CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXI No. 25 December 17, 2019 259 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

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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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CONNECTICUT REPORTS

Vol. 334

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ELIZABETH BURKE *v.* GREGORY MESNIAEFF
(SC 20062)

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

Syllabus

The plaintiff sought to recover damages from the defendant, her former husband, for, inter alia, intentional assault and battery in connection with an incident that occurred during a tour of the defendant's historic house. The defendant had purchased the house while the parties were still married and recorded the deed in his name only. Although the house was not the parties' primary marital residence, the plaintiff had spent time there periodically and stored possessions there. At the time of the incident, the parties were experiencing marital difficulties, and, after the plaintiff learned that the defendant would be hosting a tour of the house, she drove there to confront him. The tour was in progress when the plaintiff arrived, and, after aggressively entering the house, she became enraged and began screaming. The defendant and his guests all were afraid of the plaintiff's conduct and believed that it posed a risk to their safety. The defendant asked the plaintiff to leave, and, when she refused, he took her by the arm and forcibly escorted her out of the house and down the driveway. The plaintiff resisted the defendant's escort, continued to shout at the defendant, and repeatedly attempted to break loose of his hold in order to return to the house, but she was unable to do so. The defendant raised a number of special defenses, including justification and defense of others. At a charging conference, the defendant clarified that his justification defense was essentially based on a defense of premises defense and argued that his use of force was justified because the plaintiff was trespassing on his property at the time of the incident. In response, the plaintiff argued that trespass was inapplicable because a spouse cannot, as a matter of law, commit a criminal trespass on marital property in the absence of a court order or pending divorce proceedings. Over the plaintiff's objection, however, the trial court included in its jury instruction on justification a charge on the law of criminal trespass. The jury subsequently returned a verdict for the defendant, finding that, although the defendant's conduct constituted an intentional assault and battery, the plaintiff's recovery was barred by the special defenses of justification and defense of others. The trial court rendered judgment for the defendant in accordance with the verdict, and the plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. On the granting of certification, the plaintiff appealed to this court. *Held* that, although the trial court improperly charged the jury with respect to the defendant's special defense of justification by including a charge on the law of criminal trespass, that instructional impropriety was harmless because the evi-

dence was sufficient to support the jury's independent finding with respect to the special defense of defense of others:

1. The trial court improperly charged the jury on the law of criminal trespass in its jury instruction on the defendant's special defense of justification: in determining whether a spouse has committed the crime of trespass, the focus of the inquiry is on whether that spouse had a right or privilege to enter or remain on the premises and not solely on whether the spouse has an ownership interest in the property or whether the property is marital in nature, and a spouse requesting a jury charge on criminal trespass must demonstrate that both parties understood that the trespassing spouse had relinquished his or her possessory interest in the property; in the present case, although the defendant had purchased the house and recorded the deed in his name only, the record demonstrated that the plaintiff had a possessory interest in the property, as she had a key to the house, went back and forth between the house and the parties' primary marital residence, and stored her possessions at the house, her driver's license listed the address of the house as her residential address, the parties were not estranged, separated or in the process of divorcing at the time of the incident, and the defendant's single request that the plaintiff leave the house, made during a marital dispute, was insufficient to support a criminal trespass instruction.
2. The jury was misled by the trial court's improper instruction on criminal trespass and defense of premises in arriving at its finding on the defendant's justification defense; the parties and the trial court treated that defense as the functional equivalent of a defense of premises defense, and the jury, by finding in favor of the defendant on his defense of justification, necessarily found that the defendant's use of force was justified by the plaintiff's commission or attempted commission of criminal trespass.
3. The trial court's improper instruction on criminal trespass and defense of premises did not affect the jury's independent finding with respect to the defense of others defense, and, therefore, the instructional error was harmless; although defense of others is a type of justification defense, the defendant pleaded and tried his case in a manner that would have led the jury to believe that his defense of others defense was separate and distinct from his justification defense, the trial court likewise treated those defenses as separate and independent in both the jury instructions and the verdict form and properly instructed the jury on the elements of defense of others, that instruction did not include any reference to criminal trespass or defense of premises, and the jury's finding with respect to the defense of others defense did not depend implicitly or explicitly on whether the jury had found the plaintiff to be a criminal trespasser and indicated that the jury properly distinguished among the various defenses.
4. The evidence was sufficient to support the jury's finding that the defendant was acting in defense of others when he forcibly removed the plaintiff from the house, as the jury reasonably could have found, on the basis

of the totality of the evidence and the reasonable inferences drawn therefrom, that the defendant subjectively believed that the plaintiff posed an imminent risk of physical harm to his guests and that the defendant's use of force under the circumstances was objectively reasonable: the record demonstrated that, when the plaintiff arrived at the house, she was enraged, hysterical, and screaming at the defendant and the guests, her conduct was aggressive and out of control, and, on the basis of body language that the defendant had previously observed the plaintiff exhibit during prior incidents, the defendant was terrified that the plaintiff would harm the guests; moreover, the jury reasonably could have inferred, on the basis of her yelling during the incident, that the plaintiff believed that the defendant was having an extramarital affair with one of the guests, and two of the guests testified that they were afraid of the plaintiff and felt physically threatened by her out of control behavior.

(*Two justices concurring separately in one opinion*)

Argued December 19, 2018—officially released December 17, 2019

Procedural History

Action to recover damages for, inter alia, intentional assault and battery, and for other relief, brought to the Superior Court in the judicial district of Litchfield and transferred to the judicial district of Stamford-Norwalk, where the case was tried to the jury before *Lee*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to the Appellate Court, *Lavine*, *Keller* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Gregory Jacob, pro hac vice, with whom were *Mishima Alam*, pro hac vice, and *Anne C. Dranginis*, for the appellant (plaintiff).

Charles S. Harris, with whom was *Stephanie C. Laska*, for the appellee (defendant).

Joseph D. Jean filed a brief for the Connecticut Coalition Against Domestic Violence as amicus curiae.

Opinion

ECKER, J. The plaintiff, Elizabeth Burke, appeals from the Appellate Court's affirmance of the trial court's judgment rendered in favor of the defendant, Gregory

Mesniaeff, after a jury returned a verdict finding that, although the defendant had perpetrated an intentional assault and battery on the plaintiff, his use of physical force was justified because, first, the plaintiff was trespassing at the time of the incident, and, second, he was acting in the defense of others. The plaintiff claims on appeal that (1) the jury should not have been instructed on the special defense of criminal trespass because the parties were married at the time of the assault and battery, and a spouse cannot, as a matter of law, trespass on marital property, and (2) the evidence was insufficient to support the jury's finding that the defendant was acting in defense of others. We conclude that the trial court improperly instructed the jury on criminal trespass and defense of premises as part of the jury charge on justification but that the instructional impropriety was harmless because the evidence was sufficient to support the jury's independent finding with respect to the special defense of defense of others. We therefore affirm the judgment of the Appellate Court.

I

The evidence regarding virtually every material aspect of the underlying events was the subject of vigorous dispute at trial. Construing the evidence in the light most favorable to sustaining the verdict, as we must; see, e.g., *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003); the jury reasonably could have found the following facts relevant to this appeal. The plaintiff and the defendant were married in 1989. In 1998, the defendant, who is interested in the historic preservation of old homes, purchased a historic house in Sharon (Sharon house), which he titled solely in his name. Although the Sharon house was not the parties' primary marital residence, they both had Connecticut drivers' licenses listing the Sharon house as their residential address. The defendant spent more time at the Sharon house than the plaintiff, but the plaintiff had keys to the home, spent two weeks there in 2002 with

the defendant, stayed there occasionally at other times, and stored personal possessions on the premises.

The Sharon house is subject to a historic preservation easement, which requires the home occasionally to be opened to the public for viewing. To fulfill this requirement, the defendant invited members of The Questers, a historical preservation organization, to tour the Sharon house on December 5, 2009, between the hours of 2 and 4:30 p.m. The defendant did not invite the plaintiff to attend the tour because she was not a member of The Questers, they were not "on the best of terms at that time," and he was "afraid that there could be some problems if she was there."

On the morning of December 5, 2009, the plaintiff went online to find out the date and time of the annual Christmas tree lighting ceremony in Sharon, only to discover that a tour of the Sharon house was scheduled for that afternoon. The plaintiff was "shocked and puzzled" because the defendant had not mentioned the tour, and she believed that he was at work that day. She called the defendant at his office but was unable to reach him. The plaintiff decided to go to the Sharon house and talk to the defendant because she was convinced that he would deny the existence of the historic house tour, and she "couldn't take the lying anymore . . . ."

Due to the snowy weather that afternoon, only three members of The Questers other than the defendant were present for the tour: Anne Teasdale, Suzanne Chase Osborne, and Lauren Silberman. When the plaintiff arrived at the Sharon house, the defendant was in the kitchen, Osborne was in the television room, and Teasdale and Silberman were in the living room. Rather than park her car in the driveway of the Sharon house, the plaintiff parked at an adjacent guest cottage and entered the house through the back door that leads into the television room. Osborne walked midway across

the television room to greet the plaintiff, whom she believed was another guest arriving for the tour. The defendant entered the television room from the kitchen to greet the new arrival but, upon realizing it was the plaintiff, immediately instructed Osborne to go into the living room.

When the plaintiff opened the door and saw the defendant and Osborne alone together in the television room, she flew into a rage, screaming, "Who is that woman?" and "What are you doing in my house?" Osborne testified[1] that she was afraid of the plaintiff, who "came in like a raging bull, screaming," and who "was aggressively attempting to enter the house." The defendant testified that the plaintiff was "angry," "enraged" and "shrieking . . . hysterically high." The defendant stated: "There was body language that I recognized from previous such incidents, where I was terrified. . . . I was scared. I was scared of her demeanor and what she was saying and what I thought she could do, given the fact that we have been married for twenty years and, you know . . . I was afraid, but I was also embarrassed in front of the guests [who] were in the house, that this is my wife." Although the plaintiff did not verbally threaten to harm Osborne, the defendant believed that her out of control behavior posed a risk of harm to his guests.

The defendant approached the plaintiff and asked her to leave. He then took hold of the plaintiff's upper arm and "escorted" her out the door and down the driveway toward the Sharon town green, where he believed her car was parked. The plaintiff kept turning around, trying to return to the house, but the defendant would not permit her to do so. The defendant testified that the plaintiff was shrieking, "over and over, 'who's that woman in my house, what's going on here, what are

[1] Osborne was unavailable to testify at trial, so her deposition testimony was read into the record.

you doing?' " The plaintiff continued shouting, "[W]ho's that woman? What's going on between the two of you?"[2] The defendant "felt at that moment [that the plaintiff] was trying to run back into the house and confront the guests . . . and [he] was terrified of that."

Osborne and Teasdale watched through the windows as the defendant escorted the plaintiff to the end of the driveway. Teasdale testified that she was "very concerned for everybody, so I watched out of the side window and I saw . . . [the plaintiff] coming by, and she was screaming, and she was really mad. She was just out of control. Mad screaming . . . ." Teasdale continued: "I could hear the screaming and screaming, that same 'Who is that woman?' . . . . When I saw her in the side window, her face, she was screaming; she was shaking, [en]raged, screaming." Teasdale testified that she "felt in danger—[like] my life was in danger with what was going on by [the plaintiff's] showing up and screaming like that," and "I didn't know if [the plaintiff] had a gun . . . . I didn't know what was going on out there, and I was really worried about our safety, my safety, everyone's safety."

Although the plaintiff testified that the defendant "dragged" her down the driveway by her arm, head, and neck and repeatedly "flung" her to the ground and yanked her back up again, Osborne, Teasdale, and the defendant testified to a very different version of events. Teasdale explained that it "looked like [the plaintiff and the defendant] were walking as a couple. At that point, it looked like they were—he had his arm on her—around her elbow, like, you know, like a gentle—like a man would walk with a woman . . . ." Teasdale further explained that "it was snowy, and . . . it looked like [the plaintiff] was slipping, but [the defendant] . . .

[2] The defendant testified that the plaintiff had accused him of having an affair multiple times "during the course of the year 2009, up until this incident."

kept her steady . . . .'' Osborne testified that the defendant escorted the plaintiff away from the house by putting ''his arm around her'' and that the level of force used by the defendant was ''appropriate for the occasion'' because it was ''[e]nough to keep her from getting back into the house and to move her down the driveway . . . .'' The defendant admitted that he held the plaintiff by the arm and forcibly led her down the driveway away from the house, even though she was actively resisting him, slipping in the snow, and trying to return to the house, but explained that he did so to protect his guests from harm.

After the parties reached the sidewalk, the plaintiff began waving her arms and yelling, ''Help, help! Call the police!'' Pierce Kearney, who was driving to the Christmas tree lighting ceremony with his family, observed the parties on the sidewalk. At first, Kearney believed that they were ''clowning around,'' but, when he slowed down the car and rolled down his windows, he could hear the plaintiff ''screaming that she was being assaulted by her husband and could you please call the police.'' Kearney pulled over, exited the car, and ran across the street, where he observed the defendant holding the plaintiff in ''a very aggressive fashion.'' The defendant told Kearney, ''It's okay, she's my wife.'' Kearney's wife called the police while he interposed himself between the parties and said, ''No, this is over.'' The defendant then turned around and returned to the Sharon house.

Upon reentering the Sharon house, the defendant apologized to his frightened guests and told them that he was going to drive them to the train station for their safety. The defendant drove Teasdale, Osborne, and Silberman to the train station and then returned to the Sharon house, where the police were present. The defendant cooperated with the police investigation, calmly informing the officers that he had escorted the plaintiff from the property because she was not wel-

come at the Sharon house and that "he is the sole owner of the house and his wife's name is not on the deed."

Sometime after the December 5, 2009 incident, the parties divorced, and the plaintiff filed this action, seeking compensatory damages from the defendant for personal injuries she sustained during the assault and battery. The complaint contained six counts: (1) intentional assault and battery; (2) reckless assault and battery; (3) negligent assault and battery; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) reckless infliction of emotional distress. The defendant raised, among others, the following special defenses: (1) the plaintiff's injuries were caused by her own contributory negligence; (2) the plaintiff's action is barred by her own wrongful conduct, including her trespassing on the premises of the Sharon house, exhibiting disorderly conduct, creating a public disturbance, and/or assaulting and battering the defendant; (3) his actions were in self-defense; (4) his actions were in defense of others; and (5) his actions were justified because "the plaintiff was trespassing on [his] property."

After an eight day jury trial, the trial court held a charge conference, at which it asked the defendant to clarify the distinction between the special defenses of "justification" and "wrongful conduct." The defendant explained that "the case law is, if there is a criminal trespass, you are justified in removing the person. That's from the criminal statutes. So that's how that ties into the trespass part of it. And the wrongful conduct, it could be trespass. It could be [the plaintiff's] trying to hit [the defendant]. It could be all these other things. But for justification, if she was there after he ordered her to leave, he has a physical right to remove her using reasonable force." The trial court asked the defendant whether his justification defense "is premised largely on trespass." The defendant answered that he was "justified in the use of force" against the plaintiff because

"she became a criminal trespasser after [he] told her to leave and she refused."

As relevant to this appeal, the plaintiff objected to a jury instruction on criminal trespass on the ground that a wife cannot "commit a criminal trespass on marital property when there [are] no divorce proceedings" pending or court orders regarding the property. The defendant disagreed, arguing that the Sharon house was not marital property because it "was bought in his name [and] titled in his name." The trial court noted that "there is evidence on both sides" and, therefore, considered an instruction on criminal trespass to be appropriate.

The trial court instructed the jury that the defendant had raised "five special defenses . . . . They are: (1) [t]he contributory negligence of [the plaintiff]; (2) [j]ustification; (3) self-defense; (4) defense of others; [and] (5) [w]rongful conduct of [the plaintiff]." With respect to the second special defense, which the trial court referred to as "justification,"[3] the trial court instructed the jury as follows: "Justification is a general defense to the use of physical force. The use of physical force upon another person that results in actual injury, while usually a criminal assault, is not criminal if it is permitted or justified by a provision of law or statute.

"Therefore, when one who is accused of committing an assault claims that he or she acted under a legal justification, the jury must examine the circumstances

[3] As we discuss in greater detail later in this opinion, the trial court adopted the defendant's inexact and potentially confusing nomenclature to classify the various special defenses relevant to this appeal. Properly conceived, the defense of justification is a broad category that subsumes more specific claims such as self-defense, defense of others, and defense of premises. See part II B 1 of this opinion. At trial, however, the court treated the defense of justification as synonymous with only one subtype of the broader theory—the use of physical force in defense of premises. The plaintiff did not provide suggested instructions that would have alleviated this confusion. This opinion adheres to the terminology used at trial to avoid any further confusion.

and discover whether the act was truly justified. The court's function in instructing the jury is to tell the jury the circumstances in which the use of physical force against another person is legally justified.

"Justification defenses focus on the defendant's reasonable beliefs as to circumstances and the necessity of using force. The jury must view the situation from the perspective of the defendant. However, the defendant's belief ultimately must be found to be reasonable. For example, a person in possession or control of premises is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises. A person commits criminal trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises, after an order to leave, or after an order not to enter, that was personally communicated to such person by the owner of the premises.

"The claim focuses on what the defendant reasonably believes under the circumstances and presents a question of fact. The jury's initial determination requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief at the time of the confrontation is in fact credible. The jury must make a further determination as to whether that belief was reasonable, from the perspective of a reasonable person in the defendant's circumstances.

"The defendant's conduct must be judged ultimately against that of a reasonably prudent person. It is not required that the jury find that the victim was, in fact, using or about to use physical force against the defendant."

The trial court then proceeded to instruct the jury regarding the defenses of self-defense and defense of others. This portion of the jury charge provided as follows: "The defendant raised the issues of self-defense and defense of others as to the incident on December 5, 2009. After you have considered all of the evidence in this case, if you find that the plaintiff has proved her claims, you must go on to consider whether . . . the defendant acted in [the defense] of himself or of others.

"A person is justified in the use of force against another person that would otherwise be illegal if he is acting in the defense of himself or others under the circumstances.

"The statute defining self-defense reads in pertinent part as follows:

" '[A] person is justified in using reasonable physical force upon another person to defend himself [or a third person] from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose . . . .'

"The statute requires that, before a defendant uses physical force upon another person to defend himself, he must have two 'reasonable beliefs.' The first is a reasonable belief that physical force is then being used or about to be used upon him. The second is a reasonable belief that the degree of force he is using to defend himself from what he believes to be an ongoing or imminent use of force is necessary for that purpose.

"A defendant is not justified in using any degree of physical force in self-defense against another if he provokes the other person to use physical force against him. Also, a defendant is not justified in using any degree of physical force in self-defense against another if he is the initial aggressor. A defendant cannot use excessive force in his self-defense or defense of others."

After deliberating for more than one day and asking, among other things, to rehear the testimony of Osborne and Teasdale regarding their views of the alleged assault and battery, the jury returned a verdict in favor of the defendant. The plaintiff's verdict form reveals the following basis for the jury's verdict.[4] The jury found that the defendant's conduct on December 5, 2009, consti-

[4] The plaintiff's verdict form included, in relevant part, the following questions; the jury's answers are in brackets.

"1. Assault and Battery (Answer All)

"a. We find that the conduct of [the defendant] on December 5, 2009, constituted intentional assault and battery.

"Yes _____[X]_____No _____

"b. We find that the conduct of [the defendant] on December 5, 2009, constituted reckless assault and battery.

"Yes _____No _____[X]_____

"c. We find that the conduct of [the defendant] on December 5, 2009, constituted negligent assault and battery.

"Yes _____No _____[X]_____

"2. Infliction of Emotional Distress (Answer All)

"a. We find that the conduct of [the defendant] on December 5, 2009, constituted intentional infliction of emotional distress.

"Yes _____No _____[X]_____

"b. We find that the conduct of [the defendant] on December 5, 2009, constituted negligent infliction of emotional distress.

"Yes _____No _____[X]_____

"3. Proximate Cause

"We find that the conduct of [the defendant] on December 5, 2009 was a substantial factor in causing or aggravating the injuries and damages of [the plaintiff].

"Yes _____[X]_____No _____

"(If you answered no, you must render a Defendant's Verdict, using the Defendant's Verdict Form.)

"4. Defendant's Defenses (Answer All)

"a. We find [the plaintiff's] recovery is barred by the doctrine of justification

"Yes _____[X]_____No _____

"b. We find [the plaintiff's] recovery is barred by the doctrine of self-defense

"Yes _____No _____[X]_____

"c. We find [the plaintiff's] recovery is barred by the doctrine of defense of others

"Yes _____[X]_____No _____

"d. We find [the plaintiff's] recovery is barred by the doctrine of wrongful conduct

"Yes _____No _____[X]_____

"e. With respect to a finding of negligent assault and battery or of negligent infliction of emotional distress, we find that the percentage of negligence attributable to [the defendant] is: _____ . . . ."

tuted an intentional assault and battery and that the defendant's conduct proximately caused or aggravated the plaintiff's injuries and damages. The jury also found, however, that the plaintiff's recovery was barred by the defendant's special defenses of justification and defense of others. The jury rejected the plaintiff's claims of intentional and negligent infliction of emotional distress, and also rejected the defendant's special defenses of self-defense and wrongful conduct. The trial court rendered judgment in favor of the defendant, and the plaintiff appealed to the Appellate Court.

On appeal to the Appellate Court, the plaintiff raised two claims: (1) the jury improperly was charged on the defendant's special defense of justification because the trial court incorporated an instruction on criminal trespass, even though a spouse cannot trespass on marital property as a matter of law;[5] and (2) the evidence was insufficient to support the defendant's special defense of defense of others. See *Burke* v. *Mesniaeff*, 177 Conn. App. 824, 826, 173 A.3d 393 (2017). With respect to the plaintiff's first claim, the Appellate Court determined that it need not decide whether the trial court improperly instructed the jury on criminal trespass because it "construe[d] the jury's findings to indicate [that] it decided that the plaintiff was not trespassing." Id., 837. The Appellate Court reasoned that, even though "tres-

[5] The plaintiff also claimed that the trial court improperly instructed the jury on criminal trespass because "the defendant failed to plead that his special defenses relied on a criminal statute, and . . . it was plain error for the court not to include an instruction on the duty to retreat and the mere words doctrine." *Burke* v. *Mesniaeff*, supra, 177 Conn. App. 836. The Appellate Court noted that our rules of practice require a special defense grounded on a statute to be specifically identified by its number; see Practice Book § 10-3; but held that the improper instruction on criminal trespass was harmless because "the jury did not find that [the plaintiff's] claims were barred by the defendant's wrongful conduct special defense." *Burke* v. *Mesniaeff*, supra, 838. The Appellate Court further held that the plaintiff could not prevail under the plain error doctrine "because the duty to retreat exception on which she relies pertains to the use of deadly force, which is not an issue in this case"; id., 843; and the plaintiff did not request an instruction on the mere words doctrine. Id., n.14.

passing is understood to be a form of wrongful conduct," the jury did not find that the plaintiff's recovery was barred by the doctrine of wrongful conduct, and, therefore, the jury necessarily found that the plaintiff was not trespassing. Id. With respect to the plaintiff's second claim regarding the sufficiency of the evidence of the defense of others defense, the Appellate Court determined that "the jury's verdict is supported by the evidence and by its commonsense evaluation of what happened during the incident." Id., 846. The Appellate Court therefore affirmed the judgment of the trial court. Id.

Judge Bishop filed a dissenting opinion in which he expressed his view that the "wrong minded notion" of "the plaintiff as a trespasser in a marital residence" likely "confus[ed] the jury and, as a result, render[ed] its verdict unreliable." Id., 847 (*Bishop*, *J.*, dissenting). Judge Bishop believed that there was no "basis for the court to instruct the jury on the law of criminal trespass"; id., 858; because "both parties understood the Sharon house to be a marital residence," and, as such, the plaintiff was licensed and privileged to be on the property notwithstanding the defendant's title ownership. Id., 859. Judge Bishop also believed that the evidence was insufficient to support the jury's finding of defense of others because there was no objective evidence "that, at any time, the plaintiff, by gesture or words, made any threats against the houseguests." Id., 862. Accordingly, Judge Bishop would have reversed the judgment of the trial court and remanded the case for a new trial. Id., 863.

The plaintiff filed a motion for reconsideration en banc or, in the alternative, for reconsideration, which the Appellate Court denied. This certified appeal followed.[6]

[6] We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's judgment when it determined that (1) the trial court did not improperly

II

The plaintiff claims that the trial court improperly instructed the jury on the law of criminal trespass because she, as the defendant's spouse, had a legal right to be at their shared marital residence, regardless of the title ownership of the property. She argues that the defendant's justification defense was premised entirely on the law of criminal trespass, and, therefore, the jury necessarily found that the plaintiff was a criminal trespasser at the time of the assault and battery. She further argues that the improper instruction on criminal trespass irrevocably tainted the jury's finding that the defendant was acting in defense of others because a criminal trespasser's "refusal to leave when so instructed by the 'rightful owner' is inherently threatening . . . ." Alternatively, the plaintiff contends that the evidence was insufficient to support the jury's finding of defense of others because the defendant "provided no evidence that he believed [the plaintiff] was imminently about to use physical force against his houseguests, much less any evidence that such a belief would have been reasonable." (Footnote omitted.)

The defendant responds that the trial court's instruction on the law of criminal trespass was proper because the Sharon house was not a marital residence but the defendant's individually owned property, and the plaintiff did not acquire an ownership interest in the Sharon house by virtue of the parties' marriage. Because it was undisputed that the plaintiff refused to leave after being instructed to do so by the defendant-owner, the defendant contends that the evidence supported the trial court's criminal trespass instruction. Lastly, the defendant argues that the evidence was sufficient to support

charge the jury on the defendant's justification defense of criminal trespass, (2) the special defense of others was not barred by insufficient evidence, and (3) no finding needed to be made on the plaintiff's rights to the property?" *Burke* v. *Mesniaeff*, 328 Conn. 901, 177 A.3d 564 (2018).

the jury's finding that he was acting in defense of others in light of his testimony, as well as the testimony of Teasdale and Osborne, that the plaintiff's aggressive and out of control behavior posed a risk of harm to his guests.

A

We first address the plaintiff's claim that the trial court's instruction on the defendant's special defense of justification was improper because one cannot criminally trespass on the property of his or her spouse. "Our analysis begins with a well established standard of review. When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 400, 880 A.2d 151 (2005).

To determine whether the trial court properly instructed the jury on criminal trespass, we turn first to General Statutes § 53a-20, which governs the use of physical force in defense of premises.[7] Section 53a-20

[7] Section 53a-20 is a criminal statute, but the parties do not question its general applicability to civil actions, and, therefore, we assume for the purpose of this appeal that § 53a-20 provides a special defense to the tort of intentional assault and battery, provided there is sufficient evidence to support the defense. Cf. *Brown* v. *Robishaw*, 282 Conn. 628, 636, 922 A.2d 1086 (2007) ("it is well established that the defense of self-defense is available to a defendant faced with the intentional torts of civil assault and battery, provided that there is sufficient evidence in support of that defense").

provides in relevant part that "[a] person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises . . . ." A person commits a criminal trespass when, "[k]nowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person . . . ." General Statutes § 53a-107 (a) (1). Both criminal trespass and defense of premises contain a scienter requirement. Specifically, in order to commit a criminal trespass, the trespasser must know that "he is not privileged or licensed to enter or to remain on the premises"; *State* v. *Garrison*, 203 Conn. 466, 474, 525 A.2d 498 (1987); and, in order to be justified in using physical force to prevent or terminate the commission or attempted commission of a criminal trespass, the person in possession or control of the premises must "reasonably [believe]" that the use of force is "necessary to prevent or terminate the commission or attempted commission of a criminal trespass . . . ." General Statutes § 53a-20.

Our sister states uniformly have held that, in determining whether one spouse has committed the crime of trespass (or a similar crime) on the property of the other spouse, the focus is not on ownership per se but, rather, on the "trespassing" spouse's right or privilege to enter or remain on the property. See, e.g., *People* v. *Johnson*, 906 P.2d 122, 125 (Colo. 1995) (holding that, in determining whether estranged spouse has committed crime of trespass or burglary against other spouse, "the focus is [on] the possessory rights of the parties, and not their ownership rights"); *State* v.

Hagedorn, 679 N.W.2d 666, 671 (Iowa 2004) (upholding defendant's burglary conviction, even though he formerly had lived in marital home, because his wife had removed his personal belongings, told him on multiple occasions that he no longer was welcome, and changed locks); *Commonwealth* v. *Robbins*, 422 Mass. 305, 315 and n.5, 662 N.E.2d 213 (1996) (holding that marital relationship does not preclude burglary conviction, regardless of title or leasehold ownership, and that jury must be instructed on "factors that bear on a defendant's right to enter'' spouse's premises); *State* v. *Spence*, 768 N.W.2d 104, 108–10 (Minn. 2009) (upholding defendant's burglary conviction, even though he coowned residence with his estranged spouse, because property owners can divest themselves of possessory interests by agreement); *State* v. *McMillan*, 158 N.H. 753, 759, 973 A.2d 287 (2009) (concluding that "holding a legal interest in property, such as a leasehold, is not dispositive on the issue of license or privilege'' to enter premises but, rather, "the fact finder must look beyond legal title and evaluate the totality of the circumstances in determining whether a defendant had license or privilege to enter"); *State* v. *Parvilus*, 332 P.3d 281, 283, 286 (N.M. 2014) (upholding defendant's burglary conviction, despite statute providing that "neither [spouse] can be excluded from the other's dwelling,'' because ''marital property provisions . . . do not provide immunity from prosecution for burglary of a spouse's separate residence'' [internal quotation marks omitted]); *State* v. *Lilly*, 87 Ohio St. 3d 97, 102, 717 N.E.2d 322 (1999) ("in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property"); *State* v. *Wilson*, 136 Wn. App. 596, 606–607, 150 P.3d 144 (2007) (noting that, "[i]n domestic violence cases, determining possession of a residence presents a murky area of law,'' but "Washington case law is clear

that an offender can burglarize the residence of his or her spouse or partner despite legal ownership of property"). We find these precedents persuasive and hold that "whether one has a right or privilege to enter property is not determined solely by [the spouse's] ownership interest in the property, or by whether the structure can be characterized as the 'marital home,' " but, rather, "[by] whether the [spouse] had any possessory or occupancy interest in the premises at the time of entry." *State* v. *Hagedorn*, supra, 670.

Whether one spouse has a possessory or occupancy interest in the premises of the other spouse at the time of entry is a fact intensive inquiry that depends on multiple factors, including, but not limited to, the relationship status of the spouses (i.e., whether the parties are legally separated or involved in divorce proceedings), the existence of extended periods of separation, the applicability of any relevant court orders, the establishment of separate residences, the existence of any agreements regarding access to the subject property, and the method and manner of entry. See, e.g., *Commonwealth* v. *Robbins*, supra, 422 Mass. 315; *State* v. *Spence*, supra, 768 N.W. 2d 109–10. In light of the scienter requirements contained in the criminal trespass and defense of premises statutes, the party requesting a jury charge on criminal trespass and defense of premises in the context of a case involving a spousal relationship must adduce evidence demonstrating that *both* parties "understood that the possessory interest of one was being relinquished, even if it was relinquished begrudgingly or reluctantly." *State* v. *O'Neal*, 103 Ohio App. 3d 151, 155, 658 N.E.2d 1102, appeal dismissed, 73 Ohio St. 3d 1411, 651 N.E.2d 1309 (1995). In general, when the marital relationship is legally intact and both spouses have a possessory or occupancy interest in the premises, an isolated request to leave during a heated marital argument will not suffice to revoke one spouse's possessory

or occupancy interest in the premises vis-à-vis the other. See, e.g., id.; cf. *State* v. *Garrison*, supra, 203 Conn. 473–74 (holding that evidence was insufficient to support defense of premises defense, even though defendant had asked victim, who was dating and living with defendant's sister in shared apartment, to leave apartment, because sister had not revoked victim's possessory or occupancy interest in "manifest fashion"; instead, because of couple's "stormy relationship" and sister's intoxication, "her order to the victim to leave was simply a part of the couple's ongoing relationship").

In the present case, the undisputed evidence established that the plaintiff had a possessory or occupancy interest in the Sharon house at the time of her entry on December 5, 2009. The plaintiff had a key to the Sharon house, would "go back and forth" between there and the parties' primary marital residence, and stored her personal possessions on the premises. The plaintiff had obtained a Connecticut driver's license that listed the Sharon house as her residential address, and she was involved in the management and improvement of the property.[8] Furthermore, although the parties' marital relationship was strained, they were neither estranged nor separated at the time of the incident, and a dissolution action had not yet been commenced. In light of these facts, the defendant's request that the plaintiff leave the Sharon house, made in the midst of a heated marital dispute, plainly was insufficient to support the trial court's criminal trespass instruction. See, e.g., *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 139, 757 A.2d 516 (2000) (trial court's instructions must be "reasonably supported by the evidence" [internal quotation marks omitted]).

Our conclusion is bolstered by the fact that the defendant himself did not believe the plaintiff was trespass-

[8] The undisputed evidence established that the plaintiff had painted the interior of the Sharon house and managed the rental of an adjacent guest cottage.

ing when he used force to remove her from the Sharon house on the afternoon of December 5, 2009. At trial, the defendant testified that "we were married at the time so I didn't think . . . [trespassing] was an issue at all." The defendant explained that it did not occur to him that the plaintiff may have been a criminal trespasser until sometime after the incident. Because the defendant did not believe that the use of force was "necessary to prevent or terminate the commission or attempted commission of a criminal trespass"; General Statutes § 53a-20; he lacked the requisite state of mind to support a defense of premises instruction.

B

Having determined that the trial court improperly instructed the jury on criminal trespass and defense of premises, we next consider whether the improper jury instruction was harmful. It is well established that "not every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 656, 935 A.2d 1004 (2007). "When two or more separate and distinct defenses . . . are present in a case, an error in the charge as to one normally cannot upset" the jury's verdict if the jury was "properly charged as to the remaining defenses." *Dinda* v. *Sirois*, 166 Conn. 68, 75, 347 A.2d 75 (1974).

We conclude that the plaintiff has not established that the improper instruction in this case affected the jury's verdict. As we previously explained, the jury returned a verdict in favor of the defendant on the basis of its findings in connection with two different special defenses: justification and defense of others. These special defenses were pleaded and charged as separate and distinct theories of defense at trial; the justification

defense was limited to the plaintiff's alleged criminal trespass and the defendant's corresponding right to use physical force in defense of his premises; see part II B 1 of this opinion; whereas the defense of others defense was premised on the plaintiff's alleged threatening behavior and the defendant's corresponding right to use physical force to protect his guests from imminent physical harm. We conclude that the jury charge on defense of others was insulated from any taint affecting the justification charge and, consequently, hold that the jury's finding in the defendant's favor on the basis of his special defense of defense of others renders harmless the instructional impropriety on the special defense of justification.

1

We first address whether the trial court's improper instruction on justification affected the jury's finding on that special defense. As background, we point out that the defense of justification, although not treated as such in the present case, ordinarily is understood to encompass the defense of premises, self-defense, and the defense of others. See *State* v. *Bryan*, 307 Conn. 823, 832, 60 A.3d 246 (2013) ("[t]he defense of others, like self-defense, is a justification defense"); *State* v. *Garrison*, supra, 203 Conn. 472 ("[j]ustification for the use of deadly force may also be found in the provisions of § 53a-20 dealing with defense of premises"). "These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal."[9] (Internal quotation marks omitted.) *State* v. *Bryan*, supra, 832–33.

[9] Wrongful conduct, by contrast, is not a justification defense; it is a limitation on liability in civil actions premised on the notion that a plaintiff should not recover "for injuries that are sustained as the direct result of his or her knowing and intentional participation in a criminal act." *Greenwald* v. *Van Handel*, 311 Conn. 370, 377, 88 A.3d 467 (2014).

The record reflects that the defendant's justification defense in this case was not framed in accordance with its conventional understanding. Instead, the defendant used the defense of "justification" to encompass only his defense predicated on criminal trespass and defense of premises. The defendant thus pleaded that his use of force was justified, in relevant part, because "the plaintiff was trespassing on the defendant's property . . . knowing that she was not licensed or privileged to do so . . . [d]espite the defendant, who is the owner of the property, directing her to leave . . . ." At the charge conference, the defendant explained that his justification defense was based on the plaintiff's alleged criminal trespass, and the jury instructions, as well as the plaintiff's verdict form, listed justification as one of the defendant's five freestanding special defenses. Although the jury was informed that "[j]ustification is a general defense to the use of physical force," the jury was given only one example of a justifiable use of physical force in the justification instruction—defense of premises. The jury also was informed that, in order to find that the defendant's use of force was justified, "[i]t is not required that the jury find that the victim was, in fact, using or about to use physical force against the defendant." This is a correct statement of the law if the defendant's justification defense is limited to defense of premises; see General Statutes § 53a-20; but an incorrect statement of the law if the defendant's justification defense included self-defense and defense of others. See General Statutes § 53a-19 (a) (requiring defendant to have reasonable belief of "imminent use of physical force"); see also part III of this opinion.[10]

[10] The idiosyncratic terminology adopted by the trial court in the jury charge, following the defendant's lead, was carried over to the jury interrogatories, which also treated the special defenses separately. In relevant part, the jury was requested to answer four different questions, one for each special defense. See footnote 4 of this opinion. Again, the special defense of justification was kept separate and distinct from the special defense of defense of others.

On the basis of the foregoing, it is clear that the defendant's justification defense was treated by the parties, the trial court, and the jury as the functional equivalent of a defense of premises defense. By finding in favor of the defendant on his special defense of justification, the jury necessarily found that the defendant's use of force was justified by the plaintiff's commission or attempted commission of the crime of trespass. Therefore, the jury was misled by the improper instruction on criminal trespass and defense of premises in arriving at its finding on the defendant's justification defense.[11]

2

We next address whether the improper jury instruction on criminal trespass and defense of premises misled the jury with respect to the special defense of

[11] We disagree with the Appellate Court majority that the plaintiff was not harmed by the improper justification instruction because the jury's finding that the plaintiff's recovery "was not barred by the doctrine of wrongful conduct" must mean that the jury "decided that the plaintiff was not trespassing." *Burke* v. *Mesniaeff*, supra, 177 Conn. App. 837. We agree with the dissenting opinion that the jury's findings on the special defenses of justification and wrongful conduct cannot be deemed irreconcilable for two reasons. See id., 854 (*Bishop, J.*, dissenting) ("I do not believe it is reasonable to glean from the jury's answer to the wrongful conduct interrogatory that the jury found that the plaintiff had not been trespassing"); see also *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 270, 698 A.2d 838 (1997) (noting that court has duty to "harmonize" answers to jury interrogatories if possible). First, the jury was instructed that the defendant's special defense of wrongful conduct was predicated on the defendant's claim that the plaintiff "was trespassing on the premises *and* exhibiting disorderly conduct *and/or* creating a disturbance." (Emphasis added.) The use of the conjunctive "and" necessarily conveyed to the jury that it had to find *both* that the plaintiff had committed a criminal trespass *and* that she had engaged in disorderly conduct *and/or* creating a disturbance. The jury reasonably may have found that, although the plaintiff had committed the crime of trespass, she had not committed the crimes of disorderly conduct and/or creating a disturbance, and, therefore, her recovery was not barred by the wrongful conduct doctrine. Second, the jury was instructed that "[t]he wrongful conduct defense does not apply if you find that the plaintiff sustained injuries and damages independent of any wrongful conduct of the plaintiff." The jury reasonably may have found that the plaintiff sustained her injuries after the completion of the commission or attempted commission of the criminal trespass, and, therefore, her recovery was not barred by the wrongful conduct doctrine.

defense of others. As we previously explained, defense of others is a type of justification defense; see *State* v. *Bryan*, supra, 307 Conn. 832; but the present case was pleaded, tried, and charged in a manner that reasonably would have led the jury to believe that defense of others was an independent, freestanding special defense separate and distinct from the justification defense.[12] The trial court's jury instruction on defense of others did not include any reference to criminal trespass or defense of premises. Rather, the trial court properly instructed the jury that " '[a] person is justified in using reasonable physical force upon another person to defend himself [or a third person] from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose.' " See General Statutes § 53a-19 (a). Thus, in arriving at its verdict, the jury necessarily found that (1) the defendant believed that the plaintiff was about to use imminent physical force against his guests, (2) his belief was reasonable, and (3) he used a degree of force that he reasonably believed to be necessary to defend his guests.[13] None of these findings depended, either implicitly or explicitly, on the plaintiff's status as a criminal trespasser.

[12] The trial court combined self-defense and defense of others in a single instruction.

[13] As we previously explained, the details surrounding the assault were hotly disputed at trial, and the jury was presented with two very different versions of events. According to the plaintiff, the defendant perpetrated a violent and unprovoked physical assault, during which he dragged her out of the house and down the driveway, flinging her to the ground and yanking her back up multiple times. The defendant, Teasdale, and Osborne, by contrast, testified that the defendant's unwanted physical contact with the plaintiff was provoked by the plaintiff's out of control verbal and physical behavior and consisted only of holding her arm "like a man would walk with a woman" and escorting her away from the Sharon house and the defendant's frightened guests. The jury interrogatories reveal that the jury resolved this factual dispute in favor of the defendant, finding that the defendant used an amount of force that was reasonable under the circumstances to protect his guests from the imminent threat of harm posed by the plaintiff. Given the jury's finding that the defendant's use of force was reasonable, we can fairly presume that the jury did not credit the plaintiff's

The plaintiff nonetheless argues that criminal trespassers are "inherently threatening," and, therefore, the trial court's improper reference to criminal trespass in its instruction on justification "infected . . . the entire trial, including [the defendant's] claim of 'defense of others . . . .' " We disagree. As we discussed, both the jury instruction and the verdict form treated the special defenses as separate and independent legal theories. Confusion was highly unlikely under these circumstances because there was neither any linguistic overlap between the justification and defense of others jury instructions, nor was there anything about the verdict form that created any discernible risk of confusion. The jury's disparate findings also indicate to us that it did not lump together the defenses in an undifferentiated manner but, instead, distinguished among those defenses, rejecting some while crediting others. See footnote 4 of this opinion; see also *DeMarkey* v. *Fratturo*, 80 Conn. App. 650, 660, 836 A.2d 1257 (2003) (holding that jury's response to interrogatories indicated that it was not misled by allegedly improper jury instruction, and any error therefore was harmless). Moreover, although criminal trespass may pose an inherent risk of harm to property and privacy rights; see *State* v. *Robinson*, 105 Conn. App. 179, 193, 937 A.2d 717 (2008) ("[t]he rationale for the offense of criminal trespass is to protect property, and the privacy interest inhering in that property, from unwanted intruders"), aff'd, 290 Conn. 381, 963 A.2d 59 (2009); it does not, in the absence of additional facts, pose a similar inherent risk of harm to the *physical safety* of invitees who happen to be on the property.[14] Indeed, the crime of trespass can be committed even if the property is uninhabited, unoccu-

testimony that the defendant "flung [her]" to the ground multiple times and "jerked [her] up . . . by [her] right arm" each time that she struck the ground.

[14] Recall that the jury rejected the defendant's special defense of *self*-defense, thereby indicating that it did not find the plaintiff's trespassing behavior to be so "inherently threatening" as to justify the use of force in self-defense.

pied, or consists of public land. See General Statutes §§ 53a-107 through 53a-109. We conclude that the instructional impropriety was harmless because it did not affect the jury's independent finding with respect to the defendant's defense of others defense.

III

The only remaining issue is whether the evidence was sufficient to support the jury's finding that the defendant was acting in defense of others when he used physical force to remove the plaintiff from the Sharon house on December 5, 2009. "The standards governing our review of a sufficiency of evidence claim are well established and rigorous. . . . [I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it." (Citations omitted; internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, supra, 262 Conn. 442.

"We apply this familiar and deferential scope of review, however, in light of the equally familiar principle" that there must be "sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation." (Internal quotation marks omitted.) Id. The jury's verdict cannot be upheld if the jury "reasonably and legally could not have reached the determination that [it] did in fact reach" or if, "without conjecture, [it] could not have found a required element of the cause of action . . . ." Id.

This is a civil case, but self-defense or, by extension, a defense of others defense "is available to a defendant faced with the intentional torts of civil assault and battery, provided that there is sufficient evidence in support of that defense." See *Brown* v. *Robishaw*, 282 Conn. 628, 636, 922 A.2d 1086 (2007). The defendant bears the initial burden to produce sufficient evidence to inject the defense of others into the case; id., 643; but this burden of production "is slight." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 294 Conn. 399, 408, 984 A.2d 721 (2009). To prevail on a defense of others defense, "a defendant must introduce evidence that the defendant reasonably believed [the attacker's] unlawful violence to be imminent or immediate." (Internal quotation marks omitted.) *State* v. *Bryan*, supra, 307 Conn. 835; see General Statutes § 53a-19 (a). The standard encompasses both a subjective and objective component: (1) the defendant must have subjectively believed that an attack was imminent; and (2) the defendant's subjective belief must have been objectively reasonable under the circumstances. See, e.g., *State* v. *Prioleau*, 235 Conn. 274, 286–87, 664 A.2d 743 (1995) (explaining that "subjective-objective inquiry" requires jury to "make two separate affirmative determinations in order for the defendant's" special defense to succeed: [1] "the jury must determine whether, on the basis of all of the evidence presented, the defendant in fact had believed that he had needed to use . . . physical force . . . in order to repel the victim's alleged attack"; and [2] "the jury must make a further determination as to whether *that belief* was reasonable, from the perspective of a reasonable person in the defendant's circumstances" [emphasis in original]).

The plaintiff contends that the evidence was insufficient to establish that the defendant subjectively believed that the plaintiff "was *imminently* about to use physical force against his houseguests, much less . . . that such a belief would have been reasonable."

(Emphasis added; footnote omitted.) We disagree. Although the evidence surrounding the defendant's use of physical force against the plaintiff was conflicting, the jury reasonably could have found that, when the plaintiff arrived at the Sharon house, she was enraged, hysterical, and screaming "[w]ho is that woman" and "[w]hat are you doing in my house?" The plaintiff's behavior was described as "aggressive" and "out of control," and the defendant testified that, on the basis of "body language that [he] recognized from previous such incidents," he was "terrified" that the plaintiff would harm his guests. Throughout the December 5, 2009 incident, the plaintiff continually tried to return to the house. The defendant testified that he believed that the plaintiff was "trying to run back into the house and confront the guests," and he continued to use physical force against the plaintiff "[t]o protect [his] guests from harm's way." We conclude that this evidence was sufficient to support the jury's finding that the defendant subjectively believed that the plaintiff posed an imminent risk of physical harm to his guests.

The plaintiff also contends that the defendant's subjective belief was not objectively reasonable under the circumstances because she never made any verbal threats and the defendant's guests "remained safely ensconced inside the house during the entirety of the assault . . . ." Again, we are not persuaded. First, verbal threats are not required if the assailant's physical acts and behavior support a "reasonably perceived threat of [imminent] physical force . . . ." *State* v. *Jimenez*, 228 Conn. 335, 341, 636 A.2d 782 (1994). Although a defense of others defense does "not encompass a preemptive strike," neither does it obligate the defendant "to stand by meekly and wait until an assailant [strikes] the first blow before responding." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 53–54, 128 A.3d 431 (2015). Second, the physical distance between the plaintiff and Osborne at the time

the defendant intercepted the plaintiff is unclear, but the jury heard evidence that the plaintiff was enraged, out of control, and "aggressively attempting to enter" the room in which Osborne was present.[15] The plaintiff repeatedly was screaming "[w]ho is that woman," "[w]hat's going on between the two of you," and "I know what's going on," from which the jury reasonably could have inferred, on the basis of the totality of the evidence, that the plaintiff was accusing the defendant and Osborne of having an extramarital affair. Under these factual circumstances, "we cannot . . . conclude that the evidence introduced at trial was of such a nature that the jury needed to resort to speculation that the defendant reasonably believed that [he] had to act in [defense of his guests]." (Internal quotation marks omitted.) *State* v. *Edwards*, 234 Conn. 381, 390, 661 A.2d 1037 (1995). But cf. *State* v. *Bryan*, supra, 307 Conn. 837–39 and n.7 (holding that there was no imminent threat of harm to victim because undisputed evidence established that assailant was moving away from building in which victim was present at time of assault and declining to address whether victim was subject to "an imminent attack because she was inside the school building at the time of the stabbing").

The objective reasonableness of the defendant's use of force is further supported by Osborne's and Teasdale's testimony that they were afraid of the plaintiff

[15] The plaintiff contends that there was no *imminent* threat of physical harm to the defendant's guests because, according to the defendant's own testimony, his physical contact with the plaintiff was consensual until the parties were three-quarters of the way down the driveway. The defendant's testimony was contradicted, however, by the plaintiff's testimony that the assault and battery began inside the Sharon house and that the defendant pulled her out of the Sharon house without her consent. It is well established that the "defendant's own testimony need not support [his] theory of defense," and the defendant may "rely on evidence adduced either by himself *or by the* [*plaintiff*] to meet [his] evidentiary" burden. (Emphasis in original; internal quotation marks omitted.) *State* v. *Bryan*, supra, 307 Conn. 834. In light of the evidence indicating that the defendant's use of force began inside the Sharon house, in the same room as one of the defendant's guests, we reject the plaintiff's claim that there was insufficient evidence to support the imminence requirement.

and felt physically threatened by her out of control behavior. Teasdale explained that she felt like her "life was in danger" because she "didn't know if [the plaintiff] had a gun," and she "was really worried about our safety, my safety, everyone's safety." In light of the risk of violence and volatility surrounding domestic disputes generally, we agree with the Appellate Court that "the jury's verdict is supported by the evidence and by its commonsense evaluation of what happened during the incident." *Burke* v. *Mesniaeff*, supra, 177 Conn. App. 846. We therefore conclude that the evidence was sufficient to support the jury's verdict in favor of the defendant.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and PALMER, MULLINS AND VERTEFEUILLE, Js., concurred.

D'AURIA, J., with whom KAHN, J., joins, concurring. I concur in the result. I write separately to emphasize two points: one legal and one factual. Both points concern how our law requires that we review a trial court record in a civil case tried to a jury.

First, I agree with the majority that the concept of the plaintiff, Elizabeth Burke, as a trespasser had no place in the trial court's jury charge whatsoever. Clearly, the court improperly included it in its charge on the defendant's special defense of justification, which was limited to the defense of premises. The plaintiff argues that this erroneous charge—permitting the jury to consider the plaintiff a trespasser—tainted the jury's consideration of the defendant's special defense of defense of others. It's possible.

However, our law imposes on a plaintiff seeking to overturn a judgment after an adverse jury verdict the substantial burden of demonstrating that an erroneous charge on one count or defense tainted the jury's consid-

eration of the remaining counts or defenses. "When two or more separate and distinct defenses . . . are present in a case, an error in the charge as to one *normally* cannot upset" the jury's verdict if it was "properly charged as to the remaining defenses." (Emphasis added.) *Dinda* v. *Sirois*, 166 Conn. 68, 75, 347 A.2d 75 (1974). Under this standard, I am compelled to conclude, as does the majority, that the plaintiff has not sustained her burden of demonstrating that a new trial is necessary on the ground that the trial court's defense of premises charge (which contained the trespasser instruction) tainted the jury's consideration of the defense of others charge (which did not).

This standard for determining whether a new trial is necessary at all appears to me somewhat similar to the standard that applies when determining whether to limit the issues to be retried if a new trial is ordered due to instructional error concerning a single issue in the case. But it's not entirely clear to me.

We have said that when an instructional error has occurred as to one issue, requiring a new trial, we will order a new trial as to other issues as well "where the retrial of the single issue may affect the other issues to the prejudice of either party . . . ." (Internal quotation marks omitted.) *Wendland* v. *Ridgefield Construction Services, Inc.*, 190 Conn. 791, 796, 462 A.2d 1043 (1983). In particular, in civil cases in which the reviewing court has determined that an instructional error occurred regarding liability, a new trial as to both liability and damages has been ordered when "liability is inextricably intertwined with the issue of damages." *SKW Real Estate Ltd. Partnership* v. *Gallicchio*, 49 Conn. App. 563, 581 n.15, 716 A.2d 903, cert. denied, 247 Conn. 926, 719 A.2d 1169 (1998); accord *Scanlon* v. *Connecticut Light & Power Co.*, 258 Conn. 436, 451, 782 A.2d 87 (2001); *Murray* v. *Krenz*, 94 Conn. 503, 508, 109 A. 859 (1920); see also *Kelly Energy Systems, Inc.* v. *Commercial Industries Corp.*, 13 Conn. App. 236,

237, 535 A.2d 834 (1988) (in case in which trial court employed erroneous measure of damages, "since . . . the issue of liability is so inextricably intertwined with the issue of damages, a new trial on both is required in the interest of justice"). It is not clear to me if these articulations are the same as the rule described in *Dinda*. But that is essentially the plaintiff's argument in the present case: that the defense of premises and defense of others are inextricably intertwined defenses, and error as to one instruction tainted the jury's consideration of the other, to the plaintiff's prejudice.

Regardless of whether these are different ways of saying the same thing, I accept that the party seeking a new trial on all issues bears the burden of meeting the established standard; see *Scanlon* v. *Connecticut Light & Power Co.*, supra, 258 Conn. 452 (holding that defendant failed to satisfy its burden of establishing that issues were interwoven); and the plaintiff has not asked us to modify or overrule case law governing when an erroneous charge on one defense can be deemed to taint another appropriate charge on a separate defense. Nor does she explain why the rule that "normally" applies under *Dinda*, should not apply in this case. Thus, I concur in the legal reasoning of the majority.

Second, as the majority indicates, because the parties' accounts of the incident in question differed dramatically, and because we must review the sufficiency of the evidence "in the light most favorable to sustaining the verdict"; (internal quotation marks omitted) *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003); we cannot assume that the jury found the facts to be as the plaintiff has described them. Specifically, even though the jury found that the defendant committed an intentional assault and battery upon the plaintiff, substantially causing or aggravating her injuries and damages, we cannot assume that the jury credited the plaintiff's testimony that the defendant "threw [her] to the ground forcefully multiple times, jerking her up by her right arm each time that she struck the ground."

Rather, because the jury returned a verdict for the defendant, our law requires that we presume that the jury found the facts to be closer to how the defendant described them: that he only grabbed the plaintiff by the arm and forcibly escorted her out of the house and down the driveway, preventing her from returning to the house. This is true notwithstanding that the jury's verdict for the defendant was in part based on a special defense (defense of premises) as to which the court's instruction was improper. The jury also found that under the defense of others doctrine—which was properly charged—the force that the defendant used upon the plaintiff was justified.

If our required review of the factual record and the jury's verdict led us to conclude that the jury had found that the defendant's assault constituted more than just grabbing the plaintiff's arm and leading her away from the house, or perhaps if this assault had occurred farther from the house than some of the testimony indicated, I would have a much harder time concluding that there was no taint from the improper trespass charge. That is to say, if the defendant had in fact thrown the plaintiff to the ground while they were down the driveway and close to the street, as opposed to having led her away by the arm while she was in the house and near the defendant's guests, I would not believe that the jury reasonably could have found that the defendant was justified in using this level of violence so far from any potential victims. Under those circumstances, I would conclude that the instruction concerning the plaintiff as a trespasser could very well have tainted the jury's consideration of the defense of others special defense. I do not believe that the possibility of the plaintiff's breaking away from the defendant, running back up the driveway in the snow and accosting members of the Questers, a historical preservation organization, while they stood at a window watching—neither fleeing, hiding nor calling the police—was sufficiently

plausible to have justified the defendant's "[need] to use . . . physical force . . . in order to repel the victim's alleged attack." (Internal quotation marks omitted.) *State* v. *O'Bryan*, 318 Conn. 621, 632, 123 A.3d 398 (2015). Because we are not required to presume that the jury credited the entirety of the plaintiff's testimony to sustain the verdict; e.g., *State* v. *Sinclair*, 332 Conn. 204, 241, 210 A.3d 509 (2019) (jury is free to credit all, some or none of witness' testimony); and because the plaintiff does not claim that there was insufficient evidence to establish the reasonableness of the level of force used by the defendant, I concur in the result the majority reaches.

ROGER L. SAUNDERS *v.* CLARK BRINER ET AL. (SC 19940)

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

Syllabus

The plaintiff sought to recover damages from the defendants, B and two limited liability companies solely owned by B, C Co. and T Co., for their mismanagement in connection with certain business transactions, alleging, inter alia, breach of contract, fiduciary duty, and the implied covenant of good faith and fair dealing, and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Connecticut Limited Liability Company Act (CLLCA) ([Rev. to 2017] § 34-100 et seq.). The plaintiff also sought the judicial dissolution of R Co. and F Co. R Co. was a limited liability company owned equally by T Co. and S, the plaintiff's son, and had been formed for the purpose of conducting a commercial real estate lending business. S later transferred his 50 percent interest in R Co. to the plaintiff. F Co., a limited liability company owned by the plaintiff and B, was created to act as the controlling general partner of a related fund, which provided a vehicle for pooling

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

outsider investor capital for R Co.'s loans. The plaintiff agreed to source loans, secure investors and financers, and provide bridge financing, and, in return, the plaintiff would receive certain profits and fees from the loan transactions. When the plaintiff and S rejected B's request for a larger share of the profits, B created C Co. in order to divert outsider capital away from R Co., negatively affecting R Co.'s profits. B also allegedly misallocated investor profits, improperly increased investments by his insider investors and improperly charged R Co. for expenses incurred by T Co. After the plaintiff initiated the present action, the parties agreed to hire a joint, court-appointed fiduciary, A Co., to wind up the fund and F Co. A Co. issued a report detailing the lack of internal controls and concluded that R Co., the fund, and F Co. had underpaid the investors and principals, particularly the plaintiff. At trial, the court allowed W, a partner of A Co., to testify about his findings and admitted A Co.'s report into evidence. Following a bench trial, the court rendered judgment for the plaintiff on four of his derivative counts alleging, on behalf of R Co., breach of contract against T Co., and violations of CUTPA against all of the defendants, and, on behalf of R Co. and F Co., breach of fiduciary duty against T Co. The trial court rendered judgment for the plaintiff on four of his direct counts alleging breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty by T Co. and B for their failure to repay a portion of a loan funded by the plaintiff's single-member limited liability company, S Co. The trial court found against the plaintiff on his claim that B should be required to reimburse the plaintiff for fees relating to tax and accounting services provided by A Co. but awarded the plaintiff attorney's fees in connection with his derivative CUTPA claim. On appeal, the defendants claimed that the trial court lacked subject matter jurisdiction to review the plaintiff's derivative claims because CLLCA did not provide a derivative remedy, and, in the absence of a statutory remedy, the common law did not afford a member or manager of a limited liability company derivative standing because CLLCA, the statutory scheme that created the limited liability company structure, exclusively governs such claims. The defendants also claimed that the trial court incorrectly rendered judgment for the plaintiff on his direct claims concerning the failure of B and T Co. to repay one of the plaintiff's loans to R Co. because the plaintiff lacked standing to seek repayment on the ground that S Co. provided the investment and was the proper party to have asserted that claim. The defendants further claimed on appeal that the trial court had abused its discretion in admitting W's testimony relating to certain of the plaintiff's derivative claims and that the trial court improperly awarded attorney's fees associated with both the plaintiff's CUTPA and non-CUTPA claims rather than those fees attributable to only the CUTPA claims. The plaintiff cross appealed, claiming that the court had abused its discretion in declining to order B to reimburse R Co. for the fees incurred for work performed by W and another accountant retained by the plaintiff or to hold a hearing for the purpose of apportioning those fees. *Held*:

1. This court concluded that, in the absence of a provision in the operating agreements of R Co. and F Co. authorizing the filing of a derivative action, the plaintiff lacked standing to bring his derivative claims on behalf of those companies because neither CLLCA nor the common law provided for a derivative remedy when the plaintiff commenced the present action, and, accordingly, the trial court improperly exercised subject matter jurisdiction over the plaintiff's derivative claims: CLLCA ([Rev. to 2017] § 34-187) authorized only members or managers to collectively commence an action in the name of the limited liability company upon a requisite vote of disinterested members or managers, the common law of this state does not recognize limited liability companies, which were created by the enactment of CLLCA, and recognition of a common-law remedy would conflict with or frustrate the purpose of CLLCA; moreover, because the plaintiff lacked standing to assert its derivative CUTPA claim, the trial court's order awarding the plaintiff attorney's fees and costs under CUTPA was vacated, and this court did not need to address the issues of whether the trial court properly admitted W's testimony and whether the trial court incorrectly apportioned the plaintiff's award of attorney's fees between his CUTPA and non-CUTPA claims.
2. The plaintiff had standing to bring direct claims with respect to the failure of B and T Co. to repay a portion of S Co.'s loan to R Co., and, accordingly, the trial court properly exercised subject matter jurisdiction over the plaintiff's direct claims: this court concluded that, when the member of a single-member limited liability company seeks to remedy a harm suffered by the company, the trial court may, in its discretion, permit the member to bring an action raising derivative claims as a direct action and may order an individual recovery if it finds that to do so will not unfairly expose the company or defendants to a multiplicity of actions, will not materially prejudice the interests of creditors of the company, and will not negatively impact other owners or creditors of the company by interfering with a fair distribution of the recovery among all interested parties; the record revealed that there was no dispute that the plaintiff was the sole member of S Co. and that the loan from S Co. was funded with the plaintiff's personal funds, there was no evidence that creditors of S Co. existed that would have been prejudiced by the plaintiff's recovery, and the trial court's decision to permit the plaintiff to recover directly would not lead to a multiplicity of actions or interfere with a fair distribution of recovery with respect to other interested parties.
3. The trial court did not abuse its discretion in declining to order the defendants to reimburse the plaintiff for the fees he incurred from work performed by W and another accountant retained by the plaintiff to effectuate the winding up process; on the basis of the numerous findings made by the trial court, including the discrepancy of the experience between the parties and the fact that the plaintiff did not timely protect his interests insofar as he failed to hire professional legal and accounting

experts to ensure that the management duties of the companies were properly performed, it was reasonable for the court to determine that the plaintiff's neglect contributed to the complex untangling that W and the other accountant faced during the winding up process.

(*Three justices concurring in part and dissenting in part in one opinion*)

Argued December 20, 2018—officially released December 17, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the named defendant et al. filed a counterclaim; thereafter, the case was transferred to the judicial district of Waterbury, Complex Litigation Docket, where Sloan Saunders et al. were added as counterclaim defendants; subsequently, the case was tried to the court, *Zemetis*, *J.*; judgment in part for the plaintiff on the complaint and on the counterclaim, from which the named defendant et al. appealed and the plaintiff cross appealed; thereafter, the court awarded the plaintiff attorney's fees, and the named defendant et al. filed an amended appeal. *Reversed in part*; *order vacated.*

David P. Friedman, with whom were *Proloy K. Das* and, on the brief, *Marilyn B. Fagelson*, *Taruna Garg*, *David S. Hoopes* and *Jay R. Lawlor*, for the appellants-cross appellees (named defendant et al.).

David Feureisen, pro hac vice, with whom were *Edward N. Lerner* and, on the brief, *George Kent Guarino*, for the appellee-cross appellant (plaintiff).

Opinion

KAHN, J. This appeal requires us to consider five issues: (1) whether, in the absence of authorization in a limited liability company's operating agreement, its members or managers lack standing to bring derivative claims on behalf of it under either the Connecticut Limited Liability Company Act (CLLCA), General Stat-

utes (Rev. to 2017) § 34-100 et seq.,[1] or, in the alternative, the common law; (2) whether a trial court may exempt single member limited liability companies from the direct and separate injury requirement necessary to bring a direct action; (3) under what circumstances may a trial court admit opinion testimony of a joint, court-appointed fiduciary hired to wind up the companies at issue when the party who proffered the testimony of the fiduciary failed to disclose him as an expert witness under Practice Book § 13-4; (4) under what circumstances, if any, may the trial court apportion its award of attorney's fees under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., between the plaintiff's CUTPA claims and non-CUTPA claims; and (5) the parameters under which a trial court may order reimbursement for fees incurred by a joint, court-appointed fiduciary hired to wind up the companies at issue. The defendants, Clark Briner and two entities solely owned by Briner, a Connecticut limited liability company and a Texas limited liability company with the same name, Revere Capital, LLC (respectively, Revere Capital CT and Revere Capital TX),[2] appeal,[3] following a bench trial, from the trial court's judgment. The plaintiff, Roger L. Saunders, cross appeals from the trial court's judgment. We reverse the trial court's judgment rendered in favor of the plaintiff

[1] All references herein to the CLLCA are to the 2017 revision. We note that the events underlying this case occurred over the course of several years; we use the 2017 revision in the interest of simplicity. Our legislature has since repealed the CLLCA, effective July 1, 2017, and replaced it with the Connecticut Uniform Limited Liability Company Act, General Statutes § 34-243 et seq.

[2] Revere Investments, LLC, Revere High Yield GP, LLC, Madison Mott, Inc., Revere High Yield Fund, L.P., and Revere Capital Management, LLC, were also named as defendants but are not parties to this appeal. All references herein to the defendants are to Briner, Revere Capital CT and Revere Capital TX.

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

as to his derivative claims because we conclude that the plaintiff lacked standing to bring them under the CLLCA or the common law. We, therefore, do not reach the issues of whether the trial court improperly admitted the testimony of a joint, court-appointed fiduciary or whether the trial court incorrectly apportioned the plaintiff's award of attorney's fees under CUTPA. We affirm the trial court's judgment rendered in favor of the plaintiff as to his direct claims and conclude that the trial court did not abuse its discretion in refusing to order the defendants to reimburse the plaintiff for the fees incurred by the joint, court-appointed fiduciary and an accountant hired by him.

The present case arises from the deterioration of a business relationship between three individuals: Briner, the plaintiff, and the plaintiff's son, Sloan Saunders (Saunders). The trial court found the following facts that are relevant to our resolution of this appeal. In 2009, while working together at Deutsche Bank, Saunders and Briner decided to enter into the high interest, high yield commercial real estate lending business by setting up a limited liability company, Revere Investments, LLC (Revere Investments), to act as a servicer of the loans. Initially, Saunders and Revere Capital TX each owned 50 percent of Revere Investments and constituted its comanagers.[4] Although Saunders and Briner chose to enter an industry in which they had little experience, Saunders introduced Briner to the plaintiff, Saunders' father, who had successfully navigated the "hard money lending business" for forty years. Briner and Saunders sought the plaintiff's help in two respects. First, they wanted the plaintiff, who had many contacts in that industry, to help them "establish the relationships necessary to create and maintain" the business.

[4] In February, 2012, as the relationship between Briner and Saunders became increasingly hostile, Saunders transferred his membership interest in Revere Investments to the plaintiff.

Second, Briner and Saunders also needed access to the plaintiff's capital "to fund the high interest loans" before they secured investors to participate in them. The parties often did not secure all the investors necessary to fund a loan prior to closing the transaction with the borrower. Throughout their business relationship, therefore, the plaintiff helped Revere Investments succeed by lending it the capital necessary to close loans before the parties raised the necessary capital to finance it (bridge financing). After Revere Investments raised capital from investors to participate in the loan, it repaid the plaintiff the principal amount of his bridge loan with interest. The trial court found that, without the plaintiff's bridge financing, Revere Investments "would have had little or no business."

The plaintiff, who "desired to teach his son" the business, agreed to source loans, secure investors and financers, and provide bridge financing. Although the plaintiff agreed to provide assistance "to his economic detriment and for the equal and joint benefit" of Saunders and Briner, he "was not willing to forgo the . . . profits on *his* investment or [on] the investment of [others] that he would have earned if he simply invested in hard money loans outside of [Revere Investments]." (Emphasis in original.) The plaintiff, Saunders, and Briner, therefore, created a business arrangement in which the plaintiff and his contacts sourced most of the loans and most of the financing, especially at the beginning of their relationship. Revere Investments would charge the borrower a high interest rate. The parties then found investors to purchase a "participation interest" in the loans on a deal specific basis (outside investors). Outside investors would provide capital in exchange for a return of the principal invested plus a negotiated interest rate.

Revere Investments profited from outside investors by offering them a lower interest rate than it received from the borrower on the underlying loan, which pro-

vided Revere Investments with a profit equal to the difference between the two interest rates (interest rate spread profit). Revere Investments also withheld from outside investors various fees that it charged the borrower, such as extension fees, late fees, and servicing fees. Revere Investments charged the borrower "points"[5] "in connection with most of its loans," and, "[i]n all cases where points were charged, [they] were financed by Revere Investments as part of a loan, so that Revere Investments did not advance to the borrower the full principal amount of the loan, but advanced the principal amount less the points" (net funding). Revere Investments did not pass the points to outside investors, however, who received a return of principal and interest only on the amount they actually invested.

Saunders, Briner, the plaintiff, or their respective family members (inside investors) who participated in a loan, by contrast, did profit from points charged to borrowers. The advantageous treatment for inside investors derived from the fact that, unlike the outside investors, they received a return of principal plus interest on the face amount of their investment in the loan, despite the fact that they had not funded the full face amount.[6] This technique of "grossing up" allowed inside investors to receive a higher return on their investment than an outside investor who participated equally in a loan.

As part of the parties' agreement[7] to gross up inside investments, the parties additionally agreed that—in

[5] One point equaled 1 percent of the face or "gross" amount of the loan.

[6] The trial court provided the following example: "If an inside investor invested [$1 million], and received six 'points' (a 6 percent of the gross loan 'origination fee' from the borrower), the inside investor could either . . . present a [$1 million] check to [Revere Investments] and receive back a $60,000 check (points fee on the investment) from [Revere Investments] or simply present [to Revere Investments] a $940,000 check—but either way, the inside investor would be paid interest by [Revere Investments] on the [$1 million] investment."

[7] The trial court found that "[t]he partners initially [orally] agreed that inside investors would receive interest on the 'face amount' of their invest-

exchange for his help—the plaintiff "would also keep both the 'interest rate spread profit' . . . and the 'fees' earned on certain identified and agreed upon *nonfamily* [*investments*]." (Emphasis added.) This allowed the plaintiff to earn profits that Revere Investments otherwise would have earned on the outside investors he sourced. The oral agreement, however, did not give Briner the same rights with respect to the outside investors he sourced.

By mid-2011, Briner had grown dissatisfied with the arrangement allowing the plaintiff but not Briner to profit from outside investors sourced by each of them respectively, because, by that time, Revere Investments' business model and the parties' respective responsibilities had changed. Saunders, Briner and the plaintiff had created—at the request of Briner—a second entity, Revere High Yield Debt Fund, L.P. (Fund), which provided a vehicle for pooling outside investor capital, and a controlling general partner of the Fund, Revere High Yield, GP, LLC (Fund GP), which "was owned equally [and comanaged] by [the plaintiff] and Briner . . . ." Under this revised arrangement, Revere Investments' loans were funded by various combinations of investments, including (1) financing from the Fund, which would pool money from outside investors and buy a single participation interest in a loan, (2) capital from inside investors, and (3) capital from outside investors

ment (not reduced by the origination fee they received during the loan closing), including a pro rata share of the points Revere Investments charged on a loan. Using this method, inside investors rather than Revere Investments would also receive interest-on-points profit regarding investments of [insider] capital. [The plaintiff] would also keep both the 'interest rate spread profit' and the 'fees' earned on certain identified and agreed upon [nonfamily] 'inside investors' funds. During the years of operation, these agreements deprived [Revere Investments] of considerable profits and benefitted [the plaintiff], but this was obvious and understood when the parties agreed upon this conduct at the inception of their business. . . . Though [Briner] denied such an agreement, the court rejects his testimony on this point and accepts the evidence, testimonial and documentary, confirming the parties' agreement." (Footnote omitted.)

that chose to participate in a particular loan alongside the Fund (side car investments)[8].

The parties' formation of the Fund and Fund GP expanded Revere Investments' "loan portfolio size . . . [thereby] increasing the 'back office' workload." During that time, however, Saunders had accepted and begun a full-time job at another investment firm, which required him to work sixty to seventy hours per week. This placed a strain on Briner's relationship with Saunders, because Briner—concerned that Saunders left him to handle much of the work himself, including sourcing the loans and finding the Fund investors—felt that he worked "*disproportionately greater*" than Saunders yet profited less because he could not derive profits from the outside investors he sourced in the same way as the plaintiff did.

Eventually, Briner demanded that the plaintiff and Saunders allow him to "skim the same . . . profits" from Revere Investments and the Fund on his outside investors that the plaintiff received on the investors he sourced. Both the plaintiff and Saunders refused. Despite their refusal, and without their knowledge, Briner created Revere Capital CT, which constituted an inside investor as Briner owned 100 percent and which enabled Briner to conceal the true source of the funds he sourced by placing investments of outsider capital into that company as opposed to the Fund or Revere Investments. Consequently, when Revere Capital CT participated in Revere Investments' loans, either through the Fund or as a side car investment, Briner was able to treat those outside investments as insider capital, allowing him to retain "100 percent of the profits associated therewith," including a benefit from the elevated treatment of points. This conduct effectively

[8] Side car investments "differ from investments *in* the Fund in that, [as a side car] an investor invests in a single loan chosen by the investor, while in the [Fund] the investment is . . . pooled" with other capital and "invest[ed] in multiple loans." (Emphasis in original.)

"erased the distinction between the treatment of [Briner's] 'inside and outside investors,' negatively affecting the profits of [Revere Investments] and/or the Fund and correspondingly increasing [Briner's] personal profits."

In addition to diverting outside capital away from Revere Investments and the Fund in order to profit off of those investments as if they were his own insider capital, Briner also misallocated investor profits by withholding interest on points from the other inside investors, so that they received a return only on the net amount they invested. At the same time, Briner grossed up investments made by his inside investors. Briner also improperly[9] charged Revere Investments for expenses incurred by Revere Capital TX,[10] including employment, rent, travel and advertising expenses. In

[9] The trial court found that Briner "mistreated his business partners by . . . improperly allocating expenses for employees, equipment, supplies, travel, and rent from his privately owned [Revere Capital] to [Revere Investments] and the Fund, by unilaterally altering the long-standing and agreed upon allocation of profits amongst inside/outside/and owners of [Revere Investments] and the Fund, and by improper accounting methods."

[10] The trial court found that, "[i]n 2006, [Briner] had created, and solely owned, Revere Capital [TX], a Texas entity . . . and engaged in the business of 'hard money lending' before partnering with [Saunders and the plaintiff] in the involved ventures. In 2010, [Briner] created, and solely owned, Revere Capital [CT], a Connecticut entity . . . ." The record reveals that, in addition to owning Revere Capital TX prior to the inception of Revere Investments, the parties orally agreed to use "Revere Capital [TX] as the marketing arm" of Revere Investments, as Briner—who made two equity investments through that entity prior to forming Revere Investments with Saunders—felt that he already "had investors that were used to investing in Revere Capital [TX]." Saunders testified that, around the time that the plaintiff commenced litigation, he and the plaintiff learned that Briner had created Revere Capital CT after the parties started Revere Investments. The trial court found that, "[o]n four loans . . . [Briner] intentionally and deliberately violated the agreement [he had] reached with [the plaintiff and Saunders] in the operation of [Revere Investments] and the Fund by placing undisclosed outside capital in [Revere Capital TX and/or Revere Capital CT] then having [Revere Capital TX and/or Revere Capital CT] participate in the loans as an 'inside investor.' " (Footnote omitted.) When questioned at trial whether Briner placed outside capital into Revere Capital CT, rather than Revere Capital TX, to treat those outside investments as his own insider capital and divert profits from Revere Investments, Briner testified that he did not keep separate books and records for each company and could not distinguish between them.

mid-2012, after Saunders discovered Briner's misallocation of points in some of Revere Investments' loan spreadsheets, he and the plaintiff hired outside accountants and legal counsel, who exposed[11] "the extent of [Briner's] incompetent and inconsistent management of [Revere Investments], the Fund, and Fund GP . . . ."

In November, 2012, the plaintiff commenced this action and, in May, 2014, filed the operative twenty-seven count second amended complaint[12] against the defendants, consisting of fourteen direct counts brought by the plaintiff, individually, and thirteen derivative counts brought on behalf of Revere Investments, Fund GP, or both.[13] In addition to moving for judicial dissolution of Revere Investments and Fund GP in

[11] The trial court found that, "[b]y July, 2012 . . . [b]ookkeeping and accounting errors in the management of [Revere Investments] and the Fund were identified by accountants and counsel. The extent of [Briner's] incompetent and inconsistent management of [Revere Investments], the Fund, and Fund GP was discovered and identified, the misallocation of investors' profits uncovered, and the attribution of [Briner's] solely owned company expenses to [Revere Iinvestments]/Fund was exposed."

[12] The defendants asserted ten special defenses and a thirty-three count counterclaim. The trial court deemed the defendants' special defenses abandoned, as the defendants "neither briefed nor argued" them. The defendants withdrew all but nine counts of their counterclaim before the trial court rendered judgment. Following a bench trial, that court then rendered judgment in favor of the plaintiff on counts three, nineteen through twenty-two, and twenty-eight of the defendants' counterclaim. The trial court rendered judgment in favor of the defendants on their counterclaim counts thirty through thirty-three and ordered a declaratory judgment in connection with those counts.

[13] Prior to trial, the trial court granted the defendants' motion to strike the following counts: direct count seven, alleging a violation of the Connecticut Uniform Securities Act; direct count eleven and derivative count nine, alleging statutory theft; direct count twelve and derivative count ten, alleging conversion; and derivative counts three and five, alleging breach of the implied covenant of good faith and fair dealing. The plaintiff withdrew derivative count thirteen, alleging breach of the Fund's limited partnership agreement.

Following trial, the court also rendered judgment in favor of Madison Mott, Inc., a company owned by Briner's wife, on direct counts thirteen and fourteen and derivative counts eleven and twelve, alleging facilitation of breach of fiduciary duty and violations of CUTPA.

direct count one, the plaintiff asserted both direct and derivative counts alleging common-law fraud,[14] breach of contract,[15] breach of the implied covenant of good faith and fair dealing,[16] breach of fiduciary duty,[17] and violations of CUTPA and the Connecticut Uniform Securities Act.[18]

After the plaintiff initiated the action, the parties agreed to hire a joint, court-appointed fiduciary, Citrin Cooperman and Company, LLP (Citrin), to wind up the Fund and Fund GP. After a team led by Citrin's partner Alan A. Schachter examined sixteen of Revere Investments' loans, "totaling nearly $18 million" of Revere Investments' approximately $40 million loan portfolio, Schachter wrote a report containing Citrin's findings. In that report, Schachter noted that the team "found a lack of internal controls" and "a number of . . . reporting and recording problems," which he noted were "not surprising . . . given the lack of oversight and the

[14] In direct count two and derivative count one, the plaintiff alleged common-law fraud against the defendants.

[15] In direct count three and derivative count two, directly and on behalf of Revere Investments, the plaintiff alleged breach of Revere Investments' operating agreement against Revere Capital TX. In direct count five and derivative count four, directly and on behalf of Fund GP, the plaintiff alleged breach of Fund GP's limited liability company agreement against Briner.

[16] In direct counts four and six, the plaintiff alleged breach of the implied covenant of good faith and fair dealing against Revere Capital TX and Briner, respectively.

[17] In direct counts nine and ten and derivative counts seven and eight, the plaintiff alleged breach of fiduciary duty directly and on behalf of Revere Investments and Fund GP against Revere Capital TX and Briner, respectively. In direct count thirteen and derivative count eleven, the plaintiff alleged facilitation of the breach of fiduciary duty against Madison Mott, Inc.

[18] In direct count seven and derivative count twelve, the plaintiff alleged violations of the Connecticut Uniform Securities Act, directly against the defendants and on behalf of Revere Investments against Madison Mott, Inc., as to the derivative claim. In direct count eight and derivative count six, directly and on behalf of Revere Investments, respectively, the plaintiff alleged violations of CUTPA against the defendants. Moreover, in addition to his CUTPA claims against the defendants, in direct count fourteen, the plaintiff alleged violations of CUTPA against Madison Mott, Inc.

complexity of the investments." Schachter concluded that Revere Investments, the Fund, and Fund GP, "as managed by Briner, had underpaid both the investors and the principals, particularly [the plaintiff]." During the bench trial, the plaintiff called Schachter to testify at trial regarding the findings he outlined in his report. Over Briner's objection, the trial court allowed Schachter to testify and admitted his report into evidence.

Following a ten day bench trial, in which the parties distilled "897 trial exhibits exceed[ing] several hundred thousand pages in length," the trial court rendered judgment in favor of the plaintiff on four of his thirteen derivative counts and four of his fourteen direct counts. Under derivative counts two and six, which alleged, on behalf of Revere Investments, breach of contract against Revere Capital TX and violations of CUTPA against the defendants, respectively, the trial court ordered the defendants to pay Revere Investments one payment of $284,600. Under derivative counts seven and eight, which alleged breach of fiduciary duty on behalf of Revere Investments and Fund GP, respectively, the trial court ordered Revere Capital TX to pay Revere Investments and/or the Fund GP one payment of $92,797, under counts seven and eight, and an additional $71,000 under count seven. Under direct counts four and six, alleging breach of the implied covenant of good faith and fair dealing against Revere Capital TX and Briner, respectively, and counts nine and ten, alleging breach of fiduciary duty on the part of Briner and Revere Capital TX, the trial court awarded the plaintiff one payment of $85,078 in connection with the failure to repay one of the plaintiff's loans to Revere Investments. As to direct counts four and six, however, the court rejected the plaintiff's claim that the court should direct Briner to reimburse him for "fees [related to] tax and accounting experts," including Schachter.

After the court rendered judgment, it held a hearing to determine the appropriate amount of attorney's fees to award the plaintiff under derivative count six, which alleged that the defendants had violated CUTPA through Briner's diversion of outside capital into Revere Capital CT. After the posttrial hearing, the trial court filed a memorandum of decision and supplemental order awarding the plaintiff $639,054.91 in attorney's fees pursuant to General Statutes § 42-110g. This appeal followed.

The issues presented for resolution on appeal are numerous. The defendants first challenge the plaintiff's standing to bring any of the direct or derivative counts for which the trial court rendered judgment in his favor. The defendants appeal from the trial court's judgment in favor of the plaintiff as to his claims under derivative counts two, six, seven, and eight—alleging breach of contract, violations of CUTPA, and breach of fiduciary duty—claiming that the trial court lacked subject matter jurisdiction to review the plaintiff's derivative counts, because the CLLCA, the statutory scheme in place at the time the plaintiff commenced his action, did not provide a derivative remedy. Additionally, the defendants claim that, in the absence of such statutory authority by the legislature under the CLLCA, the common law does not afford a member or manager of a limited liability company derivative standing, because the CLLCA, the statute that created that company structure, solely governs this issue. The plaintiff responds that trial courts have interpreted the CLLCA as permitting derivative claims. In the alternative, the plaintiff claims that this court should conclude that the common law grants him derivative standing.

The defendants also appeal from the trial court's judgment in favor of the plaintiff as to his claims under direct counts four, six, nine, and ten, alleging breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. The defendants claim

that the plaintiff lacked standing to challenge Briner's failure to repay one of the plaintiff's loans to Revere Investments, because the plaintiff's single-member limited liability company, Saunders Capital, LLC (Saunders Capital), provided the investment at issue and, therefore, constituted the proper party to bring the action. The plaintiff responds that, because he funded the investment with his personal capital, he satisfies the requirements for direct standing regardless of the source of his investments.

Additionally, the defendants appeal from the trial court's judgment in favor of the plaintiff as to derivative counts seven and eight, claiming, specifically, that the trial court abused its discretion in admitting Schachter's testimony because the plaintiff failed to disclose him as an expert pursuant to Practice Book § 13-4. The plaintiff responds that the trial court did not abuse its discretion in admitting Schachter's testimony in the absence of expert disclosure because he did not call Schachter to testify as an expert but, rather, as a fact witness testifying in his capacity as the court-appointed fiduciary. To the extent that the trial court allowed Schachter to provide expert opinion, the plaintiff claims, Briner suffered no prejudice from its admission, and the trial court needed Schachter's assistance in understanding the complex calculations required to determine what Revere Investments owed to its investors and principals.

Finally, the defendants appeal from the trial court's award of attorney's fees under derivative count six, on which the trial court rendered judgment for the plaintiff under CUTPA. The defendants claim that the trial court improperly awarded attorney's fees associated with both the plaintiff's CUTPA and non-CUTPA claims, rather than those fees attributable only to the CUTPA claims. The plaintiff responds that the trial court properly apportioned attorney's fees under CUTPA because, when parties litigate both CUTPA and non-CUPTA

claims in the same action and those claims involve the same inextricably entwined facts, the trial court does not need to apportion the payment of attorney's fees only to work performed on the CUTPA related claims.

The plaintiff cross appeals from the trial court's judgment on his direct counts four and six insofar as he claims that the trial court abused its discretion in refusing either to order Briner to reimburse Revere Investments for the fees incurred by Schachter and another accountant hired by him or to hold a hearing for the purpose of apportioning those fees. The defendants respond that the trial court properly rejected the plaintiff's request for reimbursement because it determined that all of the owners of Revere Investments, including the plaintiff, bore some responsibility for failing to ensure that Revere Investments operated in accordance with proper bookkeeping and accounting procedures.

We affirm the trial court's judgment rendered in favor of the plaintiff on his direct counts, including its determination not to apportion the fees incurred by Schachter and another accountant hired by him. Because we conclude, however, that the plaintiff lacked standing to bring his derivative claims, we reverse the trial court's judgment in favor of the plaintiff on his derivative counts and vacate the court's award of attorney's fees under CUTPA. Additionally, because we conclude that the plaintiff lacked standing to bring his derivative claims, we do not reach the issue of whether the trial court improperly admitted Schachter's testimony.

I

STANDING

The first two issues we resolve, regarding the standing our state affords to members of limited liability companies to bring derivative claims under the CLLCA and certain direct claims, present matters of first impression. First, the defendants claim that the trial

court incorrectly determined that the plaintiff had standing to bring derivative claims against them. Second, the defendants contend the plaintiff lacked standing to bring direct claims against Briner for failing to repay the remainder of one of the plaintiff's loans to Revere Investments when that company's books and records indicate that the plaintiff's solely owned limited liability company, Saunders Capital, rather than the plaintiff himself, provided the capital.

A

Derivative Standing

We begin by addressing whether, in the absence of authorization in the operating agreements of Revere Investments and Fund GP,[19] the plaintiff lacked standing to bring derivative claims on behalf of those companies under either General Statutes (Rev. to 2017) § 34-187 or, in the alternative, the common law. The defendants claim for the first time on appeal that the plaintiff, a 50 percent member of Revere Investments and Fund

[19] The parties could have authorized the filing of derivative actions in the operating agreements of Revere Investments and Fund GP. See *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317, 138 A.3d 257 (2016) (noting that CLLCA provides default rules regarding operation of limited liability companies but permits "members to supplement these statutory provisions by adopting an operating agreement to govern the [company's] affairs"); *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 837, 43 A.3d 607 (2012) ("[T]he statutory scheme controls and provides for the default method of operation, unless the organizers or members of the limited liability company contract, through the operating agreement, for another method of operation. Indeed, this is one of the foundational principles of the law governing limited liability companies."); 3 L. Ribstein & R. Keatinge, Limited Liability Companies (2d Ed. 2011) Appendix C, p. App. C-109 ("this section does not permit derivative suits unless they are provided for in the operating agreement"). Because the operating agreements of Revere Investments and Fund GP are silent as to the parties' abilities to bring a derivative action, however, we conclude that no such contractual authorization exists in the present case, and the plaintiff's right to sue in a derivative capacity, if it exists, must emanate from the CLLCA or the common law.

GP, lacked standing to bring derivative claims on behalf of those companies under § 34-187 of the CLLCA, the operative statute at the time the plaintiff commenced the present litigation. Further, the defendants claim that, in the absence of legislative authority under the CLLCA, there is no common-law authority granting a member or manager of a limited liability company derivative standing. The plaintiff responds that, although this court has never addressed whether limited liability company members or managers can sue derivatively, other courts have interpreted the CLLCA as permitting it. In the alternative, the plaintiff claims that this court should conclude, as other courts have, that the common law grants him derivative standing.[20] We conclude that,

[20] As a second alternative—that is, if this court were to conclude that the plaintiff lacked standing under the CLLCA and the common law to bring his derivative claims—the plaintiff asks that we conclude, nevertheless, that the trial court retained subject matter jurisdiction over his claims because "the same judicial result would [have] occur[ed] under the court's order awarding judicial dissolution" pursuant to General Statutes (Rev. to 2017) § 34-207. The defendants respond that, because the parties agreed to dissolve the companies, the trial court did not need to make any of its findings to resolve that count. We conclude that, "[b]ecause the plaintiff did not request with specificity any other form of relief besides a dissolution" in count one of his complaint, the plaintiff lacked a legal basis to seek "some other form of relief besides dissolution and winding up." *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 315, 138 A.3d 257 (2016).

In *Styslinger*, this court was asked to determine whether an assignee of a membership interest in a limited liability company had standing to seek a court order winding up the company. Id., 313–14. After concluding that assignees lack standing to seek such orders, we noted that, "[a]ssuming for the sake of argument that an assignee is entitled to seek some other relief, including money damages, for wrongful conduct on the part of the members or managers of [a limited liability company], the plaintiff did not explicitly ask for any other relief besides a court-ordered dissolution and winding up of [that company's] affairs in his complaint. Although the plaintiff requested '[s]uch other and further relief as in law or equity may appertain,' the trial court properly concluded that a more specific request was necessary to put the defendants on notice that the plaintiff was seeking some other form of relief besides dissolution and winding up." Id., 315 n.2.

In *Styslinger*, therefore, we indicated that we would reject a "catchall prayer for relief" to satisfy a claim for money damages when dissolving and winding up a limited liability company. Id. In the present case, the plaintiff

in the absence of a provision in the operating agreements of the respective companies authorizing the filing of derivative lawsuits, the plaintiff lacked standing to bring his derivative claims on behalf of Revere Investments and Fund GP because neither the CLLCA nor the common law provided for a derivative remedy at the time the plaintiff commenced the present action.[21]

The record reveals the following additional facts that are relevant to our resolution of this claim. The oper-

failed to ask for any form of damages under count one but, rather, asked only that the court judicially dissolve Revere Investments and Fund GP. Although the plaintiff requested additional relief at the end of his fifty-one page complaint, the specific requests for damages expressly relate to other counts of the complaint. Additionally, where the plaintiff lists an individual request for relief asking solely for judicial dissolution, he fails to mention any additional damages. Finally, as we noted in *Styslinger*, the plaintiff's catchall prayer requesting "such other and further relief, both legal and equitable, as the court, in its discretion, may deem just and proper," does not suffice to confer standing to seek damages based on the derivative counts in his complaint.

[21] Our conclusion that the plaintiff lacked standing to bring the derivative claims, including the CUTPA counts, disposes of the issues relating to attorney's fees under CUTPA and the challenges to the admission of expert testimony. We observe that, in order to sustain a legal basis for attorney's fees, a plaintiff must first succeed on the merits of his CUTPA claim. See, e.g., *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 329, 63 A.3d 896 (2013) ("CUTPA . . . affords a trial court discretion to award attorney's fees if a violation is established"); *Vezina* v. *Nautilus Pools, Inc.*, 27 Conn. App. 810, 821, 610 A.2d 1312 (1992) ("[t]he moving party must prevail on the CUTPA cause of action before such fees and damages must be awarded"). Accordingly, because we conclude that the plaintiff lacked standing to bring derivative CUTPA claims under the CLLCA, and he has not articulated an alternative basis upon which to grant him attorney's fees, we do not reach the issue of whether the trial court incorrectly apportioned attorney's fees under the plaintiff's derivative CUPTA counts.

In addition, because we conclude that the plaintiff lacked standing to bring derivative counts seven and eight—which alleged breach of fiduciary duty on behalf of Revere Investments and Fund GP, respectively—we do not reach the issue of whether we should reverse the trial court's judgment in favor of the plaintiff as to those counts on the ground that it abused its discretion in admitting the opinion testimony of Schachter—the joint, court-appointed fiduciary hired to wind up the companies at issue—when the plaintiff, who called Schachter to testify, failed first to disclose him as an expert witness under Practice Book § 13-4.

ating agreements of Revere Investments and Fund GP list Briner and/or Revere Capital TX as both a 50 percent member and comanager of those companies. The operating agreement of Fund GP also lists the plaintiff as a 50 percent member and comanager of that company, and evidence at trial indicated that Saunders transferred his 50 percent interest in Revere Investments to the plaintiff in February, 2012.[22] Additionally, the operating agreements of both companies vest the authority to manage the business of each company in its managers (manager-managed). Neither company's operating agreement, however, authorizes its members or managers to bring a derivative action.

In his second amended complaint, in which the plaintiff added derivative claims on behalf of Revere Investments and Fund GP in thirteen separate counts, the plaintiff alleged that, as a member or manager of the companies, he "fully and adequately represent[ed] [their] interests . . . ." He further alleged that he "made demands . . . of Briner on behalf of Revere Investments and [Fund] GP to remedy the issues" upon which he based his claims. To the extent that he failed to make "any formal demand," the plaintiff claimed, "it was [because] such a demand would be futile . . . ."

In its memorandum of decision, the trial court concluded that the plaintiff had standing. With respect to the four derivative counts on which the trial court rendered judgment in favor of the plaintiff, the court noted that, "[i]nsofar as [the plaintiff] alleges misconduct that damaged investors, other than himself, he fairly and

[22] The record indicates that, although Saunders transferred his membership interest in Revere Investments to the plaintiff, the plaintiff did not become a comanager of that company. The plaintiff's status as a member but not a manager of Revere Investments does not affect our legal analysis under § 34-187, as that statute clearly provides that any member of a limited liability company, *regardless of whether that company vests management responsibilities in its members or managers,* may bring an action in the name of the company upon the vote of a majority of disinterested members.

adequately represents the interests of investors in [Revere Investments] and . . . Fund [GP]." The court reasoned that the plaintiff constituted "an investor . . . and a co-owner of [Revere Investments] (after February, 2012)," and "a manager and co-owner of Fund GP."

We begin our review of the trial court's determination with the general principles governing standing to sue. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 704–705, 960 A.2d 563 (2008). "In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also

is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory." (Internal quotation marks omitted.) *PNC Bank, N.A.* v. *Kelepecz*, supra, 289 Conn. 705. The issue of whether the CLLCA provided the plaintiff with a derivative remedy implicates statutory aggrievement, which "exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) Id.

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . [Stated differently, the] plaintiff must be within the zone of interests protected by the statute." (Citation omitted; internal quotation marks omitted.) *McWeeny* v. *Hartford*, 287 Conn. 56, 65, 946 A.2d 862 (2008).

The issue of whether the CLLCA authorizes a member or manager of a limited liability company to bring a derivative action on its behalf presents a question of statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent). We begin by noting that Connecticut first recognized the

limited liability company structure in 1993 when our legislature enacted the CLLCA, a statutory scheme it modeled after the Prototype Limited Liability Company Act (Prototype Act).[23] See *Scarfo* v. *Snow*, 168 Conn. App. 482, 500 n.9, 146 A.3d 1006 (2016) (Connecticut's limited liability company statutory provisions were modeled after Prototype Act). We recently recognized that our legislature enacted the CLLCA in order to establish "the right to form [a limited liability company] and all of the rights and duties of the [limited liability company], as well as all of the rights and duties of members . . . ." *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317, 138 A.3d 257 (2016).

On the basis of the plain language of the act, we conclude that the CLLCA does not permit members or managers to file derivative actions but, rather, authorizes them to collectively commence an action in the name of the limited liability company upon a requisite vote of disinterested members or managers (member initiated action). The CLLCA recognizes the right of the limited liability company "to . . . sue and be sued." General Statutes (Rev. to 2017) § 34-124 (b). General Statutes (Rev. to 2017) § 34-186 generally authorizes "[s]uits . . . brought by or against a limited liability company *in its own name*." (Emphasis added.) Section 34-187[24] provides the procedure that members or man-

[23] The Prototype Act was drafted in 1992 by the Working Group on the Prototype Limited Liability Company Act, Subcommittee on Limited Liability Companies, Committee on Partnerships and Unincorporated Business Organizations of the Business Law Section of the American Bar Association. See 3 Ribstein & R. Keatinge, Limited Liability Companies (2d Ed. 2011) Appendix C, p. App C-109.

[24] General Statutes (Rev. to 2017) § 34-187 provides: "(a) Except as otherwise provided in an operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by: (1) Any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote of a majority in interest of the members, unless the vote of all members shall be required pursuant to subsection (b) of section 34-142; or (2) any manager or managers

agers must follow if they wish to file a lawsuit in the name of the company. Section 34-187 (a) (1) and (b) authorizes any member of a limited liability company, regardless of whether that company vests management responsibilities in its members or managers, to bring an action in the name of the company *upon the vote of a majority of disinterested members*. Likewise, § 34-187 (a) (2) authorizes any manager of a manager-managed limited liability company to bring an action in the name of that company upon the vote necessary under General Statutes (Rev. to 2017) § 34-142 (a), which requires "more than one-half by number of [disinterested] managers . . . ."

Connecticut modeled the procedure set forth in § 34-187 on § 1102 of the Prototype Act.[25] The drafters of the Prototype Act expressly "emphasize[d] that [§ 1102]

of a limited liability company, if the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote required pursuant to section 34-142.

"(b) In determining the vote required under section 34-142 for purposes of this section, the vote of any member or manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded."

[25] Section 1102 of the Prototype Act provides: "Unless otherwise provided in an operating agreement, a suit on behalf of the limited liability company may be brought only in the name of the limited liability company by:

"(a) One or more members of a limited liability company, whether or not an operating agreement vests management of the limited liability company in one or more managers, who are authorized to sue by the vote of more than one half by number of the members eligible to vote thereon, unless the vote of all members shall be required pursuant to § 403 (B), provided that in determining the vote required under § 403, the vote of any member who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded; or

"(b) One or more managers of a limited liability company, if an operating agreements vests management of the limited liability company in one or more managers, who are authorized to do so by the vote required pursuant to § 403 of the members eligible to vote thereon, provided that in determining such required vote, the vote of any manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded." See 3 L. Ribstein & R. Keatinge, Limited Liability Companies (2d Ed. 2011) Appendix C, pp. App. C-107 through App. C-108.

does not permit derivative suits unless they are provided for in the operating agreement." 3 L. Ribstein & R. Keatinge, Limited Liability Companies (2d Ed. 2011) Appendix C, p. App. C-109.[26] Instead, the drafters intended to create a substitute for the derivative action,

[26] The type of action contemplated in the Prototype Act differs from a derivative action, the drafters explained, because § 1102 of the Prototype Act creates procedures to permit disinterested members or managers who agree to sue in the company's name to bring an action—that is, to initiate a suit by the company—rather than permitting "a single member to sue on behalf of the [limited liability company] . . . ." See 3 L. Ribstein & R. Keatinge, supra, p. App. C-109; id., pp. App. C-109 through App. C-110 ("[s]uit by a single member arguably is appropriate in public corporations because the members are generally passive and uninvolved in management and in any event too numerous to coordinate effectively for action against errant managers . . . [whereas] it may not be worth it in closely held firms like the typical [limited liability company] . . . [in which] members can be expected to be actively interested in the firm, and . . . can readily be coordinated for a vote on a suit by the firm"); J. Burkhard, "Resolving LLC Member Disputes in Connecticut, Massachusetts, Pennsylvania, Wisconsin, and the Other States that Enacted the Prototype LLC Act," 67 Bus. Law. 405, 409 (2012) (comparing derivative action's "dual purpose," in which shareholders first compel corporation to sue and then file suit on its behalf, with Prototype Act's direct action, which lacks precondition that company failed to act). We observe that, unlike the member initiated action provided in § 34-187, the section authorizing a single member to bring a derivative action under our new limited liability company statute—the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq.—requires a two step process. First, under General Statutes § 34-271a, a member of a manager-managed limited liability company who desires to bring a derivative action must first attempt to compel the company to sue by serving upon the other managers "a demand . . . [to] cause the company to bring an action . . . ." Second, if the managers fail to "bring the action within ninety days" or a demand on them "would be futile," then the member may file suit on behalf of the company. General Statutes § 34-271a (1) and (2).

Burkhard and other commentators have noted that some courts, apparently overlooking commentary by the drafters of the Prototype Act, have conflated the member initiated action with the derivative action. See, e.g., J. Burkhard, supra, 67 Bus. Law. 411 ("[i]n spite of the rather clear direction that Prototype Act [§] 1102 replaces the derivative suit . . . such has not always been how the courts have applied their respective statutes, and there appears to be substantial confusion among the courts as to how the statute should be applied"); A. Gladden, "Beyond Direct vs. Derivative: What *Muccio* v. *Hunt* Tells Us about Arkansas LLCs," 51 Ark. Law. 34, 35 (2016) (ques-

which they deemed more appropriate "in closely held firms like the typical [limited liability company] . . . [in which] members can be expected to be actively interested in the firm, and . . . can readily be coordinated for a vote on a suit by the firm." Id., p. App. C-110. The "extra expense" and procedural hurdles required to bring a derivative action, the drafters reasoned, "may not be worth it" in the limited liability company context; id.; which differs from that of "public corporations . . . [where] the members are generally passive . . . uninvolved in management and . . . too numerous to coordinate effectively for action against errant managers." Id., p. App. C-109.

We conclude, therefore, that, in adopting a functionally identical provision to § 1102 of the Prototype Act, our legislature chose to omit the derivative action under the CLLCA for members and managers of limited liability companies.[27] Consequently, the plaintiff in the pres-

tioning decision of Arkansas Supreme Court applying shareholder derivative action principles to limited liability companies despite existence of member initiated action in its limited liability company statute).

[27] Our conclusion is consistent with the context surrounding our legislature's enactment of the CLLCA and its enactment of our current limited liability company statute, the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq. Not only did our legislature decline to provide for a derivative cause of action in the CLLCA but, when it enacted the CLLCA, it also did not modify our derivative action statute, General Statutes § 52-572j, to include limited liability companies. See *Ward* v. *Gamble*, Docket No. CV-08-5017829-S, 2009 WL 2781541, *3 (Conn. Super. July 23, 2009). The fact that the legislature did not modify § 52-572j after its enactment of the CLLCA suggests that it did not intend to allow derivative actions for that type of corporate structure. See, e.g., *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010) ("[t]he legislature is always presumed to have created a harmonious and consistent body of law" [internal quotation marks omitted]).

Additionally, our interpretation that the legislature intended to omit a statutory derivative remedy in the CLLCA is strengthened by its later choice to expressly include that authority in the CULLCA. See, e.g., *Celentano* v. *Oaks Condominium Assn*, 265 Conn. 579, 597, 830 A.2d 164, 176 (2003) (citing cases that note that "subsequent legislative act may throw light on the legislative intent of an earlier related act" [internal quotation marks omitted]). The defendants claim that the legislature did not intend for the

ent case failed to allege that he undertook the proper procedure to maintain standing under the CLLCA. Although the allegations set forth in the plaintiff's second amended complaint—namely, that he was a member or manager of both companies and that either he made demands on Briner or such demands were futile—comport with the procedural requirements for bringing a derivative action under the CULLCA, they do not comply with the requirements for bringing a member initiated action under the CLLCA.[28]

CULLCA to apply retroactively. Because the CULLCA expressly provides that it applies prospectively; see General Statutes § 34-283b; and the plaintiff filed the present action in November, 2012, we agree. See, e.g., *D'Eramo* v. *Smith*, 273 Conn. 610, 621, 872 A.2d 408 (2005) ("procedural or remedial statutes are intended to apply retroactively [only] absent a clear expression of legislative intent to the contrary" [internal quotation marks omitted]).

[28] We recognize that, "because of the closely held nature of many [limited liability companies] there may be little difference between the derivative remedy and the one proposed in this section." 3 L. Ribstein & R. Keatinge, supra, p. App. C-110. Practically, the two types of actions—member initiated and derivative—differ in that, in a derivative action, the parties litigate whether demand was made or whether it was futile and, in a member initiated action, the parties litigate whether a given member's or manager's interest was adverse to the company. The plaintiff in the present case, however, was required to follow the procedure provided by statute in this jurisdiction at the time he filed his action. As such, the CLLCA required him to allege that he did not need to request a vote of Briner, whose interests were adverse to that of both companies.

Our interpretation regarding the mutual exclusivity of the two types of actions finds support in later versions of the Prototype Act and decisions by other legislatures that adopted the Prototype Act. In 2011, the Revised Prototype Limited Liability Company Act (Revised Prototype Act) was published by the Revised Prototype Limited Liability Company Act Editorial Board, Subcommittee on Limited Liability Companies, Partnerships and Unincorporated Entities of the Business Law Section of the American Bar Association. The Revised Prototype Act contains provisions permitting both the member initiated and derivative causes of action, derived from, inter alia, the Revised Model Business Corporation Act of 2007. See 3 L. Ribstein & R. Keatinge, Limited Liability Companies (Rev. Ed. 2019) Appendix G (noting that "[t]he original Prototype Act did not provide for derivative actions" but not explaining reasons for providing both remedies). Additionally, we observe that at least one other state that adopted the member initiated action from the Prototype Act chose to include, although absent from the Prototype Act itself, a separate provision permitting derivative actions. See

The plaintiff asks this court, however, to look past the CLLCA and conclude that, despite our legislature's omission of a derivative remedy in the CLLCA, limited liability company members and managers may sue derivatively under the common law.[29] We have recently

Ky. Rev. Stat. Ann. § 275.330 (LexisNexis 2012) (authorizing suit by or against limited liability company in its own name); Ky. Rev. Stat. Ann. § 275.335 (LexisNexis Supp. 2018) (providing for member initiated action authorizing members or managers to sue in name of company). But see Ky. Rev. Stat. Ann. § 275.337 (LexisNexis Supp. 2018) (providing members of limited liability companies with derivative remedy).

[29] The plaintiff relies on state trial court and federal District Court cases to claim that Connecticut courts have recognized a common-law derivative action for limited liability company members. Those decisions, however, are not binding on our court. Moreover, we are not persuaded by the reasoning in those cases, as the standing challenges in those cases chiefly contemplate a member's ability to bring direct, not derivative, causes of action. See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017) (limited liability company member lacked standing to bring direct claim because company was party directly harmed); *Scarfo* v. *Snow*, supra, 168 Conn. App. 497 (same); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214–15, 55 A.3d 583 (2012) (same), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

The most compelling case, *Ward* v. *Gamble*, Docket No. CV-08-5017829-S, 2009 WL 2781541 (Conn. Super. July 23, 2009), in which the trial court contemplated whether the plaintiff in that case could maintain a *direct* action against the other members of the limited liability company, directly addressed whether our common law provides members of limited liability companies with a derivative cause of action. Id., *3–4. In concluding that the plaintiff could not bring a *direct* action to remedy alleged harm *to the company*, the trial court noted that he had to bring those claims as a derivative action on behalf of the company. Id.

In reaching that conclusion, however, the trial court recognized that "there is no appellate authority in Connecticut directly addressing the applicability of derivative actions to [limited liability companies]" but, nonetheless, concluded that derivative actions are available to limited liability company members because the decision of "the Appellate Court in *Wasko* [v. *Farley*, 108 Conn. App. 156, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008)] . . . supports [the] conclusion" that, "[if] . . . a member may not sue individually for an injury to the [limited liability company] . . . [then] the need for a derivative action is virtually self-evident." (Footnote omitted; internal quotation marks omitted.) *Ward* v. *Gamble*, supra, 2009 WL 2781541, *4. Because, as we have explained in this opinion, the CLLCA provided members with the member initiated action, an alternative standing proposition, in which members could collectively bring suit in the company's name, we disagree with the reasoning in *Ward*. In addition, for the same reasons,

explained, however, that "[o]ur common law does not recognize [limited liability companies], which were first created by [the enactment of the CLLCA]." *Styslinger* v. *Brewster Park, LLC*, supra, 321 Conn. 317. The question we must resolve, therefore, is "whether the recognition of [this] common-law remedy would conflict with or frustrate the purpose of the [CLLCA] . . . ." (Internal quotation marks omitted.) *Caciopoli* v. *Lebowitz*, 309 Conn. 62, 69, 68 A.3d 1150 (2013). For the reasons we have already explained, we conclude that it would. Consistent with our reasoning, we observe that other Prototype Act jurisdictions have held that members and managers of limited liability companies must follow the procedure for bringing a member initiated action and, as such, lack standing to bring derivative actions under the common law. See, e.g., *Marx* v. *Morris*, 386 Wis. 2d 122, 148, 925 N.W.2d 112 (2019) (declining to "judicially import . . . corporate derivative standing provisions into the [limited liability company] context where the legislature has not done so").[30] Consequently, we conclude that the trial court improperly exercised subject matter jurisdiction over the plaintiff's claims on behalf of Revere Investments and Fund GP.

B

Direct Standing

We next address whether the trial court incorrectly determined that the plaintiff had standing to bring direct

we decline to adopt the reasoning in *Beckworth* v. *Bizer*, 138 F. Supp. 3d 144 (D. Conn. 2015), in which the United States District Court for the District of Connecticut relied on *Ward*. Id., 157.

[30] But see *In re Patel*, 536 B.R. 1, 16 (Bankr. D.N.M. 2015) ("The fact that [New Mexico's member initiated action section] does not address whether a claim is direct or derivative does not mean the legislature intended to dispense with long-standing [common-law] principles governing shareholder/member derivative actions. . . . The [c]ourt will therefore apply principles of common law governing corporations—and in particular New Mexico law—to determine whether [the plaintiffs'] claims [were] direct or derivative." [Citation omitted.]).

claims alleging breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing against Briner and Revere Capital TX for failure to repay one of his loans, the LR Global bridge loan. The defendants claim that, because Saunders Capital made the investment at issue, the plaintiff lacked standing to bring a direct claim seeking repayment, as he lacked a distinct and separate injury from the company. According to the defendants, therefore, we should reverse the trial court's judgment as to those claims because the plaintiff was required to bring the action on behalf of Saunders Capital.[31] The plaintiff acknowledges the general rule prohibiting a member of a limited liability company from bringing a direct action when seeking to recover for a harm suffered by the company. He argues, however, that the general rule should not apply because he financed the loan with his personal capital through his wholly owned company. The plaintiff, therefore, asks this court to conclude that he satisfies the requirements for direct standing regardless of his use of Saunders Capital as a conduit. We conclude that, in the present case, the trial court correctly concluded that the plaintiff had standing to bring direct claims with respect to the LR Global bridge loan.

The record reveals the following additional facts that are relevant to our resolution of this claim. In connection with one particular loan made by Revere Investments to LR Global, the plaintiff loaned Revere Investments, through his single-member, solely owned

[31] The defendants claim that the plaintiff would have had to bring a *derivative* action on behalf of Saunders Capital. Because this court concludes, however, that our legislature did not provide for and our common law did not recognize a derivative cause of action for limited liability companies at the time the plaintiff filed his action, we observe that, were this court to conclude that the plaintiff lacked direct standing, the proper procedure for bringing an action on behalf of Saunders Capital under the CLLCA would have been for the plaintiff to bring an action in the name of Saunders Capital under § 34-187.

company, Saunders Capital, $398,000 of bridge financing. Saunders Capital appears on the spreadsheets for these loans as the provider of the bridge capital.[32] Although other investors eventually participated in the loan to LR Global, the plaintiff later converted a portion of his bridge capital, the amount of which was disputed at trial, into a permanent investment. After the parties began winding down the companies, however, the plaintiff learned that Briner, whom he had "entrusted . . . to perform [Revere Investments'] 'back office' duties," failed to repay him the remainder of the amount he initially funded.

In direct counts four, six, nine, and ten, and derivative counts seven and eight of his second amended complaint, the plaintiff claimed, inter alia, that Briner and Revere Capital TX breached their fiduciary duty and the implied covenant of good faith and fair dealing by failing to repay the remainder owed to the plaintiff on his LR Global bridge loan. In their posttrial brief, the defendants claimed, for the first time, that the plaintiff lacked standing to seek damages with respect to the LR Global bridge loan because Saunders Capital provided the funding. Although the trial court did not address the defendants' argument in its memorandum of decision, it rendered judgment in favor of the plaintiff with respect to the aforementioned counts, finding that Briner had failed to repay the plaintiff $55,000 of his bridge loan and, after including accrued interest, awarded him a total of $85,078.

On appeal, the defendants claim that the trial court improperly exercised subject matter jurisdiction over

[32] The defendants suggest that some investments made by the plaintiff originated from the plaintiff's pension plan. We observe that the defendants do not directly state that the loans at issue in this appeal came from the plaintiff's pension plan, and the record does not suggest it. Accordingly, we confine our discussion to whether the plaintiff could assert direct claims to recover the outstanding bridge capital even though the investment funds came from his limited liability company and not directly from him.

the plaintiff's direct claims for breach of fiduciary duty and the implied covenant of good faith and fair dealing with respect to the LR Global bridge loan. The defendants cite to our decision in *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017), in which this court held that members of limited liability companies cannot bring direct actions to recover for injuries suffered by the company. The plaintiff responds that our rule in *Channing Real Estate, LLC*, does not apply to this case because, as the sole member and owner of his company, he had exclusive authority[33] to "withdraw and use [personally owned capital]."[34] The question presented, therefore, is whether to exempt single-member limited liability companies from the direct and separate injury requirements necessary to bring a direct action. We conclude that, when the unique circumstance arises in which the sole member of a limited liability company seeks to remedy a harm suffered by it, a trial court may permit such a member to bring his claims in a direct action, as long as doing so does not implicate the policy justifications that underlie the distinct and separate injury requirement.

We begin with the general principles governing classical aggrievement. Although the question of whether the plaintiff lacked derivative standing concerned the CLLCA—which provided a substitute to the derivative remedy—and, therefore, implicated statutory aggrievement principles, the plaintiff does not assert that § 34-187 authorized him to bring his direct claims.

[33] The record reveals that, before trial and at trial, the parties did not dispute that the capital loaned by the plaintiff was personally owned by him.

[34] The plaintiff further argues "that the defendants' multiple admissions of liability for the LR Global [bridge] loan" amount to a judicial admission that should afford him standing. We observe, however, that an admission that the plaintiff was personally injured does not resolve the issue of whether he "sustain[ed] a loss [that was] separate and distinct from that of" Saunders Capital. *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 282, 422 A.2d 311 (1979).

"The fundamental test . . . [therefore is] twofold . . . . [F]irst, 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]." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214–15, 982 A.2d 1053 (2009).

This court has not addressed the specific question of whether the member of a single-member limited liability company has standing to bring an action directly on behalf of the company. We derived the general rule outlined in *Channing Real Estate, LLC*—that members of limited liability companies cannot bring a direct action alleging harm to the company—from the direct injury requirements imposed on shareholders.[35] Consequently, the rationale behind the distinct and separate injury requirement as explained in the corporate law context provides an informative backdrop. We explained in *Channing Real Estate, LLC*, that "[a] distinction must be made between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue . . . on behalf of the corporation alleged to be injured." *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 281, 422 A.2d 311 (1979). The distinction between a direct and derivative action

[35] Our conclusion in *Channing Real Estate, LLC*, reflects the well established corporate law principle that a shareholder must bring a derivative, rather than a direct, action to seek redress for injuries to the corporation. See, e.g., *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 281, 422 A.2d 311 (1979) ("a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding 'secondarily,' deriving his rights from the corporation which is alleged to have been wronged").

turns on whether the alleged "injury sustained . . . is peculiar to [that shareholder] alone" or whether, by virtue of harm suffered by the company, it affects all of the shareholders collectively. Id., 282 n.9. In the latter situation, the plaintiff must proceed " 'secondarily,' deriving his rights from the corporation which is alleged to have been wronged." Id., 281.

We observe that the rule prohibiting shareholders from bringing a direct action to recover for a harm suffered by the corporation addresses the following policy rationales: (1) the protection of other shareholders and creditors of the company; (2) the avoidance of multitudinous litigation; and (3) the equal distribution of recovery to injured parties. See, e.g., *Barth* v. *Barth*, 659 N.E.2d 559, 561 (Ind. 1995). The American Law Institute explains that, if a shareholder sues directly for a harm that impacts multiple shareholders, the "injured shareholders other than the plaintiff will [not] share in the [plaintiff's] recovery [unless] the action is [brought as] a class action . . . on behalf of all [of] these shareholders." 2 A.L.I., Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.01, comment (d), p. 20. Likewise, a plaintiff's direct action can prevent creditors of the corporation from sharing in any recovery. Id.; see also *May* v. *Coffey*, 291 Conn. 106, 119 n.9, 967 A.2d 495 (2009) (noting, in dictum, that allowing minority shareholders to bring direct action for majority's dilution of preexisting shares "would encourage . . . multiple lawsuits"). Consequently, a direct action alleging harm to multiple shareholders can "unfairly expose the corporation or the defendants to a multiplicity of actions" by shareholders or creditors that later bring claims and affect the ability of those later plaintiffs to receive "a fair distribution of the recovery . . . ." 2 A.L.I., supra, § 7.01 (d), p. 17.

An action brought by one shareholder on behalf of the company or derivative action, by contrast, alleviates

the concerns posed by the direct action. It "distributes the recovery more broadly and evenly than a direct action . . . [because it] goes to the corporation, [allowing] creditors and others having a stake in the corporation [to] benefit financially from [it] . . . ." Id., § 7.01, comment (d), p. 20. Similarly, because the corporation's recovery will be distributed to other shareholders, "[that derivative] action will have a preclusive effect that spares the corporation and the defendants from being exposed to a multiplicity of suits." Id. Courts, therefore, can protect the interest of other shareholders and creditors of the corporation, avoid a multiplicity of actions, and distribute equal recovery to all the injured parties by requiring shareholders to bring an action on behalf of the corporation.

The law, however, has recognized some exceptions to this corporate rule. The United States Court of Appeals for the Ninth Circuit, for example, recognized that, in some circumstances, the policy reasons for requiring shareholders to bring an action on behalf of the corporation may not be present even though the action alleges in substance a corporate injury. *Watson* v. *Button*, 235 F.2d 235, 237 (9th Cir. 1956); see id. (concluding that Oregon law would permit individual recovery by shareholders, although injury belonged to corporation, where rights of creditors and other shareholders are not prejudiced and there exists no threat of multiplicity of actions); see also 2 A.L.I., supra, § 7.01, comment (e), p. 21, citing *Watson* v. *Button*, supra, 237. Partly in response to *Watson*, the American Law Institute promulgated a rule for actions brought by members of closely held corporations that permits trial courts to treat the shareholders' otherwise indirect claims as direct claims.[36] See 2 A.L.I., supra, § 7.01 (d),

[36] We recognize that the commentary to § 1102 of the Prototype Act rejected a wholesale adoption of 2 A.L.I., supra, § 7.01 (d), as part of the general rule. See 3 L. Ribstein & R. Keatinge, supra, pp. App. C-111 through App. C-112. The commentary also acknowledged, however, that, when it comes to closely held corporations, there may be little difference between

p. 17. According to the American Law Institute, before a trial court can "treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, it [must first find] that to do so will not (i) unfairly expose the corporation or defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons."[37] Id.

Following the American Law Institute's rationale, courts from other jurisdictions[38] have adopted excep-

direct and derivative claims, and recognized that "[c]ourts may permit claims that essentially seek redress on behalf of the firm to be brought directly." Id., p. App. C-111. Thus, the commentary contemplated exceptions to the general rule that would allow, under certain narrow circumstances such as those in the present case, a member to bring direct claims on behalf of the LLC.

[37] We disagree with the dissent's suggestion that, by looking to *Watson* v. *Button*, supra, 235 F.2d 235, and the American Law Institute for guidance, our decision implicates the concerns this court expressed in *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 148–49, 84 A.3d 840 (2014). In the present case, this court did not raise the issue sua sponte. The plaintiff has raised the issue of whether he has direct standing to sue in light of his status as the sole owner and member of the company. In resolving that issue, which has been presented to the court, we are not limited to the authorities relied on by the parties. We therefore disagree with the dissent that it is necessary to seek further briefing from the parties in order to resolve the issue.

[38] We recognize that this court declined to adopt the American Law Institute's exception in the corporate law context in *Fink* v. *Golenbock*, 238 Conn. 183, 202–203, 680 A.2d 1243 (1996), and *May* v. *Coffey*, supra, 291 Conn. 111, 120–22. Those cases, however, are distinguishable from the present case. In *Fink*, a 50 percent shareholder filed suit against the other 50 percent shareholder and an employee of the shareholders' pediatric practice, alleging that the defendants violated, inter alia, CUTPA. *Fink* v. *Golenbock*, supra, 185–86. The trial court rendered judgment for the plaintiff, and the defendants appealed, claiming that the plaintiff lacked standing to bring his CUTPA claims derivatively. Id., 211–13. On appeal, this court affirmed the trial court's judgment on the ground "that the plaintiff's derivative action was proper" and, therefore, did not reach the issue of whether the plaintiff could have brought a direct action. Id., 198, 200. This court recognized in *Fink*, however, that "there may be some instances in which the facts of a case give rise

either to a direct or to a derivative action—such as when an act affects both the relationship of a particular shareholder to the corporation and the structure of the corporation itself, causing or threatening injury to the corporation." Id., 202.

In *May*, minority shareholders of Latex Foam International Holdings, Inc. (Latex), alleged that the majority shareholders of Latex set the price of shares during a multiphase stock offering "too low, resulting in the dilution of the plaintiffs' percentage ownership in the company." *May* v. *Coffey*, supra, 291 Conn. 110–11. This court concluded that the facts presented in *May* did not "allow for the [trial] court to exercise . . . discretion" in permitting the plaintiffs to bring their claims in a direct action, because—regardless of whether Latex constituted a closely held corporation—the harm was suffered by all the shareholders collectively, and, as such, the plaintiffs could not allege a separate and distinct injury. Id., 119–20; cf. *Wilcox* v. *Webster Ins., Inc.*, supra, 294 Conn. 216–21 (members of limited liability company sufficiently alleged standing because their allegations that they were insureds under limited liability company's insurance policy demonstrated individual interests sufficient to challenge recovery under those policies). We reasoned, therefore, that the facts in *May* did not rise to the type of dual standing contemplated in *Fink*. *May* v. *Coffey*, supra, 120. We observe, however, that, even under § 7.01 (d) of the Principles of Corporate Governance, the plaintiff shareholders in *May* would lack standing because the fact that all of the shareholders suffered harm would lead to a risk of a multiplicity of suits and uneven distribution of recovery. See, e.g., *Trieweiler* v. *Sears*, 268 Neb. 952, 982, 689 N.W.2d 807 (2004). In the present case, by contrast, the "fraud affecting [the plaintiff] . . . does not fall alike upon other shareholders"; id., 982; because none exists.

Additionally, we observe that the question before us differs from the questions presented to this court in *May* and *Fink*. Unlike in those cases—in which we contemplated whether the plaintiffs sustained an injury that was sufficiently separate and distinct from the other shareholders of the same corporation in order to allow them to bring their claims in a direct action—in the present case, we are not presented with whether, through Briner's failure to repay the plaintiff's LR Global bridge loan, the plaintiff sustained an injury sufficiently separate and distinct from that of Briner, the other 50 percent shareholder of Revere Investments but, *rather*, whether the plaintiff suffered an injury separate and distinct from Saunders Capital, which provided the bridge funding at issue, in order to justify bringing a direct action for harm suffered by that company.

We additionally acknowledge that, in *May*, we quoted *Smith* v. *Snyder*, 267 Conn. 456, 461, 839 A.2d 589 (2004), in which we alluded to the principle that even a sole shareholder lacks standing to assert claims alleging wrongs to the corporation. See *May* v. *Coffey*, supra, 291 Conn. 115. We observe, however, that these cases are distinguishable because neither of them involved limited liability companies or sole shareholders. The question presented in this appeal, therefore, is one of first impression. We observe, additionally, that the question remains one of first impression, notwithstanding decisions on the subject by the Appellate Court. We recognize that the Appellate Court did not allow a sole member of a limited liability company to bring a direct action alleging breach of contract arising out of the failed

tions permitting trial courts to treat otherwise derivative claims in a direct action where the plaintiff shareholder belongs to a closely held corporation. See, e.g., *Trieweiler* v. *Sears*, 268 Neb. 952, 983, 689 N.W.2d 807 (2004) ("the concept of a corporate injury that is distinct from any injury to the shareholders approaches the fictional in the case of a firm with only a handful of shareholders"); *Durham* v. *Durham*, 151 N.H. 757, 762, 871 A.2d 41 (2005) ("[T]he derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become purely technical. . . . In cases . . . [in which] the principles underlying the derivative proceeding are not served, the trial court [may] allow the plaintiff to pursue a direct claim against the corporate officers." [Citation omitted; internal quotation marks omitted.]); *Aurora Credit Services, Inc.* v. *Liberty West Development, Inc.*, 970 P.2d 1273, 1280 (Utah 1998) (permitting minority "[s]hareholders in a closely held corporation [to] bring directly claims which are by nature derivative"); see also *Thomas* v. *Dickson*, 250 Ga. 772, 774–75, 301 S.E.2d 49 (1983) (holding that derivative action was properly maintained as direct action where factors outlined in *Watson* v. *Button*, supra, 235 F.2d 237, were not implicated); *Barth* v. *Barth*, supra, 659 N.E.2d 562 (adopting American Law Institute approach); *Mynatt* v. *Collis*, 274 Kan. 850, 872–73, 57 P.3d 513 (2002) (adopting American Law Institute approach); *Derouen* v. *Murray*, 604 So. 2d 1086, 1091 n.2 (Miss. 1992) (approving of American Law Institute approach in dictum); R. Thompson, "The Shareholder's Cause of Action for Oppression," 48 Bus.

sale of a limited liability company to the defendant; see *Padawer* v. *Yur*, 142 Conn. App. 812, 813–15, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); however, there was no indication in *Padawer* that the Appellate Court considered the American Law Institute principles we adopt today.

Law. 699, 735 (1993) (noting that "[a] growing number of courts . . . [have] permit[ed] direct suits in close corporation settings where the complaint is one that, in a public corporation setting, must be brought as a derivative action"). At least one other jurisdiction has extended this concept to limited liability companies. See *Dalton* v. *McLarty*, 671 Fed. Appx. 247, 248 (5th Cir. 2016) (citing corporate law case recognizing exception and anticipating that Mississippi law would allow direct action by member of limited liability company); see also S. Miller, "What Buy-Out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company?," 38 Harv. J. on Legis. 413, 453 (2001) ("Because of the closely held nature of the [limited liability company], there may be little practical difference between a direct suit and a derivative suit. Therefore, the [American Law Institute's] analysis of derivative and direct suits with respect to close corporations may well apply to privately owned [limited liability companies].").

These authorities persuade us that, in cases such as this one, a narrowly tailored exception can provide a more flexible mechanism for addressing member standing.[39] This is especially true under circumstances, like those in the present case, in which both the parties and the court system expended time and resources to litigate these matters and the "concept of a corporate injury that is distinct from any injury to [its sole member] approaches the fictional . . . ." (Internal quotation marks omitted.) *Aurora Credit Services Inc.* v.

[39] We recognize that trial courts will apply this exception only in rare circumstances, such as those in the present case, in which neither party disputed that the plaintiff belongs to a single member limited liability company or that the capital he seeks to recover belonged to him personally. We observe that had the defendants raised this issue earlier, the plaintiff could have readily addressed and cured it by amending his complaint.

We also recognize the concerns articulated by jurisdictions that have declined to adopt a version of the closely held corporate exception. See 2 A.L.I., supra, § 7.01 (d), p. 17. Courts in those jurisdictions require sharehold-

Liberty West Development, Inc., supra, 970 P.2d 1280.

ers to bring their claims derivatively on the basis of two main policy rationales. First, those courts articulate the goal of promoting the consistency and predictability of corporate rules. See, e.g., *Simmons* v. *Miller*, 261 Va. 561, 575, 544 S.E.2d 666 (2001) (noting that corporate rules should be predictable, "allowing . . . investors . . . to vary the rules by contract if they think deviations are warranted" [internal quotation marks omitted]). Similarly, the dissent suggests that the majority's approach undermines the advantages of predictability and stability. As we explained, however, this limited exception would apply in rare circumstances, under which the plaintiff would have been entitled to the same relief by a simple amendment to the form of the pleading. There is no indication from the significant number of jurisdictions that have adopted the exception that doing so has resulted in corporate unpredictability or instability. See, e.g., *Trieweiler* v. *Sears*, supra, 268 Neb. 983; *Durham* v. *Durham*, supra, 151 N.H. 762. Indeed as the Supreme Court of New Hampshire noted, although "consistency in the law is important . . . the derivative proceeding involves burdensome, and often futile, procedural requirements . . . ." *Durham* v. *Durham*, supra, 762. This is especially true in a case such as this one, in which the parties agreed that the bridge loan consisted of the plaintiff's money.

Second, courts rejecting the closely held corporation exception note that individuals employing the corporate structure to enjoy limited liability should not also be able to disregard that form to recover for corporate losses. See, e.g., *Landstrom* v. *Shaver*, 561 N.W.2d 1, 14 (S.D. 1997) (The court noted that the plaintiff sought "the best of both business entities: limited liability provided by a corporate structure and direct compensation for corporate losses. 'That cushy position is not one the law affords. Investors who created the corporate form cannot rend the veil they wove.' "). Allowing investors to disregard the corporate form in order to recover for corporate losses owed to them individually, however, is consistent with our treatment of corporate entities in other contexts. For example, our jurisdiction allows trial courts to disregard the corporate form under circumstances in which a creditor seeks to pierce the corporate veil and reach the assets of a sole or majority shareholder who exercises such domination and control that the corporation is considered to have "no separate . . . existence of its own." *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 553, 447 A.2d 406 (1982) (looking to control and domination over corporation as factor in determining whether to pierce corporate veil); see also Public Acts 2019, No. 19-181, §§ 1 and 2 (codifying traditional veil piercing).

Further, there is no risk of double recovery by the shareholder and the company, as this court has stated that, "[i]f the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by . . . the holder of ownership in it is conclusive upon the [corporation] as to issues determined therein," and reasoning, in part, that the "interests of the corporation's management and stockholders

Consequently, we conclude that the trial court may permit the member of a single-member limited liability company to bring an action raising derivative claims as a direct action and may order an individual recovery if it finds that to do so will not (1) unfairly expose the company or defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the company, or (3) negatively impact other owners or creditors of the company by interfering with a fair distribution of the recovery among all interested parties.[40]

In the present case, the trial court properly exercised subject matter jurisdiction over the plaintiff's direct claims. Although the defendants did not challenge the plaintiff's standing to directly recover the remainder of his LR Global bridge loan until after the close of evidence in their posttrial brief, the trial court's exercise of jurisdiction implicitly relies on and is supported by

and the corporation itself generally fully coincide . . . [and, therefore] there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct." (Internal quotation marks omitted.) *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 869, 675 A.2d 441 (1996).

[40] We observe that a majority of the jurisdictions that have adopted a version of the American Law Institute's provision, § 7.01 (d), have applied an abuse of discretion standard of review. See, e.g., *Barth* v. *Barth*, 693 N.E.2d 954, 957–58 (Ind. App. 1998) (reviewing, under abuse of discretion standard, trial court's dismissal of action after that state's Supreme Court had adopted American Law Institute's provision and remanded case to trial court to determine whether plaintiff met three factors); *Mynatt* v. *Collis*, supra, 274 Kan. 873 (noting that "[a] trial court's reason for its decision is immaterial if the ruling is correct for any reason" [internal quotation marks omitted]); *Mathis* v. *ERA Franchise Systems, Inc.*, 25 So. 3d 298, 302 (Miss. 2009) ("trial judge did not abuse his discretion in holding that [the plaintiff] could not pursue his derivative claims in a direct action"); *Schumacher* v. *Schumacher*, 469 N.W.2d 793, 799 (N.D. 1991) ("[t]he ultimate question is whether the trial court's refusal to allow [the plaintiffs] to bring a direct action constituted an abuse of the court's discretion"). But see *Trieweiler* v. *Sears*, supra, 268 Neb. 983–84 (applying de novo standard of review to facts of that case upon adoption of the American Law Institute's § 7.01 [d]). We follow the majority of cases and direct our appellate courts to review the trial court's application of the rule we adopt in part I B of this opinion under an abuse of discretion standard.

the three factors set forth by the American Law Institute. See 2 A.L.I., supra, § 7.01, p.17. The record reveals that, at trial, neither party disputed that the plaintiff constituted Saunders Capital's sole member or that he funded the bridge loan with his personal funds. The trial court explicitly found that the capital provided for that loan belonged to the plaintiff personally. Moreover, because neither the record nor either party suggests that any creditors of Saunders Capital exist and would be prejudiced by the plaintiff's recovery, we observe that the trial court's decision to permit the plaintiff to recover directly will not lead to a multiplicity of actions or interfere with a fair distribution of recovery with respect to other members or creditors. Under the circumstances, we believe that prohibiting the plaintiff, the sole member of Saunders Capital, from bringing a direct action ''would 'exalt form over substance' [because] . . . none of the reasons underlying the [distinct and separate injury] requirement [is] present.'' *Barth* v. *Barth*, supra, 659 N.E.2d 560.

II

REIMBURSEMENT FOR FEES AND COSTS

The final issue we resolve in this appeal concerns a prevailing party's ability to receive reimbursement for the work performed by a joint fiduciary appointed by the court to wind up the companies at issue in a dissolution proceeding. The plaintiff claims that the trial court abused its discretion in refusing to order Briner to reimburse him for fees incurred by Schachter in his capacity as the joint, court-appointed fiduciary and Nicholas Puglisi, an accountant engaged by Schachter to assist in winding up the Fund and Fund GP. The plaintiff argues that, because the trial court rendered judgment in his favor on counts four and six, and determined that Briner and Revere Capital TX breached their fiduciary duty and the implied covenant of good faith and

fair dealing in failing to repay the amount owed to the plaintiff on his LR Global bridge loan, the trial court should have either apportioned the fees or "[held] a hearing to apportion [the] fees" incurred by Schachter and Puglisi to the extent that the services performed were to correct tax and accounting errors caused by Briner's misconduct. The defendants respond that the trial court did not abuse its discretion in rejecting the plaintiff's request for reimbursement, as it properly determined that all of the owners of Revere Investments and Fund GP, including the plaintiff, bore responsibility for failing to ensure that the bookkeeping and accounting of those companies were properly performed. We conclude that the trial court did not abuse its discretion.

The following additional facts are relevant to our resolution of this issue. The trial court found that the plaintiff "trusted [Briner] to properly manage the daily operations of [Revere Investments], the Fund, and Fund GP and to service the loans to [his] expectations, but . . . failed to verify, or to hire competent help [to] verify, that [Briner] was managing and servicing [the loans] as expected and required . . . [even] when [Briner] increasingly complained about [a] disparate workload . . . ." "[E]ven after discovering [that Briner placed] his outside investor money in [Revere Capital CT] and [kept] the profits associated therewith from [Revere Investments] . . . neither [the plaintiff] nor [Saunders] exercised [his] powers in [the companies] to manage and supervise the investments and hire competent bookkeeping, tax, legal, and accounting experts to review [their] books and records . . . ."

Consequently, although the trial court determined that Briner and Revere Capital TX owed the plaintiff $85,078 in connection with failing to repay the LR Global bridge loan, it rejected the plaintiff's request to order the defendants to reimburse him for the fees incurred by Schachter and Puglisi, who analyzed "the complex payment structures" for errors and consulted on "tax

implications" associated with winding down the companies. That court noted that "[t]he cause of those fees was the bookkeeping and accounting that *all the owners and managers* were responsible [for] assur[ing] were correctly performed . . . [and] *all owners* failed to assure that appropriate bookkeeping and accounting were regularly performed and supervised." (Emphasis in original.)

We note at the outset of our analysis that, although the CLLCA contains a provision governing the ability of members and managers to wind up a company's affairs; General Statutes (Rev. to 2017) § 34-208; it does not provide guidance on reimbursement of fees incurred by receivers appointed to effectuate the winding up process. We begin, therefore, with the legal principles governing the review of a trial court's order awarding attorney's fees or other litigation expenses. We have explained that "Connecticut adheres to the 'American rule' . . . [which reflects the idea that] in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorney's fees or other 'ordinary expenses and burdens of litigation . . . .' " *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 326, 63 A.3d 896 (2013). "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, '[w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did.' " (Citations omit-

ted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 252–53, 828 A.2d 64 (2003).

We conclude that the trial court did not abuse its discretion in refusing to order the defendants to reimburse the plaintiff for the fees incurred by Schachter and Puglisi. The trial court found that, in failing to "hire professional bookkeeping, tax and legal professionals to assure that the management duties of [the companies] were properly performed . . . [and] [leaving Briner] largely unsupervised," the plaintiff did not timely protect his interests. On the basis of the trial court's numerous findings, including the discrepancy of experience between the parties, it was reasonable for the trial court to determine that the plaintiff's neglect contributed to the magnitude of complexity required for Schachter and Puglisi to untangle Revere Investments' books and records.[41] The trial court did not abuse its

[41] We therefore reject the plaintiff's claim that "a party who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm." (Internal quotation marks omitted.) Although, to support this claim, the plaintiff states that he "made every reasonable effort to avoid the expense of a judicial dissolution and to amicably resolve the parties' issues," the record reveals e-mails that paint the plaintiff in a less angelic light, such as two e-mails that the plaintiff sent to Briner's outside investors, the first in which he discussed the litigation and noted that "Briner . . . may seek . . . to prevent the dissemination of [Schachter's] report" and a second, in which he attached Schachter's report revealing Briner's misdealing, which was against Schachter's express instructions that the parties not release the report prior to his amending it.

Additionally, we reject the plaintiff's claim that the trial court's findings were contradictory in that it found both that the defendants' misappropriated and failed to adequately account for funds and also that all the parties were responsible for ensuring proper bookkeeping and accounting. The trial court explained that, although Briner inadequately "perform[ed] the duties associated with operating" Revere Investments, the Fund, and Fund GP, the plaintiff and Saunders failed to properly and adequately supervise Briner's management of those companies.

Lastly, we reject the plaintiff's claim that Briner was solely responsible for ensuring proper bookkeeping and accounting merely because the plaintiff paid him 85 percent of the management fee to perform those tasks. The trial court found that both Briner and the plaintiff, who were equal members

discretion in refusing to order Briner to reimburse the plaintiff for fees incurred by Schachter and Puglisi in winding up the Fund and Fund GP.

For the reasons set forth in this opinion, we conclude that, in the absence of a provision in the operating agreement of a limited liability company authorizing the filing of derivative lawsuits, members and managers lacked standing to bring derivative claims under the CLLCA and the common law at the time the plaintiff commenced the present action; although the general rule prohibits a derivative action, the trial court may, in its discretion, permit a member of a single-member limited liability company to bring an action raising derivative claims as a direct action and to order an individual recovery if the court finds that it will not (1) unfairly expose the company or defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the company, or (3) interfere with a fair distribution of the recovery among all interested parties. We further conclude that the trial court did not abuse its discretion in refusing to order the defendants to reimburse the plaintiff for his portion of the fees incurred by the joint, court-appointed fiduciary and an

and comanagers, owed a fiduciary duty to the Fund. In fact, the trial court noted that "[t]he fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. . . . *Falls Church Group LTD.* v. *Tyler*, *Cooper & Alcorn*, *LLP*, 281 Conn. 84, 108, 912 A.2d 1019 (2007)." (Internal quotation marks omitted.) The record reveals that the parties created " 'a complex and arcane web of business entities' " in a field in which the plaintiff benefited from expertise and Briner struggled from his inexperience. (Footnote omitted.) Additionally, Saunders—who entered the business with much more experience than Briner in Excel and Quickbooks—reviewed Briner's work and gave him feedback but failed to take further steps to prevent him from mismanaging and misallocating funds. We observe, therefore, that the record supports the trial court's finding that "*all* [*the*] *owners* failed to assure that appropriate bookkeeping and accounting were regularly performed and supervised." (Emphasis in original.)

accountant hired by him. We therefore affirm the trial court's judgment rendered in favor of the plaintiff as to his direct claims, reverse the trial court's judgment in favor of the plaintiff as to his derivative claims, and vacate the trial court's order awarding the plaintiff attorney's fees and costs under CUTPA.

The judgment is reversed with respect to the plaintiff's derivative claims and the case is remanded with direction to vacate the order awarding attorney's fees to the plaintiff; the judgment is affirmed in all other respects.

In this opinion PALMER, D'AURIA and ECKER, Js., concurred.

ROBINSON, C. J., with whom McDONALD and MULLINS, Js., join, concurring in part and dissenting in part. I respectfully disagree with part I B of the majority opinion, which concludes that the plaintiff, Roger L. Saunders, had standing to bring counts four, six, nine and ten of the second amended complaint, asserting direct claims of breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing against the defendants Clark Briner and Revere Capital, LLC, a Texas limited liability company (LLC).[1] I conclude that the plaintiff lacks standing because the bridge loan to Revere Investments, LLC (Revere Investments), in connection with Revere Investments' loan to LR Global (LR Global bridge loan) that gave rise to these claims was made by Saunders Capital, LLC (Saunders Capital), which is an LLC of which the plaintiff was the sole member and manager, meaning that any injury was suffered by the LLC rather than the plaintiff person-

[1] I do, however, agree with and join part I A of the majority opinion, which reverses the judgment of the trial court in favor of the plaintiff on his derivative claims. Because of my conclusions as to standing, I do not reach the reimbursement issues considered in part II of the majority opinion.

ally—even though it was the plaintiff who had provided the funds at issue to Saunders Capital.[2] In so concluding, I respectfully disagree with the majority's decision to follow § 7.01 (d) of the American Law Institute's Principles of Corporate Governance: Analysis and Recommendations (Principles of Corporate Governance) and adopt a single member LLC exception to the general rule prohibiting members of such companies from bringing direct actions to recover for harms suffered entirely by the company. See 2 A.L.I., Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.01 (d), p. 17; see also, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017). In my view, the majority's decision to adopt this single member exception to the general rule invades our legislature's primary role in the formulation of public policy—in an arena that is purely statutory. Additionally, the majority's approach may open the door to gamesmanship with the LLC corporate form. Because I conclude that the plaintiff lacked standing to bring counts four, six, nine and ten of the second amended complaint, I respectfully dissent from part I B of the majority opinion.

I agree at the outset with the majority's recitation of the facts and procedural history of this case. I also note that it is well settled that the "issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a [well settled] twofold determination:

[2] I agree with the majority's rejection of the plaintiff's argument that the defendants' multiple admissions of liability for the LR Global bridge loan constituted judicial admissions that afforded him standing. I also agree with the majority's determination that the fact that the plaintiff suffered an injury did not resolve the standing question, which is predicated on whether his losses were separate and distinct from those suffered by Saunders Capital.

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]." (Citation omitted; internal quotation marks omitted.) *Channing Real Estate, LLC* v. *Gates*, supra, 326 Conn. 137.

By way of background, I "begin . . . with the nature of LLCs and the law that governs them. Our common law does not recognize LLCs, which were first created by statute in Connecticut in 1993. Public Acts 1993, No. 93-267. An LLC is a distinct type of business entity that allows its owners to take advantage of the pass-through tax treatment afforded to partnerships while also providing them with limited liability protections common to corporations. See, e.g., 51 Am. Jur. 2d 818, Limited Liability Companies § 1 ([2d Ed.] 2011); see also General Statutes [Rev. to 2017] § 34-133 (setting forth members' limited liability protections). The [Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-100 et seq.] establishes the right to form an LLC and all of the rights and duties of the LLC, as well as all of the rights and duties of members and assignees. It permits the members to supplement these statutory provisions by adopting an operating agreement to govern the LLC's affairs. See, e.g., General Statutes [Rev. to 2017] § 34-140 (c) (permitting members to adopt operating agreement governing LLC's affairs, provided agreement is consistent with act)." *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317–18, 138 A.3d 257 (2016); accord General Statutes § 34-243 et seq. (provisions of Connecticut Uniform Limited Liability Company Act, effective July 1, 2017).

In *Channing Real Estate, LLC*, we followed the decision of the Appellate Court in *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013), and observed that an LLC "is a distinct legal entity whose existence is separate from its members. . . . [An LLC] has the power to sue or to be sued in its own name; see General Statutes [Rev. to 2017] §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. See General Statutes [Rev. to 2017] § 34-187.[3] A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the [LLC]." (Footnote in original; internal quotation marks omitted.) *Channing Real Estate, LLC* v. *Gates*, supra, 326 Conn. 137–38; see also General Statutes (Rev. to 2017) § 34-134 ("[a] member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company"). In *Channing Real Estate, LLC*, we concluded that an individual defendant lacked standing to assert a counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., against the plaintiff because the facts established that the defendant had "not demonstrated a specific, personal, and legal interest separate from that of Front Street Commons," an LLC of which he was a member. *Channing Real Estate, LLC* v. *Gates*, supra, 138. We explained that "Front Street Commons owned the property that was at issue during the parties' negotiations. Front Street Commons would have been a party to the proposed option and

[3] "We note that §§ 34-124, 34-186 and 34-187 have been repealed, effective July 1, 2017. See Public Acts 2016, No. 16-97. We also note, however, that General Statutes § 34-243h (a), effective July 1, 2017, provides: 'A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.' " *Channing Real Estate, LLC* v. *Gates*, supra, 326 Conn. 138 n.6.

operating agreements. Front Street Commons allegedly lost financial assistance from the plaintiff and suffered lost rental income. From these facts, it is clear that the injuries the defendant alleges in the CUTPA count of his counterclaim, if any, are those allegedly suffered by Front Street Commons specifically, and not the defendant. Front Street Commons is [an LLC] and is therefore a distinct legal entity from the defendant, who is simply a member of that entity. Because a member of [an LLC] cannot recover for an injury allegedly suffered by the [LLC], we conclude that the defendant lacks standing to pursue a claim alleging a violation of CUTPA." Id.; accord *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 219–20, 982 A.2d 1053 (2009) (concluding that General Statutes [Rev. to 2009] § 34-134 did not bar claims against insurance company by members of LLC to whom insurance policies had been issued because their status as named insureds under policies gives them standing).

Although this issue remains one of first impression for this court, I observe first that, in *Padawer* v. *Yur*, 142 Conn. App. 812, 818, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013), our Appellate Court, consistent with the analysis in our subsequent decision in *Channing Real Estate, LLC*, held that a sole member of an LLC lacks standing to bring an action for harm suffered only by the LLC.[4] Courts in other jurisdictions,

[4] In *Padawer*, on which the defendants rely heavily, the Appellate Court followed, inter alia, General Statutes (Rev. to 2017) §§ 34-134 and 34-167 (a), and held that the plaintiff in that case, who was the sole member of an LLC, lacked standing to bring a breach of contract action because it was the LLC that was "the contemplated party to the contract with the defendants, and . . . the assets intended to be transferred through the execution of that contract were assets belonging to the [LLC], rather than the plaintiff individually. If the defendants' alleged breach caused any harm, therefore, it was to [the] LLC, not to the plaintiff in his individual capacity. Although the plaintiff is the sole member of [the] LLC, that does not impute ownership of the [LLC's] assets to the plaintiff. . . . His position as sole member, also, does not provide him with standing to recover individually for harm to the [LLC]." (Citation omitted.) *Padawer* v. *Yur*, supra, 142 Conn. App. 818.

with near uniformity, have held similarly to the Appellate Court in *Padawer*. See, e.g., *Direct List, LLC* v. *Kessler*, Docket No. 15-cv-2025-WQH-JLB, 2018 WL 3327802, *1–2 (S.D. Cal. July 6, 2018); *Home Title Co. of Maryland, Inc.* v. *LaSalla*, 257 So. 3d 640, 644–45 (Fla. App. 2018); *Turner* v. *Andrew*, 413 S.W.3d 272, 276 (Ky. 2013); *Zeigler* v. *Housing Authority*, 118 So. 3d 442, 450 (La. App. 2013); *Krueger* v. *Zeman Construction Co.*, 758 N.W.2d 881, 890 (Minn. App. 2008), aff'd, 781 N.W.2d 858 (Minn. 2010); *Freedom Financial Group, Inc.* v. *Woolley*, 280 Neb. 825, 834, 792 N.W.2d 134 (2010); *Sherman* v. *Boston*, 486 S.W.3d 88, 94–95 (Tex. App. 2016); *Woods View II, LLC* v. *Kitsap*, 188 Wn. App. 1, 23–24, 352 P.3d 807, review denied, 184 Wn. 2d 1015, 360 P.3d 818 (2015); accord *Elizabeth Retail Properties LLC* v. *KeyBank National Assn.*, 83 F. Supp. 3d 972, 987–88 (D. Or. 2015) (applying Oregon law and concluding that single member of LLC had standing because defamation and loss of business reputation claims caused injuries to her that went beyond those

Although the Appellate Court's opinion in *Padawer* did not address the Principles of Corporate Governance, on which the majority relies, *Padawer* has been considered to be Connecticut's presently controlling decision with respect to the standing of a sole LLC member. See, e.g., *Lundstedt* v. *People's United Bank*, Docket No. 3:14-cv-01479 (JAM), 2015 WL 540988, *2 (D. Conn. February 10, 2015) (following *Padawer* and concluding, with respect to claims of illegal overdraft charges, that "a person who transfers his or her assets to an LLC has no standing to seek damages when those assets—now belonging solely to the LLC—are harmed," even though plaintiff was "sole manager/member" of LLC); *Bongiorno* v. *Capone*, 185 Conn. App. 176, 201–202, 196 A.3d 1212 ("The company is [an LLC] and is, therefore, a distinct legal entity from the plaintiff, who is simply a member of that entity. Even after the plaintiff became the sole member of the company, the company remained a distinct legal entity. Because a member of [an LLC] cannot recover for an injury allegedly suffered by [such] company, we conclude that the plaintiff lacked standing to pursue a claim of statutory theft in this case."), cert. denied, 330 Conn. 943, 195 A.3d 1134 (2018); see also *Scarfo* v. *Snow*, 168 Conn. App. 482, 504, 146 A.3d 1006 (2016) (following *Padawer* in intracorporate dispute between LLC members). Accordingly, for the benefit of the bar and bench, I believe that the majority's decision in this case effectively overrules *Padawer* and the line of cases that follow it.

suffered by LLC). But see *Stoker* v. *Bellemeade, LLC*, 272 Ga. App. 817, 822, 615 S.E.2d 1 (2005) ("we find no reason to require the [plaintiffs] to derivatively assert the breach of fiduciary duty claims in the context of the closely held LLCs in the present case"), rev'd in part on other grounds, 280 Ga. 635, 631 S.E.2d 693 (2006); *Marx* v. *Morris*, 386 Wis. 2d 122, 148–49, 925 N.W.2d 112 (2019) ("[C]orporate principles of standing do not apply to LLCs. Specifically, in the matter before us, injuries to North Star [an LLC] and to its members are not mutually exclusive because financial injury to North Star flows through to its members just as an injury would if North Star were a partnership rather than an LLC. Therefore, the question is not whether the alleged injury is to the LLC or to its individual members. Rather, the question is simply whether the individual member bringing the action has suffered an injury to a legally protected interest."). A prominent, local scholarly commentator agrees, writing that "a member cannot sue in an individual capacity to recover for any injury based on a wrong to the LLC, even if the LLC has only one member." M. Ford, Connecticut Corporation Law and Practice (2d Ed. 2017 Supp.) § 13.03 (H), p. 13-20; see also 51 Am. Jur. 2d, supra, § 45, p. 894 ("[a] member of an [LLC] may not sue in an individual capacity to recover for an injury the basis of which is a wrong to the LLC").

The majority, however, adopts an exception to this well settled general rule that is premised on § 7.01 (d) of the American Law Institute's Principles of Corporate Governance, which blurs the line between derivative and direct actions in certain cases involving closely held corporations.[5] Section 7.01 (d) allows a trial court

[5] We summarized our case law articulating the distinction between direct and derivative actions in *May* v. *Coffey*, 291 Conn. 106, 967 A.2d 495 (2009), observing that: "In *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 281–82, 422 A.2d 311 (1979), we stated that [a] distinction must be made between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue derivatively on behalf of the corporation

to "treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses

alleged to be injured. . . . Generally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation—to the shareholders collectively. . . . In this regard, it is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding secondarily, deriving his rights from the corporation which is alleged to have been wronged. . . . It is, however, well settled that if the injury is one to the plaintiff as a stockholder, and to him individually, and not to the corporation, as where an alleged fraud perpetrated by the corporation has affected the plaintiff directly, the cause of action is personal and individual. . . . In such a case, the plaintiff-shareholder sustains a loss separate and distinct from that of the corporation, or from that of other shareholders, and thus has the right to seek redress in a personal capacity for a wrong done to him individually. . . . Thus, where an injury sustained to a shareholder's stock is peculiar to him alone, and does not fall alike upon other stockholders, the shareholder has an individual cause of action. . . .

"Subsequently, in *Smith* v. *Snyder*, [267 Conn. 456, 461, 839 A.2d 589 (2004)], we reaffirmed the general rule that [i]n order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation. . . . [A] shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation." (Citations omitted; internal quotation marks omitted.) *May* v. *Coffey*, supra, 291 Conn. 114–15; see also *Fink* v. *Golenbock*, 238 Conn. 183, 200–202, 680 A.2d 1243 (1996) (describing shareholder derivative action procedure under General Statutes § 52-572j).

I note that the legislature has specifically recognized this distinction in the new Connecticut Uniform Limited Liability Company Act, which provides LLC members with the right to bring a direct action but requires the pleading and proof of "an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company." General Statutes § 34-271 (b).

An example of a separate and distinct injury giving rise to direct standing to sue in the intracorporate LLC context is described in the Appellate Court's opinion in the companion case, *Wiederman* v. *Halpert*, 178 Conn. App. 783, 796–98, 176 A.3d 1242 (2017), appeal dismissed, 334 Conn. 199, A.3d (2019), in which the defendants were alleged to have misappropriated and converted funds invested by the plaintiff, who was induced to become a 50 percent member in their real estate development LLC. See also *Scarfo* v. *Snow*, 168 Conn. App. 482, 504, 146 A.3d 1006 (2016) (following *Padawer* and concluding that plaintiff lacked standing to bring action against only other member of LLC alleging mismanagement of project because, "if there was an injury, that injury was sustained by [the LLC] and then sustained by the plaintiff [and] [t]hus, the plaintiff's injury is not direct, and he has no standing to sue in his individual capacity").

applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons."[6] Principles of Corporate Governance, supra, § 7.01 (d), p. 17. The commentary explains that § 7.01 (d) is premised on the decision of the United States Court of Appeals for the Ninth Circuit in *Watson* v. *Button*, 235 F.2d 235 (9th Cir. 1956), "which found that the usual policy reasons requiring an action that principally alleges an injury to the corporation to be treated as a derivative action are not always applicable to the closely held corporation." Principles of Corporate Governance, supra, § 7.01, comment (e), p. 21; see *Watson* v. *Button*, supra, 237 (Under Oregon law, "[s]uits against directors for violations of fiduciary duties are equitable in nature," and the plaintiff could seek permission to proceed directly because he and the defendant "were the only stockholders at the time of the misappropriation. The corporate creditors are adequately protected since [the two parties] are jointly responsible for the corporate liabilities.").

In adopting this principle, the American Law Institute also found persuasive the Massachusetts Supreme Judicial Court's decision in *Donahue* v. *Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975), which had observed that "the close corporation bears striking resemblance to a partnership," and that "the close corporation is often little more than an 'incor-

[6] Consistent with part I A of the majority opinion, I recognize that the plaintiff's statutory alternative to a derivative action, which we do not recognize in the LLC context as a matter of statutory or common law, was a member initiated action pursuant to General Statutes (Rev. to 2017) § 34-187. But see General Statutes § 34-271a et seq. (provisions of Connecticut Uniform Limited Liability Company Act, effective July 1, 2017, providing statutory right to derivative action).

porated' or 'chartered' partnership"; id., 586; in holding that stockholders in a close corporation owe each other a fiduciary duty akin to that of partners. Id., 592–93; see Principles of Corporate Governance, supra, § 7.01, comment (e), pp. 21–23. The American Law Institute considered that particular context and observed that, "[i]n some circumstances, characterizing the action as direct will also be fairer to the defendants, as when the defendants wish to file a counterclaim against the plaintiff, because the general rule is to prohibit counterclaims in a derivative action. . . . Also, in a direct action, each side must normally bear its own legal expenses, and the plaintiff, if successful, cannot ordinarily look to the corporation for attorney's fees. Such a rule seems more appropriate in cases that fundamentally involve disputes between a limited number of 'partners' in a closely held firm." (Citation omitted.) Principles of Corporate Governance, supra, § 7.01, comment (e), p. 22.

I respectfully disagree with the majority's decision to adopt the *Watson* v. *Button*/American Law Institute approach to close corporation standing to hold that the plaintiff had standing to raise the claims alleged in counts four, six, nine and ten of the second amended complaint.[7] First, I do not believe that approach applies at all with respect to the factual predicate underlying those counts because it "is almost always employed in

[7] I acknowledge that, as the majority observes, multiple courts have adopted the *Watson* v. *Button*/American Law Institute approach to close corporation standing, both before and after its endorsement by the American Law Institute. See, e.g., *Thomas* v. *Dickson*, 250 Ga. 772, 774, 301 S.E.2d 49 (1983); *Steelman* v. *Mallory*, 110 Idaho 510, 513, 716 P.2d 1282 (1986); *Barth* v. *Barth*, 659 N.E.2d 559, 562 (Ind. 1995); *Mynatt* v. *Collis*, 274 Kan. 850, 872–73, 57 P.3d 513 (2002); *Trieweiler* v. *Sears*, 268 Neb. 952, 983, 689 N.W.2d 807 (2004); *Durham* v. *Durham*, 151 N.H. 757, 763, 871 A.2d 41 (2005); *Crosby* v. *Beam*, 47 Ohio. St. 3d 105, 109–10, 548 N.E.2d 217 (1989); *Aurora Credit Services, Inc.* v. *Liberty West Development, Inc.*, 970 P.2d 1273, 1280–81 (Utah 1998); see also *Derouen* v. *Murray*, 604 So. 2d 1086, 1091 n.2 (Miss. 1992) (approving of approach in dicta).

purely intracorporate disputes." *Mathis* v. *ERA Franchise Systems, Inc.*, 25 So. 3d 298, 302 (Miss. 2009); see id., 301–302 (declining to apply doctrine when plaintiff's action was "filed against his current and former business partners" and "four defendants who are not and have never been owners or members" of business at issue, creating potential for multiplicity of actions and interference with distribution of recovery). As the majority acknowledges in footnote 38 of its opinion, distinguishing our decisions in *May* v. *Coffey*, 291 Conn. 106, 967 A.2d 495 (2009), and *Fink* v. *Golenbock*, 238 Conn. 183, 680 A.2d 1243 (1996), the counts considered in part I B of the majority opinion do not present an intracorporate dispute, insofar as we consider whether the plaintiff sustained an injury separate and distinct from his own LLC, Saunders Capital, rather than one distinct from the other members of Revere Investments and Revere High Yield, GP, LLC (Fund GP).[8] Rather than presenting an occasion to make significant changes to corporate law in Connecticut, I believe that the present case is nothing more than a simple "wrong plaintiff" case—which might well explain why the plaintiff did not attempt to rely on the *Watson* v. *Button*/American Law Institute approach in his brief and why the defendants' reply brief simply reiterates their reliance on *Padawer* v. *Yur*, supra, 142 Conn. App. 817–18.[9]

[8] As I understand the authorities that embrace the *Watson* v. *Button*/American Law Institute approach, this doctrine would potentially apply to save a direct action that should have been brought derivatively in the manner contemplated in part I A of the majority opinion, namely, by the plaintiff to protect his interests that derive from his 50 percent membership in Revere Investments and Fund GP. See also footnotes 5 and 6 of this dissenting opinion.

[9] I also note my prudential concerns about the process that resulted in part I B of the majority opinion. Although the majority opinion is well researched, it presents a dramatic departure from the parties' briefs in this case, which do not address—either directly or tangentially by citation to applicable case law from other jurisdictions—the applicability of the *Watson* v. *Button*/American Law Institute principles that form the basis of the majority decision. Indeed, the plaintiff, whose brief obliquely appears to seek an exception from the general rule of *Channing Real Estate, LLC* v. *Gates*,

Second, I find more persuasive the analysis of those courts that have rejected the *Watson* v. *Button*/American Law Institute approach to close corporation standing. The leading decision on this point is *Bagdon* v. *Bridgestone/Firestone, Inc.*, 916 F.2d 379 (7th Cir. 1990), cert. denied, 500 U.S. 952, 111 S. Ct. 2257, 114 L. Ed. 2d 710 (1991), in which the United States Court of Appeals for the Seventh Circuit rejected, as a matter of Delaware law, the expansion of the "special injury" doctrine articulated in *Watson* v. *Button*, supra, 235 F.2d 237, "into a general exception for closely held corporations, treating them as if they were partnerships." *Bagdon* v. *Bridgestone/Firestone, Inc.*, supra, 383–84. The Seventh Circuit emphasized that the "premise of this extension may be questioned. Corporations are *not* partnerships. Whether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors and other participants to vary the rules by contract if they think deviations are warranted. So it is understandable that not all states have joined the parade." (Emphasis in original.) Id., 384; see also *Frank* v. *Hadesman & Frank, Inc.*, 83 F.3d 158, 162 (7th Cir. 1996) (declining to adopt American Law Institute's § 7.01 [d] as matter of Illinois law).

supra, 326 Conn. 123, based on his provision to Saunders Capital of his personal funds that became the LR Global bridge loan, does not acknowledge the line of Appellate Court cases; see, e.g., *Padawer* v. *Yur*, supra, 142 Conn. App. 812; relied on by the defendants, that directly forecloses his standing in this case as the sole member of the LLC. See footnote 4 of this dissenting opinion. Although we have somewhat more latitude to act independently of the parties' briefs in this area in light of its implications on subject matter jurisdiction; see, e.g., *State* v. *Dort*, 315 Conn. 151, 161, 106 A.3d 277 (2014); *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 148–49, 84 A.3d 840 (2014); I would not do so without supplemental briefing from the parties and the issuance of appropriate amicus curiae invitations, given the significant effect of the majority opinion on Connecticut's body of corporate law, particularly as it relates to our state's many close corporations and small LLCs.

Similarly, the Virginia Supreme Court "decline[d] to adopt a closely held corporation exception to the rule requiring that suits for breach of fiduciary duty against officers and directors must be brought derivatively on behalf of the corporation and not as individual shareholder claims. Adherence to the general rule without this proposed exception prevents multiplicity of lawsuits by shareholders. A recovery by the corporation protects all shareholders as well as creditors. Finally, as expressed in *Bagdon* [v. *Bridgestone/Firestone, Inc.*, supra, 916 F.2d 384], consistent application of commercial rules promotes predictability. If shareholders and the corporation desire to vary commercial rules by contract, they are free to do so." *Simmons* v. *Miller*, 261 Va. 561, 576, 544 S.E.2d 666 (2001). Indeed, the Virginia Supreme Court has extended this analysis from *Simmons* to the LLC context. See *Remora Investments, LLC* v. *Orr*, 277 Va. 316, 323–24, 673 S.E.2d 845 (2009) (intracompany dispute between manager and member of LLC).

Beyond undermining the advantages of predictability and stability, the majority's approach also relieves the plaintiff of the consequences of his business decision to proceed through his LLC, thereby giving him "the best of both business entities: limited liability provided by a corporate structure and direct compensation for corporate losses. That cushy position is not one the law affords. Investors who created the corporate form cannot rend the veil they wove. . . . Recovery by the corporation ensures that all of the corporate participants—stockholders, trade creditors, employees and others will recover according to their contractual and statutory obligations. . . . We have consistently held that a corporation is an entity separate and distinct from its shareholders. " (Citations omitted; internal quotation marks omitted.) *Landstrom* v. *Shaver*, 561 N.W.2d 1, 14 (S.D. 1997); see also *Wessin* v. *Archives Corp.*, 592

N.W.2d 460, 466 (Minn. 1999) (rejecting American Law Institute's approach to abandon the "direct-derivative distinction for closely held corporations" because, although "closely held corporations have been described as partnership[s] in corporate guise . . . a closely held corporation is still a corporation *with all of the rights and limitations proscribed by the legislature*," and "[a] uniform, fair and predictable mechanism for enforcing claims of the corporation is important for the corporation and all of the shareholders" [citations omitted; emphasis added; internal quotation marks omitted]); *Keller* v. *Estate of McRedmond*, 495 S.W.3d 852, 881–82 (Tenn. 2016) (rejecting argument seeking "an exception to the general rule prohibiting a shareholder from asserting a claim belonging to the corporation based on the fact that this is a subchapter S, [closely held] corporation," rendering parties "more like partners in a partnership who are harmed individually when the corporation is harmed," because, "where parties have deliberately chosen to do business in corporate form for other reasons such as tax or accounting purposes, they cannot disregard the corporate form at their convenience" [citations omitted; internal quotation marks omitted]).

Moreover, as the Appellate Court observed in *Padawer* v. *Yur*, supra, 142 Conn. App. 817–18, the majority's approach to standing is directly inconsistent with General Statutes (Rev. to 2017) § 34-134, which provides that "[a] member or manager of a limited liability company is not a proper party to a proceedings by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement." Consistent with the statutory analysis in *Padawer*, the Nebraska Supreme Court has observed that the approach to stand-

ing endorsed by the majority would "allow a member of an LLC to use the corporate form as a shield to protect itself from personal liability for acts taken by an LLC while still allowing an individual to collect damages, such as lost profits, incurred by the LLC." *Freedom Financial Group, Inc.* v. *Woolley*, supra, 280 Neb. 834; see id. (The court rejected the argument of the plaintiff, the sole member of the LLC, that it had standing to bring a professional negligence action against the LLC's attorneys because, "[a]s a member of an LLC, [the plaintiff] is not a proper party to this suit, because [the defendant's] alleged liability is to [the LLC] and any potential damages would also belong to [the LLC]. [The plaintiff] may not attempt to use the corporate form of the LLC to shield itself from liability and then use the same corporate form as a sword to recover damages or enforce liability to the LLC.").

Similarly, in concluding that the sole member of a trucking business structured as an LLC lacked standing to bring an action for lost profits, the Kentucky Supreme Court rejected the argument that, "because [the defendant] was the sole owner of the business he was necessarily the real party in interest, a status that allowed him to properly advance the lost profits claim in his own name rather than in the name of the LLC." *Turner* v. *Andrew*, supra, 413 S.W.3d 276. The court emphasized that the "LLC and its solitary member . . . are not legally interchangeable. Moreover, an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim. The law pertaining to [LLCs] simply does not work that way."[10] Id.; see *Krueger* v.

[10] I disagree with the majority's reliance on corporate veil piercing principles in support of "[a]llowing investors to disregard the corporate form in order to recover for corporate losses owed to them individually . . . ." In rejecting a similar argument that, "because [the defendant] is the sole owner of the LLC and the business operated from his residence the LLC can be disregarded," the Kentucky Supreme Court observed that, "[w]hile it is true that there are limited instances where an LLC's separate entity status may

Zeman Construction Co., supra, 758 N.W.2d 889–90 (The court concluded that an LLC member lacked standing to bring a claim under a business practice discrimination statute because it was the LLC, "and not [the] appellant personally, [that] entered into a contract with [the] respondent. . . . Because a member of [an LLC] is protected from personal liability for the company's acts, debts, liability, and obligations, unless the corporate veil is pierced, [the] appellant gained protection from the decision. . . . Indeed, the avoidance of personal liability is a legitimate reason for forming [an LLC]. . . . But [the] appellant also gave up some rights." [Citations omitted.]); *Woods View II, LLC* v. *Kitsap*, supra, 188 Wn. App. 23–24 (Even though the sole shareholder personally guaranteed loans, she lacked standing to seek a remedy for "consequential damages that would not have happened but for the primary harm to [the plaintiff LLC]. A shareholder does not have standing to recover consequential damages that result

be disregarded in the interest of equity, this is not one of those cases." *Turner* v. *Andrew*, supra, 413 S.W.3d 276. As the Kentucky court observed, "[p]iercing the corporate veil is an equitable doctrine invoked by courts to allow a creditor recourse against the shareholders of a corporation. . . . The doctrine can also apply to [LLCs]." (Citation omitted; internal quotation marks omitted.) Id., 276–77; see, e.g., *McKay* v. *Longman*, 332 Conn. 394, 432–33, 211 A.3d 20 (2019) (describing equitable nature and purpose of corporate veil piercing under Connecticut law). As the Kentucky court notes, the majority's approach in essence calls for "insider reverse [veil] piercing," which would be "employed in that rare instance where equity is perceived to require disregard of the entity. Thus, the estate of a sole corporate shareholder/LLC member may be allowed to recover as an 'insured' under a policy issued to the entity . . . or a sole shareholder or LLC member may be allowed to claim the protection of a usury statute even though the loan was to the entity . . . . In all of the limited number of insider reverse [veil] piercing cases, strong public policy considerations have been at the heart of the court's decision." (Citations omitted.) *Turner* v. *Andrew*, supra, 277. I believe that there are no significant public policy reasons to disregard the corporate form in this case, which simply presents a matter of the wrong plaintiff bringing the claims at issue. See id. ("[The defendant] created an LLC and it appears that it was conducting the trucking business at issue. By law, the only appropriate plaintiff to assert the lost business damages claim was the LLC . . . .").

from the harm to her corporation. . . . The fact that [she] was the sole shareholder of [the plaintiff] does not change our analysis: a sole shareholder, by necessity, cannot show an injury distinct from that to other shareholders." [Citation omitted; internal quotation marks omitted.]).

Particularly because LLCs are entirely creatures of statute; see, e.g., *Styslinger* v. *Brewster Park, LLC*, supra, 321 Conn. 317; I believe that action in this area that affects a party's rights and remedies is a uniquely legislative function. Because the legislature is active in this area, given its recent passage of the comprehensive Connecticut Uniform Limited Liability Company Act, and because there are natural constituencies that are well situated to advocate for legislative action in this area, I believe it best to stay our hand rather than make a public policy judgment expanding standing in civil cases involving LLCs. See *Krueger* v. *Zeman Construction Co.*, supra, 758 N.W.2d 890 (deferring to legislature to create remedy for business practice discrimination when party is single member LLC); compare *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550–51 n.35, 93 A.3d 1142 (2014) (declining to overrule Freedom of Information Act case law because "[t]he circumstances of the enactment of [a statutory provision governing law enforcement disclosure obligations], and the controversy that continues to this day about the relationship between criminal investigations and the public's right to know under the act, demonstrates that this is the kind of issue that is squarely on the radar of the legislature and the various interested entities"), with *State* v. *Salamon*, 287 Conn. 509, 523–24, 949 A.2d 1092 (2008) (In overruling a prior interpretation of the kidnapping statute, this court reasoned that "the issue presented by the defendant's claim is not one that is likely to have reached the top of the legislative agenda because the issue directly implicates only a relatively narrow category of criminal

cases, that is, kidnapping cases in which the restraint involved is incidental to the commission of another crime. Moreover, in contrast to other matters that are subject to legislative regulation, it is uncertain whether the position that the defendant advocates would attract interested sponsors with access to the legislature."). Accordingly, I respectfully disagree with the majority's conclusion in part I B of its opinion that the plaintiff had standing with respect to counts four, six, nine and ten of the second amended complaint.

Because I would reverse the judgment of the trial court in its entirety, I respectfully concur in part and dissent in part.

MALKIE WIEDERMAN *v.* ISSAC HALPERT ET AL. (SC 20066)

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

Argued December 20, 2018—officially released December 17, 2019

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the named defendant et al. filed a counterclaim; thereafter, the action was withdrawn as against the defendant Judah Liberman; subsequently, the defendant 58 North Walnut, LLC, et al. were defaulted for failure to appear; thereafter, the named defendant et al. were defaulted for failure to appear at a trial management conference; subsequently, following a hearing in dam-

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

ages, the court, *Brazzel-Massaro*, *J.*, rendered judgment for the plaintiff, and the named defendant et al. appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Mihalakos*, *Js.*, which reversed in part the trial court's judgment and vacated the award of punitive damages, and the named defendant et al., on the granting of certification, appealed to this court. *Appeal dismissed.*

Kerry M. Wisser, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellants (named defendant et al.).

Taryn D. Martin, with whom, on the brief, was *Robert A. Ziegler*, for the appellee (plaintiff).

Opinion

PER CURIAM. The plaintiff, Malkie Wiederman, commenced this action arising out of a real estate investment agreement with the defendants Issac Halpert and Marsha Halpert,[1] seeking, inter alia, to recover damages for breach of fiduciary duty, fraud, conversion, and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. After the trial court rendered a judgment of default against the defendants for failing to appear at a trial management conference, it held a hearing to determine damages. On the basis of the evidence presented by the plaintiff at that hearing, at which the defendants also failed to appear, the trial court awarded the plaintiff $600,892.58 in compensatory and punitive damages, attorney's fees and costs. Thereafter, the defendants moved to open the judgment rendered against them and to enjoin the plaintiff from enforcing it. The trial court, noting both that the defendants received multiple notices to new

[1] The operative complaint also named several other defendants; they are not parties to this appeal. See *Wiederman* v. *Halpert*, 178 Conn. App. 783, 785 n.1, 176 A.3d 1242 (2017). All references herein to the defendants are to Issac Halpert and Marsha Halpert.

and old addresses and that Issac Halpert failed to appear and to testify at the hearing on damages despite being personally served by subpoena, denied their motion. The defendants then appealed from the trial court's denial of their motion to open, claiming, inter alia, that the trial court lacked subject matter jurisdiction over the plaintiff's claims because the alleged injuries sustained by her were derivative of the harm suffered by the limited liability companies of which she and the defendants were members, and, as such, the plaintiff lacked standing to recover directly. See *Wiederman* v. *Halpert*, 178 Conn. App. 783, 793, 176 A.3d 1242 (2017). The Appellate Court rejected the defendants' claim, concluding that, because the plaintiff sufficiently alleged an injury that was separate and distinct from that suffered by the limited liability companies[2]—as she alleged, among other things, that the defendants forged her signature on certain financial documents[3]—the trial court had properly exercised subject matter jurisdiction over her direct claims. See id., 797–98. We granted the defendants' petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly uphold the determination of the trial court that the

[2] We have explained that, "where an injury sustained to a [shareholder] . . . is peculiar to him alone, and does not fall alike upon other shareholders, the shareholder has an individual cause of action." *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 282 n.9, 422 A.2d 311 (1979). Consequently, we observe that the circumstances in this case differ from the situation in which a member of a closely held limited liability company attempts to bring otherwise derivative claims in a direct action. See *Saunders* v. *Briner*, 334 Conn. 135, 167, A.3d (2019) (adopting rule permitting trial courts to treat otherwise derivative claims in direct action when brought by sole member of limited liability company if it finds that certain criteria are met).

[3] We observe that the plaintiff introduced evidence at the hearing in damages that, through forging her signature on various documents, the defendants created a situation in which the plaintiff, rather than the limited liability companies, was held personally liable to repay refinance debt on at least two of the development properties. The trial court found that "[t]he exhibits provide[d] abundant support for damages as to [several counts including] count . . . four," which alleged forged financing documents.

plaintiff had standing to sue?" *Wiederman* v. *Halpert*, 328 Conn. 906, 177 A.3d 1161 (2018).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

ORDERS

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TOWN OF LEDYARD *v.* WMS GAMING, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 192 Conn. App. 836 (AC 39746), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that General Statutes § 12-161a, which allows trial courts to award attorney's fees incurred by a municipality 'as a result of and directly related to' state court proceedings to collect unpaid personal property taxes, did not authorize the award of attorney's fees incurred by a munici-

pality in defending a collateral action in federal court that challenged the municipality's authority to collect the personal property taxes at issue in the state court action?"

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

Proloy K. Das and *Kevin W. Munn*, in support of the petition.

Aaron S. Bayer and *David R. Roth*, in opposition.

Decided December 5, 2019

WELLS FARGO BANK, N.A. *v.* SANDRA CALDRELLO

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 1 (AC 41074), is denied.

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

Sandra Caldrello, self-represented, in support of the petition.

David M. Bizar and *William J. Hanlon*, in opposition.

Decided December 5, 2019

SEMINOLE REALTY, LLC *v.* SERGEY SEKRETAEV

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 405 (AC 42349), is denied.

Sergey Sekretaev, self-represented, in support of the petition.

Decided December 5, 2019

STATE OF CONNECTICUT *v.* CARLTON BRYAN

The defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 285 (AC 40848), is denied.

Erica A. Barber, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided December 5, 2019

VICTOR A. WOZNIAK ET AL. *v.*
TOWN OF COLCHESTER

The plaintiffs' petition for certification to appeal from the Appellate Court, 193 Conn. App. 842 (AC 41275), is denied.

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

Paul M. Geraghty, in support of the petition.

Matthew Ranelli, in opposition.

Decided December 5, 2019

DELORES PEEK *v.* MANCHESTER
MEMORIAL HOSPITAL ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 193 Conn. App. 337 (AC 41298), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that there existed a genuine issue of material fact as to whether the plaintiff's action was barred by the two year statute of limitations set forth in General Statutes § 52-584?"

Michael D. Neubert, *Sean R. Caruthers* and *Dennis M. Carnelli*, in support of the petition.

Neil Johnson, in opposition.

Decided December 5, 2019

LAWRENCE GOLDSTEIN *v.* YING HU ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 903 (AC 42090), is denied.

Abram J. Heisler, in support of the petition.

Decided December 5, 2019

LAWRENCE ANDREWS *v.* COMMISSIONER OF CORRECTION

The petitioner Lawrence Andrews' petition for certification to appeal from the Appellate Court, 194 Conn. App. 178 (AC 41689), is denied.

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

Patrick S. White, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided December 5, 2019

NATIONSTAR MORTGAGE, LLC *v.* ROBERT GABRIEL ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42747) is dismissed.

Harold R. Burke, in support of the petition.

Decided December 5, 2019

NATIONSTAR MORTGAGE, LLC *v.* ROBERT GABRIEL ET AL.

The defendant Pamela Gabriel's petition for certification to appeal from the Appellate Court (AC 42747) is dismissed.

Harold R. Burke, in support of the petition.

Decided December 5, 2019

NATIONSTAR MORTGAGE, LLC *v.* ROBERT GABRIEL ET AL.

The defendant Elizabeth Gabriel's petition for certification to appeal from the Appellate Court (AC 42747) is dismissed.

Harold R. Burke, in support of the petition.

Decided December 5, 2019

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ADAM C. SHACK ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 43149) is denied.

Brian E. Lambeck, in support of the petition.

Brian D. Rich, in opposition.

Decided December 5, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JOHN B. *v.* COMMISSIONER OF CORRECTION*
(AC 41640)

Lavine, Prescott and Harper, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, the crimes of attempt to commit kidnapping in the first degree and attempt to commit sexual assault in the first degree, sought a writ of habeas corpus, claiming, inter alia, that under current case law interpreting the kidnapping statutes, including *State* v. *Salamon* (287 Conn. 509), his due process rights under the federal and state constitutions were violated due to the trial court's failure to properly instruct the jury. The petitioner's conviction stemmed from his conduct in bursting through the door of the victim's apartment, choking her and engaging in a physical struggle with her, after which he dragged her out of the apartment and into a nearby hallway. Eventually the struggle moved outdoors, where a bystander heard the victim's

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statues § 54-86e.

screams and restrained the petitioner until the police arrived. While at the police station, the petitioner admitted that he intended to bring the victim back to his apartment to rape and torture her. Although the trial court did not instruct the jury that in order to find the petitioner guilty of attempted kidnapping, it had to find that he intended to restrain the victim to a greater degree than was necessary to commit sexual assault, the habeas court concluded that the trial court was not required to give a *Salamon* instruction and that even if it had been required to do so, the absence of a *Salamon* instruction was completely harmless because there was no reasonable possibility that a jury instructed pursuant to *Salamon* would have reached a different result than it did. Accordingly, the habeas court rendered judgment denying the amended petition, and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The petitioner's claim that the habeas court's failure to give the jury a *Salamon* instruction was not harmless error was unavailing, that court having properly concluded, on the basis of the evidence, that the petitioner was not entitled to a *Salamon* instruction because he intended to abduct and restrain the victim for a longer period of time and to a greater degree than would have been necessary to commit the other charged offenses and was only thwarted by the victim's own efforts to escape and the timely intercession of a third party: the evidence demonstrated that the petitioner intended to render the victim unconscious, bind her and take her to his apartment where he would rape and torture her, and that he engaged in conduct designed to carry out his plan when he burst into her apartment, choked her and chased her when she attempted to get away, and his attempt to bind and move the victim from her apartment to his apartment where he intended to rape and torture her increased the risk of harm, prevented her from seeking help and would have prevented the crime from being detected, which showed that he prevented the victim's liberation for a longer period of time or to a greater degree than that which would have been necessary to commit the other crime; moreover, the state was not required to establish any minimum period of confinement or degree of movement, the petitioner, who was convicted of attempt to commit kidnapping in the first degree, failed to address the law pertaining to the crime of attempt as it related to the facts of this case, and because the trial court was not required to give the jury a *Salamon* instruction, it was not necessary for this court to determine whether the absence of such an instruction was harmless error.
2. The petitioner's claim that his trial counsel was ineffective in conceding his guilt to a burglary charge during closing argument was unavailing; the habeas court properly determined that the petitioner failed to satisfy his burden of overcoming the presumption that trial counsel's remarks reflected a reasonable trial strategy, as the petitioner had pursued an affirmative defense that he should be found not guilty by reason of mental disease or defect, which entails an acknowledgment that he

committed the offenses, counsel explained to him that such an affirmative defense constituted an admission of guilt, and although the petitioner was equivocal as to whether he recalled counsel's advice to him about presenting a mental disease or defect defense involving a concession of guilt and claimed that he misunderstood that he would have to concede his factual guilt to all charges, there was no evidence in the record that the petitioner ever objected to counsel's concession strategy and the habeas court made no such finding, and counsel's presentation of that defense was predicated on the evidence in the record, including testimony from two experts that the petitioner was suffering from a mental disease or defect when he committed the charged crimes.

Argued September 17—officially released December 17, 2019

Procedural History

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

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, John B., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred when it concluded that (1) the trial court's failure to charge the jury pursuant to *Salamon*[1] was harmless beyond a reasonable doubt and (2) trial counsel did not render ineffective assistance of counsel. We affirm the judgment of the habeas court.

[1] *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008).

The following procedural history is relevant to the petitioner's claims. The petitioner is in the custody of the respondent, the Commissioner of Correction, serving consecutive sentences totaling fifty-five years that were imposed by the trial court following two jury trials. On January 28, 2005, the petitioner was sentenced to fifteen years in prison after a jury found him guilty of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) and assault of a peace officer in violation of General Statutes § 53a-167c (a) (1) (assault case). The petitioner's conviction was upheld on direct appeal.

On December 5, 2005, the petitioner was sentenced to forty years in prison after a jury found him guilty of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), attempt to commit kidnapping in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-92 (a) (2) (A), burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and interfering with an officer in violation of General Statutes § 53a-167a (a). *State* v. *John B.*, 102 Conn. App. 453, 455, 925 A.2d 1235, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007) (attempted kidnapping case).[2] The petitioner's conviction was upheld on direct appeal. Id.[3]

[2] The charges in the assault case arose out of an incident that took place in the holding area of the Bristol courthouse while the petitioner was awaiting arraignment on the charges in the attempted kidnapping case. We have omitted a discussion of the facts in the assault case as they are not implicated in the present appeal.

[3] The petitioner filed an application for sentence review with respect to both convictions. He asked the sentence review division to reduce his sentence by ordering that his fifteen year sentence in the assault case and his forty year sentence in the attempted kidnapping case run concurrently, rather than consecutively, for a total effective sentence of forty years. He claimed, pursuant to Practice Book § 43-28, that his fifty-five year sentence was inappropriate and disproportionate because he had no criminal record prior to his convictions in those cases. He also claimed that neither of the victims was seriously injured. The sentence review division determined that the petitioner's sentences fell within the parameters of Practice Book § 43-28.

Following the petitioner's convictions, our Supreme Court rendered a decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), which changed Connecticut law regarding kidnapping in conjunction with another crime. Thereafter, in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), our Supreme Court held that *Salamon* applied retroactively to collateral attacks on judgments rendered final before *Salamon* was issued. Those two cases are at the heart of the petitioner's *Salamon* or due process claims in this appeal.

On September 11, 2014, the self-represented petitioner initiated the present habeas corpus action. Appointed counsel filed a second amended petition on August 21, 2017, alleging that (1) the petitioner's due process rights under the fifth, sixth, eighth and fourteenth amendments to the federal constitution and article first, § 8, of the constitution of Connecticut were violated by the trial court when it failed to charge the jury pursuant to *State* v. *Salamon*, supra, 287 Conn. 509, and (2) his trial counsel rendered ineffective assistance. The respondent denied the material allegations of the amended petition, and the matter was tried on October 11, 2017. The habeas court denied the petition for a writ of habeas corpus on March 23, 2018, and, thereafter, granted the petitioner certification to appeal.

In its memorandum of decision, the habeas court quoted the facts reasonably found by the jury as stated in this court's opinion in the petitioner's direct appeal in the attempted kidnapping case. See *State* v. *John B.*, supra, 102 Conn. App. 455–48. "[T]he [petitioner] and the female victim were neighbors in an apartment building. The [petitioner] and the victim were acquaintances; they had never spoken to each other on the telephone, but the [petitioner] had once been to the victim's apartment, visiting with her and her granddaughter. At approximately 9:30 p.m. on May 8, 2001, the [petitioner] called the victim on the telephone and invited her to

his apartment to watch a movie with him. The victim declined the invitation, but the [petitioner], in a stern voice, insisted that she come to his apartment. After this initial conversation ended, the [petitioner] called the victim again, but the victim did not answer her telephone.

"A short time later, the [petitioner] appeared at the victim's apartment, knocking on the door and windows. The [petitioner] identified himself and asked the victim to let him into her apartment. The victim became frightened. As she approached the door to her apartment, the [petitioner] burst through the door, wrapped his hands around her throat and began to choke her. A physical struggle between the [petitioner] and the victim ensued. While the victim tried to break free and to protect herself, the [petitioner] dragged her out of her apartment and into a nearby hallway. The [petitioner] told the victim to 'go with it' and to 'let go.' In a hushed voice, the [petitioner] also told the victim that he loved her. At one point during the struggle, the victim pretended to faint, causing the [petitioner] to loosen his grip on her neck. The victim began to flee, but the [petitioner] grabbed her by one of her legs and pulled her back to him. Eventually, the struggle moved outdoors where the victim, experiencing difficulty as a result of the [petitioner's] assault, began screaming for help. The [petitioner] caught up with her and pinned her against a wall.

"A bystander, Myron St. Pierre, heard the victim's cries for help and observed the [petitioner] attempting to pull the victim against her will back inside the apartment building. St. Pierre approached the [petitioner] and the victim, instructing them to break up the melee. The [petitioner] told St. Pierre: '[S]he just got out of a mental institute. She's crazy. We can handle it . . . it's all right.' The victim told St. Pierre that the [petitioner] was lying and was trying to kill her. The victim also asked him to call the police. After the [petitioner] briefly

chased the victim and St. Pierre, St. Pierre physically restrained the [petitioner] on the ground and instructed the victim to run to a nearby police station. The victim took refuge in her apartment and reported the incident to the police. St. Pierre restrained the [petitioner] until the police arrived on the scene.

"When David Posadas, an officer with the local police department arrived at the scene, St. Pierre informed him that the [petitioner] had attacked the victim. Posadas asked the [petitioner] what had occurred, and the [petitioner] replied that he had not attacked the victim. The [petitioner] stated that the victim was suicidal and that he had tried to prevent her from harming herself. Posadas also spoke with the victim, who appeared to be upset and disheveled. The victim related the [petitioner's] actions to Posadas; her account was corroborated in part by the caller identification function on her telephone, which reflected that the [petitioner] had called the victim earlier that evening.

"The [petitioner] was placed under arrest. A search of his person incident to his arrest yielded, among other items, a pair of handcuffs and a 'bondage device.' The [petitioner] consented to a police search of his apartment. Although the [petitioner] was calm and cooperative with the police until and immediately following his arrest, he began mumbling to himself and rocking back and forth during the search of his apartment. During the booking process at the police department, the [petitioner] became combative with the police officers involved; he would not comply with the orders being given to him by the officers and refused to be fingerprinted. . . .

"At approximately 3 a.m. on the morning following his arrest, the [petitioner] indicated that he wanted to discuss the events that culminated in his arrest. After waiving his right to remain silent, the [petitioner] spoke with Sandra Mattucci, an officer with the local police

department. The [petitioner] stated that, on the prior evening, he had intended to help the victim by bringing her 'into a deeper level of consciousness and . . . into a true reality.' He stated that he intended to accomplish this by using the handcuffs and [the] bondage device found on his person and by raping and torturing the victim. The [petitioner] admitted that he entered the victim's apartment and choked the victim to 'make her unconscious so that he could bring her back upstairs to his apartment . . . [and] bring her into this true reality.' He also stated that he previously had used the handcuffs and [the] bondage device on himself and others." Additional facts will be included as necessary.

Before addressing the petitioner's claims, we set forth the standard of review. "Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

The petitioner's first claim on appeal is that the habeas court improperly denied his petition because the trial court's failure to give a jury instruction pursuant to *Salamon* was not harmless beyond a reasonable doubt. We disagree.

We begin with the standard of review applicable to the petitioner's claim. In reviewing the petitioner's *Salamon* claim, we are mindful that mixed questions of law and fact are subject to plenary review. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 65, 135 A.3d 596 (2016). "The applicability of *Salamon* and whether

the trial court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016).

The habeas court determined that the petitioner had alleged that (1) the trial court did not properly instruct the jury with respect to the charge of attempted kidnapping, (2) he was convicted for conduct that the legislature did not intend to criminalize with regard to attempted kidnapping, (3) plea negotiations were unreasonably curtailed in light of the change in the interpretation of the kidnapping statute, (4) he is being unreasonably and cruelly punished for conduct that is, in light of *Salamon*, no longer a crime in Connecticut, and (5) the due process violations prejudiced his case and limited his ability to obtain a lesser sentence or a conviction of a lesser offense.

The habeas court's memorandum of decision discloses that it was cognizant of the controlling law. "[A] defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case." (Footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 547. "[W]hen the evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury." (Emphasis in original.) Id., 547–48. "Connecticut courts ultimately assess the importance of a *Salamon* instruction by scrutinizing how a reasonable jury would per-

ceive the [petitioner's] restraint of the victim, particularly with respect to when, where, and how the [petitioner] confined or moved the victim." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 745, 129 A.3d 796 (2016).

Our Supreme Court summarized the circumstances preceding and following its decision in *Salamon* in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 66. "Under our Penal Code, the hallmark of a kidnapping is an abduction, a term that is defined by incorporating and building upon the definition of restraint. . . . In 1977, this court squarely rejected a claim that, when the abduction and restraint of a victim are merely incidental to some other offense, such as sexual assault, that conduct cannot form the basis of a guilty verdict on a charge of kidnapping. . . . The court pointed to the fact that our legislature had declined to merge the offense of kidnapping with sexual assault or with any other felony, as well as its clearly manifested intent in the kidnapping statutes not to impose any time requirement for the restraint or any distance requirement for the asportation." (Citations omitted; footnote omitted.) Id., 66–67. The court left "open the possibility that there could be a factual situation in which the asportation or restraint was so miniscule that a conviction of kidnapping would constitute an absurd and unconscionable result that would render the statute unconstitutionally vague as applied." Id., 67–68.

In *Salamon*, the court reexamined the broad, literal interpretation of the statute. Id., 68. "In concluding that it must overrule its long-standing interpretation, the court went beyond the language of the kidnapping statute to consider sources that it previously had overlooked." Id. The court explained that "[o]ur legislature, in replacing a single, broadly worded kidnapping provision with a graduated scheme that distinguishes kidnappings from unlawful restraints *by the presence of an intent to prevent a victim's liberation*, intended

to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are *merely incidental to and necessary for* the commission of another crime against that victim. Stated otherwise, to commit kidnapping in conjunction with another crime, a [petitioner] 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." (Emphasis in original; internal quotation marks omitted.) Id., 69.

Thereafter, Peter Luurtsema filed a petition for a writ of habeas corpus seeking to have the *Salamon* holding applied retroactively to his case.[4] See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 764. In Luurtsema's habeas appeal, our Supreme Court "concluded as a matter of state common law that policy considerations weighed in favor of retroactive application of *Salamon* to collateral attacks on judgments rendered final before that decision was issued." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 69.

In the present case, the habeas court found that the petitioner's jury trial in the attempted kidnapping case occurred in 2005, three years before the Supreme Court rendered its *Salamon* decision. The trial court, therefore, did *not* give the jury a *Salamon* instruction. The habeas court assumed for the purposes of its analysis of the petitioner's claim that he was entitled to a *Salamon* instruction.[5] The court conducted its analysis pursuant to the following test: "[T]he test for determining whether a constitutional [impropriety] is harmless . . . is whether it appears beyond a reasonable doubt that

[4] Previously, in *State* v. *Luurtsema*, 262 Conn. 179, 203–204, 811 A.2d 223 (2002), our Supreme Court "foreclosed the possibility of an absurd or unconscionable result as a matter of statutory interpretation." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 68.

[5] In footnote 2 of its memorandum of decision, the habeas court also stated that the facts in the attempted kidnapping case did not, in the court's analysis, warrant a *Salamon* instruction.

the [impropriety] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted). *State* v. *Hampton*, 293 Conn. 435, 463, 988 A.2d 167 (2009), quoting *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "The test for determining whether a trial court's constitutionally defective jury charge was harmless . . . is not whether a jury likely would return a guilty verdict if properly instructed; rather, the test is whether there is a reasonable possibility that a properly instructed jury would reach a different result." *State* v. *Flores*, 301 Conn. 77, 87, 17 A.3d 1025 (2011).

The habeas court continued that the petitioner was charged in part with attempted kidnapping[6] and that the trial court instructed the jury that the petitioner was alleged to have taken "a substantial step forward in abducting another person . . . by substantially and unlawfully restraining [the complainant's] movement and restrained [her] by the use of physical force with the intent to inflict physical injury upon her." (Internal quotation marks omitted.) The habeas court determined that the facts reasonably found by the jury included the petitioner's bursting through the door of the victim's apartment, wrapping his hands around her throat and choking her. The petitioner struggled with the victim, who tried to break free of him, but he dragged her outside the apartment into a nearby hallway. When the victim began to flee, the petitioner grabbed her leg and pulled her back toward him. The victim and the petitioner continued to struggle and ended up outdoors, where the victim screamed for help. The petitioner pinned her against a wall. The day after he committed the offenses, the petitioner acknowledged to the police that he intended to torture and rape the victim.

[6] The state alleged in part in count two of the operative information that the petitioner "with the requisite mental state required for the commission of kidnapping in the first degree did take a substantial step forward in abducting another person specifically the [victim] . . . by substantially and unlawfully confining her movement and restrained [the victim] by the use of physical force with the intent to inflict physical injury upon her."

In assessing the petitioner's *Salamon* analysis in his posttrial brief, the habeas court found a critical flaw emanating from the brief's compression of the timeline and the absence of relevant facts. The habeas court found that the petitioner's overly succinct summary of the facts pertaining to the sequence of events omits much of what transpired between the petitioner and the victim.[7] The petitioner's analysis of his *Salamon/Luurtsema* claim omits facts reasonably found by the jury. The habeas court found that as a result of the petitioner's "myopic view" of the facts surrounding the protracted series of incidents that the petitioner contends that his restriction of the victim was merely incidental to the attempted sexual assault.

The habeas court continued by comparing the *Luurtsema* facts with the facts of the present case. In *Luurtsema*, a case in which the defendant was convicted of attempt to commit sexual assault in the first degree and kidnapping in the first degree,[8] the facts surrounding the kidnapping involved the defendant's having moved the victim from the couch to the floor in front of the couch. Any sexual assault could have occurred on the couch or on the floor, or both, but whether the movement or restriction of movement had any distinct criminal significance was for a properly instructed jury to

[7] Our review of the petitioner's posttrial brief supports the habeas court's assessment of the petitioner's *Salamon* analysis. The relevant portion of the petitioner's brief states only the following facts: "Witness Marcia Wynne testified at the criminal trial that she heard someone screaming, called the police from her garage phone, and police arrived within three to five minutes of her call. . . . St. Pierre . . . testified that he was sitting on a porch where his friend lived when he heard a woman screaming. [He] testified that he broke up the physical struggle and restrained the petitioner while they waited for the police. [He] stated that the police arrived within five to seven minutes of the encounter. Officer Posada testified that he responded to a dispatch call around 10 p.m. to 10:30 p.m. on May 8, 2001. [The victim] testified that she received a phone call from the petitioner around 10:30 p.m. on May 8, 2001, and that soon after, the struggle with the petitioner ensued. This testimony, paired with . . . Posadas' testimony demonstrates that the events occurred close in time." The victim "testified that the struggle took place at the door of her apartment building and a wall nearby." (Footnotes omitted.)

[8] See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 743.

determine. The habeas court found that the present matter involved facts readily distinguishably from cases where a *Salamon* instruction clearly was warranted. It concluded that "[t]he trial court was not required to give a *Salamon* instruction, but even if it had been required to do so . . . the absence of a *Salamon* instruction was completely harmless because there [was] no reasonable possibility that a jury instructed pursuant to *Salamon* would have reached a different result than it did."[9]

In his appellate brief, the petitioner claims that the habeas court erred in concluding that a *Salamon* instruction was not warranted by the facts of the case. He claims that the brief, continuous, and uninterrupted struggle between him and the victim that began at or about the threshold of her apartment and progressed to the exterior of the building lasted mere minutes.[10] He continues that "the additional offenses for which [he] was charged were so inextricably intertwined with the struggle that occurred within such a short time-frame, a *Salamon* instruction was warranted." The sum and substance of the petitioner's claim is that because the time between his entering the victim's apartment and the arrival of the police was mere minutes—five to ten—any restraint he imposed on the victim was incidental to the underlying crimes. He contends that the habeas court incorrectly characterized the struggle between him and victim as a "protracted series of incidents" and that there is no evidence to support the

[9] The habeas court also determined that the petitioner's brief failed to analyze several allegations in count one of his petition, i.e., the petitioner was convicted for conduct that the legislature did not intend to criminalize with regard to the attempted kidnapping conviction; plea negotiations were unreasonably curtailed in light of the change in the interpretation of the kidnapping statute; and that he is being unreasonably and cruelly punished for conduct that is, in light of *Salamon*, no longer a crime in Connecticut. Moreover, the habeas court concluded that the petitioner presented no evidence to support the allegations, and the allegations were without merit and/or were abandoned.

[10] On appeal, the petitioner's description of the events was more inclusive than the description he included in his posttrial brief in the habeas court.

habeas court's characterization of events. The essence of the petitioner's claim is that because his struggle with the victim took place in a short period of time and the distance she was moved was insignificant, the trial court's failure to give a *Salamon* instruction was not harmless as the habeas court had concluded. In analyzing the *Salamon* factors, the petitioner contends that he restrained the victim for mere minutes, the victim was not exposed to an increased risk of harm beyond the charged offenses, and the victim was able to escape and summon assistance. We reject the petitioner's attempt to minimize the significance of his conduct.

The petitioner's reliance on the length of time he restrained the victim and the distance he moved her is misplaced and rests on a misapplication of *Salamon*. Our Supreme Court has stated that "to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement." (Footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 546. Moreover, the petitioner was convicted of *attempt* to commit kidnapping in the first degree, not kidnapping in the first degree. The petitioner failed to address our law regarding the crime of attempt as it pertains to the present case in his brief.[11]

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

General Statutes § 53a-92 (a) provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually."

General Statutes § 53a-91 provides in relevant part: "The following definitions are applicable to this part:

"(1) 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . .

Significantly, the state highlights the fact that the petitioner was charged with *attempt* to commit kidnapping in the first degree, not kidnapping in the first degree. The state notes that the trial court instructed the jury that "the state does not claim that the defendant actually committed the crime of kidnapping first degree. Rather, it claims that the defendant is guilty of attempting to commit that crime." The trial court continued, "[w]ith respect to the first count, our criminal attempt statute insofar as it applies here provides as follows: a person is guilty of an attempt to commit a crime if acting with the kind of mental state required for commission of a crime, in this count kidnapping first degree, he intentionally does anything which under the circumstances as he believes them to be is an act constituting a substantial step in a course of conduct planned to end in his commission of the crime."[12]

The state points to evidence of the indisputably bizarre and disturbing statements the petitioner made to Mattuci that he intended to help the victim by bringing her into a deeper level of consciousness and true reality by using handcuffs and bondage and raping and torturing her, which the prosecutor argued to the jury. The police found handcuffs and a bondage tool on the petitioner's person when he was arrested. During the state's final argument, the prosecutor argued the facts related to the petitioner's intent to render the victim unconscious, bind her, and abduct her from her apartment to his where he intended to rape and torture her. On the basis of the evidence, the state concludes that the habeas court properly determined that the petitioner was not entitled to a *Salamon* instruction because he intended to abduct and restrain the victim

"(2) 'Abduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation. . . ."

[12] During the state's final argument, the prosecutor reminded the jury of the petitioner's statement to the police that he went to the victim's apartment

for a longer period of time and to a greater degree than would have been necessary to commit the other charged offenses and was only thwarted by the victim's own efforts to escape and the timely intercession of a third party. We agree with the state.

The salutary effect of the *Salamon* rule is to prevent "the prosecution of a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, [when] the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape, and there was lacking a genuine kidnapping flavor." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 546. *Salamon* does not require an instruction if the restraint or transport of a victim progresses significantly above and beyond the conduct intended and required to commit other charged or uncharged crimes. Id. The evidence in the present case demonstrated that the petitioner intended to render the victim unconscious, bind her and take her to his apartment where he would rape and torture her. The evidence of the petitioner's conduct from the time he burst through the door of the victim's apartment until St. Pierre came to her assistance demonstrates the petitioner's attempt to carry out his intention to bind her, render her unconscious, take her to his apartment, and rape and torture her. Moreover, his conduct and restraint of the victim exceeded that which was necessary to commit the object of his criminal intent. He choked the victim; when she broke free and ran from the apartment he grabbed her leg and pulled her back, and when she was free again, he chased her and pinned her against a wall and kept St. Pierre from coming to her aid. In addition, the petitioner's attempt to bind and move the victim from her apartment to his where he intended to rape and torture her increased the risk of harm, would have

intending to rape and torture her through the use of handcuffs and bondage tools, objects that were found on his person at the time of his arrest.

prevented her from seeking help, and would have prevented the crime from being detected. Clearly, the petitioner attempted "to prevent the victim's liberation for a longer period of time or to a greater degree than that which [would have been] necessary to commit the other crime." (Footnote omitted.) Id., 542.

On the basis of our review of the record, we conclude that the trial court was not required to give the jury a *Salamon* instruction, and therefore, we need not decide whether the absence of the instruction was harmless error because it is not reasonably possible that a properly instructed jury would have reached a different result. See *State* v. *Flores*, supra, 301 Conn. 87.

II

The petitioner's second claim is that the habeas court improperly concluded that his trial counsel did not render ineffective assistance of counsel by conceding the petitioner's guilt during closing argument.[13] We disagree.

[13] On appeal, the petitioner claims that his ineffective assistance of counsel claim is not governed by *Stickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that requires a petitioner to prove by a preponderance of evidence that counsel's performance was so deficient that counsel was not functioning as counsel guaranteed by the constitution and that but for counsel's unprofessional performance there is a reasonable probability that the result of the proceedings would have been different. Rather, the petitioner contends that his claim is controlled by *McCoy* v. *Louisiana*, U.S. , 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). In *McCoy*, the United States Supreme Court held that defense counsel overrode his client's sixth amendment right to autonomy by admitting the client's guilt without the defendant's consent. Violation of a client's autonomy constitutes structural error and is not subject to harmless error analysis. Id.; see also *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

The respondent contends that we should decline to review the petitioner's client autonomy or *McCoy* claim because the petitioner did not raise it in the habeas court, and the habeas court, therefore, did not rule on it. Thus, the record is inadequate for review. We agree. In *Leon*, this court held that a "petitioner's attempt to cast his claim as one of client autonomy, rather than ineffective assistance [as pleaded], is a new invention on appeal which should not be entertained." (Internal quotation marks omitted.) Id., 521. Because the petitioner did not plead client autonomy or analyze it in his posttrial brief in the habeas court, we decline to consider it on appeal. Moreover, we note that the habeas court issued its memorandum of decision on March 23, 2018; the United States Supreme Court issued its decision in

In his amended petition for a writ of habeas corpus, the petitioner alleged in part that his trial counsel's representation fell below the level of reasonable competence required of criminal defense lawyers in Connecticut and that, but for counsel's acts and omissions, it is reasonably probable that the outcome of the proceedings would have been different. More specifically, the petitioner alleged that counsel (1) failed to explain meaningfully to him the potential of continued prosecution in view of the missing victim,[14] (2) failed to explain meaningfully to him the maximum and minimum penalties of the charges against him, (3) failed to engage effectively in plea negotiations, (4) failed to move to stay the imposition of the sentence in the assault case, (5) failed to request that the petitioner receive all available jail credit due him at the time of sentencing in either case, (6) improperly conceded the petitioner's guilt in closing argument in the kidnapping case without his consent, (7) failed to present any mitigating evidence at sentencing, and (8) failed to consult with the petitioner about the consequences of changing his plea during final argument. The habeas court concluded that the petitioner failed to prove that his trial counsel rendered ineffective assistance pursuant to the allegations in (1), (2), (6), (7), and (8).[15] On appeal, the petitioner claims only that the habeas court improperly determined that trial counsel did not provide ineffective assistance when counsel conceded the petitioner's guilt during final argument without his consent.

The following procedural history and facts are relevant to the petitioner's claim of ineffective assistance of counsel. At his criminal trial in the attempted kidnapping case, the petitioner asserted the affirmative

McCoy on May 14, 2018. The petitioner, therefore, could not have raised it in the habeas court.

[14] Initially the state was unable to locate the victim. Shortly before trial, however, her whereabouts were discovered, and she testified.

[15] The habeas court found that the petitioner had failed to address the allegations in (3), (4), and (5) and, therefore, deemed the allegations abandoned.

defense of mental disease or defect pursuant to General Statutes § 53a-13.[16] In support of the affirmative defense, at trial, counsel presented testimony from Andrew W. Meisler, a psychologist, and Kenneth M. Selig, a forensic psychiatrist, both of whom had examined the petitioner.[17] Meisler testified that the petitioner suffered from ''chronic, longstanding, very severe mental illness,'' which had exhibited itself since the petitioner was a child. Meisler also testified that the petitioner's records contained diagnoses including schizophrenia, bipolar disorder, and ''psychiatric disorders that people have a hard time identifying.''[18] Meisler opined that the petitioner's conduct on the night of the attempted kidnapping, as described by the victim and as observed by the police, was consistent with the petitioner's history of mental illness. He further opined that due to the petitioner's mental illness, the petitioner ''lack[ed] the substantial capacity at times to conform his behavior to the expectations of the law and of society.''

Selig testified that the petitioner had a ''serious mental disorder'' of psychotic proportions. On the basis of his review of the petitioner's psychiatric records and his own examination of him, Selig concluded that the petitioner suffered from ''some form of personality dis-

[16] General Statutes § 53a-13 (a) provides: ''In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.''

[17] On June 15, 2001, the trial court, *Wollenberg*, *J.*, found the petitioner incompetent to stand trial but that he ''may be'' restored to competency after treatment. See *State* v. *Jenkins*, 288 Conn. 610, 618–19, 954 A.2d 806 (2008) (person charged with criminal offense ''who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future'' [internal quotation marks omitted]). On July 18, 2003, the trial court, *Handy*, *J.*, found the petitioner competent to stand trial and understand the proceedings against him.

[18] On cross-examination, Meisler conceded that some mental health professionals who previously had evaluated the petitioner opined that he was malingering.

order . . . that renders him so vulnerable to stress that he'll lose touch with reality." Selig opined that the petitioner's conduct, as revealed in the police reports and related by the petitioner himself, was consistent with his mental illness.[19]

In his closing argument, defense counsel argued to the jury, in part, as follows: "You will hear from [the judge] that what the defense raised in this case is called an affirmative defense of mental disease, and the reason why it's an affirmative defense is because there's a burden placed on the defendant to prove to you that he was suffering from a mental disease at the time of the incident and that as a result of that mental disease he didn't appreciate or substantially appreciate the wrongfulness of his act or did not substantially appreciate adjusting his conduct according to the law. . . . [W]hen an affirmative defense is raised . . . the defense has to prove by a preponderance of the evidence.

"[As the judge] goes through what's called the jury charge . . . look . . . carefully because you will be asking yourself whether or not you come up with what was the facts this case or not, and I'm not going to stand here and say nothing happened to [the victim]. You would have to decide whether or not what happened to [the victim] . . . justified charging my client with kidnapping, burglary, attempt to commit sexual assault, attempted kidnaping, assault, and interfering with a police officer, but the judge will instruct you if you find [the petitioner] guilty of any one of [the charges] so then the next thing you'll have to decide is did the defense prove their defense of mental disease. . . . [W]hat we're claiming is the facts and the testimony prove upon a preponderance of the evidence that

[19] Selig also testified that in April, 2001, shortly before the charged offenses, the petitioner had been hospitalized for a brief period for a psychotic disorder. The records indicated that the petitioner had smoked marijuana and "there was some question at that time as to how much of the problem was

[the petitioner] did not substantially understand the wrongfulness of his actions or he did not substantially adjust his conduct to the law. . . .

"It was the evidence that had two expert witnesses here testifying about the history of [the petitioner] up to the incident. . . . Selig brought you up almost to a week before and after. . . . Meisler talked about after, about [the petitioner's] mental disease and he was not in touch with reality.

"Now, an interesting part is assume the doctors weren't even here, assume we rested . . . and said take a look at the facts as they are and make your decision. So what do you have? And of course only your memory counts here, but my client is charged with attempted or attempt to commit sexual assault. Now if [the petitioner] had the intent to commit sexual assault why would he be dragging [the victim] outside of her apartment into the street? That's one point you have to ask yourself.

"It's a horrendous thing that happened to [the victim], but looking at it without sympathy, we'd have to analyze this. *As far as the burglary*, *obviously*, *he pushed the door and went in. So there's burglary there.* As far as attempted kidnapping, nobody knows what he supposedly—well, you heard the testimony of [the victim]. He dragged her out into the street and who knows what he wanted to do. Go to a movie or what? He wasn't saying anything. He wasn't say[ing] get in my car. He didn't have anything on him, no dangerous weapon or anything. . . .

"So I tell you, even without the expert witnesses that we had . . . the uncontroverted testimony of the expert witnesses, looking at it as to what he did, I'm not trying to mitigate it. I'm just trying to show you or have you think about what he did do. What did he do?

related to marijuana and how much was related to just a basic psychotic illness."

Did he act like a, was that a normal person?" (Emphasis added.)

Attorney Robert McKay represented the petitioner in both the assault case and the attempted kidnapping case. The petitioner previously had been represented by Attorney Douglas Pelletier, who had collected the majority of discovery materials, including reports from Meisler and Selig. McKay testified at the habeas trial that when he entered the cases, he advised the petitioner that he was not likely to prevail, but the petitioner was unwilling to pursue a plea deal. As trial approached in the assault case, McKay tried to convince the petitioner to pursue a mental disease or defect defense in that case. The petitioner rejected his advice, and the jury found the petitioner guilty.

Before trial in the attempted kidnapping case, the petitioner decided to present the affirmative defense of mental disease or defect to those charges. McKay could not remember when he discussed with the petitioner that presenting a mental disease or defect defense would involve conceding in closing argument that the petitioner had engaged in the charged conduct. McKay asserted that he would have discussed the matter with the petitioner before trial and testified that "because of the first trial, and then having the argument with him about bringing that affirmative defense, it's my recollection that he clearly understood . . . that we would be saying, 'yes, I did it, but because of my mental illness . . . I wouldn't have been able to adjust my conduct to the law because of my mental illness.' I mean so we had clearly had that conversation for the first one." McKay could not recall if he advised the petitioner specifically that, by presenting a mental disease or defect defense, he automatically would be conceding his guilt, but McKay believed that it was made known to the petitioner that he would have to say, "yes, I did it." McKay's strategy for closing argument was to use the petitioner's aberrant conduct to his benefit. At

the habeas trial, McKay testified that "it was the entire incident that I was . . . probably conceding just to have . . . some sympathy from the jury toward my client, because it was so abnormal for a person who really didn't know his neighbor, to break into her apartment and drag her down the street and do all that."

At the habeas trial, the petitioner testified that it was a "psychotic break" in 2001 that lead to his arrest and subsequent incarceration. He also testified that he had decided not to present a mental disease or defect defense in the assault case because he believed that, even if he was convicted without the defense, he would have received a sentence of only time served, but if he were found not guilty by reason of mental disease or defect, he could have been hospitalized for up to fifteen years. Contrary to his expectation, the petitioner was found guilty and sentenced to fifteen years of incarceration. Thereafter, the petitioner chose to present a mental disease or defect defense in the attempted kidnapping case.[20] The petitioner testified that counsel informed him that by pursuing a not guilty plea by reason of mental disease or defect defense the petitioner was conceding guilt but he did not think that he had to say that he was guilty for everything.[21]

After the parties submitted their posttrial briefs, the habeas court issued its memorandum of decision. The

[20] The petitioner also asked his counsel to seek a plea deal on the charges in the attempted kidnapping case. The state was not willing to negotiate a plea deal at that time.

[21] The petitioner testified as follows on cross-examination by the respondent:

"Q: So [Attorney McKay] did not advise you that you would be conceding guilty by pursuing the defense of not guilty by reason of mental defect?

"A: He—he did, but I was going to say something as concerning something else but—

"Q: So you knew that by pursuing that defense, you would essentially be saying that you were guilty of each of the crimes that you were charged with?

"A: Well, that umm—I—I didn't think I needed—I had to say that I was guilty for everything because—I wasn't so . . . he conveyed that . . . that guilt would be conceded because of the [not guilty by reason of insanity] defense you're not saying that it—it didn't happen, you're saying it happened, but even—but there were things that didn't happen that—that [I] wish not to concede to."

habeas court addressed the five claims of ineffective assistance of counsel that the petitioner had not abandoned; see footnote 15 of this opinion; and determined that counsel had not rendered ineffective assistance. With respect to the only claim raised by the petitioner on appeal, i.e., counsel improperly conceded the petitioner's guilt as to the burglary charge during closing argument, the habeas court stated that an affirmative defense asserted, pursuant to § 53a-13, that the petitioner should not be found guilty by reason of mental disease or defect inherently entails an acknowledgement that he committed the offenses. The object of such a defense is to have the defendant found not criminally liable for unlawful conduct. See, e.g., *Connelly* v. *Commissioner of Correction*, 258 Conn. 374, 387, 780 A.2d 890 (2001). "[B]y maintaining an affirmative defense pursuant to § 53a-13, the petitioner admitted his commission of the crime. . . . Such an admission necessarily implies that the petitioner also concedes that each of the individual elements comprising the offense is satisfied . . . ." (Citation omitted; internal quotation marks omitted.) *Sastrom* v. *Mullaney*, 286 Conn. 655, 663–64, 945 A.2d 442 (2008). The habeas court failed to see how the closing argument of the petitioner's counsel in which he acknowledged the petitioner's actions is indicative of deficient performance. The court concluded that counsel's remarks reflect a reasonable trial strategy and, thus, that the petitioner failed to demonstrate that counsel's performance was ineffective.

At the outset, we set forth the applicable standard of review. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted.) *Duperry* v. *Solnit*, 261 Conn. 309, 335, 803 A.2d 287 (2002).

"It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . Put another way, the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . In assessing the attorney's performance, we indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Sastrom* v. *Mullaney*, supra, 286 Conn. 662.

Pursuant to our plenary review of the petitioner's claim, we conclude that the habeas court properly determined that counsel's performance with respect to his closing argument in which he conceded the petitioner's guilt with respect to burglary was not deficient. The petitioner bears the burden "to prove that his counsel's performance was objectively unreasonable." *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018).

The evidence demonstrates that counsel urged the petitioner to assert a mental disease or defect special defense in the assault case, but the petitioner rejected counsel's advice. Following his conviction in the assault case, the petitioner informed his counsel that he wanted to pursue a mental disease or defect affirmative defense in the attempted kidnapping case. Counsel explained to the petitioner that such an affirmative defense consti-

tuted an admission of guilt. Counsel testified that he advised the petitioner prior to trial that asserting a not guilty plea by reason of mental disease or defect affirmative defense involved a concession of guilt.[22] The petitioner was equivocal as to whether he recalled counsel's advice to him that presenting a mental disease or defect defense involved a concession of his factual guilt. The petitioner claimed that he misunderstood that he would concede his factual guilt to all charges. See footnote 20 of this opinion. There is no evidence in the record, however, that the petitioner ever objected to counsel's concession strategy and the habeas court made no such finding. Moreover, counsel's closing argument was predicated on the evidence in the record. Meisel and Selig both testified that the petitioner was suffering from a mental disease or defect when he committed the charged crimes. Conceding something that is obviously so is not ineffective advocacy. Counsel's closing argument conceding guilt was a reasonable trial strategy to further the petitioner's interest of pleading not guilty by reason of mental disease or defect. The petitioner's claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION
(AC 41930)

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

Syllabus

The petitioner, a Cameroonian citizen who had been convicted, on a guilty plea, of the crime of sexual assault in the third degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective

[22] When counsel was asked whether he discussed conceding guilt with the petitioner, he responded: "I don't recall specifically when I would have discussed it with him, but probably even before the trial. I'd be discussing that with him as far as going forward on that defense. He—first time he didn't want to do it. The second time he wanted that defense, affirmative defense, so then I would have gone over everything with him."

assistance by failing to advise him properly of the immigration consequences of pleading guilty and that his right to due process was violated because his plea was not knowingly, intelligently and voluntarily made due to trial counsel's failure to advise him properly with respect to the immigration consequences. The respondent, the Commissioner of Correction, filed a return raising a special defense that the petitioner's due process claim was procedural defaulted. The habeas court rendered judgment denying the habeas petition, finding that the petitioner failed to establish that trial counsel had rendered ineffective assistance or that he was prejudiced by trial counsel's alleged deficient performance. The court also found that the petitioner's due process claim was procedurally defaulted because he failed to meet his burden as to his ineffective assistance of counsel claim and had not established cause and prejudice sufficient to overcome the procedural default. In reaching its decision, the court credited trial counsel's testimony that he had advised the petitioner, prior to the plea hearing, that he would be deported if he pleaded guilty, and it discredited the petitioner's testimony to the contrary. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly rejected his ineffective assistance of counsel claim, that court having properly determined that the petitioner failed to establish that he was prejudiced by his trial counsel's alleged deficient performance; the petitioner failed to meet his burden of demonstrating that he would have rejected the plea agreement and insisted on going to trial had he known the immigration consequences of his guilty plea because, beyond his own testimony, which the habeas court found to be not credible, the petitioner did not offer any evidence that he would have rejected the plea offer and gone to trial and, in fact, there was significant evidence contradicting his claim, and the petitioner did not raise any claim of improper advice from trial counsel regarding immigration consequences until his habeas counsel filed the operative petition, several years after deportation proceedings had been initiated against him.
2. The petitioner could not prevail on his claim that his due process rights were violated because his guilty plea was not made knowingly, intelligently and voluntarily; the petitioner's due process claim relied solely on his allegation that his trial counsel improperly advised him about the immigration consequences of pleading guilty, and, therefore, because this court agreed with the habeas court that the petitioner had not demonstrated ineffective assistance of trial counsel, the petitioner was unable to establish the cause and prejudice sufficient to overcome the procedural default.

Argued September 11—officially released December 17, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Edward J. Mullar-*

key, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Jennifer B. Smith, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Angela Macchiarulo*, senior assistant state's attorney, and *Michael Proto*, assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Chrysostome Kondjoua, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly rejected his claims that (1) his trial counsel provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty under *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and (2) his guilty plea was not knowingly, intelligently, and voluntarily made. We disagree and, therefore, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. The petitioner is a Cameroonian citizen who has resided in the United States since 2010 as a long-term, permanent resident with a green card. He was arrested on November 29, 2013, and charged with the sexual assault in the first degree of an eighty-three year old woman, for whom he had been working. The petitioner entered a plea of not guilty and elected a jury trial.

On December 16, 2014, after the jury had been picked and evidence was set to begin, the petitioner accepted a plea agreement to the reduced charge of sexual assault in the third degree. Before accepting the petitioner's

guilty plea, the trial court canvassed him.[1] The trial

[1] During the plea canvass, the following colloquy occurred:

"The Court: [Petitioner], I'm going to ask you some questions. Keep your voice up, so the interpreter can understand and hear you. Sir, how far have you gone in school, be it here, or in Cameroon?

"[The Petitioner]: High school diploma.

"The Court: And have you understood all the conversations you've had with your lawyer, leading up to your decision to plead guilty to this felony charge today?

"[The Petitioner]: Yes, Your Honor.

"The Court: Are you satisfied with his advice?

"[The Petitioner]: Yes, Your Honor.

"The Court: Are you under the influence today of any alcohol, drugs, [or] medications of any kind?

"[The Petitioner]: No.

"The Court: Are you currently on probation or parole?

"[The Petitioner]: No.

"The Court: Did you have enough time to go over—

"[Defense Counsel]: Your Honor, just one second.

"(Aside)

"[Defense Counsel]: Okay. I'm sorry. I apologize.

"The Court: Did you go over with your lawyer the charge, sexual assault in the third degree, as charged, class D felony, carries up to five years, and/or, a $5000 fine, a felony, causing you to give a sample of your DNA to the state of Connecticut, and you're going to have to register as a sex offender in the state of Connecticut. You're going to have to abide by all the rules and regulations of registration. One of those is, if you get to treatment, you'd have to go in and admit whatever your involvement was with this case. If you failed to do that, you could be charged with violation of probation and serve the unexecuted portion of your sentence, which in this case would be the difference between five years and the twenty months you're going to serve, or you'd have forty months hanging over your head. So, you could go back and serve that forty months. This is considered a nonviolent ten year registration. Have you gone over all of those things with [defense counsel]?

"[The Petitioner]: Yes, Your Honor.

"The Court: [Defense Counsel], have you done that?

"[Defense Counsel]: The only thing I didn't go over, Your Honor, was the DNA, but he has already given a DNA sample. So—

"The Court: Why don't you just explain to him why he has to do that?

"(Aside)

"The Court: Okay?

"[Defense Counsel]: Yes. Thank you.

"The Court: Sexual assault in the third degree, as charged, class D felony, a person is guilty of sexual assault in the third degree when such person compels another person to submit to sexual contact by the use of force against such other person, or a third person. You have now given up your

court found that the plea was made knowingly, intelligently, and voluntarily, and ordered a presentence investigation. On March 4, 2015, the court sentenced the petitioner to the agreed disposition of five years of imprisonment, execution suspended after twenty months, with ten years of probation. The petitioner also was required to register as a sex offender for ten years. The petitioner did not file a direct appeal.

While the petitioner was serving his sentence, the United States Department of Homeland Security (department) initiated deportation proceedings against

right to remain silent, to continue to plead not guilty, to a court or a jury trial, with the assistance of your attorney, your right to cross-examine witnesses, to call witnesses on your behalf, testify, if you wanted to, present defenses, and have the state prove you guilty beyond a reasonable doubt. In other words, there will be no trial. The jury was upstairs, evidence was about to begin. This is your decision. Correct?

"[The Petitioner]: Yes.

"The Court: Did you make this decision freely and voluntarily?

"[The Petitioner]: Yes, Your Honor.

"The Court: Did anybody force you, or threaten you, in anyway, to get you to plead guilty?

"[The Petitioner]: No.

"The Court: You've heard the facts recited by the state's attorney. Are those facts, essentially, correct?

"[The Petitioner]: Yes, Your Honor.

"The Court: Do you understand if you are not a citizen of the United States that the plea that you have just entered could result in deportation, or removal from the United States, exclusion from the readmission to the United States, denial of naturalization, pursuant to the laws of the United States?

"[The Petitioner]: Yes, Your Honor.

"The Court: Did you go over that issue with your lawyer?

"[The Petitioner]: Yes.

"The Court: [Defense Counsel], did you go over that issue with your client?

"[Defense Counsel]: We did, Your Honor. I informed my client that, based on the charges, it is highly likely that, at the very least, immigration will begin deportation proceedings against him, and the likelihood that he will get deported. But, I also informed him that I do not practice immigration law and that I will put him in touch with an immigration lawyer to help him fight those proceedings, if necessary.

"The Court: Was he satisfied with that advice?

"[Defense Counsel]: He was, Your Honor."

him. The department cited the petitioner's March, 2015 conviction for sexual assault in the third degree as the ground for removal and stated that the petitioner was subject to removal because he had been convicted of an aggravated felony and a crime of moral turpitude, in violation of § 237 (a) (2) (A) (iii) and § 237 (a) (2) (A) (i) of the Immigration and Nationality Act, respectively. A warrant for the petitioner's arrest was served on July 14, 2015, and the petitioner was taken into the department's custody.[2]

On June 19, 2015, the petitioner, then self-represented, filed a petition for a writ of habeas corpus.[3] Appointed counsel thereafter filed an amended petition.[4] On October 17, 2017, counsel filed a second amended petition, which is the operative petition in this case. It alleged two claims: Ineffective assistance of trial counsel for the improper advice concerning the immigration consequences of a guilty plea and a due

[2] The petitioner filed an application for deferral of removal under the Convention against Torture, which was denied on September 14, 2015. The petitioner appealed to the Board of Immigration Appeals (board). The board found that the immigration judge had properly entered the order for removal, dismissed the petitioner's appeal, and denied his motion to remand for further consideration.

[3] The petitioner's petition alleged a due process violation claiming that his guilty plea was not made knowingly, intelligently, or voluntarily because he was under the influence of medication, trial counsel pressured him to plead guilty, and he had trouble understanding and communicating with trial counsel because English is not his first language and he did not always have the benefit of an interpreter during their conversations.

[4] The petitioner's first amended petition contained two counts, in which he alleged an ineffective assistance of counsel claim and a due process violation in that the petitioner's plea was not entered knowingly, intelligently, or voluntarily. The ineffective assistance claim alleged that trial counsel failed (1) to investigate properly a motion to suppress the petitioner's statements, (2) to advise the petitioner properly about a withdrawal of his guilty plea, (3) to inquire or investigate the medications the petitioner was taking when he pleaded guilty, and (4) to file a motion to withdraw the petitioner's guilty plea when the petitioner expressed to the court at sentencing that he wanted to go to trial. The due process claim alleged that the petitioner was under the influence of medication and did not understand the terms of the plea agreement when he pleaded guilty.

process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. On December 19, 2017, the respondent, the Commissioner of Correction, filed a return alleging that the petitioner's due process claim was in procedural default. The petitioner filed a reply denying the allegations in the respondent's return on December 28, 2017.

On May 16, 2018, the habeas court issued a memorandum of decision in which it denied the petition. The habeas court found that the petitioner failed to establish that trial counsel had rendered ineffective assistance. The court found the testimony of trial counsel credible and the petitioner's testimony not credible, and determined that counsel had advised the petitioner, prior to the plea hearing, that he would be deported if he pleaded guilty. Further, the court found that the totality of counsel's advice demonstrated that he adequately had advised the petitioner of the immigration consequences of pleading guilty. The court further found that, "because the court does not find the petitioner credible, the claim must also fail because the petitioner has not demonstrated that he would have maintained his plea of not guilty and proceeded to trial." Regarding the petitioner's second claim, the court found that the petitioner had not established cause and prejudice sufficient to overcome the procedural default. On June 15, 2018, the habeas court granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner claims that the habeas court erred in rejecting his claim that his trial counsel provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty[5]

[5] The petitioner alternatively claims that the habeas court erroneously determined that trial counsel properly had advised him that he would be deported as a result of pleading guilty. Because we determine that the

pursuant to *Padilla* v. *Kentucky*, supra, 559 U.S. 356. Because we conclude that the habeas court properly determined that the petitioner failed to establish that he was prejudiced by trial counsel's alleged deficient performance, we reject the petitioner's claim.

We begin our analysis with the legal principles that govern our review of the petitioner's claim. The sixth amendment to the United States constitution, applicable to the states through the due process clause of the fourteenth amendment, and article first, § 8, of the constitution of Connecticut provide that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. U.S. Const., amend. VI; Conn. Const., art. I, § 8; see *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.

petitioner failed to demonstrate that he was prejudiced by trial counsel's actions, we do not reach this claim.

. . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier . . . . In its analysis, a reviewing court may look to the performance prong or the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citation omitted; internal quotation marks omitted.) *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 9–10, A.3d (2019).

"[T]he *Hill* [v. *Lockhart*, 474 U.S. 51, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)] prejudice standard provides that [i]n the context of a guilty plea . . . to succeed on the prejudice prong the petitioner must demonstrate that, but for counsel's alleged ineffective performance, the petitioner would not have pleaded guilty and would have proceeded to trial. . . . In evaluating whether the petitioner ha[s] met this burden and . . . the credibility of the petitioner's assertions that he would have gone to trial, it [is] appropriate for the court to consider whether a decision to reject the plea bargain would have been rational under the circumstances." (Citations omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, supra, 171 Conn. App. 663; see also *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 705, 184 A.3d 804 ("[t]o satisfy the prejudice prong [under *Strickland–Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"), cert. denied, 330 Conn. 939, 195 A.3d 692 (2018). Finally, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017).

"The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [its] firsthand observation of [a witness'] conduct, demeanor and attitude." (Citations omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 278–79, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

In regard to the prejudice prong of *Strickland*, the petitioner argues that this case should be remanded to the habeas court for a determination of prejudice under *Strickland*. The petitioner proffers two reasons for remand: (1) "the habeas court failed to consider whether . . . there was a reasonable probability that, but for counsel's deficient performance, the petitioner would not have pleaded guilty and would have insisted on going to trial" and (2) "the habeas court speculated about the strength of evidence against the petitioner."[6] In its memorandum of decision, the habeas court found that the petitioner's testimony was not credible and determined that he had not met his burden of establishing that he would have rejected the state's plea offer and elected to go to trial.

Beyond the petitioner's own testimony, which the habeas court found to be not credible, the petitioner has not offered any evidence that he would have rejected the plea offer and gone to trial. Instead, there

[6] In the petitioner's appellate brief, he also claimed that the "habeas court abused its discretion in declining to admit evidence of prejudice" as another justification for requesting remand. During oral argument before this court, however, the petitioner explicitly stated that he was declining to pursue that claim at this time. Therefore, we do not address it here.

is significant evidence contradicting this claim. The petitioner originally was charged with sexual assault in the first degree. The charge was based on the complaint of an eighty-three year old woman who stated that the petitioner, whom she hired to do some work at her house, assaulted her by penetrating her from behind without her consent. While the petitioner's criminal case was pending, trial counsel engaged in plea negotiations on the petitioner's behalf. During that time, the petitioner made a counter offer of two years to serve, which the state rejected. Despite trial counsel's efforts, the state refused to reduce the charge to a point where the petitioner could avoid immigration consequences. The petitioner filed a motion for a speedy trial, but he did not pursue the motion. After the jury had been picked and on the same day evidence was set to begin with the testimony from the eighty-five year old victim, who was present and ready to testify, the petitioner pleaded guilty to the reduced charge of sexual assault in the third degree. At sentencing, the victim addressed the court and expressed her support for the sentence and stated that she hoped the petitioner would be deported. After the victim spoke, the petitioner addressed the court and did not deny engaging in sexual relations with the victim and stated that the victim had consented. The habeas court found that the "consent" defense proffered by the petitioner was not credible and "seems unlikely to have prevailed" at trial. In addition, the petitioner did not raise any claim of improper advice regarding immigration consequences from his trial counsel until his habeas counsel filed the operative petition, several years after the department initiated deportation proceedings. The petitioner has failed to meet his burden of demonstrating that he would have rejected the plea agreement and insisted on going to trial.

Because we conclude that the trial court properly determined that the petitioner failed to prove the prejudice prong of *Strickland*, we need not reach the issue of deficient performance. See *Strickland* v. *Washington*, supra, 466 U.S. 697 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant"); *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 422, 202 A.3d 453 (deciding ineffective assistance of counsel on basis of failure to demonstrate prejudice prong), cert. denied, 331 Conn. 905, 202 A.3d 373 (2019); *Bova* v. *Commissioner of Correction*, 162 Conn. App. 348, 358, 131 A.3d 268 ("[t]he petitioner has failed to prove that he was prejudiced . . . therefore we decline to reach the first *Strickland* prong"), cert. denied, 320 Conn. 920, 132 A.3d 1094 (2016); *Russell* v. *Commissioner of Correction*, 150 Conn. App. 38, 46, 89 A.3d 1023 (resolving petitioner's claim on basis of prejudice prong), cert. denied, 312 Conn. 921, 94 A.3d 1200 (2014); see also *Ouellette* v. *Commissioner of Correction*, 154 Conn. App. 433, 448 n.9, 107 A.3d 480 (2014) ("[a] court evaluating an ineffective assistance claim need not address both components of the *Strickland* test if the [claimant] makes an insufficient showing on one" [internal quotation marks omitted]). Accordingly, the petitioner's claim of ineffective assistance of counsel fails.

II

Next, the petitioner claims that the habeas court violated his right to due process by rejecting his claim that his guilty plea was not made knowingly, intelligently, and voluntarily. Specifically, he argues that trial counsel misadvised him about the immigration consequences of a guilty plea, and, as a result, the guilty plea he entered was made not knowing that deportation was inevitable. The respondent argues that this claim was in procedural default and, therefore, fails. The habeas court agreed with the respondent, and so do we.

Our review of this claim is plenary. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 65, 136 A.3d 596 (2016) ("[q]uestions of law and mixed questions of law and fact receive plenary review" [internal quotation marks omitted]). "When a habeas petitioner has failed to file a motion to withdraw his guilty plea or to challenge the validity of the plea on direct appeal, a challenge to the validity of the plea in a habeas proceeding is subject to procedural default." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 175, 982 A.2d 620 (2009). "In essence, the procedural default doctrine holds that a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). "[T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . . Therefore, attorney error short of ineffective assistance of counsel does not adequately excuse compliance with our rules of [trial and] appellate procedure." (Internal quotation marks omitted.) *Brunetti* v. *Commissioner of Correction*, 134 Conn. App. 160, 168, 37 A.3d 811, cert. denied, 305 Conn. 903, 44 A.3d 180 (2012).

In the operative petition, the petitioner claimed that his guilty plea was not made knowingly, intelligently, and voluntarily because his trial counsel had failed to advise him adequately of the immigration consequences. He also alleged that "the sentencing court . . .

did not specifically advise the petitioner that he would be deported as a result of his plea." In its return, the respondent raised the special defense of procedural default.

The habeas court found that the petitioner's claim was procedurally defaulted because he had failed to meet his burden as to the claimed ineffective assistance of counsel. The court further found that the trial court's "canvass comported with General Statutes § 54-1j." The habeas court concluded that because the petitioner has failed to demonstrate any cause and prejudice sufficient to overcome the procedural default, the due process claim must fail on that basis. Even if it was not procedurally defaulted, the court concluded that the claim would have failed on the merits as the court already had found that there was no ineffective assistance of counsel.

On appeal, the petitioner claims that the habeas court erred in concluding that his claim was procedurally defaulted because he had in fact demonstrated that trial counsel misadvised him of the immigration consequences of pleading guilty.[7] As a result, the petitioner argues, the demonstration of ineffective counsel satisfied the cause and prejudice standard to overcome the procedural default.

The respondent relies on the habeas court's determination of procedural default and argues that if we conclude that the petitioner's ineffective assistance of counsel claim fails, his second claim fails as well, citing

[7] The petitioner attempted to raise two other claims on appeal in relation to this due process claim. We do not consider these claims as they were not alleged in the operative habeas petition. Although both claims were raised in the petitioner's original petition and the first amended petition, the claims were not alleged in the operative petition. We therefore consider these claims abandoned. See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017) ("When an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of appeal." [Internal quotation marks omitted.]).

Placide v. *Commissioner of Correction*, 167 Conn. App. 497, 504–505, cert. denied, 323 Conn. 922, 150 A.3d 1150 (2016), for the proposition that "because [the] petitioner's due process claim was [a] reformulation of his ineffective assistance claim, and this Court concluded that the habeas court properly found that [the] petitioner's attorney was not ineffective, this claim fails." We agree with the respondent.

The petitioner's due process claim relies solely on his allegation that trial counsel improperly advised him about the immigration consequences of pleading guilty. Because we agree with the habeas court that the petitioner has not demonstrated ineffective assistance of trial counsel, the petitioner is unable to establish the cause and prejudice sufficient to overcome the procedural default.

The judgment is affirmed.

In this opinion the other judges concurred.

IAN COOKE *v.* COMMISSIONER OF CORRECTION (AC 38272)

Lavine, Devlin and Beach, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. The petitioner subsequently filed an application for a fee waiver and attached thereto an affidavit requesting certification of additional issues on appeal. Although the waiver application was granted, the court did not initially rule on the petitioner's request for certification of additional issues on appeal, and the petitioner subsequently filed a motion for articulation requesting that the court rule on his request, which the court treated as a motion to amend the petition for certification and granted. On appeal, the respondent Commissioner of Correction claimed that the habeas court, having previously denied the petition for certification to appeal, lacked jurisdiction to allow the petitioner to amend his petition for certification to appeal. *Held*:

1. The respondent's claim that the habeas court lacked jurisdiction to allow the petitioner to amend his petition for certification to appeal was unavailing: that court's ruling did not implicate the four month jurisdictional limit of the applicable rule of practice (§ 17-4) because courts have continuing jurisdiction to fashion appropriate remedies pursuant to their inherent powers, and its ruling allowing the petitioner to amend his petition for certification to appeal was merely a clarification of an ambiguity in the record concerning which claims the petitioner had preserved for appeal, and although the petitioner timely raised claims in his petition for certification to appeal and his waiver application, the court had ruled on only the former, and the issues raised in his application went unaddressed by the court, through no fault of the petitioner, until he filed a motion for articulation; accordingly, the court did not open a twenty-two month old judgment but, rather, addressed an overlooked petition for certification to appeal that previously had been filed.
2. The habeas court did not abuse its discretion in denying the habeas petition and concluding that trial counsel's performance was not deficient:

   a. The petitioner could not prevail on his claim that the habeas court erred by not analyzing whether the cumulative effect of his trial counsel's alleged errors constituted prejudice under *Strickland* v. *Washington* (466 U.S. 668); the court considered and rejected multiple claims of ineffective assistance that the petitioner alleged against his trial counsel, noting that the state presented a strong case against the petitioner, our Supreme Court has repeatedly declined to adopt a cumulative error analysis, and it was not within the province of this court to reevaluate the decisions of our Supreme Court.

   b. The petitioner's claim that his trial counsel was ineffective by failing to ensure that he was competent to stand trial was unavailing; although the petitioner claimed the court did not consider evidence that he suffered from amnesia when the crimes were committed and throughout his criminal trial, the petitioner's trial counsel testified at the habeas trial that he had reviewed three competency evaluations, all of which indicated that the petitioner was competent to stand trial and capable of assisting his attorney, the court found that trial counsel's testimony was credible and that the petitioner was intelligent and able to understand the proceeding, and that the petitioner presented no evidence to corroborate his amnesia claim or indicating what an additional investigation would have uncovered had counsel undertaken such steps, and the petitioner failed to demonstrate that that finding of the habeas court was clearly erroneous.
3. The petitioner could not prevail on his claim that the habeas court abused its discretion in denying his petition for a writ of mandamus to obtain legal assistance in preparing his appellate brief and oral argument:

   a. Contrary to the claim of the respondent, the petitioner's claim was not moot because it fell within the capable of repetition, yet evading review exception to the mootness doctrine; the petitioner's claim related

to an inherently limited action that would likely be moot in a substantial majority of cases, the petitioner alleged an ongoing constitutional violation in which our correctional facilities systematically deny inmates meaningful access to the courts and, thus, this issue would be likely to arise any time that an inmate proceeds self-represented, and the petitioner raised a question of public importance because he alleged a serious constitutional violation.

b. The habeas court did not abuse its discretion in denying the petition for a writ of mandamus; the appointment of counsel for habeas petitioners satisfies the requirements of our state constitution and *Bounds* v. *Smith* (430 U.S. 828), which provides that inmates have a constitutional right to access to the courts, the petitioner was not deprived of his rights because he had the option of appointed counsel at his habeas trial and on appeal but elected to proceed self-represented, *Bounds*, which affords the states discretion to determine how to provide access to the courts, and its progeny provide no specific requirement that the states provide law libraries or other means of legal research to inmates, and, therefore, the remedy sought was not a mandatory duty of the state and the petitioner had no clear right to have the duty performed.

Argued September 23—officially released December 17, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Cobb*, *J.*, granted the petition for certification to appeal; thereafter, the court, *Bright*, *J.*, denied the petition for a writ of mandamus filed by the petitioner. *Affirmed.*

Ian Cooke, self-represented, the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom were *Matthew A. Weiner*, assistant state's attorney, and, on the brief, *William Tong*, attorney general, *Michael L. Regan*, state's attorney, and *Lawrence J. Tytla*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. The petitioner, Ian Cooke, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner asserts that (1) his claims were properly certified for appellate review by the habeas court, (2) the cumulative effect of his trial counsel's errors deprived him of effective assistance of counsel, (3) his trial counsel was ineffective in not ensuring that he was competent to stand trial, and (4) the court erred in failing to issue a writ of mandamus directing the Office of the Chief Public Defender to provide him with legal assistance to pursue the present appeal. The respondent, in turn, argues that the habeas court lacked jurisdiction to grant the petition for certification to appeal more than four months after its initial denial of certification to appeal. In response, the petitioner contends that the court had continuing jurisdiction to grant the petition for certification to appeal. We agree that the court had continuing jurisdiction to grant the petition for certification to appeal, but conclude that it did not abuse its discretion in denying both the petition for a writ of habeas corpus and the petition for a writ of mandamus. Accordingly, we affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, capital felony murder in violation of General Statutes § 53a-54b (7), and possession of a sawed-off shotgun in violation of General Statutes § 53a-211 (a). The court sentenced him to a total effective term of life imprisonment without the possibility of parole. The petitioner's conviction was affirmed on direct appeal. *State* v. *Cooke*, 134 Conn. App. 573, 581, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). In its resolution of that appeal, this court set forth the following facts, which are relevant to this appeal.

"Sometime after 3 p.m. on May 27, 2006, the town of Groton dispatch center received a 911 call from 1021 Pleasant Valley Road reporting that one Gregory Giesing had been shot at his residence. Police officers, including Officer Sean Griffin, arrived at the scene, and Gregory Giesing's wife, Laurel Giesing, reported that she had observed in her driveway after she had found her husband shot a 'dark, silver grayish' Jeep with thick piping on the front. After going through the residence to ensure that it was safe, Griffin went to the lower unit of the residence and found Derek Von Winkle, Gregory Giesing's stepbrother, who also had been shot. Shortly thereafter, fire and medical personnel arrived.

"One of the responders from the fire department informed Griffin that there had been a stabbing at the LaTriumphe Apartments, which was near the Giesings' residence. The police, including Griffin, responded to that location, entered an apartment through an open sliding door and found on the living room floor the [petitioner], whose hand and cheek were injured. The police spoke with the [petitioner's] father, who had called 911 and had told the dispatcher that his son may have been stabbed by a drug dealer or drug dealers. Based upon the conversation between the police and the [petitioner's] father, Griffin then went outside to the parking lot to look for the Jeep that Laurel Giesing had described. Griffin located a silver gray Jeep with a 'brush guard,' and observed blood on the exterior driver's side and on the driver's side interior compartment of the vehicle. Laurel Giesing was later shown the vehicle and, after examining it, stated that it looked 'very similar' to and 'the same' as the vehicle she saw at her residence after her husband had been shot. Additionally, a search of the general outside area, including a wooded area, around the [petitioner's] apartment revealed apparently bloodstained duffle bags containing illegal drugs and a disassembled shotgun.

"An associate medical examiner for the state determined that Gregory Giesing died of a gunshot wound to the chest. The medical examiner concluded that Von Winkle died of a shotgun wound to the neck and chest. . . .

"Several items of evidence, including three known samples of DNA from Von Winkle, Gregory Giesing and the [petitioner], were submitted to the state forensic science laboratory for DNA analysis. Nicholas Yang, a forensic science examiner, performed the tests. At trial, he testified as to his findings. Yang determined that the [petitioner's] DNA was consistent with that found on the exterior of a duffle bag found outside the [petitioner's] apartment complex, the doorknob to Von Winkle's apartment, multiple locations on pants retrieved from Gregory Giesing's body, the wooden deck area of Gregory Giesing's residence, a part of the floor mat of the Jeep and on various parts of the disassembled shotgun. The [petitioner] could not be eliminated as a source of DNA on the zipper of a Dudley bag, a reddish-brown stain on a knife found near Gregory Giesing's body, a blood-like substance taken from the interior door of Gregory Giesing's apartment, the steering wheel of the Jeep, a hacksaw from the apartment in which the [petitioner] was found, two swabs from the floor mat of the Jeep and the brake pedal from the Jeep." (Citations omitted; footnote omitted.) Id., 575–77.

On August 4, 2011, the petitioner filed a self-represented petition for a writ of habeas corpus. Subsequently, Attorney John Williams was appointed to represent the petitioner. Williams never filed an amended petition. When asked by the habeas court, *Cobb*, *J.*, to clarify the claims raised in the petition, Williams presented three claims that the petitioner's trial counsel, Attorney John Walkley, was ineffective by: "(1) failing to adequately investigate and prepare the case for trial, (2) failing to adequately challenge the prosecution's case and present the defense's case at trial and

(3) failing to assure that the petitioner was competent to stand trial." In addition, the petitioner's brief to the habeas court raised two more claims that Walkley was ineffective in cross-examining one witness and impeaching another witness.

The habeas court conducted a five day trial between March 20, 2014, and September 10, 2014. On July 8, 2015, the habeas court issued a memorandum of decision denying the petition. The habeas court concluded that, as to each of the petitioner's claims, he had failed to prove either that Walkley's performance was deficient or that the petitioner was prejudiced by Walkley's performance, as required by *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to establish ineffective assistance of counsel. The habeas court also noted that the petitioner had offered little to no evidentiary support for most of his claims.

Shortly thereafter, on July 13, 2015, Williams filed a petition for certification to appeal setting forth two issues: "Did [the habeas] [c]ourt err in [1] requiring petitioner to prove prejudice from trial counsel's failure to have a competency exam, when such retrospective proof is impossible and prejudice is presumed; and [2] in failing to address counsel's failure to visit the crime scene and test . . . both sound and sight?" The court denied the petition for certification to appeal on July 14, 2015.

On July 22, 2015, independently of Williams, the petitioner filed an application for waiver of fees, costs and expenses and appointment of counsel on appeal (waiver application). Attached to the waiver application, the petitioner included a document titled, "Affidavit in Support of Petition for Certification to the Appellate Court." In this affidavit, the petitioner requested certification to appeal on different grounds than those articulated by Williams. The petitioner sought certification to appeal on four other issues: (1) whether the court properly considered the petitioner's argument that he was

not competent to assist Walkley; (2) whether the evidence, in the aggregate, supported the petitioner's theory that Walkley had not conducted a thorough and complete investigation of the blood and DNA evidence; (3) whether there were cumulative deficiencies in Walkley's representation and whether those numerous deficiencies, in the aggregate, prejudiced the petitioner; and (4) whether the court erred in not considering the totality of Walkley's alleged errors in conducting its *Strickland* analysis. While the habeas court did grant the petitioner's waiver application on July 27, 2015, there was no indication in the record at that time that the court had ruled on the petitioner's request for certification of additional issues on appeal.

On August 17, 2015, the petitioner filed his appeal. Subsequently, on November 5, 2015, Attorney Allison Near filed her appearance as appointed appellate counsel for the petitioner. On June 10, 2016, Near filed a motion for leave to withdraw as appointed counsel accompanied with an *Anders* brief.[1] The petitioner later filed, on January 4, 2017, a motion to remove Near as appointed counsel and to proceed self-represented. The court, *Bright, J.*, granted the petitioner's motion on March 6, 2017. Subsequently, the self-represented petitioner filed an appearance with this court on March 17, 2017.

On March 31, 2017, the petitioner filed a motion for articulation, requesting that the habeas court issue a ruling on his affidavit attached to his waiver application, which he had filed on July 22, 2015, that outlined additional issues for appeal. In a handwritten ruling added at the end of the petitioner's motion and dated May 9, 2017, the court, *Cobb, J.*, concluded that "[i]n view of the petitioner's status as a self-represented litigant, the [c]ourt treats this motion for articulation as a motion to

[1] See *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

amend his petition for certification to include additional issues on appeal, and grants it.'' Subsequently, on appeal, the petitioner has challenged the habeas court's judgment denying his petition for a writ of habeas corpus on the grounds raised in his affidavit.

On May 3, 2017, the petitioner filed a petition seeking a writ of mandamus to compel the Office of the Chief Public Defender to assist the petitioner's legal research. In his petition, the petitioner contended that he was incapable of conducting legal research, because the Department of Correction does not provide law libraries or online legal resources to its inmates and, as a result of his decision to proceed as a self-represented petitioner, he did not have access to outside legal assistance. Consequently, the petitioner argued that the lack of legal resources violated his federal and state constitutional right to have meaningful access to the courts and, thus, necessitated an order to compel legal assistance from the Office of the Chief Public Defender. On June 26, 2017, the court, *Bright*, *J.*, issued an oral decision from the bench, denying the petition for mandamus relief. In the present appeal, the petitioner challenges the court's ruling on his petition for a writ of mandamus.

I

Before we may reach the merits of the petitioner's appeal, we must first resolve the respondent's challenge to the subject matter jurisdiction of the habeas court, *Cobb*, *J.* The respondent argues that, by allowing the petitioner to amend his petition for certification to appeal on May 9, 2017, the habeas court effectively modified its July 14, 2015 denial of the petition for certification to appeal. The respondent argues that the habeas court was without jurisdiction to modify this decision because, as this court has stated, General Statutes § 52-212a and Practice Book § 17-4 provide that unless "the court has continuing jurisdiction, a civil

judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed." (Internal quotation marks omitted.) *Gordon* v. *Gordon*, 148 Conn. App. 59, 64, 84 A.3d 923 (2014). Thus, because the habeas court issued its May 9, 2017 decision well beyond this four month limit, the respondent argues that the court was without subject matter jurisdiction to grant certification to appeal.

We disagree with the respondent's contention. As we previously explained, following the habeas court's decision denying the petition for a writ of habeas corpus, Williams filed a petition for certification to appeal that was denied by the habeas court on July 14, 2015. Thereafter, the petitioner filed his waiver application on July 22, 2015. Attached to the waiver application was a document titled "Affidavit in Support of Petition for Certification to the Appellate Court" that requested that four grounds be certified for review. Although the waiver application was granted, no action was taken at that time on the petitioner's request for certification of additional issues on appeal. On March 31, 2017, the petitioner filed a motion for articulation requesting a ruling on the affidavit in support of certification of additional issues on appeal. On May 9, 2017, the habeas court treated the motion for articulation as a motion to amend the petition for certification and granted it.

Contrary to the respondent's claim, we do not interpret the May 9, 2017 ruling by the habeas court as implicating the four month jurisdictional limit of Practice Book § 17-4 because, "[e]ven beyond the four month time frame set forth in . . . § 17-4 . . . courts have continuing jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . ." (Footnote omitted; internal quotation marks omitted.) *Bauer* v. *Bauer*, 308 Conn. 124, 130, 60 A.3d 950 (2013); see also

Practice Book § 66-5 ("[t]he trial court may make such corrections or additions as are necessary for the proper presentation of the issues").

In the present appeal, the habeas court's ruling on May 9, 2017, was merely a clarification of the ambiguous record. Prior to its ruling, there was an ambiguity in the record concerning which claims the petitioner had preserved for his appeal. While the petitioner timely raised claims in both his petition for certification to appeal and his waiver application, the habeas court had ruled on only the former. For twenty-two months, through no fault of the petitioner, the issues raised in his waiver application went unaddressed by the court until he filed a motion for articulation. Therefore, by allowing the petitioner to "amend" his petition for certification to appeal, the habeas court was, in effect, issuing a belated ruling to recognize the additional issues raised in the petitioner's waiver application. In other words, the court was not opening a judgment twenty-two months after the fact; instead, it was addressing an overlooked petition for certification to appeal that was filed twenty-two months previously. Consequently, there is no jurisdictional problem as the respondent contends.[2]

II

The petitioner claims that the habeas court's May 9, 2017 order not only permitted him to expand the number of issues raised on appeal, but also granted the petition for certification to appeal. We agree that the decision was ambiguously written and the respondent concedes that it was "reasonabl[e] . . . [to believe] that the habeas court had *granted* certification to appeal

[2] We acknowledge that, by filing his own petition for certification to appeal, the petitioner arguably violated the prohibition on hybrid representation. See Practice Book § 62-9A ("a . . . habeas petitioner has no right to self-representation while represented by counsel"). Given the fact that the respondent did not object on this ground and the petitioner may, in fact, have been unrepresented when he filed his petition, we will consider his claims.

. . . .'' (Emphasis in original.) Therefore, we interpret the court's ambiguous ruling to have granted the petition for certification to appeal.

The petitioner asserts that the court abused its discretion by denying his petition for a writ of habeas corpus for two reasons: (1) Walkley's representation of him was ineffective due to cumulative deficiencies in Walkley's performance; and (2) Walkley's representation was ineffective because Walkley did not ensure that the petitioner was competent to stand trial.

''As the United States Supreme Court articulated in *Strickland* v. *Washington*, [supra, 468 U.S. 687], [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . Put another way, the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong.'' (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849–50, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

A

In its memorandum of decision, the habeas court carefully considered and rejected multiple claims of ineffective assistance of counsel that the petitioner alleged against Walkley. The habeas court stated, and

we agree, that the state presented a very strong case against the petitioner. The petitioner claims, however, that the court erred by not analyzing whether the cumulative effect of Walkley's alleged errors at trial constituted prejudice under *Strickland*. This claim of error is resolved by our prior decisions. "Our appellate courts . . . have consistently declined to adopt this [cumulative error analysis]. When faced with the assertion that the claims of error, none of which individually constituted error, should be aggregated to form a separate basis for a claim of a constitutional violation of a right to a fair trial, our Supreme Court has repeatedly decline[d] to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts." (Internal quotation marks omitted.) Id., 850–51; see also *State* v. *Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 112 S. Ct. 3000, 120 L. Ed. 2d 876 (1992). "Because it is not within the province of this court to reevaluate decisions of our Supreme Court . . . we lack authority under the current state of our case law to analyze the petitioner's ineffective assistance claims under the cumulative error rule." (Citation omitted; footnote omitted.) *Antwon W.* v. *Commissioner of Correction*, supra, 851. Therefore, because the petitioner is effectively asking this court to overturn our Supreme Court's precedent; see *State* v. *Tillman*, supra, 505; we cannot grant the relief he seeks, and his first claim fails.

B

The petitioner next claims that the habeas court erroneously concluded that Walkley was not deficient and that the petitioner was not prejudiced by Walkley's failure to ensure that the petitioner was competent to stand trial. The petitioner asserts that the habeas court neglected to consider evidence that the petitioner suffered from amnesia from the time that the crimes were committed and continued to suffer from amnesia throughout his trial. The petitioner further claims that

the evidence presented to the court demonstrated that Walkley failed to investigate properly the petitioner's mental state and, if Walkley had done so, he would have discovered that the petitioner was incompetent to stand trial. Accordingly, the petitioner argues that the habeas court erred by overlooking this evidence and determining that Walkley had not rendered ineffective assistance of counsel. We are not persuaded.

The standard of review pertaining to claims of ineffective assistance of counsel is well settled. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

In analyzing the performance prong of *Strickland*, our focus is on "whether counsel's assistance was reasonable considering all the circumstances. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679–80.

The following additional facts are relevant to our resolution of the petitioner's claim of ineffective assistance of counsel. At the habeas trial, Walkley testified that he received two competency evaluations from the petitioner's previous trial counsel. Both evaluations, conducted in 2006 and 2007, indicated that the petitioner was competent to stand trial and capable of assisting his attorney. Despite never having been personally concerned that the petitioner was incompetent, Walkley testified that he sought the advice of a third psychiatric expert. Although the report from this evaluation was not entered into evidence, Walkley testified that nothing contained in the report led him to believe that the petitioner was incompetent.

The habeas court concluded that the petitioner "presented no evidence at trial to corroborate his amnesia claim or to establish that the petitioner was not competent to stand trial . . . [nor any] evidence to prove what any additional investigation or an additional mental health evaluation would have uncovered had such steps been undertaken by counsel." Instead, the court found that Walkley's testimony was credible and similarly concluded that "the petitioner was very intelligent and able to communicate and understand the proceedings." Thus, the court concluded that the petitioner had not shown any error committed by Walkley to satisfy the first prong of *Strickland*. The court also noted that the petitioner failed to prove the prejudice prong of

Strickland because he had neither proven that he suffered from amnesia nor established that his amnesia would have rendered him incompetent for trial. Accordingly, the court determined that the petitioner had not demonstrated that his counsel was ineffective. We agree.

General Statutes § 54-56d (a) provides that "[a] defendant shall not be tried, convicted or sentenced while he is not competent. For the purposes of this section, a defendant is not competent if he is unable to understand the proceedings against him or her or to assist in his or her own defense." Furthermore, "[a] defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue." General Statutes § 54-56d (b). "The standard we use to determine whether a defendant is competent . . . is whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (Citations omitted; internal quotation marks omitted.) *State* v. *Dort*, 315 Conn. 151, 170, 106 A.3d 277 (2014).

On appeal, the petitioner contends that the evidence presented to the habeas court supported a finding that Walkley neglected to fully investigate the petitioner's mental state. Despite two prior competency evaluations that deemed the petitioner competent to stand trial and a third evaluation ordered by Walkley that concurred, the petitioner argues that the habeas court should have found that Walkley inadequately examined the petitioner's mental state. According to the petitioner, had Walkley conducted an additional investigation, it would have revealed that the petitioner suffered from amnesia from the time that the crimes were committed and continued to suffer from amnesia throughout his trial. In light of this evidence, the petitioner claims that the

habeas court should have found that the petitioner was incompetent to assist in his own defense. Further, the petitioner argues that, by failing to conduct an additional investigation, Walkley's performance was deficient and per se prejudicial. We disagree.

The petitioner's arguments are without merit. The crux of his arguments is that he presented evidence in support of his claims that was ignored by the habeas court. This claim, however, is directly contradicted by the habeas court's findings of fact. The habeas court found that the petitioner presented no evidence to support his claim of ineffective assistance of counsel nor evidence of his amnesia. The petitioner, in effect, attempts to point to evidence in the record that simply does not exist. It is the sole province of the habeas court to admit evidence into the record and it ''is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous.'' (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 677. The petitioner has asserted no basis for this court to determine that the habeas court's factual finding that the petitioner provided no evidence to support his claim was clearly erroneous. Likewise, we cannot conclude that the habeas court should have ruled in favor of the petitioner when there was no evidence to support the petitioner's position. Therefore, we conclude that the habeas court did not abuse its discretion in finding that Walkley's performance was not deficient, and we need not address the petitioner's arguments concerning prejudice. See *Antwon W.* v. *Commissioner of Correction*, supra, 172 Conn. App. 849–50.

III

The last issue the petitioner raises on appeal is whether the court, *Bright, J.*, erred in denying his petition for a writ of mandamus to obtain legal assistance in preparing his brief and oral argument to this court.

Before reaching this claim, we must address the respondent's argument that the petitioner's third claim is moot. The respondent contends that because the petitioner already has filed his brief and presented his argument, there is no practical relief that this court may grant and, thus, the petitioner's claim is moot. We disagree.

A

Despite the respondent's argument that the petitioner's claim is moot, we are persuaded that the claim falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 60 A.3d 323 (1995). "To qualify under this exception, an otherwise moot question must satisfy the following three requirements: First, the challenged action, or the effect of the challenged action, by its very nature, must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Gainey* v. *Commissioner of Correction*, 181 Conn. App. 377, 383, 186 A.3d 784 (2018).

"The first element in the analysis pertains to the length of the challenged action. . . . If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is sig-

nificantly reduced." (Citations omitted; footnote omitted.) *Loisel* v. *Rowe*, supra, 233 Conn. 383–84.

The present appeal satisfies the first *Loisel* factor. Our rules of appellate practice necessitate that the petitioner file a brief and attend oral argument. Practice Book § 66-8 provides that an appeal may be dismissed for failure to file a brief within the forty-five day time limit imposed by Practice Book § 67-3. Similarly, Practice Book § 70-3 provides that the court may, for nonappearance of a party at oral argument, dismiss an appeal, decide the case solely on the briefs, or further sanction the nonappearing party. Our appellate procedural rules have the effect of creating an inherently limited timeframe in which the petitioner's appeal is prosecuted. The way the petitioner has raised this issue before this court, and enabled us to reach the merits of his claim, was by filing a brief and arguing his case.[3] In other words, it would be impossible for the petitioner, or any other litigant, to seek redress on this matter in a similar manner without mooting his claim. Therefore, the petitioner's claim relates to an inherently limited action that will likely be moot in a substantial majority of cases and satisfies the first *Loisel* factor.

The second factor "entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the present litigation." *Loisel* v. *Rowe*, supra, 233 Conn. 384. "A requirement of the likelihood that a question will recur is an integral component of the 'capable of repetition, yet evading review' doctrine. In the absence of the possibility of such repetition, there would be no justification for reaching the issue, as a decision would neither provide relief in the present

[3] We note that it has not been argued that any alternative vehicle exists to present this issue.

case, nor prospectively resolve cases anticipated in the future." Id. "Commonly referred to as the surrogacy concept, [the] second inquiry requires some nexus between the litigating party and those people who may be affected by the court's ruling in the future." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 96 Conn. App. 496, 500–501, 900 A.2d 572, cert. denied, 280 Conn. 938, 910 A.2d 217 (2006).

In the present appeal, the petitioner alleges an ongoing constitutional violation in which our correctional facilities systematically deny inmates access to legal research. The petitioner argues that the denial of access to legal research effectively has denied his right to meaningful access to the courts. Thus, this issue is likely to arise any time that an inmate decides to proceed self-represented. Furthermore, the *Loisel* court noted that cases brought by inmates represent one of the quintessential examples of an adequate surrogate for the second factor. *Loisel* v. *Rowe*, supra, 233 Conn. 386. We agree that the petitioner can serve as an adequate surrogate for other inmates who similarly decide to pursue their habeas claims self-represented and are met with the burden of conducting their own legal research. Thus, the petitioner's claim satisfies the second *Loisel* factor.

The third factor, "[t]he requirement of public importance is largely self-explanatory. Since judicial resources are scarce, and typically reserved for cases that continue to be contested between the litigants, this court does not review every issue that satisfies the criteria of limited duration and likelihood of recurrence." Id., 387. Typically, cases that raise a constitutional issue satisfy this factor. See, e.g., *In re Emma F.*, 315 Conn. 414, 425, 107 A.3d 947 (2015) (noting that appellant's constitutional claim of violation of free speech rights was matter of public importance); *State* v. *Mordasky*, 84 Conn. App. 436, 442, 853 A.2d 626 (2004)

("[f]inally, because the defendant has raised a constitutional issue with respect to his competence to enter into a plea agreement, he has presented an issue that qualifies as a question of public importance").

Applying these principles to the present case, we are persuaded that the petitioner raises a question of public importance. As noted previously, he has alleged a serious constitutional violation in that he has been deprived of his right to meaningful access to the courts. Recognizing the constitutional magnitude of this claim, we conclude that the petitioner has satisfied the third *Loisel* factor.

We conclude, therefore, that we have subject matter jurisdiction to hear the merits of the petitioner's appeal, because it is not moot under the "capable of repetition, yet evading review" exception to the mootness doctrine. We turn next to the petitioner's substantive claim.

B

"The requirements for the issuance of a writ of mandamus are well settled. Mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear legal right to have done that which he seeks. . . . The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy. . . . Even satisfaction of this demanding [three-pronged] test does not, however, automatically compel issuance of the requested writ of mandamus. . . . In deciding

the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity. . . . We review the trial court's decision, therefore, to determine whether it abused its discretion in denying the writ." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 416–17, 853 A.2d 497 (2004).

"In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; internal quotation marks omitted.) Id., 417. "Nevertheless, this court will overturn a lower court's judgment if it has committed a clear error or misconceived the law." *Morris* v. *Congdon*, 277 Conn. 565, 569, 893 A.2d 413 (2006).

In seeking mandamus relief from the habeas court, the petitioner argued that the state had deprived him of his right to meaningful access to the courts by not providing any means of legal research. It is well established that "prisoners have a constitutional right of access to the courts . . . [and that such access must be] adequate, effective and meaningful." (Citations omitted; internal quotation marks omitted.) *Bounds* v. *Smith*, 430 U.S. 817, 821–22, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). "Decisions of the United States Supreme Court have consistently required [s]tates to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. . . . *Bounds* does not [however] guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment

of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." (Citations omitted; internal quotation marks omitted.) *Washington* v. *Meachum*, 238 Conn. 692, 735–36, 680 A.2d 262 (1996).

"[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds* v. *Smith*, supra, 430 U.S. 828. Such assistance, however, may take many forms and "*Bounds* . . . guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis* v. *Casey*, 518 U.S. 343, 356, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). "Insofar as the right vindicated by *Bounds* is concerned, meaningful access to the courts is the touchstone . . . and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." (Citation omitted; internal quotation marks omitted.) Id., 351.

In the context of a habeas appeal, this court has held that the appointment of counsel for habeas petitioners satisfies the requirements of *Bounds* and our state constitution. *Sadler* v. *Commissioner of Correction*, 100 Conn. App. 659, 662–63, 918 A.2d 1033, cert. denied, 285 Conn. 901, 938 A.2d 593 (2007). Consequently, this court held in *Sadler* that the absence of a law library in our correctional facilities did not deprive a habeas petitioner of his constitutional rights because he had the option of appointed counsel but elected to proceed self-represented. Id., 663. The same situation applies in the present case.

In adjudicating the petition for a writ of mandamus, the court correctly applied the law and concluded that

the petitioner had neither satisfied the first nor second prongs of *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 416–17. The court recognized that *Bounds* affords discretion to the states to determine how best to provide meaningful access to the courts. Moreover, the court noted that our state has exercised its discretion to satisfy the requirements of *Bounds* by providing appointed counsel to habeas petitioners and, as a result, the petitioner has no clear constitutional right to assistance with legal research in this matter. Thus, the court concluded that mandamus relief was improper and denied the petition. We agree.

Bounds and its progeny provide no specific requirement that the states provide law libraries or other means of legal research to inmates. E.g., *Lewis* v. *Casey*, supra, 518 U.S. 356. Further, our state has satisfied the requirements of *Bounds* by providing appointed counsel to habeas petitioners. *Sadler* v. *Commissioner of Correction*, supra, 100 Conn. App. 663. In the present case, the state provided the petitioner with meaningful access to the courts through the appointment of Williams to represent him at the habeas trial and Near to represent him on the habeas appeal. The petitioner has not presented a valid claim that his constitutional rights were violated.[4] Thus, the remedy the petitioner sought was

[4] The petitioner attempts, in his brief, to raise an independent state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). The petitioner argues that article first, § 8, of the constitution of Connecticut guarantees the right to self-representation in criminal proceedings. Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . ." However, the petitioner misunderstands his procedural posture. As a habeas petitioner, he is party to a civil proceeding. Moreover, he is no longer an "accused" but, instead, is a person who has been convicted. Our courts have never applied article first, § 8, of the constitution of Connecticut to habeas petitioners, and we decline to do so now. Therefore, because his analysis of the Connecticut constitution is irrelevant to the present appeal, the petitioner has provided no independent state constitutional claim. Accordingly, we limit our review to the petitioner's federal constitutional claim. See *State* v. *Jarrett*, 82 Conn. App. 489, 498 n.5, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004). As discussed in part III B of this opinion, the petitioner's federal constitutional claim is without merit as well.

not a mandatory duty of the state and he had no "clear legal right to have the duty performed . . . ." See *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 417. Therefore, the court properly exercised its discretion by denying the petition for a writ of mandamus.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RUBEN VASQUEZ (AC 42147)

Bright, Moll and Bishop, Js.

Syllabus

The acquittee, who had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the judgment of the trial court denying his application for discharge from the jurisdiction of the Psychiatric Security Review Board. He claimed that the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission, cannabis use disorder in remission in a controlled environment, and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, do not constitute psychiatric disabilities pursuant to the statutes (§§ 17a-580 through 17a-602) concerning the psychiatric security review board. *Held* that the trial court did not err in denying the acquittee's application for discharge from the jurisdiction of the board and determining that the acquittee's diagnoses constituted psychiatric disabilities under §§ 17a-580 through 17a-602; that court's finding that the acquittee was mentally ill, suffered from a substance induced psychotic disorder and, thus, suffered from more than mere substance abuse was not clearly erroneous, as the court, in making that finding, considered testimony from a treating forensic psychiatrist, as well as the acquittee's history under the supervision of the board, his anxious and impulsive behavior over the past eight years, the nature of and circumstances surrounding his criminal conduct in assaulting and attempting to assault individuals, his need for continued therapy and supervision, his refusal to consider medication as recommended and his lack of compliance and honesty with staff members and treaters, and on the basis of the totality of the evidence, the court determined that if the acquittee were to be released from the board's supervision entirely, he would under those circumstances present a danger to himself or others.

Argued September 24—officially released December 17, 2019

Procedural History

Application for discharge from the jurisdiction of the psychiatric security review board, brought to the Superior Court in the judicial district of Hartford and tried to the court, *D'Addabbo*, *J.*; judgment dismissing the application, from which the acquittee appealed to this court. *Affirmed.*

Monte P. Radler, public defender, with whom was *Richard E. Condon, Jr.*, senior assistant public defender, for the appellant (acquittee).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Vicki Melchiorre*, supervisory assistant state's attorney, and *Adam B. Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The acquittee,[1] Ruben Vasquez, appeals from the judgment of the trial court denying his application for discharge from the jurisdiction of the Psychiatric Security Review Board (board).[2] On appeal, the acquittee claims that the court erred in denying his application for discharge because the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission; cannabis use disorder in remission in a controlled environment; and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, do not constitute psychiatric disabilities under General Statutes §§ 17a-580 through 17a-602 (board statutes). We affirm the judgment of the court.

[1] "[An] '[a]cquittee' [is] any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." General Statutes § 17a-580 (1).

[2] We treat the court's denial of the acquittee's application as a dismissal pursuant to General Statutes § 17a-593 (g).

The following facts and procedural history are relevant to our analysis. "[On July 14, 2009, the acquittee] . . . randomly attack[ed] five young individuals, with a four foot six inch [one by four] hard yellow pine pressure treated board. Two of the young individuals attacked were a three and one year old child. While being taken into custody, [the acquittee] physically attacked a police officer."

The acquittee was charged with four counts of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), four counts of criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-50 (a) (1), and two counts of assault of a peace officer in violation of General Statutes § 53a-167c (a) (1).[3] On June 7, 2011, the acquittee was found not guilty by reason of mental disease or defect pursuant to General Statutes § 53a-13.[4] On August 8, 2011, the court, *Randolph*, *J.*, committed the acquittee to the jurisdiction of the board and ordered that he be confined at Dutcher Service on the campus of the Connecticut Valley Hospital for a period not to exceed fifteen years.

On July 25, 2017, in accordance with § 17a-593 (a), the acquittee filed an application with the court seeking discharge from the jurisdiction of the board. The court forwarded the application to the board, which held a hearing on September 15, 2017, pursuant to General Statutes § 17a-593 (d). On October 26, 2017, the board filed its report with the court recommending that the acquittee not be discharged because "[a]lthough [the

[3] One count of assault of a peace officer subsequently was dismissed.

[4] General Statutes § 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

acquittee's] psychotic symptoms have not been active since his commitment to the [b]oard, he has repeatedly demonstrated poor judgment, impulsivity, deceitfulness and rule breaking behavior. He has disregarded the rules and protocols in a hospital setting, thereby jeopardizing the [t]emporary [l]eave that would have permitted [the acquittee] to transition to the community. [The acquittee's] treatment team has recommended he consider medication to assist with some of his problematic behaviors, but he has declined the recommendation."

In addition, in its report filed with the court, the board discussed the acquittee's risk factors, stating that "[a] significant risk factor for [the acquittee] remains his history of substance use. As testimony indicated, a substance use relapse would increase [the acquittee's] risk for a re-emergence of his psychotic symptoms. Testimony noted that stress has the potential to exacerbate [the acquittee's] risk of relapse. If discharged from the jurisdiction of the [b]oard, [the acquittee] would return to the community without an established support network. Given that [the acquittee's] psychotic symptoms are intimately tied to his substance use, and [that the acquittee] failed to conform his behavior appropriately in a supervised inpatient setting, the [b]oard finds that [the acquittee's] risk for a substance abuse relapse in a nonsupervised setting without an established community support network is significant. Therefore, the [b]oard finds that [the acquittee] cannot reside safely in the community without [b]oard oversight and should remain under the supervision and jurisdiction of the [b]oard."

On May 29, 2018, after receiving the report, the court, *D'Addabbo*, *J.*, held a hearing on the acquittee's application for discharge pursuant to § 17a-593 (f). The court heard testimony from the following individuals: Maya Prabhu, M.D., consultant to the Department of Mental Health & Addiction Services; the acquittee; and Larry

Spencer of the Capitol Region Mental Health Center. The court concluded the evidentiary portion of the hearing on May 29, 2018, and heard arguments from the parties' respective counsel on June 18, 2018.

On July 27, 2018, the court issued a memorandum of decision denying the acquittee's application for discharge, concluding that, on the basis of the evidence presented at the May 29, 2018 hearing, the acquittee has "psychiatric disabilities" and "if . . . released from the [b]oard's supervision entirely . . . would . . . present a danger to himself or others." This appeal followed. Additional facts will be set forth as necessary.

The acquittee claims that the court erred in denying his application for discharge because the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission; cannabis use disorder in remission in a controlled environment; and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, are not psychiatric disabilities under the board statutes. In making this claim, the acquittee invites this court to overlook our Supreme Court's decision in *State* v. *March*, 265 Conn. 697, 830 A.2d 212 (2003), and this court's decision in *State* v. *Kalman*, 88 Conn. App. 125, 868 A.2d 766, cert. denied, 273 Conn. 938, 875 A.2d 44 (2005), and to conclude that, because his diagnoses are based on substance and alcohol abuse, they cannot be considered mental illnesses or psychiatric disabilities under the board statutes. We are not persuaded.

We first review the statutory procedure relevant to an application for discharge by an acquittee from the jurisdiction of the board. When an individual is found not guilty by reason of mental disease or defect, the individual—the acquittee—is committed to the custody of the Commissioner of Mental Health and Addiction Services for examination of the acquittee's mental condition. General Statues § 17a-582 (a). Once the examination is complete, a hearing is held, and the court deter-

mines whether the examinee should be confined,[5] conditionally released,[6] or discharged.[7] General Statutes § 17-582 (e) (1) and (2). If the court finds that the acquittee should be confined, the acquittee is committed to the jurisdiction of the board for a maximum term of commitment, no longer than that which could have been imposed if the acquittee had been convicted of the offense. General Statutes § 17a-582 (e) (1).

After the court has committed the acquittee to the jurisdiction of the board, the board must conduct a hearing within ninety days to review the status of the acquittee. General Statutes § 17a-583 (a). During the hearing, the board must consider whether the acquittee should continue to be confined or whether the acquittee should be conditionally released or discharged. General Statutes § 17a-584. The board is required to conduct these hearings at least once every two years until the acquittee is discharged. General Statutes § 17a-585. The acquittee may apply to the court for discharge no sooner than six months after the board's initial hearing and not more than once every six months thereafter. General Statutes § 17a-593 (a). The court then forwards the application for discharge to the board. Thereafter, the board has ninety days after receiving the application to file a report with the court setting forth findings

[5] General Statutes § 17a-580 (10) defines a "[p]erson who should be confined" as "an acquittee who has psychiatric disabilities or has intellectual disability to the extent that such acquittee's discharge or conditional release would constitute a danger to the acquittee or others and who cannot be adequately controlled with available supervisionand treatment on conditional release . . . ."

[6] General Statutes § 17a-580 (9) defines a "[p]erson who should be conditionally released" as "an acquittee who has psychiatric disabilities or has intellectual disability to the extent that his final discharge would constitute a danger to himself or others but who can be adequately controlled with available supervision and treatment on conditional release . . . ."

[7] General Statutes § 17a-580 (11) defines a "[p]erson who should be discharged" as "an acquittee who does not have psychiatric disabilities or does not have intellectual disability to the extent that such acquittee's discharge would constitute a danger to the acquittee or others . . . ."

and conclusions as to whether the acquittee should be discharged. General Statutes § 17a-593 (d).

Upon receiving the report, the court conducts a hearing on either the recommendation from the board or the acquittee's application for discharge. General Statutes § 17a-593 (f). At the hearing, the acquittee has the burden of proving by a preponderance of the evidence that he or she should be discharged. General Statutes § 17a-593 (g). Thereafter, the court makes a finding regarding the mental condition of the acquittee, "considering that its primary concern is the protection of society . . . ." General Statutes § 17a-593 (g). In its finding, the court may determine either that the application for discharge be dismissed or that the acquittee be discharged from the board's custody. See § 17a-593 (g).

Here, the acquittee claims that the court erred in denying his discharge application on the ground that his diagnoses constituted psychiatric disabilities under the board statutes. More specifically, the acquittee asserts that because General Statutes § 17a-458 (b) differentiates between "persons with psychiatric disabilities"[8] and "persons with substance use disorders,"[9] the acquittee is not considered to have a "psychiatric disability."

Resolution of the acquittee's claim on appeal requires us to interpret the meaning of the terms "psychiatric disability" and "mental illness" under the board statutes, which presents a question of statutory interpretation over which our review is plenary. See *State* v. *March*, supra, 265 Conn. 705. On the basis of our interpretation of the relevant statutory scheme, we then

[8] General Statutes § 17a-458 (a) defines "[p]ersons with psychiatric disorders" as "those persons who are suffering from one or more mental disorders as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders' . . . ."

[9] General Statutes § 17a-458 (b) defines "[p]ersons with substance use disorders" as "alcohol dependent persons, as that term is defined in subdivision (1) of section 17a-680, or drug dependent persons, as that term is defined in subdivision (7) of section 17a-680 . . . ."

assess whether the court's factual determination of the status of the acquittee's mental health was clearly erroneous.

General Statutes § 17a-580 (7) provides: " 'Psychiatric disability' includes any mental illness in a state of remission when the illness may, with reasonable medical probability, become active. 'Psychiatric disability' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct . . . ."

In addition, as our Supreme Court explained in *State* v. *March*, supra, 265 Conn. 697, "[t]he statutes relevant to this appeal, [the board statutes], are contained in part V of chapter 319i [of our General Statutes]. . . . General Statutes § 17a-581 (j) authorizes the board to adopt regulations necessary to carry out the purposes of chapter 319i. Section 17a-581-1 of the Regulations of Connecticut State Agencies provides: These rules and regulations will govern practice and procedure before the [board] as authorized by [§§] 17a-580 through 17a-602 of the General Statutes. Section 17a-581-2 (a) (11) of the Regulations of Connecticut State Agencies corresponds to § 17-580 (11) of the General Statutes. [Section 17-580 (11)] defines a person who should be discharged pursuant to § 17a-593 as an acquittee who does not have psychiatric disabilities . . . to the extent that his discharge would constitute a danger to himself or others . . . whereas [§ 17a-581-2 (a) (11)] provides that '[p]erson who should be discharged means an acquittee who is not mentally ill or mentally retarded to the extent that his discharge would constitute a danger to himself or others. . . . Subsection (a) (5) of [§ 17a-581-2] defines mental illness as follows: Mental illness means any mental illness or mental disease as defined by the current Diagnostic and Statistical Manual of Mental Disorders [(DSM-V)] of the American Psychiatric Association and as may hereafter be amended. . . .

"Thus, it is apparent that the . . . definitions found in § 17a-458 [b] do not apply to part V of chapter 319i because that statute specifically enumerates the sections to which it applies and does not refer to any of the sections in part V." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 706–708.

Furthermore, in *State* v. *Kalman*, supra, 88 Conn. App. 125, as in this case, the acquittee was found not guilty of criminal charges by reason of mental defect or disease and was committed to the jurisdiction of the board. The acquittee in *Kalman* claimed that his mental condition was "characterized by alcohol dependence, in remission in a controlled environment; cocaine dependence, in remission in a controlled environment"; and other substance induced mood disorders. Id., 134–35. Similar to this case, the acquittee in *Kalman* claimed that his diagnoses were not psychiatric disabilities because the statutory scheme for civil commitments applied and excluded alcohol and drug-dependent persons as individuals who have mental or emotional conditions. Id., 135.

This court in *Kalman* concluded that the civil commitment statutes were not relevant to whether the acquittee had a psychiatric disability under General Statutes §§ 17a-580 through 17a-603. Id. Rather, this court concluded that based on our Supreme Court's reasoning in *State* v. *March*, supra, 265 Conn. 708, the definition of "psychiatric disability" found in the board statutes applied. *State* v. *Kalman*, supra, 136.

On review, we are bound not only by the holdings of *Kalman* and *March* but also by the persuasiveness of their reasoning. First, "[i]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it. . . . [W]e are not at liberty to overrule or discard the decisions

of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Bischoff*, 189 Conn. App. 119, 123, 206 A.3d 253, cert. granted, 331 Conn. 926, 207 A.3d 28 (2019). Second, "[t]his court often has stated that this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017).

Because we are bound by our Supreme Court's opinion in *State* v. *March*, supra, 265 Conn. 697, and this court's opinion in *State* v. *Kalman*, supra, 88 Conn. App. 125, we conclude that the court did not err in determining that the acquittee's diagnoses were mental illnesses defined by the DSM-V, which constituted psychiatric disabilities under the board statutes.[10]

In addition to our task of statutory construction, we must also review the court's determination of the acquittee's mental health condition. "The determination as to whether an acquittee is currently mentally ill . . . is a question of fact and, therefore, our review . . . is governed by the clearly erroneous standard. . . . A finding is clearly erroneous 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. In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. Our authority . . . is circumscribed by the deference we must give

[10] We note that the court relied on General Statutes § 17a-458 (a) for the definition of "persons with psychiatric disability." The court nonetheless applied the correct standard in concluding that the acquittee suffered from mental illnesses as defined by the DSM-V and, consequently, from psychiatric disabilities under the board statutes.

to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Jacob*, 69 Conn. App. 666, 680, 798 A.2d 974 (2002).

In reaching its conclusion that the acquittee was mentally ill and thus suffered from a substance induced psychotic disorder, the court considered testimony from Dr. Maya Prabhu, a treating forensic psychiatrist, who has been involved with the acquittee's psychological treatment since his commitment to the board. During her testimony, Dr. Prabhu explained that the acquittee suffered from an underlying psychosis that was induced by substance abuse. The court found that ''[a]ccording to Dr. Prabhu, [the acquittee] tends to see his 'crime' as being related to substance abuse and [does not] think he needs to be on medication for his mental illness issues. Dr. Prabhu present[ed] the acquittee as an individual that has difficulty with emotional regulation when stressed. . . . During his commitment, [the acquittee] became involved in a relationship with another patient at Whiting Forensic. [The acquittee] was not forthright with [Whiting Forensic staff] about the relationship. . . . The issues related to the . . . relationship . . . caused a stressful situation for [the acquittee] . . . [and the acquittee] engaged in a series of rule infractions. Dr. Prabhu testified that this relationship became tempestuous and volatile. [The acquittee] was observed . . . on the telephone with [the other patient] engaging in volatile conversations. . . . A review of the hospital records indicate[d] that in the month of March 2017 there were approximately 500 telephone calls between [the acquittee] and the [other patient]. Dr. Prabhu indicate[d] that this conduct is a product of the acquittee's reaction to stress. He gets excessive, deeply anxious and frustrated. . . . In the face of this conduct, [the acquittee] lacks acceptance of having a mental illness. Dr. Prabhu opine[d] that

unless he has treatment, this [reaction] to stress and resulting conduct would be a risk for him."

In addition to the testimony of Dr. Prabhu, the court "considered the record which includes the acquittee's history under the supervision of the [b]oard, his past diagnosis, his present diagnosis, his lack of violent behavior, his anxious and impulsive behavior over the past eight years, the nature of and circumstances surrounding his criminal conduct in assault[ing] and attempting to assault individuals, his need [for] continued therapy and supervision, his refusal to consider medication to assist with some problematic behavior, previous [b]oard reports and the likelihood of any supervision upon his release from the [b]oard's jurisdiction. [T]he court also considered . . . his lack of compliance and honesty with the staff and treaters and his surreptitious conduct with prohibited items . . . [and] the conduct with the [other patient] and failure to abide by instructions to cease such conduct, which led to a termination of a temporary leave opportunity [and] cause[d] the [c]ourt pause." On the basis of the totality of this evidence, the court determined "that if the acquittee were to be released from the [b]oard's supervision entirely, he would under those circumstances present a danger to himself or others. In his current commitment under the [b]oard's supervision in his controlled environment . . . the risks of danger to himself or [others] are minimized." On the basis of our analysis of the applicable law and our review of the record, we conclude that the court's finding, consistent with the diagnoses in both the board's report and the doctor's testimony, that the acquittee suffered from more than mere substance abuse was not clearly erroneous, and, accordingly, that the trial court's denial of the acquittee's application was legally and factually correct.

The judgment is affirmed.

In this opinion the other judges concurred.

CHASE HOME FINANCE, LLC *v.* DANIEL J. SCROGGIN
(AC 41929)

Keller, Moll and Bishop, Js.

Syllabus

The plaintiff, C Co., sought to foreclose a mortgage on certain real property owned by the defendant, S, who was defaulted for failure to plead. Thereafter, the trial court granted the motion filed by the substitute plaintiff, A Co., for a judgment of strict foreclosure and rendered judgment thereon, from which S appealed to this court, which reversed in part the trial court's judgment and remanded the case to that court for further proceedings. Following the remand, A Co. filed a motion for summary judgment as to liability only on count one of its operative, six count amended complaint. Subsequently, S filed a motion for an extension of time to respond to A Co.'s motion for summary judgment, which the court denied as untimely. The parties appeared before the court at short calendar on A Co.'s motion for summary judgment, which had been marked ready. The court granted A Co.'s motion for summary judgment, absent opposition. S's counsel then stated that, pursuant to statute (§ 51-183c), the court was required to recuse itself. The court responded by asking whether S's counsel had filed a motion to recuse, to which he indicated that he had not, and the short calendar proceeding concluded. Subsequently, A Co. filed a motion for a judgment of strict foreclosure, which the trial court granted and rendered judgment thereon, from which S appealed to this court. *Held*:

1. S could not prevail on his claim that, pursuant to § 51-183c, the trial court judge should have recused herself from ruling on material issues following this court's reversal of the judgment of strict foreclosure, as § 51-183c did not apply because there was no trial within the meaning of the statute; our appellate courts have repeatedly concluded that § 51-183c does not require recusal where the adversarial proceeding at issue did not constitute a trial, and, thus, § 51-183c did not apply in the present case so as to require the recusal of the trial judge following the reversal of the judgment of strict foreclosure because that judge had not presided over any trial, as the judgment of strict foreclosure was rendered in the context of a short calendar proceeding, to which § 51-183c does not apply.
2. The trial court erred by granting A Co.'s motion for summary judgment without hearing oral argument on that motion pursuant to the applicable rule of practice (§ 11-18): the opportunity for oral argument required by § 11-18 (a) was not provided during the short calendar proceeding, as the trial court, upon confirming that S had not filed a written response to A Co.'s motion for summary judgment, did not inquire as to whether S's counsel wanted to be heard to argue whether A Co. had met its

initial burden, but, instead, the court immediately granted the motion absent opposition; moreover, although A Co. claimed that S did not comply with the procedural requirements of § 11-18 (a) (2) because he failed to file a written notice seeking oral argument, the two conditions for oral argument being a matter of right for motions for summary judgment contained in § 11-18 (a) are disjunctive, and S satisfied the condition contained in § 11-18 (a) (1), as A Co.'s motion for summary judgment had been marked ready; furthermore, although A Co. claimed that S waived oral argument as to its motion for summary judgment under § 11-18 (d), which provides that the "[f]ailure to appear and present argument on the date set by the judicial authority shall constitute a waiver of the right to argue unless the judicial authority orders otherwise," that claim failed because not only did S's counsel appear for oral argument, but the trial court ruled on the motion before either party could argue the merits of the motion, and because S had a right to oral argument, which was not waived, with respect to A Co.'s motion for summary judgment, the court improperly adjudicated that motion without permitting oral argument on the merits.

3. S's claim that the trial court abused its discretion in denying on timeliness grounds his motion for an extension of time to respond to A Co.'s motion for summary judgment was unavailing: the forty-five day period set forth in the applicable rule of practice (§ 17-45 [b]) for the filing of a response to A Co.'s motion for summary judgment passed without S filing a response or a motion for an extension of time, and although S claimed that the trial court abused its discretion by denying his motion for an extension of time as untimely because the applicable rule of practice (§ 17-47), which allows the court to grant a continuance for discovery purposes on the basis of reasons stated in the affidavits of a party opposing a motion for summary judgment, contains no timing requirement, Practice Book § 17-47 imports the forty-five day filing deadline set forth in Practice Book § 17-45 (b); moreover, this court rejected S's claim that an alleged undocumented agreement between counsel, specifically, that A Co. would not claim its motion for summary judgment until S had taken a deposition of A Co.'s corporate designee, can usurp the requirements of the rules of practice, including the need to seek extensions of time in a timely manner.

Argued September 24—officially released December 17, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant was defaulted for failure to plead; thereafter, Bank of America, N.A., was

cited in as a defendant and the plaintiff filed an amended complaint; subsequently, AJX Mortgage Trust I was substituted as the party plaintiff; thereafter, the court, *Aurigemma*, *J.*, granted the substitute plaintiff's motion for judgment as to counts two through six of the amended complaint; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court, which reversed in part the trial court's judgment and remanded the case for further proceedings; thereafter, the substitute plaintiff withdrew counts five and six of the amended complaint; subsequently, the court, *Aurigemma*, *J.*, denied the named defendant's motion for an extension of time to file an opposition to the substitute plaintiff's motion for summary judgment as to liability only on count one of the amended complaint; thereafter, the court, *Aurigemma*, *J.*, granted the substitute plaintiff's motion for summary judgment, denied the named defendant's motion to reargue and for reconsideration, and granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

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

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

Opinion

MOLL, J. The defendant, Daniel J. Scroggin also known as Daniel F. Scroggin also known as Daniel Scroggin, appeals from the judgment of strict foreclosure rendered by the trial court, for the second time, in favor of the substitute plaintiff, AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society,

FSB, Trustee.[1] The defendant makes the following claims on appeal: (1) the trial court improperly failed to recuse itself pursuant to General Statutes § 51-183c following our remand in *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 176 A.3d 1210 (2017) (*Chase I*); (2) the trial court erred by granting the plaintiff's motion for summary judgment as to liability only without hearing oral argument on that motion; and (3) the trial court erred in denying on timeliness grounds the defendant's motion for an extension of time, filed pursuant to Practice Book § 17-47, to respond to the plaintiff's motion for summary judgment. We agree with the defendant's second claim and, accordingly, reverse the judgment of the trial court.[2]

[1] In a prior appeal, this court explained that in September, 2010, after the named plaintiff, Chase Home Finance, LLC (Chase), had commenced this action against the defendant, "Chase filed a motion to cite in Bank of America, N.A. (Bank of America), as a [third-party] defendant. The court granted this motion. Subsequently, [Chase] served Bank of America with an amended complaint that alleged that Bank of America was a lien holder. In March, 2011, Bank of America was defaulted for failure to appear. In January, 2012, Middconn Federal Credit Union sought to be made a party defendant to the action as a postjudgment lis pendens holder. The court granted the request. Later, Middconn Federal Credit Union was defaulted for failure to plead and failure to disclose a defense.

"In June, 2012, Chase moved to substitute JPMorgan Chase Bank, N.A., as [the] plaintiff in the action. The court granted the motion. In June, 2014, JPMorgan Chase Bank, N.A., moved to substitute Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, as [the] plaintiff in the action. The court granted the motion. In July, 2015, Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, moved to substitute AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as [the] plaintiff in the action. The court granted the motion." *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 729 n.1, 176 A.3d 1210 (2017). As in the prior appeal, we will refer to AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as the plaintiff. Additionally, because neither Bank of America nor Middconn Federal Credit Union is participating in this appeal, we will refer to Daniel J. Scroggin as the defendant.

[2] Because our resolution of the defendant's second claim, set forth in part II of this opinion, presumes that there was no error with respect to whether the trial court should have recused itself, we find it prudent to explain why, contrary to the defendant's position, recusal was unwarranted under the

We begin with an abbreviated recitation of the factual and procedural background of this dispute, as set forth by this court in *Chase I*. "In December, 2009, Chase commenced the present foreclosure action against the defendant. In its original one count complaint, Chase alleged, in relevant part, that on July 20, 2007, the defendant executed a promissory note in the amount of $217,500 in favor of Chase Bank USA, N.A., and that the loan was secured by a mortgage of the premises located at 25 Church Street in Portland, which was owned by and in the possession of the defendant. Chase alleged that the mortgage was recorded on the Portland land records, that the mortgage was assigned to it, and that it was the holder of the note and mortgage. Chase alleged that beginning on July 1, 2009, the defendant failed to make installment payments of principal and interest required by the note and that it had exercised its option to declare the entire unpaid balance of the note (in the amount of $214,939.97) due and payable to it. . . . By way of relief, Chase sought, among other things, a foreclosure of the mortgage and the immediate possession of the subject premises.

"On June 7, 2010, Chase filed a motion for default for failure to plead. On that same day, Chase filed a motion for judgment of strict foreclosure and a finding that it was entitled to possession of the subject premises. On June 16, 2010, the clerk of the court granted the motion for default but, at that time, the court did not rule on the motion seeking a judgment of strict foreclosure.

"On September 8, 2010, Chase filed a request for leave to amend its complaint and attached a proposed amended complaint. The defendant did not object. The

circumstances here. See part I of this opinion. In addition, although our resolution of the defendant's second claim is dispositive of this appeal, we briefly address his third claim because it is likely to arise on remand. See *Redding* v. *Elfire, LLC*, 74 Conn. App. 491, 492 n.2, 812 A.2d 211 (2003); see also part III of this opinion.

amended complaint consisted of six counts. The first count brought against the defendant sought a foreclosure and generally was consistent with the allegations brought against the defendant in the original one count complaint . . . . The second, third, and fourth counts of the amended complaint were brought against Bank of America. . . . Counts five and six of the amended complaint, both of which were directed at the defendant, [were] related to Chase's allegations with respect to Bank of America's mortgage interest in the subject property. . . .

"At no time did the defendant move to set aside the default for failure to plead entered on June 16, 2010. On November 2, 2015, however, the defendant disclosed a defense, stating that he 'intend[ed] to challenge the plaintiff's alleged right and standing to foreclose upon the subject mortgage.' On the same day, the defendant filed an answer to Chase's original complaint.

"The plaintiff did not file a motion for default for failure to plead against the defendant with respect to the amended complaint. On November 24, 2015, however, the plaintiff filed a motion for judgment against the defendant with respect to counts two, three, four, five, and six of the amended complaint. On the same day, the plaintiff moved that the court enter a judgment of strict foreclosure . . . .

"On April 4, 2016, the defendant filed an answer to the plaintiff's amended complaint. In his answer to the amended complaint, the defendant, among other things, admitted portions of the allegations made in the first count and, with respect to other portions of the first count, left the plaintiff to its proof. Also, on April 4, 2016, the defendant filed an objection to the plaintiff's motion for judgment as to count six of the amended complaint and an objection to the plaintiff's motion for judgment of strict foreclosure. On that date, the court [*Aurigemma, J.*] held a hearing on the plaintiff's motion

for judgment. By order dated April 4, 2016, the court granted the plaintiff's motion for judgment with respect to counts two, three, four, and five of the amended complaint, but did not rule with respect to counts one or six of the amended complaint.

"Following the hearing, the plaintiff replied to the defendant's objection to its motion for judgment of strict foreclosure, and the defendant filed a memorandum of law in which he further articulated the reasons underlying his objection to the motion for judgment of strict foreclosure. At a hearing on April 18, 2016, the parties appeared and presented additional arguments [before Judge Aurigemma]. . . .

"The court granted the plaintiff's motion for judgment of strict foreclosure . . . and rendered judgment on count six of the plaintiff's amended complaint in the plaintiff's favor." (Footnotes omitted.) Id., 730–37.

Thereafter, the defendant appealed from the judgment of strict foreclosure rendered on count one of the amended complaint. Id., 737 n.9. On appeal, this court concluded that "[i]n light of the changes to the plaintiff's case that were reflected in the amended complaint, it was inequitable for the court not to have considered the default entered in 2010 to have been extinguished. Thus, the court should have considered the defendant's answer to the amended complaint as well as his disclosed defense. Although it was appropriate for the court to have considered the lengthy period of time that followed the entry of the default, it nonetheless abused its discretion by failing to consider the effect of the amended complaint upon that default." (Footnote omitted.) Id., 745. Accordingly, this court reversed the judgment of strict foreclosure and remanded the case for additional proceedings. Id., 746.

On March 26, 2018, following our remand, the plaintiff filed a motion for summary judgment as to liability only on count one of its amended complaint. The forty-five

day period set forth in Practice Book § 17-45 (b) for the filing of a response to the motion for summary judgment expired on May 10, 2018. On May 24, 2018, the defendant filed a document captioned "Practice Book § 17-47 Motion for Extension of Time to Respond to the Plaintiff's Motion for Summary Judgment, or Alternatively, Objection to Summary Judgment." The trial court denied that motion as untimely. At no time did the defendant file a substantive response to the plaintiff's motion for summary judgment. See Practice Book § 17-45 (b).

On May 29, 2018, the parties appeared before Judge Aurigemma at short calendar on the plaintiff's motion for summary judgment, which had been marked "ready." Counsel for the defendant acknowledged that he had not filed a response to the motion. Thereupon, the court ruled: "Well, there's no opposition, so the motion's granted, absent opposition." The defendant's counsel then stated that, pursuant to § 51-183c, the trial court was required to recuse itself. The court responded by asking whether the defendant's counsel had filed a motion to recuse, to which he indicated that he had not, and the proceedings concluded. A subsequent motion to reargue filed by the defendant was denied.

On June 21, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, and on July 9, 2018, the court granted the motion. This appeal followed. Additional facts and procedural background will be provided as necessary.

I

The defendant first claims that, pursuant to § 51-183c, Judge Aurigemma should have recused herself from ruling on "material issues" following this court's reversal of the judgment of strict foreclosure in *Chase I*. The plaintiff counters that (1) recusal was unwarranted in the absence of a written motion to disqualify filed pursu-

ant to Practice Book §§ 1-22 (a)[3] and 1-23,[4] and (2) § 51-183c did not apply because there was no "trial" within the meaning of the statute. We agree with the plaintiff's second argument.[5]

We set forth the applicable standard of review. The defendant's claim that § 51-183c required recusal under the circumstances of this case presents a question of statutory interpretation, thereby invoking our plenary review. See *State* v. *Riley*, 190 Conn. App. 1, 8, 209 A.3d 646, cert. denied, 333 Conn. 923, A.3d (2019). "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look

[3] Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter . . . because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal. . . ."

[4] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

[5] In light of our resolution of the second argument, we need not address the plaintiff's first argument.

for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Mickey* v. *Mickey*, 292 Conn. 597, 613–14, 974 A.2d 641 (2009).

Section 51-183c provides: ''No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case.''

Our Supreme Court, as well as this court, have previously held that § 51-183c applies exclusively to ''trials'' and not to other types of adversarial proceedings. See, e.g., *State* v. *Miranda*, 260 Conn. 93, 131, 794 A.2d 506 (''[§] 51-183c applies exclusively to 'trials' ''), cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); *Lafayette Bank & Trust Co.* v. *Szentkuti*, 27 Conn. App. 15, 19–21, 603 A.2d 1215 (''Section 51-183c unambiguously applies exclusively to 'trials,' as distinguished from pretrial or short calendar matters. . . . The term 'trial' was not intended to include either pretrial or short calendar proceedings.'' [Citations omitted.]), cert. denied, 222 Conn. 901, 606 A.2d 1327 (1992). On the basis of the foregoing interpretation, our appellate courts have repeatedly concluded that where the adversarial proceeding at issue did not constitute a ''trial,'' § 51-183c does not require recusal. See, e.g., *State* v. *Miranda*, supra, 131–32 (sentencing hearing); *Board of Education* v. *East Haven Education Assn.*, 66 Conn. App. 202, 215–16, 784 A.2d 958 (2001) (arbitration proceedings); *Lafayette Bank & Trust Co.* v. *Szentkuti*, supra, 16–17, 20–21 (property valuation hearing in foreclosure action).

Given the well settled interpretation of § 51-183c, we conclude that § 51-183c did not apply in the present case so as to require Judge Aurigemma's recusal following the reversal of the judgment of strict foreclosure in *Chase I* because she had not presided over any "trial." Instead, the judgment of strict foreclosure underlying *Chase I* was rendered in the context of a short calendar proceeding, to which § 51-183c does not apply.

In support of his claim that § 51-183c required Judge Aurigemma's recusal following our remand in *Chase I*, the defendant relies on *Higgins* v. *Karp*, 243 Conn. 495, 706 A.2d 1 (1998) (*Higgins II*), and *Gagne* v. *Vaccaro*, 133 Conn. App. 431, 35 A.3d 380 (2012), rev'd on other grounds, 311 Conn. 649, 90 A.3d 196 (2014). Neither of these authorities supports the defendant's position. We address them in turn.

First, *Higgins II* was the product of extensive litigation, culminating in two appeals to our Supreme Court, arising out of a fatal airplane crash. *Higgins II*, supra, 243 Conn. 498–99. Initially, in a consolidated case, the trial court denied the defendant's motions to set aside defaults entered against him for failure to plead, and the case proceeded to a trial on damages, wherein the jury awarded significant damages, with judgments rendered accordingly. *Higgins* v. *Karp*, 239 Conn. 802, 806–807, 687 A.2d 539 (1997) (*Higgins I*). In *Higgins I*, our Supreme Court reversed the judgments, concluding that the trial court abused its discretion by denying the defendant's motions to set aside the defaults. Id., 811. On remand, the trial court again denied the defendant's motions to set aside the defaults. *Higgins II*, supra, 500–502. In *Higgins II*, the defendant appealed from, and our Supreme Court reversed, the judgment of the trial court because, this time, the trial court failed to consider additional relevant evidence. Id., 509–10. In footnote 7 in *Higgins II*, our Supreme Court stated that on remand following *Higgins I*, and "[i]n accordance

with . . . § 51-183c, [it had] ordered that the matter be assigned to a judge other than the judge who originally had decided the motions [to set aside the defaults]." Id., 500 n.7.

In the present case, the defendant particularly relies on that footnote in *Higgins II* for the proposition that our Supreme Court applied § 51-183c, following the reversal of the trial court's refusal to set aside the defaults for failure to plead, to bar the same trial judge from making a subsequent ruling on those motions. Thus, the defendant contends, there is no meaningful difference between the reversal of the judgments in *Higgins I* and the reversal of the judgment in *Chase I*. A close reading of the decisions in *Higgins I* and *Higgins II* belies the defendant's argument, however, because, in *Higgins I*, the trial court, *Hurley*, *J.*, not only ruled on the motions to set aside the defaults in the first instance, but also presided at the trial on damages and rendered judgments in accordance with the jury's verdicts, from which the *Higgins I* appeal was taken. See *Higgins I*, supra, 239 Conn. 807; see also *Karp* v. *Coric*, Superior Court, judicial district of New London, Docket Nos. 530472 and 529975 (June 9, 1995) (14 Conn. L. Rptr. 386) (memorandum of decision by Judge Hurley on defendant's motions to set aside defaults), rev'd sub nom. *Higgins* v. *Karp*, 239 Conn. 802, 687 A.2d 539 (1997). Consequently, when those judgments were reversed in *Higgins I*, § 51-183c applied so as to preclude Judge Hurley from presiding over the matter again because he had already presided over a trial, i.e., the trial on damages. The circumstances in *Higgins I* and *Higgins II* are readily distinguishable from those underlying the present appeal. Although the judgment of strict foreclosure rendered by Judge Aurigemma was reversed by this court in *Chase I*, Judge Aurigemma had not, unlike Judge Hurley in *Higgins I*, presided over a "trial," as required by § 51-183c.

Second, in *Gagne* v. *Vaccaro*, supra, 133 Conn. App. 435–36, this court concluded that the trial court improperly refused to recuse itself pursuant to § 51-183c from hearing the plaintiff's motion for attorney's fees on the basis that we had reversed an earlier ruling on attorney's fees by the same trial judge. However, our Supreme Court subsequently reversed this court's decision on the ground that the recusal issue was moot because the defendant had failed to challenge the trial court's finding that the defendant waived his right to seek disqualification under § 51-183c as a result of noncompliance with the procedural requirements of Practice Book § 1-23 on appeal.[6] *Gagne* v. *Vaccaro*, 311 Conn. 649, 659–60, 90 A.3d 196 (2014). As a result, our Supreme Court reversed the judgment of this court and remanded the case with direction to dismiss the appeal as to the issue of disqualification because this court did not have subject matter jurisdiction over the § 51-183c claim underlying the decision. Id., 659–60, 662. In light of the foregoing, our decision on the merits in *Gagne* is devoid of any precedential value in the absence of subject matter jurisdiction; see *Labarbera* v. *Clestra Hauserman, Inc.*, 369 F.3d 224, 226–27 n.2 (2d Cir. 2004) (explaining that no precedential value exists in lower court decision that was reversed for lack of subject matter jurisdiction); and the defendant's reliance thereon is wholly misplaced.

In sum, we conclude that § 51-183c did not apply following *Chase I* so as to require Judge Aurigemma's recusal because she had not presided over a "trial" in the matter.

II

The defendant next claims that the trial court erred by granting the plaintiff's motion for summary judgment

[6] Rather, on appeal, the defendant challenged the nonrecusal under Practice Book § 1-22 (a) and § 51-183c. *Gagne* v. *Vaccaro*, 311 Conn. 649, 660, 90 A.3d 196 (2014).

without hearing oral argument on that motion pursuant to Practice Book § 11-18.[7] The plaintiff posits that the trial court did not need to hear argument because (1) the defendant did not follow the procedural requirements of § 11-18 (a) (2), and (2) the defendant waived oral argument. We agree with the defendant.

We begin by setting forth the applicable standard of review and legal principles. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 712, 66 A.3d 860 (2013). Practice Book § 11-18 provides in relevant part: "(a) Oral argument is at the discretion of the judicial authority except as to . . . motions for summary judgment . . . and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all other parties . . . a written notice stating the party's intention to argue the motion . . . . Such a notice shall be filed on or before the third day before the date of the short calendar date . . . ." See also *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 236, 4 A.3d 851 (2010) ("[p]arties are entitled to argue a motion for summary judgment as of right").

[7] In his principal appellate brief, the defendant appears to couch an additional argument that he was under no obligation to submit a response to the plaintiff's motion for summary judgment within his overarching contention that the trial court failed to hear oral argument on that motion. The plaintiff counters that the trial court did not need to hear argument because the defendant did not file an opposition to the motion. Although we reverse on the grounds set forth in part II of this opinion, we remind the parties that it is only upon the satisfaction of a summary judgment movant's initial burden that the burden shifts to the nonmovant to demonstrate, on the basis of a timely submission of an evidentiary showing, that there exists a genuine issue of material fact to defeat summary judgment. See *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10–11, 938 A.2d 576 (2008).

Our recent decision in *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, A.3d (2019), involving similar circumstances to those in the present appeal, is controlling. In *Bayview Loan Servicing, LLC*, the defendant appealed from a judgment of foreclosure by sale, arguing, inter alia, that the court erred in granting the plaintiff's motion for summary judgment without holding oral argument. Id., 788, 792. Simply put, this court held that, because Practice Book § 11-18 provided the defendant with the right to oral argument on the merits of the plaintiff's motion for summary judgment, the failure to conduct oral argument constituted reversible error. Id., 796–97.

Applying *Bayview Loan Servicing, LLC*, to the present case, we conclude that the trial court erred by granting the plaintiff's motion for summary judgment without hearing oral argument on the motion. We have carefully reviewed the approximately two page transcript from the short calendar proceeding[8] and conclude that the

[8] The transcript from the four minute May 29, 2018 proceeding provides in its entirety:

"The Court: Your next matter?

"[The Plaintiff's Counsel]: This is position 39, Your Honor.

"The Court: Do I have a 39?

"(Discussion off the record.)

"The Court: Sorry, I have it. And your name for the record?

"[The Defendant's Counsel]: Michael Habib for the defendant, David Scroggin.

"The Court: Okay. And, Mr. Habib, you filed no response?

"[The Defendant's Counsel]: That's correct, Your Honor. I was recently retained in the case.

"The Court: Okay. All right. Well, you've had an appearance since September of 2017.

"[The Defendant's Counsel]: That was in the appellate case, Your Honor. I was not retained for the trial court case until April 21st of this year.

"The Court: Right. Okay. And had you filed your motion for extension then, it would have been timely.

"[The Defendant's Counsel]: Okay.

"The Court: So—

"[The Defendant's Counsel]: I understand, but I noticed the deposition at that time, Your Honor.

"The Court: Okay.

opportunity for oral argument required by Practice Book § 11-18 (a) was not provided. That is, upon confirming that the defendant had not filed a written response to the plaintiff's motion for summary judgment, the court did not inquire whether the defendant's counsel wanted to be heard, namely, to argue whether the plaintiff had met its initial burden. Instead, the court immediately granted the motion "absent opposition."

The plaintiff raises two arguments supporting its assertion that oral argument on its motion for summary judgment was not required—neither of which is persuasive. First, the plaintiff contends that the defendant did not comply with the procedural requirements of Practice Book § 11-18 (a) (2) because he failed to file a written notice seeking oral argument. This argument fails because the plaintiff overlooks the fact that the

"[The Defendant's Counsel]: And I thought I had an agreement with opposing counsel as to when we rescheduled the deposition for when it would be called up or when it would be reclaimed, which we had discussed in court—[coplaintiff's counsel] and I had discussed in court.

"The Court: Okay.

"[The Defendant's Counsel]: And then four days later, they filed the reclaim, Your Honor.

"The Court: Okay. You know anything about that?

"[The Plaintiff's Counsel]: I do not, Your Honor. I spoke with [coplaintiff's counsel] in preparation for this, and he made no mention of any agreement.

"The Court: Okay. [Alright]. Well, there's no opposition, so the motion's granted, absent opposition.

"[The Defendant's Counsel]: And, Your Honor, if I could just place something on the record.

"The Court: Sure.

"[The Defendant's Counsel]: I do believe under § 51-183c, Your Honor, that this court's required to recuse itself in this matter, as well as the previous motion that was denied by the court.

"The Court: Why?

"[The Defendant's Counsel]: Because—

"The Court: Have you filed a motion to recuse?

"[The Defendant's Counsel]: I have not, Your Honor.

"The Court: Okay. Thank you.

"[The Defendant's Counsel]: Thank you, Your Honor.

"[The Plaintiff's Counsel]: Thank you, Your Honor."

conditions for oral argument being a matter of right for motions for summary judgment contained in § 11-18 (a) are disjunctive. That is, either the motion for summary judgment had to be marked ready; Practice Book § 11-18 (a) (1); *or* the defendant, as the nonmovant, had to file and serve a written notice stating his intention to argue the motion. Practice Book § 11-18 (a) (2). Here, the motion for summary judgment had been marked ready, and the parties appeared accordingly for the May 29, 2018 short calendar. Thus, § 11-18 (a) (1) was satisfied, and, as a result, the defendant was entitled to oral argument on the motion for summary judgment as of right.

Second, the plaintiff contends that the defendant waived oral argument as to the plaintiff's motion for summary judgment under Practice Book § 11-18 (d), which provides that the "[f]ailure to appear and present argument on the date set by the judicial authority shall constitute a waiver of the right to argue unless the judicial authority orders otherwise." This argument fails because not only did the defendant's counsel appear for argument, but our review of the summary judgment hearing transcript; see footnote 8 of this opinion; reveals that the trial court ruled on the motion before either party could argue the merits of the motion. Cf. *Marut* v. *IndyMac Bank, FSB*, 132 Conn. App. 763, 771–72, 34 A.3d 439 (2012) (Practice Book § 11-18 [d] applies when party fails to appear for argument). The plaintiff does not cite any relevant authority for its proposition that the waiver rule contained in § 11-18 (d) is applicable here.

In sum, we conclude that the defendant had a right to oral argument, which was not waived, with respect to the plaintiff's motion for summary judgment, and, therefore, the trial court improperly adjudicated the motion without permitting oral argument.

III

Finally, the defendant claims that the trial court abused its discretion in denying on timeliness grounds his motion for an extension of time to respond to the plaintiff's motion for summary judgment. We disagree.

We begin with the applicable standard of review and rules of practice. A trial court's adjudication of a motion for a continuance pursuant to Practice Book § 17-47 is reviewed for an abuse of discretion. See, e.g., *Sheridan* v. *Board of Education*, 20 Conn. App. 231, 237–38, 565 A.2d 882 (1989) (concluding that trial court did not abuse its discretion in denying motion to stay summary judgment proceeding in light of nonmovant's failure to comply with Practice Book [1978–97] § 382, predecessor to Practice Book § 17-47, in timely manner). Practice Book § 17-45, entitled "Proceedings upon Motion for Summary Judgment; Request for Extension of Time To Respond," provides in relevant part: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. (b) Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence. . . ." Relatedly, Practice Book § 17-47, entitled "When Appropriate Documents Are Unavailable," provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

"In *Plouffe* v. *New York, N.H. & H.R. Co.*, 160 Conn. 482, 490, 280 A.2d 359 (1971), our Supreme Court determined that the trial court had abused its discretion when it refused to grant a reasonable continuance to allow the plaintiff to investigate the truth of the facts alleged in the defendant's affidavit and to research the legal issues in a personal injury action. In that case, the court adopted the following principle, derived from summary judgment under the [F]ederal [R]ules of [C]ivil [P]rocedure: Where, however, the party opposing summary judgment *timely* presents his affidavit under [r]ule 56 (f) [of the Federal Rules of Civil Procedure] stating reasons why he is presently unable to proffer evidentiary affidavits he directly and forthrightly invokes the trial court's discretion. Unless dilatory or lacking in merit, the motion should be liberally treated. Exercising a sound discretion, the trial court then determines whether the stated reasons are adequate. And absent abuse of discretion, the trial court's determination will not be interfered with by the appellate court." (Emphasis in original; internal quotation marks omitted.) *Sheridan* v. *Board of Education*, supra, 20 Conn. App. 237–38.

In *Sheridan*, this court applied the principles set forth in *Plouffe* and held that, where the plaintiff, as the summary judgment nonmovant, had failed to comply with Practice Book (1978–97) § 382, the predecessor to Practice Book § 17-47, which permits the trial court to grant a continuance to accommodate discovery to justify opposition to a motion for summary judgment, the plaintiff's "lack of diligence [was] fatal to her claim" that the trial court abused its discretion by not granting a continuance. Id., 236 n.4, 238.

The same analysis applies to the present case and leads to the same result. As previously recited in this opinion, the forty-five day period set forth in Practice Book § 17-45 (b) for the filing of a response to the plaintiff's motion for summary judgment expired on

May 10, 2018. Such deadline passed without the defendant filing a response or a motion for an extension of time. Two weeks later, on May 24, 2018, the defendant filed a motion for an extension of time to respond to the plaintiff's motion for summary judgment, or alternatively, an objection to summary judgment. That motion, citing Practice Book § 17-47, attached the affidavit of the defendant's attorney, Michael J. Habib, in which he (1) explained that he wanted to take the deposition of the plaintiff's corporate designee in order to challenge the plaintiff's standing and (2) detailed efforts made to procure the deposition.[9] The motion did not state any reasons to justify its untimeliness. The trial court denied the motion as untimely, reasoning as follows: "Practice Book [§] 17-45 requires a response to be filed within [forty-five] days. The defendant has not done so, and the request for [an] extension of time has been filed more than [forty-five] days from the date of the filing of the [motion for] summary judgment."

Like the plaintiff in *Sheridan*, the defendant in the present case failed to comply with Practice Book § 17-47 in a timely manner, and such noncompliance is fatal to his third claim on appeal. Because the defendant did not timely comply with the requirements of § 17-47, we conclude that the trial court did not abuse its discretion by denying the defendant's motion for an extension of time to respond to the plaintiff's motion for summary judgment and to conduct discovery relating thereto.

In support of his argument that the trial court abused its discretion by denying his motion for an extension of time as untimely, the defendant contends that Practice Book § 17-47 contains no timing requirement. This con-

[9] We note that, in arguing in his principal appellate brief the merits of his motion for an extension of time, the defendant improperly goes beyond what was stated in the motion and accompanying affidavit.

tention is without merit. By its express terms, § 17-47 allows the trial court to grant a continuance for discovery purposes on the basis of reasons stated in "the affidavits of a party opposing [a] motion" for summary judgment. Although the rule itself does not specify when "the affidavits of a party opposing [a] motion" for summary judgment must be filed, that answer is readily found within the summary judgment section of chapter 17 of the Practice Book, i.e., §§ 17-44 through 17-51. Specifically, Practice Book § 17-45 (b) provides in relevant part that "[u]nless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, *including opposing affidavits* . . . ." (Emphasis added.) Simply put, Practice Book § 17-47 imports the forty-five day filing deadline set forth in Practice Book § 17-45.

Finally, we reject the defendant's suggestion that an alleged undocumented agreement between counsel—specifically, that the plaintiff would not claim its motion for summary judgment until the defendant had taken a deposition of the plaintiff's corporate designee (which the plaintiff denies)—can usurp the requirements of the rules of practice, including the need to seek extensions of time in a timely manner.[10]

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

In this opinion the other judges concurred.

[10] The defendant also cursorily argues that, by ruling on his motion for an extension of time prior to the motion appearing on the short calendar, the court violated Practice Book § 11-13 and deprived him of the opportunity to request oral argument on the motion pursuant to Practice Book § 11-18 (f). We decline to consider this claim because it is inadequately briefed. See *State* v. *Hanisko*, 187 Conn. App. 237, 254–55 n.9, 202 A.3d 375 (2019).

STATE OF CONNECTICUT *v.* JEFFREY VILLAR (AC 41503)

Alvord, Devlin and Norcott, Js.

Syllabus

Convicted, after a jury trial, of the crimes of unlawful discharge of a firearm, carrying a pistol without a permit, risk of injury to a child and reckless endangerment in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he fired a shot from a pistol into B's home after having purchased marijuana from B and fighting with him outside of the home. B's girlfriend and her five year old daughter were in the home at the time of the shooting. At trial, the state called B to testify regarding his account of the incident, including that the defendant had pulled a pistol from his waistband and fired a shot into a first floor window of his home. The defendant's friend M, who was with the defendant when he purchased the marijuana from B and witnessed the incident, also provided testimony for the state, the majority of which corroborated B's account of the incident. In addition, M testified that the defendant handed him the pistol as they fled the scene together following the shooting. The police recovered the pistol from M when they subsequently apprehended him and the defendant. The state also presented testimony from forensic examiners who testified that a bullet and shell casing found at B's home was fired by the pistol that was recovered from M and that a buccal swab of the defendant's DNA linked the defendant to that pistol. *Held* that the defendant could not prevail on his claim that there was insufficient evidence for the jury to find him guilty because the state presented insufficient evidence to prove that he was the shooter: on the basis of compelling circumstantial evidence elicited from B, M's eyewitness testimony and the DNA evidence linking the defendant to the pistol that was used to fire the bullet into B's home, the jury reasonably could have concluded that the defendant was the individual who committed the shooting, and although the defendant challenged the competency of M as a witness and noted the self-serving interest of both M and B in testifying on the state's behalf, those contentions were based on credibility considerations that were the exclusive province of the jury, which could have discounted M's and B's testimonies if it had found those witnesses to be unreliable.

Argued October 16—officially released December 17, 2019

Procedural History

Substitute information charging the defendant with the crimes of unlawful discharge of a firearm, carrying a pistol without a permit and risk of injury to a child,

and with two counts of the crime of reckless endangerment in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Harmon*, *J.*; verdict and judgment of guilty of unlawful discharge of a firearm, carrying a pistol without a permit, risk of injury to a child and reckless endangerment in the first degree, from which the defendant appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Jeffrey Villar, appeals from the judgment of conviction, rendered after a jury trial, of unlawful discharge of a firearm in violation of General Statutes § 53-203, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), reckless endangerment in the first degree in violation of General Statutes § 53a-63 (a), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1). He claims that there was insufficient evidence for the jury to have found him guilty of those crimes because (1) the state did not present sufficient evidence to prove that he fired the gunshot at issue and the complainant had an interest in seeing the defendant convicted, and (2) the only witness who testified to the defendant's firing the shot was a codefendant who had an interest in seeing the defendant convicted. We conclude that there was sufficient evidence for the jury to reasonably find the defendant guilty of the charged crimes and, therefore, affirm the trial court's judgment.

The following facts reasonably could have been found by the jury and are relevant to the resolution of this

appeal. On September 7, 2015, Waterbury police officers responded to a report of shots being fired on a residential street in Waterbury. They were advised that three males were seen leaving the area where the shots were fired. On their way to the scene, the officers had driven past three males but did not approach them. When the officers arrived at the scene, they questioned the complainant, Nathan Burk, who told them that three males—two Hispanic males and one white male—had been at his home, and that he had gotten into a fight with them. Burk told the officers that one of the individuals drew a gun and fired into his home. The officers observed a shell casing in Burk's yard and a small hole in the screen of Burk's window.

Subsequently, two officers went in search of the three males they had passed earlier, who matched Burk's description, and eventually apprehended them. The three males would be later identified as the defendant, Brandon Medina, and Tommy.[1] After the officers apprehended him, Medina disclosed that he had a weapon, and the officers found a firearm in his possession. Burk subsequently identified the defendant as the individual with whom he had fought and who had fired a gun into his home.

At trial, Burk testified to the following facts. On the date of the incident, he lived in Waterbury with his girlfriend and her five year old daughter, C.[2] At approximately noon, the defendant contacted Burk to purchase marijuana. Burk previously had sold marijuana to the defendant approximately ten times. The defendant arrived at Burk's home with two friends, Medina and Tommy, and all three appeared to be intoxicated. Once

[1] Due to his status as a minor, Tommy was referred to only by his first name during the trial court proceedings.

[2] In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the defendant completed the marijuana transaction, he asked Burk for a ride to buy a new tire because the car the defendant was driving had a flat tire. Burk agreed to give the defendant a ride, but they were ultimately unsuccessful in purchasing the tire. They then returned to Burk's home; while outside, the defendant approached Burk, showed him a silver pistol, and asked him if he wanted to buy it, and Burk declined.

Shortly thereafter, the defendant and Tommy got into an argument, which escalated to the two shoving each other. This altercation worried Burk, who then called his sister to see if he could bring C over to her home; when she agreed, he got C and left the premises. When he and C returned to the home a few hours later, the defendant and his friends were not present. At around 7 p.m., however, Burk noticed that they had returned outside and were even more intoxicated than before. He went outside and told the defendant that he had called a friend, Moses,[3] to assist with the flat tire. Moses arrived, but he left soon thereafter to retrieve a tire. The defendant and his friends then knocked on Burk's door and told him that Moses had left with their money. After a telephone call with Moses, Burk assured the defendant that Moses was returning.

Later that evening, Burk saw that the defendant and his friends remained outside with the unrepaired vehicle. He noticed that Tommy was in a neighbor's yard and asked the defendant if Tommy was urinating. Burk then noticed a shift in the defendant's demeanor. Specifically, the defendant became angry, approached Burk, and stopped about a foot from his face. Feeling threatened, Burk told the defendant that he was going back inside his home. As he walked toward his home, the defendant followed him and attempted to punch him. Burk responded by punching the defendant, causing him to stumble backward.

[3] Moses was referred to only by his first name during the trial court proceedings.

The defendant then reached into his waistband. Believing that he was about to be shot, Burk ran into his home, locked the door, and braced it with his body. Outside Burk's home, the defendant began yelling and banging on the door. This prompted Burk to call 911 on his cell phone. The defendant then stepped off Burk's porch, pulled a pistol from his waistband, and fired a shot into Burk's first floor living room window. Burk heard the shot while he was on the phone with the 911 operator. Burk's girlfriend, who was home at the time of the shooting, saw the defendant and his friends running away from the scene.

In addition to eliciting compelling circumstantial evidence from Burk, the state also called Medina as an eyewitness. Medina testified that on the drive over to Burk's home, he observed the defendant remove a silver pistol from his waistband and place it in the glove compartment of the car the defendant was driving. A majority of his testimony corroborated Burk's account of the incident, particularly his description of the defendant pulling a gun from his waistband and firing a shot at Burk's home. Additionally, Medina testified that once the shot was fired, he, Tommy, and the defendant ran down the street, and the defendant handed him the pistol.

In addition to the testimony of Burk and Medina, the state also presented DNA evidence linking the defendant to the pistol that was used to fire the bullet into Burk's home. A forensic examiner in the firearms unit of the Division of Scientific Services within the Department of Emergency Services and Public Protection testified that the bullet and casing found at Burk's home was fired by the pistol that was recovered from Medina. Further, a forensic examiner from the Connecticut Scientific Forensic Laboratory testified that a buccal swab of the defendant's DNA was compared to three swabs from the trigger, slide, and magazine of the pistol. With

respect to the results of the DNA profile on the slide, the expert testified that it was 100 billion times more likely that the DNA profile originated from the defendant than from an unknown individual.

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 151–52, 976 A.2d 678 (2009). This court "will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient." (Internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 747, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). "Furthermore, [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Morelli*, supra, 152.

The defendant does not contest that the evidence was sufficient to prove that a shooting occurred. Rather, he argues that there was insufficient evidence to prove his identity as the shooter. Among other things, the defendant challenges the competency of Medina as a witness[4] and notes the self-serving interest in Medina's

[4] The defendant notes that Medina "had been drinking heavily throughout the day of the incident. At trial, Medina testified that he did not remember a number of thing[s] that occurred that day because he 'was intoxicated and didn't have a clear mind.' "

and Burk's testimonies.[5] These challenges, however, are based on credibility considerations that rest with the jury. *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" [internal quotation marks omitted]). If the jurors had found the witnesses' testimony unreliable, they could have discounted it. At oral argument before this court, the defendant argued that if the jury had indeed discounted the testimony of both witnesses, finding them not credible, the only remaining evidence on which the jury could have reached a guilty verdict would have been circumstantial, which the defendant contends was not strong enough to "absolutely identify [the defendant] as the shooter." Circumstantial evidence, however, carries the same probative value as direct evidence. *State* v. *Berthiaume*, 171 Conn. App. 436, 444, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017). Further, as our Supreme Court has often noted, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Morelli*, supra, 293 Conn. 152.

The state did not need to produce evidence to prove the defendant's guilt beyond *any* possible doubt. Viewing the cumulative effect of the evidence in this case in the light most favorable to sustaining the verdict, the

[5] The defendant asserts that, as a codefendant, Medina had a self-interest in testifying against the defendant to avoid prosecution himself for the shooting or to receive consideration for his own charge of possession of a firearm. He also suggests that Burk may have been motivated to accuse the defendant due to fear of possible assault charges for hitting the defendant.

jury reasonably could have concluded, on the basis of the eyewitness and circumstantial evidence, that the defendant was the individual who committed the shooting.

The judgment is affirmed.

CYNTHIA CYR *v.* VKB, LLC, ET AL.
(AC 41818)

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

Syllabus

The plaintiff sought to recover damages from the defendant property owners for injuries she sustained when she tripped on a public sidewalk that abutted the defendants' property. The plaintiff alleged that an approximately one and one-half inch lip between two segments of the sidewalk constituted a defective condition in the sidewalk. Under the common law, a landowner whose property abuts a public sidewalk is under no duty to keep the sidewalk in front of the property in a reasonably safe condition, except when a municipality confers liability on the abutting landowner through a statute or ordinance, or where the defect was created by a positive act of the landowner. The defendants filed a motion for summary judgment, claiming, inter alia, that under the facts alleged by the plaintiff, they owed no duty to the plaintiff to maintain the sidewalk. The defendants claimed that the applicable city ordinance (§ 21-37) shifted only the duty of repairing an abutting sidewalk from the municipality to an abutting landowner but did not shift liability for injuries resulting from an unsafe condition on the sidewalk. The defendants further asserted that the positive act exception to the general rule absolving landowners of liability for defective sidewalks did not apply because they did not create the unsafe condition on the public sidewalk. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment for the defendants as to counts one and two of the plaintiff's complaint, which alleged that the defendants violated § 21-37, the plaintiff's appellate counsel having conceded to this court that § 21-37 did not shift liability to the defendants and did not play any role in her appeal.
2. The trial court properly rendered summary judgment in favor of the defendants as to counts four and five of the complaint, which alleged that the defect in the sidewalk developed as a result of the settling of one adjacent segment of the sidewalk: there was no allegation in those counts that any positive act on the part of the defendants caused the

settling of the sidewalk segment, as the allegation suggested that the alleged settling resulted from nature and the passage of time, which was insufficient as a matter of law to impose a duty on an abutting landowner, and, thus, the allegations of counts four and five were insufficient as a matter of law to hold the defendants liable for the plaintiff's injuries; moreover, the plaintiff's claim that the defendants owed a duty of care on the theory that a business owner that invites the public to enter and exit its property at a particular location owes a duty to ensure that the location is reasonably safe was unavailing, as the case law relied on by the plaintiff in support of that claim was inapposite in that it did not involve a public sidewalk and, therefore, did not create an additional exception to the general common-law rule.

3. The trial court improperly granted the defendants' motion for summary judgment as to counts three, six and seven of the plaintiff's complaint, which alleged that the defendants had constructed a sidewalk on their property with a resulting approximately one and one-half inch lip between the sidewalk segments and the sidewalk on the adjoining property, as those counts alleged a legally cognizable basis for liability in that they alleged that the defendants constructed the sidewalk with the alleged defect: to prevail on their motion for summary judgment, the defendants bore the initial burden to negate the factual claims as framed by the complaint, and, thus, with respect to counts three, six and seven, it was incumbent on those defendants to whom such counts were directed to proffer evidence that either they did not construct the sidewalk or that they constructed the sidewalk without the alleged defect, and because the defendants did not submit any supporting affidavits or documentary evidence, they failed to satisfy their initial burden as movants for summary judgment with respect to those counts; moreover, the fact that the defendants submitted evidentiary materials with their reply brief did not cure their failure to proffer evidence with their initial motion because the reply materials did not establish the nonexistence of a genuine issue of material fact.

Argued April 11—officially released December 17, 2019

Proceedings

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in judicial district of Hartford, where the court, *Shapiro*, *J.*, granted the plaintiff's motion to cite in Vernon W. Belanger et al. as defendants; thereafter, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Frank C. Bartlett, Jr., for the appellant (plaintiff).

Christopher P. Kriesen, with whom was *Ronald J. Houde, Jr.*, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Cynthia Cyr, appeals from the summary judgment rendered by the trial court in favor of the defendants, VKB, LLC (VKB), Shady Oaks Assisted Living, LLC (Shady Oaks Assisted Living), Shady Oaks Rest Home, Inc. (Shady Oaks Rest Home), Vernon W. Belanger, and Kay F. Belanger. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants on all counts of her amended complaint when it (1) failed to require the defendants, as the movants for summary judgment, first to establish that there was no genuine issue as to any material fact, (2) determined that the defendants' alleged affirmative acts did not create the defect in the sidewalk, and (3) purportedly determined, as a matter of law, that a business owner that invites individuals to enter and exit its property at a particular location owes no duty to ensure that such location is reasonably safe. We affirm in part and reverse in part the judgment of the trial court.

The following procedural history is relevant to our analysis of the plaintiff's claims. On November 29, 2016, the plaintiff commenced this action, sounding in negligence and negligence per se, against the original defendants, VKB, Shady Oaks Assisted Living, and Shady Oaks Rest Home. On February 2, 2017, the original defendants filed an answer and special defenses in response to the plaintiff's original complaint. On February 6, 2017, the original defendants filed a request for leave to amend their answer and special defenses and appended the proposed amendment, which was deemed to have been filed by consent, absent objection.

On February 10, 2017, the plaintiff filed a reply.[1] On December 29, 2017, the plaintiff filed a motion to cite in additional defendants, Vernon W. Belanger and Kay F. Belanger, and to amend the complaint, which was granted by the court on January 17, 2018.

On January 31, 2018, the plaintiff filed her amended complaint and alleged, inter alia, the following. At all relevant times, the defendants owned, and/or were in the possession and control of, real property located at 344 Stevens Street in Bristol (property). On May 28, 2015, at approximately 10:15 a.m., the plaintiff was walking on the sidewalk abutting the property, when she tripped on an approximately one and one-half inch lip between two sidewalk segments (defect) and fell, sustaining physical injuries, principally to her left hand, which necessitated medical treatment and interfered with her employment and enjoyment of life's activities. The parties do not dispute that the sidewalk at issue is a public sidewalk.

On the basis of the foregoing factual allegations, the plaintiff asserted the following claims: (1) negligence as to VKB (count one); (2) negligence per se as to VKB (count two); (3) nuisance as to VKB (count three); (4) negligence as to Shady Oaks Assisted Living (count four); (5) negligence as to Shady Oaks Rest Home (count five); (6) nuisance as to Vernon W. Belanger (count six); and (7) nuisance as to Kay F. Belanger (count seven). The plaintiff alleged alternative theories as to how the alleged defect in the sidewalk was created. On the one hand, in counts one and two (directed to VKB), count four (directed to Shady Oaks Assisted Living), and count five (directed to Shady Oaks Rest Home), the plaintiff alleged that the defect "developed as a result of the settling of one adjacent segment." On

[1] On December 19, 2017, the original defendants filed a motion for summary judgment as to all counts of the plaintiff's original complaint. The defendants later filed an amended motion for summary judgment, the granting of which is the subject of this appeal.

the other hand, in count three (directed to VKB), count six (directed to Vernon W. Belanger), and count seven (directed to Kay F. Belanger), the plaintiff alleged, respectively, that VKB, or its predecessor(s) in interest, Vernon W. Belanger, and/or Kay F. Belanger, through one or more of their agents, servants, and/or employees, constructed the sidewalk with the resulting defect. In each of the respective counts, the plaintiff alleged that the defendants were responsible for keeping the abutting sidewalk in a safe condition for the use of the public.

The defendants did not move to strike any of the plaintiff's claims. On March 12, 2018, however, the defendants filed an amended motion for summary judgment (motion), and a supporting memorandum of law, as to all counts of the plaintiff's amended complaint. The motion was not accompanied by any supporting affidavits or documentary evidence. The defendants argued that they were entitled to judgment as a matter of law because (1) Bristol Code of Ordinances § 21-37[2] (city ordinance) shifts only the duty of repairing an abutting sidewalk from the municipality to an abutting landowner and does not shift liability for injuries resulting from an unsafe condition of the sidewalk, (2) there is no common-law duty owed by abutting landowners to the public for sidewalk defects, and (3) there is no evidence, and the plaintiff cannot prove, that the defendants created the alleged defect so as to fall within

[2] Section 21-37 of the Bristol Code of Ordinances, entitled "Maintenance—Abutting owner's duty generally," provides: "(a) All public sidewalks, whenever installed, shall be maintained, repaired, replaced and kept clear by the abutting property owner and not at the expense of the general city taxpayers whether such public walks are described as school walks or otherwise.

"(b) Every person owning land within the city, upon or adjacent to which is a sidewalk, whether constructed by him or not, shall at all times keep such sidewalk in safe condition for the use of the public, and shall have repaired all defects which may occur in such sidewalk and at all times remove therefrom all obstructions or any substance which would in any way impede or imperil public travel upon such sidewalk."

an exception to the general rule that liability remains with the municipality in cases involving public sidewalk defects.

On April 19, 2018, the plaintiff filed an objection and a memorandum of law in opposition to the motion, as well as the affidavit of Frank C. Bartlett, Jr., Esq., and several exhibits. On May 7, 2018, the defendants filed a reply memorandum of law, as well as the affidavit of Ronald J. Houde, Jr., Esq., and several exhibits. That same day, the court held a hearing on the motion. On June 15, 2018, the court granted the defendants' motion, rendering summary judgment in favor of the defendants on all counts.

The trial court's memorandum of decision reflects the following analysis. Having reviewed the general principles regarding the liability of abutting landowners for injuries sustained on a defective public sidewalk, the court first concluded that, although the city ordinance imposes a duty on the defendants to maintain the sidewalk, it does not shift liability from the municipality to the defendants for the plaintiff's fall. The court then addressed the plaintiff's argument that there existed a genuine issue of material fact as to whether the defendants caused the sidewalk defect by performing a positive act. Specifically, the court stated that "[t]he plaintiff does not allege, and has not presented evidence to show, that the sidewalk was constructed or repaired deficiently . . . ." The court went on to reject the plaintiff's additional arguments, namely, that the defendants owed her a duty of care by (1) voluntarily undertaking to inspect the sidewalks and (2) incurring a higher duty of care to the plaintiff as a business invitee. Thereupon, the court entered judgment in favor of the defendants as to all counts. This appeal followed. Additional facts and procedural history will be provided as necessary.

Before we turn to the plaintiff's claims on appeal, we briefly discuss the standard of review and applicable

legal principles. The standard governing our review of a trial court's decision to grant a motion for 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. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Emphasis omitted; internal quotation marks omitted.) *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016).

We next review the substantive law governing liability for injuries resulting from a defective condition on a public sidewalk. "It has long been established that municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition. *Robinson* v. *Cianfarani*, [314 Conn. 521, 525, 107 A.3d 375 (2014)].

General Statutes § 13a-99 further provides in relevant part that '[t]owns shall, within their respective limits, build and repair all necessary highways and bridges . . . except when such duty belongs to some particular person. . . .' When a sidewalk 'along a public street in a city [has] been constructed and thrown open for public use, and used in connection with the rest of the street, [it] must, as a part of the street,' be maintained by the city, and kept in such repair 'as to be reasonably safe and convenient for . . . travelers . . . .' *Manchester* v. *Hartford*, 30 Conn. 118, 121 (1861). '[This] duty is by law imposed primarily upon the city, and to the city the public and individuals have a right to look for security against accidents, as well as for indemnity for injury occasioned by its neglect.' Id.

"This primary duty cannot ordinarily be delegated to or imposed upon a third party by contract or ordinance. 'An abutting landowner, in the absence of statute or ordinance, ordinarily is under no duty to keep the public sidewalk in front of his property in a reasonably safe condition for travel.' *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989). Abutting landowners, therefore, are generally not liable for injuries caused by defects on public sidewalks adjacent to their property. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 529. The common-law rule is that the abutting landowner is under no duty to keep a public sidewalk in front of his property in a reasonably safe condition for travel. Id. Moreover, shifting liability cannot be accomplished by inference or by alleging alternative theories of common-law negligence. Id., 528. There are two exceptions. First, municipalities, in limited circumstances, can confer liability onto the abutting landowner through a charter provision, statute, or ordinance. Id. Second, landowners may be liable for injuries caused by defects they created by their own actions. Id. . . .

"Therefore, without a statute that confers liability or the creation by the abutting landowner of the cause of the injury to the plaintiff, the landowner owes no duty to members of the public traversing the public sidewalk. See *Wilson* v. *New Haven*, supra, 213 Conn. 280–81." (Citations omitted; footnotes omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 93–95, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

I

We first consider the foregoing principles with respect to counts one and two of the amended complaint (i.e., the plaintiff's claims of negligence and negligence per se as to VKB). In the allegations made in support of such claims, the plaintiff exclusively relied on the city ordinance as creating a duty on the part of VKB to inspect, maintain, and/or repair the abutting sidewalk, and to warn individuals, including the plaintiff, of the allegedly defective condition of the sidewalk. During oral argument before this court, and having stated in the plaintiff's principal appellate brief that "the plaintiff is not claiming that [the city ordinance], in and of itself, shifts liability to an abutting landowner," the plaintiff's counsel expressly acknowledged that the city ordinance does not play any role in the plaintiff's appeal and conceded that summary judgment properly entered in favor of VKB on count two. Count one necessarily suffers the same fate, however, as the plaintiff's theory of negligence alleged therein also is based exclusively on VKB's alleged violation of the city ordinance.[3] See *Robinson* v. *Cianfarani*, supra, 314 Conn. 528 (holding that town ordinance that imposed duty on

[3] Specifically, in count one, the plaintiff alleged in relevant part: "4. At all times relevant, [VKB] was responsible for keeping the abutting sidewalk in safe condition for the use of [the] public, pursuant to the ordinances of the [city of] Bristol. . . . 15. [VKB] has direct liability to the plaintiff for the injuries she sustained via operation of Bristol [Code of] Ordinance[s] § 21-37."

abutting landowner to remediate hazardous conditions created by accumulation of snow and ice on public sidewalk but did not shift civil liability to that landowner for failure to do so could not be used to support alternative negligence theories). Accordingly, the plaintiff's challenge to the trial court's rendering of summary judgment in favor of VKB as to counts one and two is deemed abandoned, and the judgment as to counts one and two is affirmed on that basis.

II

We turn next, in the context of the remaining counts, which do not rely on the city ordinance, to the applicability of the second exception to the general rule. "[O]ur courts have long recognized '[the second] exception to the general rule, in that abutting property owners can be held liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by *positive acts of the defendant*.' *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 358, 660 A.2d 877 (1995). Examples of this exception include a landowner who maintained a gasoline pump inches away from a sidewalk which would spill gasoline onto the sidewalk, rendering it unsafe for travel; *Hanlon* v. *Waterbury*, 108 Conn. 197, 198–99, 142 A. 681 (1928); and a defendant who allowed grease from his restaurant to seep from the front of his building onto the public walk. *Perkins* v. *Weibel*, 132 Conn. 50, 51, 42 A.2d 360 (1945)." (Emphasis added.) *McFarline* v. *Mickens*, supra, 177 Conn. App. 94–95.

Other examples include a landowner and its lessee that allowed ice to form on a public sidewalk as a result of the melting of snow that had accumulated on projections from the defendants' building; *Calway* v. *William Schaal & Son, Inc.*, 113 Conn. 586, 588–90, 155 A. 813 (1931); and landowners and their lessee that allegedly caused sand, sticks, and debris to accumulate

on a public sidewalk; *Gambardella* v. *Kaoud*, supra, 38 Conn. App. 359; accord *Wilson* v. *New Haven*, supra, 213 Conn. 280–81 (abutting landowner not liable for injuries sustained as result of fall caused by raised, broken, and uneven section of public sidewalk where plaintiff did not claim that statute or ordinance created duty owed to plaintiff by abutting landowner and where abutting landowner did not create hazardous condition); *Abramczyk* v. *Abbey*, 64 Conn. App. 442, 446–47, 780 A.2d 957 (analogizing case, which involved public right-of-way located on defendant's property, to public sidewalk cases and concluding that, in absence of any evidence that defendant's positive acts caused city's water pipe to be tripping hazard, defendant was not liable for injuries caused by exposed pipe), cert. denied, 258 Conn. 933, 785 A.2d 229 (2001).

Moreover, an abutting landowner owes no duty to the public to take affirmative steps to remediate a defect on a public sidewalk resulting entirely from the operation of nature. See *Hartford* v. *Talcott*, 48 Conn. 525, 534 (1881) (there is not imposed "upon the individual any liability at common law for injuries resulting from obstructions in [a public sidewalk] wholly the effects of natural causes"); *McFarline* v. *Mickens*, supra, 177 Conn. App. 97–98 (landowner owed no duty to public in connection with naturally growing grass on public sidewalk).

Mindful of the foregoing principles, we address separately (1) those counts in which the plaintiff alleged that the defect in the sidewalk "developed as a result of the settling of one adjacent segment" and (2) those counts in which the plaintiff alleged that the relevant defendant "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property."

A

We begin with counts four and five, directed to Shady Oaks Assisted Living and Shady Oaks Rest Home, respectively, in which the plaintiff alleged that the defect in the sidewalk "developed as a result of the settling of one adjacent segment." As stated previously in this opinion, in construing the plaintiff's claims, the court concluded in part that "[t]he plaintiff [did] not allege . . . that the sidewalk was constructed or repaired deficiently . . . ." Insofar as counts four and five are concerned, we agree. There is no allegation in counts four and five that any positive act on the part of these defendants caused the settling of the sidewalk segment. Rather, the allegation that the defect in the sidewalk "developed as a result of the settling of one adjacent segment" suggests only that the alleged settling resulted from nature and the passage of time, which is insufficient as a matter of law to impose a duty on an abutting landowner. See *Hartford* v. *Talcott*, supra, 48 Conn. 534; *McFarline* v. *Mickens*, supra, 177 Conn. App. 97–98.

In short, it is clear on the face of these counts that they are legally insufficient.[4] They fail to state a legally cognizable basis on which to hold Shady Oaks Assisted Living and/or Shady Oaks Rest Home liable for injuries on the abutting public sidewalk. Thus, in the absence of (1) a charter provision, statute, or ordinance that confers liability, or (2) any allegations in counts four and five, that Shady Oaks Assisted Living and Shady Oaks Rest Home, respectively, *created* a defective condition on the public sidewalk, the settled common-law rule governs. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 528–29, 528 n.7.

[4] "The existence of a duty is a question of law . . . ." (Internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 338, 210 A.3d 469 (2019). "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not

Notwithstanding the well settled principles explained previously in this opinion, the plaintiff claims that the defendants owed her a duty of care on the theory that a business owner that invites the public to enter and exit its property at a particular location owes a duty to ensure that the location is reasonably safe. In support of this claim, the plaintiff largely relies on *Ford* v. *Hotel & Restaurant Employees & Bartenders Union*, 155 Conn. 24, 32–36, 229 A.2d 346 (1967), in which our Supreme Court affirmed the judgment of the trial court holding the defendant lessor liable in negligence for injuries sustained by a business invitee as he exited the lessor's premises. The trial court in the present case concluded, and we agree, that *Ford* is inapposite because, at a minimum, it did not involve a public sidewalk and, therefore, did not create an additional exception to the general common-law rule discussed previously in this opinion.

On the basis of the foregoing, we affirm the trial court's rendering of summary judgment in favor of Shady Oaks Assisted Living and Shady Oaks Rest Home as to counts four and five, respectively.

B

We continue our analysis with counts three, six, and seven, in which the plaintiff alleged that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property." With respect to these allegations, we disagree with the trial court's statement that "[t]he plaintiff [did] not allege . . . that the sidewalk was constructed or repaired deficiently . . . ." These allegations were sufficient to bring the plaintiff's claims in counts three,

be cured by repleading." *Larobina* v. *McDonald*, 274 Conn. 394, 401, 876 A.2d 522 (2005).

six, and seven within the second exception to the common-law rule, namely, that an abutting landowner can be liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by a positive act of the defendant. That is, the allegations of these counts may be reasonably viewed as alleging that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, constructed the sidewalk with the alleged defect (i.e., that the alleged defect resulted from the construction of the sidewalk).

In light of our conclusion that counts three, six, and seven sufficiently allege a legally cognizable basis for liability, we proceed to address the plaintiff's claim that the trial court erred in failing to require the defendants to satisfy their initial burden, as the movants for summary judgment, to establish the nonexistence of any genuine issue of material fact. As stated previously in this opinion, in support of their amended motion for summary judgment, the defendants did not submit any supporting affidavits or documentary evidence. The plaintiff argues that, in light of this failure, the trial court improperly shifted the burden of proof to her when it concluded that "[t]he plaintiff . . . has not presented evidence to show . . . that the sidewalk was constructed or repaired deficiently . . . ." We agree.

Practice Book § 17-45 (a) provides: "A motion for summary judgment *shall be supported by* appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents." (Emphasis added.) "On a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists

justifying a trial. . . . Accordingly, [w]hen 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." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 626–27, 57 A.3d 391 (2012); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320–21, 77 A.3d 726 (2013); *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 795, A.3d (2019); *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 583–85, 193 A.3d 700 (2018).

To prevail on their motion for summary judgment, the defendants bore the initial burden to negate the factual claims as framed by the complaint. Thus, in response to the allegations in counts three, six, and seven, that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property," it was incumbent on those defendants to whom such counts were directed to proffer evidence that either they did not construct the sidewalk or that they constructed the sidewalk without the alleged defect. In the absence of any evidentiary submission, such defendants failed to satisfy their initial burden as movants for summary judgment with respect to counts three, six, and seven, and the trial court erred in granting their motion for summary judgment as to those counts.

The fact that the defendants submitted evidentiary materials with their reply brief (reply materials) in support of their summary judgment motion does nothing to cure the failure to proffer evidence with their initial motion because the reply materials do not establish the

nonexistence of a genuine issue of material fact.[5] That is, the reply materials do not contain any affidavits or other supporting documents that demonstrate that the defendants either did not construct the sidewalk or constructed the sidewalk without the alleged defect. Moreover, the reply brief states in part: "[I]t is not clear that the defendant[s] actually constructed the sidewalk in question," which effectively concedes that there exists a genuine issue of material fact as to whether any of the defendants constructed the sidewalk.

The judgment is reversed in part only as to the granting of the defendants' motion for summary judgment as to counts three, six, and seven of the plaintiff's amended complaint and the case is remanded with direction to deny the defendants' motion for summary judgment as to those counts and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[5] The reply materials, which were filed on the same day as the summary judgment hearing, include certificates of use and occupancy, two photographs of the sidewalk, excerpts from the plaintiff's deposition transcript, and the affidavit of Ronald J. Houde, Jr., Esq. attesting that the submitted documents are true and accurate copies. Because the plaintiff's counsel stated to the trial court during the summary judgment hearing that he had no objection to the court considering the defendants' reply, the plaintiff is deemed to have waived any objection to the reply on timeliness grounds. Cf. *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, supra, 183 Conn. App. 583–85 (holding that, in adjudicating defendants' motion for summary judgment, trial court should not have considered defendants' initial affidavit, filed one day before summary judgment hearing, to which plaintiff objected on, inter alia, timeliness grounds).

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Stanley *v.* Commissioner of Correction (Memorandum Decision) 903

State *v.* Alexis 162

*Robbery in first degree; threatening in second degree; claim that trial court improperly admitted prejudicial photograph into evidence; claim that state violated defendant's due process right to fair trial by eliciting testimony and making remark during closing arguments about defendant's postarrest and post-*Miranda *silence; whether defendant demonstrated harm resulting from admission of photograph into evidence; whether alleged constitutional violation was harmless beyond reasonable doubt.*

State *v.* Brooks. 301

Illegal receipt of firearm; whether evidence was insufficient to support conviction of illegal receipt of firearm because state did not prove when or how defendant received firearm.

State *v.* Carpenter 364

Murder; arson in second degree; claim that trial court improperly declined to give jury instruction on third-party culpability; whether evidence was sufficient to establish direct connection between third party and murder of victim or arson of victim's home.

State *v.* Carter 202

Assault in first degree; attempt to commit assault in first degree; risk of injury to child; criminal possession of firearm; mootness; whether trial court erred in dismissing motion to set aside judgment of conviction; claim that trial court improperly found that it lacked subject matter jurisdiction over motion to set

aside judgment of conviction; whether there was any practical relief that could be afforded to defendant in light of unchallenged collateral estoppel basis for trial court's dismissal of defendant's motion to set aside judgment of conviction; whether appeal was moot.

State *v.* Cecil 446

Murder; criminal possession of firearm; reviewability of claim that trial court improperly admitted into evidence video recorded statements of witnesses; claim that trial court improperly admitted into evidence handgun magazine, which defendant claimed was irrelevant, highly prejudicial and misleading.

State *v.* DeJesus 304

Sexual assault in fourth degree; risk of injury to child; unpreserved claim that trial court improperly admitted into evidence expert testimony regarding how child victims of sexual abuse behave and how they disclose their abuse; whether trial court committed plain error in admitting testimony of expert witness; request that this court exercise its supervisory authority over administration of justice to preclude, as matter of law, admission of expert testimony on characteristics of children who report sexual abuse; claim that trial court abused its discretion during pretrial hearing by refusing to permit defendant to ask victim leading questions on direct examination; whether defendant failed to establish that trial court's alleged error caused him harm.

State *v.* Joseph 684

Assault of public safety personnel; claim that jury's rejection of affirmative defense of mental disease or defect was not supported by evidence; whether jury was obligated to accept testimony of expert witness; credibility of witnesses.

State *v.* Michael T.. 598

Risk of injury to child; unlawful restraint in first degree; assault in first degree; criminal attempt to commit assault in first degree; assault in second degree; whether trial court abused its discretion by admitting into evidence forensic interviews of victims; claims that forensic interviews did not meet requirements of medical diagnosis and treatment exception to rule against hearsay, as established in State *v.* Griswold *(160 Conn. App. 528), were irrelevant, were more prejudicial than probative and were cumulative; claim that trial court improperly denied motions for judgment of acquittal with respect to two counts of risk of injury to child because neither victim was placed at risk of injury to her physical or mental health, as neither victim actually witnessed burning of other; claim that trial court made constitutional and evidentiary error when it improperly precluded defendant from presenting evidence of third-party culpability by not allowing him to testify about his girlfriend's prior statement to him that she had burned victims; claim that trial court improperly determined that statement against penal interest exception to rule against hearsay did not apply to alleged admission of defendant's girlfriend to defendant that she had burned victims.*

State *v.* Ortega (Memorandum Decision) 904

State *v.* Patel 245

Murder; home invasion; burglary in first degree as accessory; robbery in first degree as accessory; conspiracy to commit burglary in first degree; tampering with physical evidence; whether trial court abused its discretion when it admitted coconspirator's statements pursuant to dual inculpatory statement exception to hearsay rule in applicable provision (§ 8-6 [4]) of Connecticut Code of Evidence; unpreserved claim that trial court improperly found coconspirator unavailable to testify; claim that defendant's sixth amendment right to confrontation was violated when trial court failed to have coconspirator sworn in prior to making its determination that coconspirator was unavailable to testify; claim that trial court committed plain error when it failed to have coconspirator sworn in before making its determination that coconspirator was unavailable to testify; claim that trial court violated defendant's sixth amendment right to confrontation when it admitted tape recording of coconspirator's statements to jailhouse informant; claim that coconspirator's statements to jailhouse informant constituted inadmissible testimonial hearsay under federal constitution; unpreserved claim that coconspirator's statements to jailhouse informant were testimonial under due process and confrontation clauses in article first, § 8, of state constitution; claim that trial court abused its discretion when it admitted coconspirator's statements to jailhouse informant and coconspirator's girlfriend pursuant to § 8-6 (4); whether trial court properly found that coconspirator's statements to jailhouse informant and coconspirator's girlfriend presented sufficient indicia of reliability; whether trial court abused its discretion when it excluded from evidence

under § 8-6 (4) certain testimony as not trustworthy; whether trial court abused its discretion when it denied defendant's motion to preclude state from offering testimony about cell phone tower data analysis; claim that trial court failed to conduct hearing pursuant to State *v.* Porter *(241 Conn. 57) to determine reliability of methods and procedures concerning cell phone tower data analysis; whether evidence was sufficient to convict defendant of murder under theory of liability that was predicated on* Pinkerton *v.* United States *(328 U.S. 640).*

State *v.* Pernell 394

Murder; prosecutorial impropriety; whether defendant was deprived of his due process right to fair trial because of certain prosecutorial improprieties in closing argument; claim that prosecutor improperly opined on how someone should act during police interview because there was no evidence as to how grieving person typically would respond when questioned by police hours after witnessing his friend's death, nor about how defendant's ingestion of phencyclidine could have affected his behavior during police interview; claim that prosecutor improperly interjected his own experience by stating what he would have done if he had found himself in defendant's circumstances; claim that prosecutor improperly appealed to jurors' emotions when prosecutor speculated that defendant shamefully went through victim's purse after her death and found letters regarding child custody issues; claim that prosecutor's statement that defendant's version of events, namely, that gun was in both his and victim's hands at time of discharge, contradicted gunshot residue evidence was improper because it was not properly derived from evidence presented; claim that prosecutor's use of words "kill shot" improperly appealed to jurors' sympathies and emotions because those words implied more than mere murder; whether prosecutor's use of word "executed" improperly appealed to jurors' sympathies and emotions; whether prosecutor's statement of "[i]t's shameful" that defendant went through victim's purse after her death was improper expression of personal opinion; whether prosecutorial improprieties deprived defendant of his due process right to fair trial.

State *v.* Ramos 594

Motion to correct illegal sentence; subject matter jurisdiction; whether motion to correct illegal sentence was proper procedural vehicle to raise claim challenging legality of defendant's conviction; whether trial court lacked jurisdiction over motion to correct illegal sentence that did not challenge legality of sentence imposed; improper form of judgment.

State *v.* Ricks 216

Motion to correct illegal sentence; claim that due process required state to prove that defendant breached initial plea agreement before state could enter into second plea agreement with him; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

State *v.* Riddick 243

Motion to correct judgment mittimus; subject matter jurisdiction; claim that trial court improperly denied motion to correct judgment mittimus; improper form of judgment.

State *v.* Salters 670

Assault of employee of Department of Correction; motion to correct illegal sentence; claim that trial court abused its discretion when it denied motion to correct illegal sentence because sentencing court substantially relied on state's materially inaccurate information at sentencing; whether defendant could establish that sentencing court relied on inaccurate information; whether police detective's sworn testimony exceeded minimum indicia of reliability required of information relied on by court in sentencing; whether trial court discussed and applied correctly appropriate standard of actual reliance; whether there was anything in record that indicated that sentencing court relied on information regarding defendant's activities in North Carolina to fashion defendant's sentence; whether, because defendant failed to establish that sentencing court relied on inaccurate or unreliable information, other claims on appeal necessarily failed.

State *v.* Vasquez 831

Application for discharge from jurisdiction of Psychiatric Security Review Board; whether trial court improperly denied application for discharge; whether acquittee suffered from mental illness under applicable statutes; claim that because diagnoses are based on substance and alcohol abuse, they cannot be considered mental illness or psychiatric disabilities; whether trial court's finding that acquittee suffered from more than mere substance abuse was clearly erroneous.

State *v.* Villar 864
Unlawful discharge of firearm; carrying pistol without permit; risk of injury to child; reckless endangerment in first degree; claim that there was insufficient evidence for jury to find defendant guilty of charged crimes; whether jury reasonably could have concluded that defendant was individual who committed shooting; credibility of witnesses.

Stevens *v.* Khalily 626
Intentional infliction of emotional distress; whether trial court properly granted motion to dismiss for lack of personal jurisdiction; claim that trial court improperly relied on affidavits of nonresident defendants and that affidavits were insufficient to rebut presumption of proper service; whether plaintiff failed to sustain his burden that he properly served nonresident defendants at their respective last known addresses and that he made a reasonably diligent search to find out their last known addresses, within a reasonable time, before attempting service of process.

Sullivan *v.* Associated Ins. Agency, LLC (Memorandum Decision) 902

Tatoian *v.* Tyler 1
Vexatious litigation; trusts; whether trial court properly denied motion to dismiss plaintiff trustee's action for vexatious litigation; claim that trial court lacked subject matter jurisdiction because trustee lacked standing at time he commenced action; claim that trial court improperly failed to consider whether settlor of trust was subjected to undue influence in connection with creation of trust; claim that trial court misinterpreted relevant law in its analysis of whether defendant beneficiaries had probable cause in prior action against trustee to claim that trustee failed to diversify trust's assets in violation of statute (§ 45a-541c); claim that trial court misinterpreted relevant law in its analysis of whether trustee could prevail merely by demonstrating that beneficiaries lacked probable cause to bring one of several claims beneficiaries brought against trustee in prior action; claim that trial court improperly analyzed whether beneficiaries had probable cause to bring claims against trustee in prior action where court essentially disallowed reliance by trustee on trust's exculpatory clause to demonstrate that beneficiaries lacked probable cause.

Telman *v.* Hoyt. 377
Fraud; hearing in damages; claim that trial court abused its discretion when it denied motion for additur as to attorney's fees; whether rules of practice provide for motion for additur in connection with hearing in damages to court.

T & M Building Co. *v.* Hastings 532
Contracts; specific performance; statute of frauds; promissory estoppel; unjust enrichment; claim that trial court erred in determining that handwritten document executed by parties violated statute of frauds; claim that trial court should have considered extrinsic evidence and past performance; claim that trial court erred in rendering judgment for defendant on unjust enrichment claim; claim that court erred in rendering judgment for defendant on promissory estoppel claim.

U.S. Bank National Assn. *v.* Stephenson (Memorandum Decision) 901

Villar *v.* A Better Way Wholesale Autos, Inc. (Memorandum Decision) 903

Watts *v.* Commissioner of Correction. 558
Habeas corpus; whether habeas court properly rejected claim that trial counsel rendered ineffective assistance by failing to properly advise petitioner about plea offer; whether petitioner proved that he was prejudiced by counsel's alleged deficient performance; claim that ninety-five year sentence violated right to remain free from cruel and unusual punishment; claim that petitioner was entitled to new sentencing proceeding in which court must consider mitigating factors of youth and impose proportionate sentence; claim that Appellate Court lacked subject matter jurisdiction because petitioner was not aggrieved by habeas court's dismissal without prejudice of cruel and unusual punishment claims; whether petitioner was entitled to resentencing in light of legislation (P.A. 15-84) passed subsequent to petitioner's conviction that provided parole eligibility for juvenile offenders serving sentence of greater than ten years of incarceration, where Supreme Court determined in State *v.* Williams-Bey *(333 Conn. 468), which had been pending during petitioner's habeas trial, that parole eligibility adequately remedied any violation of requirement that mitigating factors of youth be considered before sentence of life without possibility of parole, or functional equivalent thereof, could be imposed.*

Wells Fargo Bank, N.A. *v.* Ferraro 467
Foreclosure; summary judgment; whether trial court improperly permitted and considered live testimony from witnesses during evidentiary hearing on motion for summary judgment as to liability and objection thereto; whether, by weighing credibility of witnesses who testified and assessing strength of evidence submitted at evidentiary hearing in deciding motion, trial court improperly decided genuine issue of material fact, which rendered granting of motion for summary judgment improper.

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

JACQUELINE RODRIGUEZ *v.* KAIAFFA, LLC d/b/a CHIP'S FAMILY RESTAURANTS, et al., SC 20274
Judicial District of Hartford, Complex Litigation Docket

Employment; Connecticut Minimum Wage Act; Tip Credit; Class Actions; Whether Trial Court Properly Certified Class of Plaintiff Food Servers Claiming that Defendants Failed to Pay Full Minimum Wage for Non-Service Duties. The plaintiff brought this action by a "class action complaint" alleging that she worked as a server at a Chip's Family Restaurant allegedly owned and operated by the defendants, a limited liability company and its sole member. She alleges that the defendants violated the Connecticut Minimum Wage Act by failing to pay her the full minimum wage for the time she performed "side work" that included cleaning and restocking supplies away from the service area. Under the act and regulations promulgated pursuant thereto, employers in the restaurant industry are allowed to pay "service" employees that regularly receive gratuities a reduced minimum wage, commonly referred to as the "tip credit." The regulations define a service employee as one whose duties relate solely to serving food and performing duties incidental to such service. Employers are not allowed to apply the tip credit to employees who perform "non-service" duties. The regulations further provide that, if an employee performs both service and non-service duties, the employer must record the time spent on each so that the tip credit is applied only to the time spent on service duties. If the employer fails to record the time separately, the tip credit cannot be applied. The plaintiff alleges that the side work that the defendants routinely assigned to her and to other servers constituted non-service duties and that the defendants improperly applied the tip credit by failing to record the time that servers spend on each type of work. The plaintiff moved for certification of a class of all individuals employed as servers at any Connecticut Chip's Family Restaurant. She argued that the defendants' general policy is to assign side work to all servers during every shift and that, under Practice Book § 9-8 (3), common questions of law and fact predominate over any questions affecting individual members of the class. The defendants opposed class certification, claiming that the amount and type of side work performed varies among individual servers and from restaurant to restaurant. The trial court found that common questions of law and fact predominated because the plaintiff

alleged that all servers during their shifts performed side work properly classified as non-service duties and that the defendants did not record the servers' non-service time separately. The trial court granted the motion for class certification and, following that decision, the Chief Justice granted the defendants certification to appeal pursuant to General Statutes § 52-265a. The defendants appeal, claiming that the trial court erred by failing to correctly determine and apply the substantive law regarding the tip credit and erred in concluding that the commonality and predominance requirements of Practice Book § 9-8 (3) were satisfied.

MARTIN J. PRAISNER *v.* STATE OF CONNECTICUT, SC 20315
Judicial District of Hartford

Indemnification; Sovereign Immunity; Whether Appellate Court Properly Held that Member of State University's Special Police Force not a Member of a "Local Police Department" Entitled to Indemnification Under General Statutes § 53-39a. The plaintiff, a former member of a special police force maintained by the state of Connecticut for Eastern Connecticut State University (university), was prosecuted by the federal government for criminal offenses that he allegedly committed during the course of his duties. After the federal charges were dismissed, the plaintiff brought this action against the state under General Statutes (Rev. 2013) § 53-39a, seeking reimbursement for the economic losses he incurred in his criminal defense. That statute authorizes certain law enforcement unit members to bring an action against their employer seeking indemnification for economic loss sustained as a result of a prosecution for a crime allegedly committed in the course of the employee's duties, where the charge is dismissed or the employee is found not guilty. The state moved to dismiss the action, claiming that it was barred by sovereign immunity because a member of the university's special police force is not included in the class of employees entitled to indemnification under § 53-39a. The trial court denied the motion, concluding that a member of the university's special police force is a member of a "local police department" under the statute. The trial court subsequently rendered judgment for the plaintiff and awarded him damages, including lost wages and attorney's fees. The state appealed, claiming that the trial court improperly determined that the plaintiff was entitled to indemnification under § 53-39a. The Appellate Court (189 Conn. App. 540) reversed the judgment, concluding that the plain language of the statute and its relationship to other statutes indicates that the university's special police force is not a "local police department" as contemplated by

§ 53-39a. The court reasoned that, while § 53-39a identifies certain officers entitled to indemnification with exacting precision, it does not include members of the university's special police force in the class of employees entitled to indemnification. The court found it significant that General Statutes (Rev. 2013) § 10a-142, which provides for the establishment of special police forces for the state's public universities, expressly identifies certain sections of the General Statutes as being either applicable or inapplicable to members of such special police forces, but it does not reference § 53-39a in any manner. The court also emphasized that § 10a-142 contains an indemnification provision that applies specifically to members of the university's special police force without reference to § 53-39a. The plaintiff appeals, claiming that the Appellate Court misconstrued § 53-39a and its relationship to other statutes. He contends that the Appellate Court erred in concluding that the legislature intended that § 10a-142 govern indemnification of members of the university's special police force, because that statute applies only to indemnification for civil liability, as opposed to criminal prosecutions under § 53-39a. The plaintiff argues that the legislature clearly intended that members of the university's special police force to be entitled to indemnification where, as here, the criminal charges were ultimately dismissed.

ANTONIO VITTI *v.* CITY OF MILFORD et al., SC 20350
Compensation Review Board

Workers' Compensation; Whether Plaintiff Entitled to Permanent Partial Disability Award for 100 Percent Loss of His Heart Following Heart Transplant. The plaintiff was employed by the city of Milford's police department from 1993 to 2014. In 2010, he was diagnosed with giant cell myocarditis, a heart disease, and he underwent a heart transplant. The plaintiff subsequently sought, among other things, a permanent partial disability workers' compensation award under General Statutes § 31-308 (b) for a 100 percent loss of function of his native heart. Section 31-308 (b) lists the heart among the "members or organs" of the body for which a permanent partial disability award may be sought and provides in relevant part: "If the injury consists of the loss of a substantial part of a member resulting in a permanent partial loss of the use of a member, or if the injury results in a permanent partial loss of function, the commissioner may . . . award to the injured employee the proportion of the sum provided in this subsection for the total loss of, or the loss of the use of, the member or for incapacity or both that represents the proportion of the total loss or loss of use found to exist." Precedent also establishes that a claimant is entitled to a permanent partial disability award

once he or she reaches maximum medical improvement. During the proceedings before the trial commissioner, a cardiologist opined that the plaintiff had reached maximum medical improvement after his heart transplant and that he should be given a 23 percent impairment rating for his transplanted heart. The trial commissioner agreed and issued a permanent partial disability award to the plaintiff for a 23 percent loss of function of his transplanted heart, rejecting his claim that his native heart and not his transplanted heart was the organ that should be considered for purposes of determining the award. The Compensation Review Board affirmed the trial commissioner's award, rejecting the plaintiff's argument that the loss of his native heart was comparable to the amputation of a limb, which would warrant a permanent partial disability award for a 100 percent loss of function. The plaintiff appeals from the board's decision. The Supreme Court will decide whether the board properly affirmed the trial commissioner's decision that the plaintiff was entitled to a permanent partial disability award under General Statutes § 31-308 (b) for a 23 percent loss of function of his transplanted heart and not for a 100 percent loss of function of his native heart.

NASH STREET, LLC *v.* MAIN STREET AMERICA ASSURANCE COMPANY et al., SC 20389
Judicial District of Ansonia-Milford at Milford

Insurance; Whether Trial Court Correctly Determined that Insurer had no Duty to Defend or Indemnify its Insured; Whether Trial Court Properly Concluded that Plaintiff's Property Damage Excluded from Coverage Under "Business Risk Exclusions" in Commercial Risk Insurance Policy. In 2013, the plaintiff hired a contractor to renovate its storm-damaged beach house. Because the house needed to be elevated in order to comply with certain regulations, the contractor hired a subcontractor to perform work on the foundation. While the subcontractor was lifting the house and placing it on cribbing for support, the house shifted off of the cribbing and collapsed. At the time of the collapse, the contractor was insured under a commercial general liability policy issued by the defendant, Main Street America Assurance Company. When the plaintiff brought an action against the contractor to recover for the property damage, the defendant refused to defend or indemnify the contractor. The plaintiff obtained a default judgment against the contractor in the amount of $558,007.16. After the contractor failed to satisfy that judgment, the plaintiff brought the present action against the defendant pursuant to General Statutes § 38a-321, which authorizes a judgment creditor to bring an action against the judgment debtor's liability

insurer and exercise the insured's rights under the policy. The defendant asserted, as a special defense, that the claimed loss was excluded from coverage under two exclusions in the policy, which are commonly referred to as "business risk" exclusions. Those exclusions state that the insurance does not apply to property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations," nor does it apply to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The trial court granted summary judgment in favor of the defendant, ruling that both exclusions applied and precluded coverage for the loss. It concluded that the entire house was "that particular part" of the property on which the contractor was working because the entire house was being renovated and the damage to the house arose out of that renovation. Accordingly, the trial court rejected the plaintiff's contention that the renovation work involving the foundation was separate and distinct from the renovations performed on the house prior to the collapse. The plaintiff appeals, claiming that the trial court failed to apply the proper standard for determining whether an insurer breached a duty to defend its insured, a duty the plaintiff asserts is triggered whenever a complaint alleges facts that~potentially are within the scope of coverage. The plaintiff contends that, because the allegations in the complaint against the contractor alleged facts that could bring the claimed loss within the scope of coverage, the defendant breached its duty to defend its insured such that it is liable for the resulting judgment. The plaintiff also contends that the trial court erred in concluding that the phrase "that particular part" referred to the entire house as opposed to only the foundation.

OFFICE OF CHIEF DISCIPLINARY COUNSEL *v.*
JOSEPHINE SMALLS MILLER, SC 20390
Judicial District of Danbury

Attorney Discipline; Whether Trial Court Violated Defendant's Due Process Rights by Denying Her Motion for Articulation; Whether Trial Court Erred in Determining that Defendant's Affirmative Defenses Were Not Properly Before It; Whether Trial Court Erred in Finding that Defendant Engaged in Misconduct Warranting Suspension from Practice of Law. The plaintiff brought this presentment action against the defendant attorney in four counts. The first count alleged that the defendant commingled personal funds with client funds in her IOLTA account. The second count alleged that the defendant repeatedly failed to appear for trial court proceedings and that she failed to use the proper procedure to request continu-

ances in multiple cases. The third count alleged that the defendant engaged in the unauthorized practice of law by representing a client in the Appellate Court while she was suspended from practice before that court, and the fourth count alleged that the defendant failed to inform that client of the suspension. The defendant raised two affirmative defenses in response, alleging that the actions of the plaintiff were based on racially discriminatory and retaliatory reasons in violation of her federal and state constitutional rights. After a hearing, the trial court issued a memorandum of decision finding that the plaintiff had established by clear and convincing evidence that the defendant had engaged in misconduct in violation of the Rules of Professional Conduct as alleged in all four counts of the presentment and ordered, among other things, that the defendant be suspended from the practice of law for one year. The court determined that the defendant's affirmative defenses were not properly before it because they were independent causes of action through which she could seek specific damages or other relief and that, even if they were properly before it, the defendant had failed to meet her burden of proof. The defendant filed this appeal from the trial court's judgment to the Appellate Court. While the appeal was pending before that court, the defendant filed a motion for articulation of the trial court's judgment. The trial court denied the motion, and the defendant filed a motion for review of that denial with the Appellate Court, which denied the relief requested therein. This appeal was transferred thereafter to the Supreme Court. The Supreme Court will decide whether the trial court's denial of the defendant's motion for articulation violated her due process rights. The Supreme Court will also decide whether the trial court erred in determining that the defendant's affirmative defenses were not properly before it. Finally, the Supreme Court will decide whether the trial court properly found that the defendant engaged in misconduct that warranted her suspension from the practice of law.

STATE *v.* JOSEPH LOUIS IMPERIALE, SC 20391
Judicial District of Litchfield

Criminal; Violation of Probation; Whether Defendant's Placement at Residential Sex-Offender Treatment Facility as a Condition of Probation Violated His Constitutional Rights. In 2013, the defendant pleaded guilty to illegal possession of child pornography in the second degree, and he was sentenced to a term of incarceration. Shortly after the defendant was released on parole in 2015, his parole was revoked and he was again ordered incarcerated. The defendant was released on probation in 2017, and the conditions of

his probation required that he participate in and complete sex offender treatment. The defendant was placed at the January Center, a residential sex-offender treatment facility located on the grounds of the Corrigan Correctional Institution in Montville. The defendant did not successfully complete his treatment at the January Center, and he was discharged after he committed several disciplinary violations. The defendant was subsequently arrested, charged with violation of probation, and again returned to the custody of the Commissioner of Correction. The defendant filed a motion to dismiss the violation of probation charge, claiming that his constitutional due process rights were violated in that the condition of probation requiring him to undergo sex offender treatment at the January Center was "unreasonable" and in that, given the restrictive nature of confinement at the January Center, that confinement amounted to another form of imprisonment. The trial court denied the motion to dismiss, found that the defendant had violated his probation, and sentenced him to six years incarceration, execution suspended after two years, and the balance of his original term of probation. The defendant appeals, claiming the trial court erred in denying his motion to dismiss because his confinement at the January Center was tantamount to imprisonment and because his confinement there did not constitute a "reasonable" condition of probation. The defendant also claims that the trial court's finding that he violated his probation was in violation of his equal protection rights insofar as one factor considered when confining him to the January Center was his homelessness. Finally, the defendant claims that the imposition of confinement in the January Center as a condition of his probation violated his federal constitutional right against cruel and unusual punishment because it was grossly disproportionate to his offense.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

NOTICE OF INTENT TO APPLY FOR A STATE CERTIFICATE OF AFFORDABLE HOUSING COMPLETION

Notice is hereby given that the Town of South Windsor, Connecticut intends to file an Application for Certificate of Affordable Housing Completion (moratorium on the applicability of Section 8-30g) with the Department of Housing of the State of Connecticut, pursuant to Section 8-30g(1)(4)(B) of the Connecticut General Statutes.

The proposed application, including all supporting documentation, is available for public inspection and comment in the Office of the Town Clerk, Town Hall, 1540 Sullivan Avenue, South Windsor, Connecticut, from 8:00 a.m. to 4:30 p.m. weekdays. Written comments may be submitted to Michele R. Lipe, Director of Planning, at the Planning Department in Town Hall, 1540 Sullivan Avenue, 2nd floor, within 20 days of the publication of this notice in the Journal Inquirer and the Connecticut Law Journal. A copy of all written comments received and responses prepared by the municipality will be included as part of the application to the Department of Housing.

If within the comment period, a petition signed by at least twenty-five (25) residents of the municipality is filed with the municipal clerk requesting a public hearing with respect to the proposed application, either the municipality's legislative body or its zoning or planning commission shall hold a hearing.

Michael Maniscalco,
Town Manager
Town of South Windsor, CT

NOTICE

Electronic Publication of Orders of Notice in Civil and Family Cases

The Judicial Branch has created a Legal Notices page on the Judicial Branch website for orders of notice by publication issued by the court in civil and family cases. This new web page will be available January 2, 2020.

Historically, such notices have been ordered to be published in a newspaper. The new Legal Notices webpage will allow parties, when ordered by the court, to send their orders of notice to the Judicial Branch for publication on the Judicial Branch's website at no cost. Names published on the Legal Notices webpage will be searchable online. It is expected that this will save a great deal of time and expense, and provide greater accuracy and broader notice than newspaper publication.

FAQs for Legal Notice by Publication will be posted on the Judicial Branch website. Questions may be sent to **LegalNotice@jud.ct.gov**.

Hon. Patrick L. Carroll III
Chief Court Administrator