CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXI No. 18 October 29, 2019 323 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

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

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Vol. 333

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DEMETRICE L. LEWIS (SC 20002)

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

Syllabus

The defendant, who was convicted, on a conditional plea of nolo contendere, of carrying a pistol without a permit and criminal possession of a pistol or revolver, appealed from the judgment of conviction, claiming, inter alia, that the trial court improperly denied his motion to suppress a gun found on his person during a patdown search by a police officer. The defendant contended that the officer's seizure of him and patdown were unlawful under the federal and state constitutions. A woman, V, had called 911 at approximately 4 a.m. to report a domestic assault. V indicated to the 911 dispatcher that, approximately fifteen minutes beforehand, a black man identified as "O," whom V had been "dealing with," broke a window in her apartment and choked her. V noted to the dispatcher that O was wearing black clothing and a fitted orange and grey hat. V further explained that O had left her apartment but that she could hear him talking outside of her open window and, thus, believed that he was still nearby. V also told the dispatcher that O did not have any weapons. Approximately five minutes after the 911 call, police officers were dispatched to respond to the scene. The officers were informed that it was a domestic violence incident involving choking and that the perpetrator was likely in the area of the apartment, and they were given a description of O and what he was wearing. The officer who ultimately conducted the patdown search had been on patrol nearby in his police vehicle when he responded to the call. Approximately one minute after the dispatch call, the officer observed the defendant standing alone in a parking lot area that was in close proximity to the apartment, talking on a cell phone with no one else around, while it was raining heavily. Believing that the defendant matched the description of the perpetrator, the officer stopped and, while remaining in the vehicle, asked the defendant his name. When the defendant did not respond, the officer exited his vehicle, approached the defendant from an angle so as not to appear confrontational, and again asked for his name, where he was coming from, and whether he had any identification. The defendant did not coherently answer the officer's questions, was slurring his words and appeared to be under the influence of alcohol or controlled substances. At one point, the officer believed that the defendant had mumbled something that sounded like his name was "Michael." Shortly thereafter, the officer began patting down the defendant for weapons and felt the butt of the gun that the officer ultimately removed from his person and that formed the basis for the charges of which he was convicted. It was subsequently determined that the defendant was not the perpetrator in the incident at the victim's apartment. In denying the defendant's motion to suppress, the trial court determined that the

defendant was not seized until the officer touched him at the start of the patdown. The court further concluded that the officer had reasonable and articulable suspicion of criminal activity to stop the defendant and that the patdown was supported by reasonable and articulable suspicion that he might be armed and dangerous. On appeal to the Appellate Court, that court upheld his conviction and agreed that the officer had reasonable and articulable suspicion to stop the defendant, did not seize the defendant until he touched him, and that the patdown was supported by reasonable and articulable suspicion that he might be armed and dangerous. On the granting of certification, the defendant appealed to this court, claiming that he was unlawfully seized when the officer stopped his patrol vehicle and asked his name or, alternatively, when the officer approached him while asking him questions. The defendant further claimed that the officer did not have reasonable and articulable suspicion that the defendant was or had been engaged in criminal activity or that he might be armed and dangerous. *Held* that the Appellate Court correctly concluded that the trial court had properly determined that the seizure and patdown of the defendant were lawful under both the federal and state constitutions and, therefore, had properly denied the defendant's motion to suppress the gun:

1. The defendant could not prevail on his claim that he was seized when the officer stopped his patrol vehicle and asked for his name or, alternatively, when the officer exited his vehicle and approached him while asking questions, the defendant having failed to demonstrate that it was objectively reasonable for him to believe that he was not free to leave prior to the point at which the officer touched him: the placement of the officer's vehicle did not impede the defendant's movement or prevent him from leaving, the officer did not activate his vehicle's sirens or overhead lights, command the defendant to halt or display a weapon, and there was nothing coercive about the officer's conduct when he first asked the defendant for his name; moreover, the officer approached the defendant at an angle and did not block or impede his movement, he did not issue any commands or display authority while asking the defendant questions, and the officer's continued questioning after the defendant failed to respond or responded incoherently did not become coercive; furthermore, the defendant did not attempt to leave, ask the officer to stop questioning him, or indicate that he was unwilling to speak with the officer, and there was no case law to support the premise that a seizure can occur solely on the basis of an officer's request to a civilian to identify himself or to provide identification.
2. On the basis of the totality of the circumstances, including the similarity in clothing that the perpetrator was described as wearing and the clothing that defendant actually was wearing, the geographical and temporal proximity to the reported incident, the time of day, and the defendant's location, the officer had reasonable and articulable suspicion to seize the defendant when he commenced the patdown search: although there

were some discrepancies between the clothing that the perpetrator was reportedly wearing and the clothing that the defendant actually was wearing, the heavy rain and darkness where the defendant was standing made it difficult for the officer to discern details about the defendant's clothing other than the fact that the clothing appeared to be black, and the fact that the defendant appeared to match the general report of the perpetrator's appearance provided the officer with reasonable and articulable suspicion that the defendant was the perpetrator of the domestic violence incident; moreover, any doubt caused by the discrepancies in the description of the clothing was negated by the defendant's geographical and temporal proximity to the crime scene, as he was within one minute's walking distance from the placed of the reported incident a few minutes after the 911 call in which V stated that the suspect remained in the surrounding area; furthermore, notwithstanding the defendant's assertion that it was insignificant that he was standing alone in the early morning hours in the rain in a high crime neighborhood, the trial court did not rely on the fact that the reported incident occurred in an area known for criminal activity in determining that the officer had reasonable and articulable suspicion, as the officer did not stop the defendant on the basis of the characteristics of the neighborhood but on the basis that there was a reported domestic assault in the area.

3. The defendant could not prevail on his claim that, even if his seizure was lawful, the patdown during which the gun was found was unconstitutional because the officer lacked reasonable and articulable suspicion that he might be armed and dangerous, as the defendant was suspected of committing a violent crime, that is, domestic violence involving choking, and was discovered in close geographical and temporal proximity to the reported incident with an appearance generally matching the description of the perpetrator: because domestic violence situations are volatile situations in which the perpetrator at any moment may escalate the violence, and because a domestic violence incident involving choking increases the probability that the perpetrator might be armed with a weapon, it is reasonable for an officer to suspect, when little to no time has passed since the domestic violence incident, as in the present case, that such a perpetrator might be armed and dangerous; moreover, contrary to the defendant's assertion that the officer did not have reasonable suspicion that the defendant might be armed because the officer knew from the 911 call that the perpetrator was not armed, such knowledge did not detract from the reasonable and articulable suspicion the officer had, as V's report to the 911 dispatcher that the perpetrator had no weapons meant only that he had no weapons that the victim knew of, not that he was in fact unarmed, and there was no way for the officer to know if the perpetrator had acquired a weapon in the interim between the commission of the reported assault and the seizure.

(*Two justices concurring separately in one opinion*)

Argued January 18—officially released October 29, 2019

Procedural History

Substitute information charging the defendant with the crimes of carrying a pistol without a permit, criminal possession of a firearm and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of New Haven, where the court, *Cradle*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Keegan*, *J.*, on a conditional plea of nolo contendere to the charges of carrying a pistol without a permit and criminal possession of a pistol or revolver; subsequently, the state entered a nolle prosequi as to the charge of criminal possession of a firearm; judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Beach* and *Bishop*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The facts of this case implicate governmental and privacy interests that courts struggle to reconcile. This court is no exception. On this record, there is no question that the defendant, Demetrice L. Lewis, illegally possessed a pistol. Responding to a report of a domestic violence incident, a police officer encountered the defendant. On the basis of a description of the perpetrator and other attendant circumstances, the police officer believed that the defendant might have been the perpetrator who, only minutes

earlier, had choked a woman and broken a window in her apartment. On that basis, the officer approached the defendant, attempted to ask him questions, and patted him down pursuant to *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). During this patdown, the police officer discovered the pistol and seized it after a brief struggle.

It turned out that the defendant was not the perpetrator. Rather, he was essentially minding his own business, standing in the rain with no one else around at 4:20 a.m., talking on his cell phone. However odd this behavior might appear to some, in this country, an individual enjoys the right to act in this manner undisturbed by the police unless the police have reasonable and articulable suspicion that he is involved in or about to be involved in criminal activity.

It is the solemn responsibility of our courts to ensure that when the police intrude on a person's privacy or liberty, they do so in strict adherence to the requirements of *Terry*. To ensure that the police have not overreached when they conduct investigatory stops, we require that the state articulate its justification so that a court may review it for objective reasonableness. Although this is a lower standard than probable cause, it is important that courts apply it vigilantly to guarantee that the police indeed have justification for even limited intrusions, and to guard against arbitrariness and harassment. The police cannot retroactively justify an investigatory stop and patdown on the ground that the patdown resulted in the discovery of illegal contraband.

In this case, we are once again confronted with the ill-defined notion of a "high crime neighborhood." We have noted in the past how this imprecise shorthand challenges—indeed, can undercut—our ability to apply it to a standard of suspicion that is meant to require circumspection before justifying a governmental inter-

ference with constitutionally protected interests. See *State* v. *Edmonds*, 323 Conn. 34, 69, 145 A.3d 861 (2016) ("cautioning that high crime area justification is easily subject to abuse" [internal quotation marks omitted]). Too often, reliance on the nature of the neighborhood too easily justifies intrusions on those who happen to reside in neighborhoods plagued by crime, which courts have recognized are inhabited predominantly by those with low incomes and disproportionately by minorities. See id., 83–84 (*Robinson*, *J.*, concurring). We have recognized that it is inappropriate that the poor and minorities come under suspicion, at least in part, because of their own surroundings, while those of greater wealth and majority status, although engaged in the same conduct, are less likely to suffer these intrusions and their accompanying indignities. See id., 83–85 (*Robinson*, *J.*, concurring).

We cannot ignore the fact that in the present case, the officer and the state, in part, justified the stop of the defendant on the basis of the reputation of the neighborhood.[1] Nor is that the only circumstance that challenges us in this case. The officer also testified that he "pat[s] everybody down." As we and the Chief Justice, in his concurring opinion, indicate, this is plainly an unacceptable and improper approach to law enforcement.

The officer was not, however, on routine patrol on general watch for those who might be acting illegally. Rather, he was responding to a 911 call from a victim reporting a domestic assault—specifically, that she had been choked by a male with whom she had been spending time. Within minutes, the officer was on the scene in search of the perpetrator, whose description the officer reasonably determined matched that of the defendant.

[1] Notably, in denying the defendant's motion to suppress evidence of a gun that the police had found on his person, the trial court did not rely on the character of the neighborhood to justify the initial seizure of the defendant.

It is easy for a court to question the officer's conclusions and actions. Indeed, that is our job. It is easier still to suggest that the officer could have or should have done something else, or even that a different course of action would have been more logical or more reasonable. That is not our job. Thus, in the present case, we do not determine whether the officer could have taken a less intrusive course of action but, rather, determine whether his actions—stopping the defendant and patting him down—were supported by reasonable and articulable suspicion.

The defendant contends that the trial court improperly denied his motion to suppress the gun on the ground that his seizure and subsequent patdown were lawful under both the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution. Specifically, he claims that the Appellate Court improperly concluded that the trial court correctly determined that (1) he was not seized until the police officer touched him and performed a patdown search for weapons, (2) the officer had reasonable and articulable suspicion that he had committed a crime, and (3) the officer had reasonable and articulable suspicion that he might be armed and dangerous. Although we recognize the unique challenges that this case raises, we disagree with the defendant's claims and conclude that the seizure and subsequent patdown of the defendant were lawful. We therefore affirm the judgment of the Appellate Court.

The following facts, as found in the record, and procedural history are relevant to our consideration of the claims on appeal. On May 25, 2013, at approximately 4:16 a.m., a woman called New Haven 911 to report a domestic assault on Derby Avenue in New Haven. The 911 caller informed the 911 dispatcher that approxi-

mately fifteen minutes earlier,[2] a thirty-two year old black man identified as "O,"[3] whom she had been "dealing with,"[4] had broken a window in her apartment and choked her. Although the victim stated that she did not need an ambulance, her assailant choked her hard enough that her throat was sore. She further explained that her assailant had left her home but that, although she could not see her assailant from her window, she could hear him talking, "so, he's around the area." She believed that he was most likely hiding in bushes or other dark places outside in the area. She also stated that she had his state identification. In response to an inquiry from the 911 dispatcher, the victim stated that the perpetrator did not have any weapons. She described her assailant as wearing a black hoodie, black sweatpants, and a chain around his neck. She stated that she believed that he also wore a fitted orange and grey hat. She did not give any additional details about the hat, such as, for example, whether the hat was predominantly more orange than grey or vice versa.

At approximately 4:19 a.m., police officers were dispatched to Derby Avenue to respond to the 911 call, which was reported as a domestic violence incident

[2] The trial court's memorandum of decision denying the defendant's motion to suppress states that the alleged crime occurred "only moments before Officer [Milton] DeJesus encountered the defendant . . . ." Both parties concede that this is not entirely accurate; the record establishes that the victim did not place the 911 call until approximately fifteen minutes after the alleged crime occurred.

[3] In accordance with our policy of protecting the privacy interests of the victim of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes §§ 46b-38a (1) and (2) (F) and 54-86e.

[4] The dispatcher appeared to interpret this statement by the victim to mean that the victim and the suspect were involved in some form of an intimate relationship. The defendant does not dispute that the 911 dispatcher understood the victim to be reporting a domestic violence incident, regardless of the specific nature of the relationship between the victim and suspect.

involving choking. The police dispatcher[5] described the perpetrator as a black male, "O," who was dressed in all black clothing and was believed to be outside the victim's home in bushes nearby because the victim had stated that she could hear him outside in the area. At the time of the dispatch call, Officer Milton DeJesus was patrolling the area, with which he was very familiar,[6] in a marked patrol vehicle and was approximately one quarter mile from Derby Avenue. Being in close proximity, he responded to the call and proceeded toward Derby Avenue. Approximately one minute after the dispatch call, while en route to Derby Avenue, Officer DeJesus observed the defendant, a black male in dark clothing, standing in a parking lot area to the right of a market at 1494 Chapel Street, which is near the corner of Chapel Street and Derby Avenue and approximately one minute's walking distance from Derby Avenue.

At the time that Officer DeJesus saw the defendant, it was dark and raining heavily. Because of this, the defendant was soaking wet, and his clothing appeared to Officer DeJesus to be all black, although the defendant was wearing dark blue jeans, a dark grey leather jacket, and a navy blue skullcap. Due to the pouring rain, Officer DeJesus could not discern any additional details about the defendant's clothing, such as its material. The defendant was standing alone in the rain and appeared to be speaking on a cell phone. A street lamp near the market parking lot illuminated the street onto

[5] The record does not reflect whether the dispatcher who sent out the call to the officers was the same person as or had any connection to the New Haven 911 dispatcher.

[6] Officer DeJesus testified at the suppression hearing that he grew up in the area and that the neighborhood had "a lot of prostitution, a lot of narcotics . . . transactions." In that area, he previously had made numerous arrests for drug related violations, weapons violations, and violence in general. The trial court accepted Officer DeJesus' testimony that the area of the alleged crime was a high crime neighborhood. The defendant in his briefs on appeal to this court does not challenge that finding.

the sidewalk area, allowing Officer DeJesus to see the defendant's presence, but the area around the defendant was not well lit. The defendant was the only person Officer DeJesus saw in the area.

Believing that the defendant matched the description of the suspect, Officer DeJesus stopped his patrol vehicle about fifteen feet from the defendant. He did not activate his vehicle's overhead lights. While remaining in the vehicle, he rolled down the driver's side window and asked the defendant, "yo, my man, what's your name?" The defendant did not respond and did not appear to notice Officer DeJesus. At that point, Officer DeJesus, who was wearing his police uniform, exited the patrol vehicle, approached the defendant from an angle, in an effort to appear nonconfrontational, and asked the defendant for his name, where he was coming from, and whether he had any identification. The defendant responded by "mumbling back." "It's like he'snot there," Officer DeJesus related, and so he asked the defendant what his name was several times more. Although most of the defendant's mumbling was incoherent, at one point Officer DeJesus thought the defendant mumbled something that sounded like "Michael" in response to a question about his name, but it was unclear because he was slurring his words. In response to the question about where he was coming from, the defendant mumbled something about being "in a program." The defendant did not otherwise coherently answer Officer DeJesus' questions, and he continued to hold the cell phone to his ear, did not appear stable, and was swaying. The only time the defendant made eye contact with Officer DeJesus, he did not appear "right." According to Officer DeJesus, the defendant was not acting normally or rationally but, rather, appeared guarded and under the influence of alcohol or controlled substances.

In light of the defendant's behavior, the violent nature of the alleged crime, and the time of day,[7] Officer DeJesus walked around him and began patting him down for weapons. The defendant immediately moved his right hand downward toward his side. Officer DeJesus told him, "no, hold on," and reached toward the defendant's waistband. To that point, the encounter from beginning to end had lasted less than one minute when Officer DeJesus felt the butt of a gun, after which he and the defendant began wrestling in the street for control of the gun.

As the defendant and Officer DeJesus wrestled for the gun, another officer arrived with a canine. Both officers commanded the defendant to stop resisting, but he did not comply. The canine then bit the defendant in the arm, subduing him, and the defendant was taken into custody and arrested. It was subsequently determined that the defendant was not the perpetrator in the incident on Derby Avenue.

The defendant was charged with carrying a pistol without a permit in violation of General Statutes § 29-35 (a), criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). The defendant subsequently moved to suppress the gun on the ground that he had

[7] At the suppression hearing, Officer DeJesus explained his reasons for patting down the defendant: "[W]hen I, initially, I asked him what's his name, his response, like I said, was not clear. He was mumbling. Not only that, it's just the way his—his movements are. It's four o'clock in the morning. I'm by myself. I have to use my common sense." He also explained that his response was due in part to the fact that the crime he was investigating involved choking and domestic violence, and that the defendant's mumbling, inattentiveness, and avoidance of eye contact made him appear guarded.

We note that Officer DeJesus also stated that his standard procedure was to "pat down everyone." Although we conclude that the defendant's constitutional rights were not violated, we do not condone this overbroad practice. See part III of this opinion.

been unlawfully seized and searched during an unlawful stop by the police in violation of the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution. The defendant argued that he was seized the moment Officer DeJesus stopped his patrol vehicle near him, the seizure was unlawful because Officer DeJesus lacked reasonable and articulable suspicion that the defendant had committed a crime, and the patdown was unlawful because his behavior was not sufficient to raise a reasonable and articulable suspicion that he might be armed and dangerous.

The trial court denied the defendant's motion to suppress. The court agreed with the state that the defendant was not seized until Officer DeJesus touched the defendant at the start of the patdown because Officer DeJesus did not display a show of authority or engage in coercive or threatening behavior until he touched the defendant. The court further found that Officer DeJesus had reasonable and articulable suspicion of criminal activity to stop the defendant because the defendant sufficiently matched the description of the suspect in the incident on Derby Avenue and was located in sufficiently close proximity to the alleged crime scene, both geographically and temporally. Finally, the court found that the patdown of the defendant was supported by reasonable and articulable suspicion that he might be armed and dangerous, on the basis of the totality of the circumstances, including the violent nature of the crime under investigation, the defendant's behavior, and the time of day. In making these findings, the court credited the testimony of the officer that in approaching and questioning the defendant, he intended to appear nonconfrontational, and the court found that he did indeed appear nonconfrontational, the rain and darkness made the defendant's clothing appear to be all black, and the

defendant's behavior made him appear guarded and evasive.

Following the denial of the motion to suppress, the defendant entered a conditional plea of nolo contendere to one count of carrying a pistol without a permit and one count of criminal possession of a pistol or revolver. The state entered a nolle prosequi with respect to the count of criminal possession of a firearm. The defendant was sentenced to five years of incarceration, execution suspended after a mandatory minimum of one year of incarceration, followed by a three year conditional discharge on the count of carrying a pistol without a permit, and five years of incarceration, execution fully suspended, with a three year conditional discharge on the count of criminal possession of a pistol or revolver. The sentences were to run consecutively for a total effective sentence of ten years of incarceration, execution suspended after one year, and a three year conditional discharge.

The defendant appealed to the Appellate Court, which affirmed the judgment of the trial court. See *State* v. *Lewis*, 173 Conn. App. 827, 851, 162 A.3d 775 (2017). The Appellate Court agreed with the trial court that Officer DeJesus' questioning of the defendant was not confrontational and that he did not seize the defendant until he touched him. Id., 841. The Appellate Court also agreed with the trial court that Officer DeJesus had reasonable and articulable suspicion to stop the defendant. Id., 847. The Appellate Court reasoned that, even if, under the collective knowledge doctrine,[8] Officer DeJesus were charged with knowing the precise details of the suspect's clothing as stated by the victim in the

[8] Under the collective knowledge doctrine, in determining whether there is reasonable and articulable suspicion to search or seize a person, the arresting officer is credited with knowing, constructively, all that the law enforcement organization knew at the time of the seizure. *State* v. *Butler*, 296 Conn. 62, 72–74, 993 A.2d 970 (2010).

911 call, on the basis of the totality of the circumstances, it was reasonable for him to suspect the defendant of criminal activity. Id., 846–47. Specifically, the Appellate Court relied on the fact that (1) despite the discrepancies, the defendant's clothing, due to the darkness and rain, generally matched the description of the suspect's clothing, (2) the defendant was standing alone in the rain at 4:20 a.m. without anyone else around, (3) the defendant appeared to be under the influence of a controlled substance and was not responsive to Officer DeJesus, (4) the defendant was in close proximity to the crime scene, and (5) the defendant was in an area that Officer DeJesus knew to be prone to violence, drugs, and prostitution. Id. Relying on these same facts, the Appellate Court agreed with the trial court that the patdown of the defendant was supported by reasonable and articulable suspicion that he might be armed and dangerous. Id., 850–51.

The defendant petitioned for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court err in affirming the trial court's denial of the defendant's motion to suppress evidence of a firearm that police seized during an investigatory stop?" *State* v. *Lewis*, 327 Conn. 925, 171 A.3d 58 (2017).

On appeal to this court, the defendant argues that he was unlawfully seized and searched by Officer DeJesus. Specifically, he argues that he was seized the moment that Officer DeJesus stopped his patrol vehicle near the defendant and asked his name. Alternatively, he argues that he was seized when Officer DeJesus exited his vehicle and approached him while asking him questions. He further argues that regardless of when he was seized, the seizure was unlawful because Officer DeJesus did not have reasonable and articulable suspicion that the defendant was or had been engaged in criminal activity in light of the facts that his clothing and name did not match the clothing and name described

by the victim to the 911 dispatcher. Finally, he argues that the officer's patdown was similarly unlawful because there was no reasonable and articulable suspicion that he might be armed and dangerous. The state responds that the Appellate Court properly upheld the trial court's determination that the defendant was not seized until Officer DeJesus touched him and that the resulting seizure and patdown were based on reasonable and articulable suspicion in light of the totality of the circumstances.

We begin our analysis with our standard of review and well established overarching legal principles regarding search and seizure. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [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.) *State* v. *Burroughs*, 288 Conn. 836, 843–44, 955 A.2d 43 (2008).

"It is well established that we must undertake a more probing factual review of allegedly improper seizures, so that we may come to an independent legal determination of whether a reasonable person in the defendant's position would have believed that he was not free to leave. . . . A proper analysis of this question is necessarily fact intensive, requiring a careful examination of the entirety of the circumstances in order to determine whether the police engaged in a coercive display of authority . . . . Although we must, of course, defer to the trial court's factual findings, our usual deference . . . is qualified by the necessity for a scrupulous examination of the record to ascertain whether [each] finding is supported by substantial evidence . . . ." (Citations

omitted; internal quotation marks omitted.) *State* v. *Edmonds*, supra, 323 Conn. 38–39.

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014).

"The fourth amendment [to the federal constitution and] article first, § 7, [of the state constitution proscribe] only 'unreasonable' searches and seizures. U.S. Const., amend. IV; accord Conn. Const., art. I, § 7. A search or seizure is presumptively unreasonable when it is conducted without a warrant issued upon probable cause. . . . [However], under [*Terry* v. *Ohio*, supra, 392 U.S. 30–31], officers may temporarily seize an individual if they have a reasonable and articulable suspicion that he is involved in criminal activity." (Citations omitted; footnote omitted.) *State* v. *Kelly*, 313 Conn. 1, 16, 95 A.3d 1081 (2014).

"[W]hen considering the validity of a . . . [*Terry*] stop, our threshold inquiry is twofold. . . . First, we must determine at what point, if any, did the encounter between [the police officer] and the defendant constitute an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officer] possessed a reasonable and articulable suspicion at the time the seizure occurred." (Internal quotation marks omitted.) *State* v. *Edmonds*, supra, 323 Conn. 49. If the *Terry* stop is lawful and "the officer reasonably believes that the detained individual might be armed and dangerous, he or she [also] may undertake a patdown search of the

individual to discover weapons." *State* v. *Wilkins*, 240 Conn. 489, 495–96, 692 A.2d 1233 (1997).

I

We first address the defendant's claim that he was seized when Officer DeJesus stopped his patrol vehicle and asked his name because a reasonable person in the defendant's position would not have believed he was free to leave. Specifically, the defendant argues that Officer DeJesus evinced a show of authority by "effectively blocking the defendant from the street using his marked police cruiser at a time when businesses were closed and the defendant was completely alone in the dark . . . ." Alternatively, he argues that he was seized when Officer DeJesus exited his police cruiser and approached him while asking questions about his identity because Officer DeJesus' persistence in interacting with him amounted to a show of authority. The state responds that the defendant was not seized until Officer DeJesus physically touched him because Officer DeJesus' prior conduct was not coercive or confrontational. We agree with the state.[9]

We begin by setting forth the legal test used to determine when a person is seized for purposes of the federal

[9] Even if the defendant had been seized prior to being touched by the officer, such a seizure would have been proper because the officer would have had reasonable and articulable suspicion of criminal activity. As explained in part II of this opinion, throughout the officer's encounter with the defendant, the officer believed, and the trial court credited, that the defendant appeared to match the description of the suspect in a domestic violence incident that occurred in close geographical and temporal proximity to where the defendant was located and when the incident occurred, respectively. See footnote 17 of this opinion. Thus, even if the defendant had been seized when Officer DeJesus first called out to him, first questioned him, or asked him for identification, the totality of the circumstances—specifically, the defendant's appearing to match the description of the suspect, his geographical and temporal proximity to the crime scene, and his being the only person in the area at 4:20 a.m.—established reasonable and articulable suspicion.

and state constitutions. "[U]nder certain circumstances, the relevant provisions of the state constitution provide broader protection from unreasonable search and seizure than does the fourth amendment . . . ." (Citation omitted.) *State* v. *Edmonds*, supra, 323 Conn. 38 n.3. Under both constitutions, "[i]n determining the threshold question of whether there has been a seizure, we examine the effect of the police conduct at the time of the alleged seizure, applying an objective standard. Under our state constitution, a person is seized only if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. . . . Under the federal constitution, in contrast, a seizure occurs only if there is a show of physical force . . . or . . . submission to the assertion of authority."[10] (Citations omitted; internal quotation marks omitted.) *State* v. *James*, 237 Conn. 390, 404–405, 678 A.2d 1338 (1996). Accordingly, the defendant does not dispute that, under the federal constitution, he was not seized until Officer DeJesus physically touched him.

Under our state constitution, "[t]he inquiry is objective, focusing on a reasonable person's probable reaction to the [officer's] conduct. . . . In situations in which the police have not applied any physical force, we must conduct a careful [fact intensive] examination of the entirety of the circumstances in order to deter-

[10] Prior to 1991, the same test was applied under the federal constitution and the Connecticut constitution to determine when a stop occurs as Connecticut continues to apply today. See *State* v. *Oquendo*, 223 Conn. 635, 646–47, 613 A.2d 1300 (1992). However, in *California* v. *Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), the United States Supreme Court abandoned this test and adopted its current test, requiring physical force or submission to the assertion of authority. This court previously has "decline[d] to adopt the restricted definition of a seizure employed by the United States Supreme Court in *Hodari D.* and [continues to] adhere to our precedents in determining what constitutes a seizure under the state constitution." *State* v. *Oquendo*, supra, 652.

mine whether the police engaged in a coercive display of authority [such that a reasonable person in the defendant's position would not have believed he was free to leave] . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Edmonds*, supra, 323 Conn. 50.

"Factors to be considered in determining whether police conduct projects coercion include, but are not limited to: the number of officers and vehicles involved; whether the officers are uniformed; whether the officers are visibly armed or have their weapons drawn; whether the vehicles involved are marked police cruisers, whether the vehicles' sirens and emergency lights are activated, and whether the vehicles' headlamps or spotlights illuminate the defendant; whether the defendant is alone or otherwise appears to be the target of police attention; the nature of the location, including whether it is public or private property; whether the defendant is surrounded or fully or partially blocked in by the police; the character of any verbal communications or commands issued by the police officers; whether the officers advise the detainee of his right to terminate the encounter; the nature of any physical contact; whether the officers pursue after an initial attempt by the defendant to leave; whether the officers take and retain possession of the defendant's papers or property; and any other circumstance or conduct that bespeaks aggressiveness or a show of force on the part of the police, or suggests that the defendant is under suspicion or otherwise not free to leave. . . . Although it is true that not all personal intercourse between [the police] and citizens involves seizures of persons . . . and that law enforcement officers must be free to engage in healthy, mutually beneficial intercourse with the public . . . it is equally true that use of coercion beyond that inherent in any police-citizen encounter transforms these sorts of informal, voluntary interactions into seizures." (Citations omitted; internal

quotation marks omitted.) Id., 50–51; see also *State* v. *Burroughs*, supra, 288 Conn. 846–47.

The defendant contends that he was seized when Officer DeJesus stopped his patrol vehicle because such conduct effectively blocked the defendant's egress while alone in the dark. It is true that "a seizure occurs when the police maneuver or park their vehicles, or approach a pedestrian on foot, in such a way as to block the pedestrian's path or effectively close off any avenue of escape." *State* v. *Edmonds*, supra, 323 Conn. 53. This is especially so if the defendant is located on private property where police are not normally expected to patrol. Id., 58.

The present case is distinguishable from the cases in which this court has held that a seizure occurred when a police officer stopped his patrol vehicle in a manner that blocked the defendant from leaving. See, e.g., id., 52 (stop occurred when police officers parked patrol vehicles at both of restaurant parking lot's exits to prevent defendant from leaving private property); *State* v. *Clark*, 297 Conn. 1, 8, 997 A.2d 461 (2010) ("officers had blocked the defendant's vehicle in a manner that restricted his freedom of movement"); *State* v. *Januszewski*, 182 Conn. 142, 147, 438 A.2d 679 (1980) (pedestrian constructively seized where police blocked his vehicle from leaving parking lot) (overruled in part on other grounds by *State* v. *Hart*, 221 Conn. 595, 609, 605 A.2d 1366 [1992]), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). Officer DeJesus stopped his patrol vehicle on the side of the road approximately fifteen feet from the defendant. The defendant was located in a parking lot area near to and open and visible from the street. The placement of the police cruiser did not impede the defendant's movement or prevent him from leaving in any way. On numerous occasions, we have stated that an officer stopping near a person, either in a police cruiser or on foot, without

more, does not impede the person's movement and, thus, is not coercive conduct that would cause a reasonable person to believe he was not free to leave. See, e.g., *State* v. *Benton*, 304 Conn. 838, 845, 43 A.3d 619 (2012) (officers stepping into roadway twenty feet from defendant did not constitute seizure); *State* v. *Burroughs*, supra, 288 Conn. 849–50 (stopping police vehicle behind defendant's vehicle without activating emergency lights or sirens was not seizure).

Additionally, Officer DeJesus did not activate his vehicle's sirens or overhead lights,[11] he did not command the defendant to halt, and he did not display any weapons. See *State* v. *Burroughs*, supra, 288 Conn. 846–47 (listing such actions as factors that may indicate coercion). The fact that Officer DeJesus also asked the defendant his name when he stopped his vehicle does not turn Officer DeJesus' conduct into a show of authority. "[C]ourts have made clear that police officers do not bring about a seizure merely by asking questions of a citizen, even when the officer identifies himself as a police officer . . . . It is axiomatic that the constitution does not prohibit, or even discourage, healthy, mutually beneficial intercourse between the public and the police sworn to protect them." (Citation omitted; internal quotation marks omitted.) Id., 853, citing *Immigration & Naturalization Service* v. *Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984); see also *Immigration & Naturalization Service* v. *Delgado*, supra, 216 ("interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a . . . seizure").[12]

[11] It is not clear from the record if the patrol vehicle's headlights were on. Even if they were, however, it would be "insignificant that the [officer] in the present case kept [the] headlights on, as this is a reasonable practice that would seem necessary, or at least advisable, for the officer['s] . . . safety when the event occurs at night." *State* v. *Burroughs*, supra, 288 Conn. 849 n.9.

[12] *Immigration & Naturalization Service* was persuasive authority in *Burroughs* and is persuasive authority in the present case because it was

Factors to consider in determining whether an officer's questioning amounted to a seizure under the state constitution include the time and place of the encounter; the officer's tone of voice, demeanor and choice of words; and whether there were others in the vicinity. See *State* v. *Oquendo*, 223 Conn. 635, 653, 613 A.2d 1300 (1992) (determining that seizure of defendant occurred when officer stopped his police cruiser late at night, stepped out, asked defendant's name, and commanded him to approach cruiser when no one else was in area but companion with whom defendant was walking); see also *State* v. *James*, supra, 237 Conn. 405 (considering officer's tone of voice and demeanor in determining whether police and civilian interaction was consensual). The record does not reflect that Officer DeJesus issued any command to the defendant when he stopped the patrol vehicle and asked his name. Rather, his demeanor and tone of voice were nonconfrontational, as credited by the trial court and manifested by his word choice of "yo, my man . . . ." Although the defendant was the only person in the area and it was late at night, there was nothing coercive about Officer DeJesus' conduct when he first asked the defendant his name.

Similarly unavailing is the defendant's argument that he was seized when Officer DeJesus, wearing his police uniform, exited the patrol vehicle, approached the defendant, and asked him questions. "Although we recognize that a uniformed law enforcement officer is necessarily cloaked with an aura of authority, this cannot, in and of itself, constitute a show of authority . . . ." *State* v. *Burroughs*, supra, 288 Conn. 849. Rather, we must look at the totality of the circumstances. Officer

decided prior to *California* v. *Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), when the same test to determine when a stop occurs applied under both the federal and the Connecticut constitution. See footnote 10 of this opinion.

DeJesus approached the defendant at an angle and did not block or impede his movement. Cf. *State* v. *Edmonds*, supra, 323 Conn. 52 (patrol cars blocked defendant's egress). The trial court found that the officer had approached the defendant in a nonconfrontational manner. Merely walking toward someone, without more, is not coercive behavior. See, e.g., *State* v. *Hill*, 237 Conn. 81, 91, 675 A.2d 866 (1996) ("[t]he mere approach by a police officer, either in a police car or on foot, does not alone constitute a show of authority sufficient to cause the subject of the officer's attention reasonably to believe that he or she is not free to leave").

Additionally, although Officer DeJesus asked the defendant questions, he did not issue any commands or display authority. See, e.g., *State* v. *Burroughs*, supra, 288 Conn. 853 ("police officers do not bring about a seizure merely by asking questions"). The defendant responds that even if Officer DeJesus' initial questions did not constitute a seizure, once he failed to respond to the questions, Officer DeJesus' continued questioning became coercive. This argument fails. Prior to the defendant's and Officer DeJesus' wrestling over the gun, the entire encounter lasted approximately one minute. Officer DeJesus asked the defendant his name, whether he had identification, and from where he was coming. Although, depending on the circumstances, a command to provide identification can amount to a seizure, especially if the officer's demeanor and tone of voice are confrontational, the record in the present case does not reflect that the officer, in a confrontational manner, commanded the defendant to provide identification. Moreover, although Officer DeJesus did ask the defendant his name several times, he did so because the defendant mumbled incoherent responses. Asking these three general questions—what was the defendant's name, did he have identification and from where he was coming—does not amount to questioning that

is so persistent as to be coercive.[13] See *State* v. *James*, supra, 237 Conn. 405 ("[p]olice officers do not violate an individual's constitutional rights . . . by putting questions to him if he is willing to listen" [internal quotation marks omitted]); see also *Immigration & Naturalization Service* v. *Delgado*, supra, 466 U.S. 216 (*request* for identification is not seizure).

Although police questioning may become coercive and deemed a seizure under our state constitution if the interaction between the officer and civilian becomes nonconsensual; see *State* v. *Edmonds*, supra, 323 Conn. 51; the record in this case does not reflect that the defendant was unwilling to answer Officer DeJesus' questions. The defendant never asked or attempted to leave, never requested that questioning cease, and never indicated that he was unwilling to speak with the officer. The defendant argues that it was clear, on the basis of his unresponsive conduct, that he was unwilling to interact with the officer. The defendant, however, mumbled during the course of the encounter, appearing to attempt to respond to at least some of the officer's questions. The record does not reflect any conduct on the defendant's part that would have suggested to Officer DeJesus that he was unwilling to answer the questions or was asking or attempting to leave.

Moreover, the defendant has failed to cite a single case in which this court or any court has held that a

[13] The defendant also argues that the officer's questioning was coercive because he asked questions to which he already knew the answer. Specifically, Officer DeJesus knew, or is credited with knowing, that the victim had the suspect's identification. See part II of this opinion. This argument fails for two reasons. First, asking for identification is one way to confirm or dispel suspicion that the defendant is the suspect; possession of identification could dispel the officer's suspicion. Second, it is hardly unreasonable to expect that individuals might have more than one form of identification. Thus, although the suspect left one form of identification with the victim, it was possible that the suspect had other forms of identification such as a credit card or a library card.

seizure occurred solely on the basis of an officer's request to a civilian to identify himself or to provide identification. Rather, the cases cited by the defendant in support of his argument that continued questioning is coercive are distinguishable. In *Johnson* v. *Campbell*, 332 F.3d 199, 202–203 (3d Cir. 2003), after a police officer approached the defendant, who was sitting in his parked vehicle, the officer did not only persist in asking the defendant questions, but also issued a command that the defendant roll down his car window and provide identification. The defendant in *Johnson* complied with the command, thus submitting to the officer's show of authority, which constituted a seizure under the federal constitution. Id., 203, 205–206. The other cases cited by the defendant, none of which involves this state's constitution, either involved an officer asking a defendant not to leave; *United States* v. *Richardson*, 385 F.3d 625, 630 (6th Cir. 2004) (reasonable person would not feel free to leave when officer asked him to stay where he was); or involved a defendant who either asked to leave or attempted to leave but was prevented from leaving by further questioning. *People* v. *Morales*, 935 P.2d 936, 939–40 (Colo. 1997) (holding that defendant was not seized when asked questions about his identity and where he was going, but that he was seized when he said he was leaving and police continued to question him about possible criminal conduct); *State* v. *Stovall*, 170 N.J. 346, 358, 788 A.2d 746 (2002) (although initial questioning was permissible, questioning became seizure when defendant said she wanted to leave and officer asked her to stay). In contrast, as explained, in the present case, Officer DeJesus issued no commands, and the defendant did not ask to leave or attempt to leave.

Under these circumstances, the defendant has failed to demonstrate that it was objectively reasonable for him to believe that he was not free to leave prior to

Officer DeJesus' touching him. Thus, under the state constitution, the defendant was not seized either when Officer DeJesus stopped his patrol vehicle or when he approached the defendant while asking him questions. Rather, the Appellate Court correctly concluded that the trial court had properly determined that under both the federal and state constitutions, the defendant was seized when Officer DeJesus physically touched him, which was a show of authority. See, e.g., *State* v. *Kelly*, supra, 313 Conn. 10 (use of physical force constitutes seizure).

II

Next, we turn to the defendant's claim that regardless of when he was seized, Officer DeJesus lacked reasonable and articulable suspicion to seize him. Specifically, he argues that Officer DeJesus lacked reasonable and articulable suspicion that he was the suspect in the domestic violence incident because his clothing did not match the description given by the victim to the 911 dispatcher. The defendant contends that the collective knowledge doctrine; see footnote 8 of this opinion; which imputes the collective knowledge of the law enforcement organization to the investigating officer, applies in this case, and, thus, Officer DeJesus must be credited with having known all of the details of the suspect's description that the victim gave to the 911 dispatcher, regardless of whether those details were conveyed to the officer.

The state counters that the trial court and the Appellate Court correctly determined that even if the collective knowledge doctrines applies, the defendant sufficiently matched the description of the suspect so as to raise a reasonable and articulable suspicion that he was the suspect in the domestic violence incident, especially given the weather, time of day, and the defendant's proximity in time and location to the crime scene.

Thus, the state contends that the defendant's seizure was lawful under both the state and federal constitutions. We agree with the state.

Under both the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the constitution of Connecticut,[14] in determining whether a seizure is lawful, a court must find that the seizure was supported by reasonable and articulable suspicion that the individual was engaged in or about to engage in criminal activity. See, e.g., *State* v. *Groomes*, 232 Conn. 455, 467–68, 656 A.2d 646 (1995). "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content [from] that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable to show probable cause." (Internal quotation marks omitted.) Id., 468.

"Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion. . . . [I]n justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Citations omitted; internal quotation marks omitted.) *State* v. *Lipscomb*,

[14] This court consistently has held that, unlike the test applied in determining when a seizure occurs, the test for reasonable and articulable suspicion is the same under both the state and federal constitutions. See *State* v. *Oquendo*, supra, 223 Conn. 654. Because the defendant has not provided an independent state constitutional analysis asserting the existence of greater protection under the state constitution, we analyze his claim under the assumption that his constitutional rights are coextensive under the state and federal constitutions. See, e.g., *State* v. *Benton*, supra, 304 Conn. 843 n.3.

258 Conn. 68, 75, 779 A.2d 88 (2001). "In evaluating the validity of such a stop, courts must consider whether, in light of the totality of the circumstances, the police officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity." (Internal quotation marks omitted.) Id., 76.

In considering the totality of the circumstances, courts consider "[t]he nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, [and] the reaction of the suspect to the approach of police . . . . Proximity in the time and place of the stop to the crime is highly significant in the determination of whether an investigatory detention is justified by reasonable and articulable suspicion. . . . [N]ervous, evasive behavior . . . [also] is a pertinent factor in determining reasonable suspicion. . . . [P]olice officers may reasonably act upon observation of a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." (Citations omitted; internal quotation marks omitted.) *State* v. *Miller*, 137 Conn. App. 520, 539, 48 A.3d 748, cert. denied, 307 Conn. 914, 54 A.3d 179 (2012).

Moreover, the totality of the circumstances is not based solely on the observations and knowledge of the investigating officer, but on the collective knowledge of the law enforcement organization at the time of the seizure. See *State* v. *Butler*, 296 Conn. 62, 73, 993 A.2d 970 (2010) (applying collective knowledge doctrine to determination of whether police had reasonable and articulable suspicion for protective search of defendant's vehicle). As an initial matter, the defendant urges this court to extend the collective knowledge doctrine to include information known by a civilian 911 dispatcher. This court has not previously determined whether the doctrine applies in a situation in which information is received by a civilian 911 dispatcher and then relayed to a police officer. Federal Circuit Courts

of Appeals are not in agreement on this question. Compare *United States* v. *Whitaker*, 546 F.3d 902, 909–10 n.12 (7th Cir. 2008) (knowledge of civilian 911 dispatcher can be imputed to police officer), with *United States* v. *Colon*, 250 F.3d 130, 137–38 (2d Cir. 2001) (knowledge of 911 dispatcher could not be imputed to arresting officer when there was no evidence that dispatcher had special training so as to be capable of determining whether reasonable suspicion existed).

In the present case, however, the record is not clear whether the 911 dispatcher was a civilian dispatcher. The record reveals only that the victim called 911 and that the phone was answered by an individual who responded, "New Haven 911." Additionally, although the police dispatcher subsequently provided a description of the suspect via radio to the officers, there is no evidence regarding whether this dispatcher was the same person as the 911 dispatcher or whether the dispatch communication sent to the officers was sent through the same dispatch system as the 911 call.

Moreover, it is unsettled both in this state and under federal law whether a defendant may use the collective knowledge doctrine to negate, as opposed to support, the existence of reasonable and articulable suspicion. See *State* v. *DeMarco*, supra, 311 Conn. 530–33 (holding that collective knowledge doctrine did not apply to impute knowledge of defendant's phone number to arresting officer for purposes of determining whether emergency exception to warrant requirement applied, but not deciding whether collective knowledge doctrine ever could be used to exonerate defendant); see also *United States* v. *Hicks*, 531 F.3d 555, 560 (7th Cir. 2008) (collective knowledge doctrine does not apply in efforts to negate reasonable and articulable suspicion, as even imputed knowledge that contains inconsistencies can give rise to reasonable suspicion if police officer's reliance on it was reasonable); *United States* v. *Holmes*,

376 F.3d 270, 277 n.3 (4th Cir. 2004) (collective knowledge doctrine does not impute uncommunicated exculpatory knowledge to fellow police officers); *Savino* v. *New York*, 331 F.3d 63, 74 (2d Cir. 2003) ("the doctrine has traditionally been applied to assist officers in establishing probable cause—not . . . to impute to an officer facts known to some [other] members of the police force which exonerate an arrestee" [emphasis omitted; internal quotation marks omitted]); *United States* v. *Meade*, 110 F.3d 190, 197 n.9 (1st Cir. 1997) (declining to apply collective knowledge doctrine to impute knowledge to officer who specifically denied knowing exculpatory fact known by another officer). But see *United States* v. *Twiss*, 127 F.3d 771, 776 (8th Cir. 1997) (Gibson, J., dissenting) ("it is the collective knowledge of the officers that is material, and this must apply to exculpatory evidence, and defeats a conclusion of probable cause"). Nevertheless, we need not decide these issues because, even if we assume that the collective knowledge doctrine applies in this case, we conclude, on the basis of the totality of the circumstances, including any facts known to the 911 dispatcher, that Officer DeJesus had a reasonable and articulable suspicion that the defendant had committed the crime under investigation.

First, the trial court credited Officer DeJesus' determination that because of the rain and darkness, the defendant's clothing appeared to sufficiently match the description of the suspect's clothing.[15] "The police . . .

[15] In the alternative to applying the collective knowledge doctrine, the defendant argues that Officer DeJesus lacked reasonable suspicion because the description of the suspect he was given by the police dispatcher (black man in all black clothing) was too general. Specifically, the defendant argues that reasonable and articulable suspicion cannot be based on a vague and generic description of a suspect.

Because we apply the collective knowledge doctrine, we conclude that the description of the suspect given by the police dispatcher is not deemed too general in light of Officer DeJesus' being credited with also knowing the full details of the 911 call. Nevertheless, even in the absence of the collective knowledge doctrine, Officer DeJesus had reasonable suspicion

are not required to confirm every description of the perpetrator that is broadcast over the radio. What must be taken into account is the strength of those points of comparison which do match up and whether the nature of the descriptive factors which do not match is such that an error as to them is not improbable . . . . Moreover, account must be taken of the possibility that by . . . efforts of concealment some aspects of the description may no longer be applicable." (Citation omitted; internal quotation marks omitted.) *State* v. *Kyles*, 221 Conn. 643, 663, 607 A.2d 355 (1992).

Although the defendant was wearing dark blue jeans, a dark grey leather jacket, and a navy blue skullcap, Officer DeJesus testified at the suppression hearing that the clothing appeared to him to be all black because the clothing was soaking wet from the rain, and the area where the defendant was standing was dark and poorly lit. Similarly, because of the rain and lighting, it was difficult for Officer DeJesus to discern any details about the defendant's clothing, such as its material. Although it is true that the defendant was not wearing a black hoodie or black sweatpants or a fitted grey and orange hat when he was seized by Officer DeJesus,

on the basis of the totality of the circumstances of which he was aware—specifically, the defendant's geographical and temporal proximity to the crime scene. See *State* v. *Carter*, 189 Conn. 611, 617, 458 A.2d 369 (1983) (although description of black male wearing dungaree type clothing might be too general in other contexts, at 3 a.m., close to scene of two recent burglaries, description was sufficiently distinctive to give rise to reasonable and articulable suspicion that defendant had engaged in criminal activity); see also *United States* v. *Arthur*, 764 F.3d 92, 98 (1st Cir. 2014) (Although a general description of a black man in black clothing, "standing alone, would likely be insufficient to give rise to reasonable suspicion . . . everything depends on context and, in this instance, the description did not stand alone. [The police] [o]fficer . . . was entitled to rely on the description in combination with other clues: the precise number of robbers, the immediacy of the robbery, the suspects' close proximity to the crime scene, the direction in which the men were headed, and the dearth of others in the critical two-block area. The totality of the circumstances supported a logical inference that the appellant and his companion were the robbers.").

even if these discrepancies were obvious to Officer DeJesus at the time of the seizure—as he had responded to a 911 call reporting domestic violence—they did not negate the reasonable and articulable suspicion he had that the defendant was the suspect. See, e.g., *State* v. *Gregory*, 74 Conn. App. 248, 259–60, 812 A.2d 102 (2002) ("[g]iven . . . the lack of lighting in the area, combined with the fact that the description provided was similar, although not identical, to what the defendant was found wearing, and that the defendant's physical characteristics were the same as the [suspect's] . . . we conclude that there was a reasonable and articulable suspicion for the police to detain him" [citations omitted]), cert. denied, 262 Conn. 948, 817 A.2d 108 (2003); see also *State* v. *Mitchell*, 204 Conn. 187, 190, 196, 527 A.2d 1168 (1987) (that defendant was wearing blue sweatpants, not maroon sweatpants as described by victim, did not negate reasonable suspicion).

It may be argued that even in the dark, an orange hat would not appear black. But, as explained, the *Terry* standard does not demand a perfect match in descriptions. See, e.g., *State* v. *Kyles*, supra, 221 Conn. 663. The record reveals that the victim was equivocal about whether the suspect wore a hat, stating that she "believed" he wore an orange and grey fitted hat.[16] She provided no further details regarding the hat, such as, for example, whether it was more orange than grey or vice versa. Even if the suspect was wearing an orange and grey hat, perhaps the orange portion of the hat might have been small enough to blend in with the grey when wet and in the dark. Given the dark and rainy conditions, and allowing for—as a reasonable responding police officer might—the possibility of human error by the victim in relating a detailed description of the perpetrator, we believe that the defendant's appearing

[16] In contrast, the victim stated without hesitation that the suspect was wearing a black hoodie, black sweatpants, and a chain around his neck.

to match this general report of the perpetrator's appearance provided Officer DeJesus with a reasonable and articulable suspicion sufficient to pat him down.

The defendant responds that even if his clothing might have appeared from a distance to sufficiently match the description of the victim's clothing, once Officer DeJesus got closer to the defendant, his clothing should have dispelled any suspicion. As we explained, the purpose of a *Terry* stop is to confirm or dispel the officer's suspicion that an individual has committed or is about to commit a crime. See *State* v. *Kyles*, supra, 221 Conn. 660. "The results of the initial stop may arouse further suspicion or may dispel the questions in the officer's mind. If the latter is the case, the stop may go no further and the detained individual must be free to go. If, on the contrary, the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances." (Internal quotation marks omitted.) *State* v. *Mitchell*, supra, 204 Conn. 197.

The defendant's argument that Officer DeJesus' suspicions should have been dispelled upon viewing his clothing up close is unpersuasive on the record before this court. The present case is distinguishable from the case cited by the defendant in which there was evidence that, upon approaching the defendant, the officer could see that the defendant's appearance did not match the description of the suspect, thereby dispelling any reasonable suspicion the officer had that the defendant was the suspect. See *United States* v. *Watson*, 787 F.3d 101, 105 (2d Cir. 2015) (holding that reasonable suspicion to detain individual whom police officer mistakenly believed was robbery suspect no longer existed once officer got close enough to observe individual clearly and see that individual did not match description of robbery suspect). In the present case, there is no evidence that as Officer DeJesus got closer to the defen-

dant, his observations changed regarding the defendant's clothing. Rather, he consistently testified that the defendant's clothing appeared to him to be all black and that it was hard to see. The trial court credited this testimony and, thus, so must we.[17] See, e.g., *State* v. *DeMarco*, supra, 311 Conn. 520 ("[w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]).

Second, any doubt caused by the discrepancies in the description of the clothing was negated by the defendant's geographical and temporal proximity to the crime scene. See *State* v. *Miller*, supra, 137 Conn. App. 539–40 (although defendant was wearing windbreaker, not puffy black jacket, officer still had reasonable suspicion because of "defendant's lone presence, close in temporal and physical proximity to the scene of the burglary"); see also *State* v. *Kyles*, supra, 221 Conn. 661 n.11 ("[p]roximity in time and place of the stop to the crime is highly significant in the determination of whether an investigatory detention is justified by reasonable and articulable suspicion" [internal quotation marks omitted]); *State* v. *Carter*, 189 Conn. 611, 616–17, 458 A.2d 369 (1983) (same). The defendant was located within one minute's walking distance from the crime scene a few minutes after the 911 call in which the victim stated that the suspect remained in the surrounding area.

[17] Because the defendant's clothing appeared to match the description of the suspect's clothing at all times during and leading to the seizure, even if the defendant had been seized prior to the patdown, the officer still had reasonable and articulable suspicion to seize him, in light of the totality of the circumstances—specifically, the defendant appeared to sufficiently match the description of the suspect, he was in close geographical and temporal proximity to the crime scene, and he was the only person in the area at 4:20 a.m.

The defendant counters that his location did not create reasonable and articulable suspicion because the crime occurred fifteen minutes prior to the 911 call, and, thus, it was not reasonable to assume that the suspect remained nearby; see *Bennett* v. *United States*, 26 A.3d 745, 753 (D.C. 2011) ("the lapse in time between when the robbery occurred and when the stop occurred was long enough that it did not reasonably support an inference that [the] appellant was involved in the robbery because of . . . his proximity to the crime scene"); or alternatively, Officer DeJesus should have known that the suspect remained outside the victim's house in the bushes, not down the street. We find neither argument persuasive.

The fact that the defendant was not located directly in front of or in the bushes near the victim's home does not negate the significance of the defendant's geographical proximity to the scene of the crime. The police are allowed to take into account the possibility that, in the time between the crime and when they received the dispatch call about the crime, a suspect might have changed locations and not remained stagnant. In determining the significance of a defendant's geographical proximity to a crime scene, the appellate courts of this state have considered whether the defendant's location was someplace where the suspect might reasonably be on the basis of the amount of time that passed since the occurrence of the crime. See *State* v. *Kyles*, supra, 221 Conn. 661 (defendant's "vehicle was sighted less than ten minutes and two miles from the crime scene"); *State* v. *Manousos*, 179 Conn. App. 310, 322, 178 A.3d 1087 (officer sighted defendant twenty seconds after receiving dispatch and within 300 feet of crime scene), cert. denied, 328 Conn. 919, 181 A.3d 93 (2018); see also *State* v. *Rodriguez*, 239 Conn. 235, 246, 684 A.2d 1165 (1996) (reasonable suspicion created by "the fact that the short distance from the crime scene

easily could have been traveled on foot in the time intervening since the crime''). Thus, the defendant's geographical proximity to the crime scene is a factor supporting reasonable and articulable suspicion that he committed the crime under investigation.

The defendant counters that because the victim had reported that the suspect was outside her home in the bushes, it would have been more reasonable for Officer DeJesus first to drive to the scene of the crime to determine whether the suspect remained there. Although such action might be reasonable, we do not agree that it makes Officer DeJesus' decision to first investigate the defendant unreasonable. First, the victim had reported that she could hear the suspect talking in the area near her home, but she could not see him from her window and speculated that he might be in the bushes or hiding in some other dark area. Officer DeJesus came upon the defendant in a dark area, talking on a cell phone, in the area of the victim's home. The defendant's location was consistent with the location of the suspect as reported by the victim. Second, if an officer is required to first proceed to the crime scene before investigating suspicious circumstances, an officer may risk losing key evidence. For example, if the defendant in this case had been the suspect but the officer was required to first go to the victim's home, the defendant may have left the area by the time the officer realized the suspect no longer was located outside the victim's home. Third, Officer DeJesus testified at the suppression hearing that at the time of the stop, he was aware that other police units had been dispatched and were on their way to the scene of the crime. Thus, he knew that if the suspect remained at the scene of the crime, other officers would apprehend him.

Similarly, the defendant's argument regarding the lapse in time between the crime and his seizure by Officer DeJesus is unpersuasive. Although the crime occurred

fifteen minutes before the 911 call, the 911 call was made within a matter of minutes before the seizure. During the 911 call, the victim stated that the suspect was still in the area because she could hear him talking. Thus, Officer DeJesus knew that the suspect had been outside the victim's home a few minutes prior to seeing the defendant. As such, the lapse in time between the commission of the crime and the seizure does not negate the significance of the defendant's proximity in time to the scene of the crime.

The defendant also was the only person in the area late at night in the pouring rain. See, e.g., *United States* v. *McCargo*, 464 F.3d 192, 197 (2d Cir. 2006) (reasonable suspicion existed to stop suspect, who was walking alone with no other pedestrians about, approximately 200 feet west of crime scene just minutes after reported burglary attempt), cert. denied, 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515 (2007); *State* v. *Manousos*, supra, 179 Conn. App. 323 ("[T]he defendant was the only person on foot in the area. . . . This fact further supports a finding of reasonable suspicion."). The defendant responds that his standing alone in the early hours of the morning in the rain in a "high crime" neighborhood is insignificant because he was in a populated neighborhood, it was not inconceivable that people would be outside in the early morning, and he was merely talking on his cell phone, a commonplace activity. Although the defendant's conduct may be viewed as innocent and commonplace, "[w]e do not consider whether the defendant's conduct possibly was consistent with innocent activity but, rather, whether the rational inferences that can be derived from it reasonably suggest criminal activity to a police officer." (Internal quotation marks omitted.) *State* v. *Peterson*, 320 Conn. 720, 731, 135 A.3d 686 (2016). In the present case, Officer DeJesus knew, or is credited with knowing, that the suspect was in the vicinity of the crime and that the victim had heard

him talking. The defendant was the only person in the vicinity, alone, in the dark, talking on his cell phone at approximately 4:30 a.m. Such facts support a finding of reasonable and articulable suspicion.

Nevertheless, we agree with the defendant that the nature of the neighborhood should not determine the extent of a person's constitutional rights. Although it is true under the federal constitution that the nature of the area where a person was detained may be considered as part of the totality of the circumstances analysis; *State* v. *Nash*, 278 Conn. 620, 634–35, 899 A.2d 1 (2006); we have cautioned against overreliance on an individual's location in a neighborhood plagued by crime. See *State* v. *Edmonds*, supra, 323 Conn. 68–69; *State* v. *Benton*, supra, 304 Conn. 848 n.7. In general, resort to shorthand terms such as "high crime neighborhood" are not particularly helpful to the required analysis and can have the deleterious effect of increasing—rather than decreasing—the risk of arbitrary intrusions upon innocent citizens. Officers may not pat down a neighborhood's residents under the assumption that criminal activity might be afoot merely because the neighborhood is plagued by crime. See *State* v. *Oquendo*, supra, 223 Conn. 655 n.11 ("[a] history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality" [internal quotation marks omitted]). For the nature of the neighborhood to be relevant to the totality of the circumstances analysis, officers must specifically identify the nature of the neighborhood and the types of crimes associated with it that give rise to the officer's reasonable and articulable suspicion that this particular defendant engaged in the crime under investigation.[18] See *United States* v.

[18] Similarly, for a court to determine whether the nature of the neighborhood gives rise to reasonable and articulable suspicion that the defendant is armed and dangerous, the officer must specifically identify the nature of the neighborhood and the types of crimes associated with it that caused the officer to have such suspicion. See part III of this opinion.

Wright, 582 F.3d 199, 220–21 (1st Cir. 2009) ("[T]he evidence relevant to a high crime area finding ordinarily should include some combination of factors showing a link between the incidence of specific criminal activity in the area and the police officers' suspicions about the defendant. . . . A high incidence of crime in an area may provide such a link when the evidence establishes a similarity between the crimes that most commonly occur there and the crime suspected in the instant case. . . . [There must be] a 'nexus' between the crime prevalent in the area and the crime suspected . . . ." [Citations omitted.]), cert. denied, 559 U.S. 1021, 130 S. Ct. 1919, 176 L. Ed. 2d 390 (2010).

In the present case, Officer DeJesus testified that the area in which the alleged domestic violence incident occurred was known for narcotics, prostitution, and violence in general. Officer DeJesus never testified that the nature of the neighborhood contributed to his suspicion that the defendant was the suspect.[19] Such testimony is lacking because nothing about the nature of the neighborhood made it any more or less likely that the defendant was the suspect in the domestic violence incident to which the officer was responding. Officer DeJesus did not stop the defendant on the basis of the characteristics of the neighborhood; he stopped the defendant because there was a reported domestic assault in that particular area, and he believed that the defendant fit the description of the perpetrator.

In fact, the trial court in the present case did not rely on this factor in determining whether there was reasonable and articulable suspicion for the seizure. Similarly, we do not find the fact that the defendant was

[19] We note that the defendant does not contend, and there is no evidence in the record to support, that Officer DeJesus arbitrarily patted him down or stopped him because he assumed that the defendant had committed a crime merely because the defendant was present in a high crime neighborhood.

in a neighborhood known for violence, narcotics, and prostitution significant to the determination of reasonable and articulable suspicion to seize him. Specifically, the fact that he was standing alone in such a neighborhood did not connect him in any way to the crime under investigation. Rather, it was the defendant's location so close to the alleged crime scene that supported the officer's reasonable and articulable suspicion, without considering the nature of the neighborhood.

Despite these circumstances supporting reasonable and articulable suspicion, the defendant counters that other circumstances should have dispelled suspicion. Specifically, the defendant argues that because his behavior was indicative of his having been under the influence of alcohol or a controlled substance and the victim did not report that the suspect was inebriated, Officer DeJesus should have known that he could not have been the suspect. The fact that a victim or witness fails to report a particular detail about a suspect, however, does not mean that the unreported detail necessarily must dispel suspicion.

Additionally, the defendant argues that Officer DeJesus' suspicion should have been dispelled when he stated that his name was Michael, not "O." Officer DeJesus, however, was not required to accept the defendant at his word under these circumstances, and the defendant never produced any identification to verify his identity. See, e.g., *State* v. *Rodriguez*, supra, 239 Conn. 249–50 ("understandably unwilling to rely on the honor system under the circumstances, [the officer] asked the defendant for identification in order to verify the name he had given"). Moreover, Officer DeJesus testified that he had difficulty understanding the defendant's mumbled responses and thought he had said something like Michael but was unsure. Under these circumstances, the defendant's actions did not serve to dispel Officer DeJesus' reasonable and articulable

suspicion that the defendant committed the crime under investigation.

Thus, on the basis of the totality of the circumstances, including the similarities in clothing, the geographical and temporal proximity to the crime scene, the time of day, and the defendant's location, Officer DeJesus had reasonable and articulable suspicion to seize the defendant. Therefore, the Appellate Court properly concluded that the trial court had correctly determined that the seizure was lawful under both the state and federal constitutions.

III

Finally, the defendant claims that even if his seizure was lawful, the subsequent patdown during which his gun was found was unlawful under both the state and federal constitutions[20] because Officer DeJesus lacked reasonable and articulable suspicion that he might be armed and dangerous. Specifically, he argues that the violent nature of the crime under investigation could not provide reasonable suspicion because it should have been clear to Officer DeJesus that he did not match the description of the suspect and because he said his name was Michael, not "O." He argues that to the extent that Officer DeJesus believed that he matched the description of the suspect, Officer DeJesus knew, under the collective knowledge doctrine, that the suspect was not armed, thereby dispelling any suspicion that he might be armed. He further argues that his behavior was not suspicious and that to the extent that he appeared intoxicated, such behavior did not create reasonable suspicion that he might be armed and dangerous. He argues that mumbling alone did not create suspicion of his being armed and that his unwillingness to answer Officer DeJesus' questions could not be used against

[20] The test for reasonable and articulable suspicion is the same under both the state and federal constitutions. See footnote 14 of this opinion.

him to justify the patdown. See *Florida* v. *Royer*, 460 U.S. 491, 497–98, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) ("[t]he person approached, however, need not answer any question put to him . . . and his refusal to listen or answer does not, without more, furnish those grounds" [citations omitted]).

The state counters that the trial court and the Appellate Court correctly determined that Officer DeJesus had reasonable and articulable suspicion that the defendant might be armed and dangerous on the basis of the totality of the circumstances. Specifically, the state argues that reasonable and articulable suspicion was supported by the violent nature of the crime under investigation in light of the defendant's having sufficiently matched the description of the suspect, and the defendant's proximity to the crime scene, the time of day, and his location, appearance, and behavior. The state emphasizes the fact that the defendant was standing alone, late at night, in the pouring rain and close to the crime scene while appearing to be intoxicated. We agree with the state that Officer DeJesus had reasonable and articulable suspicion that the defendant might be armed and dangerous, principally on the basis of the defendant's link to a violent crime, specifically, the report of a domestic violence incident that involved the choking of the victim.

Under both the state and federal constitutions, "[d]uring the course of a lawful investigatory detention, if the officer reasonably believes that the detained individual might be armed and dangerous, he or she may undertake a patdown search of the individual to discover weapons." *State* v. *Wilkins*, supra, 240 Conn. 495–96. The weapon need not be a gun or be illegally possessed; rather, the officer must have reasonable and articulable suspicion only that the detained individual might be armed with some form of a weapon that might be used against the officer. See *Terry* v. *Ohio*, supra, 392 U.S.

29 (patdown must be "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer").

The defendant contends that Officer DeJesus' decision to pat him down was not based on reasonable suspicion but on his subjective belief that all suspects should be patted down. It is true that Officer DeJesus testified at the suppression hearing that "I pat everybody down. . . . I pat 'em down for my safety." We emphatically disapprove of Officer DeJesus' stated practice of patting everyone down and strongly caution against such practices. We echo the thoughtful warning by the Appellate Court that "such a practice [presents] a high risk of being an unconstitutional intrusion"; *State* v. *Lewis*, supra, 173 Conn. App. 849 n.6; and by Chief Justice Robinson in his concurring opinion in the present case that "indiscriminately frisking people without the requisite objective justification to do so . . . contributes to the erosion of the trust between our citizens and law enforcement officers."

Nevertheless, whether a patdown is supported by reasonable and articulable suspicion is an objective standard and is not based on an officer's subjective beliefs. *State* v. *Wilkins*, supra, 240 Conn. 496 ("[r]easonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion" [internal quotation marks omitted]). Like the determination of the legality of a stop, as explained in part II of this opinion, "[i]n ascertaining whether reasonable suspicion existed for the patdown search, the totality of the circumstances—the whole picture—must be taken into account." (Internal quotation marks omitted.) *State* v. *Mann*, 271 Conn. 300, 323, 857 A.2d 329 (2004). Unlike the determination of the legality of a stop, however,

the purpose of a patdown search is not to confirm or dispel suspicion of criminal activity but, rather, to confirm or dispel suspicion that a suspect is armed and dangerous. See *State* v. *Clark*, 255 Conn. 268, 282, 764 A.2d 1251 (2001) (explaining that purpose of patdown search is "to ensure [the officer's] own safety and the safety of others nearby" and, thus, patdown search may only be as intrusive as necessary to protect safety of investigating officer).

One factor the court may consider is the nature of the crime under investigation. See, e.g., *State* v. *Nash*, supra, 278 Conn. 635–36; see *State* v. *DelValle*, 109 Conn. App. 143, 154, 950 A.2d 603 ("an officer's impressions about a suspect's connection to violent crime . . . may be considered in the totality of circumstances that support a finding of reasonable suspicion"), cert. denied, 289 Conn. 928, 958 A.2d 160 (2008); see also *United States* v. *Scott*, 270 F.3d 30, 41 (1st Cir. 2001) ("[w]hen the officer suspects a crime of violence, the same information that will support an investigatory stop will without more support a frisk"), cert. denied, 535 U.S. 1007, 122 S. Ct. 1583, 152 L. Ed. 2d 501 (2002).

And, specifically, courts have held that officers appropriately may consider the nature of the crime under investigation when the crime involves domestic violence. See *United States* v. *Mouscardy*, 722 F.3d 68, 75 (1st Cir. 2013) (holding that reasonable suspicion to pat down defendant was supported by fact that defendant was suspect in case involving man who beat woman with whom he had relationship); *United States* v. *Sanchez*, 519 F.3d 1208, 1211, 1216 (10th Cir.) (holding that police officers reasonably suspected that suspect might be armed and dangerous on basis of report that suspect had slapped woman during alleged domestic violence incident), cert. denied, 555 U.S. 870, 129 S. Ct. 167, 172 L. Ed. 2d 121 (2008). There is a split of authority, however, as to whether the fact that the

crime under investigation involves domestic violence by itself is sufficient, under the federal constitution, to support a finding of reasonable and articulable suspicion to justify a patdown. Some courts have held that the inherent nature of the act of domestic violence itself justifies the patdown of a suspect under investigation for such a crime. See *United States* v. *Mouscardy*, supra, 75 ("The officers were responding to a report of a man beating a woman in the street. When an officer has a reasonable suspicion that a crime of violence has occurred, 'the same information that will support an investigatory stop will without more support a frisk.' " [Emphasis omitted.]); *Goodson* v. *Corpus Christi*, 202 F.3d 730, 738 (5th Cir. 2000) ("[i]f [the defendant] met the description [of the suspect in a domestic violence case], then [the officer] would have reasonable suspicion to suspect [the defendant] of having committed an assault, and would therefore have reasonable suspicion to frisk him"); *People* v. *Mascarenas*, 972 P.2d 717, 721 (Colo. App. 1998) (holding that there was reasonable suspicion to support patdown under *Terry* in domestic violence case even though victim stated that altercation did not involve weapon because "the officers knew that domestic violence situations were particularly dangerous . . . [and] they had been instructed to conduct [patdown] searches in such situations 'for . . . safety to make sure they don't have . . . weapons so they won't harm themselves or the officers' "), cert. denied, Colorado Supreme Court, Docket No. 98SC851 (March 15, 1999); *Williams* v. *State*, 214 Ga. App. 101, 102, 446 S.E.2d 792 (1994) (in case in which defendant was suspected of hitting girlfriend, "[i]t was not unreasonable for [the officer] to anticipate that [the] defendant, who was suspected of having recently committed an assault and battery, might be armed"); see also *Thomas* v. *Dillard*, 818 F.3d 864, 892 (9th Cir. 2016) (Bea, J., concurring in part

and dissenting in part) ("[W]e have repeatedly [and correctly] recognized the unique dangers law enforcement officers face when responding to domestic violence calls—including the inherent volatility of a domestic violence scene, the unique dynamics of battered victims seeking to protect the perpetrators of abuse, the high rate of assaults on officers' person[s], and the likelihood that an abuser may be armed. I would therefore hold that the domestic violence nature of the call can alone give rise to reasonable suspicion necessary to justify a *Terry* frisk." [Emphasis omitted.]).

One reason for these holdings is that "domestic violence calls are associated with weapons *frequently enough* that an officer can form a reasonable suspicion that a suspect might be armed based on the domestic violence nature of the call." (Emphasis in original.) *Thomas* v. *Dillard*, supra, 818 F.3d 899 (Bea, J., concurring in part and dissenting in part). Specifically, data reports from the Federal Bureau of Investigation show that "thousands of police officers are assaulted every year while responding to domestic violence disputes. One in every five of these assaults involves a deadly weapon (a firearm, a knife, or another 'dangerous weapon')." Id. (Bea, J., concurring in part and dissenting in part).

In contrast, however, other courts have held that although the nature of the crime under investigation may be considered, the label of "domestic violence," standing alone, does not automatically create reasonable suspicion that a suspect is armed and dangerous. Rather, reasonable suspicion must be based on specific facts that establish that the suspect may be armed and dangerous. See id., 885–86 ("Domestic violence encompasses too many criminal acts of varying degrees of seriousness for an officer to form reasonable suspicion [that] a suspect is armed from that label alone. Unless an officer can point to specific facts that demonstrate

reasonable suspicion that the individual is armed and dangerous, the [f]ourth [a]mendment tolerates no frisk. . . . The domestic violence nature of a call is certainly relevant to an officer's assessment of whether to conduct a search for weapons. . . . [But] [t]he officer's decision to conduct a frisk must be based on the totality of the circumstances, including the full nature and context of the call and the facts the officer actually observes on the scene." [Citations omitted; internal quotation marks omitted.]); *State* v. *Warren*, 37 P.3d 270, 273 n.3 (Utah App. 2001) ("[o]nly where there is a reasonable suspicion of criminal activity and the nature of the crime suggests an increased likelihood that the suspect is armed can a frisk be justified").

We are not constrained in the present case to decide whether a report of domestic violence in itself suffices to justify a patdown once the officer has a reasonable, articulable suspicion to stop a domestic violence suspect. Rather, even if we assume that the label of domestic violence does not by itself automatically justify a patdown search, we conclude, as the trial court did, that the specific facts of the alleged incident raised reasonable and articulable suspicion that the suspect might be armed and dangerous. Officer DeJesus was not only aware that the suspect was under investigation for domestic violence, but also was aware that the alleged domestic violence included choking—a particularly violent crime. Indeed, Officer DeJesus testified at the suppression hearing that one reason he patted down the defendant was because the crime under investigation was domestic violence that involved the choking of the victim.[21]

[21] In the present case, the victim reported that she was choked by the suspect. Commentators have noted that although it is common for the terms "choking" and "strangulation" to be used interchangeably, technically, "choking" is defined as "an object in the upper airway that impedes oxygen intake during inspiration and can occur accidentally or intentionally," whereas "strangulation" is defined as "external compression of the neck [that] can impede oxygen transport by preventing blood flow to or from

For the reasons we will explain in greater detail, we determine that because the defendant was suspected of committing a violent crime—an act of domestic violence that involved choking—and because of his temporal and geographical proximity to the crime scene, the investigating officer had reasonable and articulable suspicion that the defendant might have been armed and dangerous. If the suspect was attempting to assert his dominance over his female victim through choking—a violent and potentially lethal act; see A. Kippert, Domestic Shelters, "Abusers Use Suffocation as a Power Move," (December 3, 2018), available at https://www.domesticshelters.org/articles/identifying-abuse/abusers-use-suffocation-as-a-power-move (last visited October 23, 2019) ("abusers strangle their victims as a way to exert power and control over them—they want their victims to know they can kill them at any time"); it was reasonable for the officer to suspect that the defendant also might be in possession of some weapon (gun or otherwise), which, given the volatile nature of the situation, he might use against the officer.

Research studies suggest a strong correlation between choking and future escalated violence involving the use of weapons. See id. ("[s]tudies show most victims [of domestic violence] in the United States are killed by the use of a firearm, but before they are shot, at least 50 percent are strangled" [internal quotation marks omitted]); see also N. Glass et al., "Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women," 35 J. Emergency Med. 329, 333 (2008) ("strangulation . . . is a significant predictor for future lethal violence"); C. Gwinn, "Men Who Strangle Women

the brain or direct airway compression. . . . Therefore, the term 'strangulation' should always be used to specifically denote external neck compression." G. Strack & C. Gwinn, "On the Edge of Homicide: Strangulation as a Prelude," 26 Crim. Just. 32, 33–34 (2011). Clearly, therefore, the victim in the present case was subjected to strangulation. Nevertheless, because the victim specifically reported that she was "choked," we use that term.

Also Kill Cops," 19 Domestic Violence Rep. 85, 85 (2014) (research shows that "a man who strangles a woman once is 800 [percent] more likely to later kill her"). The fact that choking may be the penultimate step to violence involving the use of a weapon does not negate an officer's concern that the suspect "might" have some form of a weapon, which the suspect might use on a police officer when confronted. See *Thomas* v. *Dillard*, supra, 818 F.3d 897 (Bea, J., concurring in part and dissenting in part) ("an officer investigating a report of 'simple battery' may well find that the domestic violence has escalated to assault with a deadly weapon by the time the police arrive"). Indeed, because domestic violence situations are volatile situations in which the suspect at any moment may escalate the violence; see, e.g., *Tierney* v. *Davidson*, 133 F.3d 189, 197 (2d Cir. 1998) ("[c]ourts have recognized the combustible nature of domestic disputes"); it is reasonable for an officer to suspect that the perpetrator might be armed and dangerous, even if a weapon was not used in the reported assault. See *Fletcher* v. *Clinton*, 196 F.3d 41, 50 (1st Cir. 1999) (noting that domestic violence situations are especially volatile, which officers understand because they know that "violence may be lurking and explode with little warning").

Because a domestic violence incident involving choking increases the probability that the suspect might be armed with a weapon, be it a gun or other kind of weapon, it also creates reasonable suspicion that the suspect might threaten the safety of the officer. Studies show that there is a strong link between domestic violence cases in which the suspect is armed and officers are killed or shot in the line of duty. See *Mattos* v. *Agarano*, 661 F.3d 433, 450 (9th Cir. 2011) ("more officers are killed or injured on domestic violence calls than on any other type of call"), cert. denied, 566 U.S. 1021, 132 S. Ct. 2684, 183 L. Ed. 2d 45 (2012), and cert.

denied, 566 U.S. 1021, 132 S. Ct. 2682, 183 L. Ed. 2d 45 (2012), and cert. denied sub nom. *Daman* v. *Brooks*, 566 U.S. 1030, 132 S. Ct. 2681, 183 L. Ed. 2d 62 (2012), and cert. denied sub nom. *Brooks* v. *Daman*, 566 U.S. 1021, 132 S. Ct. 2682, 183 L. Ed. 2d 45 (2012); *Thomas* v. *Dillard*, supra, 818 F.3d 898 (Bea, J., concurring in part and dissenting in part) ("31.7 percent of assaults on police officers in 2011 occurred while answering domestic violence type radio calls, and 12.7 percent of the [seventy-two] officers killed in 2011 were answering domestic violence calls" [internal quotation marks omitted]); see also *Thomas* v. *Dillard*, supra, 899 (Bea, J., concurring in part and dissenting in part) ("[T]housands of police officers are assaulted every year while responding to domestic violence disputes. One in every five of these assaults involves a deadly weapon [a firearm, a knife, or another 'dangerous weapon'].''); C. Gwinn, supra, 19 Domestic Violence Rep. 85 ("14 [percent] of officers killed in the line of duty are killed in domestic violence or 'domestic dispute' incidents").

The perpetrator in the present case was suspected of committing a violent crime—domestic violence involving choking. The defendant, in turn, was discovered in close geographical proximity to the crime scene, with an appearance generally matching the description of the perpetrator only minutes after the reported assault on the victim and only seconds after the perpetrator was last heard near the victim's home. As explained, situations involving domestic violence are highly volatile; violence may break out at any moment with little to no warning. See *Fletcher* v. *Clinton*, supra, 196 F.3d 50 ("violence may be lurking and explode with little warning"); see also *Tierney* v. *Davidson*, supra, 133 F.3d 197 ("[c]ourts have recognized the combustible nature of domestic disputes"). Upon seeing a police officer, a suspect may believe that the victim called the police, reigniting the situation and possibly escalating

the level of violence against both the victim and the officer. See *Thomas* v. *Dillard*, supra, 818 F.3d 900 (Bea, J., concurring in part and dissenting in part) ("[E]ven if the initial violence has subsided, it is not uncommon for the perpetrator . . . to erupt into sudden violence or anger at an officer responding to a domestic violence call. . . . If that occurs, the seemingly calm scene can turn dangerous or deadly [if weapons are present] in a matter of seconds." [Citations omitted.]). In light of the volatile nature of domestic violence incidents, when there has been little to no passage of time between the incident and the patdown, a suspect's temporal and geographical proximity to the crime scene supports reasonable and articulable suspicion that the suspect might be armed and dangerous.

In the present case, only about fifteen minutes had passed since the choking occurred and only about one minute had passed since the suspect had been outside the victim's apartment. Although the passage of a sufficient period of time or the creation of geographical distance may in some cases negate reasonable and articulable suspicion because temporal and geographical distance may serve to defuse the volatile nature of the incident; see *State* v. *White*, 856 P.2d 656, 657, 664 and n.10 (Utah App. 1993) (finding no reasonable suspicion to pat down defendant when domestic incident was not ongoing but, rather, had occurred earlier in day at another location); the passage of such a minimal amount of time in the present case did not negate but, rather, supported the officer's suspicion—violence could have reignited and escalated at any moment. Moreover, the fact that there possibly was an innocent explanation for the defendant's proximity to the crime scene does not invalidate the officer's reasonable and articulable suspicion. See, e.g., *State* v. *Peterson*, supra, 320 Conn. 731 ("[w]e do not consider whether the defendant's conduct possibly was consistent with innocent

activity"). Accordingly, the fact that the defendant reasonably was suspected of committing a violent crime—an act of domestic violence involving choking—coupled with his temporal and geographical proximity to the crime scene, supported reasonable and articulable suspicion that he might have been armed and dangerous.

We find unavailing the defendant's argument that the nature of the crime under investigation cannot be taken into account because he did not match the description of the suspect, as discussed in part II of this opinion. The defendant responds that if Officer DeJesus believed he was the suspect, he did not have reasonable suspicion that he might be armed because Officer DeJesus knew from the 911 call that the suspect was unarmed. Even if, under the collective knowledge doctrine, Officer DeJesus is credited with knowing the details of the 911 call, including the victim's stated belief that the suspect was unarmed, such knowledge does not detract from the reasonable and articulable suspicion that Officer DeJesus had to justify the seizure of the defendant. In response to a question by the 911 dispatcher about whether her assailant was armed, the victim stated that the suspect had no weapons. All this means, however, is that the suspect had no weapons that the victim knew of, not that the suspect was unarmed. Additionally, there was no way for Officer DeJesus to know whether the suspect had acquired a weapon in the interim between the commission of the crime and the seizure.

Accordingly, in light of the nature of the crime under investigation[22]—a domestic violence incident involving

[22] We recognize that both the trial court and the Appellate Court relied on other factors to support a finding of reasonable and articulable suspicion to justify the patdown, specifically, the defendant's nervous and evasive behavior, his unwillingness to provide identification, his apparent intoxicated state, and the time of day.

We agree with the trial court and the Appellate Court that such factors properly may be considered as to whether the totality of the circumstances gives rise to reasonable and articulable suspicion. See *State* v. *Edmonds*, supra, 323 Conn. 68–69 (time of day is factor to consider for determining

choking—and the defendant's geographical and temporal proximity to the crime scene, the patdown of the defendant was supported by reasonable and articulable suspicion. Therefore, the Appellate Court properly concluded that the trial court had correctly determined that the patdown was lawful under both the federal and state constitutions.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ROBINSON, C. J., with whom MULLINS, J., joins, concurring. I agree with the majority's conclusion that, given the severe nature of the crime under investigation, New Haven police officer Milton DeJesus had reasonable suspicion that the defendant, Demetrice L. Lewis, might be armed and dangerous, which provided an objective justification for his decision to frisk the defendant while conducting a *Terry* stop.[1] I write separately only to emphasize an important observation that I fear may be lost in the sheer comprehensiveness of the majority's well reasoned opinion, namely, our express disapproval of Officer DeJesus' stated practice of pat-

reasonable suspicion to justify patdown); *State* v. *Nash*, supra, 278 Conn. 636 ("nervous and uncomfortable reaction to police interaction factor considered" in determining whether there was reasonable suspicion that defendant might be armed); see also *United States* v. *Mouscardy*, supra, 722 F.3d 75–76 (person's failure to identify himself or to provide identification may justify patdown because such evasive behavior creates suspicion that he is trying to conceal his identity); see also *State* v. *Nash*, supra, 634 ("the fact that the stop occurred in a high crime area [is] among the relevant contextual considerations in a *Terry* analysis" [internal quotation marks omitted]); *State* v. *Bishop*, 146 Idaho 804, 819, 203 P.3d 1203 (2009) (reasonable suspicion that defendant is armed and dangerous can be based on intoxication).

Nevertheless, we need not address these factors and what weight, if any, they hold in a totality of the circumstances analysis because, in our view, the nature of the crime under investigation, coupled with the defendant's proximity to the crime scene, created reasonable and articulable suspicion that he might be armed and dangerous.

[1] *Terry* v. *Ohio*, 392 U.S. 1, 30–31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

ting down "everybody . . . for my safety." Accordingly, I join with and highlight the majority's agreement with the Appellate Court's "disapprov[al] of such a practice as presenting a high risk of being an unconstitutional intrusion, saved, perhaps, only by the operative facts of any such police-public interaction." *State* v. *Lewis*, 173 Conn. App. 827, 849 n.6, 162 A.3d 775 (2017).

While I am deeply sensitive to law enforcement officers' concerns for their safety, it is black letter constitutional law that a law enforcement officer may not frisk or pat down even a validly stopped person in the absence of an objective, reasonable suspicion that the person may be armed and dangerous.[2] See, e.g., *Arizona* v. *Johnson*, 555 U.S. 323, 327, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977); *Terry* v. *Ohio*, 392 U.S. 1, 26–27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States* v. *Lopez*, 907 F.3d 472, 485–86 (7th Cir. 2018); *Floyd* v. *New York*, 959 F. Supp. 2d 540,

[2] I note that, "[w]hen conducting a patdown search of a suspect, the officer is limited to an investigatory search for weapons in order to ensure his or her own safety and the safety of others nearby. . . . The officer cannot conduct a general exploratory search for whatever evidence of criminal activity [he or she] might find. . . . Logically, therefore, a patdown search for weapons that is justified at its inception becomes constitutionally infirm if the search . . . becomes more intrusive than necessary to protect the safety of the investigating officer. . . .

"In order to determine the constitutional validity of [a] patdown search . . . we must consider if [b]ased upon the whole picture the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity. . . . [We] . . . must therefore examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom. . . . This is, in essence, a totality of the circumstances test." (Citations omitted; internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 282–83, 764 A.2d 1251 (2001); see, e.g., id., 284–86 (describing factors providing objectively reasonable basis for frisk of defendant, including connection between narcotics trade and weapons, visible nervousness in dealing with police officers, and evidence confirming his connection to narcotics trafficking under investigation).

568–69 (S.D.N.Y. 2013); *State* v. *Clark*, 255 Conn. 268, 281–82, 764 A.2d 1251 (2001); *State* v. *Wilkins*, 240 Conn. 489, 495–96, 692 A.2d 1233 (1997). Accordingly, a police officer's practice of indiscriminately frisking people without the requisite objective justification to do so constitutes a serious violation of the fourth amendment to the United States constitution that contributes to the erosion of the trust between our citizens and law enforcement officers.

As I noted in my concurring opinion in *State* v. *Edmonds*, 323 Conn. 34, 85, 145 A.3d 861 (2016), such practices, "[b]y sowing fear and distrust of police . . . could ultimately make high crime areas even less safe for the people who live there." Such " '[u]ndemocratic policing . . . increases the perception of illegitimacy, which in turn can increase levels of crime and reduce police-citizen cooperation.' . . . Instead 'individuals are more likely to voluntarily comply with the law when they perceive the law to be legitimate and applied in a nondiscriminatory fashion.' "[3] (Citation omitted.) Id.,

[3] As I explained in my concurring opinion in *Edmonds*: "Suspicionless stops are not only a violation of an individual's constitutional rights, they often breed fear and distrust toward police, which, in my view, is an additional unacceptable burden to place on the shoulders of citizens living in high crime areas. . . . As Justice Stevens of the United States Supreme Court has emphasized [in his concurring and dissenting opinion in *Illinois* v. *Wardlow*, 528 U.S. 119, 134 n.10, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)], some citizens, 'particularly minorities and those residing in high crime areas,' flee from police even when they are entirely innocent, believing that any contact with the police can be dangerous. . . . He further noted that these fears 'are validated by law enforcement investigations into their own practices' and that the evidence supporting the reasonableness of these fears 'is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.' . . . Intuitively, when citizens avoid and actively refuse to interact with police out of fear of becoming a suspect, the opportunities for positive dialogue between the police and citizens disappear. This means that the police will also miss out on learning important information related to actual criminal activity in those communities." (Citations omitted.) *State* v. *Edmonds*, supra, 323 Conn. 83–84 (*Robinson, J.*, concurring).

85–86 (*Robinson*, *J.*, concurring), quoting I. Bennett Capers, "Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle," 46 Harv. C.R.-C.L. L. Rev. 1, 34, 47 (2011). In my view, "the dehumanizing nature of some of these encounters" between citizens and the police is particularly exacerbated by an unjustified frisk;[4] *State* v. *Edmonds*, supra, 84 (*Robinson*, *J.*, concurring); and I urge our police officers, and particularly those who employ and supervise them, to take all steps appropriate to ensure that interactions between law enforcement and the citizens of our state remains within constitutional bounds.

Although I find Officer DeJesus' apparent standard procedure of frisking "everyone" to be extraordinarily troubling, I nevertheless agree with the majority's conclusion that Officer DeJesus' stop and frisk of the defendant in the present case was independently and objec-

[4] Justice Sotomayor of the United States Supreme Court describes how dehumanizing and degrading a stop and frisk may be in her dissenting opinion in *Utah* v. *Strieff*, U.S. , 136 S. Ct. 2056, 2069–70, 195 L. Ed. 2d 400 (2016), observing that: " 'Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. . . . The indignity of the stop is not limited to an officer telling you that you look like a criminal. . . . The officer may next ask for your consent to inspect your bag or purse without telling you that you can decline. . . . Regardless of your answer, he may order you to stand helpless, perhaps facing a wall with [your] hands raised. . . . If the officer thinks you might be dangerous, he may then frisk you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' . . . As such, the United States Supreme Court has acknowledged that '[i]n many communities, field interrogations are a major source of friction between the police and minority groups.' . . . When police routinely 'stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident,' according to the court, such interactions 'cannot help but be a severely exacerbating factor in police-community tensions.' " (Citations omitted.) *State* v. *Edmonds*, supra, 323 Conn. 84–85 (*Robinson*, *J.*, concurring).

tively supported by a reasonable suspicion that he had just committed a domestic violence crime. Accordingly, I join in the majority's excellent opinion affirming the judgment of the Appellate Court.

ORDERS

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WELLS FARGO BANK, N.A., TRUSTEE *v.*
MICHAEL JOHN MELAHN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 607 (AC 39426), is granted, the judgment of the Appellate Court is vacated, and the case is remanded to that court for reconsideration in light of this court's decision in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019).

Ridgely Whitmore Brown, in support of the petition.

Marissa I. Delinks, in opposition.

Decided October 15, 2019

STATE OF CONNECTICUT *v.* ACKEEM RILEY

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 1 (AC 40073), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided October 15, 2019

STATE OF CONNECTICUT *v.* JAVIER
VALENTIN PORFIL

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 494 (AC 40305), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the evidence of constructive possession was sufficient to

sustain the defendant's conviction of possession of narcotics and possession of narcotics with intent to sell by a person who is not drug-dependent, when the narcotics that formed the basis for the conviction were found in a common area over which the defendant did not have exclusive possession?"

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

James B. Streeto, senior assistant public defender, in support of the petition.

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

Decided October 15, 2019

JOAQUIN GUDINO *v.* COMMISSIONER OF CORRECTION

The petitioner Joaquin Gudino's petition for certification to appeal from the Appellate Court, 191 Conn. App. 263 (AC 40696), is denied.

Andrew S. Marcucci, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided October 15, 2019

THOMAS G. STONE III *v.* EAST COAST SWAPPERS, LLC

The plaintiff's petition for certification to appeal from the Appellate Court, 191 Conn. App. 63 (AC 40855), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court did not abuse its discretion when it denied an award of attorney's fees to the plaintiff after the plaintiff prevailed on his claim under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.?"

Michelle M. Seery and *William J. O'Sullivan*, in support of the petition.

Mario Cerame, in opposition.

Decided October 15, 2019

STATE OF CONNECTICUT *v.* JUAN V.

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 553 (AC 40889), is denied.

Pamela S. Nagy, assistant public defender, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided October 15, 2019

TOWN OF NEWTOWN ET AL. *v.* SCOTT OSTROSKY

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 450 (AC 40975), is denied.

Robert M. Fleischer, in support of the petition.

Barbara M. Schellenberg, in opposition.

Decided October 15, 2019

TOWN OF MONROE ET AL. *v.* SCOTT OSTROSKY

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 474 (AC 40976), is denied.

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

*Robert M. Fleische*r, in support of the petition.

Decided October 15, 2019

IP MEDIA PRODUCTS, LLC *v.* SUCCESS, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 191 Conn. App. 413 (AC 41242), is denied.

Stephen R. Bellis, in support of the petition.

Barbara M. Schellenberg, in opposition.

Decided October 15, 2019

CITY OF MERIDEN ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 648 (AC 41441), is granted, limited to the following issue:

"Did the Appellate Court properly construe the term 'proceeding,' contained in General Statutes § 1-200 (2), not to include a gathering of four political leaders of the Meriden City Council at which they discussed a search for a new city manager?"

Valicia Dee Harmon, commission counsel, in support of the petition.

Stephanie Dellolio, in opposition.

Decided October 15, 2019

TREVELLE DINHAM *v.* COMMISSIONER OF CORRECTION

The petitioner Trevelle Dinham's petition for certification to appeal from the Appellate Court, 191 Conn. App. 84 (AC 41625), is denied.

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

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

Zenobia G. Graham-Days, assistant attorney general, in opposition.

Decided October 15, 2019

STATE OF CONNECTICUT *v.* JAQUWAN BURTON

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 808 (AC 41807), is denied.

Alice Osedach, assistant public defender, in support of the petition.

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

Decided October 15, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 193

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MONICA PETERS *v.* NUMAN SENMAN
(AC 40438)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff brought this action seeking joint custody of the parties' minor child. After the trial court rendered judgment granting joint legal custody to the parties and primary physical custody to the defendant, the plaintiff filed a motion for modification of custody. During the pendency of the custody modification proceedings, the plaintiff also filed two motions seeking a declaratory judgment that certain fundamental rights guaranteed by the federal and state constitutions deprived the court of the authority to adjudicate parental custody conflicts under the best interests of the child standard. Thereafter, the court rendered judgment denying in part the plaintiff's motion for modification of custody, dismissing her motions for a declaratory judgment and awarding attorney's fees to the defendant. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's claim that the court violated her fourteenth amendment rights by terminating a portion of certain rights provided to her under the Individuals with Disabilities Education Act (act) (20 U.S.C. § 1400 et seq.) without conducting a fitness hearing was not reviewable, the plaintiff having failed to brief the claim adequately; moreover, even if the issue of federal preemption had been adequately briefed, it would not have any applicability to the precise claim as framed by the plaintiff, as the plaintiff stated in her brief that she was not appealing from the trial court's decision declining to modify the existing order that she has no authority to change the location of the child's schooling, which was the sole basis for her claim under the act.

2. The trial court did not err in dismissing the plaintiff's motions for a declaratory judgment that the court had no authority under the federal and state constitutions to intervene in her long-standing custody disputes with her child's father; the plaintiff's constitutional claims were meritless, as she fundamentally misunderstood when declaratory relief judgment is statutorily available and failed to recognized the difference between unwarranted governmental or third-party actions intruding upon the lives of intact families, as opposed to the obligation of family courts to hear and decide cases brought before them by one parent against the other.
3. The trial court did not err in denying the plaintiff's motion for modification of custody; the court carefully considered and applied the criteria set forth in the applicable statute (§ 46b-56), the court's factual determination that there had not been a change in circumstances warranting an increase in the plaintiff's parental access during the school year or any change in how decisions affecting the child are made was supported by the evidence, and the plaintiff did not explain how she derived her mathematical computations to support her claim that the court miscalculated the number of home to home transitions the child would experience under her proposed orders.
4. The trial court did not err in awarding the defendant $3500 for a portion of his attorney's fees; that court, which considered all of the relevant statutory (§ 46b-62) criteria, as well as the parties' testimony, evidence and an affidavit of legal fees filed by the defendant's counsel, found the amount and hourly rate set forth in the affidavit to be reasonable, and concluded from all the credible evidence that the plaintiff was in a financial position to contribute to a portion of fees incurred by the defendant for the third course of litigation on the same topic concerning the plaintiff's access to the minor child, and the trial court's failure to address the plaintiff's objection to the defendant's request for attorney's fees was harmless error, as the objection failed to address the criteria in § 46b-62.

Argued April 9—officially released October 29, 2019

Procedural History

Application for custody of the parties' minor child, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Suarez*, *J.*, rendered judgment granting joint legal custody to the parties and primary physical custody to the defendant; thereafter, the matter was referred to the Regional Family Trial Docket at Middletown, where the court, *Hon. Barbara M. Quinn*, judge trial referee, denied in part the plaintiff's amended motion for modification of custody,

dismissed the plaintiff's motions for a declaratory judgment and awarded attorney's fees to the defendant, and the plaintiff appealed to this court; thereafter, the court, *Hon. Barbara M. Quinn*, judge trial referee, denied the plaintiff's motion for articulation; subsequently, this court granted the plaintiff's motion for review of the denial of her motion for articulation and ordered the relief requested in part; thereafter, the plaintiff filed an amended appeal. *Affirmed.*

Monica L. Syzmonik, self-represented, the appellant (plaintiff).

Opinion

KELLER, J. The self-represented plaintiff, Monica L. Peters,[1] appeals from the trial court's decisions denying, in part, her postjudgment amended motion for modification of custody and awarding attorney's fees to the defendant. The plaintiff also challenges the trial court's decision dismissing two motions she filed during the pendency of the custody modification proceedings, in which she sought a declaratory judgment that certain fundamental rights guaranteed by the United States constitution deprived the court of the authority to adjudicate parental custodial conflicts under the best interests of the child standard. On appeal, the plaintiff claims that the court (1) "[violated her] fourteenth amendment and other rights by terminating a portion of her rights under the Individuals with Disabilities Education Act

[1] The plaintiff has remarried and is now known as Monica L. Syzmonik. In the trial court, the plaintiff was represented at times by various counsel but also represented herself at other times. She is appearing as a self-represented party for purposes of this appeal. We note that the defendant did not participate in this appeal. This court entered an order on April 25, 2018, providing that this appeal would be considered solely on the basis of the plaintiff's brief and the record, as defined by Practice Book § 60-4, in light of the defendant's failure to comply with this court's April 10, 2018 order requiring him to file a brief on or before April 24, 2018. Accordingly, we have considered this appeal on the basis of the plaintiff's brief, the record, and the plaintiff's oral arguments before this court.

(IDEA) [20 U.S.C. § 1400 et seq.] without conducting a fitness hearing"; (2) erred in concluding that she lacked "standing to request a declaratory judgment to adjudicate her constitutional rights as a fit parent," and violated her right to due process and abused its discretion by not ruling on her motions for declaratory judgment before trial commenced; (3) violated her and her child's rights under the first and fourteenth amendments to the United States constitution by failing to apply the proper balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); (4) erred in awarding attorney's fees to the defendant, Numan Senman; (5) erred in failing to grant her motion for modification of custody; and (6) erred in using its own opinions to infringe on her "fundamental rights to her child," circumvented her due process right to cross examine the judge, and made clearly erroneous findings regarding her proposed orders and the needs of the child. We affirm the judgment of the court.

The following facts, as found by the court, and procedural history are relevant to this appeal. The parties have never been married. The court previously awarded the parties joint legal custody of their minor son (child), and determined that his primary residence would be with the defendant. On October 22, 2015, the plaintiff filed a motion to modify the joint custody orders pertaining to the child, who has autism and was eight years old at the time of filing and ten years old by the time the hearing on the motion occurred. In her motion for modification, the plaintiff sought shared decision making by both parents and primary residence of the child with her because she claimed she resides in a school district better able to provide for his specialized needs. On November 7, 2016, the plaintiff filed an amended motion for modification that included allegations that the prior order as to custody infringed on the constitutional rights she had asserted in prior motions she filed

seeking a declaratory ruling. In proposed orders dated February 2, 2017, the defendant noted his objection to the plaintiff's motions seeking a declaratory judgment and amended motion for modification. He also sought the clarification or removal of certain mediation orders in the original joint custody orders, supervised parental access for the plaintiff due to his concerns about her husband, and attorney's fees.

A trial was held on February 15, 16 and 17, 2017. The court issued its decision on the plaintiff's motions for a declaratory judgment on April 6, 2017. It issued its decision on the plaintiff's motion for modification on April 7, 2017.

In its decision on the motion for modification, the court noted that "[t]he matter of [the child's] primary residence has now been litigated by his never married parents three times since he was four years old. All hearings have been initiated by the plaintiff . . . . The first contested hearing began in late 2010 and ended with a decision on March 22, 2011, that awarded joint custody of [the child] to both parents, and primary residence to [the defendant]. There were orders regarding access, insurance, child support and tax exemptions. [The child's] best interests were found to be with continued stability in [the defendant's] care.

"The second contested evidentiary hearing on the issue of [the child's] residential placement was conducted before Judge Holly Abery-Wetstone. It began with [the] plaintiff's motion seeking both equal decision-making privileges . . . and an equal parenting schedule. [On] October 21, 2013, the relief the plaintiff sought was denied, but changes to the earlier orders were made. Decision making was divided between the parties, with the [defendant] having final authority over issues of physical health, general welfare, extracurricular activities, religious upbringing and choice of school

system. The [plaintiff] was awarded final decision-making authority relating to the treatment of [the child's] autism, as she has been a good advocate for him. The orders were clarified to state that she had no authority to change his school [and] provided for a mediation mechanism to resolve disputes. . . .

"As noted, less than three years after the last fully contested hearing, a motion to modify, seeking essentially similar relief has been again filed by the plaintiff . . . ."

The court considered this case as one of "high conflict" since the parties first formed a relationship, a conflict that continued with respect to the child's care due to their very different parenting styles and inability to agree on most issues. "As noted by Judge Abery-Wetstone and apparent during the course of this trial, they have no effective means of coparenting or indeed communicating, largely because they have such differing viewpoints and personalities."

The court found that since the child was approximately two years old, he had remained without interruption in the defendant's care, with the plaintiff "coming in and out of his life as the parties reconciled or ended their relationship multiple times between 2006 to 2010." The child had resided in a home the defendant purchased since 2009 and had only known the Vernon school system. He is the only child in the defendant's home. The defendant has a flexible work schedule and is able to care for his son largely without assistance. The child has friends in the community and school. According to the defendant, the child is well supported by his individual education plan (IEP) and his teachers, a one-on-one paraprofessional and the defendant, who regularly supervises his school work, and is doing well academically.

The court stated that despite the plaintiff's dissatisfaction with the child's plan for transitioning to middle school in Vernon, "by history and current testimony, routine, stability and predictability of his living situation have been provided to [the child] primarily by [the defendant] for most of this child's life." The court noted that the plaintiff asserted that her changed living circumstances, her marriage and the birth of her daughter by her new husband are all changes in circumstances that supported her quest for a change in the child's primary residence, but considered most of these changes to be personal to the plaintiff and not based on events in the child's life. The plaintiff's two major claims were that her life had changed dramatically since she was last before the court regarding custody and that her son's low test scores were proof that his current school system is inadequate.

The court found the plaintiff's claims as to the unsuitability of his current schooling in Vernon were unsupported by any evidence about what could be expected of the child, in light of his age and special needs as a child with autism. The plaintiff produced no expert testimony, and the court noted that "[o]utcome does not prove causation" because school performance, especially for an autistic child, is only one of a multitude of factors that could have brought about such results. The court also noted that the plaintiff failed to present any evidence that the Glastonbury school system would provide the child with a better education.[2]

The court agreed with the defendant that a change of residence for the child was something that the plaintiff wants for herself to prove she is an adequate parent.

[2] The court indicated it had carefully reviewed a sealed exhibit containing the child's Vernon school records and it presented "a skilled and careful assessment of [the child's] current academic situation and psychological testing and a detailed plan for how to support his continuing needs for support in the classroom."

It concluded that the plaintiff had an unwillingness to take into account the details of the child's daily life, nor was she able "to provide a nuanced account of [the child] in her demand for a change of his residence. His connections to the [Vernon] community in which he has grown appeared to have no relevance to her, nor the stability that he has had where he now resides. The plaintiff did not appear to carefully consider what might be best for him, even if it went counter to her own desires."

The court found that the plaintiff believes that because she had not been previously found to be an unfit parent, she is entitled to equal time with and responsibility for the child. The court noted, however, that the plaintiff's lack of fitness or fitness as a parent was not the crux of the issue before the court. "Many children caught up in custody disputes are fortunate to have two fit parents, as these parents each appear to be. But for the court, it is what is in [the child's] best interests that must be considered. Fitness is but one of the many criteria to be considered. As our Supreme Court many years ago concluded . . . '[i]n the search for an appropriate custodial placement, the primary focus of the court is the best interests of the child . . . .' "

The court found fault with both parents, but concluded that the defendant had "been the parent who has most reliably cared for [the child] and rearranged his life to provide for the stability and predictability of care both parents agree [the child] needs. There has been no change in [the defendant's] commitment for many years."

The court noted its concerns about the plaintiff, indicating that "[h]er myopic view of the superior quality of her new family life as the only valid outlook raises questions in the court's mind about what her conduct towards her son might be in the future, should her son reside with her. As he ages, [the child's] own behavior

and outlook, which reflect similarities to those of [the defendant], are likely to conflict with those of [the plaintiff]. . . . Also, what would his integration in her family life be like, as it includes a young half-sister, and two older children of her husband who visit from time to time, as well as the plaintiff's new husband? While the plaintiff points to the fact that [the child] enjoys his visit with her and her new family, visits are different from a more permanent residence with reduced access to [the defendant]. Whatever else can be said about it, the court finds that the plaintiff's household is not a quiet household where the focus is only on [the child] with established and clear patterns of daily living."

The court also found that the defendant had some valid concerns about the plaintiff's new husband but declined to order only supervised access by the plaintiff. In assessing the validity of the defendant's concerns, the court took judicial notice of a trial court memorandum of decision in the case of *Szymonik* v. *Szymonik*, Superior Court, judicial district of Hartford, Docket No. FA-06-4027147-S (January 6, 2017). The court noted that that decision, which involved a postdissolution motion for modification filed by the plaintiff's husband regarding his children, recited "concerning conduct and behavior." In particular, the court noted that the decision "details some questionable parenting on Mr. Syzmonik's part and an appalling lack of sensitivity to his children's emotional needs in his own high-conflict custody case."

Much of the evidence presented at trial reflected the parties' difficulty to reach an agreement concerning issues involving the child, as well as the problems encountered by the parties surrounding their physical exchanges of the child for visits. The court found that in the past, the plaintiff has "been unable to return the child promptly or to pick him up without incident. Those difficulties have lessened since her new husband

provides the transportation, although his conduct has also caused some difficulties. Nonetheless, these facts do point to [the] plaintiff's historical issues with routine and predictability. Shifting the responsibility for punctuality to a third party does not address her need to demonstrate that she can provide routine and predictability herself. The plaintiff's proposed plan would increase the physical exchanges of the child between the parents. In formulating her plan, it is apparent that she did not consider how the increased changes in his routine would impact [the child]."

The court added, "[t]hat [the plaintiff] loves and wishes the best for her son is not in question. It is the methods by which she seeks that outcome which rather sharply outline what the court views as her deficits as a parent. The same dismissive and condescending pattern of conduct towards the defendant continues in her attempts to mediate all orders with the defendant, including those which were specifically stated in the decree. She simply would not accept the defendant's refusal to mediate established orders and actively blames him for what she sees as his 'failure.' She cannot appreciate her own failure to proceed in a reasonable manner to resolve disputes. The orders entered in 2013 very explicitly set forth those matters which are to be mediated and those which are ordered, a distinction apparently not clear to the plaintiff."

After considering all the relevant statutory criteria set forth in General Statutes § 46b-56 and the best interests of the child factors as articulated in the case law, the court found that the best interests of "this special needs child" are served by remaining in the primary residential care of the defendant, as previously ordered.

The court denied the plaintiff's motion to modify the child's primary residence and for an equal sharing of time. It also denied the defendant's claim for supervised

access by the plaintiff and removed the mediation provisions in the prior court order as unworkable. It further awarded attorney's fees of $3500 to the defendant. Attached to the court's decision was a Schedule A, which contained the court's parental access orders and other various provisions regarding each parties' decision-making authority,[3] including, inter alia, a parenting schedule, orders pertaining to the child's extracurricular activities, sharing information as to the child, communication and parenting guidelines, and various transportation and relocation orders.

The court also ordered that future motions to modify would not be entertained without leave of the court and unless six coparenting counseling sessions have been completed in good faith by the parties with a provider of their own choosing, although no coparenting sessions were otherwise ordered.

On April 12, 2017, the defendant filed a motion for articulation, which the court granted on April 28, 2017, making a minor change to permit the parties to alternate time with the child during the annual April school spring break. On April 25, 2017, the plaintiff filed a motion for reconsideration of the court's April 6, 2017 decision on her request for a declaratory judgment, which the court summarily denied on April 28, 2017. On April 26, 2017, the plaintiff filed a motion for reconsideration, to vacate and "to uphold constitutional rights." The court denied this motion on April 28, 2017. On May 5, 2017, the plaintiff filed a motion for clarification regarding

[3] The court granted final decision-making authority, after good faith consultation with the other parent, to the defendant on issues of physical health, general welfare, extracurricular activities, religious upbringing and choice of school system, and to the plaintiff on matters relating to the treatment of the child's autism. The plaintiff has no authority to change the child's school. These orders are very similar to the previous orders entered by Judge Abery-Wetstone in 2013, except the parties' obligation to mediate certain matters was eliminated.

child support. The court issued a clarification order on May 9, 2017, indicating that any matters concerning child support were never referred to the Regional Family Trial Docket in the judicial district of Middlesex at Middletown for her consideration and any child support matters remained before the Superior Court in the judicial district of Tolland. This appeal followed on May 15, 2017, and was subsequently amended on December 29, 2017.

On September 8, 2017, the plaintiff filed a motion for articulation, which the court summarily denied on October 18, 2017. On October 20, 2017, the plaintiff filed a motion for review with this court. This court, on December 13, 2017, granted review and granted in part the relief requested, ordering the trial court "to articulate the factual and legal basis for its award of $3500 in attorney's fees to the defendant in the April 7, 2017 memorandum of decision and how it calculated that award of attorney's fees." On January 18, 2018, the court issued its articulation. Additional facts will be set forth as necessary.

Before analyzing the claims raised in the present appeal, we set forth our well established standard of review in domestic relations matters. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . .

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 362, 190 A.3d 68 (2018).

"General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award [must] be based upon either a material change of circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall consider the best interests of the child, and in doing so may consider several factors. General Statutes § 46b-56 (c)."[4] (Citation omitted; internal quotation marks omitted.) *Harris* v. *Hamilton*, 141 Conn. App. 208, 219, 61 A.3d 542 (2013).

[4] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of

We further note that a trial court's factual findings may be reversed on appeal only if they are clearly erroneous. To the extent that the plaintiff claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court. See *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 377, 999 A.2d 721 (2010).

We apply these principles to the present case in our review of the trial court's findings and conclusions with respect to its modification of the custody order. We have thoroughly reviewed the plaintiff's arguments, the history of the case as reflected in the court file and prior decisions, of which the court took notice, the testimony, exhibits,[5] and the court's thorough decisions.

the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

[5] The clerk's office of the Superior Court for the judicial district of Tolland mistakenly destroyed the exhibits in this case. In accordance with this court's authority to order the trial court to complete the trial court record for the proper presentation of the appeal; see Practice Book § 60-2; on May 7, 2019, this court ordered the trial court "to rectify the record so that copies of the exhibits that were admitted at the trial on February 15, 2017, February 16, 2017 and February 17, 2017 are provided to the Appellate Court on or before July 5, 2019. To assist the trial court in complying with this order, the court may, if it deems necessary, hold a hearing during which it may hear oral arguments, take evidence or receive and approve a stipulation of counsel of record."

On June 6, 2019, this court issued a second order extending the deadline for the trial court's compliance to August 9, 2019. To facilitate the trial court's rectification, this court attached to its order a list describing the sixteen exhibits admitted as full exhibits during the trial proceedings based on our initial review of the trial transcripts.

On June 14, 2019, the trial court held a status conference and issued orders directing the plaintiff to contact her former counsel and the child's school to secure the school records she had previously provided to the court as Exhibits 6 and 13. The plaintiff also was ordered to submit to the

court three photographs of her residence that had been admitted as Exhibit 8 and to contact TD Bank, her bank, to obtain a pay activity printout dated January 17, 2017, which had been admitted as Exhibit 12. The defendant was ordered to attempt to find Exhibit A, an e-mail dated February 1, 2017, which had been sent by the plaintiff to the defendant directing him to communicate with her husband about child support, as well as to provide a spreadsheet of child support payments and an e-mail regarding bank records, which had been admitted as Exhibit 14. At the June 14, 2019 status conference, the plaintiff indicated that she would provide copies of the photographs of her son and other children that she previously had submitted.

Despite the willingness to cooperate that she demonstrated to the court at the status conference, in response to the court's orders regarding rectification of the record, on July 18, 2019, the plaintiff filed with this court a "Motion to Vacate Order," claiming, inter alia, that the trial court had exceeded its authority under this court's order, and that it ordered the plaintiff to produce exhibits which the court had "used against her, which may violate her fifth amendment rights," including three photographs of the plaintiff's home, which the court relied on in ordering that the plaintiff pay a portion of the defendant's attorney's fees. On July 19, 2019, we denied the plaintiff's motion to vacate order.

On August 7, 2019, the trial court filed a "Rectification of Record, In Part," indicating that it had attempted to rectify the record, and that, at a status conference on July 19, 2019, the defendant had provided copies of exhibits he had located, including copies of *some* of the plaintiff's exhibits, which the court accepted after review. The court then stated: "The plaintiff contested the jurisdiction of this court to issue its interim orders re rectification after the status conference on June 14, 2019, directing the parties to use their best efforts to complete certain tasks. She did not wish to provide any school records for her son, as she could not now be entirely sure of the content of those records and it might prejudice her case, she claimed. She reported that her attorney had no copies of any exhibits submitted at trial. She failed, without any explanation, to provide any copies of the photographs that she had previously introduced at trial. It is also the case that many of the exhibits concerned themselves with visitation claims and payment of child support, two issues which were not before the court, as the court reminded the parties and counsel at trial. The plaintiff also now asserts that the exhibits in question are not relevant to her present appeal. *It is apparent that she had no interest in supplying any additional copies of missing exhibits.*" (Emphasis added.)

Judge Quinn is correct in indicating in her order that many of the missing exhibits were not relevant to the issues before the court, such as issues concerning visitation and payment of child support. The record, however, suggests that some of the missing exhibits might be relevant to the issues raised on appeal. For example, the plaintiff claims that, after determining that the child would fare better in a quiet and structured setting where all focus would be on him, the court erroneously concluded that the defendant's home as primary residence best met the child's needs. The plaintiff claims there was no evidence to support that determination. Undoubtedly, the psychological report which had been submitted with the school records as Exhibit 13 and reviewed by the court might be quite pertinent to this claim.

I

The plaintiff's first claim is that the court violated her fourteenth amendment rights by terminating a portion of certain rights provided to her under IDEA without conducting a fitness hearing. We decline to review this claim because it is inadequately briefed.

"Although we are solicitous of the rights of [self-represented] litigants . . . [s]uch a litigant is bound by the same rules . . . and procedure as those qualified to practice law. . . . [W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . As this court has observed, [a]ssignments of error

Additionally, the plaintiff contests the partial award of attorney's fees to the defendant. In awarding the defendant those fees, the trial court, in determining that the plaintiff had sufficient assets to pay a portion of the defendant's fees under General Statutes § 46b-62, relied, in part, on missing Exhibit 8, which consisted of three photographs of the plaintiff and her family at her residence. In its decision, the court remarked that this exhibit had depicted the plaintiff's "very comfortable lifestyle."

This court consistently has noted that " '[i]t is the responsibility of the appellant to provide an adequate record for review.' " *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 753, 201 A.3d 485 (2018) (quoting Practice Book § 61-10), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019). The plaintiff has refused to present the child's school records and the three photographs, which had been admitted as Exhibits 6, 8 and 13, respectively, based, in part, on her position that these exhibits would now prejudice her on appeal. Thus, it is reasonable for this court to assume that those missing exhibits support the trial court's factual determinations that the child requires a structured, quiet setting with singular focus on his needs and that the plaintiff has a "very comfortable lifestyle."

As we have observed, the trial court in part was able to rectify the record. Furthermore, as the trial court noted, many of the missing exhibits were not directly related to the issues before it. On the basis of the exhibits that the parties provided to the court in connection with its efforts to rectify the record as well as the detailed discussion of many of the remaining missing exhibits at trial, as recorded in the transcript, particularly with respect to email exchanges between the parties, we conclude that the absence of the missing exhibits is not fatal to our ability to review the claims raised on appeal or affect the outcome of the appeal. See *Finch* v. *Earl*, 104 Conn. App. 515, 519, n.5, 935 A.2d 172 (2007) (reasoning that, despite

which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App. 800, 813, 201 A.3d 511 (2019).

Before addressing the adequacy of the plaintiff's brief with respect to this claim, we note that the issue of the plaintiff's rights under the IDEA was not raised before the trial court until the plaintiff filed a Practice Book §11-11 motion "for reconsideration, motion to vacate, and motion to uphold constitutional rights," after the court issued its memorandum of decision on the motion for modification. In her analysis of the present claim, the plaintiff argues that the court lacked subject matter jurisdiction to make an order that prohibited her from any decision making as to the choice of the child's school because the federal IDEA law preempts the state court from addressing the issue of school choice. In her brief, however, the plaintiff merely makes the bald assertion that the doctrine of federal preemption deprives the family court of subject matter jurisdiction, with no citation to any particular statutory or case-specific authority.[6]

Even if we were to conclude that the issue of federal preemption was adequately briefed, it would not have any applicability to the precise claim as framed by the plaintiff. The plaintiff states in her brief that she is *not* appealing from the court's decision declining to modify the existing order that she has no authority to change the location of the child's schooling, which is the sole basis for her claim that pursuant to federal preemption principles, IDEA has been violated by such a restriction.

missing exhibits, record provided adequate basis for appellate court to review claims raised on appeal), and cases cited therein.

[6] Moreover, the Second Circuit Court of Appeals has held that IDEA leaves intact a state's authority to determine who may make educational decisions on behalf of a child, so long as the state does so in a manner consistent with federal statutes. The court stated that "allocation of parental rights under the IDEA is best left to local domestic law." *Taylor* v. *Vermont Dept. of Education*, 313 F.3d 768, 780 (2d Cir. 2002).

Accordingly, we decline to review the plaintiff's claim for being inadequately briefed.

II

In her first, second and third claims, the plaintiff also argues that, under various provisions of the United States and Connecticut constitutions, she is entitled, as a fit parent, to equivalent rights of access and decision making with the defendant and, therefore, the court erred in not declaring this to be so as a matter of law and in not granting her such equivalent rights of access and decision making with respect to the child.[7] We disagree.

In its decision on the plaintiff's two motions for declaratory rulings, the court indicated: "In these motions, the plaintiff seeks to instruct the court on federal constitutional principles which she asserts must be applied in this family case. She further seeks to assert the validity of these principles in the dispute she has with [the defendant]. As our Supreme Court cases have held, this is not the proper application of the declaratory judgment statute or the Practice Book requirements. The procedure is not available to establish abstract principles of law nor to secure advice on that law. See *Norwalk Teachers' Assn.* v. *Board of Education*, [138 Conn. 269, 272, 83 A.2d 482 (1951)] and *Tellier* v. *Zarnowski*, [157 Conn. 370, 373, 254 A.2d 568 (1969)]. . . .

"Her arguments and legal citations also reflect a significant misunderstanding of the law and the legal consequences of her own actions in seeking relief from this court. All of her arguments and citations refer to

[7] The plaintiff avoids explaining how such absolutely equivalent rights to access and decision making are workable or how they may affect the child when, as the court noted in the present case, "these parents have had a volatile and unstable relationship full of high conflict since they first formed a relationship. Now, years after their on-again and off-again relationship ended, their conflict continues with respect to [the child] and his care. What is apparent is that they have very different parenting styles and do not agree on most things; in particular those matters relating to [the child]."

circumstances in which a state initiates legal action against an intact family, usually a claim based on child abuse or neglect. This would be a child protection proceeding under the juvenile laws of the state. In such circumstances, absent the abuse or neglect being proven, there is an expectation of privacy and federal constitutional protections are applicable . . . in cases involving the removal of a child from the family unit and placement with third parties.

"The instant case, however, is one in which the state of Connecticut has not initiated any legal action. It is one where the plaintiff herself sought the assistance of the Superior Court . . . in securing orders concerning her child. By so doing, she has voluntarily submitted herself and her family to the jurisdiction of the . . . court and its statutory framework to secure the relief she desires. She has repeatedly litigated her family claims in the family court since 2010. She has been accorded full due process and the right to be heard. She has testified, presented evidence and otherwise taken full advantage of the constitutional protections available to her. . . . Her disappointment in the fact that two previous judges have not seen fit to award her primary physical residence of her son does not invalidate the process, nor require the application of legal principles which belong to another legal arena altogether."

We afford plenary review to the plaintiff's claim. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 155, 957 A.2d 407 (2008) (constitutional claims subject to plenary review). We need not undertake an in depth analysis of the claim, however, because we agree with the court that the plaintiff's arguments are based on her fundamental misunderstanding of when and how declaratory judgment relief is available pursuant to General Statutes § 52-29, and her failure to recognize the difference between unwarranted governmental or third-party actions intruding upon the lives

of intact families[8] as opposed to the obligation of family courts to hear and decide cases brought before them by one parent against the other.

The original application for custody and the subsequent motions for modification in the present case all were initiated by the plaintiff, yet she argues that the courts have violated her fundamental rights as a parent in intervening to resolve her disputes. In the plaintiff's opinion, conflict between fit parents does not in itself provide a necessity for state action. In sum, the plaintiff, who has filed an application for custody and two subsequent motions for modification of custody, sought a declaratory judgment from the court ruling that the court had no business intervening in her long-standing custody disputes with her child's father. We consider her constitutional claims meritless, and they warrant no further discussion.[9]

III

In her fifth and sixth claims, the plaintiff makes the related arguments that the court erred in denying her motion for modification of custody by failing to recognize a material change in circumstances due to "the

[8] Among other authorities, the plaintiff relies on cases that involved constitutional challenges to third-party visitation statutes. See *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002).

[9] In her brief, the plaintiff discusses, with little reference to controlling authority, some, but not all, of the constitutional claims she presented to the court in her pretrial motions for a declaratory judgment, which the court denied on April 6, 2017. These claims essentially discuss why the use of the best interest standard in custody proceedings constitutes a denial of (1) her first amendment right of free family association between parent and child for purposes of intimate and expressive communication and her right to associate or disassociate a private romantic relationship; (2) her rights under the fourteenth amendment and article first, § 20 of the Connecticut constitution to the same protections as married persons in regard to questionable governmental actions, which include custody proceedings when both parents are "fit"; and (3) her first amendment right to convey religious ideas through free speech and to teach her child religious beliefs.

natural changing needs of the child entering adolescence," upon which the plaintiff does not elaborate; by expressing "baseless" opinions; and by making clearly erroneous mathematical findings regarding the plaintiff's proposed orders and clearly erroneous findings about the child's needs. We have thoroughly reviewed the record and conclude that the court's factual determination that there had not been a change in circumstances warranting an increase in the plaintiff's parental access during the school year[10] or any change in how decisions affecting the child are made is supported by the evidence.

The record reflects that the court carefully considered and applied the criteria set forth in General Statutes § 46b-56, including properly opining on the capacity and disposition of the parents to understand and meet the needs of the child, one of the § 46b-56 criterion. The court's factual findings as to the plaintiff's motivations in seeking a modification[11] and the child's needs as a child with autism were amply supported by the evidence and the reasonable inferences drawn therefrom and are not clearly erroneous. As the court found, the plaintiff's assertions that the Vernon school system and/or the defendant were not properly addressing the child's educational needs were unsupported. The court noted that the plaintiff "provided no information about what could be expected of a child of her son's age and with his special needs as an autistic child" other than to present the court with his test scores with no expert or a more wholesale analysis. When the court stated that the plaintiff "was not able to provide a nuanced account of [the child] in her demand for a change of

[10] As the plaintiff acknowledges, the court modified the parental access orders to provide the plaintiff with access to her son for fifteen additional days during the summer vacation.

[11] Contrary to the plaintiff's assertion, "motivation necessarily involves a question of fact to be resolved by a [factfinder]." (Citation omitted.) *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 47, 738 A.2d 623 (1999).

his residence," it then explained that the plaintiff's "emotional claims to prove herself the 'better' parent" lacked careful consideration of what might be best for the child, even if it went counter to her own desires.

The plaintiff also claims the court "miscalculated the number of home-to-home transitions the child would experience under [her] proposed orders and determined that [the] plaintiff's plan had more home-to-home transitions than what the child already was experiencing," which prejudiced the court's decision. The court, however, never used the phrase "home-to-home" transitions, but noted "increased changes in [the child's] routine." On the basis of the evidence before the court and in light of the plaintiff's proposed orders, these changes in the child's routine might have included the increased number of times that the child would have had to be transported to and from school in Vernon from Glastonbury, where the plaintiff resides, as well as the increased access afforded to the plaintiff during school vacations. We decline to speculate as to how the plaintiff derived her mathematical computations, and she does not fully explain them, or how the court mathematically derived its conclusion as to increased changes in the child's routine.

Finally, the plaintiff argues that the court had no evidentiary basis to conclude that the child requires a quiet household where the focus is only on him with established and clear patterns of daily living. The court concluded that it was the defendant who consistently had provided the child with such an environment. As previously noted, the court indicated it had reviewed the case file and the child's school records, which included a psychological evaluation of the child.[12] In addition, during his testimony on February 17, 2017, the defendant noted for the court that in an ex parte

[12] See footnote 5 of this opinion.

motion for custody filed by the plaintiff, she herself had admitted the child is easily stressed by sudden changes to his schedule. There also was testimony from both parties that during the first four or five months after the child began visiting the plaintiff and her family in Glastonbury, he exhibited "stimming," self-stimulatory behavior that is a common symptom of autism. Additionally, in his testimony, the defendant observed that, when the child visits the plaintiff, he "just plays in his room by himself."

For the foregoing reasons, we are not persuaded by the plaintiff's claim that the court erred in denying her motion for modification of custody.

IV

The plaintiff's final claim is that the court erred in awarding the defendant $3500 for a portion of his attorney's fees. The plaintiff claims that the court committed plain error by finding that she did not work outside the home when she worked part time, and by finding that the plaintiff elected not to file a financial affidavit or to respond to the defendant's motion for attorney's fees. She argues that as a result of ignoring her financial affidavit and objection to the motion for attorney's fees, the court extrapolated its findings of fact relative to the fee award from the plaintiff's testimony and three photographs of the plaintiff's living room that reflected a "very comfortable lifestyle." We disagree.

On February 15, 2017, the defendant filed proposed orders that included a request that the court award him attorney's fees. During the hearing of February 17, 2017, counsel for the defendant advised the court of the outstanding issue concerning attorney's fees, and that the parties had agreed to stipulate that the defendant still owed him "approximately $15,000." Whether such a stipulation existed is unclear, as counsel for the plaintiff responded to the representation of the defendant's counsel by stating that "the plaintiff is going to respond

as to whether or not she is in agreement that there are outstanding fees." She further indicated that "the plaintiff reserves her right within the context of this case to present her opposition to any outstanding fees."

The court then indicated it would require the parties to present financial affidavits. Counsel for the defendant indicated he would present one to the court before the end of the day, and the file contains a financial affidavit from the defendant dated February 17, 2017.[13] The court later advised counsel for the plaintiff that she could file a written response to the defendant's request for attorney's fees and the plaintiff's financial affidavit within two weeks. On February 23, 2017, the plaintiff filed an objection to the defendant's request, which contained the following assertion with respect to the court's request for the plaintiff's financial affidavit: "Finally, asking for the parties to submit financial affidavits, unrelated to child support, prior to knowing the outcome of the hearing, represents an unwarranted exploratory search. The calculation of income for purposes of addressing attorney's fees is an exploratory search and division of property years after the parties separated, in which [the] plaintiff objects."[14]

[13] Although the box for "plaintiff" is checked on this affidavit, it is signed by the defendant and notarized by the defendant's attorney, so we are certain this is the defendant's affidavit.

[14] Although the plaintiff claims that the court failed to consider her financial affidavit, the language of her objection to the defendant's request for attorney's fees undermines that contention. In addition, we have thoroughly searched the record and, although it reflects that the defendant submitted a financial affidavit in connection with the February, 2017, hearing, the plaintiff failed to submit a financial affidavit at or near the time of the hearing. As such, her claim that the court erroneously found she did not work outside the home, when in fact, she claims that she works on a part-time basis as an "abdominal therapist," is the result of her own deliberate failure to present the court with evidence to support her version of the facts. Additionally, although she testified that her office hours were approximately ten hours a week, we observe that the plaintiff's office hours do not necessarily support a finding that she generates income during her office hours. Additionally, we observe that the plaintiff also indicated that she had "drastically" reduced her employment since her daughter's birth. Moreover,

On September 8, 2017, the plaintiff filed a motion for articulation to request the legal and factual basis for rulings that were the subject of several of the claims raised on appeal. On October 12, 2017, the court denied her motion. On October 20, 2017, the plaintiff filed a motion for review before this court that included a request that the trial court be ordered to articulate the legal basis and statutory criteria on which it relied in granting attorney's fees to the defendant. On December 13, 2017, this court granted review and granted, in part, the relief requested. Specifically, this court ordered the trial court to articulate "the factual and legal basis for its award of $3500 in attorney's fees to the defendant in the April 7, 2017 memorandum of decision and how it calculated that award of attorney's fees." The trial court subsequently complied with this order.

We begin with our standard of review, as set forth in *Pena* v. *Gladstone*, 168 Conn. App. 141, 148–49, 144 A.3d 1085 (2016). Pursuant to General Statutes § 46b-62,[15] "[i]n dissolution proceedings, the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in General Statutes § 46b-82 . . . . This includes postdissolution proceedings affecting the custody of minor children. . . . Whether to allow counsel fees, and if so in what amount, calls for the exercise of judicial discretion.

even if the court had found that the plaintiff was in fact earning some income on her own, it only would have added to the court's assessment of her ability to pay the attorney's fees at issue, and we are not persuaded that such a finding would have changed the court's ultimate decision to award the defendant a portion of his requested fees.

[15] General Statutes § 46b-62 provides, in relevant part: "In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

. . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did. . . . The court's function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . [J]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, [this court] allow[s] every reasonable presumption . . . in favor of the correctness of [the trial court's] action. . . . We also note that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . It is axiomatic that we defer to the trial court's assessment of the credibility of witnesses and the weight to afford their testimony. . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Pena* v. *Gladstone*, supra, 148–49.

The test for an award of attorney's fees pursuant to General Statutes § 46b-62 is not based only on a consideration of whether the party moving for an award of such fees has ample liquid assets. If the prospective recipient of the fee award does not possess such assets, then § 46b-62 requires that the trial court look to and examine the total financial resources of the respective parties and the other criteria set forth in § 46b-82 to determine whether it would be equitable to award attorney's fees under the circumstances. The criteria set forth in § 46b-82 include "the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

In its articulation, the court indicated that it had reviewed an affidavit of legal fees filed by the defen-

dant's attorney, which reflected a billing rate of $245 an hour with fees of $7817.65 incurred as of January, 2017, and an estimate of an additional $7150 in fees to be incurred for a total of $14,976.65 through the conclusion of the trial. The court found the amount and hourly rate to be reasonable. The court stated that it had considered the parties' respective financial abilities and the criteria set forth in § 46b-82 (a).

The court then found that the defendant's affidavit reflects that he earned a gross income of $1400 a week from employment and had a net income of $1000 a week. The court found that the defendant carried many of the regular expenses for the maintenance of the child. It further noted that the testimony revealed that the plaintiff and her new husband had an approximately one year old daughter. In addition, with her husband's support and payment of expenses, the court found that the plaintiff was able to stay home caring for that child and no longer worked outside the home. The court indicated that the evidence, which included photographs and other information, also reflected that the plaintiff and her husband enjoyed a very comfortable lifestyle[16] and that the plaintiff was able to secure the services of counsel for herself. The court concluded, from all the credible evidence, that the plaintiff was in a financial position to contribute to a portion of the fees incurred by the defendant "for the third course of litigation on the same topic concerning access to her child."

The plaintiff also complains that the court indicated she had not responded to the defendant's request for attorney's fees despite the fact that she filed a written objection to the request approximately two weeks after

[16] See footnote 6 of this opinion.

the contested hearing concluded. In that objection, which was drafted by the plaintiff's attorney, the plaintiff failed to focus on the governing law the court properly applied, § 46b-62, and instead relies on accusations of misconduct on the part of the defendant's attorney and argues that the award of fees would have the effect of penalizing her for seeking to secure her fundamental rights to her child. Because the plaintiff's objection never addressed the relevant criteria in § 46b-62, which nowhere requires a determination whether the plaintiff's motion for modification was filed in good faith, we believe the court's failure to acknowledge her inapposite objection was error, but that, under the circumstances present, it constituted harmless error because it was unlikely to have impacted the result of this case.

We further note that in considering the criteria under § 46b-62, the court is not required to make express findings on each of those statutory criteria. See *Talbot* v. *Talbot*, 148 Conn. App. 279, 292, 85 A.3d 40, cert. denied, 311 Conn. 954, 97 A.3d 984 (2014). On the basis of our review of the full record, we conclude that the court did not abuse its broad discretion in granting the defendant a small portion of his attorney's fees, $3500. The court specifically stated it had considered all the relevant statutory criteria, as well as the parties' testimony, evidence and the defendant's financial affidavit. If the court was unable to consider the plaintiff's financial situation in more detail, the plaintiff has no one to blame but herself because she refused to file a financial affidavit.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY K. WARD (AC 40534)

Alvord, Sheldon and Moll, Js.*

Syllabus

The defendant, who had been convicted, on pleas of guilty, of the crimes of manslaughter in the first degree and assault in the first degree in connection with an incident that occurred at a motel, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. The defendant had a long history of untreated mental health issues for which he began treatment after his arrest. After the court canvassed the defendant, the court accepted his pleas of guilty and sentenced him to a total effective sentence of twenty-five years of incarceration. Thereafter, the defendant filed a motion to correct an illegal sentence, claiming, inter alia, that he was incompetent at the time of his sentencing hearing and, therefore, that his sentence was imposed in an illegal manner. On appeal to this court, the defendant claimed that the trial court improperly dismissed his motion to correct illegal sentence for lack of subject matter jurisdiction. *Held:*

1. The defendant could not prevail on his unpreserved claim that his due process rights, under the federal constitution, were violated when the trial court failed to refer his motion to correct to the sentencing judge, whom the defendant claimed was familiar with the defendant and his mental health issues, and was better situated to consider the issues raised in the motion to correct; this court previously has determined that due process does not require the sentencing court to hear and adjudicate a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner, there was no appellate authority in support of the defendant's claim, and due process, which seeks to assure a defendant a fair trial, not a perfect one, does not mandate that a motion to correct an illegal sentence or a sentence imposed in an illegal matter be heard by the judge whom the defendant preferred or who had the greatest familiarity with the defendant.
2. The trial court did not err in dismissing the motion to correct an illegal sentence for lack of subject matter jurisdiction, as the defendant failed to set forth a colorable claim that his sentence was imposed in an illegal manner; the defendant's motion failed to establish any possibility that he was incompetent at the time of sentencing or that there was sufficient information before the sentencing court requiring a competency examination and hearing prior to the defendant's sentencing, although the parties and the sentencing court were aware that the defendant had a history of mental health issues, nothing in the transcripts indicated that

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

he had been incompetent when he was sentenced or that a competency evaluation and hearing prior to sentencing were required, and a police report, psychiatric report and records on which the defendant relied in support of his claim could not be viewed reasonably to support a conclusion that he was incompetent at the time of sentencing, as those records suggested that the defendant had a history of mental health issues and was at risk of experiencing symptoms in the future, but failed to demonstrate that there was any likelihood that he was incompetent when sentenced.

(*One judge dissenting in part and concurring in part*)

Argued February 11—officially released October 29, 2019

Procedural History

Substitute information charging the defendant with the crimes of manslaughter in the first degree and assault in the first degree, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on pleas of guilty; judgment of guilty; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Aimee Lynn Mahon, assigned counsel, with whom was *Temmy Ann Miller*, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Jeffrey K. Ward, appeals from the judgment of the trial court dismissing his motion to correct a sentence imposed in an illegal manner (motion to correct). On appeal, the defendant claims that the court erred in (1) adjudicating the motion to correct, rather than referring the motion to the sentencing court, and (2) concluding that it lacked subject

matter jurisdiction over the motion to correct.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the appeal. On June 25, 2012, pursuant to a plea agreement, the defendant pleaded guilty to manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) and assault in the first degree in violation of General Statutes § 53a-59 (a) (1) in connection with an incident that had occurred at a motel in Enfield on September 29, 2011. After canvassing the defendant, the trial court, *Alexander*, *J.*, accepted the defendant's guilty pleas. On July 23, 2012, following a sentencing hearing, Judge Alexander sentenced the defendant to a period of twenty years of incarceration on the count of manslaughter in the first degree and five years of incarceration on the count of assault in the first degree, to run consecutively to the sentence on the count of manslaughter in the first degree, for a total effective sentence of twenty-five years of incarceration, as agreed to by the parties.[2] The defendant did not appeal from his conviction.

On November 3, 2016, pursuant to Practice Book § 43-22, the defendant filed the motion to correct, accompanied by a memorandum of law and exhibits. Specifically, the defendant contended that his sentence was imposed in an illegal manner on the grounds that (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, that a competency evaluation and hearing be conducted pursuant to General Statutes § 54-56d before the defendant's sentencing on the basis of information known to the sentencing court.

[1] For ease of discussion, we address the defendant's claims in a different order than they are set forth in his principal appellate brief.

[2] In addition to pleading guilty to manslaughter in the first degree and assault in the first degree, the defendant admitted to two counts of violating his probation in violation of General Statutes § 53a-32. Judge Alexander revoked and terminated the defendant's probations.

On November 17, 2016, the trial court, *Dewey, J.*, held a hearing on the motion to correct. At the outset of the hearing, the state argued that the court lacked subject matter jurisdiction over the motion to correct, contending that the defendant's claims should be raised by way of a petition for a writ of habeas corpus. In addition, the state argued that the record did not demonstrate that the defendant's sentence was imposed in an illegal manner. The defendant argued that the court had subject matter jurisdiction over the motion to correct because his alleged incompetence at the time of sentencing and the sentencing court's failure to order, sua sponte, that a competency evaluation and hearing be conducted before sentencing were germane to the legality of the manner in which his sentence was imposed. Following argument, the court reserved its decision regarding jurisdiction and heard the parties on the merits of the motion to correct. On March 7, 2017, the court issued a memorandum of decision dismissing the motion to correct for lack of subject matter jurisdiction. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that Judge Dewey erred in hearing and ruling on the motion to correct, rather than referring the motion to correct to Judge Alexander, the sentencing judge. Specifically, the defendant asserts that due process[3] required the motion to correct to be adjudicated by Judge Alexander, who, as the sentencing judge, had observed and interacted with the defendant, was familiar with the defendant and his mental health issues, and was better situated to consider the issues raised in the motion to correct. We are not persuaded.

[3] The defendant does not specify whether his due process claim is raised pursuant to the federal constitution or the state constitution. Therefore, we treat the defendant's claim as limited to the federal constitution. See *State* v. *Alvarez*, 257 Conn. 782, 796 n.10, 778 A.2d 938 (2001).

As a preliminary matter, the defendant concedes that this claim is unpreserved;[4] he argues, however, that his unpreserved claim is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Jerrell R.*, 187 Conn. App. 537, 543, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

At the outset, in response to a question raised by the state in its appellate brief, we note that the defendant's unpreserved claim does not fall within the ambit of those cases that stand for the proposition that a defendant is not entitled to *Golding* review of an unpreserved claim challenging the legality of a sentence that was not raised by way of a motion to correct an illegal sentence. See, e.g., *State* v. *Gang Jin*, 179 Conn. App. 185, 195–96, 179 A.3d 266 (2018). Here, the unpreserved claim at issue concerns the actions of Judge Dewey

[4] Not only did the defendant never request that Judge Alexander adjudicate the motion to correct, but the proposed order attached to the motion to correct specifically contemplated Judge Dewey being the deciding authority.

in not referring the motion to correct to Judge Alexander, as opposed to the legality of the sentence imposed by Judge Alexander, and, thus, *Golding* review may be available. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 67 n.2, 967 A.2d 41 (2009) (rejecting respondent's argument that *Golding* review inapplicable in all circumstances arising from appeal from judgment of habeas court and concluding that *Golding* review may be available to challenge certain actions of habeas court); see also *State* v. *White*, 182 Conn. App. 656, 673–74, 191 A.3d 172 (concluding that defendant's unpreserved claim, that trial court erred by not recusing itself from hearing merits of motion to correct illegal sentence, failed under third prong of *Golding*), cert. denied, 330 Conn. 924, 194 A.3d 291 (2018).

The defendant's unpreserved claim, that, as a matter of law, the sentencing court was the only judicial authority permitted to decide the motion to correct, meets the first two prongs of *Golding* and, therefore, is reviewable. Turning to the first prong of *Golding*, we conclude that the record is adequate to review the defendant's claim of error. With respect to the second prong of *Golding*, the defendant's due process claim is of constitutional magnitude. See *State* v. *Battle*, 192 Conn. App. 128, 144, A.3d (2019) (claim that defendant's right to due process was violated because sentencing court did not act on motion to correct illegal sentence was of constitutional magnitude).

Although the defendant's due process claim is reviewable, we conclude that the claim does not satisfy the third prong of *Golding* in light of this court's recent decision in *State* v. *Battle*, supra, 192 Conn. App. 146–47, wherein this court concluded that due process does not require the sentencing court to hear and adjudicate a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner.

In *Battle*, this court observed that the current version of Practice Book § 43-22[5] "does not limit the 'judicial authority' empowered to correct an illegal sentence or a sentence imposed in an illegal manner to the sentencing court." Id., 145. This court further observed that there was no appellate authority "holding that a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner *must* be heard and adjudicated by the particular judge who imposed the sentence." (Emphasis in original.) Id. Ultimately, this court concluded: "Due process does not mandate that a motion to correct an illegal sentence or a sentence imposed in an illegal manner be heard by the judge whom the defendant prefers or who has the greatest familiarity with the defendant. Due process seeks to assure a defendant a fair trial, not a perfect one." (Internal quotation marks omitted.) Id., 146–47.

The defendant's due process claim is controlled by *Battle*. Accordingly, we conclude that the defendant in the present case did not suffer a due process violation and, therefore, his claim fails under the third prong of *Golding*.[6]

[5] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[6] In his reply brief, the defendant asserts for the first time that we should invoke our inherent supervisory authority to review his unpreserved claim if we conclude that his claim fails under *Golding*. "Generally, this court does not consider claims raised for the first time in a reply brief." *Perry* v. *State*, 94 Conn. App. 733, 740 n.5, 894 A.2d 367, cert. denied, 278 Conn. 915, 899 A.2d 621 (2006). Even if the defendant's request were proper, we observe that "[b]ypass doctrines permitting the review of unpreserved claims such as [*Golding*] and plain error, are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived

II

We now turn to the defendant's claim that the court erred in dismissing the motion to correct for lack of subject matter jurisdiction. Specifically, the defendant asserts that the court misconstrued his claim in the motion to correct, which led the court to conclude erroneously that it lacked subject matter jurisdiction over the motion to correct. He contends that he raised a colorable claim contesting the legality of the manner in which his sentence was imposed, thereby invoking the court's subject matter jurisdiction. Although we agree with the defendant that the court's analysis in dismissing the motion to correct was flawed, we nevertheless conclude that the defendant failed to present a colorable claim that his sentence was imposed in an illegal manner, and, thus, the court properly dismissed the motion to correct for lack of subject matter jurisdiction.

We begin by setting forth the relevant standard of review and legal principles that guide our analysis of the defendant's claim. "Because the defendant's [claim] pertain[s] to the subject matter jurisdiction of the trial court, [it] . . . present[s] a question of law subject to the plenary standard of review. . . .

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so

fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Leach*, 165 Conn. App. 28, 35–36, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016). We see no reason to invoke our supervisory powers here.

because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . .

"[Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . .

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 242–44, 170 A.3d 139 (2017). Pursuant

to § 54-56d (a), "[a] defendant shall not be tried, convicted *or sentenced* while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense." (Emphasis added.) A defendant is presumed to be competent, and the burden of proving that a defendant is not competent is on the party raising the issue, or on the state if the trial court raises the issue. See General Statutes § 54-56d (b). In addition, "[i]f, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency." General Statutes § 54-56d (c).

In the motion to correct, the defendant claimed that his sentence was imposed in an illegal manner because (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, that a competency hearing be held prior to sentencing on the basis of information known to the court. The defendant also asserted that he had been incompetent when he had entered his guilty pleas on June 25, 2012, and that he believed that he was entitled to withdraw his guilty pleas if the motion to correct were granted and a new sentencing hearing were ordered; however, he stated expressly in the motion to correct that "[t]he issue [raised in the motion to correct] . . . is [the defendant's] sentencing, and given [the defendant's] incompetence at the time, it was imposed in an illegal manner." In addition, during the hearing held on the motion to correct, defense counsel stressed that the defendant was not challenging the legality of his sentence but, rather, the legality of the manner in which it was imposed. The defendant submitted the following with the motion to correct: four pretrial transcripts and the sentencing transcript; a police report;

a report completed following a psychiatric evaluation of the defendant (psychiatric report), which was filed under seal; and certain of the defendant's psychiatric records from the Department of Correction (psychiatric records), which were filed under seal.

In its memorandum of decision dismissing the motion to correct, the court interpreted the defendant's chief claim to be that "[the defendant] was incompetent at the time of sentencing and, consequently, the sentence was imposed in an illegal manner." The court continued: "The difficulty with the defendant's position is that the sentencing procedure in the present case complied with all constitutional and statutory requirements." Citing *State* v. *Robles*, 169 Conn. App. 127, 133, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017), the court determined that the defendant's claims did not fall into any of the categories of claims identified in *Robles* over which a trial court has jurisdiction to modify a sentence after it has commenced. The court then determined that, in substance, the defendant was making an improper collateral attack on his conviction on the basis of his purported incompetence. The court determined that the defendant had entered his guilty pleas knowingly, intelligently, and voluntarily, and that a motion to correct was not the proper vehicle by which to challenge the voluntariness of his pleas.

In addition, the court stated that the defendant "suggests that the trial court has an obligation, sua sponte, to suspect the defendant's competency. Nothing in the record before the trial court reflected an inappropriate mental health status. To the contrary, there was a presumption in favor of competence." The court determined that nothing in the pretrial proceedings demonstrated that the defendant was unable to assist in his defense or to consult with his counsel, and that the court's participation in the pretrial proceedings had not put the court on notice that a more searching inquiry

into the defendant's competence to enter his guilty pleas was necessary.

We agree with the defendant that the court's analysis in dismissing the motion to correct was flawed. After the court correctly construed the defendant's claim to be that his sentence was imposed in an illegal manner stemming from his alleged incompetence at the time of sentencing, the court determined that the defendant's claim failed to fall into any of the categories recited in *Robles* and, thus, the court lacked jurisdiction to consider it. In *Robles*, this court stated in relevant part: "Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Internal quotation marks omitted.) *State* v. *Robles*, supra, 169 Conn. App. 133. The foregoing analysis applies, however, only to a claim that a sentence is illegal, as opposed to a claim that a sentence was imposed in an illegal manner.[7] See *State* v. *Evans*, 329 Conn. 770, 779–80, 189 A.3d 1184 (2018) (discussing trial court's

[7] The excerpt in *Robles* cited by the trial court quotes language that was first set forth by our Supreme Court in *State* v. *Lawrence*, 281 Conn. 147, 156–57, 913 A.2d 428 (2007), in analyzing the parameters of a claim that a sentence is illegal.

jurisdiction to entertain claims challenging legality of sentence and legality of manner in which sentence imposed), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). Thus, the court erred in relying on *Robles* in adjudicating the defendant's claim that his sentence was imposed in an illegal manner. In addition, the court's determination that it lacked subject matter jurisdiction over the motion to correct because the defendant was collaterally attacking his conviction and the validity of his guilty pleas was erroneous. Although the defendant argued that he would seek to withdraw his guilty pleas *if* the court granted the motion to correct and ordered a new sentencing hearing, the pleadings and the record make clear that the singular focus of the motion to correct was the sentencing proceeding and the legality of the manner in which the defendant's sentence was imposed. Thus, the court's examination of the circumstances surrounding the defendant's guilty pleas and its focus on his competence at the time that he had entered his guilty pleas were misplaced.

Although the court's analysis in dismissing the motion to correct was flawed, we nevertheless conclude that the court properly dismissed the motion to correct for lack of subject matter jurisdiction on different grounds. See *HSBC Bank USA, National Assn.* v. *Lahr*, 165 Conn. App. 144, 151, 138 A.3d 1064 (2016) (affirming judgment of trial court on different grounds). The defendant asserts that he raised a colorable claim in the motion to correct asserting that his sentence was imposed in an illegal manner and, thus, the court had subject matter jurisdiction to entertain the motion to correct.[8] We disagree and conclude that the motion to correct, on its

[8] On June 24, 2019, after the parties had submitted their respective appellate briefs and following oral argument, we, sua sponte, ordered the parties to file supplemental briefs addressing the following question: "Whether the facts pleaded by the defendant in support of his motion to correct a sentence imposed in an illegal manner were sufficient to state a colorable claim of incompetency at sentencing. See *State* v. *Mukhtaar*, 189 Conn. App. 144,

face, did not set forth a colorable claim contesting the legality of the manner in which the defendant's sentence was imposed, thereby depriving the court of subject matter jurisdiction.

"Recently, our Supreme Court explained [in *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016)], in addressing the trial court's dismissal on jurisdictional grounds of a motion to correct an illegal sentence that [t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence. . . .

"Therefore, as made clear by our Supreme Court in *Delgado*, for the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is [a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, supra, 176 Conn. App. 244–45.

150 n.6., 207 A.3d 29 (2019); *State* v. *Jason B.*, [supra], 176 Conn. App. [244–45]." The parties filed their respective supplemental briefs on July 8, 2019.

In *State* v. *Jason B.*, supra, 176 Conn. App. 241–42, the defendant filed a "motion to correct an illegal sentence," asserting that his sentence was imposed in an illegal manner because, on the basis of statements made by the sentencing court at his sentencing hearing, the sentencing court had considered information that was inaccurate and outside of the record when imposing his sentence. The trial court dismissed the defendant's motion for lack of subject matter jurisdiction, concluding that the defendant had not raised a colorable claim that his sentence was imposed in an illegal manner. Id., 242. On appeal, this court affirmed the judgment. Id., 248. After reviewing the record, this court determined that the sentencing court's statements at issue in the defendant's motion to correct could not reasonably be viewed as demonstrating that the court considered information that was inaccurate or outside of the record. Id., 245–47. Accordingly, this court concluded that the defendant's motion to correct, on its face, failed to present a colorable claim invoking the subject matter jurisdiction of the trial court. Id.

Here, in the motion to correct, the defendant asserted that his sentence was imposed in an illegal manner because (1) he had been incompetent at the time of sentencing and (2) the sentencing court had failed to order, sua sponte, a competency evaluation and hearing on the basis of information known to the court when it had sentenced the defendant. The defendant attached several exhibits to the motion to correct to support his assertions. Guided by the rationale of *Jason B.*, and for the reasons discussed as follows, we conclude that the motion to correct, on its face, did not set forth a colorable claim that the defendant's sentence was imposed in an illegal manner.

In support of the motion to correct, the defendant relied on transcripts of several pretrial proceedings and the sentencing hearing. During a pretrial proceeding on

April 10, 2012, defense counsel informed Judge Alexander that the defendant had undergone a psychiatric evaluation during the prior week and that counsel expected to receive the psychiatric report in the immediate future. Judge Alexander stated that she intended to review the psychiatric report "before we can start discussing any disposition . . . ." During a pretrial proceeding on April 26, 2012, defense counsel informed Judge Alexander that additional information needed to be provided to the psychiatrist to complete the psychiatric report for the court's review. During a pretrial proceeding on May 15, 2012, the court stated that it was going to continue the case as a result of ongoing plea discussions. There was no mention of the defendant's psychiatric evaluation or mental health during the May 15, 2012 hearing. During a pretrial proceeding on June 25, 2012, after canvassing the defendant, the trial court accepted the defendant's guilty pleas. There was no discussion of the defendant's psychiatric evaluation or mental health at that time. During the sentencing hearing on July 23, 2012, the prosecutor stated that sentencing the defendant to a total effective sentence of twenty-five years of incarceration was an appropriate disposition as a result of the defendant's "psychiatric background" and "mental health history." In addition, defense counsel represented that the defendant had been experiencing "psychotic symptoms which diminished his capacity to conform his behavior to the law" at the time of the incident in September, 2011. Defense counsel also noted that the psychiatrist hired by defense counsel to evaluate the defendant had diagnosed him with paranoid type schizophrenia; the defendant had been suffering from a mental illness throughout most of his adult life; in October, 2011, following his incarceration, the defendant began receiving mental health treatment and taking anti-psychotic medication; and the defendant's symptoms had improved significantly and,

at the time of the sentencing hearing, he was "calm, rational, and . . . [understood] and [appreciated] the seriousness of this situation." Before sentencing the defendant, Judge Alexander acknowledged that the defendant had a "mental health disease," she accepted defense counsel's representations that the Department of Correction was treating the defendant, and she commented that she hoped the defendant would continue to take the proper medication as it was "essential for [his] clear thinking." In the motion to correct, the defendant asserted that the transcripts demonstrated that the parties and Judge Alexander were aware that the defendant had "serious mental health issues" prior to his sentencing.

Next, the defendant relied on a police report dated September 30, 2011. The police report indicated that during an interview conducted by a police detective on that day, the defendant inserted a pencil approximately five to six inches into his right nostril and, after the detective had intervened, the defendant attempted to stab himself in the neck with the pencil, causing a minor laceration. In the motion to correct, the defendant asserted that the police report helped demonstrate that he had been incompetent at the time that he was sentenced.

The next item on which the defendant relied was the psychiatric report, which included a cover letter dated May 8, 2012. The psychiatrist who authored the psychiatric report based his findings on information that he had gathered from, inter alia, a ninety minute interview with the defendant conducted on April 5, 2012, three and one-half months before sentencing. In the motion to correct, the defendant asserted that the psychiatric report contained findings establishing that the defendant was socially withdrawn as an adolescent[9] and

[9] The defendant was born in 1977.

began experiencing auditory hallucinations in his early twenties, which led the defendant to attempt to commit suicide on multiple occasions; the defendant experienced episodes of paranoid ideation and depression; the defendant displayed significant mood symptoms and obsessive and compulsive symptoms, which interfered with his ability to think; the defendant had paranoid type schizophrenia; the defendant had been receiving and responding well to anti-psychotic medication, but he had suffered from psychotic symptoms for many years without treatment, which could contribute to an increased likelihood of worse, chronic, and/or more frequent exacerbations of symptoms; and even with continued treatment, the defendant was at a significant risk of continuing to suffer symptoms of his schizophrenia. The defendant contended that the findings set forth in the psychiatric report helped demonstrate that he had been incompetent when sentenced.

Last, the defendant relied on the psychiatric records, which comprised clinical records from the Department of Correction. In the motion to correct, the defendant asserted that the psychiatric records revealed that in October, 2011, the defendant reportedly was having auditory hallucinations and exhibiting paranoid thought processes, and that he did not believe that his medications were working; on May 4, 2012, the defendant reportedly failed to take several doses of medication; on May 31, 2012, the defendant reportedly was referred to "psych for med. re-evaluation" and reportedly stated that he had "agreed to 20 years for murder" but was not yet sentenced; on July 2, 2012, the defendant reportedly missed multiple doses of medication, although he was not exhibiting symptoms of his psychosis; on July 11, 2012, the defendant reportedly missed taking his medication "intermittently" and reportedly was hearing voices at night; on July 13, 2012, the defendant reportedly stated that he was going to be sentenced to twenty

years of incarceration for manslaughter and that his medication was working to suppress the voices but not his depression; and on August 24, 2012, the defendant reportedly stated that he had been sentenced to thirty years of incarceration for manslaughter. The defendant contended that the psychiatric records helped establish that he had been incompetent at the time of his sentencing.

We conclude that, on its face, the motion to correct did not raise the possibility that the defendant was incompetent at the time of his sentencing or that Judge Alexander had information prior to sentencing that required her to order that a competency evaluation and hearing be conducted. The pretrial and sentencing transcripts indicate that the parties and Judge Alexander were aware that the defendant had a history of mental health issues, but nothing in the transcripts raises any indication that the defendant had been incompetent when he was sentenced or that a competency evaluation and hearing prior to sentencing were required. Likewise, the police report, the psychiatric report, and the psychiatric records cannot be viewed reasonably to support a conclusion that the defendant was incompetent at the time of sentencing.[10] The incident described in the police report, which occurred in September, 2011, well before the defendant's sentencing and before the defendant had begun receiving mental health treatment from the Department of Correction, provides no support for the proposition that the defendant was incompetent at the time of sentencing. The psychiatric report, dated over two months prior to the defendant's sentencing, suggests that the defendant had a history of mental health issues and was at risk of

[10] There is nothing in the record to suggest that Judge Alexander had been provided with the police report, the psychiatric report, or the psychiatric records prior to sentencing, and, thus, Judge Alexander could not have relied on those documents to consider ordering that a competency evaluation and hearing be conducted.

experiencing symptoms in the future, but it does not establish that there was any likelihood that the defendant was incompetent when sentenced. Similarly, the representations in the psychiatric records that, in the weeks and months preceding his sentencing, the defendant had failed to maintain a strict medication schedule and had experienced symptoms associated with his mental health issues do not imply that the defendant was incompetent when sentenced. In addition, the statements reportedly made by the defendant before and after his sentencing suggesting that he misunderstood the length of his sentence cannot be viewed rationally as establishing that he was not competent at the time of his sentencing. Accordingly, the defendant failed to raise a colorable claim in the motion to correct that his sentence was imposed in an illegal manner.[11]

The defendant, citing *State* v. *Evans*, supra, 329 Conn. 770, appears to contend that his claim that his sentence

[11] We observe that in *State* v. *Mukhtaar*, supra, 189 Conn. App. 149–50, the defendant appealed from a judgment dismissing his motion to correct an illegal sentence in which he asserted that his sentence was illegal because, inter alia, the trial court had failed to order a competency hearing on his behalf before or after his criminal trial. This court concluded that the trial court lacked jurisdiction to entertain that claim because the defendant was not attacking the sentencing proceeding itself. Id., 150. In a footnote, this court additionally stated that "a claim regarding a defendant's competency at the sentencing proceeding; see General Statutes § 54-56d (a); or a claim that the court failed to inquire, sua sponte, into a defendant's competency at the sentencing proceeding when there is sufficient evidence at that proceeding to raise a reasonable doubt as to whether that defendant can understand the proceeding or assist in his or her defense therein; *State* v. *Yeaw*, 162 Conn. App. 382, 389–90, 131 A.3d 1172 (2016); would fall within the jurisdiction of the trial court for the purpose of a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22." Id., 150 n.6. Our conclusion that the court lacked subject matter jurisdiction over the motion to correct in the present case does not conflict with the aforementioned language in *Mukhtaar*. If the defendant had raised a colorable claim in the motion to correct regarding his competency at the time of his sentencing or the sentencing court's failure to order that a competency evaluation and hearing be conducted, then the court would have had subject matter jurisdiction over the motion. Because the defendant failed to raise a colorable claim in the motion to correct, however, the court lacked subject matter jurisdiction to entertain the motion.

was imposed in an illegal manner is colorable per se because his claim challenges the actions of the sentencing court and, if successful, would require a new sentencing hearing. We are not persuaded.

In *Evans*, our Supreme Court concluded that the trial court had subject matter jurisdiction over a motion to correct an illegal sentence filed by the defendant, in which the defendant claimed that his sentence was illegal because, inter alia, under United States Supreme Court precedent, the sentence exceeded the relevant statutory limits. Id., 775. In analyzing whether the court had subject matter jurisdiction to entertain the defendant's claim, our Supreme Court stated that "[t]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . We emphasize, however, that this general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases . . . is considered in light of the common-law rule that, once a defendant's sentence has begun [the] court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Thus, the presumption in favor of jurisdiction does not itself broaden the nature of the postsentencing claims over which the court may exercise jurisdiction in criminal cases, but merely serves to emphasize that the jurisdictional inquiry is guided by the plausibility that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness. . . . In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein." (Citations omitted; internal quotation marks omitted.) Id., 784.

Our Supreme Court determined that the defendant had presented a "sufficiently plausible" interpretation of the statutes at issue in that case to render his claim "colorable for the purpose of jurisdiction over his motion [to correct an illegal sentence]" and observed that the defendant was not requesting that his conviction be disturbed but, rather, was seeking a remand for resentencing. Id., 786.

Evans supports, rather than conflicts with, our conclusion that the defendant failed to set forth a colorable claim that his sentence was imposed in an illegal manner. In *Evans*, our Supreme Court did not conclude that the defendant had raised a colorable claim contesting the legality of his sentence merely because the defendant's claim was directed to the validity of his sentence and the defendant would be entitled to a new sentencing hearing if the claim was successful; instead, our Supreme Court determined that the defendant's claim was colorable on the ground that the defendant had set forth a "sufficiently plausible" interpretation of the statutory scheme underlying his contention that his sentence exceeded statutory limits. Id., 785–86. In the present case, in contrast, the defendant's claim is not colorable because the defendant's motion to correct, on its face, failed to establish any possibility that he was incompetent at the time of sentencing or that there was sufficient information before Judge Alexander requiring a competency examination and hearing prior to the defendant's sentencing.

In sum, we conclude that the court lacked subject matter jurisdiction to entertain the motion to correct on the basis that the defendant failed to set forth a colorable claim in the motion to correct that his sentence was imposed in an illegal manner. Therefore, the court properly dismissed the motion to correct for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

SHELDON, J., concurring in part and dissenting in part. I agree with my colleagues' determination, in part I of their majority opinion, that the defendant's first claim of error—an unpreserved claim that the trial court improperly failed to refer his motion to correct an illegal sentence to the judge who imposed the challenged sentence upon him—is not reviewable and reversible under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), for the reasons stated in this court's recent decision in *State* v. *Battle*, 192 Conn. App. 128, 146-47, A.3d (2019).[1] As for the defendant's second, and principal, claim, however—that the trial court erred in dismissing his motion to correct for lack of subject matter jurisdiction because the motion purportedly challenged only the legality of his underlying conviction rather than the legality of the manner in which his sentence was imposed—I disagree with that portion of the majority's decision, in part II thereof, which concludes that, despite legal error in the trial court's jurisdictional analysis, its judgment of dismissal should be affirmed on the alternative ground that the claims pleaded in the motion to correct are not colorable claims. Concluding, as I do, that the defendant's motion to correct does state a colorable claim that he was incompetent at the time he was sentenced, which this court has recognized as a valid legal basis for moving to correct a sentence on the ground that it was imposed in an illegal manner; see *State* v. *Mukhtaar*, 189 Conn. App. 144, 150 n.6., 207 A.3d 29 (2019); I would reverse the judgment of the trial court and remand this case for further proceedings on that potentially viable

[1] Although I do not believe that the majority has reason to reach and decide the claim discussed in part I of their opinion, in light of their conclusion in part II of the opinion that the trial court lacked subject matter jurisdiction over the defendant's principal claim, I would reach that issue and dispose of it as the majority has done due to its likelihood of arising on remand if the court ordered remand as I have proposed.

aspect of the defendant's motion to correct. I respectfully dissent from the majority's conclusion to the contrary.

"[F]or the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is [a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists." (Citation omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 245, 170 A.3d 139 (2017). "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 784, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

To assess the colorability of a claim presented in a motion to correct, the court must examine the facts pleaded in the motion and in the documents and materials attached to the motion and/or relied on therein. Upon viewing such pleaded facts in the light most favorable to sustaining its exercise of jurisdiction over the claims based on them; see *Keller* v. *Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102 (2012) ("[i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged"); the court must exercise jurisdiction over any claim it finds to be colorable,

because such pleaded facts, if proved, establish a possibility that jurisdiction over the claim exists.

In his motion to correct, the defendant expressly claimed that he was sentenced in an illegal manner because he was incompetent at the time of sentencing. He filed the motion along with a detailed memorandum of law in which he argued both his incompetency at sentencing claim and an alternative claim that the sentencing court sentenced him in an illegal manner by failing to order, sua sponte, that his mental competency be evaluated by mental health professionals before it sentenced him. The defendant argued both claims in his memorandum on the basis of an extensive set of records and materials, all attached to his memorandum, which documented his lengthy history of suffering from and receiving treatment for paranoid schizophrenia, a serious mental illness that had sometimes caused him to experience hallucinations.

The defendant recounted in his memorandum that at his sentencing hearing, there was discussion of his psychiatric background, including his diagnosis of paranoid schizophrenia, by both the prosecutor and his defense attorney. The court, he noted, was presented with a report from his forensic psychiatrist, Dr. Peter Morgan, who stated that he had "suffered from the psychotic symptoms for many years without treatment, and this may contribute to an increased likelihood of worse symptoms, more chronic symptoms and/or more frequent exacerbations of symptoms." The defendant further noted that his attorney had told the court that he had been receiving mental health treatment while incarcerated, which included the administration of antipsychotic medication. He also reported that his attorney had told the court at sentencing that his symptoms had improved to the point that he was then "calm, rational, and understood and appreciated the seriousness of the situation."

Notwithstanding his attorney's foregoing representations to the court as to the course of his treatment while incarcerated and improving mental health at the time of sentencing, the defendant argued in his memorandum that substantial additional evidence had become available since the date of sentencing that shed new and important light on the course of his mental illness and psychiatric treatment prior to sentencing. The defendant argued that this new information, which was set forth in the documents and materials attached to his memorandum, demonstrated that he may not have been competent when he was sentenced despite his counsel's reassuring observations to the contrary. He claimed, more particularly, that the following events, all documented in attached records from the Department of Correction (department), demonstrated that he may have lacked a rational and factual understanding of the proceedings against him on the date he was sentenced. First, before he entered his guilty plea on June 25, 2012, the clinical records of the department reported that he had missed several doses of his prescribed anti-psychotic medication. Second, although he had agreed with the state to plead guilty to manslaughter in the first degree and assault in the first degree in exchange for a total effective sentence of twenty-five years of incarceration, he told department staff that he had agreed to a sentence of twenty years in exchange for a guilty plea to murder. Third, in the period following his guilty plea but before his sentencing on July 23, 2012, department records reported that the defendant was continuing to miss doses of his prescribed anti-psychotic medication intermittently, and at times reported experiencing auditory hallucinations. Fourth, in that same time frame, he again misstated the terms of his plea agreement, reporting incorrectly that he would be sentenced to twenty years of incarceration on the charge of manslaughter. Fifth, approximately

one month after he was sentenced to a term of twenty-five years of incarceration, he told his mental health treaters a third time that he was confused about his sentence, informing a department social worker that he was then serving a thirty year sentence for manslaughter.

On the basis of the foregoing facts, I agree with the majority's conclusion that the defendant failed to put forth a colorable claim that the trial court was required to inquire into his competence on the date he was sentenced based on the facts before it at that time.[2] I believe, however, that the defendant did put forth a colorable claim that he was incompetent in fact at the time of sentencing based primarily upon the new facts, which were documented in department records that had first come to light after the date of his sentencing. The distinction between the two claims for this purpose lies in the difference between the more limited information that was known to the sentencing court on the date of sentencing and the fuller factual record that was

[2] I note that the state argues that the defendant's claim that he was incompetent when he was sentenced, as evidenced by information that was never before the sentencing court, does not fall within the purview of Practice Book § 43-22 because the claim does not relate to any alleged error on the part of the sentencing court. In support of its argument, the state cites *State* v. *Parker*, 295 Conn. 825, 992 A.2d 1103 (2010), for the proposition that a trial court lacks subject matter jurisdiction to consider a defendant's motion to correct when the motion does not relate to any improper action by the trial court. Thus, the state argues that without evidence that the sentencing court knew of the information in the department's records at the time of sentencing, the defendant could not have been sentenced in an illegal manner. The state's reliance on *Parker* is misplaced. It is axiomatic that there are claims that fall within the purview of Practice Book § 43-22 that do not require the court to have had knowledge of the alleged error. For example, a judge who relies on materially untrue or unreliable information at sentencing imposes sentence in an illegal manner even though he or she does not then know that the information so relied on is inaccurate. See e.g., *Townsend* v. *Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Therefore, I reject the state's assertion that the court must have had knowledge of the additional evidence raised in the motion to correct at the time of sentencing for his claim to be colorable.

presented to the trial court in support of the defendant's motion to correct.

On the basis of the record before the sentencing court, which included defense counsel's contemporaneous report as to the defendant's ongoing treatment regimen and improving lucidity, I would agree with the state and the majority that the sentencing court had no obligation to order a competency evaluation, sua sponte, because there was insufficient evidence before the court to raise a reasonable doubt that he then lacked a rational and factual understanding of the proceedings against him, and thus was incompetent. See *State* v. *Yeaw*, 162 Conn. App. 382, 389–90, 131 A.3d 1172 (2016). By contrast, the additional, well documented facts presented to the trial court in the motion to correct concerning the defendant's failure to take his prescribed anti-psychotic medication in the weeks before he was sentenced, his contemporaneous experiencing of auditory hallucinations and his confusion, before and after he was sentenced, about the terms of his plea bargain and the length of his sentence, both as agreed to and as imposed, raise at least a genuine possibility that when he was sentenced he was incompetent because he lacked a rational and factual understanding of the proceedings against him due to his ongoing mental illness.

In announcing its decision that the defendant's claim that he was incompetent when he was sentenced was not colorable, the majority wrote that "the statements reportedly made by the defendant before and after his sentencing suggesting that he misunderstood the length of his sentence cannot be viewed rationally as establishing that he was not competent at the time of sentencing." Insofar as the majority's conclusion suggests that the defendant had the burden of proving that he was not competent at the time of sentencing in order for his claim to be considered colorable, it is simply incorrect. The defendant need not convince the court that he

will prevail on his claim, nor even that he will probably prevail on it, for the claim to be considered colorable; rather, he need only demonstrate that if the facts he had pleaded in support of the claim are proved, there is a possibility that he will prevail on that claim.[3] Insofar as the majority's conclusion can be read as a determination that the facts pleaded by the defendant, if proved, would be insufficient to raise even the possibility that he was incompetent at the time of sentencing, I respectfully disagree. Considered in light of the defendant's lengthy mental health history, his documented statements expressing confusion about the nature of his plea agreement and the length of his sentence, his documented failure to follow his treatment regimen in the weeks before he was sentenced and his contemporaneous experiencing of auditory hallucinations, combine to raise at least the possibility that he was incompetent when he was sentenced, and are thus sufficient to put forth a colorable claim that his sentence was imposed in an illegal manner.

[3] Similarly, the state has argued that the defendant failed to set forth a colorable claim that he was incompetent at sentencing because existing law presumes a defendant's competence; see General Statutes § 54-56d. This argument is also unavailing. The state asserts that the facts cited by the defendant in support of his claim may establish that he suffered from mental health issues, but are insufficient to overcome the presumption of competence to establish a colorable claim. The state's argument suggests that in order to establish jurisdiction for his motion to correct, the defendant is required to prove the merits of his claim, which in the present case would have required him to overcome the presumption of competence. As this court recently explained in *State* v. *Jason B.*, supra, 176 Conn. App. 244: "At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, *if the merits of the claim were reached and decided in the defendant's* favor, require correction of a sentence." (Emphasis altered). The state misconstrues this language to suggest that a defendant must prove that he would succeed on the merits of his motion to correct before it may be heard. This is not so. In order to establish subject matter jurisdiction over the motion to correct, the defendant needed only to present sufficient facts to establish that his claim of incompetence is a "possibility, rather than a certainty"; *State* v. *Jason B.*, supra, 245; and is "superficially well founded but may ultimately be deemed invalid." *State* v. *Evans*, supra, 329 Conn. 784.

For the foregoing reasons, I would conclude that the court erred in dismissing the defendant's motion to correct, and would reverse the judgment of the trial court and remand this case for further proceedings on the defendant's colorable claim that he was sentenced in an illegal manner because he was incompetent when he was sentenced. Therefore, I respectfully dissent from part II of the majority opinion.

SUMMIT SAUGATUCK, LLC *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF WESTPORT
(AC 41949)

Prescott, Bright and Bear, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant Water Pollution Control Authority of the Town of Westport denying the plaintiff's application for a sewer extension. After the matter was tried to the court, the court remanded the application for a new hearing, at which the plaintiff could produce new evidence germane to the equitable disposition of its application. Following a new hearing, the defendant again denied the plaintiff's application, and the plaintiff appealed to the trial court, which rendered judgment sustaining the second appeal, reversing the defendant's denial of the application, and remanding the application for conditional approval subject to the completion of ongoing improvements and upgrades to the sanitary sewer system. Thereafter, the defendant, on the granting of certification, appealed to this court. *Held* that the trial court improperly rendered judgment sustaining the plaintiff's appeal and remanding the matter to the defendant with direction to grant the sewer extension application, as the decision of whether to grant a conditional approval of a sewer extension application was properly left to the discretion of the defendant, and the court impermissibly substituted its own discretion and judgment for that of the defendant by overriding its decision and ordering a conditional approval of the application: the fact that a conditional approval of an application would be a viable option available to an agency in considering an application does not mean that the agency must exercise that option whenever possible and in all situations, the defendant here chose to reject the rationale relied on by the trial court in favor of a more cautious approach that required the plaintiff to file a new application once it could demonstrate that sufficient sewer capacity existed for the planned development, and the record did not support a conclusion that the defendant's

decision was illegal, arbitrary or an abuse of discretion; moreover, the defendant was entitled to a presumption of regularity in its decision-making process, as it had provided the additional rationale that it was a settled policy of the defendant not to grant conditional approval of applications, there was unrebutted testimony that the defendant had not granted a conditional approval in more than thirty years, which was sufficient to demonstrate that the defendant had a practice to refrain from granting conditional approvals, and, by choosing not to do so in the present case, it was acting in accordance with its usual practices and procedures.

Argued April 22—officially released October 29, 2019

Procedural History

Appeal from the decision of the defendant denying plaintiff's application for a sewer extension for an affordable housing development, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Shluger*, *J.*; judgment sustaining the appeal and remanding the application; thereafter, following a hearing on remand, the defendant denied the plaintiff's application, and the plaintiff appealed to the Superior Court from the denial of its application; subsequently, the court, *Shluger*, *J.*, rendered judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Peter V. Gelderman, for the appellant (defendant).

Timothy S. Hollister, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, the Water Pollution Control Authority for the Town of Westport, appeals from the judgment of the trial court sustaining the appeal of the plaintiff, Summit Saugatuck, LLC, from the defendant's decision to deny the plaintiff's application for a sewer extension to service a proposed affordable housing development. The court remanded

the matter back to the defendant with direction to approve conditionally the sewer extension application subject to the completion of ongoing improvements and upgrades of capacity to the sanitary sewer system in the town of Westport (town). On appeal, the defendant claims that the trial court, by sustaining the appeal and ordering a conditional approval of the application, improperly substituted its own judgment for the reasoned and lawful discretion exercised by the defendant. We agree and, accordingly, reverse the judgment of the trial court.[1]

The record reveals the following facts and procedural history. The plaintiff owns property or options to purchase property in an area of town that is zoned for high

[1] The defendant also claims that the trial court improperly determined that the defendant had the authority to grant the application despite a negative report from the town's planning and zoning commission that was issued pursuant to General Statutes § 8-24. That provision provides in relevant part that "[n]o municipal agency or legislative body shall . . . extend public utilities . . . until the proposal to take such action has been referred to the [municipal planning and zoning] commission for a report. . . ." Because we reverse the judgment of the trial court on the basis of the defendant's claim that the court improperly substituted its judgment for that of the defendant, it is unnecessary to decide whether the court correctly determined that a negative § 8-24 report by the town's zoning commission did not preclude, as a matter of law, the granting of the sewer extension application by the defendant. We conclude that this issue is not likely to recur on remand because our disposition requires no further action on the present application and, thus, we do not exercise our discretion to review it. See, e.g., *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009) (addressing claim likely to arise during proceeding on remand); *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 427, 142 A.3d 290 (2016) (same), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018). Furthermore, it is entirely speculative on the present record whether this precise issue, which raises complicated questions of statutory construction, is likely to arise again in the present case even if the plaintiff renews or files a revised sewer extension application and that application is referred for a new § 8-24 report. The primary reason for the prior negative report was the unfinished sewer repairs and upgrades, which may no longer be an issue. Given our reversal of the judgment on other grounds, any further discussion of the issue would be tantamount to an advisory opinion, which we cannot render. See *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 582, 589–90 n.5, 828 A.2d 676 (2003).

density development to be served by the town's sewer system. The plaintiff seeks to develop its property for multifamily residential use. A sewer extension from the town's system is needed to service the planned development.

In October, 2014, the plaintiff, pursuant to General Statutes § 7-246a,[2] applied to the defendant for approval of a private sewer extension for a proposed 186 unit affordable housing development.[3] Because a proposed sewer extension is deemed a municipal improvement, the defendant referred the application to the town's planning and zoning commission (zoning commission) for a report pursuant to General Statutes § 8-24. See footnote 1 of this opinion.

On January 8, 2015, the zoning commission held a hearing on the plaintiff's application. Steven Edwards, the town's public works director at the time, testified at the hearing that the town's existing sewer system required repairs and upgrades before it could handle the additional sewage from the proposed development. Specifically, Edwards explained that replacement of a force main running under the Saugatuck River and one of the pump stations could take up to five years.

[2] General Statutes § 7-246a provides: "(a) Whenever an application or request is made to a water pollution control authority or sewer district for (1) a determination of the adequacy of sewer capacity related to a proposed use of land, (2) approval to hook up to a sewer system at the expense of the applicant, or (3) approval of any other proposal for wastewater treatment or disposal at the expense of the applicant, the water pollution control authority or sewer district shall make a decision on such application or request within sixty-five days from the date of receipt, as defined in subsection (c) of section 8-7d, of such application or request. The applicant may consent to one or more extensions of such period, provided the total of such extensions shall not exceed sixty-five days.

"(b) Notwithstanding any other provision of the general statutes, an appeal may be taken from an action of a water pollution control agency or sewer district pursuant to subsection (a) of this section in accordance with section 8-8."

[3] In addition to the sewer extension, the application also sought a sewer capacity allocation and conditional approval to connect to the sewer system.

Edwards thought a reasonable goal for the completion of the upgrade/repairs would be the summer of 2017.

The zoning commission issued a negative report on January 26, 2015. The plaintiff elected to withdraw its application with the defendant at that time.

The plaintiff subsequently entered into an agreement with an affiliate of the Westport Housing Authority (affiliate) pursuant to which the plaintiff would develop eighty-five market rate units and the affiliate would develop seventy adjacent affordable housing units. On April 11, 2016, the plaintiff reapplied to the defendant to construct a private sewer extension to service this new planned development.

In June, 2016, the defendant referred the plaintiff's latest application to the zoning commission for a § 8-24 report. Following a hearing on July 7, 2016, the zoning commission again issued a negative report due to the as yet incomplete upgrades to the sewer system, which it concluded were not likely to be accomplished for another two to four years.[4] Despite the negative report, the plaintiff chose not to withdraw its application from consideration by the defendant. The defendant then held a public hearing on the plaintiff's sewer extension application on July 21, 2016. At that hearing, the plaintiff offered evidence about the projected timeline for the completion of the sewer upgrades and proposed that the defendant approve its application conditioned upon the final completion of all necessary upgrades to the sewer as well as the receipt of necessary wetlands and site plan approvals.

The defendant denied the plaintiff's application on July 27, 2016. The defendant concluded, in relevant part, that (1) the application violated a town policy that

[4] The town had appropriated money needed to upgrade the sewer system in 2015 and had contracted out the design work.

purportedly required a positive § 8-24 report from the zoning commission as a prerequisite to proceeding with a sewer extension application; (2) regardless of that policy, § 8-24 itself required a positive report from the zoning commission before the defendant could approve an application unless approval was obtained from the representative town meeting,[5] which had not occurred here; and (3) given remaining uncertainties and risks associated with the planned force main replacement and pump station upgrade, it would be unwise for the defendant to issue an approval conditioned upon the plaintiff's agreement to defer construction of the sewer extension until repairs were completed rather than simply requiring the plaintiff to wait and reapply after all necessary repairs and improvements were finished and sufficient capacity existed.

The plaintiff filed an appeal from that ruling with the Superior Court on August 31, 2016. In addition to its supporting brief, the plaintiff filed a motion for permission to supplement the record. The defendant objected to the motion to supplement and later filed its brief opposing the plaintiff's appeal. The plaintiff filed a reply brief and a second motion for permission to supplement the record. The matter was heard on April 26, 2017.

In a decision filed on August 1, 2017, the trial court sustained the plaintiff's appeal. The court determined that the negative report issued by the zoning commission pursuant to § 8-24 was only advisory in nature and in no way was binding on the defendant, and, thus, it

[5] The representative town meeting is the legislative body of the town. General Statutes § 8-24 provides in relevant part that "[a] proposal disapproved by the commission shall be adopted by the municipality . . . only after the subsequent approval of the proposal by (A) a two-thirds vote of the town council where one exists, or a majority vote of those present and voting in an annual or special town meeting, or (B) a two-thirds vote of the representative town meeting or city council or the warden and burgesses, as the case may be. . . ."

had been improper for the defendant to rely primarily on the negative report of the zoning commission as the basis for denying the plaintiff's sewer application, rather than considering the merits of the application.[6] Accordingly, the court remanded the application to the defendant "for a new hearing on the matter, at which [the plaintiff] may produce new evidence germane to the equitable disposition of its application."[7]

On September 27, 2017, the defendant held a hearing in accordance with the court's remand order, which was continued to October 25, 2017. Because the plaintiff's joint venture agreement with the affiliate had terminated, the plaintiff informed the defendant on remand that it was pursuing the application with respect to a new affordable housing plan that consisted of 187 units for which the plaintiff would be the sole developer.[8] The plaintiff presented evidence that the construction of the force main replacement and the upgrade

[6] The trial court found that the zoning commission's negative report was not based on any identified concern regarding the plan of development or existing zoning regulations but solely on the basis of sewer capacity, which was an issue for the defendant and outside the authority of the zoning commission to consider. This observation caused the court to question the motive behind the zoning commission's decision to issue a negative report. The court made no express finding, however, that the defendant's decision was similarly the result of an improper motive or bias.

[7] The plaintiff's motions to supplement the record sought to offer evidence demonstrating that the sewer upgrades and repairs were on track to be completed by the summer of 2017, which contradicted the testimony of the public works director that the repairs could take as long as four years to complete. The defendant argued that the evidence the plaintiff sought to admit postdated its decision to deny the sewer extension application and, thus, was not relevant to the issues raised in the appeal. The court determined that the additional evidence was "necessary for the equitable disposition of the appeal" and granted the motions to supplement the record. The defendant has not challenged the court's decision to grant those motions as part of its appeal to this court. Furthermore, the supplemental information at issue was presented to and considered by the defendant on remand.

[8] Although the defendant later argued to the trial court that this change in development plans exceeded the scope of the court's remand order, the court rejected that argument indicating that, although the plaintiff revised the number of units from 155 to 187, that change had no meaningful effect

to the pump station were scheduled to begin in December, 2017, and were to be completed in March, 2018. The plaintiff also submitted evidence demonstrating that all municipal, state, and federal permits for the sewer construction had issued and that the project was funded fully.

On October 25, 2017, the defendant nevertheless again denied the plaintiff's supplemented sewer extension application. It provided the following reasons for its decision: (1) "[T]he estimated date of completion of the replacement of the force main under the Saugatuck River and the upgrades to Pump Station # 2 is likely to be summer of 2018"; (2) "currently there is not sufficient capacity in the system to accommodate the proposed sewer line extension"; (3) the defendant agreed with Edwards' recommendation "against approving any project, whether conditional or not, that required more capacity than is available"; (4) the defendant, as a matter of policy, had never granted a conditional approval because "[e]vents could occur after a conditional approval that, if known at the time of approval, would have caused an application to be denied or modified," and "[t]here is no reason to grant approvals to extend a sewer prior to the time when the extension can physically be implemented"; (5) "[a]llocation of capacity prior to the completion of necessary work by the town is unfair to other developers and potential users who have been advised to wait until the work is complete to file applications"; (6) "although it is not the function of the [defendant] to consider land use issues in making its decisions (other than to the extent capacity may be affected), the application submitted by the [plaintiff] pursuant to the remand order was substantially different from the application that is the

on the issue of available capacity and, therefore, was inconsequential in nature. In the present appeal, the defendant has not challenged this aspect of the court's decision.

subject of the appeal"; and (7) "[the plaintiff] failed to provide a compelling reason to grant a conditional approval. The [plaintiff's] only stated reason was that it would benefit its ability to plan its project. That reason does not outweigh the public policy reasons for not granting conditional approvals (as set forth in item #4 . . .)."

The plaintiff again appealed the denial of its application to the Superior Court, arguing that its property was located in the town's sewer district and, thus, could not be developed without sewer access. The plaintiff further claimed that the record was clear that ample sewer capacity exists or soon would exist for the proposed use, there had been no showing of any engineering impediments to tying into the sewer system, and the sewer extension would be privately funded. According to the plaintiff, on those facts, the defendant had a nondiscretionary duty to grant the sewer extension application or, in the alternative, abused its discretion by failing to do so.

Following briefing, the appeal was heard on April 3, 2018.[9] The court again sustained the plaintiff's appeal and reversed the decision of the defendant. In a memorandum of decision filed on May 7, 2018, the court

[9] In its brief to this court, the plaintiff claims that, at the April 3, 2018 hearing, the parties stipulated that the new force main had been installed under the Saugatuck River but was not yet connected to the town's sewer system, although this would be accomplished within forty-five to sixty days. The parties also allegedly stipulated that the upgrade to the pump station would occur no later than August, 2018 and that, once these steps were completed, the town's sewer system would have sufficient capacity for the plaintiff's proposed residential development. If such a written stipulation or motion was filed, it does not appear in the record. Furthermore, neither of the parties included a copy of any written stipulation in its appendix, and, if oral, neither party ordered a transcript of the hearing before the trial court. Accordingly, we have no way of verifying what facts, if any, were stipulated to before the trial court. This lacuna in the record hampers our consideration of whether and to what degree the alleged stipulated facts may have influenced the court's decision to sustain the appeal and to order the conditional approval of the plaintiff's application.

rejected the plaintiff's argument that the defendant had a ministerial duty to grant its extension because the plaintiff did not seek merely to connect to an existing sewer system but to construct an extension to that system, which required the defendant to exercise judgment and discretion. See *Dauti Construction, LLC* v. *Water & Sewer Authority*, 125 Conn. App. 652, 664, 10 A.3d 84 (2010) (noting that, in determining whether water pollution control authority's action was ministerial or discretionary in nature, courts distinguish between requests to connect to an existing sewer system and those seeking to construct an extension to sewer system), cert. denied, 300 Conn. 924, 15 A.3d 629 (2011). The court nevertheless agreed with the plaintiff that the defendant's denial of the sewer extension application was arbitrary and an abuse of its discretion. The court concluded that the defendant had based its decision primarily on the fact that the sewer upgrades and repairs necessary to provide the capacity for the plaintiff's proposed development had not been completed, rather than on any potential topographical or engineering considerations. Rather than render a decision on the basis of the merits of the application, the court determined that the defendant arbitrarily had decided that the application was premature and that issuing a conditional approval was against an established policy.

The court remanded the application to the defendant for a second time, now with direction that it conditionally approve the application for the project as amended, subject to the following conditions: "(1) Construction of the sewer extension may not begin until such time as the force main replacement under the Saugatuck River and the upgrade of the pump station number two are complete and the town's public works director confirms that the public sewer system has the capacity to receive, transport, and discharge to the treatment plant the sewage to be discharged from the applicant's

proposed multifamily residential development. Construction of the sewer extension includes cutting of trees and clearing of vegetation.

"(2) The applicant understands and accepts that it may be assessed a cost of an upgrade to the capacity of pump station number two." This court subsequently granted the defendant's petition for certification to appeal, and the defendant timely filed the present appeal.[10]

The defendant claims that, by sustaining the plaintiff's appeal and remanding the matter back to the defendant with direction to grant the sewer extension application, the trial court improperly substituted its own

[10] The trial court's judgment remanding the case to the defendant raises the issue of whether the trial court's ruling constitutes an appealable final judgment. Appeals from the decisions of water pollution control authorities are not governed by the Uniform Administrative Procedure Act, General Statutes § 4-183 (j), which expressly provides that "a remand is a final judgment." Rather, such appeals are governed by § 7-246a (b), which provides in relevant part that "an appeal may be taken from an action of a water pollution control agency . . . in accordance with [General Statutes §] 8-8," the statute governing appeals from zoning boards and commissions. Thus, as with a zoning appeal, "it is the scope of the remand order in [a] particular case that determines the finality of [a] trial court's judgment." (Internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 688, 950 A.2d 1, cert. denied, 289 Conn. 942, 959 A.2d 1008, cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008). "A judgment of remand is final if it so concludes the rights of the parties that further proceedings cannot affect them. . . . A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). In the present case, the trial court's remand order directed the agency to approve the plaintiff's sewer extension application and did not require it to make further evidentiary determinations before doing so. Consequently, the trial court's decision so concluded the rights of the parties that further proceedings could not affect them, and, thus, the trial court's remand order constitutes an appealable final judgment. See id., 131; see also *Children's School, Inc.* v. *Zoning Board of Appeals*, 66 Conn. App. 615, 617–19, 785 A.2d 607 (final judgment because remand ordered approval of special exception application subject to conditions and zoning board not required to make further evidentiary determinations), cert. denied, 259 Conn. 903, 789 A.2d 990 (2001).

judgment for the reasoned and lawful discretion exercised by the defendant. The defendant advances several arguments related to its claim. First, it argues that the court failed to identify any specific statute or regulation that the defendant violated by denying the sewer extension application, which had included a request to grant conditional approval. Next, it argues that, although the court concluded that the defendant did not have a ministerial duty to grant the application but, rather, was entitled to exercise its discretion in determining whether to approve the application, the court effectively rendered the decision ministerial by concluding that because the plaintiff's application complied with all of the defendant's engineering and administrative requirements, the failure to grant approval was arbitrary. The defendant further argues that, contrary to the court's decision, there was evidence in the record demonstrating that the defendant had not granted a conditional approval in the past thirty years, which effectively constituted a policy to which the defendant was entitled to adhere. Finally, the defendant contends that the court used language that appeared to imply, without any supporting evidence, that the defendant's denial of the application was motivated by a bias against affordable housing.

The plaintiff counters that, on the basis of the record presented, the court properly determined that the defendant acted arbitrarily and abused its discretion in failing to grant a conditional approval. In addition to reasserting its argument that the defendant had a ministerial obligation to approve the sewer extension application, the plaintiff contends that, even if the defendant's action was discretionary, it abused that discretion because it used its limited authority over the sewer system to make a land use decision and to improperly thwart an unwanted multifamily residential development. We agree with defendant that, under the circumstances, whether to grant a conditional approval of a sewer extension application was a decision properly

left to the discretion of the defendant, and the court impermissibly substituted its own discretion and judgment for that of the defendant by overriding its decision and ordering a conditional approval of the application.

We begin by setting forth applicable principles of law, including our standard of review. "[W]ater pollution control authorities are quasi-municipal corporations created pursuant to statute that may exercise the power to acquire, construct, maintain, supervise, manage and operate a sewer system and perform any act pertinent to the collection, transportation and disposal of sewage. . . . In defining the powers and duties of such authorities, [General Statutes] § 7-247 (a) provides, inter alia, that they may establish and revise rules and regulations for the supervision, management, control, operation and use of a sewerage system, including rules and regulations prohibiting or regulating the discharge into a sewerage system of any sewage or any stormwater runoff which in the opinion of the water pollution control authority will adversely affect any part or any process of the sewerage system . . . ." (Citation omitted; internal quotation marks omitted.) *Dauti Construction, LLC* v. *Water & Sewer Authority*, supra, 125 Conn. App. 661.

Accordingly, "[i]n considering an application for sewer service, a water pollution control authority performs an administrative function related to the exercise of its powers. . . . When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion . . . . Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated. . . .

"With respect to factual findings, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the authority] must be upheld by the trial court if they are reasonably supported by the record. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a [water pollution control authority's] findings, it cannot substitute its judgment as to the weight of the evidence for that of the [authority]. . . . If there is conflicting evidence in support of the [authority's] stated rationale, the reviewing court . . . cannot substitute its judgment for that of the [authority]. . . . The [authority's] decision must be sustained if an examination of the record discloses evidence that supports *any one of the reasons given*. . . . Accordingly, we review the record to ascertain whether it contains such substantial evidence and whether the decision of the defendant was rendered in an arbitrary or discriminatory fashion. . . . We review the court's decision to determine if, when reviewing the decision of the administrative agency, it acted unreasonably, illegally, or in abuse of its discretion." (Citation omitted; emphasis added; internal quotation marks omitted.) *Landmark Development Group, LLC* v. *Water & Sewer Commission*, 184 Conn. App. 303, 316–17, 194 A.3d 1241, cert. denied, 330 Conn. 937, 195 A.3d 385, cert. denied, 330 Conn. 937, 195 A.3d 386 (2018).

As our Supreme Court has emphasized, "water pollution control authorities are afforded broad discretion in deciding whether to provide sewer service to property owners, but cannot exercise that discretion in an arbitrary or discriminatory manner . . . ." *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 279, 968 A.2d 345 (2009). Only if it appears that a

public agency reasonably could have reached only one conclusion is it proper for a court to "direct that agency to do that which the conclusion requires." *Dauti Construction, LLC* v. *Water & Sewer Authority*, supra, 125 Conn. App. 664.

Turning to the present case, one of the reasons stated by the defendant for denying the supplemented application was that there currently was insufficient capacity in the sewer system to service the proposed development. Although it was anticipated that the system would have the necessary capacity once the ongoing repairs and upgrades to it were completed, the defendant also concluded that granting an approval conditioned on the future completion of such work was unwarranted. In accordance with applicable standards of review, unless that rationale was illegal, arbitrary, or constituted an abuse of discretion, it was entitled to deference from the court. See *Landmark Development Group, LLC* v. *Water & Sewer Commission*, supra, 184 Conn. App. 316.

A municipal land use or related administrative agency generally may conditionally approve an application submitted for its consideration provided that the conditions imposed "are within the scope of the agency's statutory authority and are an attempt to implement its existing regulations for a specific project on which the agency acts in an administrative capacity." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 22:16, p. 721. Our appellate courts have upheld the use of conditional approvals with respect to land use related applications noting that, even in cases in which the application is conditioned on events outside the control of the granting authority, such as obtaining approval from another agency, a conditional approval can "achieve greater flexibility in zoning administration by avoiding stalemates between a zoning authority and other municipal agencies over which it

has no control." *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 482, 562 A.2d 1093 (1989). The mere fact, however, that a conditional approval of an application would be a viable option available to an agency in considering an application does not mean that the agency must exercise that option whenever possible and in all situations.

In *CMB Capital Appreciation, LLC* v. *Planning & Zoning Commission*, 124 Conn. App. 379, 4 A.3d 1256 (2010), cert. granted, 299 Conn. 925, 11 A.3d 150 (2011) (appeal withdrawn September 15, 2011), this court was asked to decide whether it was proper for the trial court to order the planning and zoning commission to approve conditionally an affordable housing site plan application that was filed pursuant to General Statutes § 8-30g and which the commission had denied on the ground that a necessary sewer connection application, most likely, would be denied. This court affirmed the decision of the trial court, concluding that, rather than denying the application, the commission was required to grant the affordable housing application on the condition that the plaintiff obtain approval from the sewer authority. Id., 394, 399. In reaching this conclusion, this court provided an overview of our case law regarding conditional approvals. See id., 386–90.

Of particular relevance to the present appeal, is this court's discussion in *CMB Capital Appreciation, LLC*, of *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 653 A.2d 798 (1995), in which our Supreme Court held that, unless a zoning commission could demonstrate that its refusal to grant the conditional approval of an affordable housing application was necessary to protect substantial public interests, "the conditional granting of [the application] was not only authorized *but required*." (Emphasis added.) Id., 164. In discussing conditional approvals in general, our Supreme Court in *Kaufman* noted, however, that even though a commission is *empowered* to grant conditional approval of

an application, the mere existence of such authority does not "demonstrate that the commission was . . . required to do so. In our past cases approving conditional zoning, we have described conditional zoning *not as an obligation*, but as a means of achieving greater flexibility in zoning administration . . . ." (Emphasis added; internal quotation marks omitted.) Id., 165. Although the court in *Kaufman* proceeded to hold that conditional zoning *was an obligation in the context of an affordable housing application* because imposing such a requirement would help to advance an expressed legislative goal of encouraging the construction of affordable housing; id., 164; the court's language strongly suggests that, outside of that specific context, whether to grant conditional approval of an application remains a matter of agency discretion. Moreover, in *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 431–433, 853 A.2d 497 (2004), our Supreme Court made clear that the rules governing zoning approval of affordable housing applications did not extend to the decisions of a water pollution control authority, and "the legislature has not required water pollution control authorities to treat applications related to developments with affordable housing components differently from applications for other types of developments, as it has with other municipal bodies." Id., 432–33.

Unlike in *Kaufman* and *CMB Capital Appreciation, LLC*, the application at issue in the present appeal was not for zoning approval of an affordable housing application filed pursuant to § 8-30g, but an application for a sewer extension filed pursuant to § 7-246a.[11] Nevertheless, the court concluded that granting conditional approval of the sewer extension application was required to afford the plaintiff the opportunity to con-

[11] The court indicated in its memorandum of decision that the parties conceded at argument that § 8-30g does not apply to this case.

tinue to make progress on its affordable housing project while at the same time protecting against any risk of harm to the public's interest in proper waste water management. By stating that a "conditional approval in the present case would protect against the risk of harm to the public [interest]," the court substituted its own decision-making calculus for that of the municipal agency entrusted with discretionary authority over such matters. The court also mistakenly cited to *CMB Capital Appreciation, LLC* v. *Planning & Zoning Commission*, supra, 124 Conn. App. 391, for the proposition that a conditional approval of the application would advance "the legislative purpose of encouraging the construction of affordable housing" (internal quotation marks omitted); even though such consideration should be limited to affordable housing zoning applications and not to applications before a water pollution control authority. See *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 431–33.

In exercising its discretion, the defendant chose to reject the rationale relied on by the trial court in favor of a more cautious approach that required the plaintiff to file a new application once it could demonstrate that sufficient sewer capacity existed for the planned development. Although the defendant's decision is contrary to the approach the trial court favored, the record does not support a conclusion that the defendant's decision was illegal, arbitrary, or an abuse of discretion. Accordingly, the defendant was entitled to a presumption of regularity in its decision-making process. See *Landmark Development Group, LLC* v. *Water & Sewer Commission*, supra, 184 Conn. App. 316 ("question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the decision reached" [internal quotation marks omitted]). In exercising its discretion not to grant a conditional approval in this case, the

defendant explained that unknown and unforeseen problems potentially could arise between the time of approval and the completion of the sewer upgrades that could adversely impact the town. Although the plaintiff attempts to make much of the fact that the defendant did not provide specific examples of the types of problems it foresaw, we are unconvinced that the lack of detailed explication so undermined the defendant's reasoning as to permit the trial court to disregard it and substitute what the court clearly believed was a more equitable outcome.

Finally, the defendant provided the additional rationale that it was a settled policy of the defendant not to grant conditional approval of applications. The court found that there was no evidence that any such policy existed. The existence of an officially promulgated policy, however, was not essential in order to justify the position taken by the defendant. There was unrebutted testimony by Edwards that the defendant had not granted a conditional approval in more than thirty years. That testimony was evidence upon which the defendant was entitled to rely, and it was sufficient to demonstrate that the defendant had a practice to refrain from granting conditional approvals and, by choosing not to do so in the present case, it was not acting arbitrarily but, rather, in accordance with its usual practices and procedures. Having reviewed the record and the arguments of the parties, we conclude that the court improperly substituted its own discretion and judgment for that of the defendant.

The judgment is reversed and the case is remanded with direction to render judgment denying the plaintiff's appeal.

In this opinion the other judges concurred.

VICTOR A. WOZNIAK ET AL. *v.* TOWN OF COLCHESTER
(AC 41275)

Alvord, Elgo and Moll, Js.

Syllabus

The plaintiffs, V and O, appealed to this court from the summary judgment rendered by the trial court in favor of the defendant town of Colchester. The plaintiffs owned an undeveloped parcel of real property located in Colchester in an area that is designated as a flood zone on a map prepared by the Federal Emergency Management Agency (FEMA). A survey indicated that the map incorrectly located a portion of a brook on the property, which the plaintiffs claimed caused the property to be improperly designated as being in a flood zone. V submitted to FEMA an application for a Letter of Map Amendment to correct the map, and FEMA requested additional information. The plaintiffs thereafter demanded that the defendant file an application for a Letter of Map Revision (LOMR) with FEMA on their behalf, and when the defendant declined, the plaintiffs commenced this action seeking a writ of mandamus to compel the defendant to do so. The plaintiffs contended that the applicable federal regulations (44 C.F.R. §§ 65.3 and 65.7) impose a ministerial duty on the defendant to file a LOMR application on their behalf to rectify the incorrect depiction of their property on the map. After the plaintiffs appealed to this court from the summary judgment rendered in the defendant's favor, the defendant filed a motion to dismiss the appeal, alleging that the appeal had been rendered moot by certain recent developments. Specifically, in 2016, FEMA officials informed the defendant of a new program that was intended to help communities reduce their flood risk. The defendant's town engineer asked FEMA to review the flood zone mapping in the area of the subject brook for potential conflicts between the flood limits shown on the map and the actual flood limit elevations based on topography. In 2018, FEMA notified the defendant that it had completed the discovery portion of the new program and had selected the brook for an upcoming study. This court denied the defendant's motion to dismiss the appeal without prejudice. *Held*:

1. The defendant's claim that the appeal was moot was unavailing, as FEMA's pending study of the brook did not render the appeal moot; correspondence from FEMA to the defendant indicated that the new program was being implemented for the first time, and the record did not indicate when the program would conclude or when any final determination regarding the brook would transpire, and, guided by the fundamental precept that this court must indulge every reasonable presumption in favor of jurisdiction in resolving the issue of mootness, this court could not conclude on the limited record before it that the pending review of

the brook under the program necessarily deprived this court of the ability to provide the plaintiffs with any meaningful relief.

2. The trial court properly rendered summary judgment in favor of the defendant and determined that there was no genuine issue of material fact that the plaintiffs were not entitled to a writ of mandamus to compel the defendant to file a LOMR application on their behalf:

a. Despite the plaintiffs' contention that the defendant owed a duty to initiate a LOMR application pursuant to § 65.3, by its plain language § 65.3 concerns physical changes to property, it was undisputed that no physical change affecting flooding conditions had occurred with respect to the plaintiffs' property, as the plaintiffs' claim was that the brook was improperly depicted on a portion of their property since the map was promulgated, and, therefore, in the absence of any allegation that the plaintiffs' property underwent any physical change or that it was affected by a physical change to another property, the plaintiffs' claim was untenable; moreover, to the extent that the plaintiffs attempted to inject new factual allegations into the case for the first time on appeal, such allegations were improper, having never been raised before the trial court, and this court declined to consider them.

b. The plaintiffs could not prevail in their claim that § 65.7 imposed a ministerial duty on the defendant to file a LOMR application to correct the inaccurate description of the brook on their behalf: a prerequisite to the extraordinary relief afforded by a writ of mandamus is the existence of a ministerial duty, and a community's determination pursuant to § 65.7, as to whether any "practicable alternatives exist" to revising the boundaries of a previously adopted floodway is a quintessentially discretionary function, as opposed to a ministerial function, as that determination requires a community to exercise its judgment as to whether alternatives to revising such boundaries are practical; moreover, the applicable federal regulation (44 C.F.R. § 72.1) expressly indicates that LOMR applications are predicated on proposed or actual manmade alterations within the floodplain, § 65.7 plainly and unambiguously concerns changes to floodways, and because the plaintiffs did not allege any manmade alterations or physical changes affecting their property or the designation thereof, § 65.7 was inapposite to the present case.

c. The plaintiffs did not demonstrate that they had no adequate remedy at law: the plaintiffs neither alleged in their complaint nor provided any evidence that property owners are precluded from filing LOMR applications, and a review of the regulatory scheme indicated that property owners were not precluded from filing LOMR applications, as the National Flood Insurance Program plainly envisions the filing of LOMR applications by parties other than local communities such as the defendant; moreover, the instructions provided by FEMA for completing LOMR applications require the submission of a concurrence form with signatures of the requester, community official and engineer, the purpose of which is to ensure that the community is aware of the impacts of

the LOMR application and which was further evidence that the program envisions applicants other than local communities, and the plaintiffs presented no basis on which this court reasonably could conclude that a property owner is prohibited, as a matter of federal administrative law, from filing a LOMR application, and the availability of that legal remedy, which would provide the plaintiffs the relief that they sought, was fatal to their mandamus action.

Argued April 9—officially released October 29, 2019

Procedural History

Action seeking, inter alia, a writ of mandamus, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Knox*, *J.*, granted the motion filed by the defendant for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the defendant filed a motion to dismiss the appeal, which this court denied without prejudice. *Affirmed.*

Paul M. Geraghty, for the appellants (plaintiffs).

Matthew Ranelli, with whom, on the brief, was *Amber N. Sarno*, for the appellee (defendant).

Opinion

ELGO, J. This case concerns the obligation of a municipality to file an application on behalf of a property owner to correct flood maps promulgated by federal administrative authorities. The plaintiffs, Victor A. Wozniak and Olga E. Wozniak,[1] appeal from the summary judgment rendered in favor of the defendant, the town of Colchester. The dispositive issue is whether the trial court properly determined that no genuine issue of material fact existed as to whether the plain-

[1] For purposes of clarity, we refer to Victor A. Wozniak and Olga E. Wozniak collectively as the plaintiffs and to Victor A. Wozniak individually by his surname.

tiffs were entitled to a writ of mandamus.[2] We affirm the judgment of the trial court.

We begin by providing necessary context for the present dispute. "Prior to 1968, there was a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. . . . Congress passed the National Flood Insurance Act (NFIA) of 1968 to address this concern.[3] The purposes of the NFIA were to provide affordable flood insurance throughout the nation, encourage appropriate land use that would minimize the exposure of property to flood damage and loss, and thereby reduce federal expenditures for flood losses and disaster assistance. . . . To that end, NFIA authorized the Federal Emergency Management Agency (FEMA) to establish and carry out the National Flood Insurance Program . . . . There are three basic components of [that program]: (1) the identification and mapping of flood-prone communities, (2) the requirement that communities adopt and enforce floodplain management regulations that meet minimum eligibility criteria in order to qualify for flood insurance, and (3) the provision of flood insurance." (Citations omitted; footnote added; internal quotation marks omitted.) *National Wildlife Federation* v. *Federal Emergency Management Agency*, United States District Court, Docket No. C11-2044 (RSM), 2014 WL 5449859 *1 (W.D. Wash. October 24, 2014); see also 44 C.F.R. § 59.2.

[2] The plaintiffs also claim that the court improperly rendered summary judgment in favor of the defendant on their inverse condemnation and negligence claims. On appeal, the plaintiffs concede that the viability of those claims is wholly dependent upon their mandamus claim, as they are premised on the defendant's alleged duty "to submit an application to correct the flood map." In light of our resolution of the plaintiffs' principal claim, we agree with the plaintiffs that their inverse condemnation and negligence claims necessarily must fail. We, therefore, do not consider those claims in any detail.

[3] See 42 U.S.C. § 4001 et seq.

To carry out its mandate, the NFIA authorizes FEMA to "identify and publish information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards"[4] and to "establish or update flood-risk zone data in all such areas, and make estimates with respect to the rates of probable flood caused loss for the various flood risk zones for each of these areas . . . ." 42 U.S.C. § 4101 (a). That data then is memorialized on a flood insurance rate map, which is "an official map of a community, on which the Federal Insurance Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community. . . ." 44 C.F.R. § 59.1. The present action concerns the mapping of flood prone areas in the defendant municipality.

The following facts are gleaned from the pleadings, affidavits, and other proof submitted, viewed in a light most favorable to the plaintiff. See *Dubinsky* v. *Black*, 185 Conn. App. 53, 56, 196 A.3d 870 (2018). The defendant is a community, as that term is defined in the code,[5] that has participated in the National Flood Insurance Program since 1982, and thus is obligated to adopt adequate flood plain management regulations consistent with federal criteria. See 44 C.F.R. § 60.1. The defendant is also a mapping partner under FEMA guidelines for map modernization that helps "[ensure] the accuracy" of flood insurance rate maps prepared by FEMA.

[4] The Code of Federal Regulations (code) defines "[a]rea of special flood hazard" as "the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year." 44 C.F.R. § 59.1. It defines "[f]lood plain or flood-prone area" in relevant part as "any land area susceptible to being inundated by water from any source . . . ." Id. We further note that the term "flood plain" is spelled as both one word and as two words in federal authorities. See, e.g., 42 U.S.C. § 4101; 44 C.F.R. § 59.1.

[5] The code defines "community" in relevant part as "any State or area or political subdivision thereof . . . which has authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction." 44 C.F.R. § 59.1.

At all relevant times, the plaintiffs owned real property known as 159 Lebanon Avenue in Colchester (property), an undeveloped parcel of vacant land. The property is located in an area that is designated as a flood zone on Flood Insurance Rate Map number 09011C0154G (map) prepared by FEMA and dated July 18, 2011. In light of that designation, the plaintiffs had a survey of the property performed, which indicated that the map incorrectly located a portion of Judd Brook on the property. As Wozniak averred in his July 14, 2017 affidavit, the survey confirmed that the map "incorrectly depicts the location of Judd Brook, resulting in our [p]roperty being wrongfully determined to be in a flood zone."

On April 4, 2012, Wozniak brought that alleged inaccuracy to FEMA's attention by submitting an application for a Letter of Map Amendment (LOMA).[6] That application consisted of a two page letter from Wozniak, in which he indicated that "[t]he property is for sale and buyers don't want to hear about flood plains and flood insurance," and attached three maps of the area in question. As Wozniak explained in his application, "[u]sing Photoshop, [he] approximated the actual course of Judd Brook and added notes" on one of those maps. By letter dated May 25, 2012, a FEMA official responded to Wozniak's LOMA application by requesting additional information.[7] There is no indication in the record before

[6] The record also indicates that, on March 27, 2012, the defendant's First Selectman, Gregg Schuster, signed a community acknowledgement form for the plaintiffs' LOMA submission.

[7] In that correspondence, the FEMA official informed Wozniak that certain "forms or supporting data, which were omitted from your previous submittal, must be provided: The metes and bounds description that was previously submitted includes a portion of the Judd Brook. Portion of streams/brooks cannot be removed from the Special Flood Hazard Area. Please revise the metes and bounds area to only include land. All corrections must be certified by a licensed land surveyor or professional engineer. If the updates to the metes and bounds area changes the lowest lot elevation provided on the elevation form, the form should be updated as well. If the lowest lot elevation does not change please provide a certified letter from the surveyor or

us that the plaintiffs ever responded to that request or provided any further documentation to FEMA in connection therewith.

The record also contains three letters sent to the plaintiffs from the defendant's First Selectman, Gregg Schuster, in the summer and fall of 2012. In his August 1, 2012 letter, Schuster stated: "Based on the [defendant's] review of the materials you submitted, specifically FEMA's May 25, 2012 letter of [r]eply regarding your LOMA application, it appears you have been asked to supply additional data in order for FEMA to continue processing your request. It does not appear that they are asking you to submit a [Letter of Map Revision (LOMR)] application. In any event, as was done for your LOMA application, if in fact you are required to file a LOMR, the [defendant's] Chief Executive Officer . . . would assist you to the extent of reviewing your application and signing a concurrence form contained within your application. The [defendant] has done this for other private property LOMR applications in the past. However, all materials and maps required to complete the submission to FEMA are the private property owner's responsibility." In his September 7, 2012 letter, Schuster similarly stated that "[a]fter speaking with FEMA representatives, including Caitlin Clifford, who you recommended that we speak with, it is our understanding that as the property owner, there is no reason why you cannot continue with your LOMA application. Should you continue with your LOMA application, the [defendant] would be more than happy to assist you by giving you concurrence through the First Selectman's

engineer that completes the new map and description stating such. Please note that if all of the required items are not submitted within 90 days of the date of this letter, any subsequent request will be treated as an original submittal and will be subject to all submittal procedures." (Emphasis omitted.)

Office." In a third letter dated October 16, 2012, Schuster provided the plaintiffs detailed advice on how to prepare a "successful LOMA application."[8]

In the months that followed, the plaintiffs continued to furnish the defendant with various documentation regarding the apparent inaccuracy on the map. As they allege in their operative complaint: "On various dates between October of 2012 and January of 2013 the [p]laintiffs submitted to the [defendant] scientific data which showed . . . the existing [map] for the [property] and the adjacent property to be incorrect. Specifically, the [p]laintiffs' survey showed that Judd Brook Channel as shown on the [map] was not in fact in the location shown on the [map] and that it was not on the [property]. Plaintiffs through historical data and survey data demonstrated that the sluiceway was located on

[8] More specifically, Schuster stated in relevant part: "Upon reviewing the submitted documentation and telephone conversation with town staff with [FEMA representative Caitlin Clifford] the following procedure is recommend[ed] for a successful LOMA application.

"1. The depicted limits of the flood zone should be a curvature-linear line that shows the elevation of the floodway as the actual topography of the site as it exists in comparison to the established floodway elevations as determined by the FEMA mapping. This area must not encroach upon the actual (field determined) location of Judd Brook or any back water areas below the established flood plain elevation. It also [is] recommended that both sides of the existing Judd Brook be more clearly defined on the submitted mapping, with topographic information shown for the complete affected area. The information must be submitted with a Licensed Land Surveyor's certification.

"2. Once the mapping is revised, the submission to Ms. Clifford should indicate that the information submitted involves field verified and determined topographic information and should be referred to her supervisor that is an engineer for evaluation. This was noted in the telephone conversation with Ms. Clifford that her 'authority' and limits of evaluation are simply map overlay and that sites that require determination of topographic information are conducted at the supervisory level above her.

"This should provide the most expedient process for the successful determination of your LOMA [a]pplication. Should you continue with your LOMA application, the [defendant] would be more than happy to assist you by giving you concurrence through the First Selectman's Office."

the abutting property and as a result the flood plain elevation for the [property] was incorrect. This incorrect depiction places a significant portion of the [property] in the flood plain when it is not. As a result of this error, a substantial, if not the entire portion, of the [property] is rendered unusable." The plaintiffs thus demanded that the defendant file a LOMR application with FEMA on their behalf to correct the map in question.

When the defendant declined to do so, this litigation ensued. The plaintiffs' operative complaint contains three counts. In the first, they seek a writ of mandamus to compel the defendant to file a LOMR application on their behalf to correct the alleged error on the map. The second count sounds in inverse condemnation, alleging that the defendant's failure to file a LOMR application "effectively resulted in a confiscation of the [p]roperty without compensation." In the third count, the plaintiffs alleged negligence on the defendant's part "in carrying out its obligations under the National Flood Insurance Program by failing to file a [LOMR] with FEMA." The defendants filed an answer, as well as a special defense to the third count of the complaint, on August 11, 2015. On August 18, 2016, the plaintiffs filed a certificate of closed pleadings, in which they requested a court trial.

The defendants thereafter filed a motion for summary judgment, which was accompanied by several exhibits, including application forms and instructions for both LOMR and LOMA applications. In response, the plaintiffs filed an opposition, to which they attached copies of various correspondence and Wozniak's affidavit. The court heard argument from the parties on November 13, 2017. In its subsequent memorandum of decision, the court concluded that no genuine issue of material fact existed as to any of the three counts alleged in the complaint and that the defendant was entitled to judgment as a matter of law. Accordingly, the court

rendered summary judgment in its favor. From that judgment, the plaintiffs now appeal.

I

As a preliminary matter, we address a question of mootness. Approximately ten months after the commencement of the present appeal, the defendant filed a motion to dismiss, in which it alleged that the plaintiffs' challenge to the court's ruling on their mandamus claim had been rendered moot by recent developments. Appended to that motion were copies of correspondence from FEMA officials who, in October, 2016, informed the defendant of a "new FEMA program" known as "Risk Mapping, Assessment, and Planning," or "Risk MAP," that was intended to help "communities identify, assess, and reduce their flood risk" by "combining quality engineering with updated flood hazard data . . . ." In implementing that new program, FEMA solicited "any data . . . [that the defendant] would like to have taken into consideration when reviewing [the defendant's] flood risk . . . ." The defendant's town engineer responded to that request by asking FEMA to review, inter alia, "the Flood Zone mapping on [the map] in the area of Judd Brook, North of Lebanon Avenue/State Route 16 for potential conflict between the flood limits/extents shown on the map and the actual flood limit elevations based on topography."[9] By letter dated October 17, 2018, a FEMA official notified the defendant it had completed the "discovery" portion of the Risk MAP program and had "selected" Judd Brook for a detailed study as part of its upcoming "engineering and mapping" activities.

The plaintiffs filed an objection to the motion to dismiss on December 3, 2018. Weeks later, they filed a supplement to the facts recited therein, in which the plaintiffs stipulated in relevant part that Judd Brook

[9] The plaintiffs' property lies north of Lebanon Avenue/State Route 16.

"will be reviewed [and] surveyed as part of the proposed field study" to be conducted by FEMA as part of the Risk MAP program. They nevertheless maintained that the pendency of that study did not render the present appeal moot. By order dated March 13, 2019, this court denied the defendant's motion to dismiss "without prejudice to the panel that hears the merits of the appeal considering the issues raised in the motion to dismiss." At oral argument before this court, the parties renewed their respective claims, as set forth in the pleadings on the motion to dismiss.

The question of mootness implicates the subject matter jurisdiction of this court and thus "may be raised at any time . . . ." *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013). "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Citations omitted; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 6, 127 A.3d 994 (2015). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 54, 161 A.3d 537 (2017). Our review of the question of mootness is plenary. *State* v. *Rodriguez*, 320 Conn. 694, 699, 132 A.3d 731 (2016).

We agree with the plaintiffs that FEMA's pending field study of Judd Brook does not render the present appeal moot. As FEMA officials plainly indicated in the October, 2016 letter to the defendant, Risk MAP is a

"new" program that is being implemented for the first time. Although the record before us, as supplemented by the materials appended to the defendant's motion to dismiss, indicates that implementation of the Risk MAP program in the lower Connecticut watershed began in November, 2016, the record is bereft of any indication as to when that program ultimately will conclude. In this regard, it bears emphasis that two years passed from the time that FEMA notified the defendant of implementation of the Risk MAP program in the lower Connecticut watershed to its announcement that Judd Brook had been selected for a detailed study during that program. Furthermore, in the October 17, 2018 letter to the defendant confirming that selection, the FEMA official cautioned the defendant that although field surveying "will be occurring during 2019," it was but one step in the Risk MAP program and that "[a]s this project continues, the [United States Geological Survey] will be conducting a number of other meetings with the stakeholders in the Lower Connecticut Valley Watershed to communicate the progress of the project and to solicit comments about draft and preliminary products." (Emphasis omitted.) In short, there is no indication in the record before us as to when the Risk MAP program will conclude and when any final determination regarding the delineation and designation of Judd Brook on the map will transpire.

Because the question of mootness implicates the subject matter jurisdiction of this court, we are obligated to indulge every reasonable presumption in favor of jurisdiction in resolving that issue. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 523, 187 A.3d 1154 (2018); *Simes* v. *Simes*, 95 Conn. App. 39, 42, 895 A.2d 852 (2006). Guided by that fundamental precept, we cannot conclude, on the limited record before us, that the pending review of Judd Brook under the Risk MAP program necessarily deprives this court of the

ability to provide the plaintiffs with any meaningful relief. Should they prevail in this appeal, the plaintiffs would secure an order of mandamus directing the defendant to submit a LOMR application on their behalf. That relief could well provide a more expeditious resolution of the mapping issue regarding their property than the ongoing Risk MAP program, whose terminal date remains unknown. For that reason, we conclude that the present appeal is not moot and turn our attention to the merits of the plaintiff's claim.

II

On appeal, the plaintiffs contend that the court improperly rendered summary judgment in favor of the defendant on their mandamus claim. We disagree.

The standard that governs our review of the trial court's decision to grant summary judgment is well established. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted;

internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). "The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 294, 977 A.2d 189 (2009).

In the present case, the plaintiffs seek a writ of mandamus to compel the defendant to file a LOMR application on their behalf. Mandamus is an ancient common law writ "with deep roots in the American legal tradition . . . ." *Hennessey* v. *Bridgeport*, 213 Conn. 656, 658, 569 A.2d 1122 (1990); see also *Rapp* v. *Van Dusen*, 350 F.2d 806, 811–12 (3d Cir. 1965). It is an order directed at public officials that is injunctive in nature. 1 D. Dobbs, Law of Remedies (2d Ed. 1993) § 2.9 (1), p.226; see also *Hamblen* v. *Kentucky Cabinet for Health & Family Services*, 322 S.W.3d 511, 518 (Ky. App. 2010) (mandamus "is quintessentially injunctive in nature"); 2 E. Stephenson, Connecticut Civil Procedure (3d Ed. 2002) § 224 (a), p.565 (mandamus a prerogative writ designed to give state superintendence of activities of public officers). As our Supreme Court has emphasized, "[t]he writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits." *Lahiff* v. *St. Joseph's Total Abstinence Society*, 76 Conn. 648, 651, 57 A. 692 (1904); see also *Cook-Littman* v. *Board of Selectmen*, 328 Conn. 758, 767 n.9, 184 A.3d 253 (2018); *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 416–17, 853 A.2d 497 (2004).

"[M]andamus neither gives nor defines rights which one does not already have. It enforces, it commands, performance of a duty. It acts at the instance of one having a complete and immediate legal right; it cannot and it does not act upon a doubtful or a contested right . . . ." (Internal quotation marks omitted.) *Hennessey*

v. *Bridgeport*, supra, 213 Conn. 659. Accordingly, "[a] party seeking a writ of mandamus must establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Internal quotation marks omitted.) *Stewart* v. *Watertown*, 303 Conn. 699, 711–12, 38 A.3d 72 (2012).

The plaintiffs claim that the defendant possesses a ministerial duty to file a LOMR application with FEMA on their behalf to rectify the allegedly improper designation of their property, as alleged in the operative complaint. In rendering summary judgment, the court concluded that no genuine issue of material fact existed to support such a duty on the part of the defendant. We agree.

A

Undisputed Facts

Critical to our analysis are certain facts that are not disputed by the parties. As the trial court noted in its memorandum of decision, a portion of the property has been designated in a flood area "since inception of the [map] and continues to be so designated. . . . [T]here is no dispute that [sometime] prior to 2011, Judd Brook was diverted into piping on [an adjacent parcel to the south of the plaintiffs' property]. It is undisputed this diversion on the [adjacent] parcel did not affect the location of . . . Judd Brook on the plaintiffs' property [and that] the point of discharge following the rerouting of . . . Judd Brook did not change."[10]

[10] As Wozniak stated in his July 14, 2017 affidavit, "Judd Brook had been relocated years ago such that it is not located where it is as shown on the [map]. . . . Judd Brook to the south was rerouted by being place[d] in [reinforced concrete] pipe *but this did not affect its location on our property*." (Emphasis added.)

The plaintiffs' claim, as set forth in their operative complaint and Wozniak's affidavit, is not that a physical change to Judd Brook transpired that affected their property. Rather, they claim that Judd Brook has been improperly depicted on a portion of their property since the map first was promulgated, which resulted in incorrect flood plain elevations on the property.[11] That "incorrect depiction," the plaintiffs allege, "places a significant portion of [the] property in the flood plain when it is not."

B

Relevant Federal Authority

It is well established that, in construing individual regulations, we do not read them in isolation, but rather in light of the entire act. See, e.g., *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007) ("Legislative intent is not to be found in an isolated sentence; the whole statute must be considered. . . . In construing [an] act . . . this court makes every part operative and harmonious with every other part insofar as is possible . . . ." [Citation omitted; internal quotation marks omitted.]). Notably, the NFIA requires FEMA to review flood maps once every five years to assess the need to update all flood plain areas and flood risk zones. See 42 U.S.C. § 4101 (e). In addition to that quinquennial requirement, communities that participate in the National Flood Insurance Program act as partners with FEMA to ensure the accuracy of its flood insurance rate maps. Under federal law, FEMA is authorized to revise and update those maps "upon the request from any State or local government stating that specific flood-plain areas or flood-risk zones in the State or locality need revision or updating, if sufficient technical data justifying the request is submitted . . . ." 42 U.S.C. § 4101 (f) (2).

[11] As the plaintiffs note in their appellate reply brief, they "do not dispute that the location of Judd Brook as shown on the [map] has always been incorrect . . . ."

The National Flood Insurance Program, which is codified at 44 C.F.R. § 59.1 et seq., specifies the manner by which communities may file a request with FEMA to revise a flood insurance rate map. The mandamus action now before us is predicated on the plaintiffs' contention that 44 C.F.R. §§ 65.3 and 65.7 impose a ministerial duty on the defendant to file a LOMR to rectify the incorrect depiction of their property on the map. For its part, the defendant acknowledges that, as a mapping partner, it is permitted to request revisions to flood insurance rate maps. It nonetheless maintains that federal law imposes no mandatory duty on municipalities to do so at the behest of a property owner. Our analysis, therefore, centers on the relevant provisions of the National Flood Insurance Program.

In considering those provisions, we note that "[a]dministrative regulations have the full force and effect of statutory law and are interpreted using the same process as statutory construction, namely, under the well established principles of General Statutes § 1-2z. . . . 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. . . . [Section] 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its

relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 603–604, 89 A.3d 841 (2014); see also *Forest Watch* v. *United States Forest Service*, 410 F.3d 115, 117 (2d Cir. 2005) (applying plain meaning rule to interpretation of federal regulation); *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 60, 557 A.2d 1249 (1989) (interpreting "agency regulations in accordance with accepted rules of statutory construction"); 1A N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2009) § 31:6, pp. 698–99 (observing that rules of statutory construction also govern interpretation of administrative regulations).

The National Flood Insurance Program provides distinct administrative mechanisms, known as LOMAs and LOMRs, to correct alleged inaccuracies on flood insurance rate maps. A LOMA is an administrative procedure intended to provide recourse to the "owner or lessee of property who believes his property has been inadvertently included" in a special flood hazard area or regulatory floodway when there has not been "any alteration of topography . . . ." 44 C.F.R. § 70.1. That procedure permits such an owner or lessee to "submit scientific or technical information" to FEMA, which is required to review that information and notify the applicant of its decision within sixty days. 44 C.F.R. §§ 70.3–70.4. When FEMA determines that a particular property has been inadvertently included in a special flood hazard area or regulatory floodway, it issues a LOMA that specifies (1) the name of the municipality in which the property lies, (2) the number of the erroneous flood insurance rate map, and (3) the identification of the property to be excluded from the previous designation.

44 C.F.R. § 70.5. FEMA then distributes copies of the LOMA to various entities and publishes notice in the Federal Register when a change of base flood elevations has occurred. 44 C.F.R. §§ 70.6–70.7. LOMAs thus exist to "correct the inadvertent inclusion of properties in the regulatory floodway depicted on a [flood insurance rate map]." *Coalition for a Sustainable Delta* v. *Federal Emergency Management Agency*, 812 F. Supp. 2d 1089, 1124 (E.D. Cal. 2011).

By contrast, a request for a LOMR is "based on proposed or actual manmade alterations within the floodplain, such as the placement of fill; modification of a channel; construction or modification of a bridge, culvert, levee, or similar measure; or construction of single or multiple residential or commercial structures on single or multiple lots." 44 C.F.R. § 72.1. The code defines a LOMR in relevant part as "FEMA's modification to an effective Flood Insurance Rate Map . . . . LOMRs are generally based on the implementation of physical measures that affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective base flood elevations, or the [special flood hazard area]. . . ." 44 C.F.R. § 72.2. Unlike a LOMA, which is an official notice that a particular property should not be included in a special flood hazard area or regulatory floodway, the issuance of a LOMR by FEMA results in an official revision to the flood insurance rate map itself. Id. The plaintiffs' mandamus action concerns the defendant's alleged duty to file a LOMR application on their behalf pursuant to 44 C.F.R. §§ 65.3 and 65.7.

1

In their principal appellate brief, the plaintiffs contend that the defendant owed them a duty to "to initiate the LOMR process, as is mandated under 44 C.F.R. § 65.3." (Footnote omitted.) By its plain language, § 65.3

concerns physical changes to property. It provides: "A community's base flood elevations may increase or decrease resulting from *physical changes affecting flooding conditions*. As soon as practicable, but not later than six months after the date such information becomes available, a community *shall notify the Administrator of the changes* by submitting technical or scientific data in accordance with this part. Such a submission is necessary so that upon *confirmation of those physical changes affecting flooding conditions*, risk premium rates and flood plain management requirements will be based upon current data." (Emphasis added.) Section 65.3, therefore, plainly and unambiguously applies to situations involving physical changes affecting flooding conditions.

In the present case, it is undisputed that no physical change affecting flooding conditions has occurred with respect to the plaintiffs' property. Their claim, as memorialized in the operative complaint and Wozniak's July 14, 2017 affidavit, is that Judd Brook has been improperly depicted on a portion of their property since the map first was promulgated. See part II A of this opinion. The plaintiffs have made no factual allegation that their property has undergone any physical change or that it has been affected by a physical change to another property. Absent such allegations, the plaintiffs' claim that the defendant had a duty under 44 C.F.R. § 65.3 to file a LOMR application on their behalf is untenable. Because § 65.3 applies only when there are "physical changes affecting flooding conditions," there is no genuine issue of material fact regarding its inapplicability to the present case, in which the sole issue raised by the plaintiffs is the incorrect depiction of Judd Brook on their property.

Perhaps cognizant of that shortcoming, the plaintiffs have attempted to inject new factual allegations into the case for the first time on appeal. They allege in their

principal appellate brief that the trial court's analysis "ignores entirely the fact that the relocation and underground piping of Judd Brook on the [adjacent] parcel changed the character of the floodway, which precipitated a change to the flow rate of the floodway, and has altered the floodplain, in which the plaintiffs' property is located." (Emphasis omitted.) The plaintiffs further allege that "the flooding on the [adjacent] parcel was caused by the removal of the dam for the Hayward Pond up-stream therefrom. The pond was a holding pond that flooded the area upstream. Removing it caused flooding downstream." Neither the operative complaint nor Wozniak's July 14, 2017 affidavit contains those allegations. Such allegations are patently improper, having never been raised in the pleadings before the trial court.[12] We therefore decline to consider them. See, e.g., *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 249 n.46, 828 A.2d 64 (2003) (declining to consider claims raised for first time on appeal "because the plaintiffs never properly raised them in the trial court by pleading them in their complaint"); *Link* v. *Shelton*, 186 Conn. 623, 628, 443 A.2d 902 (1982) ("new facts alleged . . . for the first time on appeal" improper because they "were not part of the pleadings or affidavits below"); *Stevens* v. *Helming*, 163 Conn. App. 241, 246–48, 135 A.3d 728 (2016) (observing that "[i]n ruling on the defendants' motion for summary judgment, the court could consider only the facts alleged in the pleadings" and emphasizing that "[s]imple fairness requires that a defendant not be forced to defend against facts that are not clearly pleaded in a complaint").

2

The plaintiffs also allege that 44 C.F.R. § 65.7 imposes a ministerial duty on the defendant to file a LOMR to

[12] In this regard, we note that the plaintiffs had ample opportunity to refine their factual allegations, having filed their original complaint on March 11, 2013, their first amended complaint on May 15, 2015, and the operative complaint—their second amended complaint—on July 21, 2015, the latter of which was in response to a request to revise filed by the defendant.

correct the inaccurate depiction of Judd Brook on their property. We disagree.

Titled "Floodway revisions," 44 C.F.R. § 65.7 (a) provides in relevant part: "Floodway data is developed as part of FEMA Flood Insurance Studies and is utilized by communities to select and adopt floodways as part of the flood plain management program . . . . When it has been determined by a community that no practicable alternatives exist to revising the boundaries of its previously adopted floodway, the procedures below shall be followed. . . ." The section then proceeds to outline certain data and certification requirements, as well as the submission procedure for revision requests.

A prerequisite to the extraordinary relief afforded by a writ of mandamus is the existence of a duty that is ministerial in nature. As our Supreme Court has explained, "[i]t is axiomatic that [t]he duty [that a writ of mandamus] compels must be a ministerial one; the writ will not lie to compel the performance of a duty which is discretionary. . . . Consequently, a writ of mandamus will lie only to direct performance of a ministerial act which requires no exercise of a public officer's judgment or discretion. . . . Discretion is determined from the nature of the act or thing to be done . . . ." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 422.

Here, the act or thing to be done is the determination by a community that "no practicable alternatives exist" to revising the boundaries of a previously adopted floodway. The act of determining whether any "practicable alternatives exist" is a quintessentially discretionary function, as it requires a community to exercise its judgment as to whether alternatives to revising such boundaries are practical in nature. As but one example, a community such as the defendant might reasonably

conclude that the detailed study of Judd Brook that FEMA is conducting as part of the Risk MAP program in the lower Connecticut watershed is a practical alternative to the submission of a LOMR application pursuant to 44 C.F.R. § 65.7. Because § 65.7 imparts discretion on participating communities to evaluate whether any practical alternatives exist, we disagree with the plaintiffs that it is ministerial in nature.

We also are mindful that individual regulations are not to be construed in isolation, but rather in light of the entire act. See *Historic District Commission* v. *Hall*, supra, 282 Conn. 684. The code expressly indicates that requests for LOMRs are predicated on "proposed or actual manmade alterations within the floodplain"; 44 C.F.R. § 72.1; and are "based on the implementation of *physical measures* that affect the hydrologic or hydraulic characteristics of a flooding source and thus *result in the modification of the existing regulatory floodway*, the effective base flood elevations, or the [special flood hazard area]. . . ." (Emphasis added.) 44 C.F.R. § 72.2. Section 65.7, in turn, plainly and unambiguously concerns "changes" to floodways. See 44 C.F.R. § 65.7 (b) ("[d]ata requirements when base flood elevation changes are requested"); 44 C.F.R. § 65.7 (c) ("[d]ata requirements for changes not associated with base flood elevation changes"); 44 C.F.R. § 65.7 (e) ("[a]ll requests that involve changes to floodways shall be submitted to the appropriate FEMA Regional Office"). As discussed in part II B 1 of this opinion, the plaintiffs have not alleged any manmade alterations or physical changes affecting their property or the designation thereof in their operative complaint. Their claim is that Judd Brook has been incorrectly depicted on their property since the flood insurance rate map for the area first was promulgated. Accordingly, 44 C.F.R. § 65.7 is inapposite to the present case. We therefore conclude that no genuine issue of material fact exists

as to whether the defendant had a ministerial duty to file a LOMR application on behalf of the plaintiffs in the present case.

III

The plaintiffs' claim suffers a further infirmity. To obtain a writ of mandamus, the plaintiffs also must demonstrate that they have no adequate remedy at law. *Stewart* v. *Watertown*, supra, 303 Conn. 711–12. The plaintiffs have neither alleged in their operative complaint nor provided any evidence that property owners are precluded from filing LOMR applications with FEMA.

A review of the regulatory scheme governing the LOMR application process indicates otherwise. Part 72 of the National Flood Insurance Program sets forth the procedures that govern LOMR applications. See 44 C.F.R. § 72.1. Section 72.4 of chapter 44 of the code specifies submittal and payment procedures for LOMR applications. In particular, § 72.4 (e) provides: "The entity that applies to FEMA through the local community for review is responsible for the cost of the review. The local community incurs no financial obligation under the reimbursement procedures of this part *when another party* sends the application to FEMA."[13] (Emphasis added.) Thus, the National Flood Insurance Program plainly envisions the filing of LOMR applications by parties other than local communities such as the defendant. In such instances, it is that other party—and not the local community—that bears the financial burden that accompanies the filing of a LOMR application.

The instructions provided by FEMA for completing LOMR applications, which the defendant submitted in support of its motion for summary judgment, further

[13] Section 72.4 (h) (1) likewise obligates FEMA to "[n]otify *the requester and the community* within 60 days as to the adequacy of the submittal . . . ." (Emphasis added.)

demonstrate that property owners are permitted to file LOMR applications. FEMA's "Instructions for Completing the Application Forms for Conditional Letters of Map Revision and Letters of Map Revision" state in relevant part that "[s]ubmissions to [FEMA] for revisions to . . . [f]lood [i]nsurance [r]ate [m]aps . . . by *individual* and community requesters will require the signing of application forms." (Emphasis added.) Those instructions explain that LOMR applications must include the submission of a "concurrence form" that "requires the signatures of the requester, community official, and engineer." As the instructions expressly indicate, the manifest purpose of the concurrence form is to "ensure that the community is aware of the impacts of the [LOMR] request . . . ." For that reason, the instructions require the concurrence form to be signed by both the "[r]evision [r]equester"[14] and "the [chief executive officer] for the community involved in [the requested] revision . . . ." The requirement that an applicant seeking a LOMR obtain the concurrence of the community in which the property in question resides is further evidence that the National Flood Insurance Program envisions applicants other than local communities.

The case law from various jurisdictions is replete with examples in which individual property owners have applied for, and obtained, LOMRs from FEMA. See, e.g., *McCrory* v. *Administrator of Federal Emergency Management Agency*, 22 F. Supp. 3d 279, 284–85 (S.D.N.Y. 2014) (noting that LOMRs exist to permit "individuals, organizations and municipalities to request a localized update" to flood insurance rate maps and stating that individual property owners in that case

[14] FEMA's "Instructions for Completing the Overview & Concurrence Form" state that the revision requester "should *own the property* involved in the request or have legal authority to represent a group/firm/organization or other entity in legal actions pertaining to the [National Flood Insurance Program]." (Emphasis added.)

"applied for the LOMR" and "FEMA approved the application"), aff'd, 600 Fed. Appx. 807 (2d Cir. 2015); *National Wildlife Federation* v. *Federal Emergency Management Agency*, supra, 2014 WL 5449859 *16 (explaining that "property owners" may "apply for a LOMR from FEMA"); *Somers Mill Associates, Inc.* v. *Fuss & O'Neill, Inc.*, Superior Court, judicial district of New Britain, Docket No. X03-CV-00-0503944 (March 7, 2002) (noting that FEMA issued LOMR to resolve discrepancy in flood insurance rate map in response to "a request initiated" by plaintiff property owners), aff'd sub nom. *Ahearn* v. *Fuss & O'Neill, Inc.*, 78 Conn. App. 202, 826 A.2d 1224, cert. denied, 266 Conn. 903, 832 A.2d 64 (2003); *Samuel's Furniture, Inc.* v. *Washington Dept. of Ecology*, 147 Wn.2d 440, 446, 54 P.3d 1194 (2002) ("Although the [local municipality] believed that the project was not within the shoreline jurisdiction, it suggested that [the plaintiff property owner] obtain a [LOMR] from FEMA to remove the portion of [the plaintiff's] property at issue from the FEMA floodway designation. [The individual property owner] sought and obtained the LOMR, thus removing the property from the FEMA floodway."). In addition, the record before us contains copies of correspondence between the defendant's First Selectman and Wozniak, in which the First Selectman expressly indicated that the defendant had filed concurrence forms "for other private property LOMR applications in the past." The First Selectman further advised Wozniak that, in the event that the plaintiffs filed a LOMR application on their own behalf, the defendant would provide assistance by reviewing the application and signing a concurrence form.

The plaintiffs have presented no basis on which this court reasonably could conclude that an individual property owner is prohibited, as a matter of federal administrative law, from filing a LOMR application with FEMA. The relevant federal regulations and the materials submitted in connection with the motion for summary judgment all contemplate such filings by property

owners, and the case law reflects that property owners routinely apply for and secure LOMRs from FEMA. The availability of that legal remedy, which would provide the plaintiffs the very relief they seek, is fatal to their mandamus action. See *Sterner* v. *Saugatuck Harbor Yacht Club, Inc.*, 188 Conn. 531, 534, 450 A.2d 369 (1982) ("for mandamus to lie, the plaintiff must have no other adequate remedy"); 55 C.J.S., Mandamus § 7 (2009) ("mandamus is used sparingly . . . and only when it is the sole available remedy"). We therefore conclude that the trial court properly rendered summary judgment in favor of the defendant in the present case.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 193

STATE OF CONNECTICUT *v.* ANDREW M. SENTEMENTES
(AC 41331)

Lavine, Alvord and Lavery, Js.

Argued October 15—officially released October 29, 2019

Defendant's appeal from the Superior Court in the judicial district of Danbury, geographical area number three, *Shaban, J.*

Per Curiam. The judgments are affirmed.

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Colon-Collazo *v.* Cox 251

Property execution; exemption; action to obtain satisfaction of civil dissolution judgment; whether trial court erred in determining that certain property was exempt from execution where no exemption claim form was filed as required by statute (§ 52-361b [d]); whether there was sufficient evidence to determine certain property should be exempt from execution.

Commerce Park Associates, LLC *v.* Robbins. 697

Contracts; landlord-tenant; negligence; claim that trial court improperly awarded landlord additional rent for period between November, 2014, through third full week of April, 2015, on basis of its implicit factual finding that premises were fully tenantable during that period and, therefore, that landlord was entitled to receive full amount of rent due under lease, rather than partial payments tendered by tenant; whether there was evidence in record supporting trial court's calculation of back rent owed by tenant; claim that trial court improperly found that tenant was constructively evicted from premises as result of serious and frequent sewer backups; whether record supported trial court's finding that tenant did not vacate premises before landlord had notice and reasonable opportunity to correct problems with building's sewer system; claim that trial court improperly awarded compensatory damages to tenant on theory of gross negligence because Connecticut common law does not recognize degrees of negligence or cause of action sounding in gross negligence; claim that it was improper for trial court to have awarded damages on basis of gross negligence because it was never pleaded by tenant; claim that trial court improperly determined amount of damages awarded to tenant by incorrectly determining that proper measure of tenant's damages was its loss of beneficial use of substantial improvements it had made to premises prior to constructive eviction and that court should have, instead, limited its award of damages to loss of fair market value of lease; whether trial court miscalculated amount of damages awarded to tenant for loss of beneficial use of substantial improvements tenant had made to premises.

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Negligence; claim that conduct of police detective while operating unmarked vehicle violated ministerial duty imposed on him by certain motor vehicle statutes; whether trial court improperly granted motion for directed verdict on count alleging recklessness; whether evidence, viewed in light most favorably to plaintiff, was sufficient for jury reasonably to conclude that detective acted recklessly; whether jury reasonably could have concluded that detective consciously disregarded state laws relating to speed limits, reckless driving, following too closely and traveling in correct lane of traffic, and that he was aware of risks and dangers his conduct imposed on others, yet showed little regard for consequences

of his actions; whether trial court properly set aside verdict in favor of plaintiff on negligence claim; whether circumstances surrounding conduct of detective demonstrated that he was engaged in discretionary activity for which he was entitled to governmental immunity.

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Habeas Corpus; claim that habeas court improperly denied petition for writ of habeas corpus; whether petitioner met burden to demonstrate prejudice resulting from trial counsel's allegedly deficient performance in failing to advise petitioner properly regarding immigration consequences of guilty plea.

Fernandez *v.* Commissioner of Correction 746

Habeas corpus; whether habeas court properly dismissed petitioner's third petition for writ of habeas corpus; whether petition failed to state claim upon which habeas relief could be granted; whether petitioner could assert claim for relief under Rules of Professional Conduct; claim that neither rule 1.10 nor rule 3.7 of Rules of Professional Conduct required disqualification of attorneys in all of state's attorney's offices and Office of Chief State's Attorney; whether petitioner provided basis for any conclusion that his statements to prosecutor during plea negotiations while petitioner was self-represented were privileged; whether claim that prosecutor's potential testimony regarding petitioner's statements would have been inadmissible and that prosecutor's testimony effectively prevented petitioner from testifying in his own defense was based on speculation.

Francini *v.* Riggione 321

Contracts; attorney's fees; claim that trial court abused its discretion in calculating award of attorney's fees; whether trial court abused its discretion by not discounting award of attorney's fees on account of small sum awarded to plaintiffs for breach of contract claims; claim that proper analysis of factors listed in rule 1.5 (a) of Rules of Professional Conduct would compel a significant downward departure from plaintiffs' initial lodestar calculation because damages awarded were insignificant in relation to court's award of attorney's fees; whether plaintiffs had legitimate claim for attorney's fees pursuant to contract; whether trial court abused its discretion in awarding attorney's fees with respect to private nuisance claim on which plaintiffs did not prevail; whether party may recover attorney's fees for unsuccessful claims that are inextricably intertwined and involve common basis in fact or legal theory with successful claims; whether private nuisance and breach of contract claims were factually and legally distinct and were inextricably intertwined or based on common legal theory.

Goldstein *v.* Hu (Memorandum Decision) 903

Jezouit *v.* Malloy. 576

Sovereign immunity; action concerning alleged illegal recording of telephonic communications by state officials; whether trial court properly granted motion to dismiss complaint on ground of sovereign immunity; claim that only possible interpretation of statute (§ 52-570d) pertaining to recording of telephonic communications was that it impliedly waived sovereign immunity because it authorized an aggrieved person to bring action in Superior Court; claim that because § 52-570d (b) exempted from liability certain state officials, by necessary implication, it waived sovereign immunity from suit for state officials not so designated, such as defendants; claim that dismissal of complaint was improper because trial court failed to apply exception to sovereign immunity for claims of declaratory and injunctive relief.

Kelly *v.* Kurtz. 507

Contracts; whether trial court abused its discretion in denying motion to set aside jury's verdict on counts alleging breach of supplementary agreement and breach of implied covenant of good faith and fair dealing; claim that evidence was insufficient to prove that plaintiff was terminated or prevented from working scheduling of his own choosing; claim that verdict was inconsistent; whether trial court abused its discretion in setting aside jury's verdict on claims that defendants invaded plaintiff's privacy by misappropriating his name after he was terminated, of tortious interference with business expectancies, of alleged

violations of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and of unjust enrichment; whether plaintiff failed to prove that he suffered any damages as result of defendants' use of his name; whether plaintiff failed to prove that he suffered actual loss as result of defendants' alleged interference with his business expectancies or that he suffered any ascertainable loss as result of alleged CUTPA violations; whether plaintiff could recover under theory of unjust enrichment where he recovered under theory of breach of contract; whether plaintiff lacked standing to bring claims relating to breach of operating agreement.

King *v.* Commissioner of Correction 61

Habeas corpus; claim that habeas court improperly concluded that petitioner failed to establish that he had received ineffective assistance from his trial counsel; whether trial counsel provided ineffective assistance by not objecting to trial court's jury instructions or requesting additional jury instruction regarding difference between intent elements of assault charges against petitioner; whether trial counsel provided ineffective assistance by declining to object to admission of police detective's written summary of petitioner's oral account of incident; whether trial counsel's strategic decision to allow written summary into evidence was reasonable; whether there was not reasonable probability that outcome of trial would have been different if written summary had been excluded; whether habeas court reasonably concluded that petitioner failed to prove that he was prejudiced by trial counsel's failure to request trial court to place its rejection of his plea agreement on record; whether there was reasonable probability that outcome of criminal proceedings would have been different if trial counsel had requested trial court to place its rejection of plea on record; claim that habeas court improperly dismissed claim that trial court violated petitioner's right to due process by not stating on record its reasons for rejecting plea agreement; whether petitioner was harmed by absence of record of rejection of plea agreement.

Kirby *v.* Commissioner of Correction 902

Klein *v.* Quinnipiac University 469

Negligence; premise liability action; claim that trial court erred by declining to instruct jury on definition of, and duty owed to, licensee; whether evidence sufficient to support conclusion that plaintiff was licensee; whether defendant private university explicitly or implicitly expressed desire that plaintiff enter its campus or willingness that he do so; claim that defendant impliedly gave plaintiff consent to ride his bicycle on campus because there was lack of no trespassing signs and no gate at each entrance to campus; whether lack of no trespassing signs or gate, without some additional evidence demonstrating implied consent, was insufficient to send question of whether plaintiff was licensee to jury; whether evidence supported finding that defendant breached duty to plaintiff as licensee; whether defendant was required to warn plaintiff of obvious dangers of his actions; whether general verdict rule precluded review of plaintiff's remaining evidentiary claim, which related only to special defense of contributory negligence.

Labarge *v.* Commissioner of Correction (Memorandum Decision) 904

Lampert *v.* Lampert (Memorandum Decision) 905

Meribear Productions, Inc. *v.* Frank 598

Foreign judgment; breach of contract; quantum meruit; final judgment; motion to dismiss appeal as untimely; motion for permission to file late appeal; whether twenty day time limit for filing appeal pursuant to applicable rule of practice (§ 63-1) is subject matter jurisdictional; whether good cause existed to allow defendants' appeal to proceed.

New Haven *v.* Ferrucci (Memorandum Decision) 905

Peek *v.* Manchester Memorial Hospital 337

Negligence; motion for summary judgment; claim that trial court improperly granted motion for summary judgment and determined that action was barred by applicable statute of limitations (§ 52-584); whether statute of limitations was tolled by continuous course of treatment doctrine; whether evidence before trial court demonstrated genuine issue of material fact as to when plaintiff discovered injury as contemplated by § 52-584.

Peters *v.* Senman 766

Child custody; motion for modification of custody; motion for declaratory judgment; reviewability of claim that trial court abused its discretion by terminating portion of certain rights provided to plaintiff under Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) without conducting a fitness hearing; failure

to brief claim adequately; claim that trial court erred in dismissing motions for declaratory judgment; whether plaintiff lacked standing to request declaratory judgment; claim that trial court erred in denying motion for modification of custody; whether evidence supported factual determination that there had been no change in circumstances; claim that trial court erred in awarding defendant portion of attorney's fees.

Putnam Park Apartments, Inc. *v.* Planning & Zoning Commission 42

Zoning; whether trial court improperly determined that zoning regulations permitted building to be located less than 100 feet from property line; whether trial court improperly determined that building proposal was consistent with zoning regulations; whether certain zoning regulation applied to special permit application.

R & P Realty Co. *v.* Peerless Indemnity Ins. Co. 374

Contracts; reviewability of claim that trial court erroneously concluded that defendant did not breach insurance policy by declining to cover increased demolition costs resulting from presence of asbestos and lead in building; reviewability of claim that trial court improperly found that increased demolition costs constituted replacement costs, rather than being component of actual cash value of plaintiffs' loss, and that plaintiffs failed to provide reasonable notice to defendant of claim seeking recovery for increased demolition costs; failure of plaintiffs to provide adequate record for review.

Robbins Eye Center, P.C. *v.* Commerce Park Associates, LLC (See Commerce Park Associates, LLC *v.* Robbins) 697

Simms *v.* Commissioner of Correction 901

Soto *v.* Christians Alliance, Inc. 901

State *v.* Bryan 285

Murder; conspiracy to commit murder; whether trial court abused its discretion by admitting into evidence as dual inculpatory statements under applicable rule of evidence (§ 8-6 [4]), statements that defendant's accomplice made to friend of accomplice about victim's murder; claim that accomplice's statements to friend of accomplice were inadmissible as dual inculpatory statements because they sought to shift blame for victim's murder to defendant; claim that accomplice's statements to friend of accomplice were not against accomplice's penal interest; whether trial court correctly concluded that accomplice's statements to friend of accomplice were trustworthy; unpreserved claim that state failed to disclose to defendant, in violation of Brady *v.* Maryland *(373 U.S. 83), certain police internal affairs records that concerned allegations of prior misconduct by detective who investigated murder; whether police internal affairs records were material to outcome of defendant's trial.*

State *v.* Cane 95

Criminal possession of firearm; criminal possession of ammunition; possession of controlled substance with intent to sell; whether trial court erroneously denied motion to suppress evidence police seized from defendant's home and car; claim that trial court improperly found that warrantless search of defendant's home by police after he was arrested and in police custody constituted justifiable, protective sweep of defendant's home; reviewability of unpreserved claims that defendant was constructively seized by police and that they lacked probable cause to search his car; whether information in affidavit of police officer in support of warrant application provided basis for determination that probable cause existed to search defendant's vehicle; unpreserved claim that trial court committed plain error when it granted state's motion for joinder, where defendant, personally and through counsel, expressly stated that he had no objection to joinder; unpreserved claim of judicial bias; whether reversal of judgment was warranted under plain error doctrine where defendant claimed that trial court, in pretrial memorandum of decision on motion to suppress, had found him guilty of kidnapping and assault charges as to certain individuals it referred to as victims and then considered those charges in sentencing him.

State *v.* Crewe 564

Possession of narcotic substance; claim that there was insufficient evidence to support conviction; whether jury reasonably could have inferred from evidence that defendant knew of presence of narcotics in van, exercised dominion and control over at least some of narcotics and, thus, constructively possessed narcotics.

State *v.* Gomes 79

Assault in second degree; whether trial court deprived defendant of right to present defense of investigative inadequacy when it omitted from its jury instructions

certain language in defendant's written request to charge that pertained to alleged inadequacy of police investigation as it might relate to weaknesses in state's case.

State *v.* Lynch 637

Operating motor vehicle while under influence of intoxicating liquor; failure to appear in second degree; criminal trespass in first degree; motion to withdraw guilty pleas; whether trial court abused its discretion in failing to conduct evidentiary hearing with respect to motion to withdraw guilty pleas; whether defendant failed to provide adequate factual basis to support further hearing; whether defense counsel's assertion that plea canvass was deficient for failing to specify that defendant's driver's license could be revoked permanently was reason among grounds enumerated in applicable rule of practice (§ 39-27) for withdrawal of plea; claim that trial court should have granted motion to withdraw guilty pleas, pursuant to § 39-27, on ground that defense counsel was ineffective; whether trial court abused its discretion by failing to conduct evidentiary hearing prior to terminating defendant's participation in alcohol education program.

State *v.* Palumbo. 457

Sexual assault in first degree; sexual assault in fourth degree; risk of injury to child; claim that questions referring to trial as being first time that defendant mentioned that other people were in same area during hike where he alleged sexually abused minor victim violated his constitutional right to remain silent pursuant to Doyle *v.* Ohio *(426 U.S. 610), by introducing evidence of his post-*Miranda *silence; claim that questions that sought to elicit evidence of defendant's post-*Miranda *silence amounted to prosecutorial impropriety that violated his due process right to fair trial; whether defendant's unpreserved* Doyle *claim failed under third prong of* State *v.* Golding *(213 Conn. 233).*

State *v.* Sententes (Memorandum Decision) 906

State *v.* Shin 348

Interfering with officer; disorderly conduct; reviewability of claim that defendant's arrest and seizure by police was illegal, where claim was raised for first time in reply brief, defendant never moved to suppress evidence, and trial court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized; claim that evidence was insufficient to support conviction because police officers' testimony was fabricated; reviewability of claim that trial court improperly admitted testimony from police officers about statements defendant made in Internet video he had posted; whether defendant failed to secure finalized, specific ruling as to testimony of officers; whether trial court abused its discretion when it denied defendant's request to excuse prospective juror for cause during voir dire; unpreserved claim that trial court violated defendant's state constitutional right to compulsory process when it denied request to issue subpoena to rabbi from out of state; reviewability of claim that trial court improperly found defendant incompetent to stand trial before it later determined that he was competent to stand trial; whether claim that trial court violated defendant's constitutional right to travel when it imposed as term of conditional discharge special condition that he stay out of Connecticut for two years was moot; whether claim that trial court violated defendant's constitutional right to travel was not moot because it fell within collateral consequences exception to mootness doctrine.

State *v.* Ward. 794

Motion to correct illegal sentence; manslaughter in first degree; assault in first degree; unpreserved claim that defendant's due process rights, under federal constitution, were violated when trial court failed to refer motion to correct sentence imposed in illegal manner to sentencing judge; whether due process required that sentencing court hear and adjudicate motion to correct illegal sentence; whether trial court properly dismissed motion to correct illegal sentence for lack of subject matter jurisdiction; whether defendant failed to set forth colorable claim that sentence was imposed in illegal manner; claim that defendant was incompetent at time of sentencing.

Stiggle *v.* Commissioner of Correction (Memorandum Decision) 902

Summit Saugatuck, LLC *v.* Water Pollution Control Authority 823

Administrative appeal; appeal from denial of application for sewer extension by defendant water pollution control authority; whether decision to grant conditional approval of sewer extension application was properly left to discretion of defendant; whether trial court impermissibly substituted its own discretion and judgment for that of defendant by overriding its decision denying sewer extension application and ordering conditional approval of application; whether defend-

ant's rationale for denying application was illegal, arbitrary, or constituted abuse of discretion; whether fact that conditional approval of application was viable option available to agency in considering application meant that agency had to exercise that option whenever possible; whether record supported claim that defendant had practice to refrain from granting conditional approvals.

Thunelius *v.* Posacki 666

Child custody; guardian ad litem; child support; protective order; claim that trial court improperly delegated its decision-making authority to nonjudicial entity when it defined duties and responsibilities of guardian ad litem of parties' minor child; whether trial court abused its discretion in ordering that prevailing party in any postjudgment dispute adjudicated by court between parties after unsuccessful mediation with the guardian ad litem be reimbursed by other party for his or her share of guardian ad litem's fees; whether amount of any future fees and parties' respective financial capacities to pay such fees was purely speculative; whether claim that trial court improperly appointed guardian ad litem without having complied with certain statutory requirements was moot; whether there was practical relief that this court could afford defendant; whether trial court abused its discretion in sua sponte issuing protective order; whether language of order clearly indicated that court intended order to function as protective order issued pursuant to Yontef *v.* Yontef *(185 Conn. 275); whether trial court abused its discretion in ordering parties to enroll child in private school through high school and to divide payments for that schooling; whether there was evidence of cost of private high school or that parties had ever agreed on child attending private high school; claim that trial court improperly relied on child support guidelines worksheet in issuing its child support orders; reviewability of claim that trial court, by failing to order plaintiff to reimburse defendant for certain expenses he allegedly should have paid in accordance with prior stipulation between parties, in effect, granted plaintiff retroactive modification of pendente lite orders to pay those expenses.*

U.S. Bank Trust, N.A. *v.* Theodore (Memorandum Decision) 904

Wager *v.* Moore 608

Negligence; claim that trial court erred in denying motion to set aside verdict and for new trial; claim that there was insufficient evidence to support jury's finding of contributory negligence; claim that trial court erred in instructing jury on contributory negligence when instruction was not supported by evidence; claim that trial court failed to instruct jury on law essential to plaintiff's claim regarding defendant's negligence; claim that once trial court instructed jury on pedestrian's duties pursuant to relevant statutes (§§ 14-300b [a] and 14-300c [b]), its refusal to charge jury on countervailing duties driver owes to pedestrians pursuant to relevant statutes (§§ 14-300d and 14-300i) constituted error; claim that improper hearsay evidence was introduced against plaintiff during videotaped deposition testimony of defendant's toxicology expert.

Water Pollution Control Authority *v.* McKinley 901

Weston Street Hartford, LLC *v.* Zebra Realty, LLC 542

Easements; temporary and permanent injunction; counterclaim; whether trial court properly rendered judgment for plaintiff on counts of defendant's counterclaim relating to its request to relocate plaintiff's right-of-way easement over defendant's property; difference between unilateral modification of easement and unilateral relocation of easement, discussed; claim that trial court improperly rendered judgment in defendant's favor on plaintiff's complaint and denied plaintiff's request for injunctive relief; whether trial court applied correct standard of law in determining whether plaintiff was entitled to injunctive relief; whether court abused its discretion in denying plaintiff's request for injunctive relief.

Wozniak *v.* Colchester 842

Writ of mandamus; claim that trial court improperly rendered summary judgment in favor of defendant; mootness; motion to dismiss appeal; claim that plaintiffs were entitled to writ of mandamus to compel defendant town to file application for letter of map revision on plaintiffs' behalf with federal agency; claim that federal regulations (44 C.F.R. §§ 65.3 and 65.7) imposed ministerial duty on defendant to file letter of map revision application on plaintiffs' behalf; claim that appeal was subject to dismissal as moot due to pending study conducted by federal agency; whether plaintiffs had no adequate legal remedy other than writ of mandamus.

CONNECTICUT APPELLATE REPORTS

Vol. 194

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT

RICHARD TATOIAN, TRUSTEE *v.* BRUCE D. TYLER ET AL.
(AC 40736)

Sheldon, Keller and Moll, Js.*

Syllabus

The plaintiff trustee of a trust brought this action to recover damages from the defendant beneficiaries of the trust, B and J, for common-law and statutory (§ 52-568) vexatious litigation in connection with a prior action that J and other beneficiaries had commenced against the trustee and in which B had filed a cross complaint against the trustee. In that prior action, B and J had claimed that the trustee improperly failed to provide them with certain accountings of the trust before the death of the settlor, R. Judgment was rendered in favor of the trustee on the operative complaint of J and cross complaint of B after the partial granting of a motion for summary judgment and a jury verdict. Thereafter, the trustee brought this action, claiming that all of the counts against him in the prior action were terminated by way of summary judgment or resolved by the jury in his favor. The trial court found that the trustee had conceded that his action would fail if he did not to prove one of his vexatious litigation claims as to one of the claims by B and J in the prior action. The court rendered judgment in favor of B and J after it determined that the trustee had failed to prove that they lacked probable cause, as required under the common law and under § 52-568 (1), to sue him for failure to provide them with accountings, and had failed to prove that B and J had acted with malice, as required under § 52-568 (2). The trustee thereafter filed a motion for reargument and reconsideration in which he claimed, inter alia, that the trial court had stated

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

mistakenly in its memorandum of decision that he had conceded that his action would fail if he could not prove that B and J lacked probable cause to bring all of the counts in the prior action. The trial court granted the motion for reargument and reconsideration and rendered judgment for the trustee on his claim under § 52-568 (1), and rendered judgment for B and J as to the trustee's claims under the common law and § 52-568 (2). B and J then appealed and the trustee cross appealed to this court. B and J claimed, inter alia, that the trial court lacked subject matter jurisdiction over the trustee's causes of action and improperly failed to consider whether R had been subjected to undue influence in connection with the creation of the trust. The trustee, on cross appeal, claimed, inter alia, that the trial court should have concluded that all of the claims at issue were vexatious in nature and, thus, rendered judgment in his favor with respect to those claims. *Held*:

1. The trial court properly denied B's motion to dismiss the trustee's action, in which B claimed that the court lacked subject matter jurisdiction due to the trustee's lack of standing at the time he commenced the action: although the trust document did not specifically authorize the trustee to commence a vexatious litigation action, the trustee had a specific interest in the claims he brought against B and J in his capacity as trustee, and a common-law duty to take reasonable steps to recoup assets of the trust, including attorney's fees and costs incurred as a result of the prior action, within a reasonable time frame during the winding up of the trust after R's death, as the trustee' actions were a reasonably necessary part of the winding up process, and no provision of the trust specifically abrogated the trustee's fundamental duty to pursue claims and recoup assets on behalf of the trust, including claims against beneficiaries; moreover, B and J provided no support for their claim that the trustee lacked authority to pursue his claims because the trust's beneficiaries had standing to pursue a claim against their fellow beneficiaries for damages related to the prior action, as the trustee had a fiduciary duty to act on behalf of the trust and not to defer to decisions made by beneficiaries, and B and J provided no authority to support the proposition that the trustee lacked the authority to carry out his duties as trustee during the winding up period without first seeking the approval of one or more beneficiaries of the trust.
2. B and J could not prevail on their claim that the trial court improperly failed to consider whether R was subjected to undue influence in connection with the creation of the trust; there was no indication that the court ignored or failed to consider evidence of undue influence, although the court did not expressly address the issue of undue influence in its factual findings, it plainly found that R was advised of and satisfied with the contents of the trust, and the court was not obligated to resolve the issue of undue influence because the question before it was whether J had probable cause in the prior action to claim that the trust should be modified on the ground of undue influence, and whether B and J, in relying on their claim of undue influence, had probable cause to bring their claims against the trustee.

3. This court found unavailing the claim by B and J that the trial court misinterpreted relevant law in its analysis of whether they had probable cause in the prior action to claim that the trustee had failed to diversify the trust's assets in violation of statute (§ 45a-541c); the claim by B and J rested on the faulty premise, which this court rejected, that the trial court failed to consider whether R was subjected to undue influence in connection with the creation of the trust, as the trial court plainly found that R had been advised of the contents of the trust and was satisfied with them.
4. B and J could not prevail on their claim that the trial court misinterpreted relevant law in its analysis of whether the trustee could prevail merely by demonstrating that B and J lacked probable cause to bring one of the several claims against him in the prior action; contrary to the assertion by B and J that the trustee's claims merely presented different theories of recovery that arose from his conduct in the prior action in failing to diversify the trust's assets, the court properly applied the law and concluded that the claim of failure to diversify trust assets was logically severable from the remaining claims for which probable cause existed, as the failure to diversify claim was not based on the identical factual allegations as the remaining claims, the allegations in each claim related to facts that differed in terms of times, occurrences and actions, and each of the claims at issue amounted to separate and distinct charges to which the trustee was required to respond.
5. The trial court did not properly analyze whether B and J had probable cause to bring certain of their claims against the trustee in the prior action, as the court essentially disallowed any reliance by the trustee on the trust's exculpatory clause to demonstrate that B and J lacked probable cause: although the exculpatory clause did not cloak the trustee with immunity from suit, the clause was highly relevant to an analysis of whether probable cause existed to bring the claims at issue against the trustee in that it represented a significant hurdle for B and J to overcome in order to demonstrate that the trustee was liable for the damages that they sought in the prior action, and, therefore, the trial could should have considered whether B and J reasonably believed that they could overcome the exculpatory clause and whether they reasonably believed that they were able to prove that R had been subjected to undue influence; moreover, because B was an attorney at the time he filed his cross complaint, the court had to resolve the issue of whether a reasonable attorney would have believed that B had probable cause to bring the claims in the cross complaint, and with respect to J, the court had to determine whether the facts known to J at the time he brought the claims against the trustee in the prior action were sufficient to give rise to a bona fide belief that he should entertain the action against the trustee; accordingly, the judgment could not stand with respect to the trustee's claims under § 52-568 (1) that alleged that B and J lacked probable cause in the prior action to bring certain claims in various counts of the complaint and cross complaint.

Argued December 3, 2018—officially released October 29, 2019

Procedural History

Action to recover damages for, inter alia, vexatious litigation, and for relief, brought to the Superior Court in the judicial district of Tolland, where the defendants filed a counterclaim; thereafter, the court, *Graham*, *J.*, granted the plaintiff's motion to dismiss the counterclaim; subsequently, the court, *Sferrazza*, *J.*, granted in part the plaintiff's motion for summary judgment and denied the defendants' motion for summary judgment; thereafter, the court, *Cobb*, *J.*, denied the motion to dismiss filed by the named defendant; subsequently, the matter was tried to the court, *Cobb.*, *J.*; judgment for the defendants; thereafter, the court granted the plaintiff's motion for reargument and reconsideration, and rendered judgment in part for the plaintiff, from which the defendants appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

Bruce D. Tyler, self-represented, and *Jay M. Tyler*, self-represented, the appellants-cross appellees (defendants).

Bruce S. Beck, for the appellee-cross-appellant (plaintiff).

Opinion

KELLER, J. The plaintiff, Richard Tatoian, in his capacity as trustee of the Ruth B. Tyler Irrevocable Trust, brought the underlying vexatious litigation action against the defendants, Bruce D. Tyler (Bruce Tyler) and Jay M. Tyler (Jay Tyler). The defendants are among the beneficiaries of the trust. In 2010, Jay Tyler commenced an action (prior action) against, among others, the plaintiff and Bruce Tyler. Jay Tyler named the plaintiff as a defendant in all seven counts of his complaint, but counts three through seven of the complaint were brought against the plaintiff exclusively. Essentially, with respect to the plaintiff, Jay Tyler alleged in his

complaint that, in a variety of ways, the plaintiff had performed deficiently as trustee and sought money damages and equitable relief. In 2011, Bruce Tyler brought a cross complaint in the prior action. All four counts of the cross complaint, which was brought against the plaintiff exclusively, are nearly identical to the claims raised in counts four through seven of the complaint. Bruce Tyler sought, inter alia, money damages. After the plaintiff prevailed in the prior action, he commenced the present action, sounding in common-law and statutory vexatious litigation, for, inter alia, attorney's fees and costs he incurred, on behalf of the trust, in defending himself in the prior action. Following a court trial in the present action, the trial court found that the defendants lacked probable cause to bring one of the claims against the plaintiff in the prior action. Accordingly, the court rendered judgment in part in the plaintiff's favor and awarded him a portion of the attorney's fees and costs he incurred in defending the prior action.

The defendants appeal from the judgment of the trial court and raise the following claims: (1) the court lacked subject matter jurisdiction over the plaintiff's causes of action because he lacked standing at the time of the commencement of the present action; (2) the court improperly failed to consider whether the settlor of the trust, Ruth B. Tyler (Ruth Tyler), was subjected to undue influence in connection with the creation of the trust; (3) the court misinterpreted relevant law in its analysis of whether, in the prior action, the defendants had probable cause to claim that the plaintiff had violated General Statutes § 45a-541c by failing to diversify trust assets; and (4) the court misinterpreted relevant law in its analysis of whether the plaintiff could prevail in the present action merely by demonstrating that the defendants lacked probable cause to bring one of the claims that they brought against him in the prior action.

The plaintiff cross appeals from the judgment of the trial court. He claims that, although the court properly concluded that one of the claims raised against him by the defendants in the prior action was not supported by probable cause, the court erroneously failed to conclude that the defendants lacked probable cause to bring the remaining claims and had acted with malice in bringing the claims.[1]

We disagree with the claims raised in the defendants' appeal but agree, in part, with the claim raised in the plaintiff's cross appeal. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I

FACTS AND PROCEDURAL HISTORY

In its initial memorandum of decision, the court found the following facts, many of which are not in dispute: "The defendants, [Jay Tyler] and [Bruce Tyler], are the sons of the late [Ruth Tyler]. The defendants . . . have three brothers; Thomas J. Tyler [(Thomas Tyler)], Russell J. Tyler [(Russell Tyler)], and John E. Tyler, Jr. [(John Tyler, Jr.)].

"Bruce Tyler and Thomas Tyler are attorneys licensed to practice in this state.

"In 1984, [Bruce Tyler] represented his mother, Ruth Tyler, in executing a will that stated that the Tyler child with the lowest net worth would receive enough money from her estate to equalize that child's net worth with that of the sibling with the second lowest net worth. [Bruce Tyler] gave Ruth Tyler the original of the 1984 will and he kept a copy for his records. [Bruce Tyler] did not tell his siblings about the 1984 will or provide them with a copy because he understood that as her attorney he had an obligation not to disclose such information without her consent.

[1] The plaintiff sets forth four distinct claims in his cross appeal but, because they each raise the same legal issue, we will address these claims together.

"Under the 1984 will, [Jay Tyler], the youngest of Ruth Tyler's five sons, would have received the entirety of Ruth Tyler's estate. [Jay Tyler] first learned about the 1984 will from [Bruce Tyler] after Ruth Tyler died in 2010.

"In 1988, Ruth Tyler and her husband, John Tyler, the defendants' father, executed new wills in which they divided their assets equally among their five sons. This 1988 will was also prepared by [Bruce Tyler], who was present when the will was executed and took the oaths. [Bruce Tyler] did not tell Jay Tyler that their parents had changed the will to leave their estate to their five children equally. At trial, [Bruce Tyler] claimed that he did not recall preparing the 1988 will for his parents.

"In 1990, Ruth and John Tyler took out a loan on the family home in order to loan Jay Tyler $50,000. [Bruce Tyler] assisted his parents in obtaining the bank loan. Under his agreement with his parents, [Jay Tyler] was required to pay back the loan in full with interest and to make monthly payments to his parents.

"In 1991, [Bruce Tyler] borrowed $25,000 from his parents to use for college tuition. He, too, was required to pay back this loan with interest. [Bruce Tyler] repaid his parents at least $10,000 on this loan.

"John Tyler, Ruth Tyler's husband, died in 1997.

"In 1999, Ruth Tyler executed a new will with the assistance of her son, Thomas Tyler. Under this will, Ruth's five sons would share equally in her estate; however, any outstanding loan amounts owed to her would be deducted from that child's share of the estate and redistributed to the others. At that time, she [granted] her son [John Tyler, Jr.] her power of attorney.

"[Bruce Tyler] could not recall if his mother told him about the 1999 will. [Jay Tyler] was not aware of the 1999 will until after his mother died.

"On August 3, 2004, the plaintiff received a call from Thomas Tyler notifying him that his mother, Ruth Tyler, would be calling him to discuss estate planning. The next day, Ruth Tyler called the plaintiff, and they met on August 10, 2004. The plaintiff is an attorney who has practiced in Enfield for forty years in the area of trusts, wills, and estates. He had known Ruth Tyler for fifty years, as their families were neighbors.

"At their meeting on August 10, 2004, Ruth Tyler explained that she had prepared a will in 1999, which she wished to maintain. She also told the plaintiff that she wanted to create a trust to preserve her assets in the event she went into a nursing home. They also discussed the execution of a living will and revised power of attorney, again designating her son, [John Tyler, Jr.]. The plaintiff met with [John Tyler, Jr.], who held Ruth Tyler's power of attorney, and he gave the plaintiff a copy of the 1999 will.

"The plaintiff prepared the trust based on Ruth Tyler's instructions and explained its contents to her in detail. In order to accomplish Ruth Tyler's purpose to preserve her assets and avoid probate, the trust was irrevocable. The plaintiff was made the trustee of the trust. Ruth Tyler agreed to the trust provisions.

"The trust adopted the provisions of the 1999 will, and provided that Ruth Tyler's five sons would share equally in her estate, 'subject to the direction that any sums due and owing to the [g]rantor [Ruth Tyler] by her sons [Bruce Tyler and Jay Tyler], shall be deducted from any share which they are to receive' under the trust.

"According to the trust, the trustee had 'full power and authority to manage and control the trust estate,' which included the right to invest and reinvest the trust assets. 'The trustees may make and change such investments from time to time according to their discretion; and they may continue to hold any stocks, securities

or other property received by them hereunder, without any duty of diversification.' During his time as trustee, the plaintiff had discussions with an investment advisor but decided not to make any trades or any changes to the investments of the trust assets.

"Under the section [of the trust entitled '(t)rustee (a)ccountings'], the trust provides: 'The [t]rustee shall render an account at least once each twelve months to each adult beneficiary . . . . The account shall show the receipts, disbursements and distributions of principal and income since the last accounting, and the assets on hand. If no objection shall be made to any account so rendered within ninety (90) days after a copy thereof has been deposited in the mail addressed to any person entitled thereto, as hereinabove provided, such beneficiary shall be conclusively presumed to have approved or assented to all actions reflected in the account so rendered.' Prior to Ruth Tyler's death, the plaintiff only sent accountings to Ruth Tyler and [John Tyler, Jr.].

"The trust identifies Ruth Tyler as grantor and refers to her as grantor throughout the trust. Although the trust includes some limited definitions, it does not define the term 'beneficiary.'

"The trust contains an incontestability of trust clause, which provides that 'if any beneficiary' under the trust shall contest the validity of the trust, they shall not be entitled to any benefit under the trust.

"The trust also provides a provision entitled 'Exculpation of Individual Trustees' that provides: 'No individual trustee shall be liable [for] any mistake or error of judgment, or for any action taken or omitted, either by the trustee or by any agent or attorney employed by the trustee, or for any loss or depreciation in value of the trust, except in the case of willful misconduct.'

"After the trust was executed, Ruth Tyler's assets were transferred to the trust. The assets included Bank

of America stock held by Smith Barney as the investment advisor. The Bank of America stock had been owned by Ruth and John Tyler for many years. At year end in 2006, the trust estate had a value of just under $500,000, with $362,504 attributed to stocks. At some point, Ruth Tyler sold her home and those cash proceeds were added to the trust, making the value of the trust approximately $500,000.

"Neither defendant Bruce Tyler [nor] Jay Tyler [was] aware that their mother created the trust until after her death in 2010; however, both were aware that she had wanted to do so.

"Ruth Tyler died on April 1, 2010.

"The plaintiff liquidated the assets of the trust and converted them to cash for distributions to the beneficiaries. He also prepared accountings, which he filed with the Probate Court, and provided to the defendants. At that time, the value of the trust assets had decreased substantially to approximately $270,000, with the stock value having decreased to approximately $146,000 from its high several years before of $362,504.

"After Ruth Tyler's death, Bruce Tyler told Jay Tyler . . . about the trust, and Bruce Tyler told Jay Tyler about the 1984 will. When [Jay Tyler], who is not a lawyer, learned about the trust, he had concerns that the plaintiff had kept the trust a secret and should have been providing him accountings during his mother's lifetime. Although [Jay Tyler] disputed that he owed his mother any money, he was also concerned that his mother's trust essentially disinherited him, which he did not believe she would do, leading him to believe that she had been influenced by Thomas Tyler. Jay Tyler believed that the plaintiff had conspired with Thomas Tyler and that they had unduly influenced Ruth Tyler to 'cheat' him out of his inheritance. Jay Tyler claimed that Thomas Tyler was not a nice person and enjoyed 'putting Jay down,' and [that] the fact that Thomas Tyler

was aware of the trust and will, was a 'red flag.' Also, when Jay Tyler learned from Bruce Tyler that the trust had decreased substantially in value, he was concerned that the plaintiff had not complied with prudent investor rules, which he learned about from Bruce Tyler.

"[Jay Tyler] decided that he wanted to bring a lawsuit for the purpose of seeking to have the 1984 will deemed operative, and pursuant to which he would benefit substantially. He asked his brother Bruce Tyler for assistance. At first, Bruce Tyler declined and told Jay Tyler to contact an attorney. When he spoke to Bruce Tyler a second time and again sought his assistance, Bruce Tyler agreed to help Jay Tyler with the paperwork. Bruce Tyler told Jay Tyler that he was not his attorney and that he was acting on his own.

"With Bruce Tyler's assistance, Jay Tyler prepared a complaint against all of his brothers, including Bruce Tyler, who were the other beneficiaries of the trust and heirs under the 1999 will, and the plaintiff as trustee. The suit was served on or about December 23, 2010, and was filed in [the judicial district of Fairfield at Bridgeport] on January 28, 2011. . . .

"[Jay Tyler's] initial complaint alleged that the plaintiff had conspired [with Thomas Tyler] to keep the trust and the 1999 will a secret from him, that as a result of this conspiracy, Jay Tyler was wrongfully deprived of his share of Ruth Tyler's estate, and that the plaintiff had a duty to communicate with Jay Tyler and to furnish him annual accounts of the trust during Ruth Tyler's lifetime and failed to do so. He also made claims of undue influence against Thomas Tyler.

"[Bruce Tyler] admitted all of the allegations of Jay Tyler's complaint and filed a cross complaint against the plaintiff, dated March 21, 2011. In that complaint, Bruce Tyler asserted that the plaintiff had a duty to provide him with accountings for the trust during Ruth Tyler's lifetime, and that the plaintiff had violated General Statutes § 45a-541, because he failed to act as a

'prudent investor' in investing and managing the assets of the trust. Bruce Tyler also alleged that the plaintiff failed to diversify the investments of the trust in violation of the same statute, and that his failure to provide accountings to Bruce Tyler during Ruth Tyler's lifetime deprived him of his right to seek an order from the Probate Court to compel the plaintiff not to maintain the securities he had received in the trust, which right was claimed to be afforded by General Statutes § 45a-204.

"On October 11, 2011, Bruce Tyler amended his cross complaint, with the court's permission, to proceed against the plaintiff's investment adviser and his employer, alleging that they were liable because the plaintiff had relied on their advice and management of the securities in the trust account. On February 7, 2012, Bruce Tyler's cross complaint against the investment adviser and his employer was dismissed for lack of standing.

"On April 10, 2012, [Bruce Tyler] amended his cross complaint against the plaintiff to add an additional claim alleging that the plaintiff should have sued an investment advisor who had provided advice seeking to recover the lost value of stocks owned by the trust and that the plaintiff was therefore liable to Bruce Tyler.

"On June 21, 2012, [Jay Tyler] amended his complaint adding all of the additional claims against the plaintiff that had been previously made by Bruce Tyler in his cross complaint against the plaintiff.[2]

"Judgment entered in favor of the plaintiff on Jay Tyler and Bruce Tyler's operative complaints after the

[2] In a prior appeal, this court more fully described the claims brought against the plaintiff in Jay Tyler's complaint and Bruce Tyler's cross complaint as follows: "In the first count of the complaint, Jay Tyler sought to modify the trust, claiming that Thomas Tyler had exerted undue influence upon Ruth Tyler in relation to the trust and had conspired together with [John Tyler, Jr.], Russell Tyler and [the plaintiff] to keep Ruth Tyler's trust and will a secret from him. In the second count of the complaint, Jay Tyler also sought to modify the trust based upon allegations that the . . . actions

partial granting of summary judgment and a jury verdict.[3]

"To defend the claims against him in the [prior] action, the plaintiff, on behalf of the trust, hired counsel

[of Thomas Tyler, Russell Tyler, [John Tyler, Jr., and the plaintiff] against him had wrongfully deprived him of his share of the trust estate. In the third count of the complaint, Jay Tyler alleged negligence against [the plaintiff] for failing to furnish him with accountings of the trust while his mother was still alive, and thereby preventing him from discovering the undue influence that had been exerted upon his mother in relation to the trust. In the fourth count of the complaint and the first count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff] had [failed to render trust accountings and had] failed to act as a prudent investor of the trust's assets, in violation of General Statutes § 45a-541b. In the fifth count of the complaint and second count of the cross complaint, both [Jay Tyler and Bruce Tyler] alleged that [the plaintiff] had failed to diversify the trust's assets, in violation of General Statutes § 45a-541c. In the sixth count of the complaint and the third count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff's] failure to furnish them with trust accountings during their mother's lifetime had prevented them from exercising their right to seek an order from the Probate Court under § 45a-204 compelling [the plaintiff], as trustee, not to keep the trust's assets invested in the same securities received by him. Finally, in the seventh count of the complaint and the fourth count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff] had breached his duty to the trust, and to them as trust beneficiaries, by failing to hold the investment advisor liable for losses allegedly resulting from the advisor's advice not to diversify the trust's assets." (Footnotes omitted.) *Tyler* v. *Tyler*, 163 Conn. App. 594, 599–601, 133 A.3d 934 (2016).

[3] On August 22, 2013, the trial court in the prior action, *Sommer*, *J.*, granted the plaintiff's motion for summary judgment as to all counts of the third amended complaint and the fourth amended cross complaint except for the seventh count of the third amended complaint and the fourth count of the fourth amended cross complaint. Thus, in its initial decision on the motion for summary judgment, the court denied the plaintiff's motion for summary judgment only with respect to the claim that the plaintiff had breached his duty to the trust and the trust beneficiaries by failing to hold the investment adviser liable for losses allegedly resulting from the adviser's advice not to diversify the trust assets. On September 19, 2013, in response to the parties' motions to reargue, the court reversed its prior decision only to the extent that it had granted the plaintiff's motion for summary judgment with respect to the issue of whether the plaintiff owed Jay Tyler and Bruce Tyler a duty to provide them with accountings of the trust prior to their mother's death.

Thereafter, Jay Tyler and Bruce Tyler appealed from the court's judgment. On June 17, 2014, this court dismissed the appeal brought by Jay Tyler and Bruce Tyler with respect to their claim that the trial court improperly had rendered summary judgment on several counts that were asserted against the plaintiff. This court dismissed that portion of the appeal on jurisdictional

and has incurred attorney's fees in the amount of $114,889 and costs in the amount of $2111.82." (Footnotes added and footnotes omitted.)

In support of his vexatious litigation claims in the present action, the plaintiff, in his capacity as trustee, relied on the claims brought against him in the prior action in both the operative complaint brought by Jay Tyler and the operative cross complaint brought by Bruce Tyler. The plaintiff also alleged that all of the counts brought against him either were terminated by way of summary judgment or resolved by a jury in his favor. The plaintiff alleged that "[a]lthough . . . [Bruce Tyler] was named as a defendant in the complaint and in the amended complaint [brought by Jay Tyler], in reality . . . [Bruce Tyler] and . . . Jay Tyler were not adversaries but were, in fact, acting in concert. Moreover, in addition to filing his cross complaint and the amendments thereto . . . [Bruce Tyler] directed and controlled the initiation of the action, including prepar-

grounds in light of the fact that, with respect to the claims raised against the plaintiff, the trial court had rendered a partial judgment from which a right to appeal did not exist. *Tyler* v. *Tyler*, 151 Conn. App. 98, 103–104, 93 A.3d 1179 (2014).

The claims brought against the plaintiff on which summary judgment had not been rendered were tried before a jury. On October 24, 2013, a jury returned a general verdict in the plaintiff's favor. Neither Jay Tyler nor Bruce Tyler appealed from the judgment subsequently rendered by the trial court in the plaintiff's favor.

Following this court's partial dismissal of the prior appeal brought by Jay Tyler and Bruce Tyler from the rendering of summary judgment with respect to some but not all of the claims brought against the plaintiff, and following the jury verdict on October 24, 2013, which resulted in a judgment in the plaintiff's favor with respect to the claims that had not been disposed of by the rendering of summary judgment, Jay Tyler and Bruce Tyler argued during a status conference before the trial court that certain of the claims they had brought against the plaintiff were still pending. On October 1, 2014, the trial court, *Radcliffe*, *J.*, ruled that *all* of the claims brought against the plaintiff by Jay Tyler and Bruce Tyler had been adjudicated. After Jay Tyler and Bruce Tyler appealed from the trial court's judgment in this regard, this court affirmed the judgment of the trial court. *Tyler* v. *Tyler*, 163 Conn. App. 594, 133 A.3d 934 (2016).

ing and arranging for service of the complaint and all other relevant pleadings filed by . . . [Jay Tyler] as were necessary for the commencement and prosecution of the action."

In count one, the plaintiff asserted a cause of action sounding in common-law vexatious litigation, seeking compensatory and punitive damages. The plaintiff alleged in relevant part: "The action, including the complaint and cross complaint, was brought and prosecuted by the defendants without probable cause in that the defendants lacked knowledge of the facts, actual or apparent, strong enough to justify a reasonable belief that they had lawful grounds to bring and prosecute the causes of action alleged against the plaintiff." The plaintiff alleged that "[i]n bringing and prosecuting the [prior] action, [the] defendants acted with malice based on one or more of the following: [a] [the] defendants lacked probable cause to bring and prosecute the action; [b] the action was brought and prosecuted primarily for an improper purpose; [c] the defendants knew or reasonably should have known that they had no valid claim against the plaintiff based on the facts asserted in the complaint, amended complaint, cross complaint and amended cross complaint and/or that any claims made by the defendants against the plaintiff would have been barred by the provisions of the trust or the laws of the state of Connecticut." The plaintiff alleged that "[t]he aforesaid actions on the part of the defendants were taken with a malicious intent unjustly to vex, annoy and harass the plaintiff" and "constitute vexatious litigation under Connecticut common law." The plaintiff alleged that he had incurred attorney's fees and costs in defending the prior action and bringing the present action.

In count two, the plaintiff, relying on the allegations set forth in count one, asserted a claim of statutory

vexatious litigation, seeking double damages pursuant to General Statutes § 52-568 (1).[4]

In count three, the plaintiff, also relying on allegations set forth in count one, asserted a claim for statutory vexatious litigation, seeking treble damages pursuant to § 52-568 (2).[5]

The defendants separately filed answers and special defenses in which they denied the allegations that the complaint and the cross complaint had been brought without probable cause, that they had acted with malice in bringing and prosecuting the prior action, and that their actions had constituted vexatious litigation under the common law or § 52-568.[6] The respective pleadings filed by the defendants mirrored one another. First, the defendants claimed that, in bringing the prior action against the plaintiff, they lacked the requisite intent to have engaged in vexatious litigation. Second, the defendants claimed that the plaintiff commenced the present action prior to the termination of the prior action, thus depriving the court of subject matter jurisdiction over the plaintiff's action. Third, the defendants claimed that the plaintiff lacked the authority under the trust to bring the present action. Fourth, the defendants claimed the present action reflected the plaintiff's improper motivation in that, rather than acting in the best interest of the trust, he is motivated by his own

[4] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

[5] See footnote 4 of this opinion.

[6] The defendants also brought a counterclaim against the plaintiff in his individual capacity. On October 15, 2014, the court, *Graham*, *J.*, granted the plaintiff's motion to dismiss the counterclaim. That ruling is not a subject of this appeal.

malice and vindictiveness toward the defendants and not by any acts of the defendants. Fifth, the defendants claimed that in the present action the plaintiff had violated General Statutes § 52-226a by failing to obtain a certificate from the court in the prior action confirming that the action was vexatious in nature.[7] Sixth, the defendants claimed that the plaintiff had engaged in fraud. In his replies to the special defenses filed by the defendants, the plaintiff denied each and every allegation raised therein. Later, the court granted the plaintiff's motion for summary judgment with respect to the second, third, and fifth special defenses raised by the defendants. At trial, the defendants expressly abandoned the first and fourth special defenses.

After the court, *Cobb*, *J.*, denied a motion filed by Bruce Tyler to dismiss the plaintiff's vexatious litigation action,[8] a trial took place over the course of three days in May, 2016. Thereafter, the parties submitted posttrial briefs. On December 7, 2016, the court set forth its ruling in a thorough memorandum of decision.

Having set forth its findings of fact, which we previously have recited in this opinion, the court addressed the merits of the plaintiff's claims in relevant part as follows: "The cause of action for vexatious litigation permits a party who has been wrongly sued to recover damages. . . . In Connecticut, the cause of action for vexatious litigation exists both at common law and

[7] General Statutes § 52-226a provides: "In any civil action tried to a jury, after the return of a verdict and before judgment has been rendered thereon, or in any civil action tried to the court, not more than fourteen days after judgment has been rendered, the prevailing party may file a written motion requesting the court to make a special finding to be incorporated in the judgment or made a part of the record, as the case may be, that the action or a defense to the action was without merit and not brought or asserted in good faith. Any such finding by the court shall be admissible in any subsequent action brought pursuant to section 52-568."

[8] The motion to dismiss and the court's ruling thereon are discussed in detail in part II A of this opinion.

pursuant to statute. Both the common-law and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law. . . .

"The court concludes that the . . . commencement of the [prior] action against the plaintiff [by Jay Tyler], and [the] . . . cross complaint against the plaintiff [by Bruce Tyler], satisfies the first element that they prosecuted actions against the plaintiff. The court also finds that the [prior] action terminated in the plaintiff's favor, either by summary judgment or a jury verdict in the plaintiff's favor. Thus, the court must determine the remaining elements; whether the [prior] action was prosecuted without probable cause and with malice.

"The plaintiff conceded at argument that if he fails to prove his vexatious litigation claim as to one of the defendants' claims in the [prior] action, this action fails. As explained below, the court finds that the plaintiff has failed to prove the defendants' claim [in the prior action]—that the plaintiff failed to provide them with accountings—lacked probable cause, or that it was brought with malice. Because the court finds [that] probable cause existed for this claim, it is not necessary to address the other causes of action brought by the defendants in the [prior] action. Similarly, because the

court finds the issues for the defendants, it is unnecessary for the court to address the defendants' remaining special defense [that was based on fraud]." (Citations omitted; internal quotation marks omitted.)

After discussing legal principles related to probable cause and observing that its existence in a particular case is a question of law, the court stated: "The plaintiff claims that count four of [Jay Tyler's] operative complaint and count one of [Bruce Tyler's] cross complaint alleging that the plaintiff improperly failed to provide them with accountings under the trust, lacked probable cause. In support of this claim, the plaintiff argues that this claim was disposed of in the plaintiff's favor on summary judgment and that the language of the trust is clear and did not require that accountings be provided to the defendants. The court disagrees and finds that the defendants had probable cause to bring these claims.

"First, adverse rulings in the underlying case on summary judgment or otherwise do not equate to a lack of probable cause. . . .

"Additionally, the court has reviewed the trust and concludes that it is not 'so clear,' as the plaintiff contends, such that any layperson would understand it to allow for only one interpretation. There is only one 'Trustee Accounting' provision in the trust, § 8 (h), which provides in part that: '*The* [*t*]*rustee shall render an account at least once each twelve months to each adult beneficiary and to the natural or legal guardians, if any, of each minor or otherwise legally disabled beneficiary then receiving or entitled to receive income hereunder*. The account shall show the receipts, disbursements and distributions of principal and income since the last accounting, and the assets on hand. If no objection shall be made to any account so rendered within ninety (90) days after a copy thereof has been deposited in the mail addressed to any person entitled

thereto, as hereinabove provided, such beneficiary shall be conclusively presumed to have approved or assented to all actions reflected in the account so rendered.' " (Emphasis added.)

"The plaintiff provided accountings under this clause to Ruth Tyler during her lifetime and [John Tyler, Jr.], her power of attorney. The plaintiff did not provide accountings of the trust holdings to the defendants or other heirs. The plaintiff claims that the language of this accountings provision 'clearly' required him to provide accountings only to 'income' beneficiaries and that Ruth Tyler was the only income beneficiary. Although the court agrees that this is a valid interpretation of the clause, it disagrees that it is the only possible interpretation.

"The plaintiff's argument is dependent upon the court finding that there is only one interpretation of the first sentence of the accountings provision finding that the last phrase of the first sentence, 'entitled to receive income hereunder,' modifies 'adult beneficiary,' at the beginning of the sentence. The court finds, however, that there is another possible reading of this sentence, and that is that the phrase 'entitled to receive income hereunder' modifies the category of recipients identified immediately before it, that is, 'natural or legal guardians, if any, of each minor or otherwise legally disabled beneficiary.' Thus, the court finds that the provision is ambiguous, allowing for more than one interpretation.

"If the phrase 'entitled to receive income hereunder' does not modify 'adult beneficiary,' then there is an argument that adult beneficiaries were entitled to accountings under the trust. The term beneficiary is not defined in the trust. The common definition of beneficiary is 'the person designated to receive the income of a trust estate.' . . . Thus, under the common understanding of the word beneficiary, the defendants as

recipients of property under the trust are beneficiaries, and there can be no claim that they are not adults.

"Moreover the trust identifies Ruth Tyler only as 'the [g]rantor,' and not as a beneficiary, although she was entitled to receive payments under the trust. When the term 'beneficiary' is used throughout the trust, it appears to mean Ruth Tyler's heirs, and the defendants are identified as heirs. For example, § 5 (f) of the trust allows certain payments to minors or incapacitated '[b]eneficiaries,' and § 5 (m) provides that the '[t]rustees shall not be liable to the [g]rantor, any beneficiary, or . . .' suggesting that the words have different meanings in the trust. The accounting provision requires [accountings] to 'adult beneficiar[ies]' but does not require accountings to the '[g]rantor,' although the grantor received accountings. The trust could have been drafted to include [a] definition section that would have made its provisions clearer.

"Thus, the court disagrees that the accountings clause of the trust is 'so clear' as to have only one meaning. The court finds that it is susceptible to more than one interpretation, one of which supports the defendants' claim in the [prior] action that, as adult beneficiaries under the trust, they were entitled to accountings. Thus, the court finds that there was a reasonable basis for the defendants' belief that they were beneficiaries under the trust and, as such, were entitled to receive accountings from the plaintiff. The plaintiff did not provide the defendants with accountings during Ruth Tyler's lifetime. Had the plaintiff done so, the defendants would have known that the trust was declining significantly in value. Thus, the court finds [that] there was probable cause for the defendants to bring their claim against the plaintiff for failing to provide accountings to them under the trust.

"In addition, the plaintiff has not established that the so-called '[e]xculpation [c]lause' in the trust, drafted by the plaintiff to protect the plaintiff, is sufficient to

establish that the defendants lacked probable cause to bring this claim in the [prior] action. Under the trust, the trustee shall not be subject to any liability, 'except in the case of willful misconduct.' The plaintiff argues that: 'The meaning of this language is clear to a layperson, and certainly is clear to an attorney—that in order to have a claim against the plaintiff, the defendants must allege, and moreover establish, that the plaintiff engaged in wilful misconduct.' The plaintiff claims that the defendants failed to plead 'wilful [misconduct]' or prove it at trial. The plaintiff misconstrues the probable cause standard, which does not require talismanic phrases in pleadings or that a defendant prevail at trial. . . . This 'exculpation' language in the trust does not prohibit the bringing of an action against the trustee, but only that he 'shall not be liable,' except for 'willful [misconduct].' Indeed, the clause was asserted by the plaintiff in the [prior] action as a special defense.

"Thus, the court finds that the plaintiff has failed to prove that the defendants lacked probable cause to sue the plaintiff for failure to provide them with accountings. . . .

"As for the element of malice, the court finds that the plaintiff has not proved this element, either. In a vexatious suit action, the defendant is said to have acted with 'malice' if he acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . . [W]hile malice may be inferred from the lack of probable cause, the lack of probable cause may not be inferred from malice. . . .

"The plaintiff's primary argument is that he has proved malice by proving lack of probable cause. Because the court has found probable cause, the plaintiff cannot prevail on this argument.

"The plaintiff also refers to circumstantial evidence of the defendants' animosity toward the other siblings

as proof of malice against the plaintiff, but the plaintiff has produced no evidence that the defendants held animosity toward him. The court is not aware of any cases, and the plaintiff has provided none, that allow the court to transfer the animosity of the defendants from one party to another. Thus, [t]he evidence relied on by the plaintiff fails to establish that the defendant[s] acted primarily for any purpose other than securing an adjudication of its claim." (Citations omitted; footnotes omitted.) The court rendered judgment in the defendants' favor.

On December 23, 2016, the plaintiff filed a motion seeking articulation and clarification of the court's December 7, 2016 decision. Specifically, the plaintiff asked the court to provide additional explanation for its conclusion that the defendants had probable cause to bring an action for *monetary damages* against the plaintiff. On December 23, 2016, the plaintiff also filed a motion seeking reargument and/or reconsideration of the court's December 7, 2016 decision, with a supporting memorandum of law. In relevant part, the plaintiff argued that the court had stated mistakenly in its decision that he had conceded that his action would fail if he could not prove that the defendants lacked probable cause to bring *all* of the counts in the prior action, that relevant precedent did not require him to prove that there was a lack of probable cause with respect to all of the counts in the prior action, that the court erred in finding that the defendants had probable cause to bring the accounting claims, and that, with respect to the remaining claims in the prior action, he had proven that the defendants acted with a lack of probable cause and malice. Bruce Tyler replied to the motion seeking reargument and/or reconsideration, arguing that the relief sought therein was unwarranted. On February 15, 2017, the court held a hearing on the motion. Following the hearing, the parties submitted supplemental briefs.

On July 19, 2017, the court issued a memorandum of decision in which it granted the plaintiff's motion for reconsideration and/or reargument. The court left the findings of fact set forth in its original decision undisturbed but set forth a different analysis with respect to the claims raised. In relevant part the court stated: "The plaintiff asserts that the court improperly concluded that the defendants had probable cause to bring their accounting claims in the underlying action. The plaintiff does not challenge the court's conclusion that the accountings provision in the trust is ambiguous, but instead contends that the defendants lacked probable cause to bring their accounting claim because the claim was barred by the trust's exculpatory clause. This clause, contained within § 5 (l) of the trust, provides: 'No individual [t]rustee shall be liable for any mistake or error of judgment, or for any action taken or omitted, either by the [t]rustee or by any agent or attorney employed by the [t]rustee, or for any loss or depreciation in the value of the trust, except in the case of willful misconduct.' In its original decision, the court determined that the exculpatory clause did not defeat the defendants' probable cause to bring the accounting claim because it did not prohibit the bringing of an action against the trustee, but that he shall not be liable, except for wilful misconduct. Consequently, the plaintiff has not contended that the court overlooked controlling authority or misapplied the facts. Instead, the plaintiff simply reiterates the argument made in his posttrial brief that has been adequately addressed by the court's memorandum."

As we discussed in footnote 2 of this opinion, Jay Tyler generally alleged in counts one and two of his amended complaint, which was directed at the plaintiff as well as Thomas Tyler, Russell Tyler, John Tyler, Jr., and Bruce Tyler, that the plaintiff had been a participant in a conspiracy to wrongfully deprive him of his rightful

share of Ruth Tyler's estate. The court in the present action concluded that, to the extent that it was necessary to consider whether Jay Tyler had probable cause to bring these claims, it could consider them to be part of the claims raised by Jay Tyler that were based on the plaintiff's failure to provide the defendants with trust accountings. Apparently referring to counts one and two of the complaint, in which Jay Tyler claimed that a conspiracy existed, the court explained: "[T]he court does not consider these contentions because there are not sufficient factual allegations directed at the plaintiff therein to constitute a separate claim against him and to the extent that this claim contains allegations against him, they go to his failure to provide an accounting." Accordingly, the court's analysis of "accounting claims" encompassed the claims brought against the plaintiff in counts one, two, three, and six of Jay Tyler's amended complaint.[9] In this appeal, the defendants do not raise a claim of error with respect to the court's decision to interpret counts one, two, three, and six of the complaint in the manner that it did.

The court went on to state: "In addition to the discussion in its original memorandum, the court notes that the exculpatory clause does not act as a complete bar or immunity to civil suit, as the plaintiff's argument seems to suggest. . . . The language of the clause limits the trustee's liability [to harm] resulting from the trustee's wilful misconduct. This action is a vexatious litigation suit initiated by the trustee against the defendants, who are beneficiaries of the trust, a situation not covered by the exculpatory clause. In this case, the plaintiff has the burden to prove a lack of probable cause, among other things. The probable cause standard applied in vexatious litigation actions imposes a significant burden on the plaintiff. That the exculpatory clause

[9] The court's analysis of "accounting claims" also encompasses the claim raised by Bruce Tyler in count three of his cross complaint.

may act as a shield to protect a trustee from personal liability where his conduct did not constitute wilful misconduct does [not] mean that the exculpatory clause may be used as a sword by the trustee to establish probable cause in a vexatious suit. There is no language . . . in the exculpatory clause to require such an interpretation, and the plaintiff has presented no case, and this court is not aware of any, that necessitates such a finding. Indeed, the remedy imposed by the trust when beneficiaries contest the trust is that they may not benefit from the trust assets." (Citation omitted.)

Next, the court considered the plaintiff's contention that in its original decision it mistakenly relied on what it believed to have been a concession by the plaintiff that, if probable cause existed with respect to one of the claims in the prior action, he would be unable to prevail in the present action. The court stated in relevant part: "The court agrees that the plaintiff did not concede this issue, and that a plaintiff in a vexatious litigation action need not show a lack of probable cause on all of the claims asserted in the underlying action in order to prevail on a vexatious litigation claim, especially where the claims are logically severable. . . . The court agrees with the plaintiff and therefore now considers, on the merits, whether the defendants' other . . . claims against the plaintiff in the [prior] action were vexatious." (Citation omitted.)

After discussing relevant legal principles concerning probable cause and malice, the court addressed the other claims that the defendants brought against the plaintiff in the prior action. The court stated in relevant part: "In the [prior] action, the defendants brought a claim alleging that the plaintiff failed to comply with the requirements of diversification as set forth in § 45a-541c, which provides: 'A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the

purposes of the trust are better served without diversifying.' The plaintiff argues that the trust clearly states that he had no duty to diversify. The defendants argue that they had probable cause to bring this claim because § 45a-541c imposes a duty to diversify. The court agrees with the plaintiff that under the statutory scheme and the trust, he had no duty to diversify.

"The duty imposed by § 45a-541c is part of a larger statutory scheme entitled, the 'Connecticut Uniform Prudent Investor Act,' which is a set of individual duties imposed by General Statutes §§ 45a-541 to 45a-541*l*. The applicability of the duties imposed by the Connecticut Uniform Prudent Investor Act, including the duty to diversify in § 45a-541c, is determined pursuant to General Statutes § 45a-541a, which provides: '(a) Except as provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule, as set forth in sections 45a-541 to 45a-541*l*, inclusive. (b) The prudent investor rule is a default rule that may be expanded, restricted, eliminated or otherwise altered by provisions of the trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on provisions of the trust.' The language of these statutory provisions is clear and unambiguous.

"Under § 5 (a) of the trust, the plaintiff had no duty to diversify based on the following provision stating that the trustee 'may continue to hold any stocks, securities or other property received by them . . . *without any duty of diversification*.' (Emphasis added.) In light of the clear and unambiguous language of the trust and § 45a-541c, the plaintiff did not have a duty to diversify the trust's holdings, and the defendants lacked probable cause to bring this claim. . . . As for the malice requirement, the court affirms and adopts its finding

in its original memorandum that the plaintiff has not established malice. . . .

"Consequently, the court concludes that the plaintiff has proven that the defendants lacked probable cause to bring their [claim in the prior action] alleging that the plaintiff failed to diversify the assets of the trust and that the plaintiff has failed to prove that the defendants brought this claim with malice." (Citations omitted.)

The court proceeded to address another claim that the defendants brought against the plaintiff in the prior action: "The defendants also alleged in the [prior] action that the plaintiff failed to act as a prudent investor and, as a result, the assets of the trust severely depreciated by more than $250,000. Specifically, the defendants alleged in the [prior] action that the depreciation of the trust securities was a result of the plaintiff's violation of General Statutes § 45a-541b (a), which provides: 'A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.' The defendants further alleged that the plaintiff failed to act as a prudent investor in managing the assets of the trust as prescribed by § 45a-541b (b) and (c).[10]

"As to this claim, the plaintiff relies primarily on the exculpatory clause in the trust, which the court has rejected.

"The plaintiff also asserts that General Statutes § 45a-204 provides him immunity from any claim relating to the depreciation of the securities. Section 45a-204 provides in relevant part: 'Trust funds received by . . . trustees . . . may be kept invested in the securities

[10] The court observed: "Unlike [the duty imposed by] § 45a-541c, the duty imposed by § 45a-541b is applicable because the trust does not expand, restrict, eliminate, or otherwise alter it."

received by them, unless it is otherwise ordered by the Court of Probate or unless the instrument under which such trust was created directs that a change of investments shall be made, *and the fiduciaries thereof shall not be liable for any loss that may occur by depreciation of such securities*.' . . .

"The evidence reveals that neither the probate court nor the trust instructed the plaintiff to change the initial investments. Accordingly, the plaintiff, as trustee, was subject to two somewhat conflicting statutory mandates. On one hand, pursuant to § 45a-541b, the plaintiff had a duty to the beneficiaries to maintain and invest the securities as a prudent investor would utilizing reasonable care. On the other hand, pursuant to § 45a-204, the plaintiff was able to maintain the securities as he received them without subjecting himself to any potential liability.

"The plaintiff argues that § 45a-204 provides him immunity from all liability notwithstanding the duty imposed by § 45a-541b. Even though the language of § 45a-204 appears to be applicable in the present case, our Supreme Court, applying substantially identical statutes, has held that the immunity provided by § 45a-204 is not absolute, but applies 'so long as in the *exercise of reasonable prudence* [the trustee] deem[s] it unnecessary to make any change.' . . . *Peck* v. *Searle*, 117 Conn. 573, 582, 169 A. 602 (1933); see *Beardsley* v. *Bridgeport Protestant Orphan Asylum*, 76 Conn. 560, 564, 57 A. 165 (1904) (same); *Bassett* v. *City Bank & Trust Co.*, 115 Conn. 1, 26, 160 A. 60 (1932) (holding that right to maintain securities as they were received 'must be exercised with prudence and the trustee will not be allowed to escape the responsibilities attaching to trustees generally for the safety of trust funds in his control').

"Although this reasonableness standard is not evident from the language of the current and previous versions

of the statutes, it has been imposed by these Supreme Court decisions. The reasonableness standard utilized by these cases plainly mirrors the duty imposed by § 45a-541b, in that 'the trustee shall exercise reasonable care, skill and caution' in managing the trust assets. Accordingly, the defendants' claim that the plaintiff is not absolutely precluded by the immunity of § 45a-204, is not baseless because it is supported by Supreme Court precedent. Even if the defendants lost on that claim in the underlying action and even if it may be considered novel, [t]he standard for determining probable cause is not whether there are adverse rulings by the court or whether the claim is ultimately determined to be without merit. . . . Therefore, the defendants would have had probable cause to bring this claim if they were aware of facts to support their contention that it was unreasonable for the plaintiff to retain the investments as he received them.

"In the present case, the court found in its original memorandum of decision that the accountings prepared by the plaintiff revealed that the trust securities had substantially depreciated by more than $250,000. The accountings also revealed that the plaintiff had not taken any action to slow or stop the loss of value in the securities. Based on these facts and the duty imposed on the plaintiff by § 45a-541b, the court concludes that the plaintiff failed to prove that the defendants lacked probable cause to pursue this claim. In view of the court's finding on probable cause as to this claim, the court need not decide [the issue of] malice." (Citation omitted; emphasis in original; footnote in original and footnote omitted.)

Last, the court turned to the defendants' claim in the prior action that the plaintiff failed to hold the investment advisor liable. The court stated in relevant part: "In the underlying action, the defendants asserted that the plaintiff failed to pursue an action against the

investment advisor who provided him advice and counseled him not to diversify the assets of the trust, which was contrary to the best interests of the beneficiaries of the trust and resulted in substantial depreciation of the trust assets. The defendants relied upon § 45a-541i, which provides generally that a trustee may delegate investment and management functions to an agent, who can be held liable for a breach of duty imposed by such delegation. The plaintiff argues that immunity bars this claim and that there was no evidentiary basis for this claim because the trust provided him authority to decide whether or not to pursue claims against the investment advisor. The plaintiff also asserts that he testified that he did not delegate the authority to manage any securities and [that] the defendants failed to proffer expert testimony in support of their claim.

"In determining whether the defendants had probable cause for their claims, the issue is whether the defendants had the bona fide belief in the existence of the essential facts underlying the claim. . . . The court finds that under the circumstances presented here, the defendants did have a bona fide belief in the existence of the essential facts.

"The plaintiff's claim that the investment advisor is entitled to immunity pursuant to § 45a-204 and the trust's exculpatory clause [is] undermined by General Statutes § 45a-541i (b), which provides that '[a]n attempted exoneration of the [financial advisor to whom investment and management functions have been delegated] from liability for failure to meet such a duty is contrary to public policy and void.'

"The plaintiff, as trustee, had the ability to bring a cause of action against the investment advisor pursuant to § 45a-541i. As the court found in its original memorandum of decision, the defendants brought this claim based upon the fact that the investment advisor counseled the plaintiff not to diversify the securities. The

court further found that during his time as trustee, the plaintiff had discussions with an investment advisor but decided not to make any trades or any changes to trust assets. The trust accountings reflected that no change had been made to the investments. Based upon the foregoing, the plaintiff has failed to prove that the defendants lacked probable cause to bring this claim and, therefore, no finding [with respect to the issue] of malice is necessary." (Citation omitted; footnote omitted.)

Thus, in its decision granting the plaintiff's motion for reargument and reconsideration, the court concluded that the plaintiff had sustained his burden of proving that the defendants lacked probable cause to bring the failure to diversify claim, but that he had failed to prove that the defendants had acted with malice with respect to that claim. With respect to the claim based on the plaintiff's failure to provide the defendants with trust accountings, the court concluded that the plaintiff did not prove that the defendants had brought the claim without probable cause. Relying on its finding concerning malice in its original memorandum of decision, the court affirmatively found that the plaintiff failed to prove that the defendants had brought the claim with malice. With respect to the remaining claims, the court concluded that the plaintiff failed to prove that the defendants brought the claims without probable cause, and the court stated that, in light of this determination, it was unnecessary to reach the issue of malice.

In its decision granting the plaintiff's motion for reargument and/or reconsideration, the court rendered judgment in the plaintiff's favor under count two, sounding in statutory vexatious litigation under § 52-568 (1), with respect to the failure to diversify claim. The court, relying on its finding that malice had not been proven, rendered judgment in the defendants' favor with respect to count one, sounding in common-law vexatious litigation, and count three, sounding in statutory vexatious litigation under § 52-568 (2). The court awarded the

plaintiff $33,774 in attorney's fees and $527.96 in costs arising from the plaintiff's defense in the prior action and a prior appeal involving the parties. See *Tyler* v. *Tyler*, 151 Conn. App. 98, 93 A.3d 1179 (2014).[11]

After the court granted the plaintiff's motion for reargument and/or reconsideration and granted the plaintiff the relief described previously, the defendants filed a motion for reargument and/or reconsideration of that decision, as well as a memorandum of law. On August 2, 2017, the court denied the motion. The present appeal and cross appeal followed. Additional facts will be set forth as necessary.

II

DEFENDANTS' APPEAL

The defendants appeal from the judgment of the trial court and raise the following claims: (1) the court lacked subject matter jurisdiction over the plaintiff's causes of action because he lacked standing at the time of the commencement of the lawsuit; (2) the court improperly failed to consider whether the settlor of the trust, Ruth Tyler, was subjected to undue influence in connection with the creation of the trust; (3) the court misinterpreted relevant law in its analysis of whether, in the prior action, they had probable cause to claim that he had violated § 45a-541c by failing to diversify trust assets; and (4) the court misinterpreted relevant law in its analysis of whether the plaintiff could prevail in the present action merely by demonstrating that the defendants lacked probable cause to bring one of the several claims that they brought against him in the prior action. We address these claims in turn.

A

First, the defendants claim that the court lacked subject matter jurisdiction over the plaintiff's causes of action because he lacked standing at the time of the commencement of the lawsuit. We disagree.

[11] See footnote 3 of this opinion.

The following additional facts and procedural history are relevant to this claim. In September, 2015, Bruce Tyler filed a motion to dismiss the plaintiff's complaint and an accompanying memorandum of law on the ground that the plaintiff lacked standing and, therefore, the court lacked subject matter jurisdiction. In support of the motion to dismiss, Bruce Tyler referred to the undisputed facts that Ruth Tyler died on April 1, 2010, and the plaintiff, as trustee, commenced the present action more than three years later, in December, 2013. Bruce Tyler argued that, following Ruth Tyler's death, the plaintiff had standing only to wind up the trust, which did not encompass his commencement of the present action. The plaintiff objected to the motion. On November 17, 2015, the court denied the motion to dismiss. The court stated: "The plaintiff . . . has standing to bring this lawsuit, as he is a proper person to adjudicate the claims of vexatious suit in this case. *May* v. *Coffey*, 291 Conn. 106, 967 A.2d 495 (2009). The plaintiff has a specific personal interest in this case by virtue of his status as trustee, and as [trustee] his responsibility to wind up the affairs of the trust. *Ramondetta* v. *Amenta*, 97 Conn. App. 151, 903 A.2d 232 (2006)."

The defendants argue before this court that the trial court erroneously concluded that, following the termination of the trust, the plaintiff had the authority under the trust to bring the present action against them because it was done as part of the winding up of the trust. The defendants argue that although the court properly looked to *Ramondetta* for guidance with respect to the issue of whether the plaintiff had the authority to commence the present action, the court misapplied that precedent. Specifically, the defendants argue that bringing the present action was not part of the winding up process because the present action was not an "asset" of the trust, it had no "intrinsic value," and there was no provision in the trust that required

the plaintiff to bring the present action against them.[12] The defendants argue that, far from being an act that the plaintiff was required to perform by the trust, or an act that was necessary to wind up the trust, bringing the present action was a voluntary "gamble" of trust assets that was undertaken by the plaintiff alone, and that one or more beneficiaries could have commenced the action if they believed it was worthwhile to do so.

As he did before the trial court, the plaintiff argues that his powers as trustee did not end immediately when the trust terminated upon Ruth Tyler's death, but that they continued for a reasonable time so that he could wind up the affairs of the trust. He argues that he timely commenced the present action in December, 2013, shortly after the trial in the prior action concluded in October, 2013, and the appeal period from the judgment rendered in his favor in that action had expired. When he brought the present action against the defendants, the plaintiff argues, he was working diligently and within a reasonable time to collect an asset of the trust. The plaintiff argues that the fact that the claims he brought against the defendants were valid and had value to the trust is evidenced by his obtaining a judgment in his favor on behalf of the trust. He argues: "It was well within the trustee's discretion (if not mandated by law as part of [the] plaintiff's duties) to pursue this claim as an asset of the trust."

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, [the standard of] review is plenary. . . . Standing is established by showing that the party claiming

[12] The defendants observe that § 4 of the trust contained a "penalty" provision that applied to beneficiaries who challenged the trust itself, but that it did not by its terms explicitly authorize the commencement of a vexatious litigation action against one or more beneficiaries.

it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–15, 982 A.2d 1053 (2009). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 63–64, 946 A.2d 862 (2008).

Before the trial court and before this court, the parties have framed the issue of standing as being dependent on whether the plaintiff had the authority, in his representative capacity as trustee, to commence the vexatious litigation action following the termination of the trust upon Ruth Tyler's death. As the parties observe, § 4 of the trust provides in relevant part: "After provision has been made for the payments and reservations specified in Section 3 . . . [for debts and funeral expenses, estate administration expenses, and taxes], *upon the* [*g*]*rantor's death*, *the* [*t*]*rust shall terminate* and the principal thereof (including any accumulated income) shall be distributed, in substantially equal shares, to the [g]rantor's children . . . ." (Emphasis added.) Section 3 of the trust provides in relevant part

that "[f]ollowing the death of [the] [g]rantor, the [t]rustees shall reserve and pay out of the assets otherwise passing under [s]ection 4 . . . ."

"One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets. A trustee has the right and duty to safeguard, preserve, or protect the trust assets and the safety of the principal." (Footnotes omitted.) 76 Am. Jur. 2d, Trusts § 402 (2016). "A trustee *must enforce* and collect choses in action, *claims*, debts, and demands belonging to the estate. The trustee may also be charged with the value of assets which never came into its possession if it failed its duty to acquire them." (Emphasis added; footnote omitted.) Id., § 401. "The safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees. So a trustee *must take reasonable steps to enforce claims of the trust* and to defend claims against the trust." (Emphasis added; footnote omitted.) 90A C.J.S., Trusts § 327 (2010); see also 1 Restatement (Second), Trusts § 177, p. 383 (1959) ("[t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust"). "It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise." 1 Restatement (Second), supra, § 177, comment (c), p. 384. "The trustee is the proper party to bring an action against anyone who wrongfully interferes with the interests of the trust." *Naier* v. *Beckenstein*, 131 Conn. App. 638, 646, 27 A.3d 104, cert. denied, 303 Conn. 910, 32 A.3d 963 (2011).

In *Ramondetta*, this court carefully set forth principles related to a trustee's authority to wind up a trust

following its termination: "The authorities are in agreement . . . that the fiduciary duty of a trustee does not immediately terminate when the trust property ceases to exist. Rather, the trustee's fiduciary duty survives even the termination of the trust. See 4 A. Scott, Trusts (4th Ed. Fratcher 1989) § 344, p. 542 ('[w]hen the time for the termination of the trust has arrived, the duties and powers of the trustee do not immediately cease; until the trust is actually wound up, he has such duties and powers as are appropriate for the winding up of the trust'); 1A A. Scott, Trusts (4th Ed. Fratcher 1989) § 74.2, p. 435 (trustee still under duty to account to beneficiary and still owes fiduciary duties as 'fiduciary relation continues, although it ceases to be a relation with respect to any specific property'); 2 Restatement (Second), Trusts § 344, p. 190 (1959) ('[w]hen the time for the termination of the trust has arrived, the trustee has such powers and duties as are appropriate for the winding up of the trust').

"A trustee is permitted a reasonable time to wind up trust affairs. 'At such time when the trust is terminated in any way . . . the trust nevertheless continues for a reasonable time during which the trustee has power to perform such acts as are necessary to the winding up of the trust and the distribution of the trust property . . . . Determination of what constitutes a reasonable period within which to wind up the trust and distribute the trust assets will depend upon a number of facts with respect to the particular trust.' G. Bogert & G. Bogert, Trusts and Trustees (2d Ed. Rev.1983) § 1010, pp. 448–51; see also *Trust Created Under Will of Damon*, 76 Haw. 120, 126, 869 P.2d 1339 (1994) ('trust will undoubtedly continue for a substantial time after termination during the winding up period'); Uniform Trust Code § 816 (26) (trustee may 'on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust

property to the persons entitled to it'). What is reasonable in a particular case is a fact specific question. As one authority states: 'What constitutes a reasonable time depends on the circumstances. Under some circumstances there may be a considerable period elapsing before it is possible to complete the process of winding up the trust and to make a final distribution of the trust property.' 4 A. Scott, Trusts (4th Ed. Fratcher 1989) § 344, p. 545; accord 2 Restatement (Second), supra, § 344, comment (a), p. 191 ('period [for winding up the trust] may properly be longer or shorter, depending upon the circumstances')." (Footnotes omitted.) *Ramondetta* v. *Amenta*, supra, 97 Conn. App. 157–59.

The plaintiff, as trustee, had a specific interest in the claims brought against the defendants in the vexatious litigation action. The vexatious litigation action, which was commenced by the plaintiff in his capacity as trustee, was an attempt by him to recoup assets of the trust, specifically, attorney's fees and costs incurred by the trust as a result of the prior action. As the authorities set forth previously in this opinion reflect, a trustee has a common-law duty to take reasonable steps to recoup trust assets, including bringing claims belonging to the trust within a reasonable time frame during the winding up period of a trust.[13] This fundamental duty to recoup assets made the plaintiff's actions a reasonably necessary part of the winding up of the trust. Indeed, in the present case, the plaintiff did, in fact, recoup assets on the trust's behalf in the form of attorney's fees and costs.

The defendants rely on the fact that the trust did not specifically authorize the plaintiff to commence a

[13] In their reply brief, the defendants clarify that, in connection with their claim that the plaintiff lacked standing, they do not argue that the plaintiff lacked the authority to commence the present action because he failed to commence the present action within a reasonable time.

vexatious litigation action against one or more beneficiaries. Section 5 of the trust, which sets forth administrative and investment powers granted to the trustee, explicitly provides: "With respect to each trust estate herein created, the [t]rustees thereof shall have the following powers in addition to the powers otherwise granted by applicable state common law or statute." Certainly, no provision of the trust specifically abrogated the plaintiff's common-law duty to pursue claims and recoup assets on behalf of the trust, including claims against beneficiaries.[14]

[14] The defendants argue that "[t]he [vexatious litigation] cause of action was unnecessary because the trust itself prescribed its own penalty in the event of a vexatious litigation action by one or more beneficiaries." The defendants draw our attention to § 4 of the trust, which provides: "After provision has been made for the payments and reservations specified in [s]ection 3 above, upon the [g]rantor's death, the [t]rust shall terminate and the principal thereof (including any accumulated income) shall be distributed, in substantially equal shares, to the [g]rantor's children, JOHN E. TYLER, JR., BRUCE D. TYLER, THOMAS J. TYLER, RUSSELL J. TYLER and JAY M. TYLER, share and share alike, per stirpes and not per capita, subject to the direction that any sums due and owing to the [g]rantor by her sons, BRUCE D. TYLER and JAY M. TYLER, shall be deducted from any share which they are to receive under the terms of this [p]aragraph 4. *In the event that either BRUCE D. TYLER and JAY M. TYLER dispute, in any way, the terms and provisions of this* [*p*]*aragraph 4*, the [g]rantor directs the [t]rustees to deduct from the share that either is to receive under the terms of this [p]aragraph 4, any and all expenses incurred by the [t]rustees in defending or resolving said dispute, including [a]ttorneys' fees, any and all costs, travel, board and lodging expenses incurred by the [t]rustees, said determination as to expenses shall be made by the [t]rustees in their sole and unlimited discretion. The [t]rustees shall also determine, in their sole and unlimited discretion, the proportionate share of these expenses to be deducted from the share that either BRUCE D. TYLER and/or JAY M. TYLER is to receive from the terms and provisions of this [p]aragraph 4." (Emphasis added.)

As the emphasized language in § 4 reflects, the penalty provision on which the defendants rely pertains to disputes related to the terms and provisions of § 4 of the trust. This provision does not pertain to claims brought by one or more beneficiaries against the plaintiff, as trustee, for damages related to the manner in which he has fulfilled his duties as trustee. Because the claims brought against the plaintiff in the prior action were the subject of the vexatious litigation action, and those claims related to his conduct as trustee, we are not persuaded that § 4 of the trust in any way deprived the plaintiff of his authority to recoup trust assets by commencing the present action against the defendants.

Also, the defendants argue that the plaintiff lacked the authority to commence the present action during the winding up period of the trust because one or more trust beneficiaries could have commenced the present action and the plaintiff commenced the action without consulting with one or more trust beneficiaries. The defendants have not provided this court with any authority to support the conclusion that, during the winding up period, the plaintiff lacked the authority to pursue a claim to recoup trust assets simply because one or more trust beneficiaries had standing to pursue a claim against one or more of their fellow beneficiaries for damages related to the prior action. The plaintiff had a fiduciary duty to act on behalf of the trust, not to defer to decisions made by beneficiaries. Moreover, the defendants have not provided this court with any authority, nor cited any provision of the trust, to support the proposition that the plaintiff lacked the authority to carry out his duties as trustee during the winding up period without first seeking the approval of one or more beneficiaries of the trust.

For the foregoing reasons, we conclude that there was no reason for the trial court to have concluded that the plaintiff was acting without authority to commence the present action during the winding up period of the trust. The plaintiff's commencement of the action during the winding up period was reasonably necessary to fulfilling his duty of recouping trust assets within a reasonable time. Accordingly, we conclude that the court properly denied the defendants' motion to dismiss.

B

Next, we address the defendants' claim that the court improperly failed to consider whether the settlor of the trust, Ruth Tyler, was subjected to undue influence in connection with the creation of the trust. In summary fashion, the defendants argue: "The mental state of the

trust settlor at the time the trust was created is relevant to the issue of probable cause. Yet, the court totally ignored the evidence of undue influence in connection with the creation of the trust." The defendants also argue: "It is reversible error for the [trial] court to ignore [their] claims of undue influence and their effect on the validity of the exculpatory provisions in the trust." We disagree.

Previously in this opinion, we discussed the claims raised by the defendants in the prior action. "In the first count of the complaint [in the prior action], Jay Tyler sought to modify the trust, claiming that Thomas Tyler had exerted undue influence upon Ruth Tyler in relation to the trust and had conspired together with John Tyler, Russell Tyler and [the plaintiff] to keep Ruth Tyler's trust and will a secret from him." *Tyler* v. *Tyler*, 163 Conn. App. 594, 599, 133 A.3d 934 (2016). Count one, which was brought by Jay Tyler, is the only count that was based on a claim of undue influence, and it was directed against Thomas Tyler, Russell Tyler, John Tyler, Jr., Bruce Tyler, and the plaintiff. In connection with that count, Jay Tyler alleged that the plaintiff was part of a conspiracy to keep his mother's will a secret from him, not that the plaintiff had unduly influenced her in connection with the creation of the trust.

Neither the claim raised by Jay Tyler in count one of his complaint nor the issue of undue influence were fully litigated in the prior action. As we stated in footnote 3 of this opinion, in August, 2013, the trial court, *Sommer*, *J.*, rendered summary judgment in favor of Thomas Tyler, Russell Tyler, John Tyler, Jr., and the plaintiff with respect to this claim but, in June, 2014, this court reversed the trial court's judgment with respect to count one of the complaint after concluding that a genuine issue of material fact existed with respect to the claim. *Tyler* v. *Tyler*, supra, 151 Conn. App. 104–109. In *Tyler* v. *Tyler*, supra, 163 Conn. App. 615–16,

this court, however, determined, on the basis of its review of what had transpired during the jury trial in the prior action,[15] that, following the partial dismissal of the defendants' initial appeal in June, 2014, none of the defendants' claims against the plaintiff was still pending in the trial court. This court reasoned that "all of [the defendants'] claims against [the plaintiff] were either raised, instructed on and tried to verdict before the jury or abandoned, either by failing to raise and request instructions on them at trial or by not appealing from the trial court's failure or refusal to instruct upon them despite their request. In each such scenario, the [defendants'] failure to appeal from the judgment rendered upon the jury's verdict established that all of their claims on which summary judgment was not rendered were finally resolved at or shortly after trial, either by the jury's general verdict or by the [defendants'] abandonment of them." Id. In January, 2015, Jay Tyler withdrew his complaint against Thomas Tyler, Russell Tyler, John Tyler, and Bruce Tyler.

With respect to the issue of undue influence, during the trial in the present action, Jay Tyler testified that, between 1999 and 2004, he visited his mother occasionally and did not notice anything about her behavior that led him to believe that she had been subjected to any type of undue influence. He testified that, following his mother's death, he learned of the 1999 will, as well as the 2004 trust, which incorporated the terms of the 1999 will. At this time, he began to question why his mother would have changed the estate plan that was reflected in her 1984 will, to his detriment. He stated that "[s]he would never have disinherited me knowingly, and that's

[15] On October 24, 2013, a jury found in favor of the plaintiff with respect to the defendants' claim, advanced in Jay Tyler's complaint and Bruce Tyler's cross complaint, that they were entitled to damages as a result of the plaintiff's failure to hold the investment advisor liable for losses that resulted from following the advisor's advice not to diversify the assets of the trust.

what made me go down the road of looking into the prospects of undue influence and what might have happened here." He stated his belief that, when she executed the 1999 will and the 2004 trust, she would have wanted to maintain the estate plan that was reflected in the 1984 will, which was very favorable to him.

Jay Tyler testified that, following his mother's death but prior to bringing the claims in the prior action, he hired an attorney to help him gather information about what was going on with his mother's estate and that these efforts were not fruitful. He testified that he realized that he needed to bring a lawsuit to challenge the trust and, because he lacked the financial means to challenge the trust, he turned to his brother, Bruce Tyler, for help. Although Bruce Tyler did not agree to represent him in the matter as his attorney, he agreed to guide him during the prior action.

Jay Tyler testified that when he brought the claims in the prior action, he believed that because the trust mirrored the provisions in the 1999 will, the plaintiff, who had prepared the trust and was the trustee, had aligned himself with Thomas Tyler, that the plaintiff and Thomas Tyler had conspired to keep facts concerning his mother's estate plan from him, and that the trust itself was "more evidence of undue influence that was taking place." Jay Tyler testified that it was not until 2014 or 2015, during the pendency of the prior action, that he first learned of the existence of the 1988 will, which had been drafted by Bruce Tyler, and learned that the 1988 will had significantly altered his mother's 1984 estate plan, by dividing her estate equally among her five sons, to his detriment. On the basis of his review of the 1988 will, Jay Tyler acknowledged that his mother had changed her mind about her estate plan prior to executing the 1988 will. He also testified that, prior to the time at which he commenced the prior action, Bruce Tyler had not told him about the 1988 will.

During the trial in the present action, Bruce Tyler testified that he learned about the 1999 will after his mother had died, and that he believed immediately that the 1999 will, on its face, reflected that his mother was "not . . . in her right mind" when she executed the will because "[s]he just wouldn't do that." He explained that the 1999 will was complicated and that its provisions were "vindictive," and that, on the basis of his "lifetime experience" with his mother, he knew her to be a person who "wanted to keep things simple . . . ." He testified that when he compared the 1984 and 1999 wills, "it became quite clear . . . that there was something wrong here; that comparing the two [wills], there's obviously undue influence exercised." Also, Bruce Tyler testified that his review of the 1999 will reflected that Thomas Tyler had played a role in its execution and that this was "also a big red flag that there was undue influence."

Bruce Tyler testified that, following his mother's death, he discussed the 1999 will with his brother, Jay Tyler, and that he told Jay Tyler about the existence of the 1984 will, which he had drafted for his mother. Bruce Tyler testified that he researched legal principles concerning undue influence and, for a variety of reasons, he concluded that he and Jay Tyler had a viable claim that Thomas Tyler had exerted undue influence over their mother with respect to the 1999 will. Specifically, he testified that, following his father's death in 1997, his mother lived alone and was distraught and, thus, was susceptible to undue influence. He testified that his brother, Thomas Tyler, was inclined to exert undue influence because "he thrives on power and influence and takes particular pleasure out of making people miserable. And he does that, and he enjoys it . . . that's his reputation as being some sort of monster." He testified that Thomas Tyler had an opportunity to exert undue influence over his mother because, following his

father's death, Thomas Tyler was "omnipresent" in his mother's life and had taken control of her finances. He testified that the 1999 will represented a dramatic change in his mother's estate plan.

Additionally, Bruce Tyler testified that, following his mother's death, he worked closely with Jay Tyler in an attempt to modify the trust so that it did not implement the estate plan reflected in the 1999 will. To this end, he helped Jay Tyler prepare and file the complaint in the prior action. Bruce Tyler testified that, because he was an attorney and Jay Tyler was not an attorney and did not have any training in the law, he also formulated the legal arguments advanced by Jay Tyler in the prior action.

Bruce Tyler testified that it was not until October, 2014, during the pendency of the prior action, that he became aware of his mother's 1988 will.[16] Bruce Tyler acknowledged, however, that he had prepared the 1988 will for his mother, he was present when she executed the will, and that his signature appeared on the 1988 will. He testified that he had forgotten about the existence of the 1988 will until one of his brothers "got a hold of it" and the will "surfaced with the amended answer to interrogatories" that were submitted by one or more of his brothers during the prior action. Bruce Tyler acknowledged that the 1988 will reflected substantial changes, as compared to the 1984 will, and that the changes made reflected in the 1999 will, as compared to the 1988 will, were not as substantial in nature. Specifically, the 1999 will retained the provision, set forth in the 1988 will, that estate assets would be distributed equally among his mother's five children, but the 1999 will added an explicit requirement that Jay Tyler and

[16] As we stated previously in this opinion, the 1988 will significantly altered the estate plan that was reflected in the 1984 will by requiring an equal distribution of estate assets among Ruth Tyler's five sons.

Bruce Tyler repay the estate moneys that Ruth Tyler had loaned to them during her lifetime. Nonetheless, Bruce Tyler maintained that this explicit loan repayment requirement was not something that his mother would have wanted to include in her will, and its existence reflected that undue influence had been exerted on her.

The plaintiff testified about the circumstances under which he assisted Ruth Tyler in regard to the trust. He testified that in August, 2004, Thomas Tyler contacted him to let him know that his mother would be in touch with him to set up an appointment to discuss the matter of estate planning. The plaintiff testified that, the next day, Ruth Tyler called him to make an appointment, and he met privately with her later that day at her residence. She told him that she desired to create a trust as a way of preserving her assets, as well as a new power of attorney and a living will. The plaintiff testified that Ruth Tyler told him "that she had a will that she had done; and that the provisions of the will divided her estate equally among her five sons; and that there was a provision in the will that if any of her sons owed her money—and she mentioned Bruce [Tyler] and Jay [Tyler], that they did owe her money—and that money was unpaid at the time of her death, that those sums owed would be deducted from their share."

The plaintiff testified that, later that month, he met with John Tyler, Jr., who had a power of attorney for Ruth Tyler, and that John Tyler, Jr., provided him with a copy of his mother's 1999 will and showed him records concerning loans that his mother had made to Jay Tyler and Bruce Tyler. Subsequently, in September, 2004, the plaintiff drafted the trust and met privately with Ruth Tyler to review its provisions at the assisted living facility where she had resided.[17]

[17] The plaintiff testified that he did not know why Ruth Tyler was residing in an assisted living facility.

The plaintiff testified that among the provisions that he discussed with Ruth Tyler were those that gave the trustee full authority to manage and control trust assets in whatever form he deemed appropriate without the requirement that the assets be diversified. The plaintiff also testified that he told Ruth Tyler "that I as the trustee can't be held liable for any losses of the stock that was going to be in the trust or any other asset except in the case of wilful misconduct on my part, so that, in essence, I could keep the assets in the trust; and if the assets in the trust lost value, that I'm not going to be responsible if I maintain what was given to me." He stated that he explained "that the trustee is not liable for any mistake or error or judgment or for any action taken or not taken, either by me or any agent or attorney employed by me, or for any loss of value in the assets, again, except in the case of wilful misconduct." The plaintiff testified that Ruth Tyler did not object to these provisions.

The plaintiff also testified that he explained to Ruth Tyler that trust accountings would be provided to her, as the only income beneficiary of the trust, and to no one else and that she both understood and was content with that provision of the trust.

The plaintiff testified that he provided the unexecuted trust documents that he had prepared to John Tyler, Jr., and that Ruth Tyler executed the trust at her residence in Suffield. The execution of the trust was acknowledged by a third party identified as Jean Sullivan, who was an employee of Thomas Tyler. The plaintiff testified that he was not present when Ruth Tyler executed the trust, but that he executed the trust at a different location.

In his posttrial brief in the present action, the plaintiff argued in relevant part that the exculpation clause of the trust absolved him of any liability with respect to

all of the counts of the complaint and cross complaint brought against him in the prior action. The plaintiff argued that because neither defendant had alleged nor proven in the prior action that he had engaged in wilful misconduct, the court, relying on the exculpation clause, should conclude that they brought their claims without probable cause. To the extent that the defendants alleged that he was part of a conspiracy with one or more of their brothers, the plaintiff argued, there were no facts to support such a claim.

In their joint posttrial brief in the present action, the defendants acknowledged that the plaintiff, in his answer to the complaint and cross complaint in the prior action, raised a special defense in which he relied on the exculpatory clause of the trust. The defendants argued, however, that Ruth Tyler had been subjected to undue influence in connection with the trust and, in the prior action, Jay Tyler sought to modify the trust on that ground. Thus, the defendants argued, the plaintiff's reliance on the exculpation clause of the trust, which had been "included in the trust agreement for [the plaintiff's] own protection," was misplaced. The defendants argued that, despite the existence of the exculpation clause, they brought the complaint and cross complaint with probable cause. Stated otherwise, the defendants argued that they had demonstrated in the prior action that undue influence had been exerted over the settlor of the trust and, therefore, any provisions of the trust that purported to absolve the trustee of liability were unenforceable.

In the present action, although the defendants attempted to prove that the settlor of the trust was in fact unduly influenced and, thus, that the plaintiff was unable to rely on the protections offered him by the trust, the court was not obligated to resolve that precise issue because the question before the court was whether, in the prior action, Jay Tyler had probable

cause to claim that the trust should be modified on the ground of undue influence and whether the defendants, relying on this claim of undue influence, had probable cause to bring the claims against the plaintiff.

In its factual findings, the trial court in the present action expressly found that the plaintiff had explained the contents of the trust to Ruth Tyler and that she had agreed to its terms. Moreover, the court discussed Jay Tyler's belief that his mother had been subjected to undue influence. In relevant part, the court stated: "Although defendant Jay Tyler disputed that he owed his mother any money, he was also concerned that his mother's trust essentially disinherited him, which he did not believe she would do, leading him to believe that she had been influenced by Thomas Tyler. Jay Tyler believed that the plaintiff had conspired with Thomas Tyler and that they had unduly influenced Ruth Tyler to 'cheat' him out of his inheritance. Jay Tyler claimed that Thomas Tyler was not a nice person and enjoyed 'putting Jay down,' and [that] the fact that Thomas Tyler was aware of the trust and will was a 'red flag.' "[18] In its decision granting reargument and/or reconsideration, the court addressed Jay Tyler's allegation of a conspiracy as follows: "Jay Tyler alleged that the plaintiff engaged in a conspiracy with his brothers, [John Tyler, Jr.], and Russell Tyler, which wrongfully deprived him of his share of the estate. Despite the plaintiff's assertion to the contrary, the court does not consider these contentions because there are not sufficient fac-

[18] As we have explained previously in this opinion, the court did not agree with the plaintiff's broad reliance on the exculpatory provision in the trust, observing in its original decision that "[t]his 'exculpation' language in the trust does not prohibit the bringing of an action against the trustee, but only that he 'shall not be liable,' except for 'willful conduct.' Indeed, the clause was asserted by the plaintiff in the [prior] action as a special defense." In its decision granting reargument and/or reconsideration, the court stated that "the exculpatory clause may [not] be used as a sword by the trustee to establish probable cause in a vexatious suit."

tual allegations directed at the plaintiff therein to constitute a separate legal claim against him and, to the extent this claim contains allegations against him, they go to his failure to provide an accounting."

Thus, contrary to the defendants' arguments, there is absolutely no indication that the court "ignored" the evidence of undue influence in connection with the creation of the trust that was presented during the trial or that, in the context of the claims properly before the court, it "failed to consider" the issue of whether the settlor had been subjected to undue influence.[19] Despite the fact that its factual findings do not address the issue of undue influence expressly, the court plainly found that the settlor was advised of the contents of the trust and was satisfied with them. As we have explained previously in this opinion, the defendants argued that the issue of undue influence was critical to undermining the plaintiff's right to rely on the exculpation provision of the trust to prove that the defendants did not have probable cause to bring the claims against him in the prior action. As the court clearly explained, however, it rejected the plaintiff's argument in this regard. In light of the foregoing, we reject the defendants' claim relating to undue influence.

C

Next, the defendants claim that the court misinterpreted relevant law in its analysis of whether, in the

[19] The record reflects that, after the court rendered its decision on the motion for reargument and/or reconsideration, the defendants filed a motion for articulation in which they asked the court to articulate "[w]hether the court considered the probability of undue influence affecting the settlor's willingness to agree to the exculpatory provisions in the trust." The motion stated: "If [the court did consider the probability of undue influence], explain its rationale for its decision. If it did not consider the probability of undue influence, please state the reason for the said determination of irrelevancy." The court denied this request. The defendants did not seek further review of the trial court's ruling.

prior action, they had probable cause to claim that the plaintiff had violated § 45a-541c by failing to diversify trust assets. We disagree.

As we previously explained in our discussion of the relevant facts and procedural history, the defendants, in their respective complaint and cross complaint, alleged in the prior action that the plaintiff had failed to diversify trust assets in violation of § 45a-541c. By way of special defense, the plaintiff alleged that the statutory obligations on which the defendants relied had been waived by the settlor of the trust and that the exculpatory provision in the trust shielded him from liability.

As we explained previously in this opinion, in the present action, the court determined that, in the prior action, the defendants lacked probable cause to bring this claim against the plaintiff. The court relied on what it called the "clear and unambiguous" language in § 5 of the trust that relieved the trustee of his duty to diversify trust assets. The court reasoned that, in light of this provision, the defendants lacked probable cause to bring the claim related to the plaintiff's failure to diversify.

The defendants now argue that the court afforded the language in § 5 of the trust an irrefutable presumption of validity and failed to give due regard to their argument that this presumption was refutable by evidence that the settlor of the trust had been subjected to undue influence at the time of the creation of the trust. According to the defendants, "[t]he . . . court's presumption of validity of the exculpatory provision of the trust wrongfully deprived [them] of their ability to negate the plaintiff's special defense to the defendants' claim of lack of diversification . . . ."

Our resolution of the present claim is controlled by our resolution of the claim discussed in part II B of

this opinion. The defendants' claim rests on the faulty premise, which we rejected in part II B, that the court failed to consider whether the settlor of the trust was subjected to undue influence in connection with its creation. In light of our conclusion that the court plainly found that the settlor was advised of the contents of the trust and was satisfied with them, the defendants are unable to prevail in connection with this claim.

D

Finally, the defendants claim that the court misinterpreted relevant law in its analysis of whether the plaintiff could prevail in the present action merely by demonstrating that the defendants lacked probable cause to bring one of the several claims that they brought against him in the prior action. We disagree.

Previously in this opinion, we set forth the trial court's analysis of whether the defendants had probable cause to bring the claims against the plaintiff in the prior action. In its initial decision, the court reasoned that because the plaintiff had failed to prove that the defendants had acted without probable cause (or with malice) in bringing the claim that the plaintiff had improperly failed to furnish them with trust accountings during the settlor's lifetime, he was unable to prevail with respect to any aspect of his vexatious litigation cause of action. In granting the plaintiff's motion for reargument and/or reconsideration, however, the court first concluded that the plaintiff could prevail in the present action by proving that the defendants lacked probable cause to bring any of the claims against him in the prior action and, second, that the plaintiff was entitled to damages because the defendants lacked probable cause to bring the claim that he improperly failed to diversify trust assets. In ultimately concluding that the plaintiff could prevail in the present action by proving that the defendants lacked probable cause to

bring any, but not necessarily all, of the claims against him in the prior action, the court relied on *DeLaurentis* v. *New Haven*, 220 Conn. 225, 597 A.2d 807 (1991), and noted that its rationale applied "especially where the claims [that were raised in the underlying action] are logically severable."

The defendants now argue that the court's reliance on *DeLaurentis* is misplaced because, unlike the claims at issue in that case, the claims that they raised against the plaintiff in the prior action are not logically severable in that they involve the same factual allegations. The defendants argue that the claims merely presented different theories on which to recover damages arising from the same conduct, namely, the plaintiff's failure to diversify trust assets. The plaintiff argues, in reply, that the court properly determined that the claims were logically severable and, thus, the rationale of *DeLaurentis* applied and supported the court's determination that he should prevail, despite the fact that he was unable to demonstrate that the defendants lacked probable cause to bring all of the claims they brought against him in the prior action.

Because the present claim requires us to review the trial court's interpretation and application of the law, we engage in plenary review. See, e.g., *Doe* v. *Dept. of Mental Health & Addiction Services*, 188 Conn. App. 275, 280, 204 A.3d 1230, cert. denied, 332 Conn. 901, 208 A.3d 659 (2019).

DeLaurentis governs our resolution of the present claim. In *DeLaurentis*, our Supreme Court observed the well settled rule that, in a vexatious litigation action, a plaintiff must demonstrate that the claims raised in a prior action by the defendant lacked probable cause. *DeLaurentis* v. *New Haven*, supra, 220 Conn. 252. The court addressed the issue of whether a plaintiff must prove that probable cause was lacking for *every* claim

raised in the prior action. Id., 253. The court concluded that a plaintiff could prevail in a vexatious suit action by proving that one or more logically severable claims were brought without probable cause. Id., 256. Thus, the fact that a defendant had brought one or more claims with probable cause does not preclude him from being liable for having brought other claims for which probable cause was lacking. The court reasoned: "If a civil plaintiff had probable cause to assert one cause of action but joined to that claim ten others that he knew to be groundless, the victim called upon to defend himself against the ten groundless claims would not suffer less because one good claim was included among them." Id., 253.

In considering the specific claims at issue in *DeLaurentis*, the court determined that probable cause was lacking with respect to certain claims that were logically severable from other claims for which probable cause existed because they contained "factual allegations with respect to different times, occurrences and actions." Id., 255. The court did not define a "cause of action" for purposes of this inquiry as consisting of a single group of facts that gave rise to one or more rights to relief, but stated that each group of logically severable allegations at issue in *DeLaurentis* "amount[ed] to a separate 'charge' to which [the plaintiff] was required to respond." Id., 255 and n.15.

In the present action, the claims alleged to be vexatious in the prior action were as follows: "In the fourth count of the complaint and the first count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff] had failed to act as a prudent investor of the trust's assets, in violation of General Statutes § 45a-541b. In the fifth count of the complaint and second count of the cross complaint, both [defendants] alleged that [the plaintiff] had failed to diversify the trust's assets, in violation of General Statutes § 45a-541c. In

the sixth count of the complaint and the third count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff's] failure to furnish them with trust accountings during their mother's lifetime had prevented them from exercising their right to seek an order from the Probate Court under § 45a-204 compelling [the plaintiff], as trustee, not to keep the trust's assets invested in the same securities received by him. Finally, in the seventh count of the complaint and the fourth count of the cross complaint, [Jay Tyler and Bruce Tyler] alleged that [the plaintiff] had breached his duty to the trust, and to them as trust beneficiaries, by failing to hold the investment advisor liable for losses allegedly resulting from the advisor's advice not to diversify the trust's assets." (Footnotes omitted.) *Tyler* v. *Tyler*, supra, 163 Conn. App. 599–601.

Contrary to the defendants' broad description of these counts as merely representing different theories of recovery on the basis of the same factual allegations, it is readily apparent from a review of the claims that the failure to diversify trust assets claim in the prior action, which the court in the present action found lacked probable cause, was not based on the identical factual allegations as the remaining claims. Specifically, the allegations in each claim related to facts that differed in terms of times, occurrences, and actions. Moreover, each of the claims at issue amounted to separate and distinct "charges" to which the plaintiff was required to respond.

In light of the foregoing, we conclude that the court properly applied the law and properly concluded that the failure to diversify trust assets claim was logically severable from the remaining claims for which probable cause existed.

III

PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that, although the court properly concluded that one of the claims raised against him by Bruce Tyler and Jay Tyler in the prior action and alleged to be vexatious was not supported by probable cause, the court erroneously failed to conclude that Bruce Tyler and Jay Tyler lacked probable cause to bring the remaining claims and that they acted with malice in bringing all of the claims at issue. Accordingly, the plaintiff argues that the court should have concluded that all of the claims at issue were vexatious in nature and, thus, rendered judgment in his favor with respect to these claims. As we have explained previously in this opinion, the court awarded the plaintiff damages after concluding that the defendants lacked probable cause to claim, in the prior action, that the plaintiff had improperly failed to diversify trust assets. The court, however, concluded that the plaintiff was not entitled to recover with respect to the claims, raised in the prior action, wherein the defendants alleged that he failed to act as a prudent investor, that he failed to provide them with trust accountings prior to the settlor's death, and that he failed to hold the investment advisor liable.

"A vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action. . . . Malice may be inferred from lack of probable cause. . . . The want of probable cause,

however, cannot be inferred from the fact that malice was proven. . . . A statutory action for vexatious litigation under General Statutes § 52-568 . . . differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. In either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law. . . . Accordingly, our review is plenary." (Citations omitted; internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007); see also *Lichaj* v. *Sconyers*, 163 Conn. App. 419, 425, 137 A.3d 26 (2016) (plenary review of issue of whether probable cause exists in vexatious litigation action); *Schaeppi* v. *Unifund CCR Partners*, 161 Conn. App. 33, 46, 127 A.3d 304 (same), cert. denied, 320 Conn. 909, 128 A.3d 953 (2015).

Our Supreme Court has explained that "civil probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Moreover, under our case law, it is well settled that the same standard applies under the common law and [for causes of action brought under the vexatious litigation statute, § 52-568]. [Vexatious suit] is the appellation given in this [s]tate to the cause of action created by statute (General Statutes § 6148 [now § 52-568]) for the malicious prosecution of a civil suit . . . which we have said was governed by the same general principles as the common-law action of malicious prosecution." (Citation omitted; internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. App. 102–103.

We are mindful that "[p]robable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . . Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 103–104.

Because our analysis of whether probable cause existed must be tailored to Bruce Tyler and Jay Tyler, we will address the claim as it relates to each defendant separately.

A

We first address the claim raised by the plaintiff that the court erroneously failed to conclude that, with respect to all of the claims that had been brought against him by Bruce Tyler in the prior action, Bruce Tyler had acted without probable cause and with malice, and had relied on allegations that he knew to be false. Stated otherwise, the plaintiff argues that the court erred by failing to conclude that the cross complaint brought by Bruce Tyler was vexatious in its entirety. We agree, in part, with the plaintiff's claim. We conclude that the court did not properly analyze whether Bruce Tyler had probable cause to bring counts one, three, and four of his cross complaint in the prior action.[20] Accordingly, with respect

[20] Our conclusion does not affect the trial court's determination that Bruce Tyler lacked probable cause to bring the failure to diversify trust assets claim in count two of his cross complaint in the prior action.

to the claim of statutory vexatious litigation under § 52-568 (1), we reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this opinion.

In this claim, the plaintiff argues that it was against the weight of the evidence for the court to have failed to find that Bruce Tyler lacked probable cause to bring *any* of the claims that he raised in his cross complaint in the prior action. Specifically, the plaintiff relies on the following facts: (1) Bruce Tyler, who is an attorney, prepared Ruth Tyler's 1984 and 1988 wills; (2) the 1988 will, rather than the 1999 will or the 2004 trust, greatly changed the estate plan reflected in Ruth Tyler's 1984 will by effectively disinheriting Jay Tyler; (3) Bruce Tyler, having drafted the 1984 and 1988 wills, was aware of the fact that Ruth Tyler had not deviated from the estate plan reflected in her 1984 will because she had been subjected to undue influence in connection with the drafting of the 1999 will or the 2004 trust; (4) prior to the commencement of the prior action, Bruce Tyler was familiar with the provisions of the 2004 trust, including but not limited to the provisions that shielded the plaintiff from liability except in the case of his wilful misconduct; (5) Bruce Tyler counselled Jay Tyler with respect to bringing the claims against the plaintiff in the prior action, he drafted Jay Tyler's complaint, he paid certain litigation costs for Jay Tyler, and he thereafter brought the same claims against the plaintiff in his cross complaint; and (6) neither defendant alleged or proved in the prior action that the plaintiff had committed wilful misconduct as trustee of Ruth Tyler's trust.

In arguing that the court improperly failed to conclude that Bruce Tyler's cross complaint was vexatious in its entirety, the plaintiff focuses on the exculpatory clause of the trust. As we explained previously in this opinion, the court essentially determined that, although the exculpatory clause limited the plaintiff's liability, the

plaintiff could not rely on the clause in attempting to prove that the defendants lacked probable cause to bring counts four through seven of the complaint and counts one through four of the cross complaint in the prior action.

The plaintiff argues: "As an attorney, Bruce [Tyler] should have known that, to succeed against the plaintiff, the defendants needed some proof that [the] plaintiff's conduct fell outside of the exculpation clause. . . . Here, the settlor made clear her intent to relieve the trustee of the risk of being sued except in cases of wilful misconduct. . . . [T]he issue for the court was whether the defendants (and Bruce [Tyler] in particular, as an attorney) had probable cause to believe [that the] plaintiff could be liable . . . knowing of his reliance on the investment advisor and absent any claim, let alone proof, that the plaintiff was guilty of wilful misconduct." (Citations omitted; internal quotation marks omitted.) The plaintiff argues that "[t]he trial court should have found a lack of probable cause as to all aspects of [the] plaintiff's management of the trust based solely on the fact that . . . there was no allegation or proof of wilful misconduct." Further, the plaintiff argues that the court, in analyzing whether the claims brought against him were vexatious in nature, erroneously concluded that the exculpatory clause was of no significance in its analysis, but merely governed the trustee's ultimate liability. The plaintiff argues that "[t]his interpretation [of the exculpatory clause] would, of course, eviscerate the purpose of the exculpatory clause, which is to protect the trustee, and the trust's assets, from expenses incurred in defending claims where, as here, the trustee acted in good faith."

In its initial decision, the court rejected the plaintiff's reliance on the exculpatory clause in demonstrating a lack of probable cause. The court reasoned that the clause did not prohibit the defendants from bringing

an action against the plaintiff, but that the clause merely shielded the plaintiff from liability. In its subsequent decision, the court reiterated its belief that the plaintiff was unable to rely on the exculpatory clause in demonstrating that the defendants brought the prior action without probable cause. The court, relying on, *Jackson* v. *Conland*, 178 Conn. 52, 420 A.2d 898 (1979), correctly stated that "the exculpatory clause does not act as a complete bar or immunity to civil suit . . . ." The trial court also stated that, although the exculpatory clause could "protect a trustee from personal liability," it nonetheless may not be used "as a sword by the trustee to establish probable cause in a vexatious suit." The trial court essentially disallowed any reliance by the plaintiff on the exculpatory clause in demonstrating a lack of probable cause.

The exculpatory clause provided: "No individual [t]rustee shall be liable for any mistake or error of judgment, or for any action taken or omitted, either by the [t]rustee of by any agent or attorney employed by the [t]rustee, or for any loss or depreciation in the value of the trust, except in the case of willful misconduct." Although we agree that the exculpatory clause did not cloak the plaintiff with immunity from suit, we, unlike the trial court, believe that the clause is highly relevant in an analysis of whether probable cause existed to bring the claims at issue against the plaintiff. This is because it represented a significant hurdle for the defendants to overcome in order to demonstrate that the plaintiff was *liable* for the damages that they sought in the prior action. An analysis of probable cause focuses on whether a party has knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds *for entertaining an action*. In his cross complaint, Bruce Tyler sought money damages, interest, and such other relief as may be just and proper from the plaintiff. If the exculpatory clause of the trust was enforceable, then it would shield the plaintiff

from liability and, therefore, preclude Bruce Tyler from obtaining any of the damages he sought.

Accordingly, we conclude that, in analyzing the issue of probable cause, the court should have considered whether the defendants reasonably believed that they could overcome the exculpatory clause. Stated otherwise, the exculpatory clause of the trust was a highly relevant factor in determining whether "a man of ordinary caution, prudence and judgment" would have entertained the claims at issue against the plaintiff in the prior action. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 102. Although, in *Falls Church Group, Ltd.*, our Supreme Court rejected the claim that a claim for vexatious litigation against an attorney should be judged by a higher standard than the general objective standard, it nonetheless observed that "the *reasonable attorney* is substituted for the reasonable person in [vexatious litigation] actions against attorneys . . . ." (Emphasis added.) Id., 103. The court explained that, with respect to vexatious litigation actions brought against attorneys, the proper probable cause inquiry is whether "a reasonable attorney familiar with Connecticut law would believe" that he or she had probable cause to bring the lawsuit. Id., 105. As this court explained in *Embalmers' Supply Co.* v. *Giannitti*, 103 Conn. App. 20, 35, 929 A.2d 729, cert. denied, 284 Conn. 931, 934 A.2d 246 (2007), the standard that applies to attorneys "is an objective one that is necessarily dependent on what an attorney knew when he or she initiated the lawsuit," and that probable cause may exist even if a suit lacks merit. It is undisputed that, when he filed his cross complaint in the prior action, Bruce Tyler was an attorney and, thus, the court must resolve the issue of whether a reasonable attorney would have believed that he had probable cause to bring the claims in the cross complaint.

As we have discussed previously, in an attempt to overcome the exculpatory clause of the trust, the defendants did not attempt to demonstrate that the plaintiff

had engaged in wilful misconduct, but that the settlor had been subjected to undue influence. Bruce Tyler argues before this court that he demonstrated that he had probable cause to bring the claims in that he testified that (1) he knew from reviewing his mother's 1999 will that his mother had been subjected to undue influence, (2) prior to bringing the claims against the plaintiff, he researched the law with respect to undue influence, (3) his mother was susceptible to undue influence "when the 1999 will was prepared," and (4) his brother, Thomas Tyler, who drafted the 1999 will, "had an inclination to exercise undue influence." He articulates the theory that Thomas Tyler exerted undue influence and that the plaintiff "took advantage of the situation by acting when the settlor was being subjected to the undue influence of Thomas [Tyler] by including the self-serving exculpatory language in the trust."

Bruce Tyler's argument rests on the premise that the 1999 will, which was drafted by Thomas Tyler, supports a finding of undue influence in that, when compared with the 1984 will, it significantly reduced what Jay Tyler would inherit from his mother's estate—a result, both defendants strongly maintain, their mother would not have desired. As we have discussed previously in this opinion, however, this premise is faulty because it was the 1988 will, which was drafted by Bruce Tyler, that effectively disinherited Jay Tyler.

Bruce Tyler testified at trial that, although he prepared the 1988 will for his mother, he did not recall the 1988 will until the fall of 2014, after the commencement of the prior action. This was a contested issue of fact. Before this court, he argues that, despite the fact that he drafted the 1988 will and assisted his mother in its execution, he did not conceal the will from his brothers. Rather, Bruce Tyler argues that the 1988 will had been concealed by Thomas Tyler and Russell Tyler, and they presented the will during the protracted litigation between the parties only to gain an advantage against him.

The plaintiff argues that Bruce Tyler, due to his "status as an attorney, his personal knowledge of the relevant facts, his personal and professional relationship with [the settlor of the trust] and his role in bringing this case" knew that his theory of undue influence was unsupported by fact. The plaintiff correctly observes that Bruce Tyler's knowledge of the content of the 1988 will, which he drafted for his mother, significantly undermines his claim of undue influence because the 1988 will, like the 1999 will, also significantly altered the estate plan that is reflected in the 1984 will by significantly reducing Jay Tyler's inheritance.

The plaintiff argues that Bruce Tyler should be charged with the knowledge of the 1988 will "as a matter of law." The plaintiff argues that "[i]t is uncontroverted that Bruce [Tyler], as [his mother's] attorney, at the very least, had the means of knowing, ought to know, or has the duty of knowing the truth about the 1988 will." (Internal quotation marks omitted.) The plaintiff argues that this court should conclude that Bruce Tyler knew about the 1988 will or, at the very least, was wilfully blind and failed to investigate the matter prior to bringing the cross complaint. Thus, the plaintiff argues, Bruce Tyler presumptively knew, despite his allegations, that Ruth Tyler had not been subjected to undue influence in connection with the 1999 will or the trust to effect a change in her 1984 will, because he assisted her in significantly altering her 1984 estate plan in 1988.

As the parties' arguments reflect, the issue of whether Bruce Tyler knew about the 1988 will at the time he brought the cross complaint against the plaintiff in the prior action is an essential inquiry in an analysis of whether he brought the cross complaint with probable cause. The plaintiff correctly observes that the court did not set forth any finding of fact with respect to whether Bruce Tyler testified truthfully that he did not recall the 1988 will *after* it had been disclosed to him during the course of the litigation in the prior action.

Instead, in its initial decision, the court observed that the plaintiff had characterized Bruce Tyler's testimony in this regard as untruthful. The court stated: "Although the court found Bruce Tyler's testimony on the issue of the 1988 will *troubling*, this issue is not relevant to the court's ultimate issue in this case, as to whether there was probable cause for the defendants to bring the accounting claim, and whether they had an improper purpose in doing so." (Emphasis added.) Because this factual issue is material to an analysis of probable cause, it must be resolved by the court during the proceedings on remand.

Having concluded that the court improperly failed to give appropriate consideration to the exculpatory clause in its analysis of whether Bruce Tyler had probable cause to bring counts one, three, and four of the cross complaint in the prior action, the appropriate remedy is to reverse the judgment rendered with respect to the statutory vexatious litigation claim under § 52-568 (1) as to those counts of the prior action and to remand the case to the trial court for further proceedings consistent with this opinion.[21]

[21] In its original memorandum of decision of December 7, 2016, the court found that the plaintiff failed to demonstrate that the defendants had acted with malice in bringing the counts of the complaint and the cross complaint that he alleged to be vexatious. Although, in its original decision in the present action, the court ended its analysis after it concluded that the defendants had probable cause to bring the counts of the complaint and cross complaint based on the plaintiff's failure to provide them with accountings, the court's discussion of whether malice had been proven does not appear to be limited to these specific counts of the complaint and cross complaint. Nor, in our view, is there any logical basis to construe the court's finding with respect to malice as pertaining merely to specific counts of the complaint and cross complaint. The court reasoned that, although there was evidence of animosity between the defendants and their other siblings, the plaintiff failed to prove that the defendants held animosity toward him. The court stated that it did not have any authority pursuant to which it could "transfer the animosity of the defendants from one party to another."

When the court in its memorandum of decision of July 19, 2017 granting reargument and/or reconsideration addressed the counts of the complaint and the cross complaint that were based on the plaintiff's failure to diversify the trust's assets, it expressly "adopted" the finding concerning malice that it made in its original decision. Thus, in its original memorandum of decision,

B

Last, we consider the plaintiff's claim that the court improperly concluded that the claims brought against him by Jay Tyler in counts one, two, three, four, six, and seven of the complaint in the prior action were not vexatious. We agree that the court did not properly

the court made a finding that the plaintiff had not proven malice and, in its memorandum of decision granting reargument and/or reconsideration, the court reaffirmed this broad finding.

In its memorandum of decision granting reargument and/or reconsideration, however, the court addressed the fifth count of the complaint and the second count of the cross complaint, which were based on the plaintiff's failure to diversify trust assets. It then addressed the remaining claims at issue in the complaint and the cross complaint, which were based on the plaintiff's failure to act as a prudent investor and failure to hold the investment advisor liable, and stated that, in light of its finding that the plaintiff had failed to prove that the defendants had brought these claims in the prior action without probable cause, it was unnecessary for the court to reach the issue of whether the defendants had acted with malice.

Our review of the findings set forth in both decisions leads us to conclude that the court considered the issue of malice and concluded that the plaintiff had failed to prove that the defendants had brought any of their claims at issue in the prior action with malice. The court's finding that malice had not been proven as set forth in the court's original decision and reaffirmed in its memorandum of decision granting reargument and/or reconsideration logically applies to all of the claims at issue that were raised by the defendants in the prior action. Although, in this appeal, the plaintiff argues that the court erred in failing to conclude that the defendants brought their claims in the prior action without probable cause and with malice, he has failed to demonstrate error in the court's finding that malice was not proven.

We clarify that our reversal of the judgment rendered in favor of the defendants pertains solely to the plaintiff's statutory vexatious litigation claim under § 52-568 (1), pursuant to which the plaintiff sought double damages as a result of counts one, two, three, four, six, and seven of the complaint and counts one, three, and four of the cross complaint in the prior action. In part II C of this opinion, we rejected the defendants' challenge to the court's judgment in favor of the plaintiff with respect to count five of the complaint and count two of the cross complaint. We do not reverse the court's judgment in favor of the defendants with respect to count one of the plaintiff's complaint in the present action, in which he brought a claim of common-law vexatious litigation, and count three of the plaintiff's complaint in the present action, in which he stated a claim under § 52-568 (2), pursuant to which the plaintiff would have been entitled to treble damages. To prevail in these causes of action, a plaintiff must prove that a defendant acted with a malicious intent. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94 (describing essential elements of common-law claim for vexatious litigation), and footnote 4 of this opinion.

analyze whether Jay Tyler had probable cause to bring these claims.[22]

In part III A of this opinion, we discussed the plaintiff's claim that, when the court considered the issue of probable cause, it failed to give due consideration to the exculpatory clause of the trust. This claim applies to the common-law and statutory vexatious litigation claims brought by the defendant that were related to counts one, two, three, four, six, and seven of Jay Tyler's complaint against the plaintiff in the prior action. Our conclusion in part III A of this opinion that the court did not properly analyze whether, in light of the exculpatory clause, Bruce Tyler had probable cause to bring counts one, three, and four of the cross complaint, applies to the court's analysis of whether Jay Tyler had probable cause to bring counts one, two, three, four, six, and seven of the complaint. As we have explained previously in this opinion, to overcome the exculpatory clause of the trust, both defendants relied on a theory of undue influence. In analyzing whether the defendants had probable cause to bring the claims at issue against the plaintiff, it was necessary for the court to have considered whether the defendants reasonably believed that they were able to prove that the settlor had been subjected to undue influence.

In part II B of this opinion, we discussed Jay Tyler's testimony concerning the factors that caused him to bring the claims against the plaintiff. It suffices to highlight some key evidence admitted in the present action and observe that, with respect to the complaint brought in the prior action by Jay Tyler against the plaintiff, the evidence reflects that Jay Tyler, who was a self-represented litigant, heavily relied on the expertise of

[22] Our conclusion does not affect the trial court's determination that Jay Tyler lacked probable cause to bring the failure to diversify trust assets claim in count five of his complaint in the prior action.

his brother, Bruce Tyler. Bruce Tyler assisted Jay Tyler in preparing the complaint, paid the filing fee, and paid the marshal to serve the complaint. Jay Tyler testified that, although Bruce Tyler did not represent him, he needed legal assistance in pursuing his claims and that either Bruce Tyler or someone employed at his law office helped him prepare legal arguments.[23] According to Jay Tyler, he had been told by Bruce Tyler to be at his "beck and call" during the proceedings and that Bruce Tyler had prepared his legal paperwork.

Jay Tyler testified that Bruce Tyler told him about the 1984 will and the trust. Jay Tyler testified, as well, that Bruce Tyler told him that the 1984 will should have been in effect at the time of his mother's death. He explained that he named Bruce Tyler as a defendant because he believed that he had to do so because Bruce Tyler was a beneficiary under the trust and that it would not have made any sense for Bruce Tyler to be a plaintiff in an action to enforce the 1984 will, pursuant to which Bruce Tyler would not have received anything from his mother's estate.

Jay Tyler testified that, prior to his mother's death, he did not have any reason to suspect that she had been subjected to undue influence but that, after her death and after learning details of her estate from Bruce Tyler, he came to believe that the plaintiff had conspired with Thomas Tyler to keep the trust and the 1999 will a secret. Essentially, he did not believe that his mother would have effectively disinherited him willingly and believed that Thomas Tyler had the inclination and the means to exert undue influence over his mother. Jay

[23] At trial in the present action, Bruce Tyler questioned Jay Tyler. During this examination, Jay Tyler used a written document that showed questions and answers. He testified that Bruce Tyler told him what questions he would ask and that he and Bruce Tyler scripted "appropriate" answers to these questions. Absent objection, the script that Jay Tyler reviewed during his examination was made a full exhibit.

Tyler testified that, although he brought the claims in the prior action in 2010 in an attempt to have the 1984 will reinstated, he did not learn of the existence of the 1988 will until 2014.

Jay Tyler testified: "I felt that I had good reason to bring the actions against [the plaintiff] because by the time I brought the action, I felt that I had proof that he had conspired with my brother Thomas [Tyler] in creating the trust document." He testified that this proof was related to the fact that, following his mother's death, his brothers did not share any information with him about her estate. Then, he learned that Thomas Tyler was untruthful about having filed the 1999 will in Probate Court. Then, he learned from John Tyler, Jr., that a trust had been created and that the plaintiff was the trustee. His suspicions grew, Jay Tyler testified, when he observed that the trust had been acknowledged by a third party whom he knew to be "one of [Thomas] Tyler's employees and political allies."

Jay Tyler testified that his suspicions about undue influence stemmed mostly from the fact that the 1999 will, which was reflected in the trust, was a departure from the 1984 will and, effectively, had disinherited him. He testified, as well, that he believed that his brother, Thomas Tyler, was "not a nice person" and that he would have been inclined to influence his mother to disinherit him.

As we have explained in part III A of this opinion, the issue of whether the defendants acted with probable cause in bringing the claims against the plaintiff in the prior action required the court to determine whether the defendants brought the claims with a bona fide belief that they could overcome the exculpatory clause of the trust by proving that the settlor had been subjected to undue influence in connection with the trust. Thus, the issue of whether Jay Tyler acted with probable

cause in bringing his claims against the plaintiff in the prior action is intertwined with an analysis of whether he had knowledge of facts that would justify a reasonable person in the belief that his mother had been subjected to undue influence. It is not in dispute that Bruce Tyler prepared and helped his mother execute the 1988 will that effectively disinherited Jay Tyler. The evidence suggests that Jay Tyler was unaware of the 1988 will until years after he commenced the prior action against the plaintiff. The evidence also suggests that Jay Tyler believed that his mother had been led by Thomas Tyler to effectively disinherit him by means of the 1999 will, which was reflected in the terms of the 2004 trust.

As we have discussed previously in this opinion, to overcome the exculpatory clause of the trust, it was necessary for the defendants, who did not rely on an allegation of wilful misconduct, to demonstrate that the settlor of the trust had been unduly influenced in connection with the trust. As we observed in part III A of this opinion, it is an unresolved issue of fact whether Bruce Tyler knew about the 1988 will when he brought the cross complaint against the plaintiff in the prior action. As a consequence of the court's failure to give proper consideration to the exculpatory clause of the trust in its analysis of the issue of probable cause, it also failed to find whether Jay Tyler reasonably believed that the settlor had been subjected to undue influence and, thus, had probable cause to pursue the claims at issue. We are persuaded that, with respect to the claims related to the plaintiff's failure to act as a prudent investor, failure to provide trust accountings, and failure to hold the investment advisor liable, the court must determine whether the facts known to Jay Tyler at the time he brought the claims against the plaintiff in the prior action were sufficient as to give rise to a bona fide belief that he should entertain the action against the plaintiff. The fact that the court found, as a matter of fact, that the defendants had not proven that the

settlor had been unduly influenced in connection with the trust does not affect our analysis of whether Jay Tyler had a bona fide belief in such facts at the time he commenced the prior action against the plaintiff.

Accordingly, we reverse the judgment rendered in favor of the defendants with respect to the plaintiff's statutory vexatious litigation claim that was brought under § 52-568 (1), in which he alleged, in relevant part, that Bruce Tyler lacked probable cause to bring counts one, three, and four of Bruce Tyler's cross complaint in the prior action, and in which the plaintiff alleged, in relevant part, that Jay Tyler lacked probable cause to bring counts one, two, three, four, six, and seven of the complaint in the prior action. With respect to these aspects of the claim raised under § 52-568 (1), the court is ordered to conduct further proceedings consistent with this opinion.

The judgment in favor of the defendants is reversed in part and the case is remanded for further proceedings in accordance with the preceding paragraph; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JAMES K. GROGAN *v.* JILL PENZA
(AC 41227)

Lavine, Bright and Bear, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying her postdissolution motion for contempt, in which she claimed that the defendant had violated a certain alimony obligation contained in the parties' separation agreement. The separation agreement, which was incorporated into the dissolution judgment, required the plaintiff to pay the defendant alimony based on his annual income from employment, which was defined as line 1 on the plaintiff's annual schedule K-1 from his then employer, the law firm M. Co., and included a requirement that the plaintiff pay the defendant true up alimony based on his gross

income over a certain amount. Subsequently, the plaintiff sold his interest in M. Co., where he had been a partner, and became a partner in a new law firm, G. Co. That year, the plaintiff received two schedule K-1s, one from M. Co. and one from G. Co., each of which listed income amounts on lines 1 and 4. The defendant claimed that the plaintiff's true up alimony obligation for that year must be based on the total of all of those lines and filed a motion for contempt based on the plaintiff's nonpayment of any true up alimony for that year. The defendant objected to the plaintiff's motion and requested statutory attorney's fees and costs. The trial court denied the motion for contempt and did not award attorney's fees to either party. On the defendant's appeal and the plaintiff's cross appeal to this court, *held*:

1. The trial court properly denied the defendant's motion for contempt: pursuant to the specific and plain language of the settlement agreement, which the parties freely agreed to use when they drafted the agreement, only income reported on line 1 of the schedule K-1 could be used in calculating the plaintiff's true up alimony obligation, and because the plaintiff's combined line 1 income from both K-1s was less than a certain amount, the defendant was not entitled to any true up alimony for that year; moreover, the defendant's claim that certain language in the parties' agreement required that the reference to line 1 income was meant merely to be an example of one type of employment income that could be considered with other types of alleged income in calculating the plaintiff's true up alimony obligation was belied by the clear and unambiguous language of the agreement.
2. The plaintiff could not prevail on his claim on cross appeal that the trial court improperly denied his request for attorney's fees and costs incurred in successfully opposing the defendant's motion for contempt; following a review of the briefs of the parties and the record of the hearing on the motion for contempt, this court could not conclude that the trial court abused its discretion in declining to award attorney's fees to the plaintiff.

(*One judge concurring in part and dissenting in part*)

Argued April 15—officially released October 29, 2019

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Olear*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Nastri*, *J.*, denied the defendant's motion for contempt and the plaintiff's request for attorney's fees and costs, and the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

Steven L. Katz, with whom was *Melissa Gagne*, for the appellant-cross appellee (defendant).

Mark V. Connolly, for the appellee-cross appellant (plaintiff).

Opinion

BEAR, J. The defendant, Jill Penza, appeals from the judgment denying her postdissolution motion for contempt. On appeal, she claims that the trial court improperly concluded that the plaintiff, James K. Grogan, had not violated a "true up" alimony obligation contained in the parties' separation agreement.[1] The plaintiff cross appeals, claiming that the trial court abused its discretion in denying his request for statutory attorney's fees incurred in defending against the defendant's motion for contempt. We disagree with the parties' claims and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal and cross appeal. On September 25, 2013, the parties, each of whom is an attorney, and each of whom was represented by an attorney, entered into a twenty-three page divorce settlement agreement (agreement). On September 27, 2013, the court, *Olear*, *J.*, dissolved the parties' marriage. At the time of the dissolution, the plaintiff was a partner at the law firm of McCormick, Paulding & Huber, LLP (MPH). In accordance with General Statutes § 46b-66, the judgment of dissolution incorporated by reference the agreement. Article I of the agreement addressed the plaintiff's various alimony obligations and specified how to calculate such alimony.

[1] The defendant also claims that the trial court (1) "improperly calculated the plaintiff's annual income for purposes of determining the 'true up' alimony obligation owed to the defendant," (2) "erred in failing to order the plaintiff to pay $45,846 to the defendant for 'true up' alimony due for 2015," and (3) "erred in denying the defendant's motion for contempt [on the basis of] its conclusion that no 'true up' alimony was due and owing to the defendant." Because we conclude that the trial court properly determined that no true up alimony was owed, these claims necessarily fail.

Section 1.1 of the agreement provided in relevant part: "The alimony payments detailed [herein] are based on an annual earned income/earning capacity attributed to [the defendant] of $35,000 and the [plaintiff's] 'annual income from employment' (hereinafter 'income') which, for purposes of the alimony formula[s] herein, is presently defined as [l]ine 1 on [the plaintiff's] annual [schedule] K-1[2] from [MPH]. The alimony paid by the [plaintiff] to the [defendant] shall be paid in three components (monthly . . . and quarterly payments totaling $160,000 based on the first $550,000 of [the plaintiff's] income, and a year-end 'true up' alimony payment based on gross income of the [plaintiff] between $550,000 and $750,000)." (Footnote added.)

The true up alimony formula applicable in the present case was set forth in § 1.1 D of the agreement, which provided in relevant part: "For the tax year 2014 and thereafter, [the plaintiff] shall pay 'true up' alimony to [the defendant] of 25 [percent] of the amount of [the plaintiff's] income between $550,000 and $700,000 as reflected on [l]ine 1 of [the plaintiff's schedule] K-1 and 20 [percent] of any income between $700,000 and $750,000. For example, if [the plaintiff's schedule] K-1 for 2014 shows [l]ine 1 income of $775,000, [the plaintiff] would owe [the defendant] additional 'true up' alimony in the amount of $47,500 . . . ."

In June, 2015, the plaintiff sold his interest in MPH, where he had been a partner for over twenty years, and created a new law firm, Grogan, Tuccillo & Vanderleeden, LLP (GTV), located in Springfield, Massachusetts. GTV, like MPH, was structured as a partnership. As a result, the plaintiff received two schedule K-1s for

[2] "A schedule K-1 is the document that states each individual partner's proportionate income or loss based upon [his or her] percentage ownership. The income or loss on the schedule K-1 is in turn reported on each partner's individual tax return." (Internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 813 n.10, 138 A.3d 935 (2016).

the 2015 tax year, one from MPH covering the period between January 1 and May 31, 2015, and one from GTV covering the period between June 1 and December 31, 2015. The schedule K-1 issued by MPH listed negative $93,463 of "[o]rdinary business income (loss)" on line 1 and $605,000 of "[g]uaranteed payments" on line 4.[3] The schedule K-1 issued by GTV listed $103,017 on line 1 and $127,178 on line 4. In previous years, when he was employed by MPH, all of the income the plaintiff received from employment had been reported on line 1 of his schedule K-1s.

On May 31, 2017, the defendant filed a motion for contempt alleging that the plaintiff wilfully had violated the parties' agreement by failing to pay her true up alimony for the 2015 tax year. More specifically, the defendant claimed that the plaintiff's 2015 "annual income from employment" was $741,732—the total of lines 1 and 4 from both schedule K-1s—and that, consequently, she was entitled to $45,846 of true up alimony pursuant to § 1.1 D of the agreement. In his memorandum of law in opposition to the motion, the plaintiff countered that § 1.1 D clearly and unambiguously provided that his annual income from employment was to be determined solely by reference to line 1 of his schedule K-1s. Accordingly, the plaintiff argued that he owed no true up alimony for 2015 because his total line 1 income across both schedule K-1s amounted to only $9554—well below the $550,000 threshold required by the agreement. The plaintiff therefore requested that the court deny the defendant's motion for contempt and award him costs and reasonable attorney's fees pursuant to General Statutes § 46b-87.

The trial court, *Nastri*, *J.*, conducted an evidentiary hearing on the defendant's motion for contempt on September 28 and October 13, 2017. On December 4,

[3] The trial court found that the plaintiff had had no control over how his income was reported on his 2015 schedule K-1.

2017, following posttrial briefing by the parties, the court issued a memorandum of decision holding that § 1.1 D of the agreement was clear and unambiguous and limited the plaintiff's income from his employment for purposes of calculating true up alimony to the amount listed on line 1 of the plaintiff's schedule K-1. The court rejected the defendant's argument that it should look to lines 1 and 4 of the 2015 schedule K-1s to determine the total of the plaintiff's income from his employment. It explained that the defendant's argument, that the amounts listed on both lines 1 and 4 of the schedule K-1s should be considered income, required the court to ignore the language in § 1.1 C and D of the agreement. Accordingly, the court denied the defendant's motion, but it declined to award attorney's fees to the plaintiff. This appeal and cross appeal followed.

I

THE DEFENDANT'S APPEAL

On appeal, the defendant claims that the trial court improperly concluded that the plaintiff had not violated the true up alimony provision contained in § 1.1 D of the agreement. Her principal argument is that the court erred in determining that only income listed on line 1 of a schedule K-1 may be considered for purposes of calculating true up alimony due to her under § 1.1 D of the agreement.[4] We disagree.

[4] The defendant argues in the alternative that the language of § 1.1 D was ambiguous and that the court therefore should have sought extrinsic evidence to determine the parties' intent. Rather than analyze the language of this provision and explicate why, in her view, it was ambiguous, the defendant merely states in a conclusory manner that "the settlement agreement was not clear and unambiguous as found by the trial court." The defendant therefore has abandoned this issue by failing to brief it properly. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]). Nevertheless, as our discussion of the defendant's principal argument demonstrates, the contract language at issue is clear and unambiguous in the context of the present case.

We begin with general principles and the applicable standards of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

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

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties.

. . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383–84, 107 A.3d 920 (2015); see also *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 191–92, 112 A.3d 144 (2015); *Dejana* v. *Dejana*, 176 Conn. App. 104, 115, 168 A.3d 595 (when language in question is clear and unambiguous, contract must be given effect according to its terms, and determination of parties' intent is question of law), cert. denied, 327 Conn. 977, 174 A.3d 195 (2017). "Furthermore, [i]n giving meaning to the language of a contract, we presume that the parties did not intend to create an absurd result." (Internal quotation marks omitted.) *South End Plaza Assn., Inc.* v. *Cote*, 52 Conn. App. 374, 378, 727 A.2d 231 (1999).

The defendant argues that the court's interpretation of the true up alimony provision set forth in § 1.1 D was flawed because it rendered superfluous the "presently defined" language in § 1.1, which, according to the defendant, applies to subsection D. More specifically, the defendant contends that, "[b]y specifically stating that income was 'presently defined' as line 1 of [the defendant's] schedule K-1, it is abundantly clear that the parties did not intend to permanently define income as line 1 of a schedule K-1." (Emphasis omitted.) Rather, in the defendant's view, this language indicates that the reference to line 1 income "was an example and [was] not meant to be determinative." Thus, according to the defendant, "[t]he placement of the plaintiff's earnings, whether on line 4 or line 1 of the schedule K-1 or any other income reporting form, should not bar recovery of true up alimony." (Internal quotation marks omitted.)

Section 1.1 of the parties' agreement sets forth the definition of the plaintiff's income "*for purposes of the alimony formula herein* . . . ."[5] (Emphasis added.) The only alimony formulas in the agreement that refer to the plaintiff's income are the true up alimony formulas contained in subsections C and D of § 1.1. Pursuant to § 1.1, the income to be used to calculate the plaintiff's true up alimony obligations under these subsections "is *presently* defined as [l]ine 1 on [the plaintiff's] annual [schedule] K-1 from [MPH]." (Emphasis added.) We disagree with the defendant, however, that this "presently defined" language requires that the reference to line 1 income was meant merely to be an example of one type of employment income that could be considered, at the defendant's election to do so, with other types of alleged income in calculating the plaintiff's true up alimony obligation. This claim is belied by the clear and unambiguous language of § 1.1 D, which provides that "[f]or the tax year 2014 and thereafter, [the plaintiff] shall pay 'true up' alimony to [the defendant] of 25 [percent] of the amount of [his] income between $550,000 and $700,000 as reflected on [l]ine 1 of [the plaintiff's schedule] K-1 and 20 [percent] of any income between $700,000 and $750,000. For example, if [the plaintiff's schedule] K-1 for 2014 shows [l]ine 1 income of $775,000, [the plaintiff] would owe [the defendant] additional 'true up' alimony in the amount of $47,500 . . . ." A court cannot ignore or disregard the language of the agreement because in hindsight an additional or more expansive term would have been better for one of the parties. See, e.g., *Crews* v. *Crews*, 295 Conn. 153, 169, 989 A.2d 1060 (2010); *Chang* v. *Chang*, 170 Conn. App. 822, 828, 155 A.3d 1272, cert. denied, 325 Conn. 910, 158 A.3d 321 (2017).

[5] "'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used." *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 882 (6th Cir. 1944).

To the extent that there is any conflict in the reasonable interpretation of the language of the agreement set forth in § 1.1 and § 1.1 D, which we do not credit, the more specific language in § 1.1 D controls over the more general language in § 1.1: "[I]t has been well settled that 'the particular language of a contract must prevail over the general.' " *Issler* v. *Issler*, 250 Conn. 226, 237 n.12, 737 A.2d 383 (1999), see also *Bead Chain Mfg. Co.* v. *Saxton Products, Inc.*, 183 Conn. 266, 273, 439 A.2d 314 (1981); *Miller Bros. Construction Co.* v. *Maryland Casualty Co.*, 113 Conn. 504, 514, 155 A. 709 (1931).

The defendant has neither provided analysis nor cited to any legal authority to support her contention that the addition of the word "presently"[6] somehow transforms the definition of "annual income from employment" set forth in § 1.1 into a mere example that can be expanded upon by adding another line from the schedule K-1. See *Packard* v. *Packard*, 181 Conn. App. 404, 406, 186 A.3d 795 (2018) ("analysis, rather than mere abstract assertion, required to avoid abandoning issue by failing to brief issue properly; where claim receives only cursory attention without substantive discussion or citation of authorities, it is deemed abandoned"). Moreover, the defendant's position is untenable when § 1.1 is interpreted in light of the situation of the parties at the time of the dissolution.

The "presently defined as [l]ine 1 on [the defendant's] annual K-1 from [MPH]" language set forth in § 1.1 referred to the plaintiff's then income from his employment at MPH, *for purposes of the alimony formula*. It is not specified in the agreement that the line 1 language is limited solely to the year 2013 when the agreement was made, and, thereafter, the definition of the plaintiff's annual income from employment in subsequent

[6] "Presently" is an adverb that simply means "now" or "at the present time." Webster's Third New International Dictionary (2002), p. 1793.

years would be open to review and revision, except in § 1.3, which anticipates the plaintiff's possible retirement justifying a second look at his alimony obligation. There was no dispute between the parties about the amount of the plaintiff's line 1 income for 2014, and there was no line 4 income in that year. The relevant language of § 1.1 D is clear: for the tax year 2014 and thereafter, the plaintiff shall pay true up alimony to the defendant from his income as reported on line 1 of his schedule K-1. It is also not specified in the agreement that there would be an automatic "second look" if there were entries on line 4, or any other lines other than line 1, in 2014 or in any other subsequent year. Given the clear and unambiguous language of § 1.1 D, if the $605,000 in "guaranteed payments" from line 4 of the MPH schedule K-1 for 2015 were used to calculate the plaintiff's true up alimony obligation, the agreement certainly would be violated. Without the inclusion of the $605,000 in the calculation of the plaintiff's income, the plaintiff's income in 2015 did not exceed $550,000.

The trial court recognized the differentiation between the application of the line 1 limitation in the true up alimony formula and the lack of its limitation to a specific year when it rejected the defendant's arguments and found that, in reaching their agreement, the parties were free to define income in any way they wanted and did not have to use the schedule K-1 to do so. Having agreed to use the schedule K-1, the parties could have referenced any of the lines therein, including lines 1 and 4, or any other combination of lines in part III of the schedule K-1, titled "Partner's Share of Current Year Income, Deductions, Credits and Other Items." The parties, however, agreed that the plaintiff's income, for alimony purposes, was limited to line 1 of the plaintiff's schedule K-1. At no time prior to or after the defendant's filing of her motion for contempt did she file any motion for modification of the alimony terms or any other

motion concerning the definition of alimony in the agreement, so the court did not have the authority during the hearing on the contempt motion to modify the alimony terms. See *Connolly* v. *Connolly*, 191 Conn. 468, 474–75, 464 A.2d 837 (1983).

At the time of the dissolution of the parties' marriage in 2013, the plaintiff had been a partner at MPH for over twenty years, and, during this time, his income from such employment had always been reported on line 1 of the schedule K-1s prepared by its outside accountants and issued by that law firm. That continued in 2014 and 2015. After the defendant left MPH on May 31, 2015, his new law firm, GTV, was set up as a partnership that also provided a schedule K-1 to the plaintiff with respect to his annual income from such employment. He thus received schedule K-1 forms from both MPH and GTV for the 2015 tax year, which forms had been prepared by their respective outside accountants. He did not receive a W-2 form for the 2015 tax year from MPH or GTV, or any other type of form related to his employment income. It is thus inappropriate to speculate about the possible effect, if any, on the application of the agreement of his receipt of such other income reporting forms.

We, therefore, agree with the trial court that, pursuant to the specific and plain language of the agreement set forth in § 1.1 D, only income reported on line 1 of the plaintiff's annual schedule K-1s could be used in calculating his 2015 true up alimony obligation. Because the plaintiff's combined line 1 income from both 2015 K-1s was less than $550,000, the defendant was not entitled to any true up alimony, and, consequently, the trial court properly denied the defendant's motion for contempt.

II

THE PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that the trial court abused its discretion in denying his request for

attorney's fees and costs incurred in successfully opposing the defendant's motion for contempt. We disagree.

"Our law for awarding attorney's fees in contempt proceedings is clear. General Statutes § 46b-87 provides that the court may award attorney's fees to the prevailing party in a contempt proceeding. The award of attorney's fees in contempt proceedings is within the discretion of the court. . . . In making its determination, the court is allowed to rely on its familiarity with the complexity of the legal issues involved. Indeed, it is expected that the court will bring its experience and legal expertise to the determination of the reasonableness of attorney's fees. . . . Moreover, because the award of attorney's fees pursuant to § 46b-87 is punitive, rather than compensatory, the court properly may consider the defendant's behavior as an additional factor in determining both the necessity of awarding attorney's fees and the proper amount of any award." (Internal quotation marks omitted.) *Pace* v. *Pace*, 134 Conn. App. 212, 218, 39 A.3d 756 (2012).

In the present case, the record does not reveal the court's reason for denying the plaintiff's request for attorney's fees and whether, or to what extent, it considered such factors as the merits of the defendant's motion for contempt, the complexity of the legal issues involved, and the defendant's behavior. In its memorandum of decision, the court simply ordered that "[n]o attorney's fees are awarded to either party." Following our review of the briefs of the parties and the record of the hearing on the motion for contempt, we are unable to conclude that the court abused its discretion in declining to award attorney's fees to the plaintiff.

The judgment is affirmed.

In this opinion LAVINE, J., concurred.

BRIGHT, J., concurring in part and dissenting in part. Although I agree with the majority's conclusion in part II of its opinion regarding the plaintiff's cross appeal, I disagree with its conclusion in part I of its opinion that the parties' separation agreement (agreement) is clear and unambiguous regarding the terms of the plaintiff's obligation to pay "true up" alimony to the defendant. Because the trial court based its denial of the defendant's motion for contempt solely on its conclusion that the language of the parties' agreement is clear and unambiguous, I conclude that the matter should be remanded to the trial court for factual findings that are required when an agreement is ambiguous. Furthermore, I conclude that the fact that the agreement is ambiguous does not prevent the trial court from granting relief to the defendant, even though it almost certainly would preclude a finding that the plaintiff is in contempt. Finally, because the court made no findings as to whether the plaintiff met his full obligation to pay true up alimony under the terms of the ambiguous agreement, I conclude that we are not in a position to affirm the decision of the trial court on the basis of the plaintiff's alternative ground for affirmance. Consequently, I would reverse the court's judgment denying the defendant's motion for contempt, and I would remand the matter for a new hearing on the motion. Having reached this conclusion, I would affirm the court's judgment denying the plaintiff's motion for attorney's fees. Therefore, I concur in part and respectfully dissent in part.

Because the majority's holding in part I of its opinion rests solely on its conclusion that the agreement is clear and unambiguous, I will focus my analysis on the language of the agreement and the applicable law to explain why I disagree with the majority's conclusion. As a preliminary matter, I agree with the majority's statement as to the applicable law as set forth by our

Supreme Court in *Parisi* v. *Parisi*, 315 Conn. 370, 382–84, 107 A.3d 920 (2015). In my view, three principles of contract interpretation are particularly relevant to the resolution of the parties' dispute. First, the parties' agreement must be viewed in its entirety, with each provision read in light of the other provisions, and every provision given effect if possible to do so. *Nation–Bailey* v. *Bailey*, 316 Conn. 182, 191–92, 112 A.3d 144 (2015). Second, if the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous. Id. Third, "[w]e will not construe a contract's language in such a way that it would lead to an absurd result." *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198, 118 A.3d 675, cert. denied, 318 Conn. 905, 122 A.3d 634 (2015).

In the present case, the parties' dispute revolves around § 1.1 of the agreement, in particular the interplay of that section's initial foundational paragraph and subsection D. Section 1.1 starts by setting forth the parties' agreement regarding the payment of alimony by the plaintiff; specifically, it sets forth the basis for the payment of alimony and a general description of how the amount of alimony due to the defendant is to be calculated. It provides in relevant part: "The alimony payments detailed below are based on . . . the [plaintiff's] '*annual income from employment*' (hereinafter 'income') which, for purposes of the alimony formula herein, is presently defined as Line 1 on [the plaintiff's] annual [schedule] K-1 [form] ([K-1]) from McCormick, Paulding & Huber LLP ('MPH').[1] The alimony paid by the [plaintiff] to the [defendant] shall be paid in three components (monthly payments and quarterly payments totaling $160,000 based on the first $500,000

[1] At the time the parties entered into the agreement and the dissolution judgment was rendered, the plaintiff was a full equity partner and the managing partner of MPH.

of [the plaintiff's] income, and a year-end 'true up' alimony payment based on gross income of the [plaintiff] between $550,000 and $750,000). [The defendant] shall not be entitled to any alimony on any annual income of [the plaintiff] in excess of $750,000. Said payments will be made as follows." (Emphasis added; footnote added.)

Section 1.1 then sets forth, in subsections A though D, the timing and methodology for making and calculating the alimony payments. Subsection D, in relevant part, provides: "For the tax year 2014 and thereafter, [the plaintiff] shall pay 'true up' alimony to [the defendant] of 25 [percent] of the amount of [the plaintiff's] income between $550,000 and $750,000 as reflected on Line 1 of [the plaintiff's] K-1 and 20 [percent] of any income between $700,000 and $750,000. For example, if [the plaintiff's] K-1 for 2014 shows Line 1 income of $775,000, [the plaintiff] would owe [the defendant] additional 'true up' alimony in the amount of $47,500 . . . ."

It is undisputed that the plaintiff has paid the defendant the required $160,000 per year in annual alimony. It also is undisputed that the plaintiff paid the defendant the proper amount of true up alimony in 2013 and 2014. Furthermore, had the plaintiff remained a partner at MPH through the end of 2015, and had MPH continued to report all of the plaintiff's employment income on line 1 of his K-1, as it had during the entire twenty plus years he was a partner of MPH, it is unlikely that the parties would have had any dispute over the plaintiff's obligation to pay true up alimony.

In 2015 though, the plaintiff resigned from MPH, effective June 1, and opened a new law firm, Grogan, Tuccillo & Vanderleeden, LLP (GTV), in which he is an equity partner. As a result, the plaintiff received two K-1s in 2015, one from each firm. Furthermore, both

firms reported income, or loss, to the plaintiff on both line 1, titled "ordinary business income," and line 4, titled "guaranteed payments," of the K-1.[2] When the defendant received the required copies of the plaintiff's K-1s, she totaled the amounts on lines 1 and 4 from both K-1s and determined that the plaintiff had a total income from employment in 2015 of $741,732. Applying the formula in § 1.1 D to this amount, the defendant determined that she was entitled to true up alimony in the amount of $45,846. When she demanded payment from the plaintiff, the plaintiff responded that the $605,000 reported on line 4 of the K-1 issued by MPH was not income but, rather, was the return of his capital from the firm upon his departure. The plaintiff informed the defendant that he was challenging MPH's treatment of that payment and asked her not to pursue any claim for true up alimony until he resolved the issue.

The defendant thereafter filed a motion for contempt, the denial of which is the subject of this appeal. In response to the motion for contempt, in addition to disputing that he had received sufficient employment income in 2015 to trigger the requirement that he pay true up alimony, the plaintiff also argued before the trial court that § 1.1 D of the agreement clearly and unambiguously limits income for the purpose of true up alimony to income reported on line 1 of his K-1. Because the total of the amounts reported on line 1 of the plaintiff's two K-1s in 2015 was only $9554, the plaintiff argued that no true up alimony was due.

[2] The majority notes that the court found that the plaintiff had no control over how his income was reported on his 2015 schedule K-1. The majority's reliance on this factual finding is troubling for two reasons. First, the finding is based on evidence extrinsic to the parties' contract, in particular, the plaintiff's testimony. Of course, such extrinsic evidence only may be considered where the agreement at issue is ambiguous. Second, the plaintiff did not testify that he had no control over GTV's K-1. To the contrary, he testified that it was a mistake for his new accountant to record any income on line 4 of the K-1, and that for 2016, all income from GTV was reported on line 1 of the K-1.

In contrast, the defendant argued before the trial court, in support of her motion for contempt, that the initial paragraph of § 1.1 clearly and unambiguously requires that alimony payments to the defendant are based on the plaintiff's "annual income from employment." She argued that this includes all income that the plaintiff received as a result of his employment, regardless of the line of the K-1 used to report the income. She further argued that the plaintiff's reliance on the reference in § 1.1 D to line 1 of the K-1 issued by MPH was misplaced because the initial paragraph of § 1.1 makes clear that the parties only intended line 1 of the K-1 issued by MPH to be used because that was how the plaintiff's income from employment, at that time, was "presently defined."

At the hearing on the underlying motion for contempt, the parties' expert witnesses were in conflict as to whether the $605,000 reported on line 4 of the plaintiff's K-1 issued by MPH was income for purposes of the agreement. The defendant's expert witness, Richard Buggy, testified that, on the basis of the amounts recorded on the plaintiff's two K-1s, the plaintiff's total income from employment was $741,732. He also acknowledged though that the payment of the $605,000, as shown on line 4 of the MPH K-1, was related to the plaintiff's sale of his interest in MPH. He also described it as a "departure payment" in exchange for the plaintiff terminating his partnership interest in MPH. He further testified that one should look at the MPH partnership agreement to see how the payment should be treated, but that he never looked at the agreement. After the plaintiff presented the testimony of his accountant and expert witness, Margaret Mayer, to explain why the $605,000 on line 4 of the MPH K-1 was not income, the defendant recalled Buggy in her rebuttal case to respond to Mayer's analysis. Buggy testified that, even under Mayer's methodology, the plaintiff owed true up alimony of $14,264.

The court decided the defendant's motion for contempt based solely on the language of the agreement, in particular, § 1.1 D. According to the court: "Section 1.1 D of the agreement sets forth the calculation of true up alimony for 2014 and beyond. The defendant's argument that the amounts listed on both lines 1 and line 4 of the K-1s should be considered income requires the court to ignore the language in § 1.1 . . . D. . . . In reaching their agreement, the parties were free to define income in any way they wished. They did not have to use [the] K-1 as a reference. If they wished to do so, they could have referenced lines 1 and 4, line 4, line 1, lines 1, 2, 3, and 4 or any combination of the lines in [the] K-1 . . . . They chose to specify line 1. If [the initial paragraph of] § 1.1 [was] sufficient to define the plaintiff's true up alimony obligation . . . § 1.1 D would be wholly unnecessary and completely superfluous." (Internal quotation marks omitted.) The court's analysis, however, does not discuss the language in the initial paragraph of § 1.1 that the plaintiff's income "for purposes of the alimony formula herein, is presently defined as Line 1 on [the plaintiff's] annual K-1 from . . . MPH." (Internal quotation marks omitted.) Consequently, the court's memorandum of decision does not explain what meaning, if any, the court attached to the clause "presently defined as."

The majority agrees with the court's conclusion. In doing so, the majority similarly ignores the "is presently defined as" language in § 1.1. My colleagues make no attempt to ascribe any meaning to those words or attempt to read them with the language of §1.1 D to give all of the language of § 1.1 meaning. Instead, they offer a variety of reasons, none of which I find persuasive, to essentially read the "is presently defined as" language out of the parties' agreement.[3] I address each of them in turn.

[3] Although not stated as a reason to conclude that the agreement is clear and unambiguous, the majority takes the time to note that both parties are

First, the majority, as did the trial court, notes that the parties could have defined income any way they wanted and could have identified lines other than line 1 of the K-1 from which to compute income. The majority then states that it "cannot ignore or disregard the language of the agreement because in hindsight an additional or more expansive term would have been better for one of the parties." The majority's reasoning ignores the fact that the parties specifically chose to define the plaintiff's income as his "annual income from employment." Section 1.1 D then sets forth that line 1 of the plaintiff's K-1 from MPH was to be used at the time of drafting because that was how the plaintiff's annual income from employment was "presently defined." There was no need to provide a different way to identify the plaintiff's income because the parties could not have anticipated, when the agreement was signed, that the plaintiff's employment would change or whether the manner of reporting his income would change. It is a reasonable reading of the agreement that by defining the plaintiff's obligation to pay alimony broadly as based on his "annual income from employment," the defendant protected herself from any such contingency, while also setting forth precisely how the plaintiff's income was calculated at the time of the dissolution.

Furthermore, the cases relied on by the majority do not support its conclusion. Our Supreme Court in *Crews* v. *Crews*, 295 Conn. 153, 169, 989 A.2d 1060 (2010), addressed the high burden a party faces when challenging the enforceability of a premarital agreement. In

attorneys, who also were represented by counsel when they entered into the agreement. To the extent that the majority sets forth these facts for the purpose of lending support for its conclusion, I am not persuaded. First, the parties' professions and whether they were represented by counsel are extrinsic facts that can be considered only if the agreement is not clear and unambiguous. Second, it is not unusual for sophisticated parties who are represented by highly skilled and experienced attorneys to enter into ambiguous agreements. See, e.g., *Gold* v. *Rowland*, 325 Conn. 146, 171–89, 156 A.3d 477 (2017).

doing so, the court set forth the unremarkable proposition that parties are free to contract for whatever terms they choose. In the present case, the parties chose to qualify the reference to the plaintiff's K-1 from MPH by stating that that was how his income was "presently defined."[4] The use of such a qualifier reasonably can be read as expressing an understanding that his income might not always be defined that way, and that a change in circumstances might require that it be defined differently. In fact, had the parties intended otherwise, there would have been no reason to include the "is presently defined as" language in the agreement.

Similarly, *Chang* v. *Chang*, 170 Conn. App. 822, 155 A.3d 1272, cert. denied, 325 Conn. 910, 158 A.3d 321 (2017), also is inapplicable to the present case. In *Chang*, the defendant challenged the court's award of alimony to the plaintiff because the parties' premarital agreement did not provide for the possibility of alimony upon the dissolution of the parties' marriage. This court rejected the defendant's argument because there was "no provision in the agreement that even tangentially govern[ed] the parties' rights to alimony upon the dissolution of the marriage." Id., 830. In the present case, the defendant is not asking that a *new term* be added to the parties' agreement. Rather, she simply is asking that the court interpret the parties' agreement to give meaning to *all* of its terms.

The majority next states that, to the extent that the general language in the first paragraph of § 1.1 conflicts with the specific language in § 1.1 D, the specific language in § 1.1 D must govern. I disagree with the majority's reasoning for three reasons.

[4] Yet another reason that the language of § 1.1 is not clear and unambiguous is that it refers to "line 1 of [the plaintiff's] K-1" from MPH. It does not mention the possibility of multiple K-1s from different firms. Despite this, the plaintiff, the trial court, and the majority, without comment, simply ignore the reference to a single K-1 from MPH and assume that true up alimony is to be calculated from line 1 of all of the K-1s issued to the plaintiff.

First, the principle relied on by the majority applies when reliance on the general language of the agreement would render the specific language meaningless. For example, in *Issler* v. *Issler*, 250 Conn. 226, 737 A.2d 383 (1999), another case on which the majority relies, the parties disputed the manner in which the defendant's alimony obligation should be determined. Id., 234. The parties' separation agreement explicitly provided that an accountant would prepare a letter setting forth the defendant's income from his employer, H. H. Brown. Id., 231. The plaintiff argued that the letter was insufficient because it did not capture all of the defendant's income from H. H. Brown, and the parties' agreement provided that the defendant was to pay alimony based upon his "gross earnings" from H. H. Brown. Id., 234, 236–37. The court rejected the plaintiff's argument because it would render meaningless the language in the agreement relating to the accountant's letter. Id., 239. Instead, the court held that the agreement should be construed to give full meaning and effect to all of its provisions. Id., 240. In the present case, the majority's reasoning violates this rule by rendering entirely meaningless the "is presently defined as" language at issue here.

The trial court did apply this rule, but reached what I believe to be the erroneous conclusion that the defendant's interpretation renders § 1.1 D "wholly unnecessary and completely superfluous." The initial paragraph of § 1.1 does not set forth the formula for calculating true up alimony. It merely states that the plaintiff must pay true up alimony on income, which the agreement defines as annual income from employment, between $550,000 and $750,000. Section 1.1 D provides the specific percentages that are to be applied to income between $550,000 and $700,000 and between $700,000 and $750,000. It also sets forth when such payments must be made and that the defendant is entitled to a copy of the plaintiff's K-1. Consequently, under the

defendant's interpretation, § 1.1 D is far from superfluous; rather, it absolutely is necessary to the determination of the plaintiff's obligation.

I acknowledge that § 1.1 D provides that the income used to calculate true up alimony is that "reflected on line 1 of [the plaintiff's] K-1." That language, as the majority concedes, must be interpreted in conjunction with the language in the initial foundational paragraph of § 1.1, which the trial court failed to do. Reading § 1.1 in its entirety, I conclude that the defendant has offered a reasonable interpretation of the agreement.

Second, "[w]here two clauses which are apparently inconsistent *may be reconciled by a reasonable construction*, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions." (Emphasis in original; internal quotation marks omitted.) *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 61, 100 A.3d 917 (2014). As noted previously, the defendant has offered a construction that reconciles the foundational paragraph of § 1.1 with § 1.1 D.

Finally, "[i]rreconcilable inconsistent provisions have been treated by this court and our Supreme Court as creating an ambiguity within the contract." Id., 60. Thus, to the extent that there is an irreconcilable conflict between the foundational paragraph of § 1.1 and § 1.1 D, the court should have considered extrinsic evidence to determine the intent of the parties in light of the conflict.

The majority also posits that the defendant has abandoned her claim that the agreement is ambiguous because she failed to brief this issue adequately. I disagree. In her principal brief, the defendant argues why the language of the agreement does not clearly and unambiguously lead to the result advocated by the plaintiff and argues what the court should have done if it did not accept the defendant's argument regarding the

clear and unambiguous meaning of the agreement. The plaintiff clearly understood the defendant's argument and addressed it in his brief on appeal. In addition, most of the defendant's reply brief is devoted to this issue. I conclude that the issue has been briefed fully and sufficiently. Furthermore, because the question of whether the agreement is ambiguous is a legal one, and is a "threshold question," it properly is before us regardless of how it was briefed. *Parisi* v. *Parisi*, supra, 315 Conn. 380. It is our duty in considering a judgment on a motion for contempt to determine first whether the agreement was ambiguous even if both parties offered what they claimed were competing clear and unambiguous interpretations. Id.; *In re Leah S.*, 284 Conn. 685, 693, 935 A.2d 1021 (2007). In fact, in *Parisi*, neither party argued at the trial court *or on appeal* that the agreement was ambiguous. *Parisi* v. *Parisi*, supra, 378–79. Nevertheless, our Supreme Court addressed the "threshold question" of whether the parties' separation agreement was clear and unambiguous. Id., 380–81. It held that, the arguments of the parties notwithstanding, "each of the parties has set forth a plausible construction of the alimony buyout provision, with both constructions having bases in the language used in the separation agreement. We conclude, therefore, that the agreement . . . is ambiguous, with its meaning presenting a question of fact that the trial court should have fully considered and resolved." Id., 385. That is precisely the situation in the present case. Both parties have presented plausible arguments based on the language of the parties' agreement. In my opinion, the agreement, therefore, is ambiguous. See id.

The majority's interpretation of § 1.1 also is problematic because it leads to absurd results. Under the majority's analysis, if the plaintiff's employment income is reported in some manner other than on line 1 of a K-1, the defendant would be entitled to no true up alimony. This would be true even though neither party disputes

that the line on which income is reported on a K-1 is largely in the discretion of the preparer. It also would be true if the plaintiff's law firm changed its organizational structure from a partnership reporting income on a K-1 to a professional corporation that would report its members' incomes on W-2 forms. Similarly, under the majority's interpretation, the defendant would be entitled to no true up alimony if the plaintiff, instead of working in a law firm, practiced law as the general counsel of a major corporation, and his income was reported on a W-2 form or a 1099 form. I cannot square such outcomes with the parties' express statement in their agreement that the plaintiff's obligation to pay alimony is based on his "annual income from employment."

The majority ignores such absurdities by stating that because the plaintiff did not receive a W-2 form for 2015, it is "inappropriate to speculate about the possible effect, if any, on the application of the agreement of his receipt of such other income reporting forms." No speculation is necessary though. The majority's holding spells out very clearly what would happen if the plaintiff's income is reported in some manner other than on line 1 of a K-1. The defendant would be entitled to no true up alimony. This is the undeniable consequence of the majority's interpretation and in no way is speculative.

In sum, I conclude that the plaintiff has offered a reasonable, if not more reasonable, interpretation of the agreement. The foundational paragraph of § 1.1 explicitly provides that alimony payments are to be made on the basis of the plaintiff's annual income from employment. At the time the agreement was executed, that income was "presently defined as" what was shown on line 1 of the plaintiff's K-1 from MPH. The reference to "presently defined" reasonably can be read as temporal, meaning that the plaintiff's income is currently

reflected on his MPH K-1, but that it could be reflected in some other manner in the future.[5] Such an interpretation works hand in hand with the formula in § 1.1 D, while still preserving the parties' clearly stated intention to base the plaintiff's obligation to pay alimony on his employment income if his employment, or the manner in which his income is reported, changed from the state that existed when the parties signed the agreement.

Although I have identified what I perceive to be significant problems with the interpretive approach of the trial court and the majority, I am not prepared to dismiss their interpretation as wholly unreasonable; instead, I would conclude that because the agreement is subject to more than one reasonable interpretation, it is ambiguous. See *Parisi* v. *Parisi*, supra, 315 Conn. 385. As such, the trial court should have considered the extrinsic evidence submitted to it to determine how the ambiguities in § 1.1 should be resolved. See id. In fact, the plaintiff specifically offered, through his testimony, extrinsic evidence as to the parties' negotiations and why § 1.1 was drafted in the way it was drafted. In particular, the plaintiff testified that the language of § 1.1 was intended to record properly "any income I, actually, received from the practice of law."[6] He also

[5] The majority states that the defendant has provided no analysis nor cited to any legal authority to support her contention that the addition of the word "presently" somehow transforms the definition of "income" provided by § 1.1 into a mere example. I disagree. The defendant carefully analyzed § 1.1, including pointing out that the trial court's interpretation rendered the "presently defined" language superfluous. I also disagree that the defendant needed to cite legal authority as to how the word "presently" modified the definition of true up alimony. The defendant properly relied on the common meaning of "presently," which the majority defines as "now" or "at the present time." That definition is completely consistent with the defendant's argument and my analysis.

[6] The defendant objected to the admission of any evidence regarding the parties' negotiation of the agreement claiming that parol evidence is not admissible where an agreement is clear and unambiguous. In response, plaintiff's counsel argued that because the evidence was not offered to vary or alter the terms of the agreement, which he also claimed was clear and unambiguous, the evidence did not "run afoul of the parol evidence rule."

testified that on which line GTV reported his income on the K-1 would not impact his obligation to pay true up alimony. Unfortunately, the trial court, by finding the agreement to be clear and unambiguous, did not consider such extrinsic evidence. I conclude that this was an error that requires a new hearing.

Having reached this conclusion, I turn to the plaintiff's alternative arguments for affirmance. First, the plaintiff argues that if the agreement is ambiguous, he cannot be held in contempt because a finding of contempt must be made on the basis of the intentional violation of a clear and unambiguous court order. *Brody* v. *Brody*, 315 Conn. 300, 319, 105 A.3d 887 (2015). I agree that my conclusion that the agreement is ambiguous would preclude a finding that the plaintiff is in contempt of court because he disputed the defendant's claim to true up alimony. Nevertheless, the trial court still can order relief in the form of true up alimony payments if it concludes, on the basis of the language of the agreement interpreted in light of relevant extrinsic evidence, that the defendant's interpretation of the agreement is correct and that the plaintiff has under calculated his income for 2015. See *O'Brien* v. *O'Brien*, 326 Conn. 81, 99, 161 A.3d 1236 (2017) ("[i]n a contempt proceeding, even in the absence of a finding of contempt, a trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order" [internal quotation marks omitted]); *Parisi* v. *Parisi*, supra, 315 Conn.

The court overruled the defendant's objection and admitted the evidence. The argument of plaintiff's counsel and the ruling of the court reflect a misunderstanding of the parol evidence rule. The law is clear that parol evidence is not admissible where the agreement is clear and unambiguous. *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, 248 Conn. 350, 357–58, 727 A.2d 1260 (1999). Only if the agreement is ambiguous may parol evidence be admitted, and then only if such evidence does "not vary or contradict the terms of the contract." Id., 359–60.

381 ("court's inherent authority to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted, is not dependent upon a predicate finding that a noncompliant party is in contempt" [internal quotation marks omitted]); *Pressley* v. *Johnson*, 173 Conn. App. 402, 408–409, 162 A.3d 751 (2017) (although not finding defendant in contempt, trial court had authority "to fashion an order consistent with protecting the integrity of the dissolution judgment").

Second, the plaintiff argues that the $605,000 payment he received from MPH when he left the firm clearly was not income, but was instead the purchase of his ownership interest in the firm. Although I agree that the plaintiff submitted a significant amount of evidence to support his position, it is not the function of this court to find facts. See *Parisi* v. *Parisi*, supra, 315 Conn 385 ("[i]t is elementary that neither [our Supreme Court] nor the Appellate Court can find facts in the first instance . . . but may only *review* such findings to see whether they might be legally, logically and reasonably found" [emphasis in original; internal quotation marks omitted]). Because the trial court did not resolve this question, there are no findings for this court to review. Consequently, I would reverse the trial court's judgment denying the defendant's motion for contempt and remand the case to the trial court for a new hearing on the motion.

Having concluded that the agreement is ambiguous and that a further hearing is required on the defendant's motion, I agree with the majority's conclusion in part II of its opinion that the court did not err in denying the plaintiff's request for attorney's fees. Consequently, I respectfully dissent only from part I of the opinion.

IN RE KADON M.*

(AC 42606)

Elgo, Moll and Devlin, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court transferring guardianship of her minor child, K, to K's paternal grandmother. After K had been adjudicated neglected, he was committed to the custody of the petitioner, the Commissioner of Children and Families. Thereafter, the petitioner filed a motion to open and modify the dispositive order of protected supervision to transfer guardianship to K's paternal grandmother. During the trial on the motion to open, the trial court denied the oral motion of the court-appointed attorney for K to appoint a guardian ad litem. On appeal, the mother claimed that the trial court abused its discretion by denying that motion. *Held* that the trial court did not abuse its discretion when it denied the oral motion to appoint a guardian ad litem, as the court did not require the input of a guardian ad litem in order to determine the best interests of K; the decision to appoint a guardian ad litem was within the broad discretion of the trial court, the court's denial of the motion to appoint a guardian ad litem in no way precluded the respondent mother or the attorney for K from presenting evidence for the court to weigh and consider in conducting its best interests analysis, and the mother failed to explain how the court's failure to appoint a guardian ad litem would have affected the trial, as the record before the trial court was replete with evidence to assist its determination of the best interests of K, including evidence that the mother had not complied with the specific steps ordered by the court and ample evidence to support the court's finding that the paternal grandmother, who had played a major role in K's life and was licensed as a foster parent to care for similar children, was a suitable and worthy guardian.

Argued September 6—officially released October 21, 2019**

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

** October 21, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the court, *C. Taylor*, *J.*, adjudicated the child neglected and ordered a period of six months protective supervision with custody vested in the respondent father; thereafter, the court, *Dannehy*, *J.*, sustained an order of temporary custody vesting custody of the minor child in the petitioner; subsequently, the court *Dannehy*, *J.*, denied the ex-parte motion of the attorney for the minor child to appoint a guardian ad litem; thereafter, the court, *Hoffman*, *J.*, denied the oral motion of the attorney for the minor child to appoint a guardian ad litem and, following a hearing, granted the motion filed by the petitioner to open and modify the dispositive order of protective supervision, and transferred guardianship of the minor child to his paternal grandmother, and the respondent mother appealed to this court. *Affirmed.*

Stein M. Helmrich, for the appellant (respondent mother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Kristen Wolf, for the minor child.

Opinion

DEVLIN, J. The respondent mother[1] appeals from the judgment of the trial court transferring guardianship

[1] The petitioner, the Commissioner of Children and Families, instituted this transfer of guardianship proceeding in the interests of Kadon M., naming both mother and father as respondents. Only the mother has filed an appeal from the judgment of the trial court. For simplicity, all references to the respondent herein are to the mother.

of her son, Kadon M., to his paternal grandmother. On appeal, the respondent claims that the trial court improperly denied the oral motion of the attorney for Kadon M. to appoint a guardian ad litem.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Kadon M. is a seven year old child currently under the care of his paternal grandmother. On June 26, 2017, the petitioner, the Commissioner of Children and Families, filed a neglect petition on behalf of Kadon M. due to concerns regarding medical and physical neglect and the respondent's transiency. Following a trial, the court, *C. Taylor*, *J.*, determined that Kadon M. was neglected and ordered a period of six-month protective supervision with custody vested in Kadon M.'s father on March 5, 2018.

Subsequently, on June 8, 2018, Kadon M.'s father was incarcerated and, as a result, the petitioner initiated a ninety-six-hour hold on Kadon M. On that day, Kadon M. was placed with his paternal grandmother. A few days later, on June 12, 2018, the trial court, *Dannehy*, *J.*, issued an order of temporary custody, giving legal custody of Kadon M. to the petitioner.

Several months later, on December 13, 2018, the petitioner filed a motion to open and modify the dispositive order of protective supervision to a transfer of guardianship to Kadon M.'s paternal grandmother. No agreement was reached between the parties to transfer guardianship of Kadon M. and a trial was scheduled for January 7, 2019. On January 4, 2019, the Friday before the commencement of trial, the court-appointed attorney

[2] On September 6, 2019, the attorney for Kadon M., Attorney Kristen Wolf, filed an untimely statement with this court adopting the appellant's brief and joining the appellant in requesting this court to reverse the trial court's transfer of guardianship. See Practice Book § 67-13 (allowing counsel for minor child to file statement adopting brief of either appellant or appellee within ten days of filing of appellee's brief).

for Kadon M., Attorney Kristen Wolf, filed an ex parte motion for the appointment of a guardian ad litem. In the motion, Attorney Wolf asserted that a guardian ad litem "[was] necessary to protect and ensure that the best interests of the minor child, [Kadon M.], are being met." The court, *Dannehy, J.*, denied this motion and, in doing so, noted that it was improper to file a motion for a guardian ad litem on the eve of trial.

On January 7, 2019, a trial was held on the petitioner's motion to open and modify the dispositive order of protective supervision to a transfer of guardianship. Before evidence was presented, Attorney Wolf orally moved to appoint a guardian ad litem. At this time, Attorney Wolf explained that, during a meeting with Kadon M. on the Friday before trial, he told her that he preferred to be with his mother, rather than with his paternal grandmother and father. According to Attorney Wolf, this position represented a sudden change because Kadon M. had frequently and consistently asserted his preference to remain with his paternal grandmother and father. Indeed, counsel for the petitioner stated that Kadon M., as recently as December 27, 2018, informed one of the petitioner's social workers that "he wished to remain with his grandmother." In response to this shift in opinion, Attorney Wolf explained: "I actually filed a motion for a guardian ad litem to investigate the reason for the change and also to investigate whether or not his change in position is in his best interest. . . . I've been meeting with him readily all along, that his position changed so drastically kind of at the last minute, and I'm not sure that I can adequately represent to the court—I can adequately represent his position to the court, but I can't adequately represent whether or not that's in his best interest." Nonetheless, despite these concerns, Attorney Wolf reaffirmed: "I know what my client wants, and I'm prepared to represent that. But if the court asks me whether or not that's

in my client's best interest, I'm not sure that I can answer that question, which is why I would like the court to appoint a guardian ad litem to weigh in on that fact." The court, *Hoffman*, *J.*, denied the oral motion, stating that "the court can find what's [in the] best interest of the child," and the trial proceeded.

During trial, the court heard testimony regarding the caretaking qualifications of the respondent as compared with the paternal grandmother. The evidence indicated that although the respondent completed her therapy for intimate partner violence, she had not completed her court-ordered substance abuse and mental health treatment. Moreover, as the court later stressed, there was considerable testimony regarding an incident during which the respondent visited the daycare of Kadon M.'s half brother. Despite the fact that Kadon M.'s half brother was committed to the petitioner's custody and the respondent was not allowed to visit him unsupervised, she apparently collaborated with the father of Kadon M.'s half brother to enter through a locked back door and briefly visit her son. The court's concern here was compounded by the fact that, at the time of the daycare incident, the respondent was subject to a protective order prohibiting contact with the father of Kadon M.'s half brother. This order was issued in response to incidents of domestic violence and assault committed against the respondent by the father of Kadon M.'s half brother. The court also heard testimony of a strong and compassionate relationship between the paternal grandmother and Kadon M. Kadon M. has been raised by his paternal grandmother for most of his life and has told social workers that he feels happy and safe with his grandmother. Furthermore, Kadon M.'s paternal grandmother is a licensed foster parent who has previously cared for other children under the petitioner's custody.

After hearing testimony and argument, the court issued an oral decision on January 7, 2019. The court ruled that a transfer of guardianship to the paternal grandmother was in the best interests of Kadon M. In support of its ruling, the court found that the relationship between the paternal grandmother and Kadon M. is extensive and bonded, and that the paternal grandmother is capable of meeting Kadon M.'s needs. In addition, the court found that neither the respondent nor Kadon M.'s father is currently a suitable guardian for Kadon M. In particular, the court expressed its concern that the respondent had not completed her substance abuse or mental health treatment. The court was also greatly concerned about the incident at the daycare. Accordingly, the court transferred guardianship of Kadon M. to his paternal grandmother. This appeal followed.

On appeal, the respondent argues that the court improperly denied Attorney Wolf's oral motion to appoint a guardian ad litem. We disagree.

We begin our analysis with the standard of review and applicable legal principles. The adjudication of a motion to transfer guardianship pursuant to General Statutes § 46b-129 (j) (2) requires a two step analysis. "[T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second] [t]he court must then find that the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child." (Citation omitted; internal quotation marks omitted.) *In re Mindy F.*, 153 Conn. App. 786, 802, 105 A.3d 351 (2014), cert. denied, 315 Conn. 913, 106 A.3d 307 (2015).

During such proceedings, the trial court is required to appoint counsel to represent the minor child's interests pursuant to General Statutes § 46b-129a (2) (A). "The primary role of any counsel for the child shall be to advocate for the child in accordance with the Rules of Professional Conduct, except that if the child is incapable of expressing the child's wishes to the child's counsel because of age or other incapacity, the counsel for the child shall advocate for the best interests of the child." General Statutes § 46b-129a (2) (C). In addition, § 46b-129a (2) (D) provides in relevant part: "If the court, based on evidence before it, or counsel for the child, determines that the child cannot adequately act in his or her own best interests and the child's wishes, as determined by counsel, if followed, could lead to substantial physical, financial or other harm to the child unless protective action is taken, counsel may request and the court *may* order that a separate guardian ad litem be assigned for the child . . . . The guardian ad litem shall perform an independent investigation of the case and may present at any hearing information pertinent to the court's determination of the best interests of the child." (Emphasis added.)

Our Supreme Court has further expounded on the distinction between an attorney for a minor child and a guardian ad litem. Initially, the attorney for a minor child "serve[s] the dual roles of advocate and guardian ad litem for a child." *In re Christina M.*, 280 Conn. 474, 491, 908 A.2d 1073 (2006). Then, should a trial court later appoint a guardian ad litem as well, the court has defined the parameters of each representative's role. "Although there is often no bright line between the roles of a guardian ad litem and counsel for a minor child, the legal rights of a child may be distinct from the child's best interest. When the roles do overlap, 'it is only because, in such cases, the rights of a child and the child's best interest coincide. While the best interest

of a child encompasses a catholic concern with the child's human needs regarding his or her psychological, emotional, and physical well-being, the representation of a child's legal interests requires vigilance over the child's legal rights. . . .' *In re Tayquon H.*, 76 Conn. App. 693, 706–707, 821 A.2d 796 (2003)." *In re Christina M.*, supra, 491–92. "Generally speaking, then, counsel bears responsibility for representing the legal interest of a child while a guardian ad litem must promote and protect the best interest of a child." Id., 492.

Previously, this court has noted that the determination of whether to appoint a guardian ad litem "is essentially a question of fact for the [trial] court. In addition to setting forth sufficient evidence to demonstrate [the need for a guardian ad litem], the [respondent] must also demonstrate [on appeal] that the alleged improper failure by the [trial] court to appoint a guardian ad litem affected the result of the trial." *In re Joseph L.*, 105 Conn. App. 515, 534, 939 A.2d 16, cert. denied, 287 Conn. 902, 947 A.2d 341, 342 (2008), citing *In re Brendan C.*, 89 Conn. App. 511, 521, 874 A.2d 826, cert. denied, 274 Conn. 917, 879 A.2d 893, cert. denied, 275 Conn. 910, 882 A.2d 669 (2005). In the time since *In re Joseph L.* and *In re Brendan C.* were decided, the General Assembly has amended the language of § 46b-129a. Prior to 2011, the statute contained mandatory language requiring that "[w]hen a conflict arises between the child's wishes or position and that which counsel for the child believes is in the best interest of the child, the court *shall* appoint another person as guardian ad litem for the child." (Emphasis added.) Public Act 2001, No. 01-148, § 1. The current statute no longer contains such mandatory language; instead, the current statute provides that the trial court *may* appoint a guardian ad litem. Public Acts 2011, No. 11-51, § 17. The present case is the first time since the statute was revised that

we have been asked to review a trial court's determination of whether to appoint a guardian ad litem. Nonetheless, the revised permissive language of the statute reaffirms our prior holdings that the decision to appoint a guardian ad litem is within the broad discretion of the trial court. See *In re Joseph L.*, supra, 534.

Accordingly, we consider whether the trial court abused its discretion in denying the oral motion to appoint a guardian ad litem.[3] "We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Anthony A.*, 112 Conn. App. 643, 654, 963 A.2d 1057 (2009).

We agree with the trial court's assessment that it did not require the input of a guardian ad litem in order to determine the best interests of Kadon M. It is the province of the trial court to determine the best interests of the minor child, supported by evidence and testimony—

[3] The respondent has limited her claim on appeal to the court's denial of the oral motion for the appointment of a guardian ad litem.

including other evidence of the child's wishes conveyed through counsel for a minor child—presented at trial. See *In re Mindy F.*, supra, 153 Conn. App. 802. Furthermore, the respondent has not demonstrated that the court's denial of the motion to appoint a guardian ad litem affected the result of the trial.[4] *In re Joseph L.*, supra, 105 Conn. App. 534.

The determination of the best interests of a child is an all-encompassing inquiry, in which the trial court considers a myriad of factors. This court has previously elaborated that "[a]lthough the term best interest is elusive to precise definition, one commission study aptly observed that the best interests of the child has been generally defined as a measure of a child's well-being, which includes his physical (and material) needs, his emotional (and psychological) needs, his intellectual and his moral needs." (Internal quotation marks omitted.) *In re Tayquon H.*, supra, 76 Conn. App. 704. Accordingly, the trial court may consider any number

[4] Both during trial and before this court, counsel for the respondent have argued that a guardian ad litem was necessary to prevent prejudice to the respondent. These arguments were premised on the proposition that once a transfer of guardianship to a family member is granted, it would be far more difficult for the respondent to reinstate guardianship because, in subsequent proceedings, there is no right to court-appointed counsel. During oral argument before this court, the respondent contended that a guardian ad litem would have supported commitment of Kadon M. to the petitioner's custody, rather than a transfer of guardianship to his paternal grandmother. This assertion specifically assumes that a guardian ad litem would have advocated that continued foster care is preferable to the more permanent disposition of a transfer of guardianship because, under commitment, the mother would continue to have court-appointed counsel. Besides amounting to sheer speculation, these arguments were duly made by counsel for the respondent and necessarily considered by the trial court. See *In re Brendan C.*, 89 Conn. App. 511, 529, 874 A.2d 826, cert. denied, 274 Conn. 917, 879 A.2d 893, cert. denied, 275 Conn. 910, 882 A.2d 669 (2005) (noting that father speculated guardian ad litem would have formulated an alternative to complete termination of parental rights while failing to address why trial counsel could not have presented such an alternative). There is no basis in the record or in the law for the claim that a guardian ad litem would have advanced this position nor would such an appointment have changed the result.

of factors that pertain to these considerations, such as the parents' rehabilitative status, the length of time that the child is in the temporary care of the state, the child's need for permanency, the proposed guardian's suitability, and the child's bond with the proposed guardian. The court's denial of the motion to appoint a guardian ad litem in no way deprived the respondent or Attorney Wolf from presenting evidence of any of these factors for the court to weigh and consider in conducting its best interests analysis.

Moreover, the record before the trial court was replete with evidence to assist its determination of the best interests of Kadon M. The petitioner submitted substantial evidence indicating that the respondent had not complied with the specific steps ordered by the trial court. Specifically, there was evidence presented that the respondent had completed neither her substance abuse treatment nor her mental health treatment. While the respondent had completed therapy for intimate partner violence, there was also evidence that the therapy was not wholly successful because the respondent had continued contact with the perpetrator of the violence despite an outstanding protective order. Additionally, there was evidence that the respondent contravened the petitioner's custody order to visit Kadon M.'s half brother at school while she was subject to the petitioner's custody. At the same time, there was ample evidence presented to support the trial court's finding that the paternal grandmother was a suitable and worthy guardian. The evidence presented indicated that the grandmother has played a major role in Kadon M.'s life, has a meaningful relationship with Kadon M., and that Kadon M. is doing well under her care. Moreover, the paternal grandmother is licensed as a foster parent to care for similar children. Therefore, because the respondent failed to explain how the court's failure to appoint a guardian ad litem would have affected the trial, her claim fails.

Accordingly, we conclude that the trial court did not abuse its discretion in denying the motion to appoint a guardian ad litem.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ANTHONY L. ET AL.*
(AC 42534)

Lavine, Prescott and Bear, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights as to three of her minor children. The trial court found that, pursuant to statute (§ 17a-112 [j] [3] [B] [i]), the mother had failed to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the children's lives. She claimed, for the first time on appeal, that the court violated her and her children's substantive due process rights when, in its analysis of the children's best interests, it failed to determine whether the permanency plans for the children that were proposed by the respondent Commissioner of Children and Families secured a more permanent and stable life for them compared to that which she could provide if she were given time to rehabilitate herself. *Held* that the respondent mother's unpreserved claim was not reviewable, as it was not raised during trial and, thus, she failed to provide this court with an adequate record for review of the claim; the trial court found that the petitioner had proved that the children's best interests were served by their living with their maternal grandmother, the mother on appeal did not challenge that and other relevant findings concerning the children's best interests, and this court was unable to discern any evidence in the record about when the maternal grandmother eventually may not be able to continue to provide a home for the children or as to why the children could not then be transitioned to their fictive kin in accordance with the petitioner's plan for their residence with them and possible adoption.

Argued September 5—officially released October 21, 2019**

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

** October 21, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, where the respondent father was defaulted for failure to appear; thereafter, the matters were tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed*.

Matthew C. Eagan, assigned counsel, with whom was *James P. Sexton*, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Christopher DeMatteo, for the minor children.

Opinion

PER CURIAM. The respondent mother appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families,[1] terminating her parental rights with respect to each of the three oldest of her four minor children on the grounds that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[2] On appeal, the respondent claims that her and her children's substantive due process rights were violated as a result of the trial court's analysis of whether termination of her

[1] Counsel for the minor children has adopted the brief filed by the petitioner.

[2] The parental rights of the children's father also were terminated pursuant to § 17a-112 (j) (3) (B) (1). The father has not participated in this appeal. In this opinion, we refer to the respondent mother as the respondent.

parental rights was in the children's best interests. Specifically, the respondent claims that the court's failure to conduct a factual inquiry into the petitioner's three permanency plans, which called for the termination of her parental rights and adoption,[3] in its best interest analysis denied her substantive due process of law. She claims that, because adoption was not going to occur immediately, due process required the court to determine whether the permanency plans secured a more permanent and stable life for each of the children compared to that which she could provide if she were given time to rehabilitate herself.

The record, however, contains insufficient evidence in support of such a claim because it was not raised and pursued by the respondent during trial. Neither the petitioner nor the court were aware, during trial, that it would be asserted as a claim on appeal. Accordingly, for the reasons set forth herein, we decline to review the respondent's unpreserved claim and, therefore, affirm the judgments of the trial court.[4]

The respondent failed to raise her substantive due process claim in the trial court and, accordingly, she seeks review by this court pursuant to *State* v. *Golding*,

[3] "A 'permanency plan' is the proposal for what the long-term, permanent solution for the placement of the child should be. General Statutes §§ 17a-111b (c) and 46b-129 (k). Our statutory scheme provides five permanency options: (1) reunification with a parent; (2) long-term foster care; (3) permanent guardianship; (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption. General Statutes §§ 17a-111b (c) and 46b-129 (k) (2)." (Footnotes omitted.) *In re Adelina A.*, 169 Conn. App. 111, 121, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016). In each of the three petitions for termination of parental rights, the petitioner alleged that reasonable efforts to reunify were not required for the respondent because the court had approved a permanency plan other than reunification in accordance with § 17a-111b.

[4] The respondent also argues on appeal that she has standing to bring this substantive due process claim for both herself and her children. Because we decline to reach the merits of her unpreserved claim, we need not address the issue of the respondent's standing to act on behalf of her children.

213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[5] "[A] [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail. The appellate tribunal is free, therefore, to respond to the [respondent's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) Id., 239–40. In this case, we focus on the first prong of *Golding*.

In assessing whether the first prong of *Golding* has been satisfied, it is well recognized that "[t]he [respondent] bears the responsibility for providing a record that is adequate for review of [her] claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the [respondent's] claim." (Internal quotation marks omitted.) *In re Julianna B.*, 141 Conn. App. 163, 168–69, 61 A.3d 606, cert. denied, 310 Conn. 908, 76 A.3d 625 (2013); *In re Johnson R.*, 121 Conn. App. 464, 469, 994 A.2d 739 (2010), aff'd, 300 Conn. 486, 15 A.3d 145 (2011). "The

[5] On March 1, 2019, subsequent to the judgments, the respondent filed a motion for articulation of the decision to terminate her parental rights, which the trial court denied. The respondent filed a motion for review with this court on March 29, 2019. This court granted review but denied the relief requested therein on April 17, 2019.

reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred." (Internal quotation marks omitted.) *In re Azareon Y.*, 309 Conn. 626, 635, 72 A.3d 1074 (2013).

The record reveals that the respondent and the children's biological father were involved in an abusive relationship for approximately six years. During this relationship, they conceived four children together. On November 1, 2016, the three older children were removed from their parents' care on orders of temporary custody due to ongoing and significant domestic violence between the parents, transience, substance abuse and mental health concerns. The children subsequently were placed with their maternal grandmother, with whom they have resided during the pendency of the proceedings. On March 26, 2018, after the court approved the petitioner's proposed permanency plan for each child; see footnote 7 of this opinion; the petitioner filed petitions for the termination of the respondent's and the father's parental rights as to each of the children, alleging that each of the children had been adjudicated neglected, and that both parents had failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i)[6] such

[6] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief

that neither could be relied on responsibly to parent their children within the reasonably foreseeable future. A trial was held and, on November 13, 2018, the court granted each of the petitions for termination of parental rights.

The court's memorandum of decision reveals that, during the adjudicatory phase, the court considered the evidence and determined that the respondent failed to achieve sufficient personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i). In its best interest analysis in the dispositional phase, the court examined relevant factors including "[the children's] interest in sustained growth, development, well-being, stability and continuity of their environment . . . [as well as] their length of stay in foster care, the nature of the relationship with their biological parents, the degree and quality of contact maintained with the biological parents, and their genetic bonds to the extended family," ultimately concluding that termination of parental rights was in the best interests of each of the three children. The court did not, however, address separately the findings underlying the petitioner's permanency plans for the children.[7] Pursuant to our review of the record, we conclude that the respondent's claim is not reviewable under the first prong of *Golding* because the respondent has failed to provide this court with an adequate record for review.

Our Supreme Court has declined to review a respondent mother's *Golding* claim when the respondent

that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[7] The permanency plans proposed by the petitioner stated in relevant part: "The permanency plan for [each of the children] is [t]ermination of [p]arental [r]ights and [a]doption. This is the best plan for the children as [the respondent] and [the father] have not addressed the issues that led the children to be placed in foster care. . . ." The court approved these plans.

failed to satisfy *Golding*'s first prong. In *In re Azareon Y.*, the respondent mother argued that the "deficiency in the evidentiary record [relevant to whether the permanency plan ordered was the least restrictive means necessary to secure the state's compelling interest in safeguarding the best interests of her children] confirm[ed] that the trial court could not have undertaken the constitutional analysis that substantive due process required." *In re Azareon Y.*, supra, 309 Conn. 633. Similar to the argument put forth by the respondent in the present matter, the respondent in *In re Azareon Y.* relied on the fundamental liberty interest that parents have in the " 'care, custody and control of their children' " to claim that the best interest analysis undertaken by the court was flawed. Id., 636.

The respondent in *In re Azareon Y.* proposed that a judicial gloss be imposed on our termination of parental rights statute, § 17a-112, that places the burden on the petitioner to establish, by clear and convincing evidence, that a statutorily recognized permanency plan shown to be less restrictive than the termination of parental rights would not be appropriate in that case.[8] See id. Our Supreme Court noted that if it were to allow the respondent's attempt to transform her claim of "deficient analysis by the trial court" into a claim alleging a "constitutionally deficient *standard*"; (emphasis in original) id., 639; it would permit future "claim[s] lacking a factual predicate in the record [to] be reframed as a pure legal question as to whether a deficient standard had been applied." Id., 640. Our Supreme Court declined to reach the merits of the respondent's claim.

[8] The proposed judicial gloss was as follows: "[T]he [trial] court must find by clear and convincing evidence that a viable permanency plan recognized by statute that is less restrictive than termination of parental rights is not capable of providing the children with a permanent, safe and nurturing home in light of their age and needs. The petitioner has the burden of proof as to this finding." (Internal quotation marks omitted.) *In re Azareon Y.*, supra, 309 Conn. 636.

In the present case, the respondent's claim mirrors that of the respondent in *In re Azareon Y.* First, she asserts that the record contains no evidence relevant to the details of the posttermination likelihood or reality of permanency for each of the children. Like the respondent in *In re Azareon Y.*, she relies on that dearth of evidence to support her argument that the court's best interest analysis was flawed, asserting that without undertaking an inquiry into the details of the likelihood or reality of permanency for the children, the court's analysis could not have been constitutionally proper. Relying on the same fundamental liberty interest at issue in *In re Azareon Y.*, the respondent argues that "to justify the permanent destruction of the fundamental liberty interests shared by the respondent and her children, the [petitioner] must demonstrate that termination will result in the children being provided a more permanent home than would result from continued reunification efforts."

The petitioner, however, satisfied the court on this point. In the disposition phase of the hearing, the court found that the petitioner did prove that the children's best interests were served by their living with their maternal grandmother: "[T]he children have resided with their maternal grandmother for two years. She has provided these three young children with consistency of care, safety and stability not available in their parental home . . . . [The respondent] has not been able to sufficiently adjust her circumstances, given the safety concerns around domestic violence . . . to have her children returned to her." The respondent on appeal does not challenge these and other relevant findings concerning the best interests of the children.

Additionally, although the maternal grandmother eventually may not be able to continue to provide a home for her grandchildren, we were unable to discern any evidence in the record about when this might occur, and as to why the children could not then be transiti-

oned to the fictive kin[9] in accordance with the petitioner's plan for their residence with them and possible adoption.[10]

"Our role is not to guess at possibilities, but to review claims based on a complete factual record developed

[9] General Statutes § 17a-114 (a) (3) provides in relevant part: "[F]ictive kin caregiver means a person who is twenty-one years of age or older and who is unrelated to a child by birth, adoption or marriage but who has an emotionally significant relationship with such child or such child's family amounting to a familial relationship . . . ." (Internal quotation marks omitted.)

[10] The court's order in the present case is the usual order issued in a termination of parental rights: "The [petitioner] is hereby appointed the statutory parent for [each of the children]. The [petitioner] will file, within thirty days hereof, a report as to the status of these children as required by statute and such further reports shall be timely presented to the court as required by law."

The petitioner, thus, is the statutory parent of each of the children, ultimately and continuously responsible for their guardianship, custody and care in the event of any concerns regarding the maternal grandmother or the fictive kin unless and up to the time an adoption occurs.

This order is predicated on § 17a-112 (o), which provides: "In the case where termination of parental rights is granted, the guardian of the person or statutory parent shall report to the court not later than thirty days after the date judgment is entered on a case plan, as defined by the federal Adoption and Safe Families Act of 1997, as amended from time to time, for the child which shall include measurable objectives and time schedules. At least every three months thereafter, such guardian or statutory parent shall make a report to the court on the progress made on implementation of the plan. The court may convene a hearing upon the filing of a report and shall convene and conduct a permanency hearing pursuant to subsection (k) of section 46b-129 for the purpose of reviewing the permanency plan for the child not more than twelve months from the date judgment is entered or from the date of the last permanency hearing held pursuant to subsection (k) of section 46b-129, whichever is earlier, and at least once a year thereafter while the child remains in the custody of the Commissioner of Children and Families. For children where the commissioner has determined that adoption is appropriate, the report on the implementation of the plan shall include a description of the reasonable efforts the department is taking to promote and expedite the adoptive placement and to finalize the adoption of the child, including documentation of child specific recruitment efforts. At such hearing, the court shall determine whether the department has made reasonable efforts to achieve the permanency plan. If the court determines that the department has not made reasonable efforts to place a child in an adoptive placement or that reasonable efforts have not resulted in the placement of the child, the court may order the Department of Children and Families, within available appropriations, to contract with a child-placing agency to arrange for the adoption of the child. The department, as statutory parent, shall continue to provide care and services for the child while a child-placing agency is arranging for the adoption of the child."

by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the respondent's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Duteau*, 68 Conn. App. 248, 254, 791 A.2d 591, cert. denied, 260 Conn. 939, 835 A.2d 58 (2002). It is undisputed that the record contains no evidence supporting alternatives to the general plan of the petitioner to have the children reside with their grandmother until that is no longer possible, and then with the fictive kin. Just as our Supreme Court declined to address the merits of the respondent's claim in *In re Azareon Y.*, we, too, must decline to review the respondent's *Golding* claim in this matter because of her failure to satisfy the first prong of the *Golding* requirements.

The judgments are affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

LEON BELL *v.* COMMISSIONER OF CORRECTION, SC 20223
Judicial District of Tolland

Habeas; Whether Appellate Court Properly Determined That Failure to Give *Salamon* Kidnapping Instruction Was Not Harmless Error. The petitioner was found guilty after a jury trial in 2002 of first degree kidnapping, first degree robbery, third degree burglary, and third degree larceny in connection with two incidents. In both incidents, the petitioner approached an employee at the entrance of a Friendly's Restaurant, indicated that he had a gun, ordered the employee to go back inside and open the restaurant safe so that he could get the money contained therein, ordered the employee to enter the restaurant's walk-in refrigerator and remain there, and then left the premises. The petitioner brought this habeas action in 2012 to challenge his kidnapping conviction, claiming that the trial court failed to properly instruct the jury on the elements of kidnapping in accordance with *State* v. *Salamon*, 287 Conn. 509 (2008), which has been held to apply retroactively in collateral proceedings. In *Salamon*, the Supreme Court held that "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." The habeas court denied the habeas petition, and the petitioner appealed to the Appellate Court (184 Conn. App. 150), which reversed the habeas court's judgment. The Appellate Court referred to its decision in *Banks* v. *Commissioner of Correction*, 184 Conn. App. 101, cert. granted, 330 Conn. 950 (2018), in concluding that the habeas court improperly held that the trial court's omission of a *Salamon* kidnapping instruction did not constitute harmless error. The Appellate Court considered the brief duration of the incidents, where they occurred, the sequence of events, and whether the restraint of the employees was inherent in the nature of the robberies. Given these factors, it determined that the absence of a *Salamon* instruction could have contributed to the verdict in that, if the jury had been instructed under *Salamon*, it could have found that the defendant was not guilty of kidnapping in that he did not confine or move the employees in a way that had independent criminal significance from his other crimes. The respondent was granted certification to appeal from the Appellate Court's decision, and the Supreme Court will decide whether the Appellate Court properly concluded that

the absence of an instruction in accordance with *State* v. *Salamon*, 287 Conn. 509 (2008), at the petitioner's criminal trial did not constitute harmless error.

STATE *v.* MARK T., SC 20242
Judicial District of Tolland

Criminal; Risk of Injury; Whether Trial Court Properly Precluded Evidence Offered in Support of Defense of Parental Justification. The defendant was convicted of risk of injury to a child in connection with an incident in which he dragged the victim, his minor daughter, by one leg through the corridors of her school toward the exit when she resisted his attempts to persuade her to go with him to her counseling appointment at a local mental health facility. The victim was thirteen years old and enrolled in a special education program at school that provided intensive behavioral support for children who are prone to disruptive behavior. The defendant appealed, arguing that the trial court violated his constitutional rights to present a defense and to testify in his own defense when it excluded certain evidence relevant to his defense of parental justification. The parental justification defense arises out of General Statutes § 53a-18, which provides that "[a] parent . . . entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor.§ The Appellate Court (186 Conn. App. 285) affirmed the defendant's conviction. It found that the trial court acted within its discretion when it precluded testimony from the victim's special education teacher about whether the victim had been violent with others at school because the evidence exceeded the scope of the state's redirect examination, which concerned only the teacher's capacity to accurately recall the subject incident that she witnessed involving the defendant. The Appellate Court further found that the trial court did not abuse its discretion in precluding the defendant's testimony as to certain details about the help that he had sought for the victim, including the name of the mental health institution where she receives treatment, finding that the evidence was not material to the parental justification defense. The Appellate Court noted that it was clear from the record that the trial court allowed the defendant to testify about his difficult relationship with the victim, her misbehavior at home, his belief that she needed urgent mental health treatment and the fact that he had obtained a more significant type of help for her than just

an after-school program. The defendant filed a petition for certification to appeal from the Appellate Court's judgment affirming his conviction. The Supreme Court granted the petition as to the issue of whether the Appellate Court properly rejected the defendant's claim that he is entitled to a new trial because the trial court violated his constitutional right to present the defense of parental justification by precluding his testimony and the testimony of the victim's special education teacher pertaining to that defense.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* BILLY RAY JONES, SC 20261
Judicial District of Fairfield

Criminal; Whether Jailhouse Informant Credibility Instruction Required When Witness who Received Favorable Treatment from the State Testifies That Defendant Confessed to Him While They Socialized Outside of Prison. The defendant was charged with murder in connection with the shooting death of Michael Williams. At trial, Larry Shannon testified that he had seen the defendant near the crime scene shortly before the shooting and that, while he and the defendant were watching television on the day after the shooting, the defendant had confessed to killing Williams. Shannon admitted that, at the time he initially decided to talk to the police, he was incarcerated on an unrelated felony charge, and that, in consideration for talking to the police and testifying, he was released from jail without having to make a bond payment and later received a favorable sentence on his felony charge. The defendant was convicted, and he appealed, claiming that the trial court erred in failing to provide the jury with a special credibility instruction regarding Shannon's testimony pursuant to *State* v. *Patterson*, 276 Conn. 452 (2005). While ordinarily a defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his possible motive for testifying falsely, in *Patterson* the Supreme Court recognized a jailhouse informant exception to that rule, holding that a defendant is entitled to a special credibility instruction where a prison inmate has been promised a benefit by the state in return for his testimony regarding incriminating statements made by a fellow inmate. The defendant argued that the jailhouse informant exception recognized in *Patterson* should apply here because, under the circumstances, Shannon's testimony was less suspect than that of an accomplice or jailhouse snitch. The Appel-

late Court (187 Conn. App. 752) rejected that claim and affirmed the defendant's conviction, concluding that the defendant was not entitled to a special credibility instruction because Shannon was not a "jailhouse informant" under *Patterson* because, although Shannon was incarcerated when he initiated contact with the police, he was not a fellow inmate of the defendant and he testified about events that he had witnessed and a confession that took place while he and the defendant were socializing outside of the prison environment. The Appellate Court also noted that the jury was aware of Shannon's expectation that he would receive consideration in exchange for talking to the police and accordingly that the general credibility instruction given by the trial court was sufficient. The defendant was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly determined that *Patterson*'s special jailhouse informant credibility instruction was not applicable to an incarcerated informant who offered his testimony that the defendant confessed to him when they socialized outside of prison in exchange for favorable treatment of the informant by the state.

DANNY DOUGAN et al. *v.* SIKORSKY AIRCRAFT CORPORATION et al., SC 20271
Complex Litigation Docket at Hartford

Torts; Whether Plaintiffs Exposed to Asbestos can Maintain Action in Tort Absent any Symptoms of Asbestos-Related Disease; Whether Connecticut Law Should Recognize Cause of Action for Medical Monitoring. The plaintiffs brought this action against Sikorsky Aircraft Corporation and its general contractor after the plaintiffs were exposed to asbestos in 2010 while working on a construction project at a Sikorsky facility. While the plaintiffs had no symptoms of illness as a result of the exposure, they claimed that they had suffered "subclinical injury" and that they were at increased risk of further injury in the future. The plaintiffs urged under various tort theories that the defendants were liable for the cost of their periodic medical monitoring aimed at promptly detecting the symptoms of asbestos-related disease. The trial court rendered summary judgment in favor of the defendants, finding that the plaintiffs could not demonstrate any legally cognizable claim under existing Connecticut tort law. The court further concluded that, because the plaintiffs had not demonstrated that they had suffered any actual or present injury, public policy considerations militated against the court expanding Connecticut law to provide them the medical monitoring remedy they

sought. The plaintiffs appeal, urging that the Supreme Court hold that medical monitoring is warranted even in the absence of clinical symptoms of disease where there has been a significant exposure to a toxic or dangerous substance and where the exposure created a substantial risk of future disease or illness. The defendants argue in response that the trial court properly declined to create a medical monitoring remedy based on exposure to asbestos and that, even if Connecticut law were to recognize such a remedy, the plaintiffs' claims would still fail as a matter of law because the plaintiffs did not provide any expert evidence establishing their need for medical monitoring.

STATE *v.* LUIS M. RODRIGUEZ, SC 20372
Judicial District of New Britain

Criminal; Whether Defendant's Right to Confrontation Violated by Admission of Testimony from DNA Analyst Comparing DNA Profiles Generated by Another DNA Analyst; Whether Defendant's Due Process Rights Violated by Admission of DNA Identification Evidence Concerning Random Match Probability. The defendant was convicted of sexual assault in the first degree and criminal attempt to commit sexual assault in the first degree in connection with an incident that occurred in 2006, where the victim was pulled into a van and sexually assaulted by two men whom she could not identify. A sexual assault evidence kit was administered on the victim at the hospital and then submitted to the state forensic laboratory for analysis, and the resulting DNA profiles were entered into the national Combined DNA Index System (CODIS), but no match was reported. Ten years later, however, CODIS matched DNA found on the victim and a DNA sample from the defendant that had been placed in the system sometime after the crime was committed. Police then interviewed the defendant and he consented to a buccal swab, which was submitted to the state forensic laboratory for analysis. Dr. Angela Przech, a forensic science examiner, testified at trial that she compared the defendant's DNA profile with the DNA profiles extracted from the victim and determined that the defendant was a potential contributor to the DNA mixture obtained from the victim. She further testified that the statistical probability of obtaining a similar match with the DNA profile of a random person in the relevant Hispanic population is 1 in 230,000. The defendant appeals from the judgment of conviction, claiming that the trial court violated his right to confrontation, as articulated in *Crawford* v. *Washington*, 541 U.S. 36 (2004), by allowing Przech to testify about the results of her comparison of

the defendant's DNA profile with the DNA profiles recovered from the victim without requiring testimony from the lab analyst who generated the DNA profiles from the mixed sample recovered from the victim. The defendant also claims that the trial court violated his due process right to a fair trial by allowing the introduction of DNA identification evidence that was unreliable under *Manson* v. *Braithwaite*, 432 U.S. 98 (1977), due to the likelihood that the jury would mistakenly assume that the random match probability of 1 in 230,000 to which Przech testified was the probability that the defendant is not the source of the DNA recovered from the victim. The defendant asks that the Supreme Court exercise its supervisory authority to require that trial courts instruct the jury on the proper meaning of random match probability. The defendant further claims that a random match probability of 1 in 230,000, by itself, is insufficient as a matter of law to prove that the defendant is guilty beyond a reasonable doubt.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

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

NOTICE

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on September 27, 2019, in Docket Number HHD-CV-19-6116037-S Perlesta A. Hollingsworth, Jr. juris # 418239 of Washington D.C. was suspended from the practice of law for a period of six months, with three months of the suspension being stayed in favor of one year of unsupervised probation subject to conditions as reciprocal discipline for his District of Columbia order of discipline.

The respondent shall comply with all the terms and conditions of Practice Book § 2-53 in the event that he applies for reinstatement to the Connecticut Bar following his period of suspension.

Until reinstated, the Respondent shall comply with all the terms and conditions of Practice Book § 2-47B regarding the activities of deactivated attorneys.

No trustee is appointed pursuant to Practice Book §§ 2-40 and 2-64, as the Respondent has not actively practiced within the State and does not maintain any IOLTA accounts.

David Sheridan
Presiding Judge