avenues that had been available to him.

In November, 2016, the court, *Hon. Michael E. Shay*, judge trial referee, began hearing evidence on a motion to modify alimony originally filed by the defendant on May 19, 2014, and amended on October 15, 2015. In its memorandum of decision filed August 1, 2017, the court found that the defendant had established a substantial change in circumstances and granted his motion to modify alimony. On August 7, 2017, the plaintiff filed this appeal.

While this appeal was pending, the court, *Diana*, *J.*, heard additional motions filed by the plaintiff. On April 3, 2018, the court concluded that it lacked jurisdiction over the plaintiff's motion requesting that the court order the defendant to endorse two Chubb property

damage insurance checks.[2] On April 10, 2018, the court denied the plaintiff's motion for contempt regarding the documents necessary to transfer the plaintiff's interest in companies owned by the parties and issued a remedial order. On April 20, 2018, the plaintiff filed an appeal challenging the April 3 and 10, 2018 orders, which this court treated as an amendment to the original appeal filed on August 7, 2017. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff's first claim on appeal is that the trial court erred in finding that the defendant had established a substantial change in circumstances justifying a modification in alimony. She argues that the trial court erroneously considered evidence showing a change in the defendant's earnings only from the companies owned by the parties, whereas the dissolution court based its original alimony award on the defendant's general earning capacity independent of his earnings from the companies. Thus, she argues that the trial court failed to compare "apples to apples . . . ."[3] We disagree.

The following additional facts and procedural history are relevant to this claim. In 1995, the parties established three companies together, Pentalpha Group, LLC,

[2] See footnote 1 of this opinion.

[3] In one sentence in each of her principal and reply briefs, the plaintiff maintains that "the trial court would not allow the plaintiff to present expert testimony on the absence of any substantial change in the defendant's earning capacity independent of Pentalpha." The plaintiff provides no citation to authority or analysis as to any argument that the court improperly precluded expert testimony. Accordingly, to the extent she seeks to challenge the court's preclusion of expert testimony, that issue is inadequately briefed, and we decline to address it. See *Gorski* v. *McIsaac*, 156 Conn. App. 195, 209, 112 A.3d 201 (2015) ("We are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." [Internal quotation marks omitted.]).

Pentalpha Funding, LLC, and Pentalpha Capital, LLC. The plaintiff owned 51 percent of each of the three entities and the defendant owned 49 percent. In 2005, a fourth Pentalpha entity was created, Pentalpha Surveillance, of which 100 percent was owned by the defendant (collectively, the companies). The court found that the companies "work in various fields: as an investment advisor, as a trading and brokerage company, as a broker dealer and as an oversight company, all ostensibly in the loan market, particularly working with asset-backed debt."

In its May, 2012 dissolution judgment, the court ordered the defendant to pay $60,000 per month in alimony, until the death of either party, the remarriage of the plaintiff, or as determined by the court, pursuant to General Statutes § 46b-86 (b). In so ordering, the court stated: "The alimony order is predicated on earnings, including member distributions to the defendant of up to $2,000,000 per year. The court notes that the plaintiff's valuation expert, Barry Sziklay, concluded that a comparable compensation for the defendant, as a key person operating on Wall Street, would be at least in the [$1 million to $2 million] range annually. Ultimately, in the valuation model that he used, Sziklay attributed 50 percent of the pretax profits to the defendant. For 2010, that resulted in adjusted compensation of $1,976,312. As of the second quarter's completion for 2011, that adjusted compensation attributed to the defendant was $684,880. The defendant provided no contrary evidence. The court finds this approach reasonable. No evidence was adduced of any increase in liabilities. Accordingly, finding earnings attributable to the defendant in the amount of $2,000,000 gross is conservative, the court adopts it as a finding of fact as to the present earning capacity of the defendant at Pentalpha."

On May 19, 2014, while the parties' prior appeals remained pending, the defendant filed a motion to modify his alimony. In that motion, he represented that the

companies were "experiencing a cash flow crisis" and that the defendant's earning capacity at the companies was no longer $2 million. The defendant argued that postjudgment misconduct of the plaintiff, on which the trial court relied in opening the dissolution judgment, had diminished the value of the companies, thereby reducing the earnings from which he pays alimony. The motion was not pursued while the parties' prior appeals were pending. On October 15, 2015, the defendant filed an amended motion for modification of alimony, again arguing that his income had decreased since the date of dissolution.

The court began hearing evidence on the defendant's motion on November 8, 2016. The defendant testified that, taking the four companies together, the cash collected on an annual basis had decreased substantially since the May, 2012 dissolution judgment. As to the potential for other employment, the defendant testified that he did not believe it would be possible for him to leave the companies and get a new job. Specifically, he stated: "The market has taken an invention that I've devised—this surveillance, this oversight, to investor confidence. They've made me an insider on 140 deals. I can't go show up and work at some Wall Street bank or some hedge fund; they would have to preclude me from the one thing that I know about because I'm the insider."

Both parties presented expert testimony. The defendant presented the testimony of Attorney Mark Harrison. Harrison testified that he used the compensation methodology set forth in the May, 2012 dissolution judgment, pursuant to which 50 percent of the pretax profits of three of the companies (Pentalpha Funding, LLC, Pentalpha Group, LLC, and Pentalpha Capital, LLC) as shown in the companies' audited financial statements, was attributed to the defendant as reasonable compensation. Harrison performed the same analysis for the

years 2012–2015 to arrive at reasonable compensation attributable to the defendant in the amount of $210,000. He also performed the same analysis including profits from Pentalpha Surveillance, which was omitted from the calculations in the May, 2012 dissolution judgment, to arrive at reasonable compensation attributable to the defendant in the amount of $370,000. The audited financial statements for each of the four companies, on which Harrison relied, also were entered into evidence.

Harrison testified that the defendant was not earning sufficient money to satisfy his alimony obligations. Specifically, he testified that in order to satisfy the defendant's obligations pursuant to the May, 2012 dissolution judgment, he would be "not only taking the 50 percent of income out of the company, he's taking it all out as well as withdrawing the excess capital that was valued in it to get the cash flow to be able to pay his obligations pursuant to the judgment and live his life."

The plaintiff presented the expert testimony of Sziklay, whose formula attributing 50 percent of the pretax profits of the companies to the defendant was used by the court in the May, 2012 dissolution judgment to reach an earning capacity of $2 million. In his testimony during the hearing on the motion for modification, Sziklay agreed with the numbers used by Harrison to determine 50 percent of the pretax profits of the companies. He disagreed, however, with Harrison's conclusion that the defendant had an earning capacity of $210,000. According to Sziklay's December, 2016 testimony, the defendant's earning capacity of $2 million, which was found by the dissolution court in May, 2012, remained reasonable.

In its memorandum of decision filed August 1, 2017, the court determined that the defendant had established a substantial change in circumstances due to his lower

earning capacity. The court credited Harrison's testimony that the defendant had been using his personal assets to meet his marital obligations. Finding that Harrison had "used the same basic format that . . . Sziklay used at the time of trial," the court relied on Harrison's calculations using the profits of all four companies. The court found that the defendant had an earning capacity of $370,000 per year, as of January 1, 2016, and ordered the defendant to pay $12,000 per month in alimony until "the death of either party or the remarriage of the plaintiff, or the entry into a civil union by her, whichever shall sooner occur." The court found, with respect to the period of July 1, 2014 through December 31, 2015, that the defendant had an earning capacity of $850,000 per annum and a net income of $489,692. It determined the alimony due for that period to be $24,000 per month.

On appeal, the plaintiff argues that the court was required to find the defendant's earning capacity independent of the companies. We disagree.

"We review the court's judgment granting a motion to modify alimony payments under an abuse of discretion standard. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action."[4] (Internal quotation marks omitted.) *McRae* v. *McRae*, 139 Conn. App. 75, 80, 54 A.3d 1049 (2012). "[T]he trial court's findings [of fact] 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

[4] The plaintiff suggests, without citation to any authority, that this claim should be afforded plenary review. We disagree.

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." (Internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 593, 187 A.3d 1184 (2018).

"[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony . . . the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 671–72, 81 A.3d 215 (2013). In determining whether the moving party has established a substantial change in circumstances, the trial court is "free to credit or reject all or part of the testimony given . . . . On review, we do not reexamine the court's credibility assessments." *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 489, 144 A.3d 447 (2016).

The plaintiff argues that the court erred in calculating the defendant's earning capacity on the basis of the companies' profits alone, rather than on the defendant's

earning capacity independent of the companies.[5] "While there is no fixed standard for the determination of an individual's earning capacity . . . it is well settled that earning capacity is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Fritz* v. *Fritz*, 127 Conn. App. 788, 796, 21 A.3d 466 (2011).

Bearing in mind that a party's earning capacity is not calculated by reference to amounts the party can theoretically earn, nor is earning capacity fixed at any one moment in a career, we are unpersuaded that the court abused its discretion in grounding its finding of the defendant's earning capacity on the profits of the companies. The court had before it the defendant's testimony that he would not be able to obtain a job with a Wall Street bank or hedge fund because the nature of the companies' business had made him an "insider," and the court found significant that the defendant had not worked on Wall Street in twenty years. Moreover, the transfer of the plaintiff's interest in the companies

[5] The court, in its May, 2012 dissolution judgment, stated that its "alimony order is predicated on earnings, including member distributions to the defendant of up to $2 million per year." It further stated that "[f]inding earnings attributable to the defendant in the amount of $2 million gross is conservative, [and] the court adopts it as a finding of fact as to the present earning capacity of the defendant at Pentalpha." In support of that finding, the court noted that "the plaintiff's valuation expert, Barry Sziklay, concluded that a comparable compensation for the defendant, as the key person operating on Wall Street, would be at least in the [$1 million to 2] million range annually." On appeal, this court reiterated these findings. *Callahan* v. *Callahan*, supra, 157 Conn. App. 97.

In the present appeal, the plaintiff asks this court to find error in the trial court's tying the defendant's earning capacity to his full-time employment at the companies. In making this argument, the plaintiff urges this court to require the trial court to establish the defendant's earning capacity on the basis of his pre-1995 employment. We find no error in the trial court's decision to refrain from doing so.

to the defendant, which had been ordered by the court in the May, 2012 dissolution judgment, had not yet occurred, which the defendant testified prevented him from selling the companies. Thus, the court was not required to make its finding of the defendant's earning capacity on the basis of what the defendant might theoretically earn were he to sell the companies he founded and ran for approximately twenty years to pursue limited opportunities for employment in the marketplace.

We conclude that the court's factual finding that the defendant's earning capacity had decreased from $2 million at the time of dissolution to $370,000 at the time of the modification was not clearly erroneous. The court expressly credited Harrison's testimony and accompanying exhibits showing 50 percent of the pretax profits of the companies as set forth in the companies' audited financial statements, and the plaintiff's expert agreed with the numbers used in Harrison's calculations. Moreover, the court found the defendant's earning capacity using the same formula that the court used in its May, 2012 dissolution judgment to calculate the defendant's earning capacity. The court's findings regarding a substantial change in circumstances are supported by the record, and, thus, we conclude that the court did not abuse its discretion in granting the defendant's motion to modify alimony.

II

The plaintiff's second claim is that the court abused its discretion "when it made its alimony modification order retroactive three years to July, 2014, and ordered the plaintiff to repay the defendant $1.3 million in alimony already received." She argues that the defendant's motions to modify alimony were predicated on the court's February, 2014 decision opening the May, 2012 dissolution judgment, which this court vacated, and, thus, retroactivity to the date of the filing of his motion should be barred. We disagree.

The following additional facts and procedural history are relevant to this claim. In its August 1, 2017 memorandum of decision granting the defendant's motion to modify alimony, the court, citing the marshal's return, found that the plaintiff was served in hand with the defendant's motion for modification on June 9, 2014. Noting that the defendant had filed an amended motion for modification dated October 15, 2015, seeking identical relief, the court found that "at the time of trial, the original motion was still pending and undecided . . . ." Relying on § 46b-86 (a), the court concluded that "any retroactive relief would relate back to the date of the service of the original motion . . . and that under all the facts and circumstances, it is equitable and appropriate to enter an order of modification retroactive to July 1, 2014." (Citation omitted.)

The plaintiff's claim on appeal is that retroactivity should be barred on the ground that both the original and amended motions to modify were predicated on findings contained in the court's February, 2014 judgment, which was subsequently vacated. She argues that the defendant changed the basis of his motion late in its pendency, and therefore retroactivity is improper because notice, required in order to support retroactive modification, "is not meaningful if the grounds for the motion are changed years later."

The issue of whether the court properly made the modification retroactive is reviewed for abuse of discretion. See *LeSueur* v. *LeSueur*, 172 Conn. App. 767, 783, 162 A.3d 32 (2017) (court had discretion to make child support modification retroactive to any time between date motion was served and date motion was decided that was reasonably supported by record); *Cannon* v. *Cannon*, 109 Conn. App. 844, 850, 953 A.2d 694 (2008) ("[t]he record provides support that the court acted within its discretion when it ordered the unallocated alimony and child support payments retroactive to the

date of service for the motion for modification"). Therefore, we apply the same standard of review set forth in part I of this opinion.

Pursuant to § 46b-86 (a), "[n]o order for periodic payment of permanent alimony or support may be subject to retroactive modification, *except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party* pursuant to section 52-50." (Emphasis added.) "We have held previously that parties must comply strictly with § 46b-86 (a) before a court may determine whether to retroactively modify support orders." (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 780.

"Although there is no bright line test for determining the date of retroactivity of child support [or alimony] payments, this court has set forth factors that may be considered. Specifically, in *Hane* [v. *Hane*, 158 Conn. App. 167, 176, 118 A.3d 685 (2015)], we expressly noted that a retroactive award may take into account the long time period between the date of filing a motion to modify, or . . . the contractual retroactive date, and the date that motion is heard . . . . The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes." (Internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 189 Conn. App. 486, 507, 207 A.3d 1085 (2019). "Moreover, § 46b-86 (a) accords deference to the trial court by permitting it to make a modification to a party's child support obligation retroactive to '*any* period during which there is a pending motion for modification.' " (Emphasis in original.) *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 780.

In the present case, the defendant's motion for modification was served on June 9, 2014, and an amended motion was filed on October 15, 2015. In both the original and amended motions, the defendant alleged that there had been a substantial change in circumstances, in that the companies were "experiencing a cash flow crisis" and that the defendant's earning capacity at the companies was no longer $2 million. In his amended motion, he again alleged a substantial change of circumstances on the basis of the diminution of his income since the May, 2012 dissolution judgment. Although the defendant referenced that the plaintiff's actions affected the companies' profitability, the substantial change in circumstances alleged was that the companies were "experiencing a cash flow crisis and [the defendant's] earning capacity at the companies is not $2 million." Thus, the substantial change in circumstances to be established by the defendant at trial was the cash flow crisis. Significantly, the court stated in its memorandum of decision that it had not taken into consideration allegations three and six of the defendant's motion, which referenced the plaintiff's alleged misconduct.

The court found, under the facts and circumstances of the present case, that it was equitable and appropriate to modify the defendant's alimony obligations retroactively. Those circumstances included the "substantial delay" in hearing the defendant's motion, which spanned more than three years. See *Cannon* v. *Cannon*, supra, 109 Conn. App. 851 (modification retroactive three years to date of service for motion not abuse of discretion). The original motion, served on June 9, 2014, was pending pursuant to § 46b-86 (a) until the court, which treated the amended motion as a continuation of the original motion, issued its memorandum of decision filed August 1, 2017. Given the circumstances, it was not an abuse of discretion for the court to order the modification of the defendant's alimony obligation retroactive to July 1, 2014.

III

The plaintiff's third claim on appeal is that the court lacked the legal authority to suspend the defendant's alimony payments as a condition of granting her motion for a continuance. She further claims that the court erred in refusing her request to withdraw her motion for a continuance and allow the trial to proceed. The defendant responds that the plaintiff's claim is not justiciable because the plaintiff was not harmed by the court's decision, and there is no practical relief that this court can afford her. We conclude that this court lacks subject matter jurisdiction over this claim on the ground of mootness.[6]

The following additional facts and procedural history are relevant to our resolution of this claim. The defendant's motion for downward modification of alimony; see part II of this opinion; was filed on May 19, 2014, and amended on October 15, 2015. A trial on the motion was held over the course of approximately fifteen trial days, from November, 2016, through final argument on June 28, 2017. A decision on the motion was rendered August 1, 2017, on which date the trial court issued its memorandum of decision modifying the defendant's alimony obligation.

On January 31, 2017, the plaintiff's counsel informed the court that she was requesting a continuance because the plaintiff's slipped disk had worsened and she was placed on bed rest indefinitely. The defendant's counsel objected to the continuance on the ground that it was "yet another in a very long list of continuance requests in this case." He further requested that the court suspend the alimony order subject to recalculation upon

[6] During oral argument before this court, the plaintiff's counsel argued that the plaintiff experienced an injury at the time of the suspension, but recognized that were this court to uphold the alimony modification, the plaintiff's claim of error in the suspension of the alimony payments would be rendered moot.

the conclusion of evidence in the event the court continued the matter. The court denied the motion for a continuance. When the afternoon session commenced, the plaintiff's counsel objected to proceeding in the absence of the plaintiff, and the court stated that it had looked at the number of continuances in the case and that a "good portion of them" had been accorded to the plaintiff or the plaintiff's counsel.[7]

During a court appearance on February 24, 2017, the court took up the plaintiff's motion for a continuance. The court requested that both parties provide updated financial affidavits and that the plaintiff's counsel provide a medical report that would enable the court to determine whether the plaintiff might be able to return to court to testify or whether alternative methods would be needed to secure her testimony. The court then expressed concern that the defendant's motion for modification had been pending for a long period of time. Indicating that it was required to balance the rights of both parties, including the plaintiff's right to attend the hearing and assist her counsel and the defendant's right to have his motion heard in a timely fashion, the court stated that it would consider argument during the parties' next scheduled court appearance as to whether it should suspend prospectively and temporarily the defendant's alimony payment in whole or in part. The court stated: "[T]he way I view suspension is it does not terminate the alimony. It continues to accrue subject to a final decision." Although the court was unaware of any precedent for suspending the alimony payment, it indicated that it had given the matter considerable thought and believed such an action was within the authority of the court. It also invited the parties to identify any relevant precedent.

On March 28, 2017, the parties appeared before the court, and the court described the issue to be heard as

[7] We note that the record reveals other occurrences on which the plaintiff's counsel did not attend scheduled court hearings.

"whether or not it's appropriate under all the circumstances to suspend the alimony, and I explained what I meant by suspend, which is not terminate, not modify, just simply suspend payment in whole or in part until a final decision is reached . . . ." Having presided over eight days of trial and heard the testimony of both parties' experts and the defendant, the court stated that it had a considerable body of evidence to assist its consideration of a motion to suspend. Following argument, the court found that it was equitable to suspend the full alimony payment for a period of three months. The court considered it important that the defendant was current on his alimony payments, which the court found he was paying out of assets that were awarded to him in the original dissolution judgment. The court indicated that it would revisit the issue in three months but invited the parties to return to court sooner in the event that the plaintiff's medical condition resolved in the interim.

Following the court's ruling, the plaintiff's counsel sought the opportunity to consult with the plaintiff as to whether she wanted to allow the proceedings to continue in her absence and continue receiving alimony payments or whether she maintained her request for a continuance with the knowledge that alimony payments would be suspended. Her counsel further argued that to the extent the court's granting of the continuance was conditioned on accepting a suspension of alimony, the plaintiff should be able to decide whether to accept the condition or withdraw the motion. The court rejected that argument and indicated that the motion had already been brought and decided.[8]

[8] In an ex parte emergency motion dated April 27, 2017, the plaintiff requested immediate reinstatement of her monthly alimony payments retroactive to April 1, 2017. She represented that she was available to return to court to attend the trial and that she had requested the earliest available trial dates. The court denied the motion and indicated that it would address the matter at the next scheduled hearing date. The parties appeared before the court on May 12, 2017, on which date the plaintiff was present. The

On June 28, 2017, the parties appeared for final argument on the defendant's motion to modify alimony, and the court heard argument as to whether the suspension of the alimony payment should continue. The court modified its order and required the defendant to pay $10,000 monthly in alimony until such time as the court rendered its decision on the defendant's motion for modification. Again, the court emphasized that it had ordered a suspension. It stated: "This is . . . under no circumstances . . . a modification. That's to be decided. This is a suspension. . . . The payment of [the $60,000 per month] was suspended. But as we all know . . . if the court modifies and goes retroactive, that . . . ultimately becomes a matter for a . . . mathematical adjustment. So, this is in no way, shape or form a . . . modification or prejudging of the circumstances . . . ."

In its August 1, 2017 memorandum of decision granting the defendant's motion for modification, the court reiterated that the alimony had continued to accrue during the suspension of the defendant's alimony obligation. After finding a substantial change of circumstances and modifying the defendant's alimony retroactive to July 1, 2014, the court took into account the suspension of the defendant's alimony obligation in calculating the defendant's overpayment in the amount of $1,330,000.[9]

court found that there was "nothing substantial that has changed" and declined to change its order.

[9] Specifically, the court found "[t]hat the orders herein have created a substantial overpayment of periodic alimony by the defendant; that for the period July 1, 2014 through and including August 1, 2017, the defendant has paid the sum of $1,990,000 (33 months x $60,000 plus 1 month [at] $10,000); that for the period April, 2017 through June, 2017, payment of the defendant's alimony obligation was suspended; that after taking into account the new orders herein retroactive to July 1, 2014, the defendant's total alimony obligation since that date is $660,000 (18 months x $24,000 plus 19 months x $12,000); and that the overpayment of periodic alimony amounts to $1,330,000." (Emphasis omitted.) The court thereafter ordered the plaintiff to reimburse the defendant the amount of overpayment in installments.

As a threshold matter, the defendant argues that the plaintiff was not harmed by the court's decision suspending the defendant's alimony obligation and, therefore, her claim is not justiciable. "Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 598–99, 952 A.2d 115 (2008); see also *Altraide* v. *Altraide*, 153 Conn. App. 327, 332, 101 A.3d 317 ("[m]ootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction" [internal quotation marks omitted]), cert. denied, 315 Conn. 905, 104 A.3d 759 (2014).

"[T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Zoll* v. *Zoll*, 112 Conn. App. 290, 297–98, 962 A.2d 871 (2009). In *Zoll*, this court concluded that it lacked subject matter jurisdiction over a claim that the trial court, on September 13, 2006, had improperly vacated a prior order of the court staying the defendant's alimony obligation. Id., 298. In its subsequent memorandum of decision resolving the defendant's motion to modify alimony, issued on March 2,

2007, the court instructed that its new alimony order was retroactive to June 14, 2006. Id. Because the March, 2007 judgment had retroactive effect, a reversal of the September, 2006 judgment would provide no benefit to the defendant. Thus, the claim was rendered moot. Id.

In the present case, the court expressed on multiple occasions that, although it was ordering a temporary suspension of the defendant's payment of his alimony obligation, the alimony continued to accrue during the suspension, and the court would employ a calculation in its final orders reflecting the suspension. In its memorandum of decision modifying the defendant's alimony obligation retroactive to July 1, 2014, the court factored the suspension of payments into its calculation of the defendant's overpayment.[10] Thus, a reversal of the court's suspension of alimony payments would not afford the plaintiff any practical relief because the amount of the defendant's overpayment was reduced by the amount of alimony that accrued during the suspension. Thus, the issue on appeal is moot and, as a result, we do not reach the merits of the plaintiff's claim. See *Altraide* v. *Altraide*, supra, 153 Conn. App. 332.

IV

The plaintiff's fourth claim on appeal is that the court, on remand, erred in determining that the May, 2012 financial orders, which this court ordered reinstated; see *Callahan* v. *Callahan*, supra, 157 Conn. App. 101; were effective as of September 8, 2015, the date on which the plaintiff's and the defendant's appeals to the Appellate Court were finally determined. She argues that the financial orders were effective as of May, 2012, and thus, the defendant is responsible for interest that began accruing according to the payment schedule provided in the original judgment of dissolution. She contends that the court's determination of a September,

[10] We note that the plaintiff makes no claim on appeal that the court erred in calculating the amount of the defendant's overpayment.

2015 effective date "improperly reduced the value of [the] plaintiff's property award by: (1) three years of accrued interest on [the defendant's] debt from May, 2012 through September 8, 2015; and (2) the loss of default interest on his overdue installment payments on his remaining debt." The defendant responds that the trial court correctly determined the effective date of the judgment. We agree with the defendant.

The following additional facts and procedural history are relevant to our resolution of this claim. As noted previously, the court issued a memorandum of decision dissolving the parties' marriage on May 8, 2012. Paragraph 11 of the court's order provides: "Within sixty (60) days the plaintiff shall transfer to the defendant all of her right, title and interest to the Pentalpha companies. The defendant shall, *coincident therewith*, sign a promissory note secured on the stock and accounts of the Pentalpha companies for $6,000,000 that *shall be paid at the following rate to the plaintiff: $1,000,000 per year, every year commencing with the first payment on June 1, 2012, and on every June 1 thereafter until paid in full. Said note shall bear interest at the rate of 5 percent per year and may be prepaid. If the defendant is in default of any payment, the entire note shall bear interest at the rate of 10 percent per year until the default is cured.* If any of the installments are not timely paid, the defendant shall pay the plaintiff's reasonable attorney's fees and cost[s] of collection. The plaintiff may perfect her security interest on the stock and the Pentalpha accounts at her cost."[11] (Emphasis

[11] Paragraph 11 continues: "a. If the defendant chooses to sell 100 percent interest in all of the Pentalpha companies within the next six months, then the defendant shall in full satisfaction of the note here above described pay her 55 percent of the proceeds of the sale, net of all sums necessary to pay upon sale, except any sums payable to the defendant, or for his benefit, for any reason. The defendant is entitled to a dollar for dollar setoff against that payment for all payments made to the plaintiff under this numbered order, so long as she receives no less than $4,000,000 from the sale. Otherwise, he is not entitled to any such setoff. No other terms of sale than those described herein shall trigger this section.

added.). Paragraph 12 of the court's order provides: "The defendant shall pay to the plaintiff the sum of $600,000 as an additional property order within ninety (90) days. *If defendant fails to pay in a timely manner, the entire sum outstanding shall bear interest at the rate of 5 percent per annum until paid in full.*" (Emphasis added.)

On June 15, 2012, the defendant filed a motion to open the judgment, arguing that the plaintiff had made certain unauthorized postjudgment withdrawals from company accounts. He requested that the court "open and set aside the May 8, 2012 judgment of dissolution and attendant financial orders and . . . hold a new trial as to all financial issues." In the alternative, he requested that the court "open its judgment and . . . enter new financial orders that take into account the plaintiff's unauthorized withdrawal of funds from the Pentalpha companies."

On November 6, 2012, the court opened the judgment, ordering court-supervised appropriate discovery and a hearing to provide evidence for the court to "find such facts as are necessary to enter new financial orders, as may be necessary, that take into account the plaintiff's unauthorized withdrawal of funds from the Pentalpha companies." After a period of discovery and a hearing, the court issued what this court described as "substitute financial orders" on February 27, 2014. *Callahan* v. *Callahan*, supra, 157 Conn. App. 86. In its 2014 memorandum of decision, the trial court found that the value of the companies had been reduced as a result of the plaintiff's actions from $11,747,660 in June, 2011, to $6,336,734. Id. The court issued new orders, which were

"b. If the plaintiff brings a civil action against the defendant and/or the Pentalpha companies for any rights or interests she perceives have been violated, other than those provided for in these orders, and recovers any sums therefor, the defendant shall have a dollar for dollar right of setoff of said sums paid to the plaintiff against his obligations in this paragraph eleven."

"in lieu of and replace[d] all of the orders in the original memorandum of decision regarding ownership of Pentalpha and payment therefor." The court then ordered the defendant to execute a promissory note in the amount of $3 million, which was one half of the sum ordered in the original dissolution judgment.[12] The court issued a new judgment dated February 25, 2014.

Both parties filed appeals. On August 17, 2012, the defendant filed his appeal[13] (AC 34936) from the dissolu-

[12] The replacement orders provided: "a. The plaintiff shall immediately (within ten [10] days) resign from all positions at the Pentalpha companies and execute a general release in favor of the defendant for all claims she has, or may have, for conduct arising out of the parties' management and ownership of the Pentalpha companies.

"b. The plaintiff shall also execute an agreement to provide such documentation as required [by] Pentalpha's attorneys from time to time, relating to any time period that she had an ownership interest in Pentalpha or held herself out as an officer, principal, a part of management or owner of Pentalpha. Upon her execution of this agreement, the defendant shall execute a note payable to the [plaintiff] in the amount of $3,000,000 payable as follows:

"i. $1,000,000 upon the conclusion to final judgment or withdrawal of the plaintiff's lawsuit against the auditor for all claims arising out of the auditors' work for the Pentalpha companies. The court conditions this payment upon this inasmuch as the lawsuit is a significant impediment to the smooth operation of the Pentalpha companies and their ability to borrow money (e.g., the typical need for a clean audit to borrow) so that the businesses can continue to operate with reduced income and support the ability of the defendant to pay this obligation;

"ii. $1,000,000 on the first annual anniversary of the first payment; and

"iii. $1,000,000 on the second such anniversary of the first payment.

"c. If the plaintiff refuses to cooperate with the signing of any document deemed necessary by a Pentalpha attorney in response to a particular inquiry, the defendant shall be excused from the next anniversary payment until and unless a court of competent jurisdiction determines that the plaintiff shall be excused from signing such requirement regarding the issue then at hand. Any overdue payments to the plaintiff as a result of this circumstance shall not accrue interest until and unless she is so excused by a final order of the court, in which case the interest shall accrue from 30 days after that final order.

"d. If the defendant fails to make payments in a timely manner (note the exception is subparagraph d above), they shall accrue interest, from their due date at the rate of 5 [percent] per annum, simple interest."

[13] Pending resolution of the defendant's appeal, execution of the financial orders regarding the companies was stayed. See Practice Book § 61-11 (a). The plaintiff filed a motion for termination of the stay of execution, which the court, *Munro, J.*, denied. See Practice Book § 61-11 (e). *Callahan* v. *Callahan*, supra, 157 Conn. App. 83.

tion judgment and the court's August 1, 2012 denial of his May 29, 2012 motions to open the judgment and to reargue. *Callahan* v. *Callahan*, supra, 157 Conn. App. 84 n.8. On March 7, 2014, the plaintiff filed her appeal (AC 36617) from the court's decision opening the dissolution judgment and modifying the financial orders. Id., 87. On April 7, 2014, the defendant amended his appeal to include a challenge to the court's opening of the judgment and its modification of the financial orders. Id. Although this court did not consolidate the appeals, it wrote one opinion addressing the claims made in both appeals. Id., 80 n.1.

In a decision released on May 5, 2015, this court "agree[d] with the plaintiff's claim that the court did not have authority to open the dissolution judgment and, accordingly, reverse[d] the judgment entering substitute financial orders and remand[ed] the case with direction to reinstate the May, 2012 financial orders." Id., 81. This court "otherwise affirm[ed] the dissolution judgment." Id. The rescript provided: "The judgment granting the motion to open is reversed and the case is remanded with direction to reinstate the May, 2012 financial orders. The judgment is affirmed in all other respects." Id., 101. The defendant filed two petitions for certification to appeal to our Supreme Court, which denied the petitions on June 24, 2015. *Callahan* v. *Callahan*, 317 Conn. 913, 116 A.3d 812 (2015); *Callahan* v. *Callahan*, 317 Conn. 914, 116 A.3d 813 (2015).

Following this court's resolution of the parties' prior appeals, the plaintiff filed, among other motions, a motion for contempt dated July 6, 2015. In her motion, she argued, inter alia, that the defendant had refused to comply with the judgment in that he had failed to pay the amounts set forth in the financial orders, plus interest, which she contended had begun accruing in

2012.[14] The parties appeared before the court, *Hon. Michael E. Shay*, judge trial referee, on this and other motions on November 24, 2015. During that appearance, the subject of the effective date of the judgment arose, and the court requested briefing. The parties appeared for argument on the issue on April 22, 2016.

On May 4, 2016, Judge Shay issued a memorandum of decision, in which he concluded that "the effective date for the running of interest is September 8, 2015." The court set forth the sole issue of the parties as "whether 5 [percent] interest should be calculated from June 1, 2012, as set forth in the original judgment or from May 5, 2015, at the earliest, or at a date following the termination of the appellate process, at the latest." The court stated that counsel for the plaintiff had conceded during argument that the plaintiff's obligation to transfer the stock and the defendant's obligation to prepare the promissory note were not triggered until the appellate process terminated in 2015. Thus, the court found that "[i]n the absence of the obligation to draft a promissory note until after the appellate process was complete . . . it is only logical that interest would start to run from the later date." The court relied on

[14] Specifically, she argued: "1. The defendant has failed to pay the plaintiff—$4,000,000, plus interest at 5 [percent] from June 1, 2012 (per [paragraph] 11 of the judgment) or 10 [percent] interest due to his default. This amount represents four of the six equal annual payments already due, together with the accrued interest at 5 [percent] from June 1, 2012, to date of payment on the total due of $6,000,000. Such accrued interest totals $972,146.80 to June 25, 2015. As payment has not been made as per judgment, the entire amount due of $6,000,000 and accrued interest is in default and will accrue interest at 10 [percent] from June 26, 2015 until such amount is paid (per [paragraph] 11 of the judgment at pages 23 and 23).

"2. The defendant has failed to execute a promissory note secured on the stock and accounts of the Pentalpha companies in the amount of the unpaid balance of the $6,000,000, plus all accrued interest at the 5 [percent] interest rate or default rate of 10 [percent] per year (per [paragraph] 11 of the judgment at page 24).

"3. The defendant has failed to pay the plaintiff $600,000, together with accrued interest at 5 [percent] from August 6, 2012 (per [paragraph] 12 of the judgment) to date of payment. Such accrued interest totals approximately $91,552.45 as of to date."

case law providing that "the granting of a motion to open renders a trial court's judgment nonfinal and, therefore, ineffective pending its resolution"; *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 686, 899 A.2d 586 (2006); and that "[s]etting aside or vacating a prior order renders the situation the same as though the order had never been made"; *State* v. *Phillips*, 166 Conn. 642, 646, 353 A.2d 706 (1974); and concluded that "where the Appellate Court breathed new life into the then defunct original judgment, its provisions should become effective as of that date, and in this case, when the appellate process was at an end."[15]

We begin by setting forth the standard of review applicable to the claim that the court improperly construed this court's remand order as to the effective date of the judgment directed. "Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"At the outset, we note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered. . . . As a result, [w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion*. . . . This is

[15] This court granted the plaintiff's motion for permission to file a late second amended appeal from Judge Shay's May 4, 2016 decision. The plaintiff filed her amended appeal on October 5, 2018, and subsequently filed a supplemental brief on October 19, 2018.

the guiding principle that the trial court must observe. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . . The trial court should examine the mandate and *the opinion of the reviewing court and proceed in conformity with the views expressed therein*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383–84, 3 A.3d 892 (2010); see also *Bruno* v. *Bruno*, 177 Conn. App. 599, 606–607, 176 A.3d 104 (2017).

Both parties rely on the general principle that "[i]f the trial court's judgment is sustained, or the appeal dismissed, the final judgment ordinarily is that of the trial court. If, however, there is reversible error, the final judgment is that of the appellate court." *Preisner* v. *Aetna Casualty & Surety Co.*, 203 Conn. 407, 415, 525 A.2d 83 (1987); see also W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2018–2019 Ed.) § 71-1, p. 258, authors' comments ("[i]f the Superior Court judgment is affirmed, the judgment is effective retroactive to the date of its entry; if a Superior Court judgment is reversed and a different judgment is directed by the Supreme Court, it is effective as of the date of the appellate judgment"). They disagree, however, as to the proper application of this principle. The plaintiff contends that "[t]he operative Superior Court judgment to determine the effective date is the May, 2012 judgment, which was affirmed, not [the February, 2014 decision], which impermissibly opened [the May, 2012 dissolution judgment] and which this court determined was a legal nullity." According to the defendant, however, the dissolution judgment was no longer in effect as of the court's November 6, 2012 decision opening the judgment. See *Connecticut National Bank* v. *Great Neck Development Co.*, 215 Conn. 143, 147, 574 A.2d 1298

(1990) ("[a]fter a motion for opening a judgment is granted, the case stands as though no judgment was rendered" [internal quotation marks omitted]). He contends that the judgment issued on February 25, 2014, remained in effect until this court released its decision in May, 2015. In that decision, this court *reversed* the February, 2014 judgment and, thus, he argues that the effect of the reversal is that the judgment directed by this court became effective upon the release of this court's decision.

We agree with the defendant that, under the unique procedural posture of this case, this court's decision and remand order disposing of the parties' prior appeals constituted a reversal of a judgment, which commands a new effective date, rather than an affirmance of a judgment, which would operate retroactively. Because the original financial orders were superseded by those contained in the court's intervening judgment, and that intervening judgment was reversed by this court, the judgment subsequently directed, which mandated a reinstatement of the superseded financial orders, was not effective retroactively.

The plaintiff argues, however, that the intervening decision constituted "a legal nullity" and that "[b]ecause the trial court lacked authority to open the judgment in the first instance, that opened judgment cannot possibly provide authority to the trial court . . . to change the terms and effective date of the original May, 2012 judgment."[16] In support of her argument, she cites *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 684. In that case, our Supreme Court concluded that the trial court improperly opened the judgment of foreclosure and set new law days, in an action our

[16] This court concluded that the trial court "exceeded the scope of its authority by opening the judgment to modify its financial orders based on the plaintiff's postjudgment misconduct." *Callahan* v. *Callahan*, supra, 157 Conn. App. 93.

Supreme Court described as "either a legal nullity or an action in contravention to the appellate stay barring actions to carry out or to enforce the judgment pending appeal." Id., 685. Accordingly, our Supreme Court concluded that the defendants' appeal "was not vitiated by the opening of the judgment." Id., 682. We find this case distinguishable, in that the issue presented in *RAL Management, Inc.*, was whether a pending appeal becomes moot when a trial court grants a motion to open a judgment of foreclosure to set new law days. Our Supreme Court recognized that the law days in a judgment of strict foreclosure have no legal effect pending the stay occasioned by an appeal because to give them legal effect "would result in the extinguishment of the right of redemption pending appeal." Id., 683. Thus, the court stated that "[i]t necessarily follows . . . that, if the law days have no legal effect and necessarily will lapse pending the appeal . . . any change to those dates pending appeal similarly [has] no effect." (Citation omitted.) Id., 684. In the present case, the court, in opening the dissolution judgment, did not modify a provision of the judgment that already lacked legal effect but, rather, set aside significant provisions of the financial orders contained in the dissolution judgment. Thus, we do not read *RAL Management, Inc.*, as suggesting that the court's opening of the judgment in the present case must be viewed as a legal nullity such that reversal of that decision would not warrant a new effective date of the judgment directed following reversal.

Moreover, our review of this court's opinion and its remand order leads us to conclude that this court did not order the reinstatement of the original judgment retroactive to May, 2012. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 384 (in carrying out mandate of this court, trial court should "examine the mandate and the opinion of the reviewing court and pro-

ceed in conformity with the views expressed therein" [emphasis omitted; internal quotation marks omitted]). In this court's opinion, which disposed of two separate appeals, we concluded that the trial court lacked authority to open the judgment of dissolution and enter substitute financial orders on the basis of its finding that the plaintiff's postjudgment misconduct had reduced the value of the companies. *Callahan* v. *Callahan*, supra, 157 Conn. App. 91. In reciting the facts and procedural history, this court described the relevant May, 2012 orders as follows: "The court ordered that the plaintiff transfer to the defendant all of her right, title, and interest to the companies within sixty days. Coincident therewith, the court ordered the defendant to sign a promissory note secured by the stock and accounts of the companies for $6 million payable to the plaintiff, at the rate of $1 million per year for six years. The order further provided that, if the defendant elected to sell the companies within six months, then he was to pay the plaintiff 55 percent of the sale proceeds, and the plaintiff was to receive no less than $4 million from the sale."[17] Id., 82–83.

This court's recitation of the orders it ultimately directed the trial court to reinstate suggests that it did not intend for the reinstatement to be effective as of May, 2012. First, it referenced the amount and schedule of the payments without reference to the dates set forth within that provision. Moreover, it noted that the defendant's obligation to sign the promissory note was coincident with the plaintiff's obligation to transfer the stock

[17] Subsequently in the opinion, this court similarly described the orders as follows: "On May 8, 2012, the court ordered that the plaintiff transfer to the defendant all of her rights, title, and interest to the companies. *In exchange*, the court ordered the defendant to sign a promissory note, secured by the stock and accounts of the companies, requiring him to pay the plaintiff $1 million per year for six years for her share in the companies. The order further provided that, if the defendant elected to sell the companies within six months from the dissolution judgment, then he was to pay the plaintiff 55 percent of the sale proceeds, and the plaintiff was to receive no less

in the companies. A conclusion that the financial orders were effective retroactively would ignore the plaintiff's coincident obligation, which remains outstanding. See part V of this opinion. Last, this court referenced the defendant's option to sell the companies and pay the plaintiff for her interest in an alternative manner. To conclude that the judgment was effective retroactively would deprive the defendant of the opportunity to take advantage of that option and pay the plaintiff as set forth in paragraph 11 (a) of the dissolution judgment.[18] See footnote 11 of this opinion.

We also look to the rescript in this court's opinion, which provides: "The judgment granting the motion to open is reversed and the case is remanded with direction to reinstate the May, 2012 financial orders. The

than $4 million from the sale." (Emphasis added.) *Callahan* v. *Callahan*, supra, 157 Conn. App. 98.

[18] The plaintiff argues that the court's decision as to the effective date of the judgment constituted an impermissible modification of the property distribution. The defendant responds that the decision was an effectuation of the trial court's orders, which, aside from setting forth payments to be made by the defendant, provided him with the option to sell or finance the companies to pay the plaintiff for her interests.

"A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith.

"Although the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [I]f the . . . motion . . . can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation." (Internal quotation marks omitted.) *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 677–78, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

We agree with the defendant that the determination of the judgment's effective date was necessary in order to implement the property distribution orders and that the court's order protected the integrity of, rather than modified, those orders.

judgment is affirmed in all other respects." Id., 101. Construing the remand order; see *Barlow* v. *Commissioner of Correction*, 328 Conn. 610, 612–13, 182 A.3d 78 (2018) (appellate court has authority to interpret its own rescript); we conclude that it is not reasonable to interpret the direction to "reinstate" the May, 2012 financial orders as an instruction to the trial court to reinstate the orders retroactively to May, 2012. See *Connecticut National Bank* v. *Great Neck Development Co.*, supra, 215 Conn. 147 (stating, in context of determining whether motion to set aside judgment of dismissal was filed within four month period, that "[e]ven had the original judgment been *reinstated*, its effective date would have been November 1, 1988, and not the date it was first rendered" [emphasis added]). We think that had this court intended to direct the trial court to reinstate the May, 2012 financial orders retroactively to the date of the original judgment of dissolution, it would have included additional language, either in the body of the opinion or in its remand order, directing the trial court accordingly. See *Gary Excavating Co.* v. *North Haven*, 163 Conn. 428, 430, 311 A.2d 90 (1972) ("[n]o judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed" [internal quotation marks omitted]). The date May, 2012, was employed to identify which financial orders were reinstated.

The plaintiff argues that "[l]ike other postjudgment interest cases, the accrued interest provision in the May, 2012 orders was meant to compensate [her] for 'the loss of the use of the money that . . . she is awarded from the time of the award until the award is paid in full,' " citing a case involving the application of General Statutes § 37-3a, *DiLieto* v. *County Obstetrics & Gyne-*

cology Group, P.C., 310 Conn. 38, 55, 74 A.3d 1212 (2013). "A trial court must make two determinations when awarding compensatory interest under § 37-3a: (1) whether the party against whom interest is sought has wrongfully detained money due the other party; and (2) the date upon which the wrongful detention began in order to determine the time from which interest should be calculated." (Internal quotation marks omitted.) *Marshall* v. *Marshall*, 151 Conn. App. 638, 653, 97 A.3d 1 (2014); see also *Sosin* v. *Sosin*, 300 Conn. 205, 245, 14 A.3d 307 (2011) (trial court did not abuse discretion under § 37-3a in ordering interest from September 8, 2005, and it must be assumed that trial court determined that, until that time, plaintiff's retention of money was not entirely unjustified); *Bruno* v. *Bruno*, supra, 177 Conn. App. 611, 613–14 (where 2008 dissolution judgment awarded defendant certain assets in Charles Schwab account, and appellate court subsequently found error in trial court's postjudgment valuation of account, trial court on remand did not abuse its discretion in awarding postjudgment interest on amount due from that account from September 30, 2014, which was date on which trial court on remand established value of that account).

Although the present case does not involve statutory interest, it is worth noting that § 37-3a "authorizes an award of interest in civil actions . . . as damages for the detention of money *after it becomes payable*." (Emphasis added.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 310 Conn. 43 n.8. In the present case, the sums set forth in the dissolution's financial orders were no longer payable once the court opened the dissolution judgment and, therefore, the plaintiff's argument that she should be compensated for the loss of use of that money is without foundation.

Accordingly, we conclude that the trial court properly interpreted this court's mandate in determining the effective date of the judgment.

V

The plaintiff next claims that the court erred in ordering her to execute certain documents to transfer her interest in the companies, as contemplated by the dissolution judgment. She argues broadly that the "complex commercial document[s]" prepared by the defendant were inconsistent with the dissolution judgment's requirement that she "transfer" her interest. Specifically, she argues that the defendant's proposed documents were improper in three main respects.[19] First, she challenges the inclusion of a general release, which she contends was not required by the May, 2012 financial orders. Second, she argues that the documents require the plaintiff to make representations and warranties that she cannot make on the basis of her personal knowledge. Third, she emphasizes the difference between a "transfer" of her interest, which the dissolution court ordered, and a "sale" of her interest, which

[19] The plaintiff also maintains that the documents are improper in a fourth respect, in that the new promissory note delayed the accrual of interest for three years and reset the deadlines for payments on the note. Our resolution of the plaintiff's fourth claim is dispositive of this argument, which requires no further discussion here. See part IV of this opinion.

With respect to the proposed promissory note, she also argues that unlike the May, 2012 dissolution judgment, it improperly "forbids [the] plaintiff from transferring, bequeathing or otherwise disposing of the note in any way." Attorney William Perrone, who testified as an expert in the area of business transactions, recognized that the dissolution judgment by its express terms did not prohibit the plaintiff from bequeathing or transferring the note, but testified that "I think that it's not uncommon in a situation like this where the note—where the paper wouldn't be negotiable. Sometimes paper is personal because you don't want one party to discount this paper, sell the paper, and then have the other party be dealing with a party that they didn't know." The plaintiff presented no evidence to the contrary and we are not persuaded that the inclusion of a prohibition on transfer of the note constituted a modification of the dissolution judgment.

she contends was not contemplated by the dissolution judgment. She argues that "there was no language in the property orders that indicates the companies should be sold at fair market value." We disagree that the court acted outside of its authority to issue postjudgment orders effectuating the dissolution judgment.

The following additional facts and procedural history are relevant to this claim. As noted previously, paragraph 11 of the May, 2012 dissolution judgment required the plaintiff to transfer to the defendant "all of her right, title and interest to the Pentalpha companies" within sixty days. Coincident with the transfer, the defendant was required to sign a promissory note secured by the stock and accounts of the companies in the amount of $6 million.[20] See part IV of this opinion. Following this court's decision resolving the parties' prior appeals, the defendant, in October, 2015, provided the plaintiff with a proposed document to effectuate the transfer of her interest. The plaintiff thereafter filed a motion for contempt, in which she argued that the defendant had wilfully failed to provide her with the promissory note within the time frame required and that "the defendant has acted in bad faith by submitting an onerous document beyond the scope of the judgment." Specifically, she argued that the draft document improperly required her to "make representations and disclosures about the Pentalpha companies that she is [in] no position to make since she has not been actively working at the company since 2009."

The court heard the contempt motion on April 10, 2018. The plaintiff presented no witnesses, as her counsel took the position that no testimony was required.

[20] We note that the court's April 17, 2019 memorandum of decision terminating the appellate stay of the court's April 10, 2018 decision indicated that the defendant had made payments to the plaintiff in the amount of $4 million.

He maintained that the court could decide the motion on the basis of both parties' proposed transfer documents, which had been entered into evidence. The defendant presented the testimony of Attorney William Perrone, who was qualified as an expert in the area of business transactions. Perrone testified regarding the type of legal documents necessary to effectuate the sale of a company. The plaintiff's counsel objected to Perrone's testimony on the ground that the dissolution judgment required a transfer of the plaintiff's interest, not a sale. The court overruled the objection, and Perrone testified that the terms transfer and sale are synonymous. Specifically, he testified: "[I]n corporate parlance, transfer and sale are used interchangeably. Quitclaim, which is a term that is more prevalent in real estate, is also used outside of the real estate world to denote a transaction in which an asset is transferred but there's no . . . backup. It's basically what I have—literally what I have, you have. You have no representations. You have no warranties. You have no indemnification, no protection."

Perrone testified that buyers look to representations and warranties to determine the value of the transaction. He further opined that the sale of a business that operates in a regulated industry, such as the present companies, requires more fulsome representations and warranties, which he stated "essentially make the seller stand behind everything from compliance with laws, to observation of rules regarding data privacy, to the accuracy of financial statements, to whether or not there [are] any environmental issues."

Perrone reviewed each party's proposed transfer documents. The document prepared by the defendant's counsel, dated October 27, 2015, and titled "Agreement Under Section 11 of Order dated May 8, 2012," was

entered into evidence as the defendant's exhibit D. Perrone opined that exhibit D contained standard representations and warranties for a transaction of this size and that it would permit the defendant to transfer the companies at fair market value. The documents prepared by the plaintiff's counsel, including a promissory note, assignment, and pledge and security agreement, were entered into evidence as the defendant's exhibit E.[21] Perrone testified that exhibit E contained no representations or warranties, and that the lack thereof would adversely impact the value of the companies as held by the defendant or to a potential third party buyer. On cross-examination, the plaintiff's counsel asked Perrone to identify the provision of the dissolution judgment that ensured that the defendant could sell the companies at fair market value. Perrone responded that the provisions setting forth the valuation of the companies and permitting the defendant to sell the companies, when read together, implicitly contemplate that the defendant should have the opportunity to sell the companies at fair market value.

As to the specific terms of the defendant's proposed transfer documents, Perrone acknowledged that certain provisions contained in exhibit D required amendment because they were inconsistent with the dissolution judgment, in that they purported to transfer the plaintiff's interest "free and clear of any pledge, security interest, lien, charge or other encumbrance . . . ." Perrone testified that the document required "a carve out . . . for the discrete lien that is called for by the order."

[21] Perrone additionally had examined a document prepared by the plaintiff's prior counsel to effectuate the sale and opined that it was "essentially a quitclaim." Perrone opined that use of that document, which was titled "Promissory Note" and dated May 8, 2012, could reduce the sale price of the companies to a "fire sale" price due to the potential buyer accepting additional risk because of sparse representations and warranties.

With respect to the release contained in exhibit D, Perrone testified that "[i]t's customary when shareholders are exiting a business that they . . . execute and deliver a release, and the reason for that is that you make your deal and you pay somebody for their shares; you don't want them coming back after the fact and saying, well, yeah, about that dividend, about this, about that, what about this money that I was owed. You want a clean break when someone sells." He stated that a release is "common in this context" and opined that with the same carve out for obligations that were owed under the note, the release would be acceptable.

In closing argument, the plaintiff's counsel asked the court, in the event it declined to find the defendant in contempt, to order him to execute the plaintiff's proposed documents, which the plaintiff contended conformed to the dissolution judgment. In its oral ruling, the court found the relevant provisions of the judgment, namely, paragraph 11 requiring transfer of the plaintiff's interest and paragraph 17 requiring the execution of all documents necessary to effectuate the orders within thirty days, to be clear and unambiguous. The court credited Perrone's testimony and noted that paragraph 17 contemplates other documents that would not specifically be mentioned in the judgment. Finding a failure to comply with the court's order to sign a promissory note but that such failure was not wilful, the court declined to find the defendant in contempt. The court then issued the following remedial order: "In order to effectuate these orders, and the court finds the word[s] transfer and sale as defined by [Perrone] to be interchangeable, the court finds that exhibit D, with the representations and warranties, is the normal and customary document to transfer these types of assets. However, the document as presented wasn't perfect, and counsel pointed out a few items regarding the security

and paragraph 4.4,[22] [and] some of the language on page thirty eight.[23]

"So, the court finds that exhibit D is normal and customary for these types of transactions, and is issuing a remedial order ordering the plaintiff to execute the documents in the line of exhibit D as amended with a few of the items.

"Now, there may be a few other items that weren't picked up through [Perrone's] examination, and I don't

[22] Paragraph 4.4 of exhibit D provided: "No Undisclosed Liabilities. The Company is not subject to any liability (including unasserted claims, whether known or unknown), whether absolute, contingent, accrued or otherwise, that is not shown or that is in excess of amounts shown or reserved for in the Financial Statements, other than liabilities of the same nature as those set forth in the Financial Statements and reasonably incurred in the ordinary course of business after the Financial Statements Date, whether or not material."

The following colloquy occurred with respect to whether the plaintiff could make the warranty provided therein:

"The Court: In your opinion, can she make that even though she hasn't actively been involved in the business since [2009] and she's still the majority owner today? Does it matter?

"[The Witness]: I think—well, I think I could live—if I were negotiating this deal, right, I could live without 4.4 because 4.5 is sufficient to cover any activity since her resignation. Right? I mean that's the kind of thing I was talking about earlier today, about being able to say—

"[The Plaintiff's Counsel]: Okay. So, when you—when it was set forth in your disclosure of expert witness that the documents presented by [the defendant] were in conformance with the orders of Judge Munro, was it an oversight that 4.4 was included in here?

"[The Witness]: I don't think that the—my testimony or my opinion letter was intended to cite, to go chapter and verse, line by line with every part of every document. Because in any document, any deal, even in this context, ultimately there's going to be give and take and negotiations and things like that; the oversight regarding the no lien other than the lien that the court ordered are going to be picked up. Right?

"So, this is—this was done, you know, a while ago. I think that as a practical matter, you—this would be negotiated, and this would come out. But you have to look at that. So, there's continuum from zero reps and warranties, which is what's being offered up, to something that is more typical and would yield a fair result to [the defendant] being able to sell this business and realize the best value you can and not fire sale it."

[23] There was some discussion during the hearing as to whether certain language contained in the document titled "Promissory Term Note and Security Agreement," on page thirty-eight of the document, required amendment to conform to the promissory note. That language provided: "The obligations under this Note and Security Agreement are not secured by any other assets of Jim Callahan or by any of the assets of any of the Companies . . . ." Ultimately, Perrone agreed that amending the language by "adding

expect that to be an exhaustive list of other things that might have been just overlooked because I don't think the details have been strictly negotiated by the parties. So, the court will use that as a guideline, including the general release, all the documents as provided.

"And the court's going to reserve jurisdiction over this. I do not believe that this is an additional order. This is to effectuate the order of Judge Munro from [the May, 2012 dissolution judgment]." (Footnotes added.) At the parties' request, the court ordered the plaintiff's counsel, within ten days, to review the documents and provide comments to the defendant's counsel, who would then have ten days to respond, and the parties could then return to court for resolution of any remaining issues.

We begin by setting forth the standard governing our review of the court's order regarding the transfer documents. "Although the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [I]f the . . . motion . . . can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation." (Internal quotation marks omitted.) *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 677–78, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013). "A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the

the word other before the words assets [of any of the companies] would cure any perceived inconsistency."

parties' timely compliance therewith." (Internal quotation marks omitted.) Id., 677.

"In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order." *Stechel* v. *Foster*, 125 Conn. App. 441, 447, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011). "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Perry* v. *Perry*, 156 Conn. App. 587, 593, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015).

Before turning to the specific provisions of exhibit D that the plaintiff finds objectionable, we first address the plaintiff's broader argument that the court erred in requiring her to execute a " 'negotiated' complex commercial document." In its remedial order regarding the transfer documents, the court found that a document of the type of exhibit D, including the representations and warranties and release contained therein, was required to transfer the plaintiff's interest in what the court described as "an asset that has significant value . . . ." In so finding, the court credited the testimony of Perrone, who opined that especially in the case of a regulated industry, a transfer of the plaintiff's interest would require fulsome representations and warranties

in order to preserve the fair market value of the companies. Our review of the record indicates that the court's credibility determination was not clearly erroneous, and we thereby defer to the court's conclusion regarding the credibility of Perrone's testimony. See *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 646, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

As to whether the original judgment should be construed to require such a transfer, the plaintiff argues that "there was no language in the property orders that indicates the companies should be sold at fair market value." During the dissolution trial and first appeal, the disposition of the companies, which were valued collectively in excess of $10 million, was a central issue. Notably, both parties proposed that the companies be sold. *Callahan* v. *Callahan*, supra, 157 Conn. App. 98. Despite finding that "neither party wants the Pentalpha companies," the court ordered the plaintiff to transfer her interest in the companies to the defendant in exchange for the defendant's execution of a promissory note. Although the court declined to order a sale, its orders anticipated that the defendant might elect to sell the companies. In the event that he did sell the companies, the plaintiff was to receive no less than $4 million from the sale. Thus, both parties and the court envisaged a potential sale of the companies. As to whether the transfer documents should be drafted in order to permit a sale at fair market value, it is significant that the amount of the promissory note correlated with the valuation of the companies, in that the note in the amount of $6 million was to be exchanged for the plaintiff's 51 percent interest in the companies valued at $11,747,660. Accordingly, we do not find persuasive the plaintiff's argument premised on the absence of language expressly contemplating a sale at fair market value. Indeed, it would be inconsistent with the distribution of the parties' assets to allow the plaintiff to transfer

her interest by way of a document that effected a significant reduction in the value of the companies. Thus, we construe the judgment as requiring a transfer of her interest in a manner that preserves the fair market value of the companies.

Having concluded generally that a document of the type and breadth of exhibit D is required to effectively transfer the plaintiff's interest, we turn to the plaintiff's challenges to the specific provisions of that document. She argues that a general release was not required by the May, 2012 financial orders.[24] Perrone testified that the release provided in exhibit D was customary in the context of a shareholder exiting a business and that the purpose of a release in that context is to ensure a "clean break" and provide assurance against future claims alleging unpaid dividends or other sums owed. The plaintiff presented no evidence to refute Perrone's testimony that such a release was customary. We conclude that the inclusion of a release in the transfer documents did not constitute a modification of the dissolution judgment.

With respect to the plaintiff's broadly stated concern that she was unable to make certain representations because she had been "absent from running the company since 2009," she relied solely on the court's finding

[24] The plaintiff further argues that the release contained in exhibit D is not limited to claims relating solely to the companies, but rather releases the defendant from all liability. Although the plaintiff's counsel questioned Perrone as to the release, she failed to raise, either through inquiry of Perrone or the presentation of evidence on her own behalf, a challenge to the scope of the release with respect to the type of claims released. Because the plaintiff failed to raise the scope of the release as an issue before the trial court, we do not address it on appeal. See *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006) ("[W]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." [Internal quotation marks omitted.]).

in the judgment of dissolution that "[t]he plaintiff's full and final resignation from actual work . . . occurred in September, 2009."[25] Aside from repeating that finding, the plaintiff presented no evidence to demonstrate her inability to make particular representations. Although the plaintiff declined to call any witnesses during the hearing, she had the opportunity to challenge specific provisions through her counsel's examination of Perrone.

As to inconsistencies she identified during the hearing, the trial court expressly acknowledged such provisions as requiring amendment prior to execution of the transfer documents. For example, the transcript reveals that the plaintiff's counsel questioned Perrone regarding paragraph 4.4, which provided: "No Undisclosed Liabilities. The Company is not subject to any liability (including unasserted claims, whether known or unknown), whether absolute, contingent, accrued or otherwise, that is not shown or that is in excess of amounts shown or reserved for in the Financial Statements, other than liabilities of the same nature as those set forth in the Financial Statements and reasonably incurred in the ordinary course of business after the Financial Statements Date, whether or not material." Perrone agreed that paragraph 4.4 was not necessary, and the court's order expressly identified that provision as one requiring amendment prior to the plaintiff's execution. Although the plaintiff provides examples in her supplemental appellate brief of representations and warranties she finds objectionable, our review of the record reveals that she neither set forth the particular provisions in her motion for contempt, nor identified these provisions to the trial court during the hearing. Thus, we need not address these arguments. See *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006)

[25] The court also noted, however, that she had performed work "on one last occasion" in March, 2010.

(argument need not be addressed because plaintiff never made it in proceedings before trial court).

"[I]t is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Fewtrell* v. *Fewtrell*, 87 Conn. App. 526, 531 n.4, 865 A.2d 1240 (2005). We conclude that the court's order requiring the plaintiff to execute the defendant's proposed transfer documents, as amended to correct inconsistencies identified during the hearing, effectuated rather than modified the existing judgment of dissolution.

VI

The plaintiff's last claim on appeal is that the court improperly concluded that it lacked subject matter jurisdiction to require the defendant to endorse two insurance checks totaling $440,370.58. Specifically, she argues that the court's failure to issue an order compelling the defendant to endorse the checks, which were issued following postdissolution property damage to the former marital home, was tantamount to an impermissible modification of the original property division, in that the plaintiff was deprived of the full value of the home. She argues that an order requiring the defendant to endorse the checks is necessary to effectuate and preserve the dissolution judgment.[26] The defendant

[26] The plaintiff also asserts in her supplemental brief that "the trial court improperly declined to hold an evidentiary hearing to assess the jurisdictional claim," and states that she sought a hearing "to present testimony regarding, among other things, the homeowner's policy and to clarify mischaracterizations made by counsel during argument." In support of this argument, she cites *Oxford House at Yale* v. *Gilligan*, 125 Conn. App. 464, 473, 10 A.3d 52 (2010), which provides generally that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Internal quotation marks omitted.) The defendant responds that the plaintiff waived any claim as to the court's failure to hold an

responds that the court correctly determined that it lacked authority to distribute the insurance proceeds because the funds were acquired after the dissolution of the marriage and "family courts do not have the authority to make postjudgment property distribution awards or to adjudicate postjudgment tort or contract claims between two divorced persons relating to new assets." We conclude that the court lacked authority to enter an order with respect to the checks.

The following additional procedural history is relevant to this claim. On March 28, 2017, the plaintiff filed a motion requesting that the court order the defendant

evidentiary hearing. On the basis of our review of the record, we conclude that the plaintiff waived any claim that the court improperly declined to hold an evidentiary hearing.

Addressing the day's schedule at the outset of the hearing on April 3, 2018, the plaintiff's counsel indicated, with respect to her motion for an order, that "we've discussed the fact that should it become—on the Chubb motion, we're going to argue the legal issues first and then should the court make certain rulings, then we would have a factual hearing, and that would require our witness, who is coming tomorrow."

When the motion came up for argument, counsel for the defendant informed the court that "there really is a preliminary legal issue as to whether this court has the authority to grant the relief being sought in . . . the plaintiff's motion, and that's the issue that we'd like to tee up for Your Honor." Presenting the motion to the court, the plaintiff's counsel stated: "Now, the reason that we're arguing these preliminary matters and, counsel, correct me if I misstate this, is that we do have evidence to put on, but counsel's contention is that the court has no authority to hear this issue, and that is what we're going to argue. And then if the court decides that it wants to hear evidence, we are able to put that on tomorrow."

Toward the conclusion of argument, the plaintiff's counsel argued: "There are factual characterizations and mischaracterizations that would benefit from an evidentiary hearing such as the mischaracterization that [the plaintiff] refused to get new insurance, etc. That if the court deems that the court has . . . statutory authority to hear this issue, does the court in divorce cases construe contracts? Yes. Does the court in divorce cases construe all sorts of wills? You have that jurisdiction and that subject matter jurisdiction and that statutory authority. So, we are seeking an evidentiary hearing so that we can put on our witnesses and Your Honor can make a decision. Counsel is saying Your Honor has no authority to even have a hearing. Thank you."

to endorse two Chubb property damage insurance checks totaling $440,370.58. In her motion, she represented the following facts. The defendant had occupied the former marital home following the dissolution until October 9, 2015. After he vacated the home, the insurance policy issued by Chubb remained in both his and the plaintiff's names, and he continued to make premium payments from October 9, 2015 through March 24, 2017. His name also remained on the mortgage for the property. At some point after he vacated the property on October 9, 2015, the pipes burst. The plaintiff filed an insurance claim for the resulting damage. In her motion requesting that the court order the defendant to endorse the checks, she stated: "Chubb appraised the damage and issued the first set of insurance damage checks in June, 2016 ($163,429.42 and $276,941.16). A second replacement set of checks was issued approximately one month later to include James Callahan. The checks are made out to [the] parties, and one check includes Citibank Mortgage." The defendant refused to endorse the checks, preventing the plaintiff from receiving the proceeds to repair the damage to the home.

On March 31, 2017, the defendant filed an objection, in which he argued that the plaintiff's request that the court adjudicate ownership rights to the checks issued relating to damage that occurred following the dissolution of the parties' marriage was improper. He contended that the court lacked authority "to adjudicate postjudgment disputes relating to the diminished value of property awarded to one of the spouses." On March 14, 2018, the plaintiff filed a memorandum of law in support of her motion. In her memorandum, she argued that an order requiring the defendant to endorse the checks was necessary to effectuate the provision of the dissolution judgment that awarded the former marital

home to the plaintiff.[27] She further directed the court's attention to paragraph 17 of the May, 2012 dissolution judgment, which provides: "Both parties shall execute all necessary documents for the effectuation of these orders within thirty (30) days, unless other specific times are already provided herein."

On April 3, 2018, the court, *Diana, J.*, heard the plaintiff's motion. After argument, the court issued an oral ruling denying the motion. It stated: "I've considered the statutory breakdown of what's an asset, listened to your arguments, and reviewed the motions. The court finds this is an after-acquired asset, and it does not have jurisdiction to address this matter under [§] 46b-81."[28]

We begin with our standard of review. The plaintiff's claim implicates the scope of the court's authority to act postdissolution with respect to the dispute over the insurance checks. "Any determination regarding the scope of a court's . . . authority to act presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *McLoughlin* v. *McLoughlin*, 157 Conn. App. 568, 578, 118 A.3d 64 (2015).

"It is well settled that [c]ourts have no inherent power to transfer property from one spouse to another;

[27] Paragraph 3 of the May, 2012 dissolution judgment provided: "The plaintiff shall be the sole owner of the real property at 3 Partridge Hollow, Greenwich, Connecticut. The defendant shall within thirty (30) days execute a quitclaim deed provided by the plaintiff to transfer the title. Until such time as the defendant has transferred title to said property, he shall be solely responsible for all costs associated with the property, including but not limited to mortgage, taxes, insurance, all upkeep and repairs in the same condition as the premise[s] were in, or better, than [on the] day the property was appraised by [Michael B.] Gold. The defendant shall vacate the premises with all of his possessions therein on the date of transfer of title. After the defendant has both vacated the premises with all of his belongings and transferred title to the plaintiff, then the plaintiff shall be solely responsible for all of the above referenced costs pertaining to the property and she shall hold the defendant harmless thereon."

[28] See footnote 1 of this opinion.

instead, that power must rest upon an enabling statute. . . . The court's authority to transfer property [in] a dissolution proceeding rests on [General Statutes] § 46b-81. That section provides in relevant part: *At the time of entering a decree* . . . dissolving a marriage . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other . . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage." (Emphasis in original; internal quotation marks omitted.) Id., 578–79.

In support of her argument that the court had authority to order the defendant to endorse the checks as an effectuation of the dissolution judgment, the plaintiff cites *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 983 A.2d 293 (2009). In that case, the parties entered into a separation agreement, the terms of which were incorporated into the dissolution judgment. Id., 327. Pursuant to that agreement, the parties agreed to have qualified domestic relations orders (QDROs)[29] prepared to divide the defendant's two pensions. Id. At the time the defendant retired, the QDROs had not yet been processed by either pension plan administrator. Id., 328–29. The defendant went into pay status with respect to his pensions, and his payments included the portions of the pensions that had been assigned to the plaintiff. Id. The plaintiff sought an order of the court requiring the defendant to reimburse her portion of his pension benefits, which the court declined to issue. Id., 329–30. On appeal, this court concluded that the trial court improperly declined to issue the requested order because such order was necessary to effectuate the judgment. Id., 330.

[29] "A QDRO is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." *Krafick* v. *Krafick*, 234 Conn. 783, 786 n.4, 663 A.2d 365 (1995).

"[W]hen a party has been denied marital property to which the party is entitled as part of the allocation of property pursuant to a judgment of dissolution of marriage, and the aggrieved party seeks relief from the court, the court is under an affirmative obligation to issue financial orders effectuating the existing allocation of marital property to protect the integrity of the original judgment, subject to equitable defenses. To hold otherwise would allow a court to modify a property distribution simply by its own silence or inaction." Id., 334. We conclude that *Cifaldi* is distinguishable from the present case, in that the judgment in *Cifaldi* afforded the plaintiff a property interest in portions of the defendant's pension benefits, and she never received this asset. Thus, the provision of the dissolution judgment at issue had not been effectuated. In contrast, the plaintiff in the present case received the asset awarded to her by the dissolution provision at issue. The plaintiff does not dispute that she both owned, and was in possession of, the home at the time the damage occurred and the checks were issued.

She argues, however, that the proceeds from the insurance checks should be "used as intended, i.e., to protect the integrity of the original judgment, including the value of the marital home," which, according to the plaintiff, was reduced by $440,370.58 due to the defendant's failure to endorse the checks. The defendant responds that even if the damage was regarded as causing a postjudgment change affecting the value of the home, this court, in its prior decision in this matter, rejected the argument that the court could revisit the judgment on a similar basis. The defendant points to this court's recognition in the parties' prior appeals that "neither § 46b-81 nor any other closely related statute vests the trial court with authority to revisit a judgment dividing marital property where postjudgment conduct, conditions, or changes affect the value of a marital asset." *Callahan* v. *Callahan*, supra,

157 Conn. App. 92. The defendant further argues that *Buehler* v. *Buehler*, 138 Conn. App. 63, 66, 50 A.3d 372 (2012), controls. In that case, the trial court entered orders at the time of dissolution relating to the marital home, including that the home be sold. Id. In postjudgment orders, the court permitted the home to be rented and awarded the defendant the rental income generated by the home. Id., 71. On appeal, this court determined that the court acted without authority in assigning the rental income wholly to the defendant, as such order constituted an improper postjudgment property assignment in violation of § 46b-86 (a). Id.

In the present case, the court in its May, 2012 dissolution judgment awarded the plaintiff the former marital home and that distribution was effectuated when ownership vested in the plaintiff. Subsequent to the effectuation of the judgment, damage to the home caused a change in its value. Under these circumstances, the trial court lacked authority to revisit its property distribution orders or enter additional property distribution orders to compensate the plaintiff for the alleged postjudgment reduction in value of the home. See *Callahan* v. *Callahan*, supra, 157 Conn. App. 89 (stating general rule that "[t]he court's authority to distribute the personal property of the parties must be exercised, if at all, at the time that it renders judgment dissolving the marriage" [internal quotation marks omitted]). Moreover, to the extent the proceeds of the insurance checks are viewed not as a reflection of the reduction in value of the home but rather as a new asset acquired pursuant to a contract of insurance in effect after the parties' marriage had been dissolved, such proceeds would not be marital property distributable under § 46b-81. See *Reinke* v. *Sing*, 328 Conn. 376, 381 n.3, 179 A.3d 769 (2018) ("[t]he purpose of a property division pursuant to a dissolution proceeding is to unscramble existing marital property in order to give each spouse his or her equitable share at the time of dissolution" [internal quotation marks

omitted]); *Wood* v. *Wood*, 160 Conn. App. 708, 716, 125 A.3d 1040 (2015) ("the marital estate divisible pursuant to § 46b-81 refers to interests already acquired, not to expected or unvested interests, or to interests that the court has not quantified" [internal quotation marks omitted]).

We therefore conclude that the court lacked authority under § 46b-81 to issue postjudgment orders regarding the insurance checks.

The plaintiff's appeal regarding the suspension of alimony payments is dismissed as moot. The judgments are affirmed in all other respects.

In this opinion the other judges concurred.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION ET AL. *v.* ROBERT J. VIRGULAK ET AL.
(AC 40479)

Sheldon, Keller and Bear, Js.*

Syllabus

The plaintiff bank, J Co., sought to foreclose a mortgage on certain real property owned by the defendant T. T's husband, R, had executed and delivered to J Co. a note for a loan on December 11, 2006. The note was not signed by T. On the same date, T signed a mortgage for property she owned, which did not reference R, and recited that it was given to secure a note dated December 11, 2006, and that the note was signed by T as the borrower. After the note subsequently went into default, this action followed. Thereafter, M Co. was sustituted as the plaintiff. The trial court rendered judgment in part in favor of T on the counts seeking foreclosure and reformation of the mortgage deed to reflect that the obligation being secured by the mortgage was R's debt and not that of T. With respect to the unjust enrichment count, the court found that T had benefited in several respects as a result of R's loan but that certain responses by M Co. to requests for admissions precluded any recovery on its unjust enrichment claim, except for certain property tax payments that T conceded that she owed to M Co. On M Co.'s appeal to this court, *held:*

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

1. M Co. could not prevail in its claim that the trial court improperly failed to consider the foreclosure count as a stand-alone claim that was independent of the reformation count: that court concluded that M Co.'s claim was inadequately briefed and unsupported by any authority, and that M Co.'s claim that the mortgage could be foreclosed without first reforming the mortgage was without merit, as it was undisputed that T did not sign the note executed by R and the mortgage signed by T did not purport to secure a note executed by R but, rather, identified T as the borrower on the note, and the mortgage did not expressly refer to any obligation for which T was legally responsible; moreover, M Co.'s claim that the mortgage T signed was intended to secure the note executed by R and, thus, that foreclosure was warranted was unavailing, as the court determined that the mortgage, as executed, was a nullity because it secured a nonexistent debt, and although M Co. claimed that the discrepancy in the mortgage was a scrivener's error or inadvertent technical error and that the equitable remedy of foreclosure was warranted even without reformation to ensure justice, the well established jurisprudence on reformation, also an equitable remedy, was the proper prerequisite in order for M Co. to correct the purported mistake in the mortgage document, and because reformation of the mortgage was not warranted under the circumstances of this case, the court's decision denying forelcosure was appropriate.

(*One judge dissenting*)

2. The trial court did not abuse its discretion in declining to reform the mortgage: although M Co. introduced evidence suggesting that the mortgage signed by T was intended to secure R's note, in light of the conflicting evidence before the trial court and the gaps left in the factual record, M Co. did not provide sufficient evidence to demonstrate that a mutual mistake had been made, as T testified that her signatures were on some of the mortgage closing documents but questions remained with respect to what she intended by signing them, T testified that she signed the documents at R's request and had not read them before doing so, and that she was aware of R's intent to borrow money but that R never told her how much money he was borrowing, T signed the documents in the presence of R only and was not present at the closing that took place at an attorney's office, there was no explanation of how the mortgage came to bear the signatures of two witnesses, including an attorney's, nor was there any indication in the record that an attorney or representative from J Co. explained to T her role in the process and that her property would be used as collateral to secure R's loan, and the vast majority of the documents relating to the closing were given to R and all communications regarding the mortgage were sent to him; moreover, M Co. offered little evidence, if any, to demonstrate that the mortgage was integral to the decision to provide R with the loan, and the records authenticated by a representative of J Co. at trial were silent as to the understanding that J Co. may have had with T regarding her responsibility for R's loan.

3. The trial court properly denied M Co.'s motion to amend its responses to T's requests for admission: M Co. did not cite any case law holding that a court's denial of a motion to withdraw and amend responses to requests for admissions after the conclusion of trial constitutes an abuse of discretion, and the court correctly relied on the applicable rule of practice (§ 13-24 [a]) and noted that T likely would have been prejudiced by allowing M Co. to amend its responses two weeks after trial concluded because T had every reason to believe that M Co.'s admissions were operative and binding, and it was likely that M Co.'s admissions affected how T presented her defense; moreover, if the court had granted M Co.'s motion two weeks after the close of evidence, it likely would have been necessary to give T an opportunity to conduct discovery on the facts established by M Co.'s admissions, which would have caused an unreasonable delay, and M Co. could have filed a timely motion pursuant to § 13-24 (a) to withdraw or amend its admissions before trial but failed to do so.
4. The trial court properly concluded that M Co.'s admissions limited its recovery under its unjust enrichment claim, as it was undisputed that M Co.'s response to request number five of T's requests for admission stated that T did not owe it any money, and, thus, it was appropriate for the court to conclude that M Co. was bound by its admission and to limit M Co.'s recovery to property taxes that T conceded she owed to it.
5. The trial court did not abuse its discretion in denying M Co.'s motion for reargument; although M Co. claimed that its motion for reargument set forth legal principles that were not expressly considered by the court in its memorandum of decision, the record showed that M Co.'s twenty-two page motion was largely a request for the court to reevaluate the facts before it and, thus, sought an improper second bite at the apple.

Argued January 14—officially released September 17, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the defendant Theresa Virgulak, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk; thereafter, the plaintiff withdrew the action as to the named defendant; subsequently, the court, *Heller, J.*, granted the motion to substitute Manufacturers and Traders Trust Company as the plaintiff; thereafter, the case was tried to the court, *Hon. David R. Tobin*, judge trial referee; judgment in part in favor of the defendant Theresa Virgulak; subsequently, court, *Hon. David R. Tobin*, judge trial

referee, denied the motion for regargument filed by the substitute plaintiff, and the substitute plaintiff appealed to this court. *Affirmed.*

Brian D. Rich, with whom, on the brief, were *Laura Pascale Zaino* and *Peter R. Meggers*, for the appellant (substitute plaintiff).

Alexander H. Schwartz, for the appellee (defendant Theresa Virgulak).

Opinion

KELLER, J. In this foreclosure action, the plaintiff, Manufacturers and Traders Trust Company, also known as M&T Bank (M&T Bank),[1] appeals from the judgment of the trial court in favor of the defendant Theresa Virgulak.[2] The plaintiff claims that the trial court improperly (1) failed to exercise its discretion in considering the plaintiff's foreclosure claim as a stand-alone claim independent from its other causes of action and failed to grant the plaintiff the equitable remedy of foreclosure, (2) declined to reform the mortgage deed, (3) denied its motion to amend its responses to the defendant's requests for admission, (4) concluded that its admissions limited its recovery under its unjust

[1] The named plaintiff, JPMorgan Chase Bank, National Association (JPMorgan Chase), is no longer a party in this matter. On August 4, 2015, JPMorgan Chase filed a motion to substitute Hudson City Savings Bank as the plaintiff, which the court granted on August 18, 2015. On August 9, 2016, M&T Bank filed a motion to substitute itself as the plaintiff noting that it was the successor by merger to Hudson City Savings Bank. That motion was granted on August 15, 2016. Accordingly, any reference in this opinion to "the plaintiff" is to M&T Bank.

[2] The original complaint filed in this matter also named as defendants Robert J. Virgulak and the state of Connecticut, Department of Revenue Services. During the pendency of the case, the then plaintiff, JPMorgan Chase, withdrew the action against Robert J. Virgulak. Additionally, the state of Connecticut, Department of Revenue Services, which filed an initial appearance in the matter, was defaulted for failing to plead. Thus, any reference in this opinion to "the defendant" is to Theresa Virgulak.

enrichment count, and (5) denied its motion for reargument. We disagree and affirm the judgment of the trial court.

The following procedural history and facts, which either are undisputed in the record or were found by the trial court in its memorandum of decision, are relevant to our resolution of this appeal. On or about December 11, 2006, Robert J. Virgulak (Robert), the defendant's husband, executed and delivered to JPMorgan Chase Bank, National Association (JPMorgan Chase) a note for a loan in the principal amount of $533,000 (note). The defendant was not a signatory on the note. On the same date, the defendant signed a document titled "Open-End Mortgage Deed" (mortgage) for residential property she owns at 14 Bayne Court in Norwalk (property). The mortgage recited that it was given to secure a note dated December 11, 2006, and recited that the note was signed by the defendant as "Borrower" in the amount of $533,000. The term "Borrower" is defined in the mortgage deed as "THERESA VIRGULAK, MARRIED." The mortgage did not reference Robert. The defendant did not sign any guarantee.

On or about February 1, 2010, after JPMorgan Chase failed to receive payments in accordance with the terms of the note, the note went into default and JPMorgan Chase elected to accelerate the balance due. On January 3, 2011, notices of default were sent to both the defendant and Robert and, in February, 2013, JPMorgan Chase commenced this foreclosure action against the couple. The action sought to foreclose the mortgage that JPMorgan Chase claimed to have on the property. In September, 2014, JPMorgan Chase withdrew the foreclosure action against Robert, as he had filed for bankruptcy and been granted an unconditional discharge of the debt.

Thereafter, JPMorgan Chase filed a motion to substitute party plaintiff, stating that it had assigned the sub-

ject mortgage deed and note to Hudson City Savings Bank (Hudson). This motion was granted by the court on August 18, 2015.

On September 25, 2015, the defendant filed a motion for summary judgment arguing that Hudson was precluded from foreclosing the mortgage. In particular, she argued that she had not defaulted under the terms of the note because she was never a party to a promissory note with the plaintiff or any of its predecessors-in-interest. The motion was denied by the court on January 14, 2016, on the basis of the court's determination that an issue of material fact remained with respect to whether the mortgage deed provided reasonable notice to third parties that the defendant was securing Robert's obligation.

On March 18, 2016, the defendant served Hudson with requests for admission. On May 6, 2016, Hudson filed notice with the court that it had responded to the defendant's requests.

On August 9, 2016, the plaintiff, M&T Bank, into which Hudson had merged, filed a motion to substitute itself as the party plaintiff and requested leave to amend the complaint in order to add two additional causes of action. The court granted the motion on August 15, 2016. In the first count of the plaintiff's three count amended complaint, the plaintiff sought a judgment of foreclosure against the defendants. In the second count, it sought equitable reformation of the note in order to include the defendant as a borrower on the note.[3] In

[3] We note that the plaintiff's complaint sought reformation of the note, but not the deed. The trial court noted in its memorandum of decision, however, that "on page [seven] of its posttrial brief . . . the plaintiff concedes: 'Quite simply, there is . . . no support for any notion that the mortgage was ever intended to secure a note executed by [the defendant].' " The court noted that the plaintiff changed its position in its posttrial brief arguing "that the mortgage deed should be reformed 'to reference the fact that the mortgage executed by [the defendant] was to secure the note executed by Robert.' " This was not challenged by the defendant.

the third count, the plaintiff pleaded that the defendant had been unjustly enriched because (1) the proceeds of the note were used to pay off loans which she was obligated to pay and (2) she had free use of the subject property without satisfying the terms of the mortgage, which she had executed.

On December 1, 2016, the defendant filed an amended answer denying the essential allegations of the amended complaint regarding her liability for the debt and the claim of unjust enrichment. She also set forth eight special defenses.

On December 5, 2016, the defendant filed a motion in limine seeking to have the trial court order that all of the plaintiff's earlier admissions in response to her March 18, 2016 requests for admissions "be conclusively established at trial." The trial court indicated subsequently that it would rule on the motion in limine during the course of trial "when a context develop[ed] that require[d] [its] ruling."

The parties tried the case before the court on December 6, 2016. The plaintiff presented three witnesses, including Wilkin Rodriguez, a mortgage banking research officer at JPMorgan Chase, the defendant, and Robert. After the plaintiff rested, the defendant did not present additional evidence; she relied instead on the testimony and exhibits introduced during cross-examination of the witnesses called by the plaintiff. The next day, the court met with the parties to discuss the issues it believed to be germane to its decision and set a briefing schedule. As noted in the court's memorandum of decision, the court requested that the parties address the following issues in their briefs: (1) "Is the plaintiff entitled to foreclose the mortgage against [the defendant's] property without first reforming the mortgage note to make her a maker or guarantor of the note and/or reforming the mortgage deed to alter the description

of the debt secured by the mortgage?"; (2) "If the answer to #1 is negative, is there sufficient evidence to support equitable reformation of the mortgage note and/or deed?"; (3) "If the answer[s] to both #1 and #2 are negative, is the plaintiff entitled to recover, by way of a claim of unjust enrichment, any of the following: [use and occupancy of the property, property taxes paid by the plaintiff for the property, or property insurance premiums paid by the plaintiff for coverage of the property?]"; (4) "If the plaintiff is otherwise entitled to recover under #1, #2, or #3, is such recovery precluded by [the] plaintiff's responses to the requests for admissions . . . which included the admission that the defendant did not owe any money to the plaintiff?"; (5) "If [the] plaintiff is otherwise entitled to recover under #1, #2, or #3, is there adequate evidence to support any of the defendant's special defenses?"

On December 21, 2016, approximately two weeks after the conclusion of the trial, the plaintiff filed a motion seeking to withdraw and amend its responses to the requests for admissions that it had previously provided to the defendant. On December 27, 2016, the court entered orders stating that it would not entertain arguments on the plaintiff's motion until all of the post-trial briefs it had ordered had been filed by the parties.

On April 12, 2017, the court issued its memorandum of decision. The court found in favor of the defendant on the foreclosure and reformation counts of the complaint. In particular, the court stated, among other things, that "[t]he court finds that the plaintiff has not sustained its burden of proving, by clear and convincing evidence, that it [was] entitled to the equitable remedy of reformation of the mortgage deed . . . . Accordingly, the court finds the issues on the second count for [the defendant] and against the plaintiff. Since the plaintiff failed to present any authority to the court which would allow the plaintiff to prevail on the first

count [foreclosure claim] in the absence of reformation of the mortgage deed, the court [also] finds the issues on the first count for [the defendant] and against the plaintiff."

The court then proceeded to address the plaintiff's unjust enrichment claim, noting that the defendant had been benefitted in several respects as a result of the loan that Robert had obtained, but determining that, prior to ruling on the unjust enrichment claim, it needed to determine whether the plaintiff was entitled to withdraw and amend its responses to the defendant's requests for admissions. The court ultimately found that, pursuant to Practice Book § 13-24 (a), a motion to withdraw and amend responses to requests for admissions could not be filed following trial, as was done here, because § 13-24 (a) required the court to find (1) that "the presentation of the merits of the action will be subserved thereby" and (2) the party who obtained the admission will not be prejudiced "in maintaining his or her action or defense on the merits." The court concluded that it was unable to find "that 'the presentation of the merits of the action will be subserved' by the granting of the plaintiff's motion" after trial. It further found that it would be "hard to imagine how the defendant would not be prejudiced at the time the case was tried because defense counsel had every reason to believe that the plaintiff's admissions were both operative and binding." The court, therefore, denied the plaintiff's motion to withdraw and amend, which it had filed on December 21, 2016.[4] The court ultimately determined that the plaintiff's responses to the requests for admissions precluded any recovery on its unjust enrichment claim, except for the property tax

[4] The court also rejected the plaintiff's argument that the defendant had waived her right to rely on its responses when she failed to object to Wilkin Rodriguez' testimony disagreeing with those responses.

payments that the defendant conceded that she owed to the plaintiff.

On May 1, 2017, the plaintiff filed a motion for reargument. The court summarily denied the motion for reargument on May 4, 2017. This appeal followed.[5] Additional facts will be set forth as necessary.

I

The plaintiff first argues that the court committed reversible error by refusing to exercise its discretion in considering the plaintiff's foreclosure claim as a standalone claim independent from its other causes of action. The plaintiff also argues that "[a]side from the trial court's failure to properly consider the plaintiff's argument that foreclosure is warranted, even without reformation, extant legal authority . . . dictates that result." We disagree.

A

Our Supreme Court has made clear that when a "trial court is properly called upon to exercise its discretion, its failure to do so is error." *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 609, 181 A.3d 550, 565 (2018) (remand for hearing was appropriate because trial court failed to exercise its discretion); *Costello* v. *Goldstein & Peck*, P.C., 321 Conn. 244, 256, 137 A.3d 748 (2016) ("the court's failure to recognize its authority to act constituted an abuse of discretion"). In a foreclosure proceeding, "the determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has

[5] After filing this appeal, the plaintiff filed a motion for articulation and a motion for rectification with the trial court. The trial court largely denied those motions, and the plaintiff filed two motions for review with this court pursuant to Practice Book § 66-7. This court granted the motions for review, but denied the relief requested therein on January 18, 2018.

abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *AJJ Enterprises, LLP* v. *Jean-Charles*, 160 Conn. App. 375, 394–95, 125 A.3d 618 (2015). We thus address the plaintiff's claim that the court committed reversible error by refusing to exercise its discretion in considering its foreclosure claim as a stand-alone claim.

In support of its argument, the plaintiff directs us to the trial court's memorandum of decision, which states in relevant part: "In its January 27, 2017 posttrial brief . . . the plaintiff does not argue that the law would permit the plaintiff to foreclose a mortgage on 14 Bayne Court without first obtaining equitable reformation of the mortgage note and/or deed. Accordingly, the court will first address the plaintiff's second count which requests reformation." The plaintiff argues that the court's statement is "simply wrong," and that the plaintiff properly requested that the court consider the foreclosure count as an independent claim irrespective of the other two causes of action it advanced.

The plaintiff further contends that it gave the court multiple opportunities to correct this purported error by way of motions for reargument, articulation, and rectification, but it failed to do so. Specifically, it contends that the court improperly ignored its claim for foreclosure. Our review of the record, however, suggests otherwise. After the court issued its memorandum of decision, the plaintiff filed numerous motions with the court to which the court responded. In particular, the plaintiff filed with the court a motion for articulation and a motion for rectification raising this same argument that it presses on appeal. With respect to the

motion for articulation, the court addressed the plaintiff's arguments in a four page response. In relevant part, the court stated: "In its first posttrial brief dated January 27, 2017 . . . the plaintiff addressed the merits of the first two counts of its August 9, 2016, amended complaint . . . under one heading [titled] 'Plaintiff has Met its Burden to Recover under its Claim of Foreclosure and Reformation.' In that section of its brief, the plaintiff provided no authority whatsoever supporting the plaintiff's right to foreclose its mortgage without reforming either the mortgage deed (to state that it was Robert's debt under a promissory note that was secured by the mortgage) or the mortgage note (to state that [the defendant] was a maker or guarantor of the note.) The court recognizes that the plaintiff recited some general propositions of law in that brief and in its posttrial reply brief . . . to the effect that mortgage foreclosures are equitable proceedings. . . .

"On page 5 of its May 1, 2017 motion for reargument/reconsideration . . . the plaintiff cited no less than nine cases in support of its claim that the court had the power, in equity, 'to fashion any order aimed at achieving the interest of justice.' None of those cases addressed the question of whether a mortgage deed which purportedly secured a nonexistent debt could be foreclosed without reforming at least one of the mortgage documents. . . .

"If, in its memorandum of decision, the court failed to address the first count independently of the remedy of reformation claimed in the second count, it was because the plaintiff did not (and probably could not) present the court with any authority supporting the first count as an independent cause of action."

The court further addressed the claim in the court's five page response to the plaintiff's motion for rectification. In a section titled "Plaintiff's 'Stand-Alone' Foreclosure Claim," the court stated: "Following extensive

oral argument and review of the plaintiff's brief, the court concluded that the plaintiff had offered no authority for the proposition that the plaintiff was entitled to foreclose its mortgage, which, on its face, purported to secure an obligation that did not exist, without first reforming either the mortgage note or the mortgage deed. The plaintiff correctly points out that foreclosure actions invoke the court's equitable powers. In its memorandum of decision at pages 11 through 18, the court addressed the plaintiff's equitable claim that the mortgage deed should be reformed to reflect that the obligation being secured by the mortgage was not [the defendant's] debt, but rather her husband Robert's debt. The court concluded that the plaintiff did not meet the standards required by case law for the reformation of the mortgage deed.

"The plaintiff offered no legal authority to support the notion that a court, in the exercise of its equitable powers, can change the obligations of a party to a written instrument without meeting the standards for reformation of the instrument. If the court ignored the plaintiff's 'stand-alone' claim it was because it was inadequately briefed and, in the absence of reformation, *without merit*." (Emphasis added.).

With this as our backdrop, we reject the plaintiff's claim that the court "ignore[d] the plaintiff's claim for foreclosure" and conclude that the court did in fact exercise its discretion. With respect to that claim, the court explained that it believed that the plaintiff's claim was inadequately briefed and was unsupported by any citation of authority to support its contention. It made clear that the plaintiff's claim that the mortgage could be foreclosed without first reforming the mortgage was "without merit." As such, we reject the plaintiff's claim and conclude that the court did not ignore the plaintiff's

claim for foreclosure, as it clearly exercised its discretion in declining to grant foreclosure of the defendant's property.

B

The plaintiff also argues that "[a]side from the trial court's failure to properly consider the plaintiff's argument that foreclosure is warranted, even without reformation, extant legal authority . . . dictates that result." The plaintiff contends that the record in the present case required the court to grant foreclosure because the evidence demonstrates that the mortgage signed by the defendant was intended to secure the note that was executed solely by Robert.

The defendant contends that the plaintiff did not provide either the trial court or this court with any authority to support a claim that a court can foreclose a mortgage that secures a nonexistent debt. Furthermore, the defendant argues that there is no authority in Connecticut to support the proposition that a court can, sua sponte, or at the request of one party to a commercial transaction, rewrite a promissory note or mortgage to materially change the terms of the transaction they describe without first reforming the document. The defendant contends that the proper vehicle by which the plaintiff could obtain relief is by seeking reformation of the mortgage, which the plaintiff did in count two of its complaint. The defendant ultimately argues that the trial court correctly exercised its discretion in refusing to foreclose a mortgage that secured a nonexistent debt. We agree with the defendant.

It is well established that a mortgagee in a foreclosure action is entitled "to pursue its remedy at law on the notes, or to pursue its remedy in equity upon the mortgage, or to pursue both. A note and a mortgage given to secure it are separate instruments, executed for different purposes and, in this State, action for foreclosure

of the mortgage and upon the note are regarded and treated, in practice, as separate and distinct causes of action, although both may be pursued in a foreclosure suit." (Internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 266–67, 708 A.2d 1378 (1998). "In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 514, 202 A.3d 1092 (2019).

"Mortgage foreclosure appeals are reviewed under an abuse of discretion standard." (Internal quotation marks omitted.) *Cliffside Condominium Assn., Inc.* v. *Cushman*, 100 Conn. App. 803, 804, 921 A.2d 609 (2007). "A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Franklin Credit Management Corp.* v. *Nicholas*, 73 Conn. App. 830, 838, 812 A.2d 51 (2002), cert. denied, 262 Conn. 937, 815 A.2d 136 (2003).

In the present case, it is undisputed that the defendant did not sign the promissory note executed by Robert on which he defaulted, prompting this foreclosure proceeding. It is also undisputed that the subject mortgage signed by the defendant does not purport to secure a note executed by her husband, but rather identifies

her as the borrower on the note. The subject mortgage does not expressly refer to any obligation for which the defendant is legally responsible. In reviewing the court's memorandum of decision and subsequent rulings on the plaintiff's motions, it is clear that it declined to grant foreclosure of the mortgage without reformation because it determined that the mortgage, as executed, was a nullity because it secured a nonexistent debt.[6]

In arguing that the court should have foreclosed the mortgage despite this discrepancy and without reformation because foreclosure is an equitable remedy in and of itself, the plaintiff cites to numerous cases largely for the axiom that "[f]oreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done." See, e.g., *Hartford Federal Savings & Loan Assn.* v. *Lenczyk*, 153 Conn. 457, 463, 217 A.2d 694 (1966); *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, 233 Conn. 153, 170–71, 659 A.2d 138 (1995). The factual underpinnings of the cases relied upon by the plaintiff, however, are markedly different from the facts of the present case and, thus, we do not interpret them to suggest that a court can foreclose a mortgage that contains a material mistake without first concluding that the requirements for reformation of the mortgage have been satisfied. Although the plaintiff argues that the discrepancy at issue in the mortgage can best be described as a "scrivener's error" or "an inadvertent technical error" and that the equitable remedy of foreclosure is warranted even without reformation in order to ensure complete justice, our well established jurisprudence on reformation, also an equitable remedy, was the proper prerequisite in order for the plaintiff

[6] Indeed, the plaintiff similarly describes the court's decision in its appellate brief: "In other words . . . the trial court concluded that the mortgage deed the defendant executed had no meaning and was a nullity."

to correct the purported mistake in the mortgage document.

The dissent ultimately agrees with the plaintiff and concludes that the trial court erred in declining to grant foreclosure of the mortgage. In the dissent's view, the trial court was required to foreclose the subject mortgage, without first reforming it, despite the fact that the mortgage did not purport to secure her husband's debt. The dissent cites to no case law in this state, or elsewhere, that holds that a court can foreclose a mortgage containing this type of material flaw without first satisfying the requirements to reform the document. Like the plaintiff, the dissent cites generally to case law for the proposition that "[f]oreclosure is peculiarly an equitable action . . . ." See, e.g., *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, supra, 233 Conn. 170–71. On the basis of the equitable nature of foreclosure, the dissent concludes that "[w]hen the essence of a transaction is clear, as it is in this case, a court must look to its substance, instead of relying upon errors of form, to determine its enforceability against a party to it." We respectfully disagree with the dissent that such a conclusion is tenable in light of our Supreme Court's well established jurisprudence on reformation.

The dissent's conclusion essentially would permit a court to disregard the requirements for reformation and choose to foreclose a mortgage that contains a material flaw in the mortgage document if it believed the essence of the transaction was clear. Although the dissent argues that the transaction in this case was clear, there is little support in the record before us to suggest that a contract was ever formed between JPMorgan Chase and the defendant in the first place. Courts do not have the power to make a contract where none exists. Where a contract does exist but does not conform to the real contract agreed upon and does not express the intention of the parties, our Supreme Court

has said that our courts can reform the contract if it was executed as the result of mutual mistake, fraud, or other inequitable conduct on the part of the other. See *Lopinto* v. *Haines*, 185 Conn. 527, 531, 441 A.2d 151 (1981) ("reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other" [internal quotation marks omitted]). Because the dissent's newly proposed "essence of a transaction" test would fly in the face of our Supreme Court's jurisprudence on reformation and would render it obsolete, we decline to sanction such a test.

Following reformation of the mortgage, if appropriate, it would have then been proper for the plaintiff in the present case to seek foreclosure. As we discuss in part II of this opinion, the plaintiff did in fact bring a cause of action for reformation in count two of its complaint, which the court properly denied. Because reformation of the mortgage was not warranted in the present case, we conclude that the court's decision denying foreclosure was appropriate. The subject mortgage, as executed, was a nullity because it purported to secure a nonexistent debt.[7] The plaintiff has cited no authority, and we have found none, that stands for the proposition that, absent reformation, a court can foreclose a mortgage that purports to secure a nonexistent debt. This is for good reason. To hold otherwise would be counter to the basic concept of mortgages. "A mortgage is a conveyance or retention of an interest

[7] Although the plaintiff argues that the subject mortgage was valid because it gave "reasonable notice" to third parties of the nature and amount of Robert's obligation; see *Dart & Bogue Co.* v. *Slosberg*, 202 Conn. 566, 579, 522 A.2d 763 (1987); we find its argument unpersuasive.

in real property as security for performance of an obligation." Restatement (Third), Property, Mortgages § 1.1, p. 8–9 (1997). However, "[u]nless it secures an obligation, a mortgage is a nullity." Restatement (Third), supra, § 1.1, comment.

II

The plaintiff next claims that the court abused its discretion by declining to reform the mortgage. In its view, the evidence at trial and the facts found by the court established that the mortgage signed by the defendant was intended to secure the note executed by Robert and, thus, the mortgage should be reformed to reflect that intention. The defendant argues, however, that the court properly declined to reform the mortgage because the plaintiff did not meet its burden of proving by "clear, substantial and convincing evidence" that there was a mutual mistake made by the parties to warrant reformation. (Internal quotation marks omitted.) We agree with the defendant.

We begin by setting forth our standard of review and the applicable legal principles with respect to this claim. "Reformation and foreclosure are both equitable proceedings." *Derby Savings Bank* v. *Oliwa*, 49 Conn. App. 602, 604, 714 A.2d 1278 (1998). The "determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Perez*, 146 Conn. App. 833, 838, 80 A.3d 910 (2013), appeal dismissed, 315 Conn.

542, 109 A.3d 452 (2015). "When a decision in an equitable matter lies within the trial court's discretion, an appellate court will reverse that decision only when an abuse of discretion is manifest or where an injustice appears to have been done . . . ." (Internal quotation marks omitted.) *Traggis* v. *Shawmut Bank Connecticut, N.A.*, 72 Conn. App. 251, 264, 805 A.2d 105, cert. denied, 262 Conn. 903, 810 A.2d 270 (2002).

"A cause of action for reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other." (Internal quotation marks omitted.) *Lopinto* v. *Haines*, supra, 185 Conn. 531. "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties." (Internal quotation marks omitted.) *Kaplan v. Scheer*, 182 Conn. App. 488, 502, 190 A.3d 31, cert. denied, 330 Conn. 913, 193 A.3d 49 (2018). "Reformation is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction." *Home Owners' Loan Corp.* v. *Stevens*, 120 Conn. 6, 9–10,179 A. 330 (1935). Simply put, "the mistake, being common to both parties, effects a result which neither intended." (Internal quotation marks omitted.) *Czeczotka* v. *Roode*, 130 Conn. App. 90, 99, 21 A.3d 958 (2011). "Therefore a definite agreement on which the minds of the parties have met must have preexisted the instrument in question. The court cannot

supply an agreement which was never made, for it is its province to enforce contracts, not to make or alter them." *Hoffman* v. *Fidelity & Casualty Co.*, 125 Conn. 440, 443, 6 A.2d 357 (1939).

"A court in the exercise of its power to reform a contract must act with the utmost caution . . . . In the absence of fraud, it must be established that both parties agreed to something different from what is expressed in writing, and the proof on this point should be clear so as to leave no room for doubt. . . . If the right to reformation is grounded solely on mistake, it is required that the mistake be mutual, and to prevail in such a case, it must appear that the writing, as reformed, will express what was understood and agreed to by both parties." (Citations omitted.) *Greenwich Contracting Co.* v. *Bonwit Construction Co.*, 156 Conn. 123, 126–27, 239 A.2d 519 (1968). The party insisting on reformation must show proof justifying reformation by "clear, substantial and convincing evidence," meaning evidence that "induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *Lopinto* v. *Haines*, supra, 185 Conn. 534, 534 n.9.

The following additional facts are pertinent to our discussion. During trial, the plaintiff called Rodriguez, a mortgage banking research officer employed by JPMorgan Chase, to testify regarding the files and records maintained by his employer. He testified that his employer maintains files for each mortgage it holds or services, including the original collateral file that typically contains, among other things, the original mortgage note and deed, title insurance policies, and records regarding loan origination. Through his testimony, the plaintiff introduced into evidence numerous

documents relating to the subject mortgage, including the note and deed.

With respect to the note, page one of the note recites the obligations of the "Borrower," but the note does not further define that term. Page three of the note, however, bears the signature of "Robert J. Virgulak—Borrower." The note does not contain any reference to the defendant nor does her signature appear on the document. The only person obligated under the terms of the note is Robert.

With respect to the subject mortgage, it recited that it was given to secure a note dated December 11, 2006, signed by the defendant as "Borrower" in the amount of $533,000. The term "Borrower" is defined in the mortgage deed as "THERESA VIRGULAK, MARRIED." There was no reference to Robert.

Rodriguez authenticated numerous documents relating to the approval and closing of the mortgage documents that were addressed to or signed solely by Robert. He also authenticated numerous documents relating to the mortgage that show that the defendant signed a United States Department of Housing and Urban Development settlement statement (commonly referred to as a HUD-1), a Transfer of Servicing Disclosure Statement, a Federal Truth in Lending Statement, and a Notice of Right to Cancel.

The defendant was also called as a witness at trial. During her testimony, she testified that she did not recognize the subject mortgage document but acknowledged that her signature was on it and that it was signed at her husband's request. She knew at the time she signed the mortgage there was an existing mortgage on the residence, but she did not recall the mortgage lender or the balance of the mortgage loan. The defendant testified that she believed that the old mortgage was paid off with the proceeds of the loan Robert received

from JPMorgan Chase. She also acknowledged her signature on the HUD-1, Transfer of Servicing Disclosure Statement, Federal Truth in Lending Statement, and Notice of Right to Cancel documents. She testified that she had not read those documents before signing them. The defendant testified that even though she signed the HUD-1 form as "Borrower," she did not receive any portion of the $155,236.22 shown as paid to "Borrower" at closing. She testified that perhaps Robert had been paid that sum. On being confronted by her deposition testimony, the defendant acknowledged that the proceeds of the 2006 note had been used to pay off a prior mortgage on the property to People's Bank for which she may have been responsible.

On cross-examination by her attorney, the defendant stated that she did not consider the prior mortgages to be her debts since they were taken out by Robert, who managed all the family's bills and paid all the property taxes. She stated that she did not sign any of the documents relating to the mortgage in front of any witnesses and that she believed that she signed the documents at their home in her husband's presence only. The defendant testified that she never filed joint tax returns with Robert and they never had credit cards in both their names. She denied that she had signed any guarantees of her husband's debts.

Robert also testified at the trial. He testified that on the loan application submitted to JPMorgan Chase, he included the value of the property even though he knew that title to that property was solely in the defendant's name. He testified that he believed that he and the defendant were jointly responsible for the prior mortgages on the property. Robert testified that he had received all of the funds available to the borrower at the closing of the mortgage and that the defendant did not receive any portion of the $155,236.32 shown on the HUD-1 form paid to "Borrower" at closing. Some

of the proceeds of the mortgage were used by Robert to improve the kitchen and bathroom of the property, and he testified that he made the required payments on the mortgage, the real estate taxes and the property insurance for the property until he filed for bankruptcy in 2010. He never made any additional payments on the mortgage or real estate taxes, but believed he may have reinstated the property insurance after a couple of years.

On cross-examination, Robert testified that the vast majority of the documents relating to the closing of the mortgage were given to him and not to the defendant and all communications regarding the mortgage were sent to him. He testified that the defendant was not present at the closing. Robert testified that a portion of the proceeds of the mortgage were used to pay off credit cards that were Robert's exclusive responsibility, which totaled $109,070.48. Robert testified that he used approximately $35,000 of the $155,236.22 paid to him at closing to improve the kitchen and bathroom of the property. On redirect examination, Robert testified that JPMorgan Chase required that the prior mortgages be paid off as a condition of granting the loan. Those mortgage balances totaled $255,882.56. After the plaintiff rested, the defendant did not present additional evidence; she relied on the testimony and exhibits introduced during cross-examination of the witnesses called by the plaintiff.

In its posttrial brief, the plaintiff argued that to the extent that the court found a technical deficiency with the language of the loan documents, "the court should use its equitable powers, in ensuring justice, to cure the mutual mistake of the parties in not specifically documenting within the mortgage that the note which it secures was executed by Robert and not [the defendant]." It requested that the court "reform the mortgage to reference the fact that the mortgage executed by

[the defendant] was to secure the note executed by Robert." On April 12, 2017, the court concluded in its memorandum of decision "that the plaintiff [had] not sustained its burden of proving, by clear and convincing evidence, that it [was] entitled to the equitable remedy of reformation of the mortgage deed . . . ."

On appeal, the plaintiff argues that the only discrepancy, or true error, with the information reflected in the mortgage is the fact that it references that the note it was securing was executed by the defendant rather than her husband. The plaintiff argues that the evidence presented at trial and the facts found by the court established that the mortgage signed by the defendant was intended to secure the note executed by Robert and, thus, the mortgage should be reformed to reflect that intention. In support of this contention, it argues, inter alia, that it demonstrated that reformation was warranted because (1) the trial court found that the defendant's debts were paid off at the time of the closing, (2) it was established that the defendant signed at least four of the closing documents, and (3) it was established that the mortgage itself referred to a note identical to both the date and exact amount of the only note executed in the present case.

The plaintiff argues that in the present case, as in this court's decision in *Derby Savings Bank* v. *Oliwa*, supra, 49 Conn. App. 602, reformation is necessary to ensure justice. In *Derby Savings Bank*, the defendant appealed from the trial court's judgment reforming his mortgage deed and granting strict foreclosure. Id. In that case, the defendant executed a mortgage deed and note to the plaintiff. Id., 602–603. The trial court found that both parties intended for the mortgage to cover property other than that described in the mortgage deed, and that the error resulted from a mistake by the attorney who prepared the mortgage documents. Id., 603. The court found it to be a mutual mistake. Id.

Specifically, the trial court found that the commitment letter, which was signed by both parties, described what was found to be the parcel of land actually covered by the mortgage. Id. The mortgage note also contained a notation in its lower left corner describing the correct property. Id. This court affirmed the trial court's decision. Id., 604.

Unlike in the present case, the plaintiff in *Derby Savings Bank* provided sufficient evidence to demonstrate that a mutual mistake was in fact made. Both the commitment letter and the mortgage note, which were each signed by the defendant, described the correct property which the parties actually agreed was to secure the note. Id., 603. The attorney preparing the mortgage document for the parties, however, failed to include the proper description on the mortgage deed. Id. Under the specific facts of that case, it is evident that the evidence introduced was clear and convincing.

As our Supreme Court has noted, "evidence of a very high order" is required in order to show that reformation is justified. (Internal quotation marks omitted.) *Lopinto* v. *Haines*, supra, 185 Conn. 534. Although the plaintiff in the present case may have introduced some evidence at trial that suggested that the mortgage signed by the defendant was intended to secure her husband's note, in light of the conflicting evidence before the trial court, we are not persuaded that it abused its discretion in declining to reform the mortgage.

In the present case, it was necessary for the plaintiff to demonstrate that JPMorgan Chase and the defendant agreed that the subject mortgage signed by the defendant was effectuated in order to secure her husband's debt, that the subject mortgage did not express that intent, and that the subject mortgage was executed as the result of a mutual mistake. See *Lopinto* v. *Haines*, supra, 185 Conn. 531; see also *Hoffman* v. *Fidelity &*

Casualty Co., 125 Conn. 440, 443, 6 A.2d 357 (1939) ("a definite agreement on which the minds of the parties have met must have preexisted the instrument in question. The court cannot supply an agreement which was never made, for it is its province to enforce contracts, not to make or alter them.").

As the court correctly noted, even with the various documents admitted into evidence at trial and the testimony of the witnesses, many gaps were left in the factual record. For instance, although the defendant testified that her signatures were on some of the mortgage closing documents, there were still questions remaining with respect to her state of mind and what she intended by signing them. The defendant testified that she signed the documents at Robert's request and that she had not read those documents before doing so. The defendant testified that she was aware of Robert's intent to borrow money, but she indicated that he never told her how much money he was borrowing. When asked at trial whether she knew what institution Robert was seeking the loan from, she responded: "No, because . . . I wasn't getting the loan, he was, so I didn't question it."

Furthermore, the record discloses that the defendant signed the aforementioned documents in the presence of her husband only, and was not present at the closing that took place in Attorney John A. Milici's office. Additionally, as the court noted, there was no explanation of how the mortgage came to bear the signatures of two witnesses, including Attorney Milici's. There is also no indication in the record that any attorney for or a representative from JPMorgan Chase explained to the defendant her role in the process and that her property would be used as collateral to secure Robert's loan. The testimony introduced disclosed that the vast majority of the documents relating to the closing of the mort-

gage were given to Robert and that all communications regarding the mortgage were sent to him.

Further, the plaintiff offered little evidence, if any, to demonstrate that the subject mortgage was integral to its decision in providing Robert with the loan. As the trial court aptly noted, the records authenticated by Rodriguez at trial were silent as to the understanding that JPMorgan Chase may have had with the defendant regarding her responsibility for Robert's loan. For example, there was no mortgage commitment letter or closing instructions introduced into evidence, which typically would describe the transaction in detail and set forth conditions that must be met in order for disbursement to be made. Additionally, the plaintiff could have called the loan officer or another representative to explain how the subject mortgage impacted its decision to offer the loan. Instead, the only JPMorgan Chase representative introduced at trial was Rodriguez, an employee whose employment began after the execution of the note.

On the basis of the evidence before the trial court, we discern no reason to disturb its decision. We conclude that court did not abuse its discretion in declining to reform the mortgage.

III

The plaintiff next argues that the court improperly denied its motion to amend its responses to the defendant's requests for admission to conform to the evidence at trial. We disagree.

We briefly set forth additional facts necessary for this claim. On December 21, 2016, approximately two weeks after the trial ended and the court had set a briefing schedule, the plaintiff filed a motion to withdraw and amend its responses to the defendant's requests for admission in order to conform to the

evidence at trial. In particular, it requested that its responses to requests four and five be withdrawn and amended because there was no basis in fact adduced at trial to support those responses. Request for admission number four asked: "Do you admit that the defendant did not borrow any money from the plaintiff?" The response: "Admitted but this did not preclude the defendant from obtaining a benefit from the loan." Request for admission number five asked: "Do you admit that the defendant does not owe any money to the plaintiff?" The response: "Admitted." The plaintiff argued, inter alia, that the defendant would not be prejudiced if the court were to grant the motion.

On December 27, 2016, the court entered an order stating that it would not entertain any arguments on the plaintiff's motion until all the posttrial briefs it had ordered on December 7, 2016, had been filed by the parties.

In the court's memorandum of decision filed on April 12, 2017, the court addressed, inter alia, the plaintiff's unjust enrichment claim. In addressing its arguments, the court noted certain instances in which the defendant had been benefited by the note executed by Robert. The court also acknowledged that the defendant conceded that she should reimburse the plaintiff for the taxes it and JPMorgan Chase had paid on her behalf. The court then addressed whether the plaintiff was entitled to withdraw and/or amend its responses to the requests for admission served on it by the defendant. The court concluded that, pursuant to Practice Book § 13-24 (a), a motion to withdraw and amend responses to requests for admissions could not be filed following trial, as in the present case, because § 13-24 (a) required the court to determine (1) that "the presentation of the merits of the action will be subserved thereby," and (2) the party who obtained the admission will not be prejudiced "in maintaining his or her action or defense

on the merits." The court concluded that "it would be impossible for [it] to find that 'the presentation of the merits of the action will be subserved' by the granting of the plaintiff's motion" after trial. It further concluded that it would be "hard to imagine how the defendant would not be prejudiced at the time the case was tried because defense counsel had every reason to believe that the plaintiff's admissions were both operative and binding."

The court went on to state that "[i]f, after having amended its complaint, the plaintiff had wished to be relieved of the consequences of its admissions, it could have filed a timely motion, pursuant to Practice Book § 13-24 (a), to withdraw or amend its admissions. As noted . . . the court finds no authority permitting a party to seek withdrawal or amendment of admissions following the completion of trial." The court concluded that it did "not agree with the plaintiff that it can avoid the consequences of its admission that [the defendant] does not owe any money to the plaintiff simply because the money judgment which the plaintiff seeks is sought as damages on a claim based on equitable principles. Under these circumstances, the court is compelled to find that the plaintiff's responses to the requests for admissions preclude the plaintiff from any recovery on count three of the plaintiff's amended complaint, except to the extent of the tax payments which the defendant has conceded she owes."

We briefly set forth the relevant legal principles that guide our discussion. Practice Book § 13-24 (a) provides: "Any matter admitted under this section is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission. The judicial authority may permit withdrawal or amendment when the presentation of the merits of the action will be sub-served thereby and the party who obtained the admission fails to satisfy the judicial

authority that withdrawal or amendment will prejudice such party in maintaining his or her action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him or her for any other purpose nor may it be used against him or her in any other proceeding."

"A trial court has wide discretion in granting or denying amendments to the pleadings and only rarely will this court overturn the decision of the trial court. . . . To reverse a ruling of the trial court [denying] an amendment to the pleadings requires that the [plaintiff] make a clear showing of abuse of discretion." (Internal quotation marks omitted.) *JPMorgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 280, 73 A.3d 757, cert. denied, 310 Conn. 935, 79 A.3d 889 (2013).

"In determining whether there has been an abuse of discretion, much depends on the circumstances of each case. . . . In the final analysis, the court will allow an amendment unless it will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party." (Citations omitted; internal quotation marks omitted.) *Kelley* v. *Tomas*, 66 Conn. App. 146, 178, 783 A.2d 1226 (2001).

Although the plaintiff attempts on appeal to distinguish the present case from certain cases cited in the court's memorandum of decision; see, e.g., *JPMorgan Chase Bank, N.A.* v. *Eldon*, supra, 144 Conn. App. 260; *Montanaro* v. *Balcom*, 132 Conn. App. 520, 521, 35 A.3d 280 (2011); it fails to cite to any case law that holds that a court's denial of a motion to withdraw and amend a party's responses to requests for admissions after the conclusion of trial constitutes an abuse of discretion.

Despite the plaintiff's contentions, the court correctly relied on Practice Book § 13-24 (a), which governs when a withdrawal or an amendment of an admission is proper, and noted that the defendant likely would have been prejudiced by allowing the plaintiff to amend its responses two weeks after the conclusion of trial. As the court made clear, the defendant had every reason to believe that the plaintiff's admissions were both operative and binding. See Practice Book § 13-24 (a) ("[a]ny matter admitted under this section is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission"). As such, it is likely that these binding admissions affected how the defendant presented her defense.

It is also hard to imagine how the presentation of the merits of the action would be subserved by allowing a post hoc withdrawal or amendment of the plaintiff's responses in the present case. If the court had granted the plaintiff's motion two weeks after the close of evidence, it likely would have been necessary, at a minimum, to give the defendant the opportunity to conduct further discovery on the facts previously established by the plaintiff's admissions. This assuredly would have caused an unreasonable delay and would not have subserved the presentation of the merits of the action.[8] Although the plaintiff takes issue with the court's denial of its motion to withdraw and amend its responses, as the court correctly noted, after having amended its complaint to add the two additional counts, the plaintiff could have easily filed a timely motion pursuant to Practice Book § 13-24 (a) to withdraw or amend its admissions before trial. It failed to do so. Under the

[8] To the extent that the plaintiff is claiming that the defendant was not permitted to rely on its responses to her requests because certain testimony elicited at trial contradicted the responses to the questions it sought to amend, we deem it inadequately briefed and, thus, abandoned. See *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014).

facts of this case, we conclude that the trial court did not abuse its discretion in denying the plaintiff's motion to withdraw and amend its responses to the defendant's requests for admission.[9]

IV

The plaintiff next contends that the court erred in concluding that the plaintiff's responses to the defendant's requests for admission precluded it from any recovery under its unjust enrichment count aside from the property tax payments that the defendant conceded she owed to the plaintiff. We disagree.

"Appellate appraisal of a trial court's finding of unjust enrichment is governed by the well established principle that the determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings for the trial court that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . This limited scope of review is consistent with the general proposition that equitable determinations that depend on the balancing of many factors are committed to the sound discretion of the trial court." (Internal quotation marks omitted.) *Laser Contracting, LLC* v. *Torrance Family Ltd. Partnership*, 108 Conn. App. 222, 230–31, 947 A.2d 989 (2008).

As our case law makes clear, the only remedy a plaintiff can obtain with respect to an unjust enrichment

[9] To the extent that the plaintiff's few passing references in its appellate brief about the court's decision not to hold a hearing on its motion to withdraw and amend its responses can be read to challenge that decision, we conclude that the plaintiff abandoned such argument as a result of an inadequate brief. See *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 329–30 n.14, 898 A.2d 197 ("[T]he parties must clearly and fully set forth their arguments in their briefs. . . . Analysis, rather mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly" [Citation omitted; emphasis omitted; internal quotation marks omitted.]), cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006).

claim is "an award of money damages." (Internal quotation marks omitted.) Id., 233. In the present case, however, it is undisputed that the plaintiff's response to request number five of the defendant's requests for admission stated that the defendant did not owe the plaintiff any money. Practice Book § 13-24 (a) makes clear that "[a]ny matter admitted under this section is conclusively established . . . ." It was thus appropriate for the court to hold that the plaintiff was bound by its admissions and to limit its recovery under the unjust enrichment claim to property taxes that the defendant conceded in her posttrial brief that she owed to it.

We, therefore, conclude that the court did not abuse its discretion in limiting the award under the unjust enrichment count to the property taxes owed to the plaintiff.

V

The plaintiff's final argument is that the court abused its discretion in denying its motion for reargument. We disagree.

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 69, 111 A.3d 551 (2015). We thus review a trial court's denial of a motion to reargue for an abuse of discretion. Id.

This claim requires little discussion. Although the plaintiff contends that the court abused its discretion

in denying its motion for reargument where it set forth legal principles that were not expressly considered by the trial court in its memorandum of decision, our review of the record discloses that the plaintiff's twenty-two page motion filed on May 1, 2017, was largely a request for the court to reevaluate the facts that it had before it, thus seeking an improper second bite of the apple. We, therefore, conclude that the court did not abuse its discretion in denying the relief sought in the motion for reargument.

The judgment is affirmed.

In this opinion, SHELDON, J., concurred.

BEAR, J., dissenting. The plaintiff, Manufacturers and Traders Trust Company, also known as M&T Bank (M&T Bank),[1] successor in interest to the named plaintiff JPMorgan Chase Bank, National Association (JPMorgan Chase), appeals from the judgment of the trial court rendered in favor of the defendant Theresa Virgulak.[2] On appeal, the plaintiff claims that the trial court abused its discretion by (1) failing to consider the plaintiff's foreclosure claim against the defendant as a stand-alone claim independent from its other causes of action and, thus, failing to grant the plaintiff the equitable remedy of foreclosure to which it was entitled on the facts of this case, (2) declining to reform the note and/or mortgage deed at issue in this case, (3) denying its motion to amend its responses to the defendant's requests for admission, (4) concluding that the plaintiff's admissions limited its recovery under its unjust enrichment count, and (5) denying the plaintiff's motion for reargument.

[1] As the majority notes in footnote 1 of its opinion, JPMorgan Chase Bank, National Association, is no longer a party in this matter, and M&T Bank filed a motion to substitute itself as the plaintiff.

[2] As noted in footnote 2 of the majority opinion, this action was withdrawn against Robert J. Virgulak, and the state of Connecticut, Department of Revenue Services, was defaulted for failure to plead.

The majority disagrees with the plaintiff as to all of its claims and concludes that the court did not abuse its discretion in refusing to consider those claims. I respectfully disagree with the majority's disposition of this case and, rather, would reverse the judgment of the court on the ground that the court both abused its discretion and erred in failing to properly consider the plaintiff's stand-alone foreclosure claim. The court should have allowed the plaintiff to proceed with its foreclosure claim.

The plaintiff argues that the court abused its discretion in failing to consider its foreclosure claim and, therefore, erred in failing to exercise its equitable powers to render a judgment of foreclosure against the defendant. Specifically, plaintiff asserts that, even without reformation of the note or mortgage, the court had discretion to consider its foreclosure claim and, in light of the evidence presented at trial, abused that discretion. The plaintiff also argues that it is entitled to proceed with the foreclosure complaint as a matter of law.

The following facts are evident from the record and are undisputed. The defendant and her husband, Robert J. Virgulak (Robert), on this and prior occasions, had a practice of borrowing money from banks whereby Robert would execute a note for the amount to be borrowed, and the defendant would execute a mortgage as security for the note. In this case, there is no dispute that Robert, on December 11, 2006, executed a note to JPMorgan Chase in the amount of $533,000 and that he received and expended that $533,000 for the benefit of himself and the defendant. There is also no dispute that on December 11, 2006, the defendant signed an open-end mortgage deed to JPMorgan Chase for the defendant's real property known as 14 Bayne Court, Norwalk (real property), and that she initialed each page of that fifteen page form mortgage document, which was recorded on the Norwalk land records. The defendant

was listed in the form mortgage document as the "Borrower . . . THERESA VIRGULAK, MARRIED," a reference to her marriage to Robert, the maker of the note. The note, however, incorrectly was described in the mortgage document as being signed by the defendant, instead of Robert. Consistently with the note signed by Robert, the mortgage referred to a note dated December 11, 2006, in the amount of $533,000.

On December 11, 2016, the defendant also signed a U.S. Department of Housing and Urban Development form, RESPA HUD1A (HUD-1), that included the following disbursements to pay off encumbrances on the defendant's real property: (1) to M&T Mortgage Corporation in the amount of $14,889.38; (2) to Wachovia Bank, N. A., in the amount of $240,993.18; (3) to The Greater Norwalk Area Credit Union, Inc., in the amount of $18,285.47; (4) to Bank of America in the amount of $27,921.82; (5) to Wachovia in the amount of $27,647.94; (6) to Chase in the amount of $16,950.47; (7) to the Norwalk Tax Collector in the amount of $4640; and (8) to James P. Murphy & Assoc. in the amount of $1274 for an unpaid insurance premium. The encumbrances on the defendant's real property that were paid off for her benefit at the closing thus totaled approximately $370,000.

In rejecting the plaintiff's foreclosure claim, the majority looks to the trial court's memorandum of decision and the plaintiff's pleadings filed thereafter and concludes that the court properly exercised its discretion in determining that the plaintiff's claim was inadequately briefed and "without merit." Moreover, the majority, relying on our well established mortgage foreclosure case law that "the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that the conditions precedent to foreclosure . . . have been satisfied;" *Bank of*

America, *N.A.* v. *Gonzalez*, 187 Conn. App. 511, 514, 202 A.3d 1092 (2019); concludes that because the defendant did not sign the promissory note and the mortgage did not refer to any obligation for which the defendant was legally responsible, "the subject mortgage, as executed, was a nullity because it purported to secure a nonexistent debt." I respectfully disagree with the majority's conclusion.

When the essence of a transaction is clear, as it is in this case, a court must look to its substance, instead of relying upon errors of form, to determine its enforceability against a party to it. As our Supreme Court observed, "[e]quity always looks to the substance of a transaction and not to mere form . . . and seeks to prevent injustice." (Citation omitted; internal quotation marks omitted.) *Natural Harmony*, *Inc.* v. *Normand*, 211 Conn. 145, 149, 558 A.2d 231 (1989). Accordingly, "[t]he governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit." (Internal quotation marks omitted.) *Maruca* v. *Phillips*, 139 Conn. 79, 82–83, 90 A.2d 159 (1952). "In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities*, *Inc.* v. *Sewer Commission*, 270 Conn. 409, 417, 853 A.2d 497 (2004); see also *Connecticut National Bank* v. *Chapman*, 153 Conn. 393, 216 A.2d 814 (1966).

"[F]oreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, 233 Conn. 153, 170–71, 659 A.2d 138 (1995). "[T]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . For that reason, equitable remedies are not bound by formula but are molded to the needs of justice." (Citations omitted; internal quotation marks omitted.) *McKeever* v. *Fiore*, 78 Conn. App. 783, 788–89, 829 A.2d 846 (2003) (concluding "that in light of the [trial] court's inherent equitable powers in a foreclosure action, the court did not improperly consider the equitable doctrine of unclean hands without it being specifically pleaded").

"While it is normally true that this court will refrain from interfering with a trial court's exercise of discretion . . . *this presupposes that the trial court did in fact exercise its discretion*. . . . Where . . . the trial court is properly called upon to exercise its discretion, its failure to do so is error." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998); *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986).

Additionally, a court must apply common sense in analyzing and interpreting all relevant documents and the entire transaction. See *Gazo* v. *Stamford*, 255 Conn. 245, 266, 765 A.2d 505 (2001) ("[c]ommon sense also informs us that the plaintiff's contract claim is in reality his negligence claim cloaked in contract garb"); see also *State* v. *Zayas*, 195 Conn. 611, 620, 490 A.2d 68 (1985) ("[i]t is an abiding principle of jurisprudence

that common sense does not take flight when one enters a courtroom"); *Lawson* v. *Whitey's Frame Shop*, 241 Conn. 678, 697 A.2d 1137 (1997) ("[e]ven if we were to assume, without deciding, that the contract's failure to refer to subsection (g) meant that the entire statute applies, the Appellate Court's conclusion that the defendant could not dispose of vehicles that were not specifically designated by [General Statutes] § 14-150 is contrary to common sense and to a plain reading of the contract as a whole"); *Gino's Pizza of East Hartford, Inc.* v. *Kaplan*, 193 Conn. 135, 138, 475 A.2d 305 (1984) (contract must be given common sense interpretation, and in construing contract, court must view written document as expression of parties' intent).

In the present case, the first count of the plaintiff's amended complaint unambiguously sets forth a claim for foreclosure of a valid mortgage, independent of any claim for reformation. In connection with the defendant's motion for summary judgment, the court, *Hon. Kevin Tierney*, judge trial referee, in its memorandum of decision denying that motion, framed the issue as whether a foreclosure action could be maintained "by a lender who has a mortgage deed executed by a named defendant, the sole property owner who has not executed the note." At trial, the plaintiff's counsel and the court, *Tobin, J.*, further discussed this issue:

"[The Plaintiff's Counsel]: [*T*]*his is a three count complaint for foreclosure, equitable reformation of the note and unjust enrichment.* We have essentially stipulated by virtue of our stipulation of facts that all the prerequisites to foreclosure have been satisfied, but there is a legal issue raised by the defendants that remains. . . . The defendant's contention is that the foreclosure action is not valid by virtue of the fact that the note does not secure the mortgage because two different parties executed those documents . . .

* * *

"The Court: Okay. Now, I can understand how you might prevail if you're—you've got your equitable remedy in the form of reformation of the note, and I understand what you're seeking is to have the [defendant] added as a maker of the note, and that would make the recitations of the mortgage deed accurate. . . . But it—*it strikes me that the manner in which you introduced your case you suggested that you believe the plaintiff can prevail in this case even if it is not successful in demonstrating the requisites to have the note reformed*?"

"[The Plaintiff's Counsel]: That's correct, Your Honor. *We are proceeding out of three different* [*bases*] *essentially. We believe that foreclosure itself is appropriate.* Now we have added the other causes of action, *but we believe that we can foreclose under these circumstances regardless of those causes of action* to answer Your Honor's question." (Emphasis added.)

The plaintiff asserted, as well, in its posttrial brief "that, under both the law and equitably, it is entitled to foreclosure of the mortgage in issue and equitable relief." In support of its claim for foreclosure, the plaintiff argued that it had established a prima facie case for foreclosure, and that "the only issue remaining in this matter results from a technical reading of the mortgage, which, based on a literal reading of its terms, describes [the defendant] as the 'Borrower.' " The plaintiff concluded by requesting that the trial court enter "an order of judgment of foreclosure in its favor or, in the alternative, order appropriate equitable relief."

It is thus clear that the plaintiff adequately articulated to the court the merits of his claim for foreclosure. Rather than substantively addressing this claim, however, the court summarily rejected it on the basis that "the plaintiff does not argue that the law would permit

the plaintiff to foreclose a mortgage . . . without first obtaining equitable reformation of the mortgage note and/or deed." In reaching this conclusion, the court erred both as a matter of law and as a matter of equity. It did not consider the plaintiff's adequately argued and briefed foreclosure claim, including whether the plaintiff was entitled to any remedies upon the default of the obligor on the underlying debt. The majority's conclusion that the court did exercise its discretion by explaining that "the plaintiff's claim was inadequately briefed and was unsupported by any citation to support its contention" compounds this error and runs counter to the inherently equitable nature of foreclosure actions. This conclusion is also inconsistent with our law that requires a court to be guided by the substance of the transaction, in the present case the note and the mortgage, which although signed separately, constituted one unified transaction through the joint and concerted actions, with full knowledge of the consequences, of the defendant and Robert, and resulted in them obtaining $533,000 from JPMorgan Chase while also providing security for repayment of the loan.[3] Any limitation or defect in the mortgage form that did not correctly describe the defendant or the maker of the note is in the nature of a technical defect, or a scrivener's or otherwise harmless error; see, e. g., *Boisvert* v. *Gavis*, 332 Conn. 115, 122 n.4, 210 A.3d 1 (2019); *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 665, 200 A.3d 681 (2019); and as a matter of law cannot bar the enforcement of the valid mortgage, the terms of which were known and agreed to by both

[3] Both the defendant and Robert signed two documents at the closing: (1) the Transfer of Servicing Disclosure Statement, in which both stated that they understood that their acknowledgements were a "required part of the mortgage loan application;" and (2) the Federal Truth in Lending Statement, which contained the following statement: "You are giving a security interest in certain real property located at 14 Bayne Court, Norwalk, CT, 06851."

parties to the document; see, e.g., *Wiley* v. *London & Lancashire Fire Ins. Co.*, 89 Conn. 35, 43, 92 A. 678 (1914); where JPMorgan Chase's disbursement of $533,000 to or for the benefit of the defendant and Robert is far more than sufficient consideration for Robert's execution of the note and the defendant's agreement to and execution of the mortgage document.

In the context of this case, therefore, I respectfully disagree with the majority's conclusion that, absent a reformation of the mortgage or note, the court is precluded from foreclosing on the mortgage. Under the particular circumstances of this case, the defendant's failure to sign the promissory note executed by Robert did not protect her from a foreclosure of the valid security interest she had granted to JPMorgan Chase in the real property. The trial court and the majority erroneously have concluded that the mortgage fails to expressly refer to any obligation for which the defendant is legally responsible. The appropriate approach in this case is to view the note and mortgage as elements of one transaction; see, e. g., *Wiley* v. *London & Lancashire Fire Ins. Co.*, supra, 89 Conn. 43–44; or alternatively, to view the mortgage from the defendant to JPMorgan Chase as a grant of security, in the nature of a guarantee, for the repayment of Robert's note to JPMorgan Chase.

There are certain fundamental principles underlying both the right of a party to initiate and prosecute a foreclosure action and an action on a guarantee, whether it is secured or unsecured: "Upon a mortgagor's default on an underlying obligation, the mortgagee is entitled to pursue various remedies against the mortgagor including its remedy at law for the amount due on the note, its remedy in equity to foreclose on the mortgage, or both remedies in one consolidated cause of action. . . . To understand who are proper parties when a mortgagee pursues the remedy of foreclosure,

one must recognize that Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property. . . . As the holder of equitable title, also called the equity of redemption, the mortgagor . . . has the right to redeem the legal title on the performance of certain conditions contained within the mortgage instrument. . . . The purpose of the foreclosure is to extinguish the mortgagor's equitable right of redemption that he retained when he granted legal title to his property to the mortgagee following the execution of the mortgage. . . .

"Unlike the equitable nature and aims of foreclosure, a claim on the note at law is grounded in contract, and is enforceable as between the parties to that contract—the debtor and the creditor . . . . Thus, any deficiency judgment sought in connection with the foreclosure arises from the contractual relationship between the parties to the promissory note.

"When payment of a promissory note secured by a mortgage is further protected by a separate guarantee, in addition to the aforementioned potential remedies against the mortgagor, the mortgagee may pursue a claim against the guarantors to recover any of the unpaid debt of the mortgagor. . . . A guarantee is a promise to answer for another's debt, default or failure to perform a contractual obligation. . . . As a contractual obligation separate from the contractual agreement between the lender and borrower, a guarantee imports the existence of two different obligations: the obligation of the borrower and the obligation of the guarantor." (Citations omitted; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 675, 94 A.3d 622 (2014).

It is well established that "a contract of guarant[ee] creates a secondary liability" and, therefore, "a guarantor is not bound to do what the principal has contracted to do but only to answer for the consequences of the default of the principal." (Footnote omitted.) 23 S. Williston, Contracts (4th Ed. 2019) § 61:2; see also *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, supra, 312 Conn. 676 ("a guarantor's liability does not arise from the debt or other obligation secured by the mortgage; rather, it flows from the separate and distinct obligation incurred under the guarantee contract"); *Carpenter* v. *Thompson*, 66 Conn. 457, 464, 34 A. 105 (1895) ("[t]he contract of the guarantor is his own separate undertaking in which the principal does not join" [internal quotation marks omitted]). As such, it has been "recognized that, in the absence of a statute expressly pertaining to guarantors, such secondary obligors are not proper parties to a claim seeking the foreclosure of a mortgage and their obligations are not limited by the extinguishment of the mortgagor's rights and obligations." *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties*, supra, 677. In *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties*, supra, 682–83, our Supreme Court reversed the judgment of this court and concluded that the judgment of strict foreclosure that had been rendered against the mortgagor had no effect on the plaintiff's ability to recover damages from the guarantors for the remaining unpaid debt. Although our Supreme Court determined that the plaintiff mortgagee could not properly make the guarantors parties to the foreclosure claim because they were not parties to the mortgage or the note, it concluded that the guarantors' obligation that separately arose under the guarantee could still be enforced. Id. In the present case, the defendant provided security in connection with, but only to the extent of, her equity in the real property.

The principle that a guarantor may be held liable for an unpaid debt on a promissory note applies to the

particular factual circumstances of the present case. The mortgage document signed by the defendant makes specific reference to the terms of the underlying note, demonstrating her intent that the mortgage operate as her promise to pay in the event of a default by Robert on the terms of the note.[4] Specifically, the document transfers the "Borrower's" rights in the real property to JPMorgan Chase, and its successors in interest. Moreover, the mortgage describes JPMorgan Chase as the "lender" and "mortgagee," which it was at the initiation of the mortgage from the defendant, and sets forth the exact amount of the note obligation. Not only is the mortgage dated the same date as the note, but it also defines itself as the "Security Instrument." Further evidence that the mortgage was intended to provide the plaintiff with a security interest in the defendant's property in the event Robert failed to make payments on the note is contained in the following documents signed by the defendant: (1) the HUD-1 form; (2) the Transfer of Servicing Disclosure Statement where she confirmed that her acknowledgement of that document was part of the mortgage loan application; (3) the Federal Truth in Lending Statement containing details of the loan including that "[you] are giving a security interest in certain real property located at 14 Bayne Court, Norwalk;" and (4) the Notice of Right to Cancel, that set forth, inter alia: "You are entering into a transaction that will result in a mortgage/security interest in your

[4] "Construction of a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally, and to deeds particularly. The primary rule of construction is to ascertain the intention of the parties. This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of their transactions. . . . A promissory note and a mortgage deed are deemed parts of one transaction and must be construed together as such." (Internal quotation marks omitted.) *Webster Bank* v. *Oakley*, 265 Conn. 539, 547, 830 A.2d 139 (2003), cert. denied, 541 U.S. 903, 124 S. Ct. 1603, 158 L. Ed. 2d 244 (2004); *Sunset Mortgage* v. *Agolio*, 109 Conn. App. 198, 202, 952 A.2d 65 (2008).

home. . . . If you cancel the transaction, the mortgage/security interest is also cancelled."

The present case is distinguishable from *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties*, supra, 312 Conn. 662, in that the defendant is the mortgagor of the real property, as well as the guarantor of Robert's note. Nevertheless, this distinction, in addition to the references in the mortgage, the note, and the ancillary documents that demonstrate that the note and mortgage, although signed separately by each party, were designed to be part of the same transaction, supports the position that the defendant, as mortgagor and guarantor, is the proper party defendant in the underlying foreclosure action.

The majority relies on the defendant's failure to sign the promissory note executed by her husband and the mortgage's identification of her as the borrower on the note for the conclusion that without reformation,[5] the mortgage secured a nonexistent debt and, thus, as executed, was a nullity. I disagree and, instead, note that strict compliance with a specific form, statutory or otherwise, is not necessary for the execution of a valid mortgage between parties to a transaction. See *New Orleans National Banking Assn.* v. *Adams*, 109 U.S. 211, 214, 3 S. Ct. 161, 27 L. Ed. 910 (1883) ("no precise

[5] As the majority states, "[a] cause of action for reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other." (Internal quotation marks omitted.) *Lopinto* v. *Haines*, 185 Conn. 527, 531, 441 A.2d 151 (1981). "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties." (Internal quotation marks omitted.) *Kaplan* v. *Scheer*, 182 Conn. App. 488, 502, 190 A.3d 31, cert. denied, 330 Conn. 913, 193 A.3d 49 (2018),

form of words is necessary to constitute a mortgage"); *Harding* v. *Trenor*, 157 F. Supp. 350, 356 (D.N.D. 1957) (standard form for mortgage prescribed by statute "neither mandatory nor exclusive"); *Wolf* v. *Schumacher*, 477 N.W.2d 827, 828 (N.D. 1991) (compliance with standard form for mortgage "not necessary to create a valid mortgage between the parties to a transaction"). Rather, the validity of a mortgage rests on (1) whether there is some evidence that the transaction was intended as a mortgage in consideration for some debt; see *New Orleans National Banking Assn.* v. *Adams*, supra, 214 (to constitute mortgage, "there must be a present purpose of the mortgagor to pledge his land for the payment of a sum of money, or the performance of some other act"), and *Wolf* v. *Schumacher*, supra, 829 (documentary evidence and testimony established that transaction between parties was intended as mortgage and could be enforced as such); and (2) whether the mortgage "provides reasonable notice to third parties of the obligation that is secured." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Esposito*, 210 Conn. 221, 227, 554 A.2d 735 (1989).

Furthermore, a mortgage that is not properly executed or contains technical defects may be enforced through equity. See *Ketchum* v. *St. Louis*, 101 U.S. 306, 317, 25 L. Ed. 999 (1879) ("It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim . . . . In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds, and contracts, which are wanting in one or both of these characteristics of a common-law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they

shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions." [Citation omitted; internal quotation marks omitted.]); *Union Planters Bank, N.A.* v. *New York*, 988 So. 2d 1007, 1011 (Ala. 2008) ("[w]hen a mortgage is invalid due to a technical defect, equity will give effect to the intent of the parties according to the substance of the transaction" [internal quotation marks omitted]). It is also well established that "[e]rrors and omissions in the recorded mortgage that would not mislead a title searcher as to the true nature of the secured obligation do not affect the validity of the mortgage against third parties." (Internal quotation marks omitted.) *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 702, 960 A.2d 563 (2008); *Dart & Bogue Co.* v. *Slosberg*, 202 Conn. 566, 581, 522 A.2d 763 (1987) ("[F]ailure to state the maximum term of a promissory note . . . does not, of itself, render a mortgage invalid. . . . [A] mortgage need not set forth all of the terms of the underlying obligation provided that it gives notice of the nature and amount of the obligation, so that subsequent lien creditors are not misled." [Citations omitted.]).

In the present case, there is no dispute that the mortgage was properly recorded in the land records, although as between the parties, that is not necessary to its validity. *Wiley* v. *London & Lancashire Fire Ins. Co.*, supra, 89 Conn. 45 ("[t]he deed, when delivered and accepted, is good between the parties, irrespective of the date of its record, and when the title of the grantee is in issue, and the rights of no one are prejudiced by the failure to record, that title is to be determined for all purposes by the fact of title, and not by the record evidence of it"). Thus, although the mortgage contained an inaccuracy by describing the defendant as the "Borrower" and as the maker of the note, this did not undermine the validity of the mortgage between the parties. In this case, the mortgage also provided reasonable

notice[6] to any third party that it secured a debt for the amount listed. Moreover, as previously discussed, the references in the mortgage and note to each other demonstrate that they were designed to be part of the same transaction. When read together, the mortgage and the note clearly establish that the consideration for the mortgage was the amount of $533,000 made available by JPMorgan Chase to Robert, approximately $370,000 of which was used to pay off and release encumbrances on the defendant's real property, and the rest for making improvements to the defendant's real property or for Robert's personal use. Accordingly, I conclude that the trial court erred as a matter of law in failing to view the mortgage on the defendant's real property as a valid mortgage, or, more generally, as the defendant's guarantee to answer for any default by Robert pursuant to the terms of the note.

I also conclude that, to the extent it is necessary to consider the equities of this matter, they clearly favor the plaintiff, the successor to JPMorgan Chase. The defendant and Robert clearly benefitted from the $533,000 they received from JPMorgan Chase, and there is nothing in the record to provide the defendant with any equitable or legal defense to the plaintiff's foreclosure of the mortgage.[7]

[6] "Reasonable notice" is defined as "notice of the nature and amount of the encumbrance which the mortgagor intends to place upon the land." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Esposito*, supra, 210 Conn. 228.

[7] Reformation of a document is ordinarily the appropriate equitable remedy in circumstances such as an unknown mutual mistake. See *Lopinto* v. *Haines*, supra, 185 Conn. 532 ("The remedy of reformation is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction. . . . In short, the mistake, being common to both parties, effects a result which neither intended." [Citations omitted; internal quotation marks omitted.]); *Deutsche Bank National Trust Co.* v. *Perez*, 146 Conn. App. 833, 839, 80 A.3d 910 (2013) ("[t]he relief afforded in reforming an instrument is to make it conform to the previous agreement of the parties"), appeal dismissed, 315 Conn. 542, 109 A.3d 452

For the foregoing reasons, I would reverse the judgment and remand the case to the trial court with direction to proceed on the first count of the plaintiff's complaint for foreclosure of the mortgage on the defendant's real property.

STATE OF CONNECTICUT *v.* JAMAAL COLTHERST (AC 40828)

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

Syllabus

The defendant, who had been convicted of capital felony, murder, felony murder, kidnapping in the first degree, robbery in the first degree, robbery in the second degree, larceny in the first degree, conspiracy to commit kidnapping in the first degree, and larceny in the fourth degree, appealed to this court challenging the sentence imposed by the trial court following the court's granting of his motion to correct an illegal sentence. The defendant initially had been sentenced to life imprisonment without the possibility of release followed by seventy-one years of imprisonment. Subsequently, our legislature enacted No. 15-84 of the 2015 Public Acts, which ensures that all juveniles who are sentenced to more than ten years of imprisonment are eligible for parole. The trial court thereafter granted the defendant's motion to correct an illegal sentence and, following a resentencing hearing, sentenced the defendant to a total effective sentence of eighty years of incarceration, noting that he would be eligible for parole after a meaningful period of time. On appeal to this court, the defendant claimed that the trial court improperly failed, pursuant to statute (§ 54-91g), to account adequately for his youth at the time he committed the underlying crimes and improperly afforded him an opportunity to provide additional remarks to the court in violation of his rights to counsel, due process and allocution. *Held*:

(2015). I do not write separately on the ground of reformation, however, because the particular factual circumstances of this case do not require reformation of the note or mortgage, given the substance of the transaction created by the defendant and Robert, upon which the plaintiff relied. Simply put, the defendant was aware of the nature and consequences of her transaction with JPMorgan Chase, and an unnecessarily strict adherence to the concept of documentary perfection should not shield her from her resulting obligation to JPMorgan Chase and its successors, into which she knowingly and voluntarily entered.

1. The trial court properly resentenced the defendant: § 54-91g does not create a presumption against the imposition of a sentence of life imprisonment on a juvenile defendant, and the trial court was not required to make a finding that the defendant was incorrigible, irreparably corrupt, or irretrievably depraved before it properly could sentence him to life imprisonment or its equivalent, as the defendant was granted the eligibility of parole in his resentencing; moreover, the trial court's sentence was supported by the record from the resentencing hearing and the court adequately considered the factors set forth in § 54-91g, as the court considered the defendant's age, environment, criminal history and family and home environment at the time of the crimes, as well as a personality functioning test of the defendant administered by a clinical neuropsychologist and evidence concerning adolescent brain development, and the court's sentence afforded the defendant an opportunity of parole.
2. The defendant's claim that the trial court, at the resentencing hearing, improperly afforded him an opportunity to provide the court with a lengthier statement than he had provided initially was unavailing: that court afforded the defendant ample opportunity to provide a personal statement on his own behalf before being resentenced and did not interfere with the attorney-client relationship, as the defendant was afforded an opportunity to address the trial court and free to elect not to provide any statement, and the court did not force him to provide any remarks, nor was he coerced into addressing the court or induced to reveal privileged attorney-client communications; moreover, the defendant's claim that the court's invitation to him to provide additional remarks violated his rights to allocution and due process was not reviewable, the defendant having failed to brief the claim adequately.

Argued May 15—officially released September 17, 2019

Procedural History

Substitute information charging the defendant with the crimes of capital felony, murder, felony murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, robbery in the first degree, robbery in the second degree, larceny in the first degree and larceny in the fourth degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mulcahy*, *J.*; verdict and judgment of guilty; thereafter, the defendant appealed to the Supreme Court, which affirmed his conviction; subsequently, the court, *Dewey*, *J.*, granted the defendant's motion to correct an illegal sentence and resentenced the defendant, and the defendant appealed to this court. *Affirmed.*

Michael W. Brown, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Vicki Melchiorre*, supervisory assistant state's attorney, for the appellee (state).

Opinion

LAVERY, J. The defendant, Jamaal Coltherst, appeals from the judgment of the trial court resentencing him for crimes which he had committed when he was seventeen years old. The defendant claims that the court improperly (1) failed, pursuant to General Statutes § 54-91g,[1] to account adequately for the defendant's youth at the time he committed the underlying crimes, and

[1] General Statutes § 54-91g provides: "(a) If the case of a child, as defined in section 46b-120, is transferred to the regular criminal docket of the Superior Court pursuant to section 46b-127 and the child is convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall:

"(1) Consider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development; and

"(2) Consider, if the court proposes to sentence the child to a lengthy sentence under which it is likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence.

"(b) Notwithstanding the provisions of section 54-91a, no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony. Any presentence report prepared with respect to a child convicted of a class A or B felony shall address the factors set forth in subparagraphs (A) to (D), inclusive, of subdivision (1) of subsection (a) of this section.

"(c) Whenever a child is sentenced pursuant to subsection (a) of this section, the court shall indicate the maximum period of incarceration that may apply to the child and whether the child may be eligible to apply for release on parole pursuant to subdivision (1) of subsection (f) of section 54-125a.

"(d) The Court Support Services Division of the Judicial Branch shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section."

(2) afforded the defendant an opportunity to provide additional remarks to the court, in violation of his rights to counsel, due process, and allocution. We affirm the judgment of the trial court.

The following facts, as set forth by our Supreme Court in its decision affirming the defendant's underlying criminal convictions, are relevant to this appeal: "On the morning of October 15, 1999, the defendant was released from the Manson Youth Institute, a correctional institution located in Cheshire, where he had been incarcerated for violating probation after having been convicted on charges of assault in the third degree. His mother and his grandfather picked him up at the institute and drove him to their house on Plain Drive in East Hartford. At some point during the day, a friend of the defendant, Jamarie Cole, came by to visit. The defendant and Cole were sitting outside together when, at about 3 p.m., another of the defendant's friends, Carl Johnson, came up to them. Johnson indicated that he was going to 'do something' that night. The defendant understood Johnson to mean that he was going to rob someone. Johnson told the defendant that he would meet him later and left.

"At approximately 6:30 p.m., Johnson returned to the defendant's house. Johnson was riding a mountain bike and carrying a bike for the defendant to ride. The defendant, seeing that Johnson was dressed entirely in black, went to his room and changed into black clothes. Johnson and the defendant then rode the bicycles to a parking lot near the defendant's house, where the defendant asked Johnson to show him the gun that Johnson previously had indicated he would be carrying. Johnson showed him a black .22 caliber pistol and let him hold it. They then proceeded to an exotic dance club known as Kahoots, located on Main Street in East Hartford, arriving at approximately 7:30 p.m. They parked the bicycles in the bushes behind the club and then walked

around the parking lot to identify cars that they might want to carjack.

"The defendant and Johnson previously had discussed how they would commit the carjacking. Their plan was to approach the first person who came out of the club, at which point Johnson would point the gun at the person's head and demand the car keys. The defendant would take the keys, and the defendant and Johnson would force the person into the car. They would then drive to a place far away from any telephones or cars and leave the person there. Johnson told the defendant that he had rope and tape in his backpack if they needed to restrain the person.

"The defendant and Johnson identified approximately three desirable cars in the Kahoots parking lot, but they decided to leave because it was early and they knew that people would not be leaving the club until later. At that point they rode down Main Street to the Triple A Diner, where they continued to look for cars to carjack. They determined that the diner was too busy for them to commit a robbery without being seen. They then rode their bicycles across the street to Dunkin Donuts, where they had seen a Lexus automobile in the parking lot. They hid in the bushes near the car but left after waiting for about one-half hour for the owner of the car to come out.

"The defendant and Johnson then returned to Kahoots, arriving at approximately 9 p.m. They hid their bicycles behind the Rent-A-Wreck building located next to the club. They saw a 1999 Toyota 4Runner parked in the Rent-A-Wreck parking lot and waited there for the driver to return so that they could carjack the car. While they were waiting, a black Honda Accord pulled up behind Rent-A-Wreck. The driver, later identified as Kyle Holden (victim), exited the car and went into Kahoots. Some time later, when the victim came out

of Kahoots and headed toward his car, the defendant and Johnson ran up to him. Johnson pointed his gun at the victim's head and demanded the keys to the car. The defendant took them. Johnson then gave the gun to the defendant and took the keys himself. Johnson and the defendant forced the victim into the backseat of the car, where the defendant joined him. They then drove to an automatic teller machine (ATM) located next to the Triple A Diner. The defendant took the victim's wallet, removed his ATM card and demanded the victim's personal identification number. The defendant [then] gave the card to Johnson, who used it to withdraw money from the ATM.

"Johnson then drove to a nearby entrance ramp for Interstate 84, where he pulled over to the side of the road. The defendant and Johnson got out of the car, and the defendant gave the gun to Johnson. Johnson then ordered the victim to get out of the car. The victim went to the far side of the guardrail, where he sat down. The defendant removed the victim's belongings from the car and then got back into the car's passenger side seat. At that point, the defendant saw Johnson shoot the victim at point blank range in the back of the head. The victim died within seconds. Johnson then got back into the car. The defendant asked him why he had shot the victim, and Johnson said that he did not want any witnesses. Johnson had been wearing a pair of black gloves, which he placed in the car's glove compartment.

"Over the next eight days, the defendant and Johnson continued to use the car. Bank transaction records showed that, on October 16, 1999, the victim's ATM card was used at an ATM machine located on Park Avenue in Bloomfield to make three separate withdrawals from the victim's checking account, for a total of $280. A surveillance camera at that ATM machine photographed Johnson and the defendant in the victim's car as they made the withdrawals.

"Meanwhile, on October 16, 1999, East Hartford police officer Gerard Scagliola was on patrol in East Hartford when he noticed the victim's car being operated in what he considered to be a suspicious manner. He entered the car's license plate number into his cruiser's computerized search system, which revealed no irregularities. On October 19, 1999, the Avon police department received a report that the victim, who had been a resident of Avon, was missing. During their investigation, the Avon police learned of Scagliola's computer inquiry and focused their search for the victim and his car on the area of East Hartford where Scagliola had seen the car. On October 24, 1999, Sergeant Robert Whitty of the Avon police department was patrolling in East Hartford in connection with the investigation when he saw a black Honda matching the description of the victim's car. Whitty, who was in an unmarked car, followed the Honda and used a cell phone to call the East Hartford police department to request additional police officers. The Honda pulled into a parking lot on Plain Drive. Whitty pulled up behind it, exited his car and identified himself as a police officer. Four individuals, ultimately identified as Johnson, the defendant, Rashad Smith and Damion Kelly, emerged from the Honda. Whitty drew his service revolver and ordered the four individuals to lie in a prone position behind the Honda. The East Hartford police arrived within approximately one minute and arrested the four individuals.

"In the hours following his arrest, the defendant gave the police several inconsistent statements concerning his involvement in the crimes. At trial he testified and denied any involvement. He claimed that the police had fabricated the statements and that he had signed them without reading them.

"After a jury trial, the defendant was convicted of capital felony, murder, felony murder, kidnapping in the first degree, robbery in the first degree, robbery in

the second degree, larceny in the first degree, conspiracy to commit kidnapping in the first degree, and larceny in the fourth degree. The trial court merged the convictions of capital felony, murder, felony murder and kidnapping in the first degree and imposed a sentence of life imprisonment without the possibility of release on the capital felony count, twenty years imprisonment on the count of robbery in the first degree, ten years imprisonment on the count of robbery in the second degree, twenty years imprisonment on the count of larceny in the first degree, twenty years imprisonment on the count of conspiracy to commit kidnapping in the first degree, and one year imprisonment on the count of larceny in the fourth degree, all to be served consecutively to the sentence of life imprisonment, for a total effective sentence of life imprisonment without the possibility of release followed by seventy-one years imprisonment."[2] (Footnote omitted.) *State* v. *Coltherst*,

[2] The defendant also was found guilty and sentenced separately in connection with his involvement in crimes committed against a second individual, Michael Clarke, which events occurred four days after the defendant was involved in the murder of the victim. The jury reasonably could have found the following facts, as set forth by this court in an earlier appeal: "On October 19, 1999, the defendant, Carl Johnson and Rashad Smith were sitting in a stolen black Honda Accord near 85 Wolcott Hill Road in Wethersfield. The trio had smoked marijuana. Sometime after darkness fell, [Clarke] returned to Camilleri and Clarke Associates, Inc., the insurance brokerage firm located there, of which he was an owner. He had left his motor vehicle, a black Lincoln Mark VIII valued at approximately $28,000, in the firm's parking lot. After [Clarke] had been in the building for some time, his dog began to bark, and so [Clarke] went outside. After [Clarke] left the building, he was accosted by the defendant and Johnson. The defendant wore a red sweatshirt or parka. [Clarke] was instructed to turn over the keys to his vehicle. One of the men pointed a gun at [Clarke], and told him to go back into the building and to his office.

"In the office, while one of the men continued to point the gun at [Clarke], the other held [Clarke]. The defendant and Johnson took [Clarke's] laptop computer and credit card. They threatened [Clarke] and ordered him to provide the access code for the card so that they could use it to obtain cash. Johnson took the computer while the defendant took the credit card. The defendant and Johnson stated that they were going to take [Clarke] to the car, and after he protested and resisted, he was struck twice in the face with the gun. [Clarke] was pushed outside, continued to struggle with the

263 Conn. 478, 483–88, 820 A.2d 1024 (2003). After the defendant was sentenced, he appealed his conviction on several grounds. Id., 482–83. Our Supreme Court affirmed his conviction. Id., 524.

Subsequently, our legislature enacted No. 15-84 of the 2015 Public Acts (P.A. 15-84). "Section 1 of P.A. 15-84, codified at [General Statutes] § 54-125a, ensures that

two men and broke away from them before being forced into the car. [Clarke] started to flee and called out for help, but was soon tackled by Johnson. [Clarke] then struggled with the defendant, who took out a .22 caliber Beretta and shot [Clarke] in the head. The defendant and Johnson fled the scene in [Clarke's] Lincoln while Smith drove the Honda Accord.

"Oscar Rivera, a Wethersfield police officer, arrived at the scene after being notified of the assault. He found [Clarke] lying on the ground in the parking lot, which was otherwise empty. At that time, [Clarke] was responsive, but had suffered visible injuries. Medical [personnel] subsequently transferred [Clarke] to Hartford Hospital for treatment. [Clarke] was hospitalized for nine to ten days and then was transferred to a rehabilitation facility for an additional seven weeks of therapy.

"Leslie Higgins, an employee of United States Automobile Association, the company that issued [Clarke's] credit card, testified that on the night of the shooting, there were several attempts at various automatic teller machines to obtain cash with the card taken by the defendant. The first three attempts were declined due to an incorrect access code, and the fourth failed as a result of an automatic lock out due to the previous incorrect access codes. Higgins further testified that [Clarke's] card was used on October 21, 1999, to make several purchases, totaling seven hundred dollars, at various stores in Manchester. Eventually, a hold was placed on the account due to suspected fraudulent activity.

"On October 24, 1999, Sergeant Robert Whitty of the Avon police department stopped a black Honda Accord carrying the defendant, Johnson, Smith and Damion Kelly. A search of the vehicle revealed [Clarke's] credit card, credit card receipts that matched [Clarke's] credit card, items purchased with [Clarke's] credit card and a .22 caliber bullet that subsequently was determined to have been of the same caliber used in the shooting. Additionally, after searching the defendant's residence, the police recovered a pair of the defendant's boots that were stained with [Clarke's] blood, a computer case containing [Clarke's] business card and a red jacket.

"The defendant subsequently was arrested, tried before the jury and convicted on all of the fifteen counts with which he had been charged." (Footnotes omitted.) *State* v. *Coltherst*, 87 Conn. App. 93, 96–99, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005). Well after his conviction, the defendant filed a motion to correct an illegal sentence in that case, asserting that his sentence constituted cruel and unusual punishment under the eighth amendment. On December 7, 2017, the motion was dismissed by the trial court. The defendant, again, appealed and this court has stayed that case pending the resolution of our Supreme Court's decisions in *State* v. *Williams-Bey*, SC 19954, and *State* v. *McCleese*, SC 20081.

all juveniles who are sentenced to more than ten years imprisonment are eligible for parole. Section 2 of P.A. 15-84, codified as amended at . . . § 54-91g, requires a sentencing judge to consider a juvenile's age and any youth related mitigating factors before imposing a sentence following a juvenile's conviction of any class A or class B felony."[3] *State* v. *Riley* 190 Conn. App. 1, 21, 209 A.3d 646 (2019). On the basis of § 54-91g, the defendant filed a motion to correct his initial sentence with the Superior Court, which the court granted on May 23, 2017.

Resentencing was held on May 23, 2017. The defendant presented expert testimony regarding the brain science of juveniles, as well as an independent psychiatric evaluation of the defendant's history in prison, present maturity, developmental status, and his capacity for rehabilitation.

The court resentenced the defendant to a total effective sentence of eighty years incarceration, noting that he would be eligible for parole after a meaningful period of time.[4] This appeal followed. Additional facts and procedural history will be set forth as needed.

I

The defendant claims that the court, in resentencing him, did not adequately account for his youth at the

[3] General Statutes § 54-91g (a) provides, in relevant part, that a court shall "(1) [c]onsider, in addition to any other information relevant to sentencing, the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development" and shall "(2) [c]onsider, if the court proposes to sentence the child to a lengthy sentence under which is it likely that the child will die while incarcerated, how the scientific and psychological evidence described in subdivision (1) of this subsection counsels against such a sentence."

[4] This sentence was in addition to the sentence that was imposed by the trial court in regard to the crimes committed against Michael Clarke. See footnote 2 of this opinion.

time he had committed the underlying crimes. He contends that § 54-91g creates a presumption against the imposition of a sentence of life imprisonment on a juvenile defendant, and that the court's sentence was not supported by the record from the resentencing hearing and did not comport with § 54-91g. The state counters that the court's resentencing was proper. We agree with the state.

Addressing the defendant's claim requires us to determine whether the sentencing court properly resentenced the defendant and also requires us to interpret § 54-91g. "[A] trial court has wide discretion to tailor a just sentence in order to fit a particular defendant and his crimes, as long as the final sentence falls within the statutory limits." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 34, 40, 111 A.3d 447 (2015). Whether the court properly applied § 54-91g presents a question of statutory interpretation over which our review is plenary. *State* v. *Riley*, supra, 190 Conn. App. 23; see also *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 355, 63 A.3d 940 (2013) ("[t]he interpretation of a statute presents a question of law over which our review is plenary").

The following additional facts are relevant. At his resentencing hearing, the defendant presented testimony from several individuals, including his friend Michael Russell, and David Lovejoy, a clinical neuropsychologist. Russell testified that the defendant grew up in a "pretty rough environment." Russell recalled an incident in which he and the defendant were shot at while they were in a park. Furthermore, Russell testified that the defendant's mother frequently was absent, resulting in the defendant befriending poor role models.

Additionally, the court heard testimony from Lovejoy, a clinical neuropsychologist who "specialize[s] in brain behavioral relationships . . . [and who] evaluate[s]

individuals where there are questions of psychiatric impairment . . . questions of adjustment, [and] questions of cognitive [ability] . . . .'' Lovejoy testified that he administered ''a number of cognitive tests'' to the defendant, including an intelligence test, a separate test that ''look[s] at higher-order problem solving, mental flexibility, [and] the ability to inhibit impulsivity,'' and a personality functioning test referred to as the Psychopathic Personality Inventory. Through these tests, Lovejoy concluded that the defendant ''falls within the average range in terms of his IQ, his ability to solve verbal problems as well as nonverbal problems, his ability to think on his feet are all perfectly intact. The test that emphasized impulsivity and his ability to control impulsivity fell within normal limits . . . . The Psychopathic Personality Inventory largely fell within normal limits . . . . There was a spike with regard to one, and that was externalization of blame, the tendency to . . . blame others for your situation.'' On cross-examination, Lovejoy acknowledged that his evaluation was not performed until seventeen and one-half years after the crime and further acknowledged that it is preferable to evaluate someone as close in point of time to the crime as possible, which did not happen in this case. The court, after considering this evidence and identifying which factors it considered, rendered an oral decision and sentenced the defendant to a total effective term of eighty years incarceration.

We next turn to the relevant legal principles that govern our analysis. At the outset, we note that the United States Supreme Court has decided three cases that have ''fundamentally altered the legal landscape for the sentencing of juvenile offenders to comport with the ban on cruel and unusual punishment under the eighth amendment to the federal constitution. The court first barred capital punishment for all juvenile offenders; *Roper* v. *Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183,

161 L. Ed. 2d 1 (2005); and then barred life imprisonment without the possibility of parole for juvenile nonhomicide offenders. *Graham* v. *Florida*, 560 U.S. 48, [82], 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Most recently, in *Miller* v. *Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the court held that mandatory sentencing schemes that impose a term of life imprisonment without parole on juvenile homicide offenders, thus precluding consideration of the offender's youth as mitigating against such a severe punishment, violate the principle of proportionate punishment under the eighth amendment." (Footnote omitted.) *State* v. *Riley*, 315 Conn. 637, 640, 110 A.3d 1205 (2015), cert. denied, U.S. , 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016). *Miller* requires courts, when sentencing juveniles, to take into account, among other things, a defendant's "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," and family and home environment. *Miller* v. *Alabama*, supra, 477. In a subsequent decision, the Supreme Court extended the holding in *Miller* retroactively, ensuring that juveniles who were convicted prior to *Miller* obtain the benefit of that judgment. *Montgomery* v. *Louisiana*, U.S. , 136 S. Ct. 718, 729, 193 L. Ed. 2d 599 (2016). Our legislature enacted P.A. 15-84, which is codified at §§ 54-125a and 54-91g, in response to *Roper*, *Graham*, and *Miller*.

In light of the evidence presented at the defendant's resentencing hearing, the defendant first argues that he is entitled to a presumption against the imposition of a life sentence or its equivalent because the court did not conclude that he was "irreparably corrupt." The defendant mistakenly reads § 54-91g to create a presumption against the imposition of a life sentence for juveniles. He contends that this presumption is consistent with *Miller* and *Montgomery*, and with nonbinding precedent from other jurisdictions. Accordingly, the

defendant argues that the court was required to find that the defendant was "the rare juvenile offender whose crime reflects irreparable corruption"; (internal quotation marks omitted.) *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 734; before it properly could sentence him to life imprisonment or its equivalent.

This court recently disposed of an identical argument in *State* v. *Riley*, supra, 190 Conn. App. 1. In that case, the defendant, who was convicted of murder and other crimes when he was seventeen, appealed from the judgment of the trial court following his resentencing to a term of seventy years imprisonment. Id., 4. The defendant argued that § 54-91g created a presumption against imposing a life sentence for juveniles and that the court was required to overcome this presumption by finding that the defendant was "incorrigible, irreparably corrupt, or irretrievably depraved" before it properly could impose such a sentence. (Internal quotation marks omitted.) Id., 17. This court determined that no such finding was required, holding that "[a]lthough the defendant asserts that [§ 54-91g] creates a presumption against the imposition of a life sentence and requires a finding that the juvenile being sentenced is 'permanently incorrigible, irreparably corrupt, or irretrievably depraved' in order to overcome that presumption, our review of the statute reveals no language to support the defendant's contention." Id., 28.

"The plain and unambiguous language of [§ 54-91g] makes clear what a court must consider when sentencing a child convicted of an A or B felony. . . . [T]he sentencing court was required to *consider* only how the scientific and psychological evidence described in . . . [§ 54-91g (a)] counsels against [imposition of a life sentence]." (Emphasis in original; internal quotation marks omitted.) Id.

Riley cited to our Supreme Court's decision in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016), which

held that once a defendant was given the eligibility for parole, the eighth amendment requirements set forth in *Miller* did not apply. Id., 811–12. "Following the enactment of P.A. 15-84 . . . the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or its equivalent, without parole. The eighth amendment as interpreted by *Miller*, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. . . . Rather, under *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, *without* parole." (Citation omitted; emphasis in original.) Id., 810–11. Applying the court's decision in *Delgado*, *Riley* held that the sentencing court was not required to make any particular finding that the defendant was incorrigible, irreparably corrupt, or irretrievably depraved before resentencing him because he was eligible for parole after thirty years. *State* v. *Riley*, supra, 190 Conn. App. 26.

We are bound by this court's decision in *Riley*. See id., 25 ("[b]ecause [our Supreme Court's] discussion about overcoming presumptions referred only to mandatory or discretionary life without parole sentences, the fact that the defendant no longer faced a life sentence without the opportunity of parole at the time of his resentencing rendered this aspect of *Riley* inapplicable to the defendant at the time of resentencing"). Like the defendant in *Riley*, the defendant in the present case was granted the eligibility of parole. Therefore, we reject the defendant's argument that § 54-91g creates a presumption against the imposition of a sentence of life imprisonment on a juvenile defendant, and that the court was required to make a finding that the defendant

was incorrigible, irreparably corrupt, or irretrievably depraved.

We next turn to the second part of the defendant's argument, namely, whether the court's sentence was inconsistent with the record from the resentencing hearing and with § 54-91g. We conclude that the court adequately considered the factors set forth in § 54-91g.

At the outset of sentencing, the court noted its responsibility in considering the factors set forth in *Miller* and § 54-91g. Before sentencing the defendant, the court stated: "[I am] cognizant of the need for consideration of his age, of his social factors at the time, of his impulsive nature at the time, of the environment he lived in at the time, of his educational status at the time. But I have to sentence based upon not only that but the crime that occurred."

The court first addressed scientific factors regarding the difference between adult and adolescent brains, indicating: "I absolutely accept the fact that adolescent brains mature at a slower rate. And there are questions about where age maturity is and that adolescent brains aren't necessarily mature, and some adolescents are impulsive; meaning, that adolescents can't be treated as adults for eighth amendment purposes. . . . Under the case law I need to impose a realistic opportunity for this individual to obtain release and cannot make a judgment that he's totally incorrigible."

The court further acknowledged that because each individual is different, it was difficult to compare the scientific articles and testimony presented at resentencing with the facts of this case. The court noted: "It's hard to say, especially after seventeen years, whether this individual was himself more or less mature at the time of the event. . . . [T]he risk taking that the articles talk about is self-absorption, privacy issues, mood swings, unique dress, escapism, and they call it risky

behavior such as drugs and sex, impulsive acts. The articles don't talk about murder, kidnapping, and robbery." The court further noted that seventeen year olds typically do not commit murder and robbery.

The court then turned to the evidence it was presented from scholarly articles and the testimony of Lovejoy as to adolescent brain development.[5] The court noted that the defendant did not act impulsively in carrying out the crime: "It was not a spontaneous action; it was a planned event. It wasn't the result of impulsiveness; it took several hours from the initiation of the plan to the actual culmination with a murder." The court also noted that the defendant had been convicted of a second crime that also was not carried out impulsively: "[I]t's difficult to reconcile impulsive behavior or the notion of impulsive conduct with the fact that Michael Clarke was attacked four days later, again planned, again a carjacking."[6] The court acknowledged that the defendant's brain might not have been fully developed at the time the defendant committed the crimes, but noted that this was not an excuse for the defendant's conduct: "[The defendant's] brain at the time may or may not have been developed, that's true of a lot of adolescents . . . . But the vast majority of adolescents do not engage in any type of criminal conduct at all, much less murder and kidnapping." The court, therefore, understood the defendant's criminal activity as "more than adolescent impulsiveness. [It was] just plain mean."

The court then considered the defendant's family and home environment at the time of the crimes. The court acknowledged that the defendant had a difficult childhood, as he lived in a neighborhood that was beset with

[5] The court acknowledged the neuropsychological report that was presented at the hearing and concluded that it contained similar arguments that were set forth in the scholarly materials, which were provided to the court.

[6] See footnote 3 of this opinion.

drugs and violence. The court, however, noted that this factor only applied until the defendant was ten years of age, at which time he moved to a safer neighborhood.[7]

Lastly, the court considered the Psychopathic Personality Inventory of the defendant by Lovejoy, which revealed the defendant's tendency to externalize his actions, or in other words, blame his actions on another individuals. Specifically, the court focused on the fact that the defendant still blamed the murder on Carl Johnson.[8] The court was concerned that it was not apparent that the defendant "gained any real insight as to the seriousness of what he did and the real impact on the victims."

We conclude that the court considered the factors set forth under § 54-91g. The court considered the defendant's age, environment, criminal history, and Psychopathic Personality Inventory. Additionally, the court's sentence afforded the defendant an opportunity of parole. We, therefore, conclude that the defendant properly was resentenced by the trial court.

II

The defendant additionally claims that the court, at the resentencing hearing, improperly afforded him an opportunity to provide the court with a lengthier statement than he had provided initially. The defendant contends that the court knew that affording him that opportunity was contrary to his counsel's advice and also could have induced him to disclose confidential attorney-client communications in violation of his right to due process, counsel, and allocution. The defendant's

[7] The court referred to letters that it received at resentencing, asserting that after the defendant moved to East Hartford he was surrounded by "good families . . . good friends, [and a] good neighborhood."

[8] The defendant stated, per the presentence investigation report: "I wasn't the one that pulled the trigger; I didn't kill your son. I'm sorry for what happened to your son. No one should be subjected to dying like that. I have changed tremendously; I value life now."

claims as to due process and allocution, however, are inadequately briefed and, therefore, do not merit our review. His claim as to right to counsel is meritless.

The following additional facts are pertinent to this issue. The court afforded the defendant an opportunity to address the court before being resentenced. The defendant indicated that in light of his understanding that he would have a limited time to address the court, he planned to offer a summary of the complete remarks he wished to deliver. The court clarified that it was not imposing a time limitation on the defendant and invited him to "[s]ay whatever you want to say. . . . I'm not going to restrict you."

The defendant then addressed the court while referencing a statement that he had prepared with his counsel. When the defendant finished his statement, the court reiterated that there was no time limitation and asked the defendant whether he wished to provide any further statement to the court. The defendant responded that he "had a whole different . . . speech" that he wanted to present, but that he elected to provide a brief statement, per his counsel's advice. The court reiterated: "[T]here was never any restriction on the time today. I don't know why there was even that impression, counsel." The court then invited the defendant to "tell [the court] what you want to tell me right now . . . ."

In response, defense counsel indicated that he advised the defendant to provide a brief statement so as not to risk revealing privileged attorney-client communications. Defense counsel further stated that his recommendation to provide a brief statement was based on strategy, and was not based on any perceived time limitation.[9] The court then responded that it would take

[9] "[Defense Counsel]: I don't want to get into the conversations I had with my client, but it wasn't based on you not allowing it. It was based on a strategic decision that I'm very uncomfortable with discussing at this point."

a brief recess at which time the defendant would have an opportunity to "write down whatever else he wishe[d] to tell [the court]." Defense counsel responded "[t]hank you" before the court took recess.

When the proceeding resumed, the defendant expressed his desire to provide a lengthier statement to the court. To this, defense counsel indicated that the defendant's decision to provide a lengthier statement was contrary to the previous advice defense counsel had given him. The court informed the defendant that he was permitted to "present whatever he wishes." The defendant then provided a lengthier statement to the court.

The defendant now argues that the court's invitation to provide additional remarks infringed upon his rights to allocution, due process, and counsel. We first note that although the defendant, in his brief, expresses concern that the court infringed upon his rights to allocution and to due process, he does not brief those matters beyond a bare assertion. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief." (Internal quotation marks omitted.) *Bushy* v. *Forster*, 50 Conn. App. 233, 236, 718 A.2d 968, cert. denied, 247 Conn. 944, 723 A.2d 321 (1998) (citing *Connecticut National Bank* v. *Giacomi*, 242 Conn. 17, 44–45, 699 A.2d 101 [1997]). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *State* v. *Diaz*, 94 Conn. App. 582, 593, 893 A.2d 495, cert. denied, 280 Conn. 901, 907 A.2d 91 (2006). Accordingly, the defendant's claimed violations as to allocution and due process do not merit our review.

We apply a de novo standard of review to the defendant's sixth amendment claim. *State* v. *Leconte*, 320

Conn. 500, 507, 131 A.3d 1132 (2016). The defendant essentially argues that the court's invitation to provide additional remarks undermined his counsel's advice to provide a brief statement so as not to risk revealing confidential attorney-client communications. The defendant, however, provides us with no authority to support this argument. Moreover, Practice Book § 43-10 (3) instructs that "[t]he judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence." Our Practice Book, therefore, belies the defendant's argument.

At oral argument before this court, defense counsel acknowledged that the defendant was afforded an opportunity to address the court and conceded that the defendant was free to elect not to provide any statement, as the court did not force the defendant to provide any remarks. Defense counsel's concession undermines his argument that the court induced the defendant to reveal privileged attorney-client communications. Although the defendant, in his brief, indicates that the court's invitation to provide a lengthier statement resulted in his "expos[ing] to the sentencing court that counsel had assisted the defendant in refining the statement that he chose to present to the court" and that the court's instruction directly contravened his counsel's advice, the defendant was not coerced into addressing the court whatsoever. We conclude that the court afforded the defendant ample opportunity to provide a personal statement on his own behalf before being resentenced, and, additionally, conclude that the court did not interfere with the attorney-client relationship.

The judgment is affirmed.

In this opinion the other judges concurred.

DANIEL REALE ET AL. *v.* STATE OF RHODE ISLAND ET AL.
(AC 42044)

Keller, Elgo and Harper, Js.

Syllabus

The plaintiff, a Connecticut resident, brought a spoliation of evidence action against certain Rhode Island state and town defendants in connection with certain neglect petitions commenced against him in Rhode Island. The defendants moved to dismiss or, in the alternative, to strike the plaintiff's complaint. The trial court granted the defendants' motions to dismiss for lack of personal jurisdiction. On appeal to this court, the plaintiff claimed that the trial court erred in determining that the defendants did not waive their right to seek dismissal for lack of personal jurisdiction by concurrently moving to strike the plaintiff's complaint as an alternative to dismissal, and that the court improperly granted the defendants' motions to dismiss on the ground of a lack of personal jurisdiction. *Held*:

1. The trial court properly dismissed the claims against the state defendants, as they were barred by the doctrine of sovereign immunity; during the pendency of the appeal, the United States Supreme Court held that states retain their sovereign immunity from private actions brought in the courts of other states, and, thus, under the doctrine of sovereign immunity, the state defendants were immune from suit brought by the plaintiff in Connecticut.
2. The trial court properly exercised its discretion to allow the town defendant to file a motion to dismiss and a motion to strike simultaneously; this court has determined previously that a trial court has discretion to overlook the simultaneous filing of a motion to dismiss and a motion to strike in order to consider the motion to dismiss, and this court was bound by that opinion, as it is the policy of this court that one panel should not overrule the ruling of a previous panel unless the appeal is heard en banc.
3. The trial court properly granted the town's motion to dismiss for lack of personal jurisdiction, as the town was not considered a foreign corporation within the meaning of the long-arm statute that sets forth service of process on foreign corporations by a Connecticut resident (§ 33-929 [f]); the statutes (§§ 33-602 [18] and 33-1002 [15]) that define foreign corporations and § 33-602 (6), which defines a corporation, do not include towns, cities, boroughs or any municipal corporation or department thereof within those definitions, and, thus, because the town is not considered a foreign corporation, § 33-929 (f) did not confer personal jurisdiction over it.

Argued May 23—officially released September 17, 2019

Procedural History

Action to recover damages for the spoliation of evidence, and for other relief, brought to the Superior Court in the judicial district of Windham, where the court, *Cole-Chu*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the named plaintiff appealed to this court; thereafter, the court, *Cole-Chu*, *J.*, denied the named plaintiff's motion for articulation; subsequently, this court granted the named plaintiff's motion for review, but denied the relief requested therein. *Affirmed.*

Daniel Reale, self-represented, the appellant (named plaintiff).

Michael W. Field, assistant attorney general for the state of Rhode Island, with whom, on the brief, was *Peter F. Neronha*, attorney general for the state of Rhode Island, for the appellee (named defendant).

Steven M. Richard, for the appellee (defendant town of Coventry).

Opinion

HARPER, J. In this spoliation of evidence action, the plaintiff Daniel Reale[1] appeals from the judgment of dismissal rendered by the trial court in favor of the defendant town of Coventry, Rhode Island (town), and the state defendants, the state of Rhode Island; the Rhode Island Department of Children, Youth, and Families; Investigator Harry Lonergan; and Attorneys Brenda Baum and Diane Leyden, on the ground of a lack of personal jurisdiction.[2] On appeal, the plaintiff claims

[1] This action was brought by two self-represented plaintiffs: Daniel Reale and Benjamin Ligeri. Daniel Reale was the only plaintiff to appeal from the judgment of the trial court. Accordingly, we refer to Daniel Reale as the plaintiff.

[2] The defendants filed two motions to dismiss, one filed by the state defendants and one filed by the town. The trial court issued separate memoranda of decision for each motion, both of which dismissed the plaintiff's claims on the ground of a of lack personal jurisdiction.

that the court erred in (1) determining that the state defendants did not waive their right to seek dismissal for lack of personal jurisdiction by concurrently moving to strike the plaintiff's complaint as an alternative to dismissal, and (2) granting the state defendants' motions to dismiss on the ground of a lack of personal jurisdiction.[3] We affirm the judgment of the court.

The following facts, as set forth in the trial court's memoranda of decision and procedural history are relevant to our resolution of this appeal. "The plaintiff is a Connecticut resident and father of two children who has joint custody with his ex-wife, who, during the pertinent time, was a resident of Rhode Island. In June, 2016, two neglect petitions were commenced against the plaintiff by the Rhode Island Department of Children, Youth, and Families arising from an allegation by a school psychologist employed by the town . . . that the plaintiff's son suffered a gunshot wound . . . ." "That incident was investigated by the Coventry, Rhode Island, Police Department, which determined that no crime, abuse or neglect had occurred."

Thereafter, the "neglect petitions terminated in favor of [the plaintiff] and his ex-wife in August, 2016, and September, 2016, respectively." "The plaintiff subsequently joined a civil action against the town, inter alia, in the United States District Court for the District of Rhode Island . . . ." In the federal action, "[the plaintiff] claim[ed] he suffered damages from [the] defendants' wilful withholding, concealment and destruction of evidence, including documents and other records,

[3] The plaintiff raises four issues in this appeal, which are whether (1) the defendants' motions to strike were fatally deficient; (2) the defendants waived personal jurisdiction; (3) two types of pleadings can be combined; and (4) the trial court erred in granting the defendants' motions and ordering dismissal. We consider the plaintiff's formation of the issues duplicative and summarize them accordingly.

internal communications, recordings and expert opinions during and since the prosecution of the . . . petitions against him, despite notice by [the plaintiff] . . . instructing said defendants . . . to preserve and produce such evidence." The federal action subsequently was dismissed with prejudice.

"On January 3, 2018, [the plaintiff] . . . filed this action against [the state defendants] for spoliation of evidence. On February 5, 2018, the [town] moved . . . to dismiss count one of the [plaintiff's] complaint . . . or, in the alternative, to strike count one based on (1) the bar of res judicata; and (2) the claim that the legal basis for the plaintiff's claim—spoliation of evidence—does not exist under governing law, i.e., the law of the state of Rhode Island." (Citation omitted; footnote omitted.) A day later, "the [state defendants] moved . . . to dismiss the [plaintiff's] complaint for [a] lack of personal jurisdiction or, in the alternative, to strike the complaint based on (1) the prior pending case doctrine; (2) lack of service of process; and (3) the claim that there is no cause of action for spoliation of evidence under governing law, i.e., the law of Rhode Island." (Citation omitted.)

"On February 20, 2018, the [plaintiff] filed a joint objection and memorandum of law . . . in opposition to the [state defendants'] [motions] to dismiss . . . [and] the town filed a reply brief." "On February 22, 2018, [the state defendants] filed a reply brief." On July 24, 2018, the trial court granted the state defendants' motions to dismiss for lack of personal jurisdiction, finding that the plaintiff failed (1) to allege sufficient facts to subject the town to this state's jurisdiction under General Statutes § 33-929 (f), the long-arm statute for foreign corporations, and (2) to establish that General Statutes § 52-59b, the long-arm statute for nonresident individuals, foreign partnerships and foreign voluntary associations, authorized the exercise of

personal jurisdiction over the state defendants. This appeal followed.

I

As a preliminary matter, we conclude that this court need not address the merits of the plaintiff's claims against the state defendants, as they are barred by the doctrine of sovereign immunity. Sovereign immunity implicates subject matter jurisdiction and because subject matter jurisdiction concerns a "basic competency of the court, [it] can be raised . . . by the court sua sponte, at any time." *Daley* v. *Hartford*, 215 Conn. 14, 27–28, 574 A.2d 194, cert. denied, 498 U.S. 982, 111 S. Ct. 513, 112 L. Ed. 2d 525 (1990). During the pendency of this appeal, the United States Supreme Court expressly overruled *Nevada* v. *Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979),[4] by holding that states retain their sovereign immunity from private suits brought in the courts of other states. *Franchise Tax Board* v. *Hyatt*, U.S. , 139 S. Ct. 1485, 1497, 203 L. Ed. 2d 768 (2019).[5] As the court explained, "[e]ach State's equal dignity and sovereignty under the Constitution implies certain constitutional limitation[s] on the sovereignty of all of its sister States. . . . One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign

[4] In *Nevada* v. *Hall*, supra, 440 U.S. 416, the United States Supreme Court held that the federal constitution did not bar private suits against a state in the courts of another state as sovereign immunity was only available if the forum state voluntarily decided to respect the dignity of another state as a matter of comity.

[5] Prior to oral argument, the state defendants filed a notice of supplemental authority pursuant to Practice Book § 67-10 citing *Franchise Tax Board v. Hyatt*, supra, 139 S. Ct. 1492, as supplemental authority supporting a dismissal on the ground of sovereign immunity. The plaintiff had an opportunity to respond to the notice and did so by stating the "[s]upplemental [a]uthority [was] irrelevant."

immunity within the constitutional design." (Citation omitted; internal quotation marks omitted.) Id. Thus, under the doctrine of sovereign immunity, the state defendants are immune from suit brought by the plaintiff in Connecticut.[6]

On the basis of the foregoing, we affirm the judgment of dismissal in regard to the plaintiff's claims against the state defendants.

II

We next address the plaintiff's claims against the town in turn. The plaintiff first claims that the town, by filing a motion to dismiss and a motion to strike concurrently, waived its right to file the motion to dismiss on the basis of personal jurisdiction.

This court previously has held that a trial court has discretion to overlook the simultaneous filing of a motion to dismiss and a motion to strike in order to consider the motion to dismiss. *Sabino* v. *Ruffolo*, 19 Conn. App. 402, 404–405, 562 A.2d 1134 (1989). Although this court noted in *Sabino* that "generally, pleadings are not to be filed out of the order specified in [Practice Book] § 112 [now § 10-6], and the filing of a pleading listed later in the order set out by § [10-6] waives the right to be heard on a pleading that appears earlier," it ultimately concluded that the language in Practice Book § [10-7] providing, "when the [judicial authority] does not otherwise order"; (emphasis omitted); enables the

[6] The Rhode Island Department of Children, Youth and Families is an entity of the state of Rhode Island. Moreover, the complaint reveals that Harry Lonergan, Diane Leyden, and Brenda Baum were sued while acting in their official capacities as state employees. See *Hultman* v. *Blumenthal*, 67 Conn. App. 613, 620, 787 A.2d 666 ("[t]he doctrine of sovereign immunity protects state officials and employees from lawsuits resulting from the performance of their duty"), cert. denied, 259 Conn. 929, 793 A.2d 253 (2002). Accordingly, the plaintiff's claims are barred against all of the state defendants by the doctrine of sovereign immunity.

trial court to exercise discretion in considering a pleading filed out of order. Id., 404. Furthermore, this court concluded that its interpretation was consistent with the Practice Book's purpose "to facilitate business and advance justice." (Internal quotation marks omitted.) Id.

It is the policy of this court "that one panel should not, on its own, [overrule] the ruling of a previous panel" unless the appeal is heard en banc. (Internal quotation marks omitted.) *State* v. *Ortiz*, 133 Conn. App. 118, 122, 33 A.3d 862 (2012), aff'd, 312 Conn. 551, 93 A.3d 1128 (2014). Because we are bound by this court's opinion in *Sabino* v. *Ruffolo*, supra, 19 Conn. App. 404–405, we conclude that the trial court properly exercised its discretion to allow the town to file a motion to dismiss and a motion to strike simultaneously.

III

The plaintiff also claims that the court erred in granting the town's motion to dismiss on the ground of a lack of personal jurisdiction. We disagree.

"[A] challenge to the jurisdiction of the court presents a question of law over which our review is plenary. . . . When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Citation omitted; internal quotation marks omitted.) *Kenny* v. *Banks*, 289 Conn. 529, 532–33, 958 A.2d 750 (2008). "Only if we find the [long-arm] statute to be applicable do we reach the question of whether it would offend

due process to assert jurisdiction." (Internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 543, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014).

The provision of Connecticut's long-arm statute that sets forth service of process on a foreign corporation by a Connecticut resident is § 33-929 (f), which provides: "Every *foreign corporation* shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state; (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state; (3) out of the production, manufacture or distribution of goods by such corporation with the reasonable expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers; or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance." (Emphasis added.)

General Statutes § 33-602 (18) defines a "foreign corporation" as "a *corporation* incorporated under a law other than the law of this state"; (emphasis added); and General Statutes § 33-1002 (15) defines a "foreign corporation" as "any nonprofit *corporation* with or without capital stock which is not organized under the laws of this state." (Emphasis added.) Moreover, § 33-602 (6) provides that a "corporation" is defined, in part,

as "a stock corporation," and § 33-1002 (8) provides that a "corporation" is "a corporation without capital stock or shares, which is not a foreign corporation, incorporated under the laws of this state . . . *but shall not include towns, cities, boroughs or any municipal corporation or department thereof*." (Emphasis added.) Neither § 33-602 nor § 33-1002 include "towns, cities, boroughs or any municipal corporation or department thereof"; General Statutes § 33-1002 (8); within their definitions of "corporation" or "foreign corporation." Thus, because the town is not considered a foreign corporation within the meaning of our General Statutes, § 33-929 (f) does not confer personal jurisdiction over the town.[7] Accordingly, we conclude that the court properly rendered judgment dismissing the plaintiff's claim against the town for a lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

[7] In reaching this conclusion, we disagree with the trial court that § 33-929 (f) applies to this action. In its memorandum of decision, the trial court relied on language from *Osso* v. *Marc Automotive, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-12-6009636-S (July 1, 2013), which states that "[t]he [g]eneral [s]tatute's definition for foreign corporation as it relates to § 33-929 is quite broad and has been applied in the past by the Superior Court to apply to foreign municipalities." No appellate court, however, has held that § 33-929 applies to foreign municipalities. Moreover, as indicated, our General Statutes have explicitly excluded "towns, cities, boroughs or any municipal corporation or department thereof"; General Statutes § 33-1002 (8); from the definition of "corporation" and, thus, "foreign corporation."

Although we recognize that the trial court concluded that § 33-929 applies to the town and that the parties did not dispute whether the town is a foreign corporation, we agree with the trial court that, in regard to the underlying issue of whether personal jurisdiction exists, § 33-929 (f) does not authorize personal jurisdiction over the town. Thus, as our case law allows, we affirm the trial court's judgment on different grounds. See *White* v. *Dept. of Children & Families*, 136 Conn. App. 759, 767 n.5, 51 A.3d 1116 ("[w]e may affirm the judgment of the court on different grounds if we disagree with the grounds relied on by the court"), cert. denied, 307 Conn. 906, 53 A.3d 221 (2012).

WEINSHEL, WYNNICK & ASSOCIATES, LLC *v.* MARIE BONGIORNO ET AL.
(AC 41467)

Keller, Bright and Flynn, Js.

Syllabus

The plaintiff, an accounting firm, sought to recover damages from the defendant G, his wife, the defendant M, and L Co., a limited liability company, for unpaid accounting services. G was the owner and operator of B Co., a liquor store, with which the plaintiff had a long standing service contract. In 2010, G created L Co., of which he was the sole member and, in July 2012, he transferred all of his interest in L Co. to M exclusively. L Co. became the backer for B Co. and M took control over B Co.'s operations. During this change in ownership, the plaintiff billed B Co. for accounting services in June, 2012. After the services went unpaid, the plaintiff commenced the present action against the defendants in December, 2012. Thereafter, G died during the action's pendency, and M, as executrix of G's estate, was substituted as a defendant. The trial court rendered judgment in favor of the plaintiff as against L Co., but not against M, individually or as executrix. On appeal, the plaintiff claimed, inter alia, that the trial court improperly concluded that M could not be held personally liable for the plaintiff's damages pursuant to the theory of successor liability. *Held:*

1. The plaintiff could not prevail on its claim that because M failed to obtain approval from the Liquor Control Commission for her acquisition of G's interest in L Co., as required by state regulations, for the time prior to January 8, 2013, when the commission approved the transfer of the interest, M was operating B Co. in her individual capacity from August, 2012, until January, 2013, and was liable to the same extent as L Co. under a theory of successor liability: the plaintiff failed to provide any authority for its position that a party may seek to enforce a liquor control regulation by means of a private cause of action, or its claim that under the applicable statute regulation (§ 30-6-A4), an unapproved transfer of interest in a corporate backer of a liquor permit exposes the transferee to personal liability for the debts of the backer corporation, as § 30-6-A4 was enacted for the benefit of the public, not for the benefit of individuals engaged in private transactions with regulated entities, the sale of intoxicating liquors had no substantial relevance to the plaintiff's claim for breach of contract for unpaid accounting services, the health and safety concerns that undergird regulations such as § 30-6-A4 were not implicated in this case, and even if this court were to recognize a right to enforce a regulation by means of a private right of action, the plaintiff was not among the class of persons § 30-6-A4 was intended to protect, nor was the injury the type that the regulation was designed

to prevent; moreover, to the extent that G and M failed to comply with § 30-6-A4, such nonfeasance was inconsequential to the plaintiff's dealings with L Co., and, thus, even if the transfer was invalid, that basis alone was insufficient to hold M personally liable for the plaintiff's damages.

2. The trial court improperly rendered judgment in favor of M in her capacity as executrix of G's estate on the basis of the statute (§ 52-599 [b]) concerning the survival of a cause of action when a party thereto dies, and its determination that because the substitution of M, as executrix, for G was untimely, it had discretion to render judgment in favor of M in her capacity as executrix: pursuant to the plain and unambiguous language of § 52-599 (b), the plaintiff had one year, following notice of the death of G, in which to apply for an order to substitute G with a representative of his estate, and because the record clearly indicated that an application to substitute a representative of the estate of the deceased defendant, G, was made within one year, it was timely and the trial court's finding to the contrary was clearly erroneous; moreover, because the motion to cite in a temporary administratrix of G's estate was timely, the court did not have discretion to render judgment in favor of M, executrix, on that basis, and should have rendered judgment in favor of the plaintiff accordingly.

Argued March 18—officially released September 17, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, brought to the Superior Court in the district of Stamford; thereafter, the named defendant, the executrix of the estate of the defendant George Bongiorno, was substituted as a defendant; subsequently, the matter was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment in part for the plaintiff, from which the plaintiff appealed. *Reversed in part; judgment directed.*

Andrew M. McPherson, for the appellant (plaintiff).

Peter V. Lathouris, for the appellees (defendants).

Opinion

KELLER, J. The plaintiff, Weinshel, Wynnick & Associates, LLC, appeals from the trial court's judgment in favor of the defendants, Marie Bongiorno, individually (Marie Bongiorno), and Marie Bongiorno, executrix of the estate of George Bongiorno (Marie Bongiorno, exec-

utrix),[1] on its claims of successor liability and breach of contract. On appeal, the plaintiff argues that the court improperly (1) concluded that Marie Bongiorno could not be held personally liable for the plaintiff's damages pursuant to a theory of successor liability, and (2) rendered judgment in favor of Marie Bongiorno, executrix, on the basis of General Statutes 52-599 (b). We affirm the judgment in favor of Marie Bongiorno, and reverse the judgment in favor of Marie Bongiorno, executrix.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The plaintiff is an accounting firm. In 1971, it was hired by George Bongiorno, the husband of Marie Bongiorno, to provide him with personal and business accounting services.[2] At the time, George Bongiorno, a successful businessman and investor, owned and operated with his brother, John Bongiorno, a supermarket in Stamford. At some point, George Bongiorno obtained a liquor permit and began operating a liquor store, Bongiorno Maxi Discount Liquors, in the same business complex as the supermarket.[3]

Until September, 2010, George Bongiorno operated the liquor store as a sole proprietorship. During this time, the plaintiff continued to provide accounting services and billed its services to Bongiorno Maxi Discount

[1] The defendants Marie's Liquors, LLC, formerly Bongiorno Maxi Discount Liquors, and Samuel Starks, are also parties to this appeal; however, the plaintiff has appealed only from the portion of the judgment related to its claims against the defendants, Marie Bongiorno and Marie Bongiorno, executrix. Accordingly, in this opinion all references to the defendants are to the defendants, Marie Bongiorno and Marie Bongiorno, executrix.

[2] At trial, several "engagement letters" were admitted that evidenced a contract between the plaintiff and George Bongiorno. These letters, dated January 31, 2003, January 1, 2005, and January 1, 2010, provided that the parties' agreement would "remain in effect for future periods until changed by either party." The court found that no evidence was presented to establish a change or modification of the parties' agreement.

[3] George Bongiorno was the original permittee and backer for the liquor permit.

Liquors. On September 21, 2010, articles of organization were drafted for an entity named Marie's Liquors, LLC, and, on September 23, the articles were filed with the secretary of state. Marie's Liquors, LLC, was a member managed limited liability company, with George Bongiorno designated as its sole member. Shortly after the creation of Marie's Liquors, LLC, an application was submitted to the Department of Consumer Protection, Liquor Control Division, to change the backer[4] for Bongiorno Maxi Discount Liquors to the newly formed Marie's Liquors, LLC.[5] Despite the change in proprietorship, the business continued to operate under the name Bongiorno Maxi Discount Liquors. On October 14, 2010, George Bongiorno transferred all "right, title and interest" of his "membership units" in Marie's Liquors, LLC, to Marie Bongiorno.

On June 21, 2012, the plaintiff sent Bongiorno Maxi Discount Liquors three separate invoices for various accounting services. In total, the plaintiff billed Bongiorno Maxi Discount Liquors $36,075, with payment due in full by July 21, 2012. The parties do not dispute that the June 21, 2012 invoices were never paid.

On July 31, 2012, a purchase and sale agreement was executed that purported to convey all of George Bongiorno's interest in Marie's Liquor, LLC, to Marie Bongiorno in consideration of one dollar.[6] The agreement

[4] General Statutes § 30-1 (4) provides: " 'Backer' means, except in cases where the permittee is himself the proprietor, the proprietor of any business or club, incorporated or unincorporated, engaged in the manufacture or sale of alcoholic liquor, in which business a permittee is associated, whether as employee, agent or part owner."

[5] Letters admitted into evidence at trial indicate that, at this time, George Bongiorno was no longer the permittee for the store's liquor license, having been replaced by Frank Bongiorno. George Bongiorno was still named as the backer.

[6] At trial, the parties stipulated that Marie Bongiorno took over the liquor store in August, 2012, effectively disregarding the October 14, 2010 transfer of all of George Bongiorno's "membership units" to Marie Bongiorno.

also provided that George Bongiorno would resign as the sole member of Marie's Liquor, LLC, and that Marie Bongiorno would be made the sole member in his place. On October 12, 2012, Marie Bongiorno sent an "application for transfer of interest within a limited liability company" to the Liquor Control Division. The application indicated that Marie Bongiorno was acquiring all interest in Marie's Liquors, LLC, which was now the backer for Bongiorno Maxi Discount Liquors. On January 8, 2013, the Liquor Control Commission approved the transfer of interest in Marie's Liquors, LLC. Shortly thereafter, on February 28, 2013, Marie Bongiorno filed amended articles of organization with the secretary of state, naming herself as the sole member manager of Marie's Liquors, LLC.

Following the nonpayment of the June 21, 2012 invoices, the plaintiff commenced this action against Marie Bongiorno, George Bongiorno, and Marie's Liquors, LLC. In its original complaint, dated November 21, 2012, the plaintiff alleged, inter alia, that Marie Bongiorno was responsible for the unpaid invoices pursuant to an agreement that she had with the plaintiff. While the action was pending, George Bongiorno died and notice of his death was filed with the court on April 6, 2016.[7] On December 23, 2016, the plaintiff filed a motion to cite in the temporary administratrix, Susan Gottlin, of the estate of George Bongiorno. The plaintiff's motion was granted on January 9, 2017. Thereafter, on August 22, 2017, the plaintiff filed a motion to cite in Marie Bongiorno, executrix. In its motion, the plaintiff asserted that Marie Borgiorno, executrix, had replaced Gottlin as the representative for George Bongiorno's estate. The court granted the plaintiff's motion, and Marie Bongiorno, executrix, was served on September 14, 2017. Prior to trial, the plaintiff amended its complaint, alleging, among other things, breach of contract

[7] The court found that George Bongiorno died on March 13, 2016.

against the defendants and successor liability against Marie Bongiorno.

On November 15 and 16, 2017, a court trial was held before the court, *Hon. Kevin Tierney*, judge trial referee, during which one witness, Michael Weinshel, testified. Weinshel testified that he was a managing member of the plaintiff and had performed accounting services for Bongiorno Maxi Discount Liquors and the Bongiorno family for many years dating back to 1971. Through Weinshel's testimony, the plaintiff introduced into evidence several documents detailing the formation and ownership of Marie's Liquors, LLC. Other documents that were introduced included, inter alia, copies of the unpaid June 21, 2012 invoices; copies of checks made payable to the plaintiff from the Bongiorno Maxi Discount Liquors' checking account; and Marie Bongiorno's federal income tax returns, which reported income from Bongiorno Maxi Discount Liquors in 2010, 2011, and 2012. The parties also executed a stipulation that provided: "All bills of Bongiorno's Maxi Discount Liquors that were incurred prior to the take over of the liquor store by Marie Bongiorno in August of 2012, with the exception of the bills of the plaintiff, were paid out of income of Bongiorno's Maxi Discount Liquors after take over." Following the close of evidence, the parties waived oral argument and submitted posttrial briefs.

In a memorandum of decision dated February 28, 2018, the court found that there was an agreement between the plaintiff and George Bongiorno and that the agreement had been breached by the nonpayment of the June 21, 2012 invoices, resulting in $36,075 in damages to the plaintiff.[8] The court rendered judgment in that amount against Marie's Liquors, LLC. As to Marie

[8] As against Marie's Liquors, LLC, the court also awarded prejudgment and postjudgment interest on this amount pursuant to General Statutes § 37-3a (a). As of the date of the memorandum of decision, the total amount due was $56,638.

Bongiorno, however, the court found that she did not have an agreement with the plaintiff and, thus, was not responsible for the unpaid invoices pursuant to this claim. Although the court found that the plaintiff had established the necessary elements of its breach of contract claim against George Bongiorno, it nonetheless rendered judgment in favor of Marie Bongiorno, executrix, on this count. See General Statutes § 52-599 (a).[9] In providing the basis for its ruling, the court noted: "Marie Bongiorno as executrix of the estate of George Bongiorno was not joined as a party defendant in this litigation within six months of March 13, 2016. [General Statutes] § 52-599 (b). May 15, 2017, was the date of the appointment of Marie Bongiorno as executrix of the estate of George Bongiorno. Marie Bongiorno as executrix was not joined by the plaintiff as a party defendant in this litigation until August 29, 2017. . . . Because of the circumstances of this case, the claim of successor liability and the uncertainty of the status of the probate appeal against Marie Bongiorno as executrix . . . and the possibility of the appointment of a new fiduciary for the estate of George Bongiorno as a result of the Superior Court and Probate Court litigation, this court is reluctant to find liability in favor of the plaintiff as against the estate of George Bongiorno on the first count of breach of contract. The court does find as a fact that all the elements of a breach of contract have been met and that George Bongiorno, by failing to pay the $36,075.00, has breached the contract and damages in that amount have been sustained by the plaintiff."

"Marie Bongiorno was appointed the executrix of the estate of George Bongiorno by the Stamford Probate Court on May 15, 2017. . . . That Probate Court

[9] General Statutes § 52-599 (a) provides: "A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person."

appointment and the admission of the underlying last will and testament of George Bongiorno is the subject of an appeal commenced in the Stamford Superior Court on May 25, 2017. . . . The plaintiffs in that probate appeal are Michele B. Nizzardo and Frank Bongiorno, two of the four children of George Bongiorno and Marie Bongiorno. The defendant in that probate appeal is Marie Bongiorno, the executrix under the contested will, and one of the three defendants in this liquor store litigation. . . . This court is unsure of the status of fiduciary orders issued by the Probate Court, district of Stamford. In the event this probate appeal is successful, Marie Bongiorno may no longer be the executrix of the estate of George Bongiorno. A new fiduciary may then be appointed subject to appellate stays, if any. What a new fiduciary may do with this $36,075 claim is best left to speculation. Therefore, in order to satisfy the requirements of judicial economy and to bring to an end this relatively simple $36,075 accounting services collection lawsuit, the court will exercise its discretion and find no liability or damages against the decedent's estate of George Bongiorno."

The court also found in favor of Marie Bongiorno on the plaintiff's claim of successor liability. In so doing, the court acknowledged that, in accordance with the Regulations of Connecticut State Agencies, a permittee may be held strictly liable for conduct related to her permitted premises. The court found that the plaintiff failed to provide any authority, however, for the proposition that such regulations, which are related to the sale of intoxicating liquors, allowed the court to disregard the corporate structure of a business and hold its individual members personally liable for the company's contractual obligations. Therefore, although the court found that Marie's Liquors, LLC, was liable for the debts incurred by George Bongiorno pursuant to the plaintiff's

claim of successor liability,[10] it concluded that there was inadequate legal support for concluding that Marie Bongiorno could be held personally liable under the same theory. This appeal followed.

I

The plaintiff first argues on appeal that the court improperly concluded that Marie Bongiorno could not be held personally liable for the plaintiff's damages pursuant to a theory of successor liability. Specifically, the plaintiff claims that Marie Bongiorno failed to obtain approval from the Liquor Control Division for her acquisition of George Bongiorno's interest in Marie's Liquors, LLC, as required by the Regulations of Connecticut State Agencies, until January 8, 2013.[11] The plaintiff contends that, in the absence of approval from the Liquor Control Division, Marie Bongiorno was operating Bongiorno Maxi Discount Liquors in her individual capacity from August, 2012, until January, 2013, and is liable to the same extent as Marie's Liquor's, LLC, under

[10] Specifically, the court found that the plaintiff had presented "persuasive evidence of successor liability under the continuity of enterprise theory and the theory that Marie's Liquors, LLC, [was] a mere continuation or reincarnation of the old business." Therefore, although Marie's Liquors, LLC, did not have a contract with the plaintiff for the provision of accounting services, it could be held liable as the successor to George Bongiorno, with whom the plaintiff had such a contract. On appeal, neither party challenges the court's findings as to the claim against Marie's Liquors, LLC.

[11] The defendants argue that the plaintiff failed to preserve this claim on appeal. Although we acknowledge that the court did not expressly address § 30-6-A4 of the Regulations of Connecticut State Agencies, our review of the record reveals that the court acknowledged the general precept that a permittee and backer are strictly liable for any legal violations related to their permitted premises. "Given that the sine qua non of preservation is fair notice to the trial court;" (internal quotation marks omitted) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 738 n.7, 183 A.3d 611 (2018); we conclude that the plaintiff adequately preserved its claim, despite the fact that it was not asserted as distinctly and clearly as it could have been. See *Outlaw* v. *Meriden*, 43 Conn. App. 387, 390, 682 A.2d 1112, cert. denied, 239 Conn. 946, 686 A.2d 122 (1996).

a theory of successor liability, for the plaintiff's damages. We are not persuaded and, accordingly, affirm the judgment of the trial court.

We begin by setting forth the standard of review and legal principles that guide our analysis. Because the court's judgment was premised on the legal conclusion that Marie Bongiorno could not be held personally responsible for the plaintiff's damages under a theory of successor liability, our review is plenary. "This court affords plenary review to conclusions of law reached by the trial court. . . . Under plenary review, we must decide whether the trial court's conclusions of law are legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Joyner* v. *Simkins Industries, Inc.*, 111 Conn. App. 93, 97, 957 A.2d 882 (2008).

With respect to the plaintiff's claim of successor liability against Marie Bongiorno, "[t]he general rule is that where a corporation sells or otherwise transfers all of its assets, its transferee is not liable for the debts and liabilities of the transferor, and that [the] liability of a new corporation for the debts of another corporation does not result from the mere fact that the former is organized to succeed the latter. . . . This general rule of corporate nonliability serves, in effect, as a security blanket that protects corporate successors from unknown or contingent liabilities of their predecessors. . . .

"The rule is nonetheless subject to four well established exceptions. A successor . . . may be held liable for the debts and liabilities of its predecessor when there is an express or implied assumption of liability, the transaction amounts to a consolidation or merger, the transaction is fraudulent, or the transferee corporation is a mere continuation or reincarnation of the old

corporation." (Internal quotation marks omitted.) *Robbins* v. *Physicians for Women's Health, LLC*, 311 Conn. 707, 715, 90 A.3d 925 (2014).

"There are two theories used to determine whether the purchaser is merely a continuation of the selling corporation. Under the common law mere continuation theory, successor liability attaches when the plaintiff demonstrates the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations. . . . Under the continuity of enterprise theory, a mere continuation exists if the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." (Citations omitted; internal quotation marks omitted.) *Chamlink Corp.* v. *Merritt Extruder Corp.*, 96 Conn. App. 183, 187–88, 899 A.2d 90 (2006).

In its memorandum of decision, the court found that the plaintiff had proven its claim of successor liability against Marie's Liquors, LLC, under both the mere continuation theory and the continuity of enterprise theory. It found that Marie's Liquors, LLC, was the current backer for the liquor permit. The former backer was Bongiorno Maxi Discount Liquors. Despite the change in proprietorship, the store continued to operate under the name "Bongiorno Maxi Discount Liquors." Moreover, "[t]he same store manager, the same store employees, the same business location, the same landlord, the same shelving, and the former liquor supply were all continued without cessation. Most importantly the same liquor permit and liquor permit number was transferred. There was no need to go through a full liquor permit process, which would have required showing the source of purchase funds, source of business capital, background information, letters of recommendation, and the like since this was a continuation of the

Bongiorno liquor business from one family member to another."

Although the parties stipulated that, following the July 31, 2012 purchase and sale agreement, Marie Bongiorno took control of the liquor store and was the sole member of Marie's Liquors, LLC, the court concluded that she was shielded from individual liability in light of the corporate structure of the business. Moreover, the court noted that the plaintiff did not plead or offer sufficient evidence to pierce the corporate veil of Marie's Liquors, LLC, which would, thus, expose her to liability for the company's debts. As such, the court concluded that the plaintiff failed to provide adequate legal authority to support its claim of successor liability against Marie Bongiorno.

The plaintiff argues on appeal that the court improperly concluded that Marie Bongiorno could not be held liable because it failed to consider the fact that she did not obtain approval from the Liquor Control Division prior to her acquisition of George Bongiorno's interest in Marie's Liquors, LLC. Thus, for the period between August, 2012, and January, 2013, the plaintiff contends that Marie Bongiorno was operating the liquor store in her individual capacity. In support of this contention, the plaintiff cites § 30-6-A4 of the Regulations of Connecticut State Agencies, which provides in relevant part: "No transfer by sale or otherwise of any of the shares of stock of the backer corporation, or the corporation which has a financial interest in the backer, may be made or any additional shares of stock issued without notice to and approval by the department . . . ." The plaintiff claims that this regulation stands for the proposition that an unapproved transfer of interest in a corporate backer of a liquor permit exposes the transferee to personal liability for the debts of the backer corporation. We do not agree.

In arguing that the July 31, 2012 purchase and sale agreement was invalid pursuant to the language of § 30-6-A4, the plaintiff has provided this court with no authority for the position that a party may seek to enforce a liquor control regulation by means of a private cause of action. Further, the plaintiff has failed to address the factors set forth in *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997), overruled in part on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284–85, 914 A.2d 996 (2007). In *Napoletano*, our Supreme Court held that a party asserting the existence of an implicit private remedy must satisfy an exacting three part test: "First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" (Internal quotation marks omitted.) Id.

"Additionally, in order to overcome the presumption that no private right of action is implied in the statutory enactment, the plaintiff must demonstrate that no factor weighs against affording an implied right of action and [that] the balance of factors weighs in [the plaintiffs'] favor. . . . In examining these three factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [the plaintiff] to bring a private cause of action despite having failed expressly to provide for one." (Internal quotation marks omitted.) *D'Attilo* v. *Statewide Grievance Commission*, Superior Court, judicial district of Hartford, Docket No. CV-16-6065012 (July 18, 2016), aff'd, 329 Conn. 624, 188 A.3d 727 (2018).

Our review of existing precedent reveals that the Liquor Control Act, General Statutes §§ 30-1 through 30-116, and the regulations promulgated therefrom were enacted for the benefit of the public, not for the benefit of individuals engaged in private transactions with regulated entities. See *Eder Bros., Inc.* v. *Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 377, 880 A.2d 138 (2005) ("[i]ndeed, when a plaintiff has brought an action challenging the imposition of certain provisions of the Liquor Control Act due to an economic harm to their business, we have explained that the purpose of that act is to regulate the sale and consumption of alcohol for the protection of the public, not for the economic benefit of a particular wholesaler"); see also *All Brand Importers, Inc.* v. *Department of Liquor Control*, 213 Conn. 184, 211, 567 A.2d 1156 (1989) ("[i]t is fair to say that the liquor control laws are to be enforced for the benefit of the public and not for the economic benefit of the plaintiff"). Additionally, we note that the sale of intoxicating liquors has no substantial relevance to the gravamen of the plaintiff's claim. This is a breach of contract action for unpaid accounting services. The health and safety concerns that undergird regulations such as § 30-6-A4 are not implicated in this case. Accordingly, even if this court were to recognize a right to enforce a regulation by means of a private right of action, the plaintiff is not among the class of persons § 30-6-A4 was intended to protect nor is the injury alleged of the type that the regulation was designed to prevent. Cf. *Gore* v. *People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995) ("It is well established that [i]n order to establish liability as a result of a statutory violation, a plaintiff must satisfy two conditions. First, the plaintiff must be within the class of persons protected by the statute. . . . Second, the injury must be of the type which the statute was intended to prevent." [Citations omitted; internal quotation marks omitted.]).

Moreover, even if we assume that the July 31, 2012 transfer was invalid until it was approved by the Liquor Control Division, the effect would have been George Bongiorno retaining his status as sole member of Marie's Liquors, LLC, during the interim. Concomitantly, Marie Bongiorno would have had no interest in the company. In that circumstance, we could perceive an argument that during such time Marie Bongiorno did not have the authority to act on the company's behalf and might be personally liable for any obligations she incurred. See *Rich-Taubman Associates.* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996) ("To avoid personal liability, an agent must disclose to the party with whom he deals both the fact that he is acting in a representative capacity and the identity of his principal. . . . Accordingly, the agent is not liable where, acting within the scope of his authority, he contracts with a third party for a known principal." [Citations omitted; internal quotation marks omitted.]). It does not follow, however, that if Marie Bongiorno was operating the business without any interest in Marie's Liquors, LLC, she should be held personally responsible for the company's preexisting debts, such as those owed to the plaintiff. In this instance, the plaintiff performed accounting services pursuant to a longstanding agreement it had with George Bongiorno. The plaintiff's damages were incurred before the parties executed the allegedly unauthorized transfer of interest in Marie's Liquors, LLC, on July 31, 2012. To the extent that George and Marie Bongiorno failed to comply with § 30-6-A4, such nonfeasance was inconsequential to the plaintiff's dealings with the liquor store. Thus, even if we were to conclude that the July 31, 2012 purchase and sale agreement was invalid, this basis alone is insufficient to hold Marie Bongiorno personally liable for the plaintiff's damages.

In sum, the plaintiff has failed to convince us that the court improperly applied the law when it concluded

that Marie Bongiorno was not personally liable for the plaintiff's damages. We, therefore, conclude that the court properly rendered judgment in favor of Marie Bongiorno on this claim.

II

The plaintiff's second claim on appeal is that the court improperly rendered judgment in favor of Marie Bongiorno, executrix, on the basis of § 52-599 (b). In particular, the plaintiff argues that the court erred in finding that the substitution of Marie Bongiorno, executrix, for the deceased defendant George Bongiorno, was untimely and, thus, improperly concluded that it had discretion to render judgment in favor of Marie Bongiorno, executrix. We agree with the plaintiff that the court improperly interpreted § 52-599 (b) and, accordingly, reverse the judgment in favor of Marie Bongiorno, executrix.

"With regard to the trial court's factual findings, the clearly erroneous standard of review is appropriate. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses. . . .

"The trial court's legal conclusions are subject to plenary review. [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.) *Miller* v. *Guimaraes*, 78 Conn. App. 760, 766–67, 829 A.2d 422 (2003).

"Although at common law the death of a sole plaintiff or defendant abated an action . . . by virtue of § 52-599, Connecticut's right of survival statute, a cause of action can survive if a representative of the decedent's estate is substituted for the decedent. It is a well established principle, however, that [d]uring the interval . . . between the death and the revival of the action by the appearance of the executor or administrator, the cause has no vitality. The surviving party and the court alike are powerless to proceed with it. . . . Moreover, the language of § 52-599, and its predecessor, has been construed to mean that the fiduciary may be substituted as a matter of right within the time prescribed by the statute, but the court in its discretion may permit the fiduciary to be substituted after the time described for good cause shown. . . . Statutes in derogation of the common law are remedial in nature and are to be liberally construed to implement their remedial purpose." (Citations omitted; internal quotation marks omitted.) *Negro* v. *Metas*, 110 Conn. App. 485, 497–98, 955 A.2d 599, cert. denied, 289 Conn. 949, 960 A.3d 1037 (2008).

Section 52-599 (b), provides that: "A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. If a party plaintiff dies, his executor or administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. If a party defendant dies, the plaintiff, *within one year* after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed." (Emphasis added.)

It is evident from the plain and unambiguous language of this statute, that the plaintiff had one year, following written notice of the death of George Bongiorno, in which to apply for an order to substitute the deceased party with the representative of his estate.[12] Although the court made no specific finding as to when written notice of George Bongiorno's death was provided to the plaintiff, it is undisputed that he died on March 13, 2016. Recognizing that this date was the earliest point at which such notice could have been provided, the record clearly indicates that the application to substitute the representative of the estate of George Bongiorno for the deceased defendant was made within one year.

As stated previously in this opinion, the plaintiff filed a motion to cite in Gottlin, the temporary adminstratrix of the estate of George Bongiorno on December 23, 2016.[13] This motion was granted on January 9, 2017. Thus, given the fact that the plaintiff's motion was filed within one year of George Bongiorno's death, it was undoubtedly timely pursuant to § 52-599 (b), irrespective of when written notice of his death was provided to the plaintiff, and the court's finding to the contrary

[12] Accordingly, we note that the court incorrectly applied the six month time limitation to this action. It is clear from the language of the statute that the six month limitation applies only when it is a party plaintiff that has died; in cases involving deceased defendants, such as this case, the one year time limitation applies. This error alone is not dispositive, however, as we must address whether the plaintiff's application to substitute the representative of the estate of George Bongiorno for the deceased defendant was nonetheless filed within one year of the written notice of his death.

[13] We note that the motion to cite in Marie Bongiorno was filed on August 22, 2017, more than a year after the death of George Bongiorno. For the purposes of § 52-599 (b) however, the December 23, 2016 motion satisfied the statutory requirement of an application "for an order to substitute the decedent's executor or administrator in the place of the decedent," and, thus, the date on which the plaintiff sought to cite in Marie Bongiorno, executrix, after she replaced the temporary administratrix, Gottlin, on May 15, 2017, is immaterial as to this issue on appeal.

was clearly erroneous. Further, because the plaintiff's motion was timely, the court did not have discretion to render judgment in favor of Marie Bongiorno, executrix, on this basis. *Dorsey* v. *Honeyman*, 141 Conn. 397, 400, 107 A.2d 260 (1954) ("the plaintiff [has] an absolute right to have the representative of a deceased defendant cited in within one year after the defendant's death, and thereafter it is within the power of the court to order him cited in if good cause is shown for the delay"). Indeed, having found that the plaintiff had established all the elements of its breach of contract claim against George Bongiorno, for which Marie Bongiorno, executrix, is liable pursuant to § 52-599 (a), it should have rendered judgment in favor of the plaintiff accordingly.

The judgment in favor of Marie Bongiorno, executrix, is reversed and the case is remanded with direction to render judgment in favor of the plaintiff as against Marie Bongiorno, executrix; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BAYVIEW LOAN SERVICING, LLC *v.* SANDRA FRIMEL ET AL.
(AC 41213)

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

Syllabus

The plaintiff company sought to foreclose a mortgage on certain real property owned by the defendant F. The plaintiff filed a motion for summary judgment as to liability only on the complaint and as to F's special defenses and counterclaim. In July, 2017, at a scheduled hearing on the plaintiff's motion for summary judgment, the plaintiff's counsel indicated that although she was ready to proceed with regard to the motion for summary judgment, she would leave it to the trial court's discretion in light of the suspension from the practice of law of F's attorney and F's attempts to retain another attorney. During that hearing, the court noted that it would consider the plaintiff's motion on or after August 18, 2017, but that it would grant the motion for summary judgment if F failed to

file an objection by that time. The court also noted that it would hear oral argument on the merits of the motion for summary judgment if F requested argument on or before August 18, 2017, but that it would otherwise consider the matter on the papers. On August 21, 2017, F's new attorney, H, filed an objection to the plaintiff's motion for summary judgment, indicating that oral argument was requested, but the court subsequently granted the plaintiff's motion for summary judgment, without a hearing, on the basis of the parties' written submissions. Thereafter, the trial court rendered a judgment of foreclosure by sale, from which F appealed to this court. *Held* that the trial court erred in granting the plaintiff's motion for summary judgment without the motion appearing on the short calendar and without permitting oral argument on the motion: although that court, in granting the plaintiff's motion for summary judgment, cited F's failure to file an opposition to the motion by the deadline established by the court and treated F's objection as untimely and insufficient because it did not include a memorandum of law, evidence, or an affidavit, the court was required to consider, in the first instance, whether the plaintiff, as the movant, had satisfied its burden of establishing its entitlement to summary judgment, and, if the plaintiff had failed to meet its initial burden, it would not matter if F had not filed any response; moreover, the trial court improperly granted the plaintiff's motion for summary judgment without hearing oral argument regarding the merits of that motion as required by the applicable rule of practice (§ 11-18), as the court indicated during the July, 2017 hearing, which did not address the merits of the plaintiff's motion, that it would consider the motion on the papers unless F filed a request for oral argument by August 18, 2017, H filed an objection to the plaintiff's motion for summary judgment with a request for oral argument on August 21, 2017, and, notwithstanding those filings, the court granted the plaintiff's motion for summary judgment without hearing oral argument on the merits of that motion.

Argued May 22—officially released September 17, 2019

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the named defendant filed a counterclaim; thereafter, the court, *Aurigemma*, *J.*, granted the plaintiff's motion for summary judgment as to liability on the complaint and as to the counterclaim; subsequently, the court denied the named defendant's motion to reargue and for reconsideration; thereafter, the court,

Domnarski, *J.*, rendered a judgment of foreclosure by sale, from which the named defendant appealed to this court; subsequently, the court, *Aurigemma*, *J.*, denied the named defendant's motion for articulation; thereafter, this court granted the named defendant's motion for review but denied the relief requested therein. *Reversed*; *further proceedings*.

Michael J. Habib, with whom was *Thomas P. Willcutts*, for the appellant (named defendant).

Benjamin T. Staskiewicz, for the appellee (plaintiff).

Jeffrey Gentes filed a brief for the Connecticut Fair Housing Center as amicus curiae.

Opinion

BEACH, J. The defendant Sandra Frimel appeals from the judgment of foreclosure by sale rendered in favor of the plaintiff, Bayview Loan Servicing, LLC.[1] On appeal, the defendant claims that the trial court erred in granting the plaintiff's motion for summary judgment without the motion appearing on the short calendar and without permitting oral argument on the motion. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's claim on appeal. The plaintiff filed this action in February, 2011, seeking to foreclose a mortgage on the defendant's property located at 158 Brainard Hill Road in Higganum. On December 23, 2013, the trial court, *Domnarski*, *J.*, granted the plaintiff's motion for summary judgment as to liability only. On

[1] Geoffrey Hammerson and JPMorgan Chase Bank, N.A., also were named as defendants in this action. On April 1, 2011, the court granted the plaintiff's motion for default for failure to plead against Hammerson. On April 28, 2014, the court granted the plaintiff's motion for default for failure to plead against JPMorgan Chase Bank, N.A. We refer to Frimel as the defendant in this opinion.

April 28, 2014, the court, *Marcus*, *J.*, rendered a judgment of foreclosure by sale. On August 18, 2014, Judge Domnarski granted the defendant's motion to open the judgment and vacated the judgment of foreclosure by sale. On January 12, 2015, the plaintiff filed a motion for judgment of strict foreclosure. On January 23, 2015, the defendant filed an answer, a special defense, and a counterclaim.

On June 2, 2017, the plaintiff filed a motion for summary judgment as to liability only on the complaint and as to the defendant's special defense and counterclaim. On June 19, 2017, William B. Smith, trustee for Thomas P. Willcutts, the defendant's former attorney, filed a letter informing the court that Willcutts had been placed on interim suspension from the practice of law and that the defendant had only recently become aware of Willcutts' suspension. The letter also asked that the court offer "any appropriate forbearance or time in proceeding" with this matter.[2] At a scheduled hearing on the plaintiff's motion for summary judgment on July 24, 2017, the plaintiff's counsel indicated that although she was ready to proceed with regard to the plaintiff's motion for summary judgment, she would leave it to

[2] The letter, addressed to the clerk of the court, stated:

"As of April 11, 2017, I was appointed [t]rustee for Thomas P. Willcutts, Esq., who was suspended on an interim basis from the practice of law in Connecticut, pursuant to Practice Book § 2-64, and by [o]rder of Judge Robaina.

"I am informing the [c]ourt, for informational purposes, in light of the matter **Bayview Loan Servicing, LLC v. Frimel et al. (MMX-CV11-6004441-S)**, in which Attorney Willcutts filed an appearance for [the defendant]. Further, I have learned that [the defendant] has only become aware of Attorney Willcutts' suspension and her need to retain new counsel this week due to mail delivery problems to her rural delivery route. Additionally, I have come to understand that she currently is without new representation at the time of this writing.

"Finally, I respectfully request that the [c]ourt offer any appropriate forbearance or time in proceeding with the above matter, so that [the defendant] has ample opportunity to arrange for new representation." (Emphasis in original.)

the court's discretion in light of Willcutts' suspension and the defendant's attempts to retain another attorney.[3] The defendant then informed the court that she was having a problem receiving her mail and that she had very recently learned of Willcutts' suspension.[4] In response, the court, *Aurigemma*, *J.*, stated that it "will consider this matter on or after August [18, 2017]. If there's nothing filed by your attorney, the court will grant the summary judgment. This case is six years old. The court is not inclined to give any more time. I think [August 18, 2017], is quite generous." Counsel for the plaintiff then inquired whether the court would want oral argument on August 18, 2017, or if it would consider the case on the papers on that date. In response, the court stated that "[i]f they file it and want argument, they can request argument . . . on or before [August 18, 2017]; otherwise, I will take it on the papers."

[3] The plaintiff's counsel stated: "And, Your Honor, this is the plaintiff's motion for summary judgment. And, just by way of background, the defendant was represented by Attorney Willcutts, who is no longer able to practice at this moment.

"We spoke with the trustee, who stated that he would be filing a request with the [c]ourt for additional time, so that a new attorney can be sought.

"I haven't seen an appearance yet, but I did speak with the defendant this morning. She said she is in talks with an attorney. She has his name. He is deciding whether he wants to take the case or not. So, I leave that matter up to Your Honor's discretion.

"We're ready to proceed, but given the circumstances, we're leaving it to Your Honor's discretion."

[4] The following colloquy took place between the court and the defendant:

"The Court: When can your attorney be hired and file an opposition to the [motion for] summary judgment?

"[The Defendant]: What I've heard is—and I'm sorry for the delay. The trustee—there's a problem with my mail. I don't know if you've read that letter. And the trustee—I did not know that my attorney had been suspended. The first I heard of it is when I heard from the bank's representative, which they mailed something to me on—it's postmarked [June 2, 2017], but I didn't receive it until almost two and [one-half] weeks later because of a mail problem, which I continue to straighten out. And I then called the trustee, who had not notified me, and his name is William B. Smith, and he called me back and said, didn't you get my letter? I never got a letter from him, and that's when I first heard that Attorney Willcutts had been suspended . . . ."

On August 18, 2017, Attorney Michael J. Habib filed an appearance on behalf of the defendant. On August 21, 2017, Habib filed an objection to the plaintiff's motion for summary judgment. The opposition indicated that oral argument was requested.[5] On August 29, 2017, the court granted the plaintiff's motion for summary judgment on the basis of the parties' written submissions and without a hearing. The court's decision stated: "Absent opposition. The motion for summary judgment was filed in June. It appeared on the calendar on [July 24, 2017]. At that time the defendant's attorney was suspended from practice. The court stated that it would not consider the motion until August 18, 2017, thereby giving the defendant or her attorney time to file something in opposition to the motion for summary judgment. As of August 18, 2017, there was nothing filed in opposition. The defendant's new attorney filed a one page objection to the [motion for] summary judgment on August 21, 2017, but filed no memorandum of law and filed no evidence or affidavit in opposition to the summary judgment motion. Given the age of this case and the unfairness to the plaintiff, the court finds that the defendant's conduct is motivated only by desire to delay proceedings and, in the absence of anything substantive to oppose the plaintiff's [motion for] summary judgment, the same is granted."

On September 19, 2017, the defendant filed a motion to reargue and for reconsideration,[6] contending that the court's order granting the plaintiff's motion for summary judgment was "against applicable law in its failure to permit the defendant to present her opposition to

[5] Although the opposition made reference to a memorandum of law, the memorandum of law in opposition to the motion for summary judgment was not filed until October 2, 2017. On October 19, 2017, the defendant filed a notice of intent to argue her objection and memorandum of law in opposition to the plaintiff's motion for summary judgment.

[6] Although captioned as the plaintiff's motion to reargue and for reconsideration, this motion was filed by the defendant.

the plaintiff's motion, by way of argument or otherwise, and its failure to consider the same in granting the plaintiff's motion." That same day, the plaintiff filed an objection to the defendant's motion to reargue and for reconsideration. On October 10, 2017, the court denied the defendant's motion and sustained the plaintiff's objection thereto. On December 18, 2017, Judge Domnarski rendered a judgment of foreclosure by sale. The defendant then filed the present appeal.

On appeal, the defendant claims that the court erred in granting the plaintiff's motion for summary judgment without the motion appearing on the short calendar and without permitting oral argument on the motion. The plaintiff counters that the court acted within its discretion in scheduling the hearing on its motion for summary judgment, setting deadlines for the defendant's opposition to be filed and, ultimately, granting the motion for summary judgment. We agree with the defendant and conclude, for two reasons, that the court erred in granting the plaintiff's motion for summary judgment.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy [its] 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." (Emphasis in original; internal quotation marks omitted.) *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016). "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 712, 66 A.3d 860 (2013).

We initially note that the trial court, in granting the plaintiff's motion for summary judgment, cited the defendant's failure to file an opposition to the motion by the deadline established by the court. In *Capasso* v. *Christmann*, supra, 163 Conn. App. 250, the plaintiffs claimed that the trial court improperly rendered summary judgment in favor of the defendants "on the basis that the plaintiffs' counsel [had] failed to file an adequate opposition to the defendants' motion." We noted that the trial court in that case "failed to address or consider whether the defendants had met their burden of establishing that they were entitled to summary judgment. The court instead rendered judgment in favor of the defendants because the plaintiffs' counsel had submitted an inadequate brief. Specifically, the court stated: 'The motion for summary judgment now before the court is granted for the failure of its counseled opponents to submit an adequate brief following specific instructions to do so.' In other words, the court effectively sanctioned the plaintiffs for failing to comply with its prior order." Id., 260.

In concluding that the trial court in *Capasso* improperly rendered summary judgment in favor of the defendants, we stated: "Under these facts and circumstances, it was improper to grant summary judgment solely because the court determined that the opposition to the defendants' motion was inadequate. . . . Under our jurisprudence, the court was required to consider, in the first instance, whether the defendants, as the

movants, had satisfied their burden of establishing their entitlement to summary judgment. If, and only if that burden was met, would the court have considered the plaintiffs' memoranda in opposition and supporting evidentiary submissions to determine if they raised genuine issues as to any facts material to the defendants' right to judgment in their favor. If the defendants had failed to meet their initial burden, it would not matter if the plaintiffs had not filed *any* response. . . . Summary judgment could not be rendered if the defendants failed to establish that there was no genuine issue as to any material fact." (Citations omitted; emphasis in original.) Id., 260–61.

As in *Capasso*, the court's order in the present case failed to consider whether the plaintiff had met its burden of establishing that it was entitled to summary judgment. Instead, the order noted that it was being issued "[a]bsent opposition" and that, although the court had given the defendant until August 18, 2017, to file an opposition to the motion for summary judgment, nothing had been filed by that date. The order further noted that Habib had filed a one page objection to the motion for summary judgment on August 21, 2017, but "filed no memorandum of law and filed no evidence or affidavit in opposition to the summary judgment motion."[7]

The court appears to have treated the defendant's objection as untimely and insufficient because it did

[7] The court also stated that "[g]iven the age of this case and the unfairness to the plaintiff, the court finds that the defendant's conduct is motivated only by desire to delay proceedings and, in the absence of anything substantive to oppose the plaintiff's [motion for] summary judgment, the same is granted." With regard to the court's statements regarding the age of the case and the fact that the defendant's conduct was motivated by a desire to delay the proceedings, we note that the defendant filed her answer, special defense and counterclaim on January 23, 2015. The plaintiff, however, did not file its motion for summary judgment until June 2, 2017, over two years later.

The defendant filed a motion for articulation requesting that the court articulate, inter alia, the factual and legal basis for its conclusions that the defendant's conduct was motivated by a desire to delay the proceedings

not include a memorandum of law, evidence, or an affidavit. In this regard, the plaintiff argues, in part, that the trial court properly granted its motion for summary judgment because the defendant had not filed an opposition to the motion within forty-five days of the filing of the motion pursuant to Practice Book § 17-45 (b).[8] As we stated in *Capasso*, however, the court was required to consider, in the first instance, whether the plaintiff, as the movant, had satisfied its burden of establishing its entitlement to summary judgment. If the plaintiff had failed to meet its initial burden, it would not matter if the defendant had not filed any response. *Capasso* v. *Christmann*, supra, 163 Conn. App. 261.

Additionally, the court granted the plaintiff's motion for summary judgment in the absence of oral argument on the motion. As stated previously in this opinion, at the hearing on July 24, 2017, the court indicated that it would consider the matter on or after August 18, 2017, and that if the defendant had not filed anything by that date, it would grant the plaintiff's motion. In response to an inquiry by counsel for the plaintiff, the court stated that the defendant could file a request for oral argument by August 18, 2017; otherwise, the court would consider the motion on the papers.[9] Habib filed an appearance for the defendant on August 18, 2017, and an objection to the plaintiff's motion for summary

and involved unfairness to the plaintiff. The court denied the motion for articulation. The defendant thereafter filed a motion for review of the decision on the motion for articulation. This court granted review but denied the relief requested therein.

[8] Practice Book § 17-45 (b) provides: "Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence."

[9] The court did not issue a written order establishing the deadline of August 18, 2017. The defendant's affidavit, filed on October 2, 2017, along with the defendant's memorandum of law in opposition to the plaintiff's motion for summary judgment, indicated that the defendant was not sure of the nature of the August 18, 2017 deadline and that she contacted the court clerk for clarification; the clerk, however, was unable to provide clarification regarding the deadline.

judgment on August 21, 2017. The objection indicated that oral argument was requested. Notwithstanding these filings, on August 29, 2017, the court granted the plaintiff's motion for summary judgment without hearing oral argument on the merits of the plaintiff's motion.

Practice Book § 11-18 provides in relevant part: "(a) Oral argument is at the discretion of the judicial authority except as to . . . motions for summary judgment . . . and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all other parties . . . a written notice stating the party's intention to argue the motion or present testimony. Such a notice shall be filed on or before the third day before the date of the short calendar date . . . ." "Parties are entitled to argue a motion for summary judgment as of right." *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 236, 4 A.3d 851 (2010).

The plaintiff argues that the court properly scheduled this matter for the July 24, 2017 short calendar and that it properly marked this motion "Ready" in accordance with Practice Book § 17-45 (c).[10] (Internal quotation marks omitted.) At the hearing on July 24, 2017, however, the parties did not argue the merits of the motion for summary judgment. Counsel for the plaintiff conceded, at oral argument before this court, that the trial court did not address the merits of the plaintiff's motion, either at the hearing on July 24, 2017, or in its order granting the motion. Pursuant to Practice Book § 11-18, the defendant had a right to oral argument on the plaintiff's motion for summary judgment. See *Curry* v.

[10] Practice Book § 17-45 (c) provides: "Unless otherwise ordered by the judicial authority, the moving party shall not claim the motion for summary judgment to the short calendar less than forty-five days after the filing of the motion for summary judgment."

Allan S. Goodman, Inc., 95 Conn. App. 147, 151–54, 895 A.2d 266 (2006) (trial court improperly rendered summary judgment in favor of defendant without oral argument where defendant had requested argument and parties anticipated argument on motion); see also *Singhaviroj* v. *Board of Education*, supra, 124 Conn. App. 237 (concluding that parties should be given opportunity to argue merits of claims at issue where transcript reveals that argument commenced on motions for summary judgment but no substantive discussion followed). The trial court, therefore, improperly granted the plaintiff's motion for summary judgment without hearing oral argument regarding the merits of that motion.[11]

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

In this opinion the other judges concurred.

TROY MCCARTHY *v.* COMMISSIONER OF CORRECTION
(AC 40926)

Prescott, Elgo and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of murder in connection with the shooting death of the victim, sought a second writ of habeas corpus, claiming, inter alia, that his right to due process was violated because his decision to reject the state's plea offer was not made knowingly and voluntarily, and that his trial counsel for bond purposes, E, had rendered ineffective assistance. At the petitioner's arraignment, E filed an appearance on the petitioner's behalf for bond purposes only, and, at subsequent pretrial proceedings, E reiterated that he had appeared for bond purposes only and informed the court that he did not intend to remain in the case and that he would return his retainer to the petitioner's family. Although the trial court discharged E from the case on March 10, 2004, at some point prior to April 9, 2004, E's investigator interviewed

[11] We note that nothing in this opinion precludes the trial court, on remand, from reconsidering the merits of the plaintiff's motion for summary judgment and determining whether that motion should be granted. See *Capasso* v. *Christmann*, supra, 163 Conn. App. 261 n.13.

two witnesses to the shooting who previously had provided statements to the police implicating the petitioner. On the basis of the investigator's interview notes, E then prepared affidavits for the witnesses in which they purportedly recanted their prior statements and indicated that the police had coerced them to make those statements. The trial court subsequently appointed new counsel, S and K, to represent the petitioner, and the witnesses' signed affidavits became part of S and K's criminal trial file. Thereafter, the petitioner rejected a plea offer from the state and the case proceeded to trial, at which the petitioner impeached the two witnesses with their affidavits after they testified for the state, identified the petitioner as the shooter, and denied telling the investigator that they had been coerced by the police into making their prior statements. E thereafter testified for the state, stating that although he had used the investigator's notes to prepare the affidavits, he had made up certain information to fill in narrative gaps. The petitioner alleged in count one of his second habeas petition that his right to due process of law was violated because his decision to reject the state's plea offer was not knowing and voluntary, in that he was misled as to the strength of the state's case against him by virtue of E's fabrication of the affidavits without his knowledge. In count three, the petitioner alleged that E had rendered ineffective assistance by causing him to misunderstand the strength of the evidence against him by fabricating the affidavits. The habeas court concluded that the petitioner had procedurally defaulted his due process claim because he failed both to raise it in his direct appeal and to establish cause for his default. The habeas court further determined that because E was not representing the petitioner at the time he fabricated the affidavits or at the time the petitioner rejected the state's plea offer in reliance on those affidavits, an ineffective assistance of counsel claim against E was not cognizable as a matter of law. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner's due process claim was subject to procedural default and that the petitioner failed to demonstrate good cause to excuse the procedural default of that claim: notwithstanding the petitioner's claim that his due process claim was not susceptible to procedural default because it was premised on E's alleged ineffective assistance, the plain language of count one, viewed in the context of the entire amended habeas petition, alleged a freestanding due process claim, not an ineffective assistance of counsel claim, that could have been raised either at the petitioner's criminal trial, when E testified about fabricating the affidavits and the basis for the due process claim first became apparent, or on direct appeal, on the basis of the record established by E's testimony; accordingly, because the petitioner failed to raise his due process claim at his trial or on direct appeal, and the respondent Commissioner of Correction raised the

defense of procedural default as to count one, the burden shifted to the petitioner to prove why the default should be excused, which he failed to do.

2. The habeas court erred in concluding that the petitioner's claim that E rendered ineffective assistance of counsel was not cognizable as a matter of law because E did not represent the petitioner at the time he fabricated the affidavits or when the petitioner relied on those affidavits and rejected the state's plea offer: ineffective assistance of counsel claims are not limited to actions taken by attorneys who are counsel of record or who appeared in court, but may be maintained in cases in which a nonappearing attorney is alleged to have rendered deficient performance that subsequently has an adverse impact on the petitioner's criminal case if, on the basis of the totality of the circumstances, the nonappearing attorney was representing the petitioner as counsel for purposes of the sixth amendment at the time he rendered the deficient performance; moreover, in the present case, in considering the scope and duration of the attorney-client relationship, the habeas court unduly focused on E's presence in the courtroom, the nature of his written appearance, and the date on which the criminal court discharged him from the case, and improperly disregarded evidence that E's representation was not limited to appearing for bond purposes and that he continued to perform out-of-court work on the petitioner's behalf even after his appearance was withdrawn, especially given that it was unclear whether E's retainer covered professional services beyond representing the petitioner at arraignment and there was evidence in the record that E prepared the affidavits and performed out-of-court work on behalf of the petitioner after the bond hearing; accordingly, because the court focused unduly on the nature of E's written appearance and official representation, and because the question of whether an attorney-client relationship exists presents a mixed question of law and fact, the case was remanded to the habeas court for a new trial on count three of the amended habeas petition and a determination on the issue of whether E continued to represent the petitioner for purposes of the sixth amendment at the time he fabricated the affidavits.

Argued March 19—officially released September 17, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Robert L. O'Brien, assigned counsel, with whom on the brief was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Angela R. Macchiarulo*, senior assistant state's attorney, and *Michael Proto*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The petitioner, Troy McCarthy, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. In his underlying criminal case, the petitioner allegedly rejected a plea offer from the state after being misled regarding the strength of the state's case against him because his prior counsel, Joseph Elder, fabricated affidavits from certain eyewitnesses to the underlying crime. The habeas court denied the petition on the ground that an ineffective assistance of counsel claim was not cognizable because Elder was no longer representing the petitioner when he fabricated the affidavits or at the time the plea offer was made.

On appeal, the petitioner claims that the habeas court improperly concluded that (1) count one of his amended petition alleging a due process violation was procedurally defaulted because he failed to sustain his burden to establish good cause for his failure to raise this claim at trial or on direct appeal and (2) an ineffective assistance of counsel action regarding Elder was not cognizable because Elder did not represent him at the time that Elder fabricated the witnesses' affidavits or at the time that the petitioner, in reliance on these affidavits, rejected the state's plea offer. We conclude that the court properly determined that count one of the petitioner's amended petition was barred by procedural default. We agree, however, with the petitioner that the court improperly denied count three of his amended petition alleging ineffective assistance by

Elder because, in assessing his sixth amendment right to the effective assistance of counsel, the habeas court applied an unduly narrow view of the scope and duration of the attorney-client relationship. Accordingly, we affirm in part and reverse in part the judgment of the habeas court.

The relevant facts, as set forth in the habeas court's memorandum of decision and in this court's decision resolving the petitioner's direct appeal, are as follows: "On September 25, 2003, the [petitioner] and the victim, Raymond Moore, were standing near the corner of Westland Street and Garden Street in Hartford, in front of the former Nelson & Son's Market, when they engaged in a physical altercation. After the victim slammed the [petitioner]'s body onto the sidewalk, several people intervened and stopped the fight. The [petitioner], humiliated, left the scene but stated that he would be back. Later, the [petitioner] returned with a gun, but the victim was not there. A friend of the victim, Robert Ware, and others told the [petitioner] that 'it wasn't worth it.' The [petitioner], however, responded that the victim was going to respect him.

"Two days later, on September 27, 2003, the victim returned to the area and was standing in front of Nelson & Son's Market speaking with Ware. Ware then went across Westland Street and entered Melissa's Market to buy cigarettes. A homeless woman from the area, Mary Cauley, who was on her way to the C-Town Market on Barbour Street, approached the victim and told him that he should go home to his family. She then continued on her way to the C-Town Market, walking north on Garden Street, where she saw the [petitioner] standing on his front porch. Cauley said hello to the [petitioner], who instructed her to get out of the way. When she got to the C-Town Market, Cauley heard gunshots.

"Upon hearing a gunshot, Ware immediately ran out of Melissa's Market as a second gunshot was fired.

Looking up Garden Street, Ware saw the victim falling to the ground and saw the [petitioner] running in the opposite direction carrying a gun. At that same time, Maurice Henry, Chauncey Odum and Tylon Barlow were in a vehicle in the parking lot behind Nelson & Son's Market smoking 'blunts.' Henry was in the driver's seat. As he began to drive out of the parking lot, onto Garden Street, Henry saw the victim walking north. He then saw the [petitioner] emerge from the rear yard of a Garden Street building, carrying a gun. Henry saw the [petitioner] shoot the victim twice." (Footnote omitted.) *State* v. *McCarthy*, 105 Conn. App. 596, 598–600, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008).

The petitioner was arrested on March 1, 2004, and charged with murder in violation of General Statutes § 53a-54a, carrying a pistol without a permit in violation of General Statutes § 29-35, and criminal possession of a firearm in violation of General Statutes § 53a-217. Elder entered a court appearance on the petitioner's behalf at his first bond hearing on March 2, 2004. The appearance form indicated that the appearance was for bond purposes only. See Practice Book § 3-6. On March 10, 2004, Elder "informed the court that he did not intend to file a full appearance in the petitioner's case, and that he would return the petitioner's retainer," and the court permitted him to withdraw his court appearance. On March 29, 2004, Attorney R. Bruce Lorenzen, a public defender, entered his appearance on the petitioner's behalf but withdrew from the case on June 23, 2005, due to a conflict of interest. The court then appointed special public defenders, Attorneys Michael O. Sheehan and George G. Kouros, to represent the petitioner.[1]

[1] Sheehan and Kouros represented the petitioner at trial and in his subsequent direct appeal.

Sometime between March 3, 2004, and April 9, 2004, Elder's private investigator, Homer Ferguson, interviewed Henry and Cauley, eyewitnesses to the shooting. Elder prepared affidavits based on Ferguson's notes from these interviews. The affidavits were signed by Henry and Cauley on April 9, 2004. In their affidavits, both witnesses purportedly recanted the prior statements that they had made to the police implicating the petitioner in the shooting and, instead, indicated that the investigating detective had "intimidated, coerced and pressured [them] to provide inculpatory testimony against the petitioner." Their affidavits further indicated that they did not know who shot the victim. After Lorenzen was appointed to represent the petitioner, Elder placed the affidavits in the copy of the file he shared with Lorenzen, and the affidavits ultimately became part of Sheehan and Kouros' file.[2]

The petitioner pleaded not guilty to all charges and elected a jury trial. During jury selection, the state extended a plea offer to the petitioner that would have required him to plead guilty to manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a in exchange for a maximum sentence of fifteen years of incarceration with a right to argue for a lower sentence of no less than ten years of incarceration. After consulting with Sheehan and Kouros, the petitioner rejected the state's offer and proceeded to trial.

At the petitioner's criminal trial, Henry and Cauley testified for the state and identified the petitioner as

[2] It is not apparent from this record when Elder created the affidavits or when Lorenzen took custody of the file containing them. It is evident, however, that the affidavits were created before April 9, 2004, when they were signed by both witnesses and that Lorenzen was in possession of them on April 30, 2004, because he impeached Henry with his affidavit during cross-examination at the probable cause hearing on that date. The file containing the affidavits, therefore, must have been passed to Lorenzen between April 9 and April 30, 2004.

the shooter in the victim's murder. On cross-examination, the petitioner impeached Henry and Cauley with the affidavits that had been prepared by Elder. Both witnesses testified that they never told Ferguson that the police had intimidated, coerced, and pressured them to identify the petitioner as the shooter.

The state also called Elder to testify at the petitioner's criminal trial. He testified that he had used Ferguson's notes from his meetings with Henry and Cauley to prepare the affidavits. The prosecutor asked if he "[made] things up" in the affidavits, which he answered by saying: "What I did was, I filled in the gap. And the idea would be to fill in the gap to see if that would be what the witness would agree to. It was not information that came directly from the witness, it was information that I provided . . . ." The prosecutor then asked, "where did you get that information from," to which Elder responded: "I made it up." The prosecutor asked if he believed that he had fabricated evidence, and Elder replied: "No, because it wasn't information that would have been substantial or substantive in that way. It was information that did not go to the substance of the case." As an example, Elder noted that Henry's claim that he did not witness the shooting was not something he would fabricate. The prosecutor then asked if Elder would fabricate the phrase "out of fear and through intimidation," and Elder indicated that the phrase was "something [he] would put in there." When asked if he often editorialized witnesses' affidavits, Elder stated: "I don't generally do that. But, in doing this particular one, my recollection is that I felt that it needed a little oomph." Elder had not informed the petitioner or any of his attorneys that he had fabricated the affidavits.

The petitioner subsequently was convicted of murder in violation of § 53a-54a. He was sentenced to fifty years of incarceration.

On direct appeal, the petitioner claimed that "(1) the court improperly denied his motion for a new trial, (2) the court improperly admitted certain impeachment evidence for substantive purposes, (3) the court improperly instructed the jury and (4) he was deprived of a fair trial due to prosecutorial impropriety." *State* v. *McCarthy*, supra, 105 Conn. App. 598. We subsequently affirmed his conviction. Id.

The petitioner filed his first petition for a writ of habeas corpus on January 9, 2007, in which he was represented by Attorney Robert J. McKay. In his first habeas action, McKay did not raise a claim of ineffective assistance of counsel against Elder.[3] The habeas court, *Cobb*, *J.*, denied the petition on March 22, 2012. *McCarthy* v. *Warden*, Docket No. CV-07-4001548-S, 2012 WL 1222247, *1 (Conn. Super. March 22, 2012). The petitioner was granted certification to appeal on March 28, 2012, but the appeal was withdrawn on February 4, 2013.

The petitioner commenced this second habeas corpus action in February, 2013. His amended petition, filed on December 6, 2016, contained four counts. Count one raised a due process claim in which he alleged that his decision to reject the state's plea offer was not

[3] In his first petition for a writ of habeas corpus, the petitioner claimed that he was deprived of the effective assistance of counsel by his trial attorneys, Sheehan and Kouros, because they: "(1) failed to object to the testimony of [Ware], a late disclosed state's witness; (2) failed to request a continuance to investigate Ware's testimony; (3) failed to move for a mistrial subsequent to Ware's testimony; (4) failed to object to the testimony of [Elder], the petitioner's bond counsel or cross-examine him; (5) failed to file a motion for a mistrial after Elder testified; (6) failed to file a notice of alibi or to subpoena alibi witnesses; (7) failed to investigate the evidence or state's witnesses prior to trial; (8) misrepresented the state's plea offer; (9) failed to adequately present evidence of third-party culpability, and in particular, that [Odum] was in possession of a firearm of the same caliber as the murder weapon; (10) failed to cross-examine Odum as to his possession of the gun; and (11) failed to request a jury charge on third-party culpability." *McCarthy* v. *Warden*, supra, 2012 WL 1222247, *2.

knowingly and voluntarily made because he was misled regarding the strength of the state's case against him by Elder's fabrication of the affidavits from eyewitnesses to the underlying crime without his knowledge. Count two alleged ineffective assistance of counsel by McKay for failing to plead and litigate in his first habeas action the freestanding due process claim alleged in count one. Count three alleged ineffective assistance of counsel by Elder for causing him to misunderstand the strength of the evidence against him in the underlying criminal prosecution. Finally, count four alleged ineffective assistance of counsel by McKay for failing to plead and litigate the ineffective assistance of counsel claim alleged in count three.[4]

In its return, the respondent raised the special defense of procedural default with respect to count one of the petitioner's amended complaint, his freestanding due process claim. Importantly, the respondent did not raise procedural default as a special defense to any of the other claims in the petitioner's amended petition.[5]

[4] The habeas court denied counts two and four of the amended petition, the so-called "habeas on a habeas" counts; see *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550, 153 A.3d 1233 (2017); on the ground that the petitioner failed to produce evidence sufficient to overcome the strong presumption that McKay's decision not to raise in the petitioner's first habeas action the claims now asserted in counts one and three fell within the wide range of competence required by the sixth amendment. See *Strickland* v. *Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). On appeal, the petitioner has failed to raise and separately brief any claim challenging the habeas court's denial of counts two and four. Although he does address McKay's alleged deficient performance in his argument that he satisfies the cause and prejudice standard necessary to avoid procedural default with respect to count one, we conclude that such briefing, untethered to any specific claim directed at the court's resolution of count two, is inadequate to avoid abandoning a challenge to the denial of count two. See *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208, cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

[5] Moreover, during the habeas trial, the respondent did not assert, as he did during oral argument before this court, that he had raised procedural default in his return with respect to count three. The habeas court, in reviewing the pleadings with counsel prior to trial, expressly stated that it viewed the respondent's allegation of procedural default as directed only

In his reply, the petitioner asserted that "[c]laims of due process that involve or stem from the ineffective assistance of trial counsel and prior habeas counsel, as alleged in count one, negate an alleged procedural default, such that cause and prejudice need not be shown . . . ." The petitioner further asserted that "the issue could only properly be raised for the first time in a habeas petition;" therefore, "[p]rior habeas counsel was ineffective for failing to raise this issue at that time."

In a memorandum of decision, the habeas court, *Oliver*, *J.*, denied the petition, concluding, inter alia, that the freestanding due process claim in count one of the amended petition was procedurally defaulted. Because the respondent did not allege that the claim raised by the petitioner in count three was procedurally defaulted, the habeas court reached the merits of that claim. The court, however, concluded that because Elder's representation of the petitioner ended on March 10, 2004, an ineffective assistance of counsel claim against Elder, as a matter of law, could not be maintained with respect to the conduct alleged in count three of the amended petition.[6] The petitioner sought certification to appeal, which the court granted on September 27, 2017. This appeal followed.

I

The petitioner first claims that the habeas court improperly concluded that he failed to demonstrate good cause to overcome procedural default of the due

to count one, and counsel for the respondent made no attempt to clarify or assert otherwise. Moreover, during posttrial arguments, the respondent reiterated that he was "still pursuing the procedural default in count 1."

[6] Because the habeas court concluded that Elder was not representing the petitioner within the meaning of the sixth amendment when he fabricated the affidavits, it did not reach the question of whether Elder's performance fell below acceptable standards or if the petitioner was prejudiced by Elder's alleged deficient performance.

process claim alleged in count one of the amended petition. Specifically, the petitioner argues that his due process claim stems from the ineffective assistance of Elder and, therefore, is not susceptible to procedural default. We agree with the habeas court that the due process claim was procedurally defaulted.

"In essence, the procedural default doctrine holds that a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding . . . ." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). Claims that are "fully capable of being raised and decided in the trial court or on direct appeal" are distinguishable from "a typical claim of ineffective assistance of counsel under [*Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984)],[7] which can only be adequately litigated in a collateral proceeding . . . ." *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 646, 153 A.3d 1264 (2017). Typical claims of ineffective assistance of counsel require the court to determine whether "counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 689.

[7] "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* v. *Washington*, supra, 466 U.S. 687.

"The trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action." *State* v. *Leecan*, 198 Conn. 517, 541, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986). "[C]laims [such as] structural error based on the complete denial of counsel in a proceeding [however] would be apparent on the record." *Taylor* v. *Commissioner of Correction*, supra, 646. "Habeas, as a collateral form of relief, is generally available to litigate constitutional issues only if a more direct route to justice has been foreclosed through no fault of the petitioner." (Internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 511, 193 A.3d 625 (2018).

If the state "alleges that a [petitioner] should be procedurally defaulted from now making the claim, the [petitioner] bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, supra, 151 Conn. App. 852. "The cause and prejudice standard is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . [T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . . Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, 173 Conn. App. 352, 366, 163 A.3d 1208, cert. denied, 327 Conn. 901, 169 A.3d 796 (2017).

It is true that "[a] successful ineffective assistance of counsel claim can satisfy the cause and prejudice standard so as to cure a procedurally defaulted claim." Id. Indeed, "[i]f a petitioner can prove that his attorney's performance fell below acceptable standards, and that, as a result, he was deprived of a fair trial or appeal, he will necessarily have established a basis for cause and will invariably have demonstrated prejudice." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 570, 941 A.2d 248 (2008).

It is with these principles in mind that we turn to the petitioner's claim that the court improperly concluded that he failed to demonstrate good cause to overcome procedural default of the due process claim alleged in count one of the amended petition. "The habeas court's conclusion that the petitioner is procedurally defaulted from raising his [due process] claim before the habeas court involves a question of law. Our review is therefore plenary." *Chaparro* v. *Commissioner of Correction*, 120 Conn. App. 41, 46, 990 A.2d 1261, cert. denied, 297 Conn. 903, 994 A.2d 1287 (2010).

As an initial matter, we agree with the court that the petitioner alleged a freestanding[8] due process claim in the first count of his amended petition, not an ineffective assistance of counsel claim as he asserted in his reply to the state's return and in his brief on appeal. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . [Although] the habeas court has considerable discretion to frame a remedy that is commensurate with

[8] In habeas corpus proceedings, courts often describe constitutional claims that are not tethered to a petitioner's sixth amendment right to counsel as "freestanding." See, e.g., *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 785–86, 114 A.3d 925, 928 (2015).

the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . The purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d 1095 (2016).

The plain language of count one of the amended petition alleges a due process claim, not an ineffective assistance of counsel claim. Count one is titled "Due Process Violation: Involuntary Plea on Account of Petitioner's Fundamental Misunderstanding of the State's Evidence" and alleges that the petitioner's "conviction and incarceration are illegal because they were obtained in violation of his state and federal constitutional rights to due process of law . . . ." Moreover, a reading of the entire amended petition supports the conclusion that count one alleges a freestanding due process claim because the petitioner also alleges in count three a separate claim of ineffective assistance of counsel by Elder. That count is based on the same conduct by Elder and would be duplicative of count one if it was interpreted as the petitioner argues. This construction of the amended petition supports the court's conclusion that the due process claim in count one, although related to the claim of ineffective assistance by Elder, is a separate, freestanding due process claim subject to procedural default, unless the petitioner establishes good cause and prejudice for having failed to raise the claim at trial or on direct appeal.

The petitioner's assertion that he could not pursue this argument on direct appeal because it was unpreserved at the underlying criminal trial is unavailing. The

petitioner was not only capable of raising the freestanding due process claim on direct appeal, but could have raised the issue at trial when it first became apparent. When Elder testified to having fabricated portions of the witnesses' affidavits at the petitioner's underlying criminal trial, the petitioner became aware of the conduct forming the basis of his freestanding due process claim. At that time, the petitioner could have moved for a mistrial pursuant to Practice Book § 42-43[9] or moved for a new trial pursuant to Practice Book § 42-53.[10]

The petitioner also was capable of raising the freestanding due process claim on direct appeal. Although the defendant's claim is based on allegations against his first trial counsel that are similar to a typical claim of ineffective assistance of counsel, the petitioner alleged a freestanding due process claim. As our Supreme Court noted in *Taylor* v. *Commissioner of Correction*, supra, 324 Conn. 646, a typical claim of ineffective assistance of counsel can adequately be litigated only in a collateral proceeding because an analysis of counsel's conduct under *Strickland* necessarily requires an inquiry into the strategic considerations that caused the attorney to pursue a particular course of action, which is usually not reflected in the record of the underlying trial.

[9] Practice Book § 42-43 provides in relevant part: "Upon motion of a defendant, the judicial authority may declare a mistrial at any time during the trial if there occurs during the trial an error or legal defect in the proceedings, or any conduct inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant's case. . . ."

[10] Practice Book § 42-53 (a) provides: "Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the error, the judicial authority shall grant the motion: (1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or (2) For any other error which the defendant can establish was materially injurious to him or her."

It is true that the petitioner's due process claim requires the court adjudicating it to consider Elder's conduct outside of the courtroom, a topic that typically could adequately be explored only in a collateral proceeding. In the present case, however, the state questioned Elder at the criminal trial about his fabrication of the affidavits. The petitioner, therefore, had a record of the conduct that formed the basis of the freestanding due process claim that he wanted to have reviewed on appeal. The freestanding due process claim in count one, therefore, was fully capable of being raised on direct appeal, if not at trial, and the petitioner was required to show good cause to overcome the procedural default of this claim.

We further agree with the habeas court that the petitioner failed to demonstrate good cause for procedurally defaulting his claim. The petitioner argues that the freestanding due process claim in count one is not susceptible to procedural default because the default derives from the ineffective assistance of Elder, which necessarily established a basis for cause and prejudice by virtue of the nature of the claim. As the court explained in *Johnson*, because a petitioner must meet the two-pronged test announced in *Strickland* to prevail on an *ineffective assistance of counsel claim*, he will "necessarily have established a basis for cause and will invariably have demonstrated prejudice" to overcome procedural default in so doing. (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 570. Because the petitioner alleged *a freestanding due process claim*, the rationale of *Johnson* does not apply to the present case. To avoid procedurally defaulting count one of his amended petition, the petitioner was required to demonstrate good cause for his failure to raise this issue at trial or on direct appeal, when it first could have been raised. The petitioner failed to do so.

Instead of asserting that his trial and appellate counsel, Sheehan and Kouros, were ineffective for failing to raise the due process claim at trial or on direct appeal, the petitioner claims Elder and McKay were ineffective for actions they took during pretrial proceedings and on collateral appeal during his first habeas case, respectively. This mere assertion of ineffectiveness by Elder and McKay is insufficient to show that some objective factor external to the defense impeded counsel's efforts to raise this issue at trial or on direct appeal when it was first capable of being raised. We, therefore, conclude that the court properly determined that count one of the amended petition was procedurally defaulted.

II

The petitioner next claims that the court improperly concluded that an ineffective assistance of counsel claim regarding Elder could not be maintained because Elder did not represent him at the time that Elder fabricated the witnesses' affidavits or at the time that the petitioner rejected the state's plea offer in reliance on the affidavits. For the reasons that follow, we conclude that the habeas court improperly denied count three of the amended petition because it applied an unduly narrow legal view of the scope and duration of the attorney-client relationship, and, thus, the case should be remanded for a new trial on that count.

The following additional facts, as set forth in the habeas court's decision denying the petitioner's first petition for a writ of habeas corpus, are relevant to this claim. "The petitioner was arraigned . . . on March 2, 2004. At that proceeding, Elder appeared for the purpose of bond only. The case was transferred to Part A and continued to March 9, 2004. On March 9, 2004, when the case was called, Elder did not appear, nor did any other attorney for the petitioner. On March 10, 2004, the trial court, *Solomon*, *J.*, explained to the

petitioner that Elder had been in a different court the day before and that it had ordered Elder to appear in court that day, March 10, 2004, at 10:00 a.m. The court explained that Elder's response to that message, through [his] secretary, was that he could not appear in the petitioner's matter on March 10 because he had a matter in Enfield, but that he would withdraw his bond only appearance and refund the petitioner's family's retainer. The court expressed its frustration with Elder's failure to appear, particularly in view of the serious nature of the charges.

"Later that day, the case was recalled, and Elder appeared. Elder explained that his appearance had been for bond only, he did not intend to file a full appearance in the case and that he would return the petitioner's family's retainer. The court ordered Elder out of the case and continued the matter for the petitioner to apply for a public defender or to obtain private counsel. At the next court appearance on March 29, 2004, public defender [Lorenzen] filed his appearance on the petitioner's behalf." *McCarthy* v. *Warden*, supra, 2012 WL 1222247, *5.

In concluding that an ineffective assistance of counsel claim regarding the fabricated affidavits was not cognizable, the habeas court was required to consider the nature and duration of the attorney-client relationship between the petitioner and Elder. This question necessarily involves a consideration of the attorney-client relationship in general, as well as a factual inquiry into the events surrounding Elder's procurement of the falsified affidavits.[11] The United States Supreme Court has determined that the question of whether an attorney

[11] We recognize that the petitioner did not call Elder as a witness at the second habeas trial. Because we conclude that the habeas court applied an incorrect legal standard in concluding that Elder was not the petitioner's counsel for purposes of the sixth amendment, that failure is not fatal to the petitioner's claim on appeal.

"represented" a defendant or served as counsel within the meaning of the sixth amendment presents a mixed question of fact and law over which an appellate court exercises plenary review. See *Cuyler* v. *Sullivan*, 446 U.S. 335, 341–42, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

At the outset, it is important to review some of the well established legal principles regarding the formation and termination of the attorney-client relationship and the fundamental obligations of a lawyer to a client and a former client. "An attorney-client relationship is established when the advice and assistance of the attorney is sought and received in matters pertinent to his profession. . . . With respect to termination of the relationship, our Supreme Court has stated: The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney's motion to withdraw from the representation. A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Ceana R.*, 177 Conn. App. 758, 769, 172 A.3d 870, cert. denied, 327 Conn. 991, 175 A.3d 1244 (2017).

For purposes of the sixth amendment and a petitioner's right to effective assistance of counsel, we agree with the United States Court of Appeals for the Seventh Circuit that an ineffective assistance of counsel claim may be cognizable with respect to the actions of an attorney who is not appearing in court or who is not counsel of record. See *Stoia* v. *United States*, 22 F.3d 766, 769 (7th Cir. 1994). As that court stated: "An attorney's constitutional ineffectiveness can manifest itself

at trial *even though the attorney never appears in court.* For example, a defendant may hire more than one attorney to work on his criminal case, but only one of them may actually enter an appearance and represent him in court. . . . Also, an attorney hired to do 'behind the scenes' work may, through deficient performance, negatively impact the trial counsel's ability to give the defendant an adequate defense." (Emphasis added.) Id.[12]

In determining the scope and duration of the attorney-client relationship in the present case, the habeas court narrowly focused on the courtroom component of Elder's representation of the petitioner. The cornerstone of the court's analysis was whether Elder had filed a written appearance with the court at the time he fabricated the affidavits. Indeed, the court began its analysis by emphasizing that "Elder appeared in the petitioner's case for bond purposes only." The court then declared that "Elder's *official representation* of the petitioner ended on March 10, 2004, when the court ordered him out of the case." (Emphasis added.) Finally, the court noted that "[t]he petitioner had not produced *any evidence* that [he] retained [Elder's] services after he withdrew from the case."[13] (Emphasis added.)

[12] In *Stoia*, the petitioner brought an ineffective assistance of counsel claim regarding one of his several attorneys, Raymond Takiff, who suffered from an improper conflict of interest but who had never appeared in court on his behalf. *Stoia* v. *United States*, supra, 22 F.3d 767–68. The court concluded that the petitioner's sixth amendment right to counsel was implicated, despite the fact that Takiff never appeared in court, because his conflict of interest negatively impacted the performance of other counsel and his defense as a whole. Id., 773.

[13] This statement by the habeas court is incorrect for at least two reasons. First, if Elder's representation of the petitioner continued beyond the end of Elder's in-court participation, then there would have been no need for the petitioner to again retain Elder. Second, the petitioner did produce evidence that Elder continued to represent him after March 10, 2004. That evidence included the undisputed fact that Elder and his investigator continued to work on the petitioner's case after that date. From that fact, a court

The habeas court's analysis suggests that it determined as irrelevant evidence that Elder was acting on the petitioner's behalf and for his benefit when he fabricated the affidavits. It is evident from the court's analysis in its memorandum of decision that it was most persuaded by the limited nature of the initial appearance filed by Elder and the subsequent withdrawal of that appearance. The court's reasoning fails to recognize that the sixth amendment right to effective assistance of counsel may extend, in the words of *Stoia*, to an attorney who performs "behind the scenes" work that, through deficient performance, negatively impacts the ability of the petitioner to assess the strength of the state's case and the decision to accept or reject a plea offer. See *Stoia* v. *United States*, supra, 22 F.3d 769.

The habeas court's use of the phrase "official representation" and its narrow focus on the nature of Elder's written appearance does not find support in our habeas jurisprudence or our rules of practice. The filing of a written appearance merely permits an attorney to appear in court and be heard on behalf of a party, entitles the attorney to confer with the prosecutor in a criminal case, and allows the attorney to receive copies of all notices required to be given by statute. Practice Book § 3-7. The filing of an appearance by one attorney does not mean that the petitioner is prevented from retaining other attorneys who will not appear in court on his behalf but may perform important out-of-court work on his behalf, including investigating potential eyewitnesses and obtaining written statements from them. Thus, even though Elder may not have been counsel of record after March 10, 2004, Elder may have continued to serve as the petitioner's counsel behind the scenes. Thus, the fact that Elder filed a limited appearance in court is not dispositive, but is merely

would be entitled to infer that the attorney-client relationship continued unabated until sometime later.

one factor in determining the scope and duration of the attorney-client relationship in the present case. See *State* v. *Murphy-Scullard*, Docket. No. A07-1319, 2008 WL 4470378, *4 (Minn. App. October 7, 2008) ("[f]ormally retaining an attorney is an important, although not dispositive, factor for the purposes of being deemed 'counsel' under the [s]ixth [a]mendment and its guarantee of effective assistance of counsel").

The habeas court's narrow focus on the status of Elder's "official representation" simply begs the question: If he no longer represented the petitioner, why would Elder continue to expend time and money investigating the eyewitnesses and then fabricate the affidavits, at great risk to his own personal and professional interests, if his representation of the petitioner had ended? It is difficult to imagine Elder engaging in such a frolic if he was not doing so as part of his continuing representation of the petitioner.

Indeed, the habeas court failed to consider other facts that suggest Elder continued to work on the petitioner's behalf after his written appearance was withdrawn on March 10, 2004. For example, the court did not consider, as was conceded by the state, that the witnesses' affidavits were prepared sometime between the bond hearing on March 2, 2004, and April 9, 2004, when Ferguson, acting within the scope of his employment with Elder, had the eyewitnesses sign their affidavits. It is clear that, sometime between April 9, 2004, when the affidavits were signed, and April 30, 2004, when Lorenzen used the fabricated affidavits during his cross-examination of Henry at the probable cause hearing, Elder gave Lorenzen a copy of his file containing the fabricated affidavits without alerting him or the petitioner to their fraudulent nature.

The habeas court presumably also failed to consider the fact that the petitioner was not appointed new counsel on March 10, 2004, when Elder last appeared in

court on the petitioner's behalf. In fact, the court continued the matter for the petitioner to apply for a public defender or obtain new private counsel, leaving a period of time during which it is unclear whether and when the petitioner began to rely on the advice of an attorney other than Elder, thereby signaling a de facto termination of the attorney-client relationship. Finally, there is no indication that the habeas court considered whether Elder's representation was truly limited, given that he had been paid a retainer that appeared to cover professional services that extended beyond representing the petitioner at his arraignment.[14]

We agree with the petitioner that a sixth amendment ineffective assistance of counsel claim is not limited solely to those attorneys appearing in court on his behalf but may extend to cases in which a nonappearing attorney engages in deficient performance that adversely impacts his case at a later time. Thus, the habeas court should have considered the totality of the circumstances regarding Elder's representation of the petitioner when analyzing the scope and duration of the attorney-client relationship in the present case.

It is true that courts in other jurisdictions have declined to extend the sixth amendment right to effective assistance of counsel to bad advice from an attorney if the petitioner has otherwise received adequate advice from another attorney acting on his behalf. These cases are, however, distinguishable from the present case.

In *United States* v. *Martini*, 31 F.3d 781, 782 (9th Cir. 1994), the petitioner received conflicting advice regarding a plea offer. The attorney who was originally

[14] If the retainer covered only professional services performed by Elder during the petitioner's arraignment, then there would have been no need for Elder to represent to the court that he intended on returning the retainer to the petitioner's family.

retained to represent the petitioner had urged him to accept the offer. Id. Dissatisfied with this advice, the petitioner sought a second opinion from an attorney who was not familiar with the case and who, based on the petitioner's understated representations about the strength of the state's case, advised him that "the case might be 'triable,' " advice that the petitioner later claimed constituted ineffective assistance of counsel. Id. In concluding that the sixth amendment right to the effective assistance of the counsel did not extend to the second opinion that he had received, the court stated: "If a criminal defendant in fact receives effective assistance of counsel from the lawyer he has retained to meet the prosecution's case, he cannot later claim that he received ineffective assistance of counsel from another lawyer he chose to consult." Id., 782–83.

Following *Martini*, the Sixth Circuit Court of Appeals in *Santosuosso* v. *United States*, Docket No. 95-3146, 1996 WL 15631, *3 (6th Cir. 1996), concluded that an ineffective assistance of counsel claim did not extend to an attorney's advice where that attorney was not counsel of record and the defendant had received adequate advice from another attorney who was counsel of record. In *Santosuosso*, the petitioner was represented by an attorney who had arranged a plea bargain and advised that he accept it. Id., *1. On the same day that his attorney of record convinced him to accept the plea offer, the petitioner met with two other attorneys who urged him to reject the plea offer, fire his current attorneys, and hire them instead. Id. The petitioner did so and subsequently claimed that the advice from those attorneys to reject the offer constituted ineffective assistance of counsel. Id., *2. Citing *Martini*, the court concluded that the petitioner had received adequate advice from his attorney of record, which satisfied the sixth amendment right. Id., *3. The court noted that, "[t]he opposite conclusion, that whenever a criminal

defendant acts upon what turns out to be bad advice he is entitled to relief for ineffective assistance, would leave a defendant free to reject a plea bargain, go to trial to test the waters, and then vacate the resulting sentence when the trial proves more costly than the plea agreement." Id.

In a similar case, the United States District Court for the Western District of Michigan concluded in *United States* v. *Logan*, 257 F. Supp. 3d 880, 890–91 (W. D. Mich. 2017), aff'd, 910 F.3d 864 (6th Cir. 2018), cert. denied, U.S. , 139 S. Ct. 1589, 203 L. Ed. 2d 745 (2019), that the sixth amendment right to effective assistance of counsel does not guarantee the right to effective assistance of two attorneys in a case where the attorneys have given conflicting advice. In *Logan*, the petitioner was appointed counsel by the court, but his family had also retained a different attorney to represent him. Id., 882–83. When the court disallowed the appointed lawyer to withdraw and the retained attorney to enter his appearance based on the tardy nature of the request, the petitioner continued to seek advice from the attorney he had retained to his detriment. Id., 883. The court concluded that the retained attorney was acting within the scope of the attorney-client relationship when he gave the petitioner poor advice, but this poor advice did not negate the adequate advice and effective representation the petitioner had received from appointed counsel. Id., 889.

The present case does not turn on any poor advice that he allegedly received from Elder. The petitioner also does not assert that his trial attorneys, who represented him at the time he received the plea offer, engaged in deficient performance in rendering him advice regarding whether to accept the plea offer. Finally, the present case, unlike *Martini*, does not involve a petitioner who received conflicting advice from various counsel and later claimed that one attorney's advice was deficient while the other attorney's advice was not.

Instead, under the unusual circumstances of this case, the petitioner argues that his decision to reject the state's plea offer was negatively impacted by the deficient performance of Elder, who, acting within the scope of his representation of the petitioner while investigating the state's case, decided to fabricate evidence by putting words into the mouths of the state's witnesses. This distinction renders *Martini* and its progeny inapposite.

Instead, we are guided by those courts, in addition to *Stoia*, that have concluded that the sixth amendment right to effective assistance of counsel, in certain circumstances, may extend to the performance of an attorney who did not directly represent a petitioner in court, but whose conduct negatively impacted the petitioner's representation at a later time. In *State* v. *Murphy-Scullard*, supra, 2008 WL 4470378, *1, the petitioner was represented at her guilty plea hearing by two attorneys of record from the public defender's office. The petitioner's case was first being handled by Attorney Sara Sjoholm, but in anticipation of passing the case to a second attorney, Kelly Madden, both were present for the guilty plea. Id. During the hearing, only Sjoholm discussed the plea agreement with the petitioner and addressed the court. Id. There was, however, evidence that Madden had discussed the decision to plead guilty with the petitioner before the date of the hearing. Id., *4. The court concluded that, because Madden was one of the petitioner's attorneys of record and had "some minimal involvement in counseling" the petitioner regarding the plea offer, the sixth amendment protections extended to her conduct. Id.

In *United States* v. *Chezan*, Docket No. 10 CR 905-1, 2014 WL 8382792, *16-17 (N.D. Ill. October 14, 2014) (report and recommendation adopted by federal District Court), United States Magistrate Judge Sheila Finnegan considered whether the sixth amendment right

to effective assistance of counsel extended to advice given to the petitioner by an immigration attorney regarding the immigration consequences of his pending criminal matter, although the immigration attorney never appeared in the criminal court. Importantly, the petitioner's criminal attorney relied on the advice from the immigration attorney when advising the petitioner on how to proceed with his criminal case. Id., *13. The court found that it was undisputed that the immigration attorney was retained to provide and did provide legal advice to the petitioner and, thus, concluded that there was "no question that the [s]ixth [a]mendment applies to this type of representation." Id., *17. The circumstances in the present case are more like those faced by the petitioners in *Chezan* and *Murphy-Scullard*, in which counsel, acting within the scope of the attorney-client relationship, influenced the advice of a subsequent counsel in a way that prejudiced the petitioners.

We also are not persuaded by the respondent's attempt to distinguish *Stoia* v. *United States*, supra, 22 F.3d 766, from the present case by arguing that there is "no evidence that Elder 'called the shots' or directly controlled the petitioner's defense from behind the scenes." *Stoia* imposes no such test. Although the court in *Stoia* employed such language in assessing the level of involvement of the attorney suffering from an improper conflict of interest in that case; id., 769–70; *Stoia* does not suggest that a petitioner must demonstrate that the nonappearing counsel must have "called the shots" in the case. Instead, *Stoia* simply recognizes that, for the purpose of determining whether counsel is representing a petitioner, the sixth amendment may extend to *nonappearing* counsel who "negatively impact the trial counsel's ability to give the defendant an adequate defense."

We simply are unconvinced by the respondent's assertion that the petitioner's sixth amendment right

to effective assistance of counsel is so narrow so as to leave unprotected a defendant whose prior counsel engages in deficient performance, unbeknownst to subsequent counsel, that influences the conduct of other attorneys in the case or the defendant's critical decision on whether to accept a plea. Elder's alleged conduct may well have negatively impacted the propriety of the advice given by his subsequent counsel regarding the plea offer.[15] Moreover, contrary to the state's assertion, there is little dispute that Elder impacted the petitioner's defense from behind the scenes when he, in the course of investigating the state's case, fabricated witnesses' affidavits without informing the petitioner or his new attorneys, thereby influencing every subsequent decision made on the basis of those fabricated affidavits.

In sum, by unduly focusing on the limited nature of Elder's court appearance and his subsequent withdrawal of that appearance, the habeas court precluded the possibility that Elder continued to represent the petitioner for purposes of the sixth amendment when he fabricated the affidavits. The existence of those fabricated affidavits allegedly played a crucial role in the petitioner's decision to reject a plea offer to manslaughter in the first degree with a firearm that would have

[15] If Sheehan and Kouros knew or should have known that the affidavits were fabricated and subject to attack by the state, they arguably would have had a duty to their client to investigate the procurement of the affidavits in order to assess and provide advice to the petitioner regarding the strength of the state's case. Under those circumstances, Elder's deficient performance would have been ameliorated or cured by the constitutionally effective representation of subsequent counsel. The habeas court did not reach this question because it concluded that Elder, for purposes of the sixth amendment, simply did not represent the petitioner at the time he fabricated the affidavits. If, on remand, the habeas court concludes that Elder was representing the petitioner for purposes of the sixth amendment during the relevant period, then it would need to reach the question of whether the petitioner, or Sheehan and Kouros, reasonably relied on the accuracy of the affidavits without further investigation.

resulted in his serving a ten to fifteen year period of incarceration. Instead, the defendant rejected the plea offer, was subsequently convicted of murder, and is now serving a sentence of fifty years of incarceration.

In remanding this case for a new trial on the third count of the amended petition, we do not mean to suggest that the habeas court is required to reach the legal conclusion that Elder was representing the petitioner for purposes of the sixth amendment when he fabricated the affidavits or that the petitioner was necessarily prejudiced by this conduct. Instead, we simply conclude that the petitioner is entitled to a determination by the habeas court that is not limited to consideration of the status of Elder's formal appearance in court during the relevant period.

The judgment is reversed with respect to the habeas court's denial of count three of the operative amended habeas petition, and the case is remanded for a new trial on that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DITECH FINANCIAL, LLC *v.* MAUD JOSEPH ET AL.
(AC 41702)

Lavine, Keller and Harper, Js.

Syllabus

The plaintiff, D Co., sought to foreclose a mortgage on certain real property of the defendant J. Thereafter, M Co. was substituted as the plaintiff and J was defaulted for failure to plead. The trial court subsequently rendered judgment of strict foreclosure in favor of M Co., from which J appealed to this court. On appeal, J claimed, inter alia, that D Co. lacked standing to commence this action because at the time it commenced this action it did not hold the note and had no interest in the note. *Held* that because the resolution of J's jurisdictional claim was dependent on disputed factual findings that could not be resolved due to an inadequate

appellate record, and because that claim implicated the subject matter jurisdiction of the trial court, this court was unable to review the merits of the appeal and the matter was remanded for a determination of the jurisdictional issue and for further proceedings according to law; in order to resolve J's standing challenge, this court had to determine if D Co. was the holder of the note or had the authority to enforce the note on behalf of another party in interest at the time this action was commenced, but the only indication in the record that the court reviewed the note was in its order granting M Co.'s motion for a judgment of strict foreclosure, in which it stated, in one sentence, that the original note and mortgage documents had been reviewed and were found to be in order, that statement was called into question by M Co. in its brief to this court, and, thus, this court was unable to verify what was in fact presented to and reviewed by the trial court, as there were no other findings in the record made by the trial court pertaining to standing, or even a copy of the note or a lost note affidavit referenced by M Co., nor did either party present this court with any transcript of any proceeding during which the court may have made findings or explained what it reviewed, and although D Co. attached to its motion to substitute party plaintiff a copy of its assignment of the mortgage to M Co. and a limited power of attorney document pertaining thereto, there were no documents that shed light on M Co.'s claimed right to enforce the note.

Argued May 13—officially released September 17, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, MTGLQ Investors, L.P., was substituted as the plaintiff; subsequently, the named defendant was defaulted for failure to plead; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the motion filed by the substitute plaintiff for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed; further proceedings.*

Maud Joseph, self-represented, the appellant (named defendant).

Benjamin T. Staskiewicz, for the appellee (substitute plaintiff).

Opinion

KELLER, J. The self-represented defendant, Maud Joseph, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, MTGLQ Investors, L.P. (MTGLQ).[1] On appeal, the defendant claims that the court (1) lacked subject matter jurisdiction because the named plaintiff, Ditech Financial, LLC (Ditech), lacked standing to commence this action, (2) improperly granted Ditech's motion to substitute, (3) lacked authority to render a judgment of strict foreclosure, and (4) improperly denied her motion for reargument. Because the resolution of the defendant's first claim as to standing is dependent on disputed factual findings that cannot be resolved due to an inadequate appellate record, and because this claim implicates the subject matter jurisdiction of the trial court, we are unable to review the merits of this appeal. We therefore reverse the judgment of the trial court and remand the case for further proceedings.

We briefly set forth the procedural history and facts relevant to this appeal. On October 27, 2016, Ditech commenced this action alleging that the defendant and Manita Cenat (Cenat) executed and delivered to Countrywide Bank, FSB, a note for a loan in the principal amount of $140,000 (note). To secure the note, Ditech alleged that the defendant and Cenat executed a mortgage dated December 12, 2007, for property located at 116 North Bishop Avenue in Bridgeport. Ditech alleged that it was the holder of the note and that the note was

[1] In its complaint, the named plaintiff, Ditech Financial, LLC (Ditech), also named Manita Cenat as a defendant. Cenat, however, is not participating in this appeal. Thus, any reference to the defendant in this opinion is solely to Maud Joseph.

Additionally, Ditech is no longer a party to this action. On June 22, 2017, Ditech filed a motion to substitute MTGLQ as the plaintiff, representing that it had assigned the subject mortgage deed and note, including the cause of action, to MTGLQ. This motion was granted by the court on July 13, 2017. Accordingly, any reference to the plaintiff in this opinion is to MTGLQ.

in default. Accordingly, it elected to accelerate the balance due, declared the balance due in full, and sought to foreclose the mortgage securing the note.

On May 11, 2017, the defendant and Cenat filed jointly a motion to dismiss arguing that the court lacked personal jurisdiction over them because service of process was not properly effectuated. By order dated June 7, 2017, the court denied the defendant's motion. The court concluded that the defendant had not sustained her burden of overcoming the presumption of the truth of the facts stated in the return of service attested to by the marshal.

As discussed in footnote 1 of this opinion, Ditech filed a motion to substitute MTGLQ as the plaintiff on June 22, 2017, representing that it had assigned the subject mortgage deed and note, including the cause of action, to MTGLQ. The defendant filed an objection to Ditech's motion to substitute arguing, inter alia, that the assignment was not made while the action was pending and that Ditech lacked standing in the first instance. The court granted Ditech's motion on July 13, 2017. In addressing the defendant's objection, it concluded that the assignment took place thirty-nine days after this action commenced and, thus, it overruled the defendant's objection. The court did not address the defendant's standing argument and stated: "Defendant's challenge to Ditech Financial's standing to commence this action is not properly raised in an objection to motion to substitute. See Practice Book § 10-30."

On September 22, 2017, the plaintiff filed a motion for default for failure to plead arguing that the defendant and Cenat had failed to plead within the time required by Practice Book § 10-8. That same day, the plaintiff filed a motion for judgment of strict foreclosure.

On September 29, 2017, pursuant to Practice Book § 10-35, both the defendant and Cenat filed requests to

revise the plaintiff's complaint. The plaintiff filed an objection to the requests of the defendant and Cenat to revise on October 5, 2017. On October 23, 2017, the court sustained all of the plaintiff's objections.

On November 22, 2017, despite the defendant having filed her request to revise, which is a responsive pleading,[2] on September 29, 2017, the clerk granted the plaintiff's September 22, 2017 motion for default for failure to plead against the defendant and Cenat.

On March 6, 2018, the defendant and Cenat jointly filed a motion to strike requesting that the court strike the plaintiff's prayer for relief and the notice attached thereto. The court denied the motion to strike on March 12, 2018.

On March 12, 2018, the defendant and Cenat filed an objection to the plaintiff's motion for strict foreclosure arguing that no default had entered and no summary judgment had been obtained. Additionally, they argued that their March 6, 2018 motion to strike was a responsive pleading.

On that same day, the court granted the plaintiff's motion for a judgment of strict foreclosure setting the law day for July 17, 2018. On April 2, 2018, the defendant and Cenat filed a motion to reargue the court's order granting the plaintiff's motion for a judgment of strict foreclosure on the basis of the default for failure to plead, arguing that the court misapprehended the fact that the defendant and Cenat had filed a responsive pleading to the complaint before the hearing on the

[2] Practice Book § 10-6, titled "Pleadings Allowed and Their Order," provides: "The order of pleading shall be as follows: (1) The plaintiff's complaint. (2) The defendant's motion to dismiss the complaint. (3) The defendant's request to revise the complaint. (4) The defendant's motion to strike the complaint. (5) The defendant's answer (including any special defenses) to the complaint. (6) The plaintiff's request to revise the defendant's answer. (7) The plaintiff's motion to strike the defendant's answer. (8) The plaintiff's reply to any special defenses."

motion for a judgment of strict foreclosure and overlooked General Statutes § 52-121.[3] The plaintiff filed an objection to the motion for reargument.

On May 8, 2018, the court denied the motion to reargue. In its order, the court stated: "Motion for Reargument of Motion for Judgment of Strict Foreclosure is denied. The motion to strike filed on March 6, 2018 was ineffective because the defendants were in default status when the motion to strike was filed, having been defaulted for failure to [plead] on November 22, 2017. The motion to strike did not automatically open the defaults because the plaintiff had previously moved for judgment of strict foreclosure on September 22, 2017. Practice Book § 17-32 (b). The court had the authority to act on the motion to strike on March 12, 2018 even though it was not on the short calendar for that day. Practice Book § 10-40 (b). The motion to strike was frivolous and obviously filed solely for purposes of delay." This appeal followed.[4]

On appeal, the defendant argues that the court lacked subject matter jurisdiction over this action because Ditech lacked standing. In particular, the defendant argues that Ditech was not the holder of the note and had no interest in the note at the time it commenced this action. The defendant essentially argues that the loan was serviced by Ditech but owned by Fannie Mae, which allegedly sold the loan to MTGLQ in June, 2016,

[3] General Statutes § 52-121 (a) provides: "Any pleading in any civil action may be filed after the expiration of the time fixed by statute or by any rule of court until the court has heard any motion for judgment by default or nonsuit for failure to plead which has been filed in writing with the clerk of the court in which the action is pending."

[4] After the defendant filed the present appeal, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, issued further articulations relating to its denial of the defendant's motion to strike and the court's rendering of a judgment of strict foreclosure. The court additionally articulated its decision when it addressed the plaintiff's motion to terminate the appellate stay, which was denied on December 7, 2018.

prior to the commencement of this action. The defendant, therefore, argues that Ditech lacked standing to bring this action and, thus, the court's substitution of MTGLQ as party plaintiff also was improper.

The plaintiff argues that the court did not lack subject matter jurisdiction. It contends that Ditech was the servicer of the loan through the commencement of this action and was the mortgagee of record and, therefore, was the party entitled to enforce the note and mortgage when this action was commenced. The plaintiff further contends that the trial court made the necessary findings establishing that Ditech and, thus, MTGLQ, has standing in this case. We do not agree.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [it] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property. . . . The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt."

(Internal quotation marks omitted.) *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 243, 199 A.3d 57 (2018), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019); see *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 135, 74 A.3d 1225 (2013) ("[a] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted may foreclose the mortgage under [General Statutes] § 49-17" [internal quotation marks omitted]).

In the present case, if Ditech did not hold the note or did not have authority to enforce the note and mortgage at the commencement of this action; see *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 327–28 ("a loan servicer need not be the owner or holder of the note and mortgage in order to have standing to bring a foreclosure action if it otherwise has established the right to enforce those instruments"); then it lacked standing, thus depriving the trial court of subject matter jurisdiction and requiring a dismissal of the plaintiff's action. In resolving the defendant's challenge to the plaintiff's standing in this case, we must determine if Ditech was the holder of the note or had the authority to enforce the note on behalf of another party in interest at the time this action was commenced. On the basis of our review of the record before us, we conclude that we are unable to review the defendant's jurisdictional claim because the record is inadequate for us to do so. See *Deutsche Bank National Trust Co.* v. *Thompson*, 163 Conn. App. 827, 832–33, 136 A.3d 1277 (2016) (concluding that record on appeal was inadequate to review jurisdictional claim); see also *Deutsche Bank National Trust Co.* v. *Bialobrzeski*, 123 Conn. App. 791, 799–800, 3 A.3d 183 (2010).

In *Deutsche Bank National Trust Co.* v. *Thompson*, supra, 163 Conn. App. 827, this court addressed a similar claim. In that case, a defendant challenged for the first time on appeal the plaintiff's standing to bring the underlying foreclosure action. Id., 831. This court concluded ultimately that the record was inadequate to

review the jurisdictional claim. Id., 836. We noted, inter alia, that there was no indication in the record that the plaintiff ever presented the court with the note, that no other factual findings were in the record that the plaintiff was the holder of the note at the commencement of the action, and that no transcript of any hearing was provided by the parties for this court's review. Id., 832–33. In the light of the inadequacies of the record, this court reversed the judgment of the trial court and remanded the case for a determination of the jurisdictional issue and for further proceedings according to law.[5] Id., 836.

As in *Thompson*, the record before us contains similar deficiencies. In particular, the only indication in the record that the court reviewed the note was in its order granting the plaintiff's motion for judgment of strict foreclosure. The court stated in one sentence: "Original Note and Mortgage documents have been reviewed and are found to be in order." The court's statement, however, is called into question by the plaintiff in its appellate brief. Therein, the plaintiff states in relevant part that "[i]t is believed that the trial court's order should have referenced . . . an original Lost Note Affidavit with [a] copy of [the] Note endorsed in blank . . . instead of the words 'Original Note' to avoid any factual discrepancy as to what was actually reviewed by the trial court at the judgment hearing." On the basis of the record before us, however, we are unable to verify what was in fact presented to and reviewed by the court.

We have not found in the record any other findings made by the trial court pertaining to the plaintiff's standing, or even a copy of the note or lost note affidavit referenced by the plaintiff. Nor has either party presented this court with any transcript of any proceeding

[5] This court in *Thompson* also rejected the plaintiff's argument that an inadequate record precludes this court's review of the plaintiff's standing. *Deutsche Bank National Trust Co.* v. *Thompson*, supra, 163 Conn. App. 835. We stated that "although it is indeed the burden of the defendant, as the

during which the court may have made particular findings or explained what it reviewed. Although Ditech attached to its motion to substitute party plaintiff a copy of its assignment of the mortgage to the plaintiff and a limited power of attorney document pertaining thereto, there are no documents that shed light on the plaintiff's claimed right to enforce the note.

In addressing the defendant's standing claim, the plaintiff directs our attention to this court's decision in *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 107, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017), stating that this court "dealt with a similar jurisdictional issue as raised in *Thompson* but found that the facts in that case were able to establish [the] plaintiff's standing through the trial court record . . . ." The plaintiff appears to cite *Cornelius* in an attempt to demonstrate that the record in the present case is adequate for our review of the defendant's jurisdictional claim. Our review of *Cornelius*, however, discloses that the deficiencies present in the record before us, and in *Thompson*, were not present in that case. As this court stated in *Cornelius*: "The plaintiff produced the note, the mortgage, and the dated assignments of the note and mortgage at the December 15, 2015 hearing. After reviewing these documents and discussing them with the parties, the court found on the record that the plaintiff possessed the note prior to the commencement of the foreclosure action. The defendant did not offer any evidence that the note presented by the plaintiff was invalid or that the plaintiff did not possess the note when it commenced the foreclosure action." Id., 114. This court made clear that the record before it expressly reflected that the trial court carefully reviewed the note and mortgage documents. Id., 111.

appellant, to provide an adequate record for review, it is [t]he plaintiff [who] bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) Id., 836.

The record in the present case, however, does not clearly reflect what the court reviewed. In particular, the plaintiff's statement in its appellate brief that it believed that the trial court's order should have referenced an original lost note affidavit with a copy of the note endorsed in blank instead of the words "Original Note" to avoid any factual discrepancy, calls into question what the court in fact reviewed. Additionally, this court has not been presented with a record containing a copy of any note or lost note affidavit that the court may have reviewed. It is evident that the facts of the present case are more akin to *Thompson* than they are to *Cornelius*. As such, we conclude, like the court in *Thompson*, that we are unable to review the defendant's jurisdictional claim on the record before us.

The judgment is reversed and the case is remanded for a determination of the jurisdictional issue and for further proceedings according to law.

In this opinion the other judges concurred.

TOWN OF LEDYARD *v.* WMS GAMING, INC.
(AC 39746)

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

Syllabus

The plaintiff town brought this action against the defendant, W Co., seeking to collect unpaid personal property taxes it had imposed on slot machines that W Co. owned and leased for use at a casino. Thereafter, the Indian tribe that owned the casino filed an action in federal court against the town, among others, challenging the town's authority to impose personal property taxes on the slot machines. After a federal appeals court determined that the town did have authority to impose taxes, the town and W Co. entered into a stipulation regarding the unpaid taxes, interest, penalties, and attorney's fees in the present action. The town and W Co., however, disputed whether the trial court in the present action could also find W Co. liable for the attorney's fees the town incurred in defending the federal action in which W Co. was not a party, and, therefore, they filed cross motions for summary judgment as to liability only on that issue. The trial court granted the town's motion

for summary judgment, concluding that the town was entitled to the attorney's fees it had incurred in defending the federal action pursuant to the statute (§ 12-161a) that requires a property owner to pay the attorney's fees of a municipality in an action brought to collect delinquent personal property taxes when the fees are "as a result of and directly related to" the collection proceeding. W Co. appealed to this court, which granted the town's motion to dismiss the appeal for lack of subject matter jurisdiction and dismissed the appeal. Thereafter, W Co., on the granting of certification, appealed to our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to deny the town's motion to dismiss and for further proceedings. On remand, *held* that the trial court improperly granted the town's motion for summary judgment because it improperly applied an expansive interpretation of § 12-161a to characterize the attorney's fees incurred in the federal action as falling within the ambit of fees directly related to the collection proceeding presently before this court: the attorney's fees attributable to the federal action were not directly related to the collection proceeding, as the federal action was a collateral action the resolution of which, although significant to the ultimate resolution of the tax collection issue in the present action, did not result directly in a final determination of the rights and obligations of the parties relative to the claimed delinquent tax, and, therefore, given the restrictive language of § 12-161a, only litigation fees incurred in the prosecution of the collection action itself would qualify as attorney's fees directly related to the collection proceeding; moreover, this court's conclusion that the attorney's fees attributable to the federal action were not directly related to the collection proceeding was supported by the claims that were at issue in the federal action, which were related solely to the Indian tribe's defense against the town's alleged encroachment upon aspects of tribal sovereignty protected under federal law, by consideration of the relationship of § 12-161a to other statutes, which indicated that the legislature's use of the adverb directly establishes a greater limitation on the nexus between the attorney's fees sought and the proceeding in which they are requested than that urged by the town in the present case, and by certain relevant authority from our Supreme Court; accordingly, the trial court's judgment was reversed and the case was remanded with direction to deny the town's motion for summary judgment and to grant W Co.'s motion for summary judgment.

Argued May 21—officially released September 17, 2019

Procedural History

Action to recover unpaid personal property taxes, and for other relief, brought to the Superior Court in the judicial district of New London, where the parties entered into a stipulated agreement; thereafter, the court, *Vacchelli*, *J.*, granted the plaintiff's motion for

summary judgment as to liability and denied the defendant's motion for summary judgment as to liability, and the defendant appealed to this court, which granted the plaintiff's motion to dismiss the appeal, from which the defendant, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court with direction to deny the plaintiff's motion to dismiss and for further proceedings. *Reversed*; *judgment directed.*

Aaron S. Bayer, with whom was *David R. Roth*, for the appellant (defendant).

Lloyd L. Langhammer, for the appellee (plaintiff).

Opinion

NOBLE, J. In this action to collect unpaid personal property taxes, the defendant, WMS Gaming, Inc., appeals from the summary judgment as to liability only rendered by the trial court in favor of the plaintiff, the town of Ledyard, awarding it attorney's fees pursuant to General Statutes § 12-161a.[1] The defendant's sole claim on appeal is that the trial court improperly concluded that the defendant was liable for attorney's fees incurred by the plaintiff while litigating a collateral action in federal court in addition to the fees incurred while pursuing this action. Specifically, it argues that the court improperly determined that the fees incurred in the collateral action were "as a result of and directly related to" this collection action within the meaning of § 12-161a. We agree and, accordingly, reverse the judgment of the trial court.

[1] General Statutes § 12-161a provides in relevant part: "In the institution of proceedings by any municipality to enforce collection of any delinquent tax on personal property from the owner of such property, through . . . any other proceeding in law in the name of the municipality for purposes of enforcing such collection, such person shall be required to pay any court costs, reasonable appraiser's fees or reasonable attorney's fees incurred by such municipality as a result of and directly related to such levy and sale, enforcement of lien or other collection proceedings."

The following facts and procedural history are relevant to this appeal. On August 3, 2006, two years prior to commencing the present action, the Mashantucket Pequot Tribal Nation (Tribal Nation) filed an action in the United States District Court for the District of Connecticut challenging the authority of the state of Connecticut and the plaintiff to impose property taxes on slot machines owned by Atlantic City Coin & Slot Co. (AC Coin) and leased to the Tribal Nation, for use in its gaming operations. In that complaint, the Tribal Nation alleged that the plaintiff lacked the authority to impose the property tax because such taxation is preempted by federal regulation of Indian gaming pursuant to both the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA), and the Final Mashantucket Pequot Gaming Procedures, 56 Fed. Reg. 24996 (May 31, 1991), and that the taxation was an illegal interference with the Tribal Nation's sovereignty. The present action was filed on June 23, 2008, to collect unpaid personal property taxes for gaming equipment owned by the defendant and leased to the Tribal Nation for its gaming operations.

Our Supreme Court, in a previous appeal from the judgment of this court, recited the following additional relevant facts and procedural history: "[T]he plaintiff [in the present action] sought $18,251.23 in unpaid personal property taxes, plus costs, interest, and penalties. In addition, the plaintiff sought attorney's fees pursuant to . . . § 12-161a.

"Shortly after the plaintiff had commenced the underlying state action, the Tribal Nation filed [a second] action in the United States District Court for the District of Connecticut challenging the authority of the state of Connecticut[2] and the plaintiff to impose the taxes at

[2] The state of Connecticut intervened as a defendant in both actions.

issue in the present state action.[3] Although it was not a party to the federal action commenced by the Tribal Nation, the defendant filed a motion to stay the present state action pending the outcome of the federal action, which the trial court, *Martin*, *J.*, granted.

"On March 27, 2012, the District Court ruled on cross motions for summary judgment filed in the . . . federal action. The District Court, determining that the authority of the state and the plaintiff to impose the taxes was preempted by federal law, granted the Tribal Nation's motion for summary judgment and denied separate motions for summary judgment filed by the plaintiff and the state . . . . See *Mashantucket Pequot Tribe* v. *Ledyard*, Docket No. 3:06CV1212 (WWE), 2012 WL 1069342, *12 (D. Conn. March 27, 2012), rev'd, 722 F.3d 457 (2d Cir. 2013). On July 15, 2013, the United States Court of Appeals for the Second Circuit reversed the District Court's judgment, concluding that the authority of the state and the plaintiff to impose the taxes was not preempted by federal law. See *Mashantucket Pequot Tribe* v. *Ledyard*, 722 F.3d 457, 477 (2d Cir. 2013).

"After the proceedings had resumed in the present state action, the parties executed a stipulation. Under the stipulation, the parties agreed that the defendant had tendered payment to the plaintiff for all outstanding taxes, accrued interest, and accrued penalties at issue. They further agreed that the plaintiff was entitled to reasonable attorney's fees and costs incurred in the underlying state action, the amount of which would be determined by the trial court and the payment of which would be accepted by the plaintiff as satisfaction of

[3] The Tribal Nation's second federal action was subsequently consolidated with its first federal action. See *Mashantucket Pequot Tribe* v. *Ledyard*, Docket No. 3:06CV1212 (WWE), 2012 WL 1069342 (D. Conn. March 27, 2012), rev'd, 722 F.3d 457 (2d Cir. 2013). For ease of discussion, we refer to these joined actions as the federal action.

all of the taxes, interest, penalties, attorney's fees, and costs recoverable by the plaintiff with respect to the underlying state action. They disputed, however, whether the trial court could also find the defendant liable for attorney's fees incurred by the plaintiff in defense of the federal action commenced by the Tribal Nation to which the defendant was not a party . . . . The parties agreed to submit to the trial court the issue of whether the defendant was liable for the federal action attorney's fees.

"After executing the stipulation, the parties filed . . . motions for summary judgment as to liability only with respect to the federal action attorney's fees. On October 6, 2016, the trial court, *Vacchelli*, *J.*, issued its memorandum of decision granting the plaintiff's motion for summary judgment, denying the defendant's motion for summary judgment, and rendering . . . judgment as to liability only in favor of the plaintiff with respect to the federal action attorney's fees. The trial court concluded that the defendant was liable for the federal action attorney's fees pursuant to § 12-161a. The trial court further stated that the plaintiff could file a motion for attorney's fees within thirty days and that a hearing would be scheduled thereafter to determine the amount of the attorney's fees to which the plaintiff is entitled. Shortly thereafter, on October 11, 2016, the plaintiff filed a motion for attorney's fees.

"On October 25, 2016, [before] the trial court [scheduled] a hearing on the plaintiff's motion for attorney's fees, the defendant appealed [from] the trial court's decision with respect to the federal action attorney's fees [to the Appellate Court]." (Footnotes added; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 78–80, 191 A.3d 983 (2018).

The plaintiff subsequently filed a motion to dismiss the appeal for lack of subject matter jurisdiction, which

this court granted on the ground that the trial court's decision was not yet an appealable final judgment because it had yet to determine the amount of attorney's fees owed to the plaintiff. *Ledyard* v. *WMS Gaming, Inc.*, 171 Conn. App. 624, 635, 157 A.3d 1215 (2017), rev'd, 330 Conn. 75, 191 A.3d 983 (2018). Thereafter, our Supreme Court reversed the judgment of this court and remanded the case back to this court with direction to deny the plaintiff's motion to dismiss. *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 91. On remand, we now address the merits of the defendant's claim. Further facts will be provided as necessary.

We begin our analysis by setting forth the applicable standards of review and relevant legal principles. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material [fact] which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide

whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 471–72, 200 A.3d 202 (2018).

The defendant's claim implicates the proper interpretation and application of § 12-161a, which is a question of law over which our review is plenary. See *Kaminsky* v. *Commissioner of Emergency Services & Public Protection*, 188 Conn. App. 109, 112, 203 A.3d 1252 (2019). "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, extra textual 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." (Internal quotation marks omitted.) Id., 112–13. Moreover, because § 12-161a is a statute in derogation of the common-law American rule pursuant to which attorney's fees are not generally allowed to the successful litigant absent a contractual or statutory exception, it must be strictly construed and "limited to matters clearly brought within its scope." (Internal quotation marks omitted.) *Perry* v. *Perry*, 312 Conn. 600, 623, 95 A.3d 500 (2014). Mindful of these foregoing legal principles, we next address the defendant's claim.

In the view of the defendant, the trial court improperly rendered summary judgment in favor of the plaintiff because it adopted an expansive interpretation of § 12-161a that impermissibly permitted recovery for attorney's fees—those attributable to the federal action—which were not "directly related" to the present action. The defendant asserts that this is so because the federal action (1) involved a separate case brought against the plaintiff in another jurisdiction by the Tribal Nation, an entity that is not a party to the present action, (2) was brought to assert tribal sovereignty under federal law, not to contest the defendant's tax liability, and (3) was brought two years before the plaintiff filed the present collection action and would have been litigated regardless of whether the plaintiff brought the present claim. The plaintiff argues that the trial court correctly concluded that it was entitled to recover the attorney's fees attributable to the federal action because they were incurred "as a result of and directly related to" this collection proceeding within the meaning of § 12-161a. We agree with the defendant.

Our analysis begins, as it must, with consideration of the text of § 12-161a and its relationship to other statutes. See General Statutes § 1-2z. The phrase "as a result of" has been interpreted by our Supreme Court as synonymous with "proximate cause," that is, "[a]n actual cause that is a substantial factor in the [result] . . . ." (Internal quotation marks omitted.) *Abrahams* v. *Young & Rubicam, Inc.*, 240 Conn. 300, 306, 692 A.2d 709 (1997). The next consideration is that of the phrase "directly related." Clearly, we are not at liberty to construe the phrase "directly related" as identical with that of "as a result of" because that would render the former superfluous in violation of cardinal principles of statutory interpretation. See, e.g., *Williams* v. *Housing Authority*, 327 Conn. 338, 356, 174 A.3d 137 (2017).

Instead, this additional modifier imports a more restrictive proximal nexus to the collection proceeding in which the attorney's fees are requested than the phrase "as a result of." The adverb "directly" means "in a direct manner" and "direct" is defined as "from point to point without deviation: by the shortest way . . . from the source without interruption or diversion . . . without an intervening agency . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 353; see *Board of Selectman* v. *Freedom of Information Commission*, 294 Conn. 438, 449, 984 A.2d 748 (2010) ("when . . . a statute does not define a term, we may look to the dictionary to determine the commonly approved meaning of the term"). Mindful of the restrictive effect of the phrase "directly related," we conclude that the attorney's fees attributable to the federal action are not directly related to the collection proceeding.

The federal action was a collateral action the resolution of which, although significant to the ultimate resolution of the tax collection issue in the present action, did not result directly in a final determination of the rights and obligations of the parties relative to the claimed delinquent tax. Given its restrictive language, only litigation fees incurred in the prosecution of the collection action itself would qualify as attorney's fees directly related to the collection proceeding as contemplated by § 12-161a.

This conclusion is supported by the claims that were at issue in the federal action. The Court of Appeals for the Second Circuit considered a number of defenses raised by the plaintiff and the state to the action, including the argument that it was barred by the Tax Injunction Act (TIA), 28 U.S.C. § 1341. The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The

Tribal Nation claimed an exception to the operation of the TIA as recognized by the United States Supreme Court that permitted Indian tribes to vindicate interests protected by federal legislation and federal programs. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976). The Second Circuit agreed with the Tribal Nation, observing that "[i]nsofar as the [Tribal Nation] is suing on behalf of the third-party vendors [AC Coin and the defendant] who are the taxed parties, its suit (like theirs) is barred by the TIA. Here, the [Tribal Nation] is suing to defend against the [plaintiff's] and State's alleged encroachment upon aspects of tribal sovereignty protected by the Indian Trader Statutes and IGRA." *Mashantucket Pequot Tribe* v. *Ledyard*, supra, 722 F.3d 464–65. Moreover, the Second Circuit rejected a claim that the Tribal Nation lacked standing to complain of the "monetary injury asserted by the taxed parties" because of the principle that "a tribe has an interest in protecting tribal self-government from the assertion by a state that it has regulatory or taxing authority over Indians and non-Indians conducting business on tribal reservations." (Internal quotation marks omitted.) Id., 463. Thus, far from incurring attorney's fees directly related to an action that would result in a final determination of the rights and obligations of the parties relative to the claimed delinquent tax, the attorney's fees in the federal action were incurred in a collateral deviation or diversion from such a final determination. Moreover, the attorney's fees in the federal action can hardly be viewed as directly related to the tax delinquency proceeding involving the defendant if they would have been incurred regardless of whether that proceeding had been initiated. Thus the plain meaning of the text of § 12-161a compels the conclusion that the attorney's fees attributable to the federal action are not directly related to the present action.

Our conclusion is further bolstered when considering the relationship of § 12-161a to other statutes. See General Statutes § 1-2z. A number of decisions from our Superior Court have considered the implications of the phrase "directly related" in the context of a similar statute, General Statutes § 12-193,[4] which authorizes recovery of, inter alia, attorneys' fees incurred by a municipality "as a result of" and "directly related" to the foreclosure of a tax lien. These decisions reflect the principle that the legislature's use of the adverb "directly" establishes a greater limitation on the nexus between the attorney's fees sought and the proceeding in which they are requested than that urged by the plaintiff in the present case. See *Milford Tax, LLC* v. *Paradigm Milford, LLC*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-14-6015774-S, 2015 WL 3875386, (May 28, 2015) (60 Conn. L. Rptr. 473) (prior bankruptcy proceedings involving foreclosed property not directly related to municipal tax foreclosure action); *Groton* v. *First Groton, LLC*, Superior Court, judicial district of New London, Docket No. CV-08-5008750-S, 2011 WL 1470809 (March 25, 2011) (fees attributable to prior actions to foreclose property by other lienors and bankruptcy proceedings initiated by other creditors not recoverable because not directly related to foreclosure action); *White Sands Beach Assn., Inc.* v. *Bombaci*, Superior Court, judicial district of New London, Docket No. CV-04-0568713-S, 2009 WL 1622788, (May 12, 2009) (trial of counterclaim questioning status of plaintiff quasi municipal corporation, and not the foreclosure of tax liens, not directly related

[4] General Statutes § 12-193 provides in relevant part: "Court costs, reasonable appraiser's fees, and reasonable attorney's fees incurred by a municipality *as a result of* any foreclosure action brought pursuant to section 12-181 or 12-182 and *directly related thereto* shall be taxed in any such proceeding against any person or persons having title to any property so foreclosed and may be collected by the municipality once a foreclosure action has been brought pursuant to section 12-181 or 12-182. . . ." (Emphasis added.)

to foreclosure of tax lien); *Redding* v. *Elfire, LLC*, Superior Court, judicial district of Danbury, Docket No. CV-99-0337512-S, 2004 WL 3090656, (December 1, 2004) (attorney's fees incurred in related quiet title action brought by taxpayer not directly related to foreclosure action).[5]

Moreover, authority from our Supreme Court also lends support to our conclusion. The case of *Mechanics Savings Bank* v. *Tucker*, 178 Conn. 640, 425 A.2d 124 (1979), is instructive for its application of General Statutes § 49-7,[6] which "authorizes agreements contained in notes and mortgages to provide for the payment of attorney's fees incurred not only in collection of the debt or foreclosure of the mortgage, *but also* '*in protecting or sustaining the lien of such mortgage.*' " (Emphasis added.) Id., 647. The defendant in *Mechanics Savings Bank* appealed from a judgment of strict foreclosure rendered against him. Id., 641. One of the issues on appeal was the award of attorney's fees to the plaintiff, which were attributable to collateral antitrust and bankruptcy proceedings brought by the defendant. Id., 647. The court held that because the antitrust action sought negation of the defendant's obligations under

[5] One other decision of the Superior Court, *Monroe* v. *Mandanici*, Superior Court, judicial district of Fairfield, Docket No. CV-92-0293224-S, 1995 WL 107185 (March 2, 1995) (awarding attorney's fees for defending set off and counterclaim raised in foreclosure action that constituted defense thereto), is consistent with the subsequent line of cases because the related attorney's fees were incurred in the same action as the foreclosure.

[6] General Statutes § 49-7 provides: "Any agreement contained in a bill, note, trade acceptance or other evidence of indebtedness, whether negotiable or not, or in any mortgage, to pay costs, expenses or attorneys' fees, or any of them, incurred by the holder of that evidence of indebtedness or mortgage, in any proceeding for collection of the debt, or in any foreclosure of the mortgage, *or in protecting or sustaining the lien of the mortgage*, is valid, but shall be construed as an agreement for fair compensation rather than as a penalty, and the court may determine the amounts to be allowed for those expenses and attorneys' fees, even though the agreement may specify a larger sum." (Emphasis added.)

the note and mortgage, it constituted an action for the "protection of the lien of the mortgage within . . . § 49-7." Id., 648. It did not characterize that action as a "proceeding for the collection of the debt . . . ." General Statutes § 49-7. Similarly, the court found recoverable the attorney's fees attributable to the collateral bankruptcy proceedings even though they did "not impinge *directly* on valid security interests . . . ." (Emphasis added.) Id., 648. The attorneys' fees from the collateral actions were recoverable not because they *directly* derived from the "proceeding for collection of the debt," but because they were more properly characterized as actions to "protect or sustain the lien of the mortgage . . . ." General Statutes § 49-7.

It is also significant that § 49-7 distinguishes between a direct action to collect the debt and an action collateral to the direct action. Indeed, the legislature was free to utilize similar language in § 12-161a to enable the recovery of attorney's fees incurred from actions collateral to collection proceedings, but it declined to do so, instead electing to utilize the more restrictive wording "directly related" to bar such a possibility. "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

Accordingly, we conclude that the trial court erred in granting the plaintiff's motion for summary judgment because it improperly applied an expansive interpretation of § 12-161a to characterize the attorney's fees incurred in the federal action as falling within the ambit

of fees directly related to the collection proceeding presently before this court.

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

In this opinion the other judges concurred.

DAVID A. ABRAMS *v.* COMMISSIONER OF CORRECTION (AC 40719)

Keller, Bright and Devlin, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder, assault in the first degree, and criminal possession of a firearm in connection with a shooting incident, filed a fourth petition for a writ of habeas corpus, claiming that he had received ineffective assistance of counsel from D, who had represented him with respect to his appeal of the habeas court's denial of his first habeas petition. Specifically, the petitioner alleged that D was ineffective for withdrawing the appeal at the petitioner's direction and that he would not have withdrawn the appeal but for D's poor advice regarding his ability to proceed with the appeal as a self-represented party, and that his subsequent habeas counsel, A and M, rendered ineffective assistance by failing to raise a claim regarding D's ineffectiveness. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly determined that D did not render ineffective assistance; that court properly determined that D acted reasonably in withdrawing the appeal, as it would have been unreasonable for D to ignore the petitioner's directive to withdraw the appeal under the circumstances and, thus, D's conduct in withdrawing the appeal did not fall below an objective standard of reasonableness, and the petitioner's claim that D was deficient in failing to advise the petitioner that he had a right to proceed as a self-represented party was unavailing, as the petitioner's expression of dissatisfaction with D's choice of claims to raise on appeal did not confer on D a duty to explain to the petitioner his right to proceed as a self-represented party, the petitioner did not indicate to D that he was interested in proceeding as self-represented, and, thus, there was no reason for D to discuss the attendant rights with him.

Argued May 29—officially released September 17, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Judie Marshall, with whom, on the brief, was *Walter C. Bansley IV*, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. The petitioner, David A. Abrams,[1] appeals, following the granting of his certification to appeal, from the judgment of the habeas court denying his fourth petition for a writ of habeas corpus. He claims that counsel who represented him in the appeal taken from the denial of his first petition for a writ of habeas corpus, John C. Drapp, rendered ineffective assistance by withdrawing the appeal pursuant to Practice Book § 63-9.[2] On appeal, the petitioner asserts that the habeas court erred in concluding that Drapp did not render ineffective assistance by withdrawing the appeal at the petitioner's direction because his decision to withdraw

[1] The petitioner is also known as David A. Abrahams. His conviction in the case underlying his habeas petition was confirmed by this court in *State* v. *Abrahams*, 79 Conn. App. 767, 831 A.2d 299 (2003). Because, when the petitioner testified at the habeas trial, he identified himself as David Abrams and also indicated that his name has been misspelled in the record, we use the name David A. Abrams in this appeal. There is no dispute that David A. Abrahams and David A. Abrams are the same individual.

[2] Practice Book § 63-9 provides in relevant part: "Prior to oral argument or the date the appeal is assigned for disposition without oral argument, an appeal or writ of error may be withdrawn as of right by filing form JD-AC-008 with the appellate clerk. . . ."

the appeal was based on Drapp's poor advice.[3] We disagree and, accordingly, affirm the judgment of the habeas court.

The following procedural history and facts, as found by the habeas court, are relevant to this appeal. The petitioner was convicted, following a jury trial, of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217. The petitioner's sentence was enhanced pursuant to General Statutes § 53-202k based on the finding that he committed a class B felony with a firearm. On December 7, 2011, the petitioner was sentenced to a total effective sentence of fifty-one years of incarceration, followed by nine years of special parole.[4] The petitioner subsequently appealed to this

[3] On appeal, the petitioner also argues that the habeas court erred in concluding that Drapp did not render ineffective assistance because he failed to raise numerous assertedly viable appellate issues in his appellate brief, which ultimately caused the petitioner to direct Drapp to withdraw the appeal on his behalf. The petitioner, however, raised one issue in his petition for a writ of habeas corpus and one question was certified by the habeas court for appeal, that is, whether Drapp was ineffective for withdrawing the petitioner's appeal from the denial of his first petition for a writ of habeas corpus. Whether Drapp was ineffective for failing to raise all of the purportedly meritorious issues available to him in the appeal to this court is a distinct question. See, e.g. *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008) (petitioner claimed that appellate counsel rendered ineffective assistance in failing to raise certain claims on direct appeal). It is well settled that the right of a petitioner to relief is limited to the allegations raised in his petition. See *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d 1095 (2016). The petitioner, however, failed to plead this issue in his petition or raise it as a distinct claim in his appellate brief. Thus, it is not reviewable.

[4] Specifically, the petitioner was sentenced in the underlying criminal prosecution to a total effective sentence of forty-six years of incarceration, followed by nine years of special parole. He was also found by the court to be in violation of probation and was sentenced to an additional five years of incarceration to run consecutive to all other sentences.

court, which affirmed the judgment of the trial court and determined that the jury reasonably could have found the following facts:

"The [petitioner] and the victim, Jacqueline Peton, were involved in a sometimes volatile, live-in relationship from December, 1994, until August, 2000, during which time they had a child. Prior to the relationship ending, the victim called the Danbury police in August, 2000, claiming that the [petitioner] had violated the restraining order that she had obtained against him living with her. At that time, to give the victim 'a taste of her own medicine,' the [petitioner] called her employer and reported that she was stealing cleaning products at work and selling them.

"On November 1, 2000, the [petitioner] went to the victim's apartment to see his son. When the victim did not allow him into her apartment, the [petitioner] threatened to kill her and stated that he was going to report her to the department of children and families for child abuse. During the early evening hours of November 3, 2000, the [petitioner] and the victim had an argument during a telephone conversation. After the victim hung up, the [petitioner] repeatedly called her telephone number. Despite the [petitioner]'s objections, she went out that night with Ricky Cordiero. At approximately 5 a.m. on November 4, 2000, the victim returned to her apartment complex and observed the [petitioner] sitting in his vehicle, a black Chrysler sedan with custom wheel rims. As the victim walked toward her building, the [petitioner] ran to her with a gun in his hand and grabbed her. When she escaped, the [petitioner] circled her and fired a series of shots at her, wounding her in the leg, elbow and buttocks. After the [petitioner]'s gun jammed, as he left the scene, he told the victim, 'I'm going to get you. I'm going to have somebody f*cking kill you.' " *State* v. *Abrahams*, 79 Conn. App. 767, 769–70, 831 A.2d 299 (2003).

The petitioner filed his first amended petition for a writ of habeas corpus on September 17, 2003, in which he asserted twenty-three claims of ineffective assistance of trial counsel, Joseph Romanello. The petition was denied by the habeas court in a memorandum of decision issued February 28, 2005.

The petitioner filed an appeal from the denial of his first habeas petition on August 3, 2005, wherein he was represented by Drapp. Drapp submitted a brief to the Appellate Court on February 22, 2006, in which he raised the following issue: "Did the habeas trial court err in finding that the petitioner received effective assistance of counsel at the sentencing hearing on the underlying criminal charges?" More specifically, the petitioner claimed that the habeas court erred in not finding that his trial counsel was ineffective for failing to take any action to stop the petitioner's verbal assault of the victim, the judge, the prosecutor and his own trial counsel during allocution at sentencing. Drapp also filed a reply brief for the case on August 9, 2006, and the case was "marked ready" on the same date. On September 26, 2006, Drapp withdrew the appeal pursuant to Practice Book § 63-9, indicating on the required form that he was withdrawing "as a result of some activity before the case was assigned to the settlement program." (Emphasis omitted.)

Prior to the withdrawal of the appeal from the denial of his first habeas petition, the petitioner had filed a second petition for a writ of habeas corpus, in which he was represented by Attorney Salvatore Adamo. This second habeas petition was denied in a memorandum of decision dated April 7, 2008; *Abrams* v. *Warden*, *State Prison*, Superior Court, judicial district of Tolland, Docket No. CV-04-4000112-S (April 7, 2008); and the appeal was dismissed by this court on February 16, 2010. *Abrams* v. *Commissioner of Correction*, 119 Conn. App. 414, 987 A.2d 370, cert. denied, 295 Conn.

920, 991 A.2d 564 (2010). The petitioner's third habeas petition, in which he was represented by Attorney Justine Miller, was also denied by the habeas court; *Abrams* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003316-S (November 13, 2012); and the appeal was subsequently dismissed by this court on April 8, 2014. *Abrams* v. *Commissioner of Correction*, 149 Conn. App. 903, 87 A.3d 631, cert. denied, 312 Conn. 905, 93 A.2d 157 (2014). Neither the petitioner's second nor third habeas petitions alleged that Drapp was ineffective for withdrawing the first habeas appeal.

In his amended petition in the present case, the petitioner alleged that Drapp rendered ineffective assistance by withdrawing the appeal taken from the denial of his first habeas petition and that subsequent habeas counsel, Adamo and Miller, also rendered ineffective assistance of counsel by failing to raise a claim regarding Drapp's ineffectiveness, as a result of his withdrawal of the appeal in the first habeas petition, in the second and third habeas petitions, respectively. At the trial on the underlying habeas petition, Drapp testified that he represented the petitioner in the appeal from the denial of his first habeas petition. Based on his review of the pleadings, the evidence presented at the first habeas trial, the habeas court's decision, and appropriate legal research, he determined that he would raise one issue on appeal, namely, that the habeas court had erred in concluding that the petitioner's trial counsel did not render ineffective assistance at the petitioner's sentencing.

Prior to oral argument, Drapp received a letter from the petitioner stating that he wished to withdraw the appeal. Drapp, however, could not recall some eleven years later what the petitioner's stated reason was in the letter for his request to withdraw the appeal. After receiving the letter, Drapp spoke with the petitioner

about the request. Although he could not remember the details of the conversation, Drapp testified that he was certain that they would have discussed his reasons for requesting the withdrawal and also believed that he would have advised the petitioner that it was against his interests to withdraw the appeal.

The petitioner then testified as to his recollection of the events at issue. He agreed that Drapp visited him at the correctional institution where he was housed to discuss the letter before withdrawing the appeal. During the meeting, the petitioner expressed his concern that Drapp had elected to raise only one issue on appeal when twenty-three issues had been litigated at the habeas trial. In response to the petitioner's concerns, Drapp stated that the only issue that was preserved for appeal was the one that he had raised in his brief. The petitioner then informed Drapp that the brief he had prepared was "garbage" and that the issue he had chosen to pursue was not a winnable one. Drapp replied that the only option, rather than go forward on the one issue as briefed, would be to withdraw the appeal and proceed with his second habeas corpus petition against Attorney Bruce McIntyre, the petitioner's first habeas attorney. The petitioner, believing that he could not win on the appeal as it was briefed and wanting to avoid any further delay in litigation, directed Drapp to withdraw the appeal in subsequent correspondence.

The petitioner testified that, during their conversation about withdrawing the appeal, Drapp never informed him that he could proceed as a self-represented party and, therefore, he believed his only option was to proceed with the appeal as briefed or to withdraw. He further asserted that, had Drapp explained that he had the right to proceed as self-represented, he would have done so because he had represented himself in the past. Finally, the petitioner testified that he discussed with both Adamo and Miller raising a claim of

ineffective assistance by Drapp based on his withdrawal of the appeal, but neither counsel raised this claim in their respective habeas petitions.

The court denied the petition in a memorandum of decision issued on July 12, 2017, finding that the petitioner had failed to establish that Drapp's performance was constitutionally deficient and had further failed to establish that he was prejudiced by Drapp's withdrawal of the appeal by demonstrating that, but for the withdrawal, the petitioner would have prevailed on his claim on appeal. The court granted the petitioner's petition for certification to appeal on July 21, 2017, and this appeal followed.

"Before turning to the petitioner's claims, we set forth basic principles governing the present appeal. The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." (Internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 150–51, 196 A.3d 1149, cert. denied, 330 Conn. 946, 196 A.3d 326 (2018).

"To succeed on an ineffective assistance of appellate counsel claim, the petitioner must satisfy both the performance prong and the prejudice prong of *Strickland*

v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 728, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L .Ed. 2d 336 (2008). In *Strickland* . . . the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable." (Internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 168 Conn. App. 108, 122, 144 A.3d 519, cert. denied, 323 Conn. 933, 150 A.3d 233 (2016).

"The standard of appellate review of habeas corpus proceedings is well settled. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. . . . Whether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 576, 941 A.2d 248 (2008).

As an initial matter, it is undisputed that Drapp withdrew the appeal at the direction of the petitioner. The parties, however, disagree on the proper framework

for evaluating Drapp's performance. The parties do not cite, nor are we aware of, any case directly addressing an ineffective assistance of counsel claim wherein an attorney withdrew an appeal at the petitioner's direction after it had been filed and briefed.[5] The respondent argues that the court's inquiry into Drapp's performance should end with the finding that the petitioner instructed him to withdraw the appeal. The petitioner argues that the circumstances leading up to the withdrawal are part and parcel of the petitioner's claim. Specifically, the petitioner argues that Drapp performed deficiently when he failed to inform him that he could proceed as a self-represented party and, thus, he believed that his only options were to proceed with an appeal that he did not believe could succeed or to withdraw the appeal. The respondent counters that this is a freestanding claim that the petitioner was required to plead separately on appeal and, therefore, this court cannot properly consider Drapp's advice leading to the petitioner's decision to instruct him to withdraw the appeal when reviewing his performance.

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of

[5] Our Supreme Court has been asked to consider the question before, but has never reached the merits of the issue. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 139–40, 7 A.3d 911 (2010) (concluding that petitioner did not allege ineffectiveness by particular attorney who had represented him when appeal was withdrawn and, thus, failed to state claim on which relief could be granted). Our Supreme Court, however, has considered whether counsel was ineffective for failing to advise a defendant of the right to appeal; see, e.g., *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 761 A.2d 740 (2000); how *Strickland* should apply to the failure to file a timely appeal altogether; see, e.g., *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 699 A.2d 1003 (1997); and whether an attorney was ineffective for failing to plead and argue certain issues on direct appeal. See, e.g., *Small* v. *Commissioner of Correction*, supra, 286 Conn. 707.

his complaint. . . . [Although] the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . The purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 678, 142 A.3d 1095 (2016).

In the present case, the amended petition alleged, in relevant part, that "habeas appellate counsel, Attorney Drapp, was ineffective for withdrawing the petitioner's first habeas appeal." There was no further explanation within the petition for a writ of habeas corpus regarding the petitioner's theory of the case for this claim. The habeas court certified one issue for this court on appeal, that is: "Whether the court erred in finding that the petitioner failed to prove ineffective assistance of appellate counsel for withdrawing the petitioner's first habeas appeal."

In support of its position, the respondent relies on *Roe* v. *Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id., 478. Thus, the state argues, it would have been ineffective for Drapp not to have withdrawn the appeal after the petitioner had instructed him to do so, and that should end the court's review of his performance.

In *Roe*, the Supreme Court considered the "proper framework for evaluating an ineffective assistance of counsel claim, based on counsel's failure to file a notice of appeal without [the] respondent's consent." Id., 473. The court reasoned: "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. *At the other end of the spectrum, a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.* See *Jones* v. *Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L .Ed. 2d 987 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal)." (Citations omitted; emphasis altered.) Id., 477.

The petitioner disagrees and asserts that his "claim that counsel was ineffective for withdrawing his appeal requires this court to look at the context in which the appeal was withdrawn," which "necessitates this court to examine the . . . advice given leading up to counsel's withdrawal of [his] appeal." We need not resolve this question in the present case, however, because our analysis would reach the same conclusion even if we take the more expansive view of Drapp's performance as urged by the petitioner.

We agree with the habeas court that Drapp acted reasonably in withdrawing the appeal. The petitioner had written a letter directing Drapp to withdraw the appeal. Drapp then met with the petitioner who, throughout the conversation, continued to express his

desire to withdraw the appeal. In subsequent correspondence, the petitioner indicated for a third time that he still wished for Drapp to withdraw his appeal. Evaluating counsel's conduct from his perspective at the time, we cannot conclude that it fell below an objective standard of reasonableness for Drapp to withdraw the appeal. Guided by *Roe*, we agree with the respondent that it would have been unreasonable for Drapp to ignore the petitioner's directive to withdraw the appeal under the circumstances.

Moreover, the petitioner's argument that Drapp performed deficiently by failing to advise him that he had the right to proceed as a self-represented party is also unpersuasive. Under the sixth amendment to the United States constitution, an accused is guaranteed the right to represent himself. See *Faretta* v. *California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A criminal defendant is entitled to proceed as a self-represented party if he knowingly, voluntarily, and unequivocally waives his right to appointed counsel. See id., 835. Our Supreme Court has stated that "[t]he court is not obligated to suggest self-representation to a defendant as an option simply because the defendant repeatedly expressed dissatisfaction with his court-appointed counsel." (Internal quotation marks omitted.) *State* v. *Pires*, 310 Conn. 222, 249, 77 A.3d 87 (2013). Indeed, "because self-representation relinquishes . . . many of the traditional benefits associated with the right to counsel . . . the right to self-representation does not attach unless it is asserted clearly and unequivocally . . . ." (Citation omitted; internal quotation marks omitted.) *United States* v. *Barnes*, 693 F.3d 261, 271 (2d Cir. 2012), cert. denied, 568 U.S. 1113, 133 S. Ct. 917, 184 L. Ed. 2d 704 (2013).

In the present case, the petitioner's expressed dissatisfaction with Drapp's choice of claims to raise on appeal did not confer a duty on Drapp to explain to

the petitioner his right to proceed as a self-represented party. The petitioner did not indicate to Drapp that he was interested in proceeding as self-represented, thus, there was no reason for Drapp to discuss the attendant rights with him. We conclude, therefore, that Drapp did not render ineffective assistance by failing to do so.

For the foregoing reasons, we agree with the court that Drapp's performance was not deficient. Because we agree with the habeas court that Drapp did not perform deficiently, we need not reach the issue of prejudice. See *Ouellette* v. *Commissioner of Correction*, 154 Conn. App. 433, 448 n.9, 107 A.3d 480 (2014) ("[a] court evaluating an ineffective assistance claim need not address both components of the *Strickland* test if the [claimant] makes an insufficient showing on one" [internal quotation marks omitted]).

The judgment is affirmed.

In this opinion the other judges concurred.

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Intentional sexual assault; motion to dismiss; personal jurisdiction; motion to set aside verdict; punitive damages; claim that trial court's assertion of personal jurisdiction over defendant violated her right to due process because she personally had no minimum contacts with state; whether trial court properly exercised jurisdiction over defendant under state's long arm statute (§ 52-59b); whether defendant, as executrix of decedent's estate, stepped into decedent's shoes for purposes of this action; claim that trial court improperly admitted certain evidence; whether any purported error in admission of evidence was harmless; whether evidence merely was cumulative of other evidence; whether defendant failed to prove that improper admission of evidence likely affected outcome of trial; whether jury's determination that plaintiff was entitled to common-law punitive damages was final judgment for purposes of appeal; whether trial court improperly permitted jury to find defendant liable for common-law punitive damages without evidence as to plaintiff's litigation expenses; whether trial court improperly reserved for its own consideration specific amount of common-law punitive damages to be awarded to plaintiff; whether trial court abused its discretion in denying motion to set aside verdict; whether there was insufficient evidence that plaintiff suffers from post-traumatic stress disorder and other psychological trauma caused by childhood sexual abuse by decedent.

Ives *v.* Commissioner of Motor Vehicles 587
Administrative appeal; suspension of motor vehicle operator's license by defendant Commissioner of Motor Vehicles pursuant to statute (§ 14-227b); claim that trial court erred in concluding that blood test results need not satisfy conditions for admissibility and competence set forth by statute (§ 14-227a [k]) that applies to criminal proceedings to be admissible in administrative license suspension hearing; claim that trial court improperly interpreted 2009 amendment to § 14-227b (j) as changing requirements for admissibility of chemical evidence at administrative hearing; claim that because plaintiff did not suffer and was not alleged to have suffered physical injury in accident as required by § 14-227a (k), his blood sample was improperly obtained; whether trial court properly determined that blood test derived from plaintiff's blood sample satisfied conditions for admissibility in underlying administrative hearing before defendant; whether legislative history of 2009 amendment to § 14-227b (j) demonstrated that its purpose was to extend factual circumstances in which blood test results derived from blood samples are admissible in administrative proceedings under § 14-227b (j) to include accident situations where operator of motor vehicle, regardless of physical injury or alleged physical injury, is determined by police officer to require treatment or observation at hospital; reviewability of claim that permitting introduction of blood test results absent satisfaction of admissibility conditions set forth in § 14-227a (k) was unconstitutional; failure to raise claim in administrative hearing; whether unpreserved claim was reviewable under State *v.* Golding *(213 Conn. 233).*

JPMorgan Chase Bank, National Assn. *v.* Virgulak 688
Foreclosure; reformation; claim that trial court erred by failing to exercise discretion in considering substitute plaintiff's foreclosure claim as stand-alone claim that was not dependent on reformation of mortgage deed; claim that trial court improperly failed to grant equitable remedy of foreclosure; whether trial court abused its discretion in declining to reform mortgage deed; whether substitute plaintiff provided sufficient evidence to demonstrate that mutual mistake was made; claim that trial court improperly denied substitute plaintiff's motion to withdraw and amend responses to requests for admission; claim that trial court improperly concluded that substitute plaintiff's admissions limited recovery under its unjust

enrichment claim; whether trial court abused its discretion in denying motion for reargument.

Kusy *v.* Norwich 171
Negligence; summary judgment; governmental immunity; claim that trial court improperly rendered summary judgment in favor of defendants on ground of governmental immunity pursuant to statute (§ 52-557n [a] [2] [B]); claim that snow and ice removal by municipality is ministerial act as matter of law; whether in absence of policy or directive prescribing manner in which municipal official is to remove snow and ice such act is discretionary in nature; whether trial court properly determined that removal of snow and ice at subject school was discretionary in nature; whether issue of whether removal of snow and ice is ministerial in nature is factual question that is reserved for jury and may not be decided by trial court by way of summary judgment; claim that trial court improperly determined that plaintiff failed to raise genuine issue of material fact regarding whether he was identifiable victim for purposes of identifiable person-imminent harm exception to governmental immunity.

Ledyard *v.* WMS Gaming, Inc. 836
Personal property taxes; attorney's fees; summary judgment; whether, pursuant to statute (§ 12-161a) that requires property owner to pay attorney's fees of municipality in action brought to collect delinquent personal property taxes when fees are "as a result of and directly related to" collection proceeding, plaintiff town was entitled to attorney's fees it incurred in defending collateral federal action; claim that trial court improperly granted plaintiff town's motion for summary judgment because it improperly applied expansive interpretation of § 12-161a to characterize attorney's fees incurred in federal action as falling within ambit of fees directly related to present collection proceeding; whether attorney's fees attributable to federal action were directly related to present collection proceeding.

McCarthy *v.* Commissioner of Correction 797
Habeas corpus; due process; ineffective assistance of counsel; whether petitioner procedurally defaulted due process claim that his decision to reject plea offer was not made knowingly and voluntarily because he was misled regarding strength of state's case against him; whether petitioner's due process claim was freestanding claim subject to procedural default; whether petitioner established cause even if he had procedurally defaulted his due process claim; claim that counsel for bond purposes only had rendered ineffective assistance by causing petitioner to misunderstand strength of state's case against him by fabricating witnesses' affidavits without petitioner's knowledge; whether claim that nonappearing counsel who was not counsel of record rendered ineffective assistance was cognizable as matter of law; whether ineffective assistance of counsel claims are limited to actions taken by attorneys who are counsel of record or who appeared in court; whether counsel for bond purposes only was representing petitioner for purposes of sixth amendment when he fabricated witnesses' affidavits.

Nonhuman Rights Project, Inc. *v.* R.W. Commerford & Sons, Inc. 36
Habeas corpus; whether habeas court properly declined to issue writ of habeas corpus pursuant to applicable rule of practice (§ 23-24 [a] [1] and [2]); whether habeas court properly concluded that it lacked subject matter jurisdiction; whether habeas court properly concluded that petitioner lacked standing to bring habeas petition on behalf of elephants; whether elephants, not being persons, lacked standing to file habeas petition; whether petitioner failed to establish next friend standing; whether habeas corpus relief was intended to apply to nonhuman animal; whether, pursuant to statute (§ 52-466 [a]), only person is authorized to file application for writ of habeas corpus.

One Elmcroft Stamford, LLC *v.* Zoning Board of Appeals 275
Zoning; claim that trial court improperly concluded that named applicant had standing on behalf of defendant business to apply to zoning board of appeals for approval of location of used car dealer on certain real property; claim that board failed to conduct requisite suitability analysis as required by applicable statute (§ 14-55); whether § 14-55 has been repealed; whether board should have reviewed application under standard set forth in § 14-55; whether board mistakenly treated application as if it were application for variance and, thus, failed to comply with requirements set forth in § 14-55 in granting that application; whether trial court erred in searching beyond board's stated reason for approval to find basis for board's decision and improperly upheld that decision on alternative grounds.

Pasco Common Condominium Assn., Inc. *v.* Benson 479
Contracts; Common Interest Ownership Act (§ 47-200 et seq.); action to recover damages for alleged violations of condominium declaration; whether trial court improperly determined that statute of limitations applicable to action was tolled until commencement of this action, rather than to until period of time when declarant control ended under declaration; whether trial court improperly interpreted applicable statutes and declaration to conclude that period of declarant control could continue beyond ten year limit established in declaration so long as one of terminating events in applicable statute (§ 47-245 [d]) and declaration did not occur; whether timeliness of action was contingent on whether three year tort statute of limitations (§ 52-577) or six year contract statute of limitations (§ 52-576) applied; whether claim that declarant had duty to record correct unit square footage in amendments to declaration sounded in tort and contract; whether claims that defendants made secret arrangement with owner of restaurant to exempt restaurant from paying common charges, that defendants improperly assessed common charges related to improper wiring of certain common area lighting, and that defendants improperly expended funds of association to finance repairs and maintenance for units and for paving expenses sounded in tort and contract; whether claims of self-dealing and breach of fiduciary duty relating to management fee and personal vehicle expenses were tort claims only; whether trial court's award of damages to association for common charges that should have been assessed to restaurant was proper; whether court's decision to pierce corporate veil and hold defendant individually liable was clearly erroneous.

Reale *v.* Rhode Island 759
Spoliation of evidence; claim that trial court erred in determining that defendants did not waive right to seek dismissal for lack of personal jurisdiction by concurrently moving to strike plaintiff's complaint as alternative to dismissal; claim that trial court erred in granting motions to dismiss on ground of lack of personal jurisdiction; whether claims against state defendants were barred by doctrine of sovereign immunity; whether trial court properly exercised its discretion to allow town defendant to file motion to dismiss and motion to strike simultaneously; whether town defendant was considered foreign corporation within meaning of long arm statute that sets forth service of process on foreign corporations by Connecticut resident (§ 33-929 [f]).

Seminole Realty, LLC *v.* Sekretaev 405
Foreclosure; claim that trial court abused its discretion in granting application and execution for ejectment and denying motion for stay of execution for ejectment; whether law day was extended by sixty days pursuant to bankruptcy court's order suspending relief from automatic bankruptcy stay under provision of United States Bankruptcy Code (11 U.S.C. § 362 [a]); whether defendant, who failed to redeem by extended law day, had right or interest in property; claim that trial court improperly found that defendant had agreed to revised law day.

Sen *v.* Tsiongas 188
Negligence; premises liability; action to recover damages for personal injuries sustained by plaintiff tenant when she was bitten by dog owned by another tenant of defendant landlord; whether trial court erred in rendering summary judgment in favor of defendant; whether there was disputed issue of material fact as to whether defendant landlord should have known that tenant's dog had vicious propensities.

State *v.* Battle 128
Violation of probation; whether trial court improperly dismissed motion to correct illegal sentence; whether defendant challenged sentence imposed rather than events leading to conviction; whether trial court had jurisdiction to consider merits of motion to correct illegal sentence; claim that imposition of special parole, following determination that defendant had violated probation, constituted illegal sentence; whether defendant's sentence, including use of special parole, fell within "any lesser sentence" language of applicable statute (§ 53a-32 [d]); claim that defendant was denied due process of law when motion to correct illegal sentence was not acted on by specific judge who had sentenced defendant; whether motion to correct illegal sentence or sentence imposed in illegal manner must be heard and adjudicated by particular judge who imposed sentence; whether defendant's unpreserved claim that defendant was deprived of full and fair proceeding with regard to motion to correct illegal sentence failed under third prong of State *v.* Golding *(213 Conn. 233).*

State *v.* Brown 147
Assault in second degree; threatening in first degree; claim that trial court improperly denied motion to correct illegal sentence; claim that statutes governing concurrent and consecutive sentences (§ 53a-37) and addressing method of calculation of sentences (§ 53a-38) were ambiguous and contradictory; claim that § 53a-38 is unconstitutional because it violates defendant's constitutional rights to due process, to be free from double jeopardy, and to equal protection; whether court had jurisdiction over claim in motion to correct illegal sentence that did not attack sentencing proceeding itself; claim that prisoners sentenced to consecutive sentences are members of suspect class; whether claim that aggregation of consecutive sentences adversely affected defendant's eligibility for parole and risk reduction credits fell within ambit of double jeopardy.

State *v.* Coltherst 738
Capital felony; murder; felony murder; kidnapping in first degree; robbery in first degree; robbery in second degree; larceny in first degree; conspiracy to commit kidnapping in first degree; larceny in fourth degree; motion to correct illegal sentence; claim that trial court improperly failed to account adequately for defendant's youth at time defendant committed underlying crimes; claim that trial court improperly afforded defendant opportunity to provide additional remarks to court in violation of defendant's rights to counsel, due process and allocution; whether trial court properly resentenced defendant; whether statute governing sentencing of child (§ 54-91g) creates presumption against imposition of sentence of life imprisonment on juvenile defendant; whether trial court was required to make finding that defendant was incorrigible, irreparably corrupt or irretrievably depraved before it properly could sentence defendant to life imprisonment or equivalent; whether trial court's sentence was supported by record from resentencing hearing; whether trial court properly considered factors set forth in § 54-91g; whether trial court afforded defendant ample opportunity to provide personal statement before being resentenced; whether trial court interfered with defendant's attorney-client relationship; reviewability of claim that court's invitation to defendant to provide additional remarks violated his rights to allocution and due process; failure to brief claim adequately.

State *v.* Fox 221
Home invasion; conspiracy to commit home invasion; assault in first degree; conspiracy to commit assault in first degree; claim that trial court violated defendant's right against double jeopardy by sentencing defendant on two counts of conspiracy pursuant to single agreement with multiple criminal objectives; whether appropriate remedy was to reverse judgment of lesser offense of conspiracy and remand case to trial court with direction to vacate conviction; claim that defendant's right to due process under Connecticut constitution was violated by state's failure to produce discernible photographs of crime scene; whether defendant met balancing test set forth in State *v.* Asherman *(193 Conn. 695); whether defendant established materiality of indiscernible photographs; whether likelihood of mistaken interpretation of missing evidence by witnesses or jury was low; whether state's failure to preserve useful photographic evidence of condition of doors at crime scene was result of any bad faith or improper motive on part of state or law enforcement; whether defendant was prejudiced as result of unavailable evidence; whether trial court erred when it denied defendant's request for adverse inference jury instruction related to failure of police to produce discernable photographs; whether factual basis existed for specific charge requested by defendant; whether defendant showed that it was more probable than not that failure to give requested instruction affected result of trial.*

State *v.* Marsan. 49
Burglary in third degree; larceny in sixth degree; motion to suppress; whether there was sufficient evidence to support conviction of burglary in third degree; whether defendant was licensed and privileged to be in victim's home when she committed larceny; whether license was explicitly or implicitly revoked; whether state presented evidence from which jury reasonably could have concluded that defendant committed larceny in manner likely to terrorize victim or occupants in victim's home; claim that trial court improperly denied motion to suppress statements that defendant made to police detectives in her home; whether defendant was in custody and entitled to warnings pursuant to Miranda *v.* Arizona *(384 U.S. 436) when she was questioned by detectives; whether reasonable person in defendant's position would have felt that she was in custody for purposes of* Miranda*; whether*

fact that defendant was suspect at time of encounter with detectives transformed encounter into custodial interrogation.

State *v.* Moon 68

Felony murder; robbery in first degree; conspiracy to commit robbery in first degree; jury instructions; claim that trial court erred when it provided jury with supplemental instruction in response to jury question regarding use of force element of robbery in first degree; claim that court introduced new theory of liability when it added phrase "another participant" to instructions on use of physical force element of robbery in first degree; claim that supplemental instruction invaded province of jury or suggested preferred verdict; claim that court erred when it declined to poll jurors on affirmative defense to felony murder charge; claim that trial court abused its discretion by admitting into evidence two spent shell casings that were found in defendant's house two days after shooting; claim that shell casings were impermissible evidence of defendant's criminal propensity; whether defendant waived claim that trial court improperly instructed the jury on conspiracy to commit robbery in first degree when it omitted intent element required for underlying crime of robbery in first degree by failing to instruct jury that it had to find that defendant intended to commit robbery while he or another participant was armed; claim that court's instruction constituted plain error.

State *v.* Rodriguez 115

Public indecency; breach of peace; improper use of marker, registration, or license; illegal operation of motor vehicle while driver's license was under suspension; failure to appear in second degree; reviewability of claim that trial court improperly admitted evidence of uncharged misconduct; whether trial court committed plain error by admitting uncharged misconduct evidence; claim that defendant was entitled to plain error reversal because trial court improperly instructed jury on uncharged misconduct evidence; whether trial court abused its discretion in denying motion to sever failure to appear counts from other counts in information.

State *v.* Tarasiuk 207

Assault of public safety personnel; criminal trespass; whether trial court abused its discretion by permitting state to introduce evidence of prior felony conviction of defendant for criminal violation of restraining order for purpose of impeaching defendant's credibility; whether defendant failed to demonstrate that admission of evidence of prior felony constituted harmful error entitling him to new trial; whether state was required to prove that defendant intended to physically harm police officer; whether defendant's admissions supported jury finding that defendant intended to prevent police officer from performing duties; whether jury reasonably could have found any ameliorative aspects of defendant's testimony to be not credible; whether admission of prior felony conviction substantially affected verdict.

State *v.* Watson 353

Strangulation in second degree; assault in third degree; unlawful restraint in first degree; threatening in second degree; unpreserved claim that it was improper for trial court, rather than jury, to make determination of whether charges of assault and unlawful restraint were upon same incident as charge of strangulation for purposes of applicable statute ([Rev. to 2015] § 53a-64bb [b]); claim that trial court violated § 53a-64bb (b) and defendant's right to be free from double jeopardy when it punished him for assault, unlawful restraint and strangulation because separate charges of assault and unlawful restraint, as charged in information and based on evidence, were not established as wholly separate claims from strangulation; claim that trial court violated defendant's constitutional rights to confrontation and to present defense by restricting his cross-examination of victim; claim that defendant should have been allowed to question victim regarding certain past conduct.

Vodovskaia-Scandura *v.* Hartford Headache Center, LLC 559

Negligence; intentional infliction of emotional distress; whether trial court properly granted motion for summary judgment as to claims of negligence and intentional infliction of emotional distress; adoption of trial court's memorandum of decision as proper statement of relevant facts, issues and applicable law.

Weinshel, Wynnick & Associates, LLC *v.* Bongiorno 768

Contracts; claim that trial court improperly concluded that individual defendant could not be held personally liable for plaintiff's damages pursuant to theory of successor liability; whether trial court properly rendered judgment in favor of

defendant, individually; claim that defendant was liable on ground that she did not obtain approval, pursuant to applicable state regulation (§ 30-6-A4), from Liquor Control Commission for acquisition of interest in liquor company; whether plaintiff provided support for claim that party may seek to enforce liquor control regulation by means of private cause of action; claim that § 30-6-A4 stands for proposition that unapproved transfer of interest in corporate backer of liquor permit exposes transferee to personal liability for debts of backer corporation; whether trial court improperly interpreted statute (§ 52-599 [b]) in finding that substitution of defendant, as executrix, for husband's estate was untimely.

Wells Fargo Bank, N.A. *v.* Caldrello 1

Foreclosure; standing; claim that trial court erred in concluding that no genuine issue of material fact existed with respect to plaintiff's standing and in rendering summary judgment as to liability in plaintiff's favor; whether plaintiff met its evidentiary burden and raised presumption that it was holder of note and rightful owner of debt; whether plaintiff was successor by merger to original holder of subject note; whether, under federal banking law (12 U.S.C. § 215a [e]), all of rights in note of original holder automatically transferred to plaintiff without need for any endorsement; whether defendant's submissions in opposition to plaintiff's motion for summary judgment failed to satisfy her burden to rebut, with competent evidence, presumption that plaintiff, as holder of note, was also rightful owner of debt and had standing to bring foreclosure action; whether defendant's submissions in opposition to plaintiff's motion for summary judgment as to liability lacked adequate evidentiary foundation; whether defendant presented evidence that some entity other than plaintiff owned note at time action was commenced or at any time thereafter; reviewability of claims; failure to provide adequate record for review of claims or to brief claims adequately.

Wells Fargo Bank, N.A. *v.* Fratarcangeli 159

Foreclosure; special defenses; motion to strike; attestation of mortgage deed; notary public; claim that mortgage deed was invalid because there was no second attesting witness as required by statute (§ 47-5 [a]); whether trial court improperly concluded that validating statute (§ 47-36aa) rendered mortgage deed valid and enforceable; whether witnessing defect was automatically cured by § 47-36aa; whether trial court properly granted substitute plaintiff's motion to strike special defense of illegal attestation of mortgage deed as legally insufficient; whether § 47-36aa (a) (2) contains fraud exception for instances where it is alleged that lack of valid second attesting witness resulted from fraudulent act; whether trial court properly granted substitute plaintiff's motion to strike special defense of unclean hands as to attestation of mortgage deed; whether defendant alleged that conduct claimed to be unclean was done directly against defendant's interests; whether unclean hands doctrine was available to defendant on basis of allegations made in support of defendant's second special defense.

Wilson *v.* Di Iulio 101

Dissolution of marriage; claim that trial court improperly failed to award more than nominal alimony; claim that trial court abused its discretion by making property award enforceable by modifiable alimony award.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

RICHARD N. DINO et al. *v.* SAFECO INSURANCE COMPANY OF AMERICA et al., SC 20197
Judicial District of Tolland

Insurance; Crumbling Foundations; Proper Method for Determining Date of Loss. The plaintiffs are among a group of homeowners in northeastern Connecticut who have experienced cracking in their basement walls due to the presence of the mineral pyrrhotite in the concrete that was used in the construction of their homes. The defendants, who provided homeowners' insurance to the plaintiffs over various periods of time, all denied coverage for the plaintiffs' losses. As a result, the plaintiffs brought this action alleging breach of contract and unfair insurance practice. The defendants moved for summary judgment, claiming that potential coverage under their policies was never triggered because the loss did not occur during the effective dates of their policies and that, regardless, their policies do not cover this type of loss. The trial court found that the proper method for determining the date of loss is the manifestation theory, pursuant to which potential coverage under a policy is triggered when the loss becomes known or reasonably discoverable. The trial court found that there was no evidence suggesting that the plaintiffs knew, or should have known, of the loss prior to their discovery of the cracks in the concrete in 2015 and that, as a result, there was no breach of contract by the defendants whose policies were not in effect at that time. The trial court additionally found that because there was no coverage under the policies, the unfair insurance practice claims must also fail. The plaintiffs appeal, claiming that the proper method for determining the date of loss is the continuous injury theory, pursuant to which potential coverage under a policy is triggered over the entire period of time between the first exposure to the harm and the manifestation of the loss. The plaintiffs also claim that the trial court improperly precluded their expert witness from testifying concerning his opinion that substantial impairment to the structural integrity of the plaintiffs' basement walls would have been visible ten years prior to his inspection in 2015 on the ground that his opinion was based only on his experience and the conditions that he observed, and not on any reliable scientific methodology. The plaintiffs additionally claim that the trial court improperly shifted the burden of proof on summary judgment to them and that, in light of the trial court's alleged error

in finding that potential coverage under the policies was not triggered, the judgment in favor of the defendants on the unfair insurance practice claim must be reversed. The defendants claim that the trial court's judgment may affirmed on the alternative grounds that, regardless of the trigger of coverage theory applied, the plaintiffs' loss was not a covered "collapse" under the provisions of the policies and that the action is time-barred.

STATE *v.* JOESENIER RUIZ-PACHECO, SC 20206
Judicial District of Danbury

Criminal; Whether Defendant's Convictions of Assault as Both Principal and Accessory, For a Joint Assault of the Same Victim, Violates Double Jeopardy Clause. The defendant and his brother, Eliezer, became embroiled in a fight with the victims, Kenneth Tucker and Luis Rodriguez, in a parking lot. During the fight, the defendant and Eliezer stabbed Tucker multiple times, and the defendant stabbed Rodriguez two or three times. The defendant and Eliezer then ran after Rodriguez, and Eliezer stabbed him in the back. The defendant then approached Rodriguez, who was in the street at this point, and stabbed him again. The defendant was subsequently convicted of one count each of assault in the first degree as a principal and an accessory with respect to the stabbing injuries suffered by Rodriguez, and one count each of assault in the first degree as a principal and an accessory with respect to the stabbing injuries sustained by Rodriguez. On appeal, he claimed that his convictions of two counts each of first degree assault as a principal and as an accessory violated the federal constitution's double jeopardy clause, and therefore that his two assault convictions as an accessory should be vacated. The Appellate Court (185 Conn. App. 1) rejected the defendant's claim and affirmed his convictions, concluding that, while the four assault convictions arose from one criminal event, the double jeopardy clause was not violated because the jury reasonably could have found that each charged offense was the result of a distinct act of independent legal significance. Specifically, with respect to the convictions arising out of the stabbing injuries to Rodriguez, the court determined that the jury reasonably could have found that the defendant committed assault as a principal either when he stabbed Rodriguez during the initial brawl or when he pursued Rodriguez into the street and stabbed him again. The court added that, even assuming that the relatively simultaneous stabbings of Rodriguez by the defendant and Eliezer during the initial brawl was a single act for purposes of double

jeopardy, there was no doubt that the defendant's stabbing of Rodriguez after he left the initial brawl was a criminal act that was distinct and separate from the stabbings that the defendant and Eliezer initially inflicted on Rodriguez. In addition, the court determined that the jury's finding that the defendant engaged in an assault as an accessory could have been predicated on his having aided Eliezer when he stabbed Rodriguez in the back. With respect to the convictions arising out of the stabbing injuries to Tucker, the court ruled that the jury was free to resolve conflicting evidence by concluding that both the defendant and Eliezer stabbed Tucker, and thus, could have reasonably found the defendant liable for (1) assault as a principal on the basis of his stabbing of Tucker, and (2) assault as an accessory for Eliezer's stabbing of Tucker, which was a contemporaneous yet separate assault with independent legal significance because the defendant had engaged in conduct with the intent to aid Eliezer's assault. Moreover, the court noted that the state never suggested to the jury that the assault charges were alternative theories of liability and that the state argued that the evidence supported a finding that the defendant acted as an accessory by being there with a knife. The Supreme Court will decide whether the Appellate Court properly concluded that the defendant's convictions of assault in the first degree as both a principal and as an accessory, for a joint assault of the same victim, do not violate the double jeopardy clause of the federal constitution.

STATE *v.* CODY M., SC 20213
Judicial District of New Haven at G.A. 23

Criminal; Harassment; Whether Defendant Subject to Double Jeopardy on Conviction of Two Counts of Violating Protective Order; Whether Jury Properly Instructed that "Harass" Means to "Trouble, Worry or Torment." The defendant was subject to a standing criminal protective order that prohibited him from having contact with the victim, the mother of his children, except for the purpose of visitation as directed by the trial court. The order also prohibited the defendant from, among other things, threatening or harassing the victim. During a juvenile court hearing regarding their children, the defendant told the victim that he loved her and asked her why she had blocked his telephone number, but she ignored him. The defendant then told the victim, using obscenities, that "you're going to have problems when I get home," and, when she looked at him, he mouthed that he was going to kill her. The victim contacted the police thereafter, and the defendant was charged with two counts

of violation of a standing criminal protective order under General Statutes § 53a-223a. The first count alleged that the defendant had engaged in contact with the victim in violation of the protective order, while the second count alleged that the defendant had violated the order by threatening or harassing the victim. The defendant was convicted after a jury found him guilty of both counts. He appealed, and the Appellate Court (185 Conn. App. 287) affirmed the conviction. The Appellate Court rejected the defendant's claim that his conviction violated his right against double jeopardy because the two counts amounted to an improper double punishment for one act, that is, his interaction with the victim. The Appellate Court determined that each count was based on distinct act; the act of engaging in contact with the victim for a purpose unrelated to visitation was a violation of one part of the protective order while the act of telling the victim that he was going to kill her was an additional violation of an additional part of the order. The Appellate Court thus concluded that each act was a separately chargeable violation. The Appellate Court also rejected the defendant's claim that the trial court erroneously instructed the jury on the second violation of a protective order count that the definition of "harassing" was "to trouble, worry, or torment." The defendant argued that the trial court's definition imposed a lower standard than a definition for "harassing" that was previously recognized by the Appellate Court, that is, "to annoy persistently." The Appellate Court disagreed, acknowledging the distinction but concluding that the distinction was "not so great as to implicate the fairness of the defendant's trial." The defendant was granted certification to appeal from the Appellate Court's decision. The Supreme Court will decide whether the Appellate Court properly concluded that the defendant's right against double jeopardy was not violated when he was convicted of two counts of violation of a protective order based on different words spoken to the same person during a single, brief, and uninterrupted statement. The Supreme Court will also decide whether the Appellate Court properly concluded that to "harass" means to "trouble, worry, or torment" for purposes of an enhanced penalty for violating a standing criminal protective order.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION, SC 20233
Judicial District of Tolland

Habeas; Appellate Review; Whether Appellate Court Properly Affirmed Habeas Court Judgment on Ground Not Raised or Decided by Habeas Court and Not Raised or Briefed by Parties on Appeal. The petitioner was charged with home invasion, burglary, larceny, assault, and interfering with an officer in connection with an incident in which he broke into the victim's residence while it was unoccupied, assaulted the victim when the victim returned, took the victim's car keys and wallet, and fled in the victim's car. Before his criminal trial, the petitioner entered an *Alford* guilty plea on the home invasion charge and was sentenced to 25 years of incarceration. The petitioner subsequently filed this habeas action, alleging, among other things, ineffective assistance of counsel based on his trial counsel's failure to file a motion to dismiss the home invasion charge on the ground that the charge did not apply to the facts of the petitioner's case. The habeas court denied the habeas petition on the merits, and the petitioner appealed, claiming that the habeas court erred in denying his claim that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge. The Appellate Court (185 Conn. App. 686) affirmed the habeas court's judgment. Instead of considering the habeas court's decision on the merits of the petitioner's ineffective assistance claim, however, the Appellate Court held that the petitioner's guilty plea, which he made knowingly, intelligently, and voluntarily, served as a waiver of any constitutional claims unrelated to the plea. The waiver ground was not raised before either the habeas court or the Appellate Court. The petitioner has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly affirmed the judgment of the habeas court on a legal ground that was not raised or decided in the habeas court and never raised or briefed by the parties in the Appellate Court.

OHAN KARAGOZIAN *v.* USV OPTICAL, INC., SC 20257
Judicial District of New Haven at Meriden

Employment; Whether Action Alleging Constructive Discharge in Violation of Public Policy Requires that Plaintiff Allege and Prove Both that Employer Intended to Create Intolerable Work Atmosphere and that Employer Intended to Force Plaintiff to Resign. The plaintiff brought this action alleging that he was constructively discharged from his employment as a licensed optician

manager of an optical department that the defendant owned and operated in a JCPenney department store. The plaintiff alleged that from the beginning of his employment to the date on which he resigned, the defendant required him as part of his duties to provide optometric assistant services to the doctor of optometry in the store and that the duties that the defendant required him to perform violated certain public policies of the state. The plaintiff further alleged that he was compelled to resign from his position because the defendant refused his request that he not be required to perform the duties. The plaintiff claims that the defendant thereby constructively discharged him in violation of the public policy of the state. The trial court granted the defendant's motion to strike the complaint on the ground that it failed to sufficiently allege a claim of constructive discharge. The plaintiff appealed from the trial court's judgment in favor of the defendant on the stricken complaint. The Appellate Court (186 Conn. App. 587) affirmed the judgment, holding that the trial court properly determined that the plaintiff failed to state a claim for constructive discharge. The Appellate Court noted that, in *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178 (1998), our Supreme Court stated that "constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily." (Emphasis in original). The Appellate Court found that, here, there were no allegations in the complaint that reasonably could be construed to claim that the defendant intended to create conditions so intolerable that a reasonable person would be compelled to resign. The Appellate Court rejected the plaintiff's argument that a more sensible reading of *Brittell* would conclude that it is the employer's intent to create the work atmosphere in question that matters, rather than the intent that such atmosphere should force an employee to resign. The plaintiff filed a petition for certification to appeal, which the Supreme Court granted as to the issue of whether the Appellate Court correctly construed and applied *Brittell* as holding that an action for constructive discharge in violation of public policy requires that the plaintiff allege and prove not only that the employer intended to create an intolerable work atmosphere, but also that the employer intended thereby to force the plaintiff to resign.

E. I. DU PONT DE NEMOURS AND COMPANY *v.*
CHEMTURA CORPORATION, SC 20329
Judicial District of Danbury

Breach of Contract; Whether, Under New York law, the Plaintiff was Required to Comply Strictly With Contractual Notice Provisions in Order to Exercise its Right to Indemnification Under the Contract. In December, 2007, the parties entered into an asset purchase agreement (contract) for the sale of the defendant's fluorine chemical business to the plaintiff. Under the contract, the defendant was obligated to indemnify the plaintiff for losses it incurred as a result of any breach of the defendant's representations and warranties regarding the business, provided that, within four years of the closing date, the plaintiff notified the defendant in writing, stating the amount of and the factual basis for any claim. The contract specified that all notices had to be sent to the defendant's General Counsel and its outside counsel. The closing occurred on January 31, 2008, and, shortly thereafter, the plaintiff sought indemnification for various losses that it claimed were caused by the defendant's misrepresentations. The parties' representatives attempted to resolve the claims during the ensuing years, but they failed to resolve all of the plaintiff's claims under the contract. In June, 2014, the plaintiff brought this action alleging that the defendant breached its indemnity obligations under the contract. The case was tried to the court, and the parties agreed that New York law governed the plaintiff's claims. At trial, the defendant moved for a directed verdict on the ground that the plaintiff had failed to satisfy a condition precedent to bringing the action in that it failed to comply strictly with the contract's notice provisions. It argued that, under New York law, strict compliance with contractual notice provisions is required. The plaintiff countered that strict compliance is not required in commercial contracts and that noncompliance is excused where the defendant has received actual notice and has not been prejudiced by the failure to comply strictly with the terms of the contract. The trial court deferred any decision on the motion and the defendant presented its case. After trial, the court rendered judgment for the defendant, concluding that the plaintiff failed to comply with the contract's notice provisions when it failed to send notice of its claims to the defendant's General Counsel or its outside counsel within four years after the closing. It rejected the plaintiff's claim that the defendant had received actual notice, finding that the evidence did not establish that the plaintiff had provided notice of the particular contract claims and that the plaintiff's noncompliance with the terms of the notice provisions prejudiced the defendant. The plain-

tiff appeals, claiming that the trial court erred in concluding that New York law requires strict compliance with notice provisions of commercial contracts as a condition precedent to recovery for breach of contract. The plaintiff argues that the trial court failed to recognize that the parties' communications during the years following the closing constituted actual notice of the claims even if it did not comply with the contract's formal notice procedure. The defendant contends, as an alternative ground for affirming the judgment, that the plaintiff failed to prove its breach of contract claims.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Medicaid Access Monitoring Review Plan - Triennial Update Opportunity for Public Comment

Federal Medicaid Access Regulations

Effective January 1, 2016, the federal Centers for Medicare & Medicaid Services (CMS) adopted federal regulations at 42 C.F.R. §§ 447.203 and 447.204 that require state Medicaid programs to ensure Medicaid members have access to covered services. The Department of Social Services (DSS), which is Connecticut's single state Medicaid agency, is committed to ensuring that Medicaid members can access the services they need. DSS is also committed to following the federal access requirements.

Medicaid Access Monitoring Review Plan (AMRP)

The federal access regulations require DSS to prepare an access monitoring review plan (''access plan''), which must analyze how Medicaid members have access to medically necessary covered services, including analysis of data sources, methodologies, baselines, assumptions, trends, factors, and thresholds. States must also consider information about access from providers, members, and other stakeholders. This plan must be updated every three years in accordance with the federal regulations. DSS has prepared a draft access plan update for Connecticut's Medicaid program, which is posted at this link: http://www.ct.gov/amrp. Your comments are important to help DSS revise and finalize the access plan update.

How to Send DSS Comments About the Access Plan

If you wish to send DSS comments about the draft update to the AMRP, please send them by email to amrpdss@ct.gov or by mail to Nina Holmes, Department of Social Services–Medical Policy Unit, 55 Farmington Ave.–9th Floor, Hartford CT, 06105, Attn: Access Plan–Triennial Update Comments.

Comments must be received by DSS at the above contact information as soon as possible, but no later than October 17, 2019. In the subject line of your comments, please reference ''Access Plan Update Comments'' and please include your name and contact information in the body of your comments. Please do not include any personally sensitive information in your comments such as social security numbers or Medicaid ID numbers.

Medicaid Members Who Need Help Finding a Provider Now

Sending DSS Comments on the access plan will help DSS improve the update to the access plan and make overall policy regarding access to services in the Medicaid program. If you are a Medicaid member who needs help finding a doctor or other provider right now, please contact member services on your Medicaid card or one of the following:

Medical: HUSKY Health / Community Health Network (CHNCT)

Call 1-800-859-9889 (or 711 if you are hearing impaired), open Monday–Friday, 8:00 a.m.–6:00 p.m. or go to the HUSKY Health website at www.huskyhealth.com.

Behavioral Health: CT Behavioral Health Partnership/Beacon Health Options CT

Call 1-877-552-8247 (TTY: 1-866-218-0525), open Monday–Friday, 9:00 a.m.–7:00 p.m. or go to the CT Behavioral Health Partnership website at www.ctbhp.com.

Dental: CT Dental Health Partnership / BeneCare

Call 1-855-283-3682, open Monday–Friday, 8:00 a.m.–5:00 p.m. or go to the CT Dental Health Partnership website: at www.ctdhp.com.

CONNECTICUT RETIREMENT SECURITY AUTHORITY

Notice of Intent to Adopt Procedure

In accordance with Section 1-121(a) of the Connecticut General Statutes, notice is hereby given that the Connecticut Retirement Security Authority (the ''Authority'') is proposing to adopt a procedure to govern procurement of goods and services pursuant to Section 31-417(j) of the Connecticut General Statutes. The procedure is entitled ''Procurement: Acquisition of Real and Personal Property and Contracting for Personal Services.''

Interested persons wishing to present their views on this procedure are invited to do so in writing within thirty (30) days following publication of this notice. Comments can be submitted electronically to the Authority at maryfaycrsa@gmail.com (please include ''Procurement Procedure'' in the subject line). Comments can also be mailed to Connecticut Retirement Security Authority, Attn: Procurement Procedure, P.O. Box 270684, West Hartford, CT 06127.

The proposed procedure is available by sending an email to the Authority at maryfaycrsa@gmail.com (please include ''Procurement Procedure'' in the subject line).

NOTICES

Notice of Suspension

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on August 16, 2019, in Docket Number HHD-CV-18-6103946 Justin Freeman, juris #418626, stipulated as follows:

1. The Respondent shall be suspended form the practice of law for a period of 24 months retroactive to February 15, 2019.
2. Pursuant to Practice Book Section 2-64 and the court's order of February 20, 2019, Attorney Donald Howard of Rockville, CT, juris number 432865, shall continue to serve as Trustee to take such steps are necessary to protect the interests of respondent's clients, secure the respondent's files and clients' fund accounts, and disburse amounts as approved by the court.
3. The Respondent shall comply with all the terms and conditions of Practice Book Section 2-53 in the event that he applies for reinstatement to the Connecticut bar following his period of suspension.

David Sheridan
Presiding Judge

Notice of Suspension

NNH-CV18-6087812-S. OFFICE OF CHIEF DISCIPLINARY COUNSEL VS. NEWMAN, SUSAN. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, SEPTEMBER 5, 2019.

ORDER

The following order is entered in the above matter:

ORDER: The respondent is hereby suspended from the practice of law on an interim basis pending further order of the court. The respondent shall comply with the dictates of Practice Book 2-47B regarding the activities of deactivated attorneys. Based on the information currently before the court, it is not necessary to appoint a trustee at this time. The court reserves the right to take further disciplinary action as circumstances warrant.

By the Court
427017
James Wilson Abrams