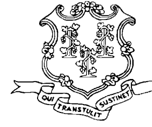
CONNECTICUT LAW JOURNAL



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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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IN RE JACOB W. ET AL.*

(SC 20063)

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

Syllabus

Pursuant to statute (§ 45a-717 [g] [1] and [2] [C]), a court may approve a petition terminating parental rights if it finds, upon clear and convincing evidence, that termination is in the best interests of the child, there is no ongoing parent-child relationship, and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child.

The respondent father appealed from the judgment of the Appellate Court, which reversed the trial court's judgments denying petitions for the termination of his parental rights with respect to his three minor children, J, N and C, filed by the petitioner, the children's grandmother. The respondent, who had been married to M, the mother of the children and the petitioner's daughter, was arrested and charged with multiple crimes as a result of his repeated sexual assault of A, the petitioner's minor child and M's younger sister. M was charged with conspiracy in connection with those sexual assaults. After the respondent and M were incarcerated, the petitioner and her husband were appointed guardians of the children. In addition, a standing criminal protective order was issued, barring the respondent from contacting A and others with whom contact would be likely to cause annoyance or alarm to A. At the time the protective order was issued, A lived in the same home with the children and the petitioner. The respondent subsequently was convicted of multiple counts of sexual assault, among other crimes, and was sentenced to a term of twenty-nine years of incarceration. The petitioner sought to terminate the parental rights of both the respondent and M. M consented to termination, and the case proceeded against the respondent. The petitioner alleged as a ground for termination under § 45a-717 (g) (2) (C) that there was no ongoing parent-child relationship between the respondent and the children. The trial court denied the petitions, concluding, inter alia, that the petitioner had failed to prove that ground by clear and convincing evidence. In reaching its conclusion, the trial court relied on the respondent's efforts while he was incarcerated to maintain contact with the children in light of the protective

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

order, including his request that the grandparents provide him with updates concerning the children. The trial court found that the grandparents had interfered with the respondent's efforts to maintain a relationship with the children, citing the grandparents' failure to provide the respondent with any updates about the children and their false explanation to the children that the respondent was incarcerated for a domestic violence incident involving M that the children previously had witnessed. In reversing the trial court's judgments and remanding the case for a new termination hearing, the Appellate Court concluded that the trial court applied an incorrect legal test in determining that the petitioner had failed to prove the lack of an ongoing parent-child relationship. On the granting of certification, the respondent appealed to this court. *Held*:

1. The Appellate Court properly reversed the trial court's judgments on the ground that the trial court applied an incorrect legal test in determining that the petitioner had failed to prove the lack of an ongoing parent-child relationship by clear and convincing evidence pursuant to § 45a-717 (g) (2) (C): this court clarified that, when a custodial parent or guardian seeks to terminate the parental rights of a noncustodial parent, and that parent or guardian has engaged in conduct that inevitably leads to the noncustodial parent's lack of an ongoing parent-child relationship, the custodial parent or guardian cannot rely on the lack of such a relationship to terminate the noncustodial parent's rights, and, except in cases involving infant children, the existence of an ongoing parent-child relationship is determined by looking at the present feelings or memories of the child toward the respondent parent rather than by the respondent parent's conduct in maintaining that relationship; furthermore, the trial court failed to determine that the grandparents' conduct inevitably led to the lack of an ongoing parent-child relationship between the respondent and the children, as it failed to explain how the grandparents' failure to update the respondent about the children or how the grandparents' failure to explain the real reason for the respondent's incarceration would have affected the children's feelings toward the respondent, and, in the absence of such a determination, the trial court could not conclude that the petitioner could not rely on the lack of an ongoing parent-child relationship as a basis for termination; moreover, the court, in denying the petitions, improperly focused on the respondent's conduct rather than focusing on whether the children had present memories or feelings for the respondent that were positive in nature.
2. The respondent could not prevail on his claim that, even if the trial court had applied an incorrect legal test in concluding that the petitioner had failed to prove the lack of an ongoing parent-child relationship, this court must reverse the Appellate Court's judgment on the ground that the trial court also determined that the petitioner had failed to prove by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children, as that determination was predicated

on a clearly erroneous factual finding that there was no evidence presented with respect to that issue; the trial court's finding that there was no evidence presented that would support a claim that additional time to reestablish such a relationship would be detrimental to the children's best interests could not be reconciled with the record, which revealed the existence of such evidence, including evidence regarding J's and N's negative feelings toward the respondent, the fact that C had little or no memory of the respondent, the preclusive effect that the protective order had on the respondent's ability to maintain a relationship with the children, and the fact that the Department of Children and Families, and the guardian ad litem and attorney for the minor children recommended termination of the respondent's parental rights.

(*Three justices dissenting in one opinion*)

Argued September 11, 2018—officially released February 15, 2019**

Procedural History

Petitions to terminate the respondents' parental rights with respect to their minor children, brought to the Probate Court for the district of Ellington and transferred to the Superior Court in the judicial district of Tolland, Juvenile Matters at Rockville, where the respondent mother consented to termination; thereafter, the case was tried to the court, *Westbrook*, *J.*; judgments denying the petitions as to the respondent father, from which the petitioner appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Prescott* and *Mihalakos*, *Js.*, which reversed the trial court's judgments and remanded the case to that court for a new trial, and the respondent father, on the granting of certification, appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, with whom, on the brief, was *Amir Shaikh*, assigned counsel, for the appellant (respondent father).

James P. Sexton, assigned counsel, with whom were *Matthew C. Eagan*, assigned counsel, and, on the brief, *Megan L. Wade*, assigned counsel, for the appellee (petitioner).

** February 15, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KAHN, J. This certified appeal requires us to clarify the circumstances under which a petitioner is precluded from relying on an alleged lack of an ongoing parent-child relationship as a basis for terminating a noncustodial parent's rights.[1] The respondent father, Daniel W., appeals from the judgment of the Appellate Court, which reversed the judgments of the trial court denying the petitions for termination of the respondent's parental rights with respect to his three minor children and remanded the case for a new trial. *In re Jacob W.*, 178 Conn. App. 195, 219, 172 A.3d 1274 (2017). The respondent contends that the Appellate Court improperly concluded that the trial court had applied an incorrect legal test in determining that the petitioner,[2] the maternal grandmother of the minor children, had failed to prove the nonexistence of an ongoing parent-child relationship by clear and convincing evidence. See id.,

[1] This court granted the respondent father's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly reverse the trial court's judgment[s] denying the custodian's petition[s] to terminate the father's parental rights when it determined that the trial court's judgment[s] [were] legally and logically inconsistent?" *In re Jacob W.*, 328 Conn. 902, 177 A.3d 563 (2018). After hearing the parties and considering the case more fully, we conclude that the certified question does not properly frame the issues presented in the appeal because it inaccurately reflects the holding of the Appellate Court. The Appellate Court reversed the judgments of the trial court on the basis that the trial court applied an incorrect legal test to determine whether the petitioner had proven the lack of an ongoing parent-child relationship. *In re Jacob W.*, 178 Conn. App. 195, 198–99, 172 A.3d 1274 (2017). We therefore rephrase the certified issue as whether the Appellate Court properly reversed the trial court's judgments on the basis that the court applied an incorrect legal test to deny the petitions. See, e.g., *Stamford Hospital* v. *Vega*, 236 Conn. 646, 656, 674 A.2d 821 (1996) (court may rephrase certified question to more accurately reflect issues presented on appeal).

[2] As the Appellate Court explained, "[t]he maternal grandmother is the petitioner pro forma. Both maternal grandparents are currently custodians, and the maternal grandfather signed the applications for termination of parental rights . . . ." *In re Jacob W.*, 178 Conn. App. 195, 198 n.1, 172 A.3d 1274 (2017).

207. The respondent claims that, in so concluding, the Appellate Court incorrectly reasoned that the trial court improperly rested its analysis on inconsistent propositions.[3] The respondent further contends that, even if the trial court applied an incorrect legal test to determine that the petitioner had failed to prove the lack of an ongoing parent-child relationship, the judgment of the trial court may be upheld on the basis that the court also found that the petitioner failed to prove that allowing further time for a parent-child relationship to develop would be detrimental to the best interests of the children. Although we agree with the Appellate Court that the trial court applied an incorrect legal test, our conclusion rests on different grounds. Specifically, we conclude that the trial court incorrectly concluded that, under the facts of the present case, it was required to depart from the usual test to determine whether a petitioner has established a lack of an ongoing parent-child relationship. As we explain in this opinion, the facts as found by the trial court did not support a departure from the ordinary inquiry and instead required the court to base its decision on the present feelings and memories of the children rather than the actions of the respondent. We further conclude that the trial court's determination that the petitioner failed to prove that allowing further time for a parent-child relationship to develop would be detrimental to the best interests of the children was predicated on a clearly erroneous factual finding. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts, found by the trial court or otherwise undisputed, and proce-

[3] Because we do not rest our affirmance of the judgment of the Appellate Court on the basis of any inconsistent statements in the trial court's memorandum of decision, we need not resolve whether the Appellate Court properly concluded that any inconsistent statements in the memorandum of decision required the conclusion that the trial court applied an incorrect legal test.

dural history. The respondent and his then wife, J, had three children, Jacob, born in 2006, N, born in 2008, and C, born in 2012. Jacob, N and C have been living in the home of their maternal grandparents since May, 2012, when the respondent, J and the children moved in with them. When the grandfather asked the respondent to leave in October, 2012, he moved in with his mother, while J and the children remained with the grandparents. The respondent continued to have contact with the children until he was arrested on April 2, 2014, and charged with multiple counts of sexual assault of a minor. On July 3, 2014, J also was arrested and charged with conspiracy in connection with the same set of incidents that gave rise to the respondent's arrest.

As a result of the criminal charges against him, the respondent was convicted, following a jury trial, of six counts of risk of injury to a child in violation of General Statutes (Rev. to 2013) § 53-21 (a) (2), five counts of sexual assault in the first degree in violation of General Statutes (Rev. to 2013) § 53a-70 (a) (2), one count of attempt to commit sexual assault in the first degree in violation of § 53a-70 (a) (2) and General Statutes § 53a-49, one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2013) § 53a-73a (a) (1) (A), one count of risk of injury to a child in violation of § 53-21 (a) (1), one count of conspiracy to commit risk of injury to a child in violation of § 53-21 (a) (2) and General Statutes § 53a-48, and one count of attempt to commit risk of injury to a child in violation of §§ 53-21 (a) (2) and 53a-49. The respondent was sentenced to a total effective term of twenty-nine years of incarceration, followed by sixteen years of special parole. See *State* v. *Daniel W.*, 180 Conn. App. 76, 79, 84, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

The minor that the respondent was convicted of assaulting was J's younger sister, A, the children's aunt.

At the time of the respondent's arrest, a criminal protective order was put in place preventing the respondent from contacting A "in any manner, including by written, electronic or telephone contact . . . ." The order also barred the respondent from contacting A's "home, workplace or others with whom the contact would be likely to cause annoyance or alarm to [A]." At the respondent's January, 2016 sentencing hearing, the court issued a standing criminal protective order to remain in effect until September 6, 2068. During the sentencing hearing, upon the request of the respondent's counsel for clarification of the scope of the order, the court explained that the standing protective order, which was identical to the one already in place, barred the respondent from having contact not only with A, but also with her immediate family, including her parents, the children's grandparents, but not the respondent's children themselves. Because the children lived with A in their grandparents' home, the protective order had the practical effect of prohibiting the respondent from contacting the children's home and the children's guardians. During the sentencing hearing, the respondent did not request any modification to the scope of the standing criminal protective order.

On the day that J was arrested, the grandparents petitioned the Probate Court for the district of Ellington for immediate temporary custody of the children on the basis that both parents were now incarcerated. The court granted the petitions and, five months later, granted the grandparents' petitions for the removal of the parents and the appointment of the grandparents as the guardians of the children, to which both the respondent and J consented. Approximately one year after the grandparents were appointed guardians of the children, the petitioner filed the petitions to terminate the parental rights of both the respondent and J. The respondent indicated through counsel his intent to con-

test the termination, and, on that basis, the guardian ad litem for the children filed a motion pursuant to General Statutes § 45a-715 (g) to transfer the case from the Probate Court to the Superior Court, which the court granted. J subsequently consented to the termination of her parental rights, and the case proceeded against the respondent alone.

The original petitions alleged that the children had been denied the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being, by reason of acts of parental commission or omission. In an amendment to the petitions filed on November 16, 2016, the petitioner withdrew that allegation and instead alleged abandonment and the lack of an ongoing parent-child relationship as grounds for termination.

Following a trial, the court denied the petitions. In its memorandum of decision, the trial court first turned to the question of whether the petitioner had proven that the respondent abandoned the children pursuant to General Statutes § 45a-717 (g) (2) (A). In concluding that she had not, the court relied on the actions undertaken by the respondent to maintain contact with the children. Prior to the respondent's incarceration, the court found that he provided for the children financially, participated in their daily activities and had hosted birthday parties for the children. The court evaluated the respondent's efforts to maintain contact with the children during his incarceration in light of the protective order, which greatly limited his ability to contact them. The court observed that, despite that obstacle, the respondent had made some efforts to maintain contact with the children. The court noted that the respondent had requested assistance from the Department of Children and Families (department) in facilitating visitation

with the children[4] and, in 2014, participated in a program that sends Christmas gifts to children of incarcerated parents. The trial court also found that, in 2014, during a Probate Court proceeding, the respondent requested that the grandparents provide him with updates on the children. Relying on these facts, the court concluded that the petitioner had failed to prove by clear and convincing evidence that the respondent had abandoned the children.

The court next turned to the petitioner's claim that there was no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C). The court began its analysis by recognizing that § 45a-717 (g) (2) (C) requires a two part inquiry. Turning to the first part of the inquiry—whether the petitioner had established no ongoing parent-child relationship by clear and convincing evidence—the court cited to the same facts it had relied on to conclude that the petitioner had failed to prove abandonment, that is, the court looked to the respondent's conduct. Although the court had made findings regarding the children's negative feelings toward or lack of memory of the respondent, it did not consider the feelings or memories of the children in resolving the first part of the inquiry under § 45a-717 (g) (2) (C).

In its analysis, the court cited to an Appellate Court decision, *In re Carla C.*, 167 Conn. App. 248, 251, 143 A.3d 677 (2016), which held that a custodial parent or guardian who has "interfered [with a noncustodial parent's] visitation and other efforts" cannot terminate the noncustodial parent's rights on the basis of an alleged lack of an ongoing parent-child relationship. The trial court found that the grandparents had interfered with the respondent's efforts to maintain a relationship with his children. In support of that finding,

[4] Because the children were not in its custody, the department was unable to assist the respondent.

the court cited to the failure of the grandparents to provide updates to the respondent concerning the children. In reaching its finding of interference, the trial court also relied on evidence that the grandparents had not told the children the truth about why the respondent was incarcerated. Specifically, the grandparents initially had not provided the children with any explanation for the respondent's absence, and, when they eventually told the children that the respondent was incarcerated, rather than tell them that he had sexually assaulted their aunt, the grandparents told the children he was in prison for beating J.

As a consequence of its finding that the grandparents had interfered with the respondent's efforts to maintain a relationship with the children, the trial court did not conclude that the petitioner was barred from relying on the ground of no ongoing parent-child relationship as a basis for termination. Instead, the trial court suggested that the combination of two of its findings—namely, that the grandparents had interfered and that the respondent had made efforts to maintain contact with the children—supported the conclusion that the petitioner had not proven by clear and convincing evidence a lack of an ongoing parent-child relationship.

The court next turned to the second part of the inquiry under § 45a-717 (g) (2) (C)—whether the petitioner had proven by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children. The court's entire discussion of this prong encompassed two sentences: "There was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental. The statements of dislike by very young children with false information about their father does not estab-

lish by clear and convincing evidence that reestablishing a relationship would be detrimental."

The petitioner appealed from the trial court's judgments denying the petitions to the Appellate Court. That court concluded that the trial court had applied an incorrect legal test in denying the petitions. In so concluding, the court focused on inconsistencies that it had discerned in the trial court's memorandum of decision. See *In re Jacob W.*, supra, 178 Conn. App. 198–99. The Appellate Court identified two inconsistencies in the trial court's analysis: (1) a conclusion that an ongoing parent-child relationship existed and simultaneously did not exist because the grandparents' "unreasonable interference inevitably prevented the respondent from maintaining an ongoing parent-child relationship"; id., 211; and (2) a finding "both that the grandparents' unreasonable conduct constituted interference and that there was no evidence of unreasonable interference by any person." Id., 215–16.

I

We first consider whether the Appellate Court properly concluded that the trial court applied an incorrect legal test to determine whether the petitioner had proven by clear and convincing evidence the lack of an ongoing parent-child relationship. Because that question presents a question of law, our review is plenary. See *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21 (setting forth applicable standards of review for subordinate factual findings [clear error], ultimate conclusion that ground for termination has been proven [evidentiary sufficiency] and legal questions [plenary]), cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

Section 45a-717 (g) provides in relevant part: "At the adjourned hearing or at the initial hearing where no

investigation and report has been requested, the court may approve a petition terminating the parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . ." We have explained that the inquiry under § 45a-717 (g) (2) (C) is a two step process. First, the court must determine whether the petitioner has proven the lack of an ongoing parent-child relationship. Only if the court answers that question in the affirmative may it turn to the second part of the inquiry, namely, "whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests." (Emphasis omitted.) *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 675–76, 420 A.2d 875 (1979); see id. ("[t]he 'best interests' standard . . . comes into play only if it has been determined that no ongoing parent-child relationship exists, *in order to decide whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests*" [emphasis altered]); see also *In re Carla C.*, supra, 167 Conn. App. 265 ("[t]he best interest standard . . . does not become relevant until *after* it has been determined that no parent-child relationship exists" [emphasis added; internal quotation marks omitted]); *In re Michael M.*, 29 Conn. App. 112, 128, 614 A.2d 832 (1992) (same); *In re Juvenile Appeal (84-3)*, 1 Conn. App. 463, 480, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984) (same).

In interpreting the parameters of § 45a-717 (g) (2) (C), we must be mindful of what is at stake. "[T]he termination of parental rights is defined, in [what is now General Statutes § 45a-707 (8)], as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . . It is, accordingly, a most serious and sensitive judicial action. . . . Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection. *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) . . . ." (Citation omitted; internal quotation marks omitted.) *In re Valerie D.*, 223 Conn. 492, 514, 613 A.2d 748 (1992).

Moreover, because the respondent is incarcerated, we emphasize that "the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. See, e.g., *In re Katia M.*, 124 Conn. App. 650, 661, 6 A.3d 86 (parent's unavailability, due to incarceration, is an obstacle to reunification), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010); see also *In re Gwynne P.*, 346 Ill. App. 3d 584, 597–98, 805 N.E.2d 329 (2004) (parent's repeated incarceration may lead to diminished capacity to provide financial, physical, and emotional support for . . . child . . .), aff'd, 215 Ill. 2d 340, 830 N.E.2d 508 (2005). Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a

parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent." (Citations omitted; internal quotation marks omitted.) *In re Elvin G.*, 310 Conn. 485, 514–15, 78 A.3d 797 (2013).

The lack of an ongoing parent-child relationship is a " 'no fault' " statutory ground for the termination of parental rights. *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 669. This court has explained that the ground of " 'no ongoing parent-child relationship' " for the termination of parental rights contemplates "a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced." Id., 670. The ultimate question is whether the child has "some present memories or feelings for the natural parent that are positive in nature." (Internal quotation marks omitted.) *In re Jessica M.*, 217 Conn. 459, 469, 586 A.2d 597 (1991).

In its interpretation of the language of § 45a-717 (g) (2) (C), this court has been careful to avoid placing "insurmountable burden[s]" on noncustodial parents. Id., 467. Because of that concern, we have explicitly rejected a literal interpretation of the statute, which defines the relationship as one "that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . ." General Statutes § 45a-717 (g) (2) (C). "[D]ay-to-day absence alone," we clarified, is insufficient to support a finding of no ongoing parent-child relationship. *In re Jessica M.*, supra, 217 Conn. 470. We also have rejected the notion that termination may be predicated on the lack of a "*meaningful* relationship," explaining that the statute "requires that

there be *no* relationship." (Emphasis added.) *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675.

We have emphasized that, as to noncustodial parents, "[t]he evidence regarding the nature of the [parent's] relationship with [his] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation had been permitted." *In re Jessica M.*, supra, 217 Conn. 473. For instance, in *In re Jessica M.*, we concluded that there was insufficient evidence to prove a lack of an ongoing parent-child relationship between a noncustodial mother and her child. Id., 472–73. Although that conclusion was based primarily on the fact that the child had "present memories or feelings for her mother [and] that at least some aspects of [those] memories and feelings [were] positive"; id., 474–75; we also took into account the circumstances under which visitation had been permitted. Specifically, we considered it relevant that the child's legal guardians, who had petitioned for termination of the mother's parental rights, had placed restrictions on her ability to visit the child during the duration of their guardianship. Id., 472–73.

We later applied these principles to conclude that, when the department engages in conduct that inevitably leads to a noncustodial parent's lack of an ongoing parent-child relationship, the department cannot rely on the lack of that relationship to terminate the noncustodial parent's rights. *In re Valerie D.*, supra, 223 Conn. 531, 535. In other words, we did not hold that the consequence of such conduct was that the test for determining whether there was an ongoing parent-child relationship was altered. Instead, we held that, as a result of its conduct, the department was precluded from relying on that ground as a basis for termination. Id., 532. In *In re Valerie D.*, the department was granted temporary custody of the child within days after she was born, primarily because the mother, who had used

cocaine throughout her pregnancy, had injected herself with cocaine hours prior to delivery, as a result of which the child was born addicted to cocaine and suffered from withdrawal. Id., 499–504. Soon after it had obtained temporary custody, the department filed coterminous petitions for custody and termination of the parental rights of the mother. Id., 499–503. The amended petition for termination relied, inter alia, on the ground that there was no ongoing parent-child relationship. Id., 504. As a result of the department's success in obtaining custody of the child, from the time that the department was granted temporary custody a few days after the child's birth to the date of the termination hearing three and one-half months later, the child remained in foster care. Id., 527. During that time, primarily due to the placement of the child in a foster home, the mother had been able to visit the child only eight times. Id., 528.

Two factors led this court to conclude that, under the circumstances of that case, termination of the mother's parental rights could not be permitted on the basis that there was no ongoing parent-child relationship. Id., 532. First, the court observed that, at the time of the termination hearing, the child was not yet four months old. Id., 527. The court recognized that the usual test for an ongoing parent-child relationship is not appropriate when the child is "virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence." Id., 532. Under those circumstances, the court reasoned, it simply makes no sense to inquire as to whether an infant has some present memories or feelings for the natural parent that are positive in nature. Id. Instead, "the inquiry must focus, not on the feelings of the infant, but on the positive feelings of the natural parent." Id.

Second, even assuming that the department had established that the mother lacked such positive feel-

ings, the court concluded that principles of statutory construction precluded the department from gaining and maintaining "custody of a newborn infant pursuant to [General Statutes] § 46b-129 under circumstances . . . that will lead almost inevitably" to termination on the basis of a lack of an ongoing parent-child relationship. Id., 532 n.34, 533. The statutory problem, the court explained, stemmed from the different standards governing custody and termination. Under the facts of the case, "a factual predicate for custody, established by the lesser standard of a preponderance of the evidence, led inexorably, for all practical purposes, to the factual predicate for termination required to be established by the higher standard of clear and convincing evidence." Id., 533–34. The problem highlighted by the court in *In re Valerie D.* was that it was the very party who petitioned to terminate the mother's parental rights—the department—whose conduct inevitably had led to the lack of a parent-child relationship. That is, by filing the petitions coterminously in the case of a child who was so young, the department virtually ensured that, upon the grant of custody at the lower standard of proof, and in the absence of heroic efforts by the mother or significant additional services provided by the department, there would be no parent-child bond by the time of the termination hearing.

This court has not had the opportunity to consider whether the principle we relied on in *In re Valerie D.* would apply to a petitioner who is a private party. The Appellate Court, however, has extended the holding of *In re Valerie D.* to apply to a custodial parent whose conduct inevitably led to the noncustodial parent's lack of an ongoing parent-child relationship. In *In re Carla C.*, supra, 167 Conn. App. 251, the court concluded that, under those circumstances, the petitioner was precluded from relying on the lack of an ongoing parent-child relationship as a basis for termina-

tion. Specifically, the court held that "a parent whose conduct inevitably has led to the [other parent's] lack of an ongoing parent-child relationship may not terminate parental rights on this ground." Id., 262. The petitioner in that case, the mother and custodial parent of the child, used her status as the custodial parent and engaged in conduct that interfered in a variety of ways with the ability of the father, who was incarcerated, to maintain a relationship with the child. The mother's interference with the father's efforts to maintain contact with the child began after she "met and began a relationship with [Steve], whom she described as a 'real man' and '[the] father figure that [Carla] deserves.' " Id., 252. The mother's interfering conduct included the following. She obtained an order from the MacDougall-Walker Correctional Institution, where the father was incarcerated, directing him to cease all oral and written communication with her and the child, either directly or through a third party, or face disciplinary action. Id., 253. She also threw away cards and letters that the father had sent to the child, without first showing them to the child. Id. She later successfully moved to suspend the father's visitation, on the basis that the existing arrangement, which relied on the paternal grandmother to facilitate visitation, had proven unworkable. Id., 255–56. Under those circumstances, the Appellate Court concluded, the mother was precluded from relying on the lack of an ongoing parent-child relationship as a ground for termination of the father's parental rights because it was her conduct that had inevitably led to the lack of that relationship. Id., 262.

We agree with the Appellate Court that the reasoning of *In re Valerie D.*, supra, 223 Conn. 492, should extend to individuals who are custodial parents or guardians. We observe that, in *In re Carla C.*, supra, 167 Conn. App. 280, the Appellate Court accurately characterized the mother's conduct as "interference." The concept of

"interference" fit particularly well with the facts of that case. We consider it unnecessary, however, as a general rule, to limit the exception that we set forth in *In re Valerie D.* to instances in which the actions of a custodial parent or guardian necessarily constitute "interference." That term carries with it the connotation that the conduct at issue was undertaken with the express purpose of preventing the noncustodial parent from having access to the child. The question is not whether a petitioner—the department or a private party—intends to interfere with the noncustodial parent's visitation or other efforts to maintain a relationship with the child. For example, there was no suggestion in *In re Valerie D.*, supra, 223 Conn. 492, that the department filed coterminous petitions with the express purpose of preventing the mother from having access to her child, nor did the department's intent play any part in our analysis. It was sufficient that the department's conduct inevitably led to the lack of an ongoing parent-child relationship. Id., 533. Our inquiry properly focuses not on the petitioner's intent in engaging in the conduct at issue, but on the consequences of that conduct. In other words, the question is whether the petitioner engaged in conduct that inevitably led to a noncustodial parent's lack of an ongoing parent-child relationship. If the answer to that question is yes, the petitioner will be precluded from relying on the ground of "no ongoing parent-child relationship" as a basis for termination regardless of the petitioner's intent—or not—to interfere.

In summary, the following is the proper legal test to apply when a petitioner seeks to terminate a parent's rights on the basis of no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C). We reiterate that the inquiry is a two step process. In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In

other words, the petitioner must prove by clear and convincing evidence that the child has no present memories or feelings for the natural parent that are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, the petition must be denied and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship, does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. Only then may the court proceed to the disposition phase.

There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception, which is not at issue in the present case, applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. As we have explained, when a child is "virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence," it makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. *In re Valerie D.*, supra, 223 Conn. 532. Under those circumstances, it is appropriate to consider the conduct of a respondent parent.

The second exception, which is at issue in this appeal, applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination. Under these circumstances,

even if neither the respondent parent nor the child has present positive feelings for the other and, even if the child lacks any present memories of the respondent parent, the petitioner is precluded from relying on § 45a-717 (g) (2) (C) as a basis for termination.

In view of the foregoing principles, it is clear that the Appellate Court correctly concluded that the trial court applied an incorrect legal test to deny the petitions to terminate the respondent's parental rights. Nowhere in the trial court's decision did the court suggest that it had determined that the conduct of the grandparents or their alleged interference inevitably led to the lack of an ongoing parent-child relationship between the respondent and the children. The only conduct of the grandparents that the trial court pointed to in its decision was their failure to provide the respondent with updates about the children and to tell the children the truth about the reason for the respondent's incarceration.

As to the updates, the court provided no explanation as to how those updates, even if the respondent had received any, would have affected the children's feelings toward him. We also observe that, at the termination hearing, the respondent conceded that the protective order rendered it impossible for the grandparents to provide any such updates to the respondent.

Similarly, the trial court did not explain how the children's feelings toward the respondent would have improved had the grandparents told them the truth—that their father was incarcerated for sexually assaulting their aunt when she was between seven and twelve years old. See *State* v. *Daniel W.*, supra, 180 Conn. App. 80–81. We observe that the court suggested that the children's negative feelings toward the respondent were at least in part due to the false information provided to them by the grandparents, including both

the initial failure to provide any explanation for the respondent's absence and the subsequent false explanation provided to the children—that the respondent was incarcerated for beating J. That suggestion falls far short of the required determination for purposes of applying the exception—that the false information provided to the children by the grandparents inevitably led to the lack of an ongoing parent-child relationship. In the absence of a determination that the grandparents engaged in conduct that inevitably led to the lack of an ongoing parent-child relationship, the trial court improperly concluded that the exception applied.

We further observe that the department's studies submitted to the court in connection with the petitions for temporary custody and removal of guardianship, both of which were admitted into evidence at the termination hearing, reflect that the children had witnessed the respondent beating J. According to the studies, the department received a referral on June 14, 2013, alleging physical and emotional neglect of Jacob, N and C by the respondent and J. The department's investigation of the allegations revealed that, on June 6, 2013, J reported to the police that the respondent had placed her in a headlock and hit her in the face several times in the presence of all three children. Jacob confirmed J's account, informing the police when questioned that he had witnessed the respondent hitting J, despite Jacob's pleas to the respondent to "stop," and that he had seen the respondent "physically hurting" J on a prior occasion. The respondent admitted that the children were present during the incident. As a result of the investigation, the allegation of emotional neglect was substantiated regarding Jacob. At the termination hearing, the respondent did not challenge the evidence that the children had witnessed him beating J.

In light of this evidence, the trial court's failure to provide any explanation as to how the grandparents'

prevarication to the children prejudiced them against the respondent is puzzling. The only misrepresentation conveyed to the children was that the domestic violence was the reason for the respondent's incarceration. If anything, the grandparents' prevarication painted the respondent in a more favorable light than the facts warranted. Rather than inform the children of the new information about their father's incarceration that likely would have reinforced or even increased their already negative feelings toward the respondent, the grandparents told the children that he was in prison for a misdeed of which the children were already aware and had personally witnessed. Evidence was presented at trial that the children were unaware that the respondent had been convicted of sexually assaulting their aunt. Accordingly, by determining that the grandparents had prejudiced the children against the respondent when they attributed his incarceration to the domestic violence against J that the children had witnessed, the trial court implied that the children somehow would have held more positive views of him if they had known that he not only had beaten their mother but had also been convicted of sexually assaulting their aunt.

It is significant that the trial court acknowledged that it was the protective order that prevented the respondent from contacting the children, rather than any actions of the grandparents. It is undisputed that the grandparents played no role in setting the protective order. Accordingly, the present case is distinguishable from *In re Carla C.*, supra, 167 Conn. App. 253, in which the petitioner mother obtained an order from the prison barring the respondent father from all oral or written communication with her and the child. Because protective orders are commonly issued in cases of sexual assault, applying the rule of *In re Valerie D.*, supra, 223 Conn. 492, and *In re Carla C.*, supra, 253, to the present case would yield the bizarre result that a noncustodial

parent who has been convicted of a sexual assault that results in a protective order that has the direct or practical effect of preventing the parent from maintaining a relationship with his or her child would nonetheless automatically be immune from termination on the basis of no ongoing parent-child relationship.

Even if the trial court had determined that the grandparents had engaged in conduct that inevitably prevented the respondent from maintaining a relationship with his children, the court's subsequent analysis did not properly apply the applicable exception. Specifically, rather than concluding that, as a result of the court's finding of "interference," the petitioner was precluded from seeking termination of the respondent's parental rights on the basis of no ongoing parent-child relationship, the court appears to have determined that the conduct of the grandparents justified a departure from the ordinary inquiry as to whether the petitioner had proven no ongoing parent-child relationship. That is, in denying the petitions, rather than considering the children's feelings, the trial court looked to the respondent's conduct.

As we have explained, however, an inquiry that focuses on the conduct of the respondent parent to resolve a petition for termination on the basis of § 45a-717 (g) (2) (C) is appropriate only upon a finding by the trial court that a child is "virtually" an infant whose present feelings and memories cannot be determined by the court. See *In re Valerie D.*, supra, 223 Conn. 532. An inquiry that focuses on a respondent parent's conduct also is the key inquiry under the abandonment ground pursuant to § 45a-717 (g) (2) (A); see, e.g., *In re Juvenile Appeal (Docket No. 9489)*, 183 Conn. 11, 14, 438 A.2d 801 (1981) ("[a]bandonment focuses on the parent's conduct"); the court already had independently addressed and rejected the ground of abandonment in its memorandum of decision, applying the correct

principles to that ground. An inquiry similar to that of the abandonment ground cannot be applied to assess whether a petitioner has established a lack of an ongoing parent-child relationship unless the child is an infant at the time of the inquiry. The court made no finding that any of the children, even the youngest child, was an infant at the time of trial.[5] The trial court, therefore, improperly considered the respondent's conduct in determining that the petitioner had failed to prove a lack of an ongoing parent-child relationship. Because no exception to the general rule applied under the facts found by the trial court, the court's inquiry properly should have focused on the present feelings and memories of the children.[6] The Appellate Court properly con-

[5] The respondent reiterates his claim, rejected by the Appellate Court; *In re Jacob W.*, supra, 178 Conn. App. 209 n.12; that the "virtual infancy exception" should apply to C, who was one year old at the time of the respondent's incarceration. As the Appellate Court acknowledged, the parties "concede" that the virtual infancy exception applied to C. Id. That court correctly concluded, however, that the parties' concession was irrelevant. The trial court did not rely on the virtual infancy exception and made no finding that C qualified as an infant. We further observe that the parties are incorrect. It is not C's age at the time of the respondent's incarceration three years prior to the termination hearing that controls for purposes of the application of the virtual infancy exception, but C's age, four years old, at the time of the termination hearing. To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. See *In re Valerie D.*, supra, 223 Conn. 532 (referring to difficulty of trial court's discerning child's "present" feelings). It would make no sense to require a trial court to resolve whether a child's feelings *could have been determined* at some time prior to the termination hearing. The inability of the court to discern or to be presented with evidence regarding a virtual infant's present feelings drives the exception. That finding must be made at the time of the termination hearing. The present case serves as an apt illustration. The trial court had no difficulty discerning C's present memories of or feelings toward the respondent. The court expressly found that C had "little to no memory" of him. Accordingly, there was no need to apply the virtual infancy exception.

[6] The respondent contends that, even if we conclude that the Appellate Court properly held that the trial court applied an improper legal test to

cluded that the trial court had applied an incorrect legal test to determine whether the petitioner had proven the lack of an ongoing parent-child relationship.

II

We next turn to the respondent's claim that, even if the trial court applied an incorrect legal test to conclude that the petitioner failed to prove the lack of an ongoing parent-child relationship, we must reverse the Appellate Court's judgment on the basis that the trial court found that the petitioner had failed to prove by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children. We agree with the petitioner, however, that the trial court's finding was clearly erroneous.

We begin by observing that the trial court correctly turned to the second prong of § 45a-717 (g) (2) (C) only after first addressing whether the petitioner had established the first prong—whether the petitioner had established the lack of an ongoing parent-child relationship. Although a petitioner must establish both prongs by clear and convincing evidence, and, accordingly, a petition may fail under either prong, the inquiries under

conclude that the petitioner had failed to prove the lack of an ongoing parent-child relationship, the error was harmless because the trial court independently determined in the disposition phase that termination was not in the best interests of the children. The respondent's claim ignores the fact that the trial court's analysis of the best interests of the children was affected by its application of an incorrect legal test during the adjudicatory phase. The court's consideration of the children's best interests reflects the same focus on the facts that the court improperly relied on in concluding that the petitioner had failed to prove no ongoing parent-child relationship. Specifically, in determining that termination was not in the best interests of the children, the court relied heavily on the possible motives of the grandparents in failing to tell the children the true reason for the respondent's incarceration, the efforts that the respondent had made to maintain a relationship with the children, and the grandparents failure to provide updates about the children to the respondent.

the two prongs are intertwined. That is, logic dictates that the question of whether it would be detrimental to the children's interests to allow further time for the development of a parent-child relationship will depend to some extent on the findings made and reasoning employed by the trial court in resolving whether there was an ongoing parent-child relationship. See, e.g., *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675–76; *In re Carla C.*, supra, 167 Conn. App. 265; *In re Michael M.*, supra, 29 Conn. App. 128; *In re Juvenile Appeal (84-3)*, supra, 1 Conn. App. 480.[7]

The trial court, however, did not provide any analysis as to the second prong of § 45a-717 (g) (2) (C). Instead, the court grounded its decision on the conclusory finding that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental [to their best interests]." That finding cannot be reconciled with the record, which reveals that there *was* evidence presented that was relevant to this question.

"Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

In arriving at its finding that the petitioner had presented no evidence that it would be detrimental to allow the respondent more time to develop or reestablish a relationship with the children, the trial court did not

[7] We emphasize that our decision today is grounded in our review of the trial court's analysis of *both* prongs of § 45a-717 (g) (2) (c).

accord any effect to evidence that had been presented at trial that was relevant to that precise question. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. By finding that no evidence was presented as to the second prong, the court did not consider the negative feelings that Jacob and N had expressed toward the respondent, despite the fact that the court made a finding that the children had those negative feelings.[8] Specifically, evidence was presented during the termination hearing that both Jacob and N had told department social workers that they "hate," "fear," and "distrust" the respondent. The court also had evidence before it that Jacob had told his teachers at school that the respondent was a "bad parent" and that both Jacob and N had told a department social worker that they did not want *any* present contact with the respondent. Indeed, as of the time of trial, none of the children was requesting opportunities to visit with or speak to the respondent, and both Jacob and N had indicated that they never wanted to see him again. Both Jacob and N specifically refused to call him "Dad," insisted on referring to him by his first name, and indicated that they wished to have their last name changed. Regarding C, who was approximately four years old at the time of trial, the court heard evidence that she had no present recollection of the respondent. The intensity of the negative feelings that Jacob and N harbored toward the respondent, as well as C's lack of any memory of him, was highly relevant to the likelihood that the respondent could succeed in reestablishing a relationship with them, and, if so, how long that would

[8] We note that the court also found that Jacob had previously had more positive feelings toward the respondent. It is the child's *present* feelings and memories, however, that are relevant for purposes of § 45a-717 (g) (2) (C).

take. The court should have been considered both of those factors in determining whether allowing more time would have been detrimental to the children's best interests.

It is particularly problematic that the court provided the same explanation for its refusal to consider the negative feelings of Jacob and N toward the respondent that it had provided for its conclusion that the grandparents had "interfered" with the respondent's efforts to maintain a relationship with them. As we explained in part I of this opinion, one of the flaws of the trial court's analysis of the first prong of § 45a-717 (g) (2) (C) was its determination to discount the negative feelings of the children on the basis of the grandparents' alleged "interference." The trial court relied on that same principle in declining to consider the children's negative feelings in the second prong. Thus, the court's finding as to the second prong suffers from the same flaw. Specifically, in its analysis of the first prong, the court discounted those negative feelings on the basis that the children had been biased against the respondent as a result of the grandparents' failure to tell them that he was incarcerated because he was convicted of sexually assaulting their aunt. As we explained in part I of this opinion, this aspect of the trial court's reasoning is questionable at best. Moreover, the grandparents' false explanation of the reason for the respondent's incarceration has no relevance whatsoever to C's lack of any memories of the respondent. The court took no account of the fact that C did not remember the respondent. This failure cannot be reconciled with the " 'paramount importance' " of the feelings of the child in the application of § 45a-717 (g) (2) (C). See *In re Alexander C.*, 67 Conn. App. 417, 422, 787 A.2d 608 (2001), aff'd, 262 Conn. 308, 813 A.2d 87 (2003).

In addition to expressly declining to consider the relevant evidence regarding Jacob's and N's negative

feelings toward the respondent, the court failed to consider significant, additional relevant evidence that had been presented, which would have supported a finding that allowing further time for a relationship to develop would be detrimental to the children's best interests. The elephant in the room, so to speak, was the protective order. As we have noted, even the respondent conceded at trial the overarching preclusive effect that the protective order had on his ability to maintain a relationship with the children. We note that the respondent has not claimed that he ever attempted to have the protective order modified. See id., 425 (deeming respondent parent's failure to seek modification of protective order relevant to analysis under § 45a-717 [g] [2] [C]). That order, which will remain in effect until 2068—long after the children reach adulthood—would function as a significant obstacle to any future efforts that the respondent might make to reestablish a relationship with the children. It is also relevant that the respondent will not be released from prison until 2043, long after the children have reached adulthood. See *In re Elvin G.*, supra, 310 Conn. 514–15 (recognizing that, although incarceration cannot be sole basis for termination of parental rights, courts properly may consider length of incarceration and its effects on parent-child bond). The court also failed to take into account the positions of the department, the guardian ad litem, and the attorney for the minor children, all of whom recommended termination of the respondent's parental rights. The department based its position in part on its conclusion that, with the protective order in place and the respondent incarcerated, the respondent could not be expected to be able to reestablish a relationship with the children until they reached adulthood. The unlikelihood that the respondent will be able to reestablish a relationship with the children prior to adulthood is relevant to the question of whether allowing further time would

be detrimental to the best interests of the children. This court has repeatedly recognized that "stability and permanence" are "necessary for a young child's healthy development." *In re Egypt E.*, supra, 327 Conn. 531; see also *In re Davonta V.*, 285 Conn. 483, 495, 940 A.2d 733 (2008) ("[t]ermination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption").

In light of the abundance of evidence in the record contrary to the trial court's statement that there was *no evidence* presented that it would be detrimental to the best interests of the children to allow additional time for the respondent to develop a relationship with them, we are left with a firm conviction that a mistake has been made and, therefore, conclude that the trial court's finding was clearly erroneous.

We emphasize that we take no position as to whether the trial court, after considering all of the relevant evidence, properly could have found that the petitioner failed to prove by clear and convincing evidence that it would be detrimental to the children's interests to allow the respondent more time to reestablish the relationship. Our conclusion that the trial court's finding was clearly erroneous is predicated on the court's reliance on its determination that the petitioner had presented *no evidence* relevant to this issue. That determination finds no support in the record. The trial court's failure to consider its own express factual findings regarding Jacob's and N's negative feelings toward the respondent, to provide any relevant explanation for discounting its finding that C had little to no memory of the respondent, as well as to acknowledge the abundant, additional relevant evidence pertaining to this issue leaves us with a firm con-

viction that a mistake has been made.[9] The court should have considered all of the relevant evidence before resolving the issue.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, MULLINS and VERTEFEUILLE, Js., concurred.

D'AURIA, J., with whom McDONALD and ECKER, Js., join, dissenting. I would reverse the Appellate Court's judgment and remand the case to that court with direction to affirm the trial court's denial of the petitions filed by the petitioner, the maternal grandmother of the three minor children at issue, to terminate the parental rights of the respondent father, Daniel W., as to those children.

My disagreement with the Appellate Court centers on what I view as its failure to adequately address the fact that in addition to finding that the petitioner had failed to prove that there was no ongoing parent-child relationship at the time of trial—a ruling the Appellate

[9] Of course, because this court cannot engage in fact-finding, we cannot go any farther than to conclude that the trial court's finding—that there was no evidence in the record to support the petitioner's claim that allowing further time for a parent-child relationship to develop would be detrimental to the children's best interests—was clearly erroneous. Accordingly, we disagree with the dissent's statements that the majority opinion "awards the petitioner no real practical relief" and that it would have been appropriate for this court to direct judgment terminating the respondent's parental rights. The petitioner did not request that this court order a directed judgment. Even if she had, we could not order that relief. Our decision today merely affirms the judgment of the Appellate Court setting aside the denial of the petitions. The respondent retains the right to present evidence and to hold the petitioner to her burden of proof. The proper venue for the respondent to exercise that right is in the trial court. The petitioner received the sole relief that she sought from this court: the affirmance of the judgment of the Appellate Court, which remanded the case to the trial court for a new termination hearing. Further, whether the petitioner would file new petitions for termination if we were to reverse the judgment of the Appellate Court is not relevant to our decision today.

Court concluded was in error—the trial court also found that the petitioner had failed to prove that "to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interest of the child." This latter finding independently would have sufficed to deny the petitions.[1]

My disagreement with the majority is similar. I believe that by focusing on the trial court's isolated and subordinate statement that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental," and declaring *that* statement clearly erroneous, the majority has mistakenly avoided the fact that the latter finding was equally dispositive of the trial court's denial of the petitions. In my view, the majority (1) misreads the meaning of the trial court's memorandum of decision; (2) in essence, substitutes its judgment for the trial court's judgment on an issue of fact entrusted to trial judges in our juvenile session; and (3) ultimately awards the petitioner no real practical relief. I, therefore, respectfully dissent.

I

The respondent is serving a total effective sentence of twenty-nine years in prison. The conduct that landed him in prison (sexually abusing his children's young aunt, who lives with them) is reprehensible. His children are not aware of that conduct, but the conduct that

[1] The petitioner originally alleged that the children had been denied the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being by reason of acts of parental commission or omission. See General Statutes § 45a-717 (g) (2) (B). In her amended petitions, the petitioner withdrew that allegation and instead alleged abandonment and the lack of an ongoing parent-child relationship as grounds for termination. See General Statutes § 45a-717 (g) (2) (A) and (C). The trial court ruled against the petitioner on both grounds. The only ground relevant to this appeal, however, is the ground of no ongoing parent-child relationship. See General Statutes § 45a-717 (g) (2) (C).

they *believe* landed him in prison (beating their mother, which they witnessed) is also reprehensible. It is not difficult to predict that this respondent might well be on the road to having his parental rights terminated. If I had been the trial judge, I might have ruled on the record presented to terminate his parental rights. But no one on this court was the trial judge in this case.

The trial court judge who did address the petitions in the present case was confronted with an issue that is not unusual in juvenile cases in which a parent faces a long term of incarceration: whether and when to terminate the parental rights of the parent-inmate. The reality is that some parents serving lengthy prison sentences may not play any significant role in the upbringing of their children and will not do so because of their own conduct. Without extraordinary effort of their own or active cooperation from the children's caregivers, parent-inmates might have little or no contact with their children at all.

But, as the majority observes, although a court may consider the "inevitable effects of incarceration" on an individual's ability to parent, "the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights." *In re Elvin G.*, 310 Conn. 485, 514, 78 A.3d 797 (2013); see also *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 443, 446 A.2d 808 (1982). Termination of parental rights implicates a fundamental constitutional right; *In re Yasiel R.*, 317 Conn. 773, 792, 120 A.3d 1188 (2015); and has implications beyond a child's childhood. When parental rights have been terminated, it becomes unlikely that the child and the parent will ever have any relationship, even as adults.

Children, of course, also have rights, as well as a need for a continuous, stable home environment. See *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733

(2008). In some cases, terminating a parent's rights is exactly the right thing for a child's best interests. Perhaps this is such a case. My point in dissenting from the majority should not be read as suggesting that this respondent is a good example of someone who should necessarily play a parental role in the lives of his children, given his conduct and the other circumstances relevant to that determination. My point is that we are not well positioned to make that determination. Rather, this is a difficult decision assigned to our trial court judges sitting in the juvenile session. Specifically, as it relates to the ground asserted and solely pursued by the petitioner in the present case—"no ongoing parent-child relationship"—the trial court is entrusted not just with determining *whether* to terminate a parent's rights, but *when* to do so. In adjudicating this particular ground, as applied to a parent who will be incarcerated throughout a child's childhood, General Statutes § 45a-717 (g) (2) (C) places discretion in the hands of the trial court to determine whether the "effects of incarceration" are indeed "inevitable" under the particular facts of the case, or whether allowing more time for the relationship to establish or reestablish is detrimental to the children's best interest.

II

Section 45a-717 (g) provides in relevant part that "the court may approve a petition terminating . . . parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and *to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child* . . . ."

(Emphasis added.) Thus, to satisfy subsection (g) (2) (C) of the statute, the court must find both (1) that the petitioner has established that there is no ongoing parent-child relationship (the "no ongoing parent-child relationship" prong) *and* (2) that permitting the parent further time to establish or reestablish such a relationship would be detrimental to the children's best interests (the "further time" prong). See *In re Jonathon G.*, 63 Conn. App. 516, 525, 777 A.2d 695 (2001). The petitioner must prove both prongs by clear and convincing evidence. See *In re Baby Girl B.*, 224 Conn. 263, 300–301, 618 A.2d 1 (1992).

The trial court in the present case found that the petitioner had failed to establish either prong by clear and convincing evidence. Specifically, the court found "that the petitioner has not demonstrated that there is a lack of parent-child relationship *nor* that it would be detrimental to allow further time for the establishment of the relationship." (Emphasis added.) Regarding the "further time" prong, the trial court stated that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The trial court also found that terminating the respondent's parental rights would not have been in the best interest of the children.[2]

[2] In support of these findings, the trial court made the following subordinate findings: The respondent is the father of three children, Jacob, N, and C. Because of a protective order put into place to prevent the respondent from having contact with the children's maternal aunt, with whom they live, the respondent has not been able to contact his children while in prison. Nevertheless, while incarcerated, he has requested assistance to arrange visits with and updates about his children, and participated in programs to send Christmas gifts to them. Although Jacob initially stated that he missed the respondent, he has since called him a "bad parent." N has stated that he hates the respondent, and C has little to no memory of him. Both Jacob and N have stated that they want no contact with the respondent. The children have bonded with the petitioner, their maternal grandmother, who wants to change their last name. Additionally, the guardian ad litem has opined that termination of the respondent's parental rights is in the children's

III

Rather than awaiting the "further time" contemplated by § 45a-717 (g) (2) (C) and either amending her petitions or bringing new petitions,[3] the petitioner appealed to the Appellate Court, claiming that all three of the trial court's critical findings were clearly erroneous. Specifically, she argued to the Appellate Court that upon the record presented, the trial court should have found by clear and convincing evidence that (1) there was no ongoing parent-child relationship between the respondent and his children; (2) permitting the respondent further time to establish or reestablish such a relationship would be detrimental to the children's best interests; and (3) termination of the respondent's parental rights would be in the children's best interests. The petitioner claimed that if she was correct that the trial

best interest because there would be no benefit in the children forming a relationship with him, as he will be incarcerated for the remainder of their childhood.

[3] My research identifies nothing that prevents (or would have prevented) the petitioner from pursuing termination on the "no ongoing parent-child relationship" ground, or any other ground, at some point after the trial court ruled against her on the present petitions. This court has held that a party can file an amended or new petition alleging either new grounds or a material change in circumstances so as to avoid both res judicata and collateral estoppel issues. See *In re Baby Girl B.*, supra, 224 Conn. 293–94 ("it makes no difference whether [the Department of Children and Families] chooses to honor its obligation by filing an amended petition or by filing a second independent petition alleging [a material change in circumstances or] new grounds for termination"); see id., 294 n.19; *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 318–19, 460 A.2d 1277 (1983) ("[T]he doctrines of res judicata and collateral estoppel ordinarily afford very little protection to a parent who has once successfully resisted an attempt to terminate his [or her parental] rights to a child. . . . An adjudication that a ground for termination did not exist at one time does not mean such ground has not arisen at a later time." [Citations omitted.]). This is because § 45a-717 (g) (2) (C) looks at whether there is a *present* ongoing relationship, which necessarily must be assessed as of the time of trial. See *In re Juvenile Appeal (83-DE)*, supra, 318 ("the issue of whether termination of parental rights is appropriate must be decided upon the basis of conditions as they appear at the time of trial").

court erred in each of its findings, she would be entitled to directed judgments terminating the respondent's rights, rather than merely the new trial the Appellate Court ordered and the majority today affirms. See *In re James T.*, 9 Conn. App. 608, 644, 520 A.2d 608 (1987) ("[f]rom the facts presented in the court's memorandum, to the effect that [the Department of Children and Families (department)] 'clearly established' that it is not in the child's best interest to allow further time to establish a relationship, we conclude that [the department] did meet its burden of clear and convincing proof, and the petition should have been granted").

As the majority notes, the Appellate Court did not address the petitioner's claims on appeal that the trial court's findings were clearly erroneous. Nor did it address at all the trial court's finding that it had not been proven to the court that allowing further time would be detrimental to the children's best interests. Instead, the Appellate Court reversed the trial court's judgments denying the petitions, holding that the trial court's reasoning was legally and logically inconsistent, and that its factual findings were fatally inconsistent. *In re Jacob W.*, 178 Conn. App. 195, 215, 172 A.3d 1274 (2017). Specifically, the Appellate Court held that the trial court had applied the wrong legal test to determine whether there was an ongoing parent-child relationship. Id., 211. It determined that the trial court's findings were legally inconsistent in that the trial court found both "that an ongoing parent-child relationship exists and that unreasonable interference inevitably prevented the respondent from maintaining an ongoing parent-child relationship." (Emphasis omitted.) Id. It also determined that the trial court's findings were factually inconsistent in that the trial court "found both that the grandparents' unreasonable conduct constituted interference and that there was no evidence of unreasonable interference by any person." Id., 215–16.

The Appellate Court therefore ordered a new trial on the petitioner's amended petitions. Id., 219.

Although the trial court's memorandum of decision is not entirely clear—and is in one place inconsistent—neither the parties nor the Appellate Court saw fit to ask the trial court to clarify or articulate its ruling.[4] See Practice Book § 66-5; see also *In re Jason R.*, 306 Conn. 438, 460, 51 A.3d 334 (2012) (trial court states burden of proof correctly in articulations to clarify ambiguity in memorandum of decision regarding allocation of burden of proof). Trial court judges operate under tremendous time pressure and without the resources available to this court and the Appellate Court. See K. Stith, "The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal," 57 U. Chi. L. Rev. 1, 61 n.99 (1990) ("appellate judges have more resources [time, staff, and so on than trial judges]"). Thus, a trial court "opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) *In re Jason R.*, supra, 453.

More significantly for this case, even if the trial court's decision was in some way unclear, the examples provided by the Appellate Court concerned only the "no ongoing parent-child relationship" prong. The Appellate Court identified no lack of clarity or inconsistency concerning the "further time" prong, which provides an independent basis for upholding the trial court's deci-

[4] In the absence of an articulation, we do not know if the trial court's memorandum of decision truly is inconsistent, or if the legal "inconsistencies" are arguments in the alternative and the factual "inconsistencies" are scrivener's errors. Because we must read a memorandum of decision as a whole; *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012); and because there is a presumption that the trial court properly applied the law and considered the facts; *State* v. *Henderson*, 312 Conn. 585, 598, 94 A.3d 614 (2014); *Walton* v. *New Hartford*, 223 Conn. 155, 165, 612 A.2d 1153 (1992); we should construe these "inconsistencies" to conform to the trial court's holding.

sion. See footnote 6 of this dissenting opinion. Therefore, whatever flaws the trial court's opinion might have contained, I had no trouble understanding from my review that the court found that the time had not yet come to terminate the respondent's parental rights. I therefore would not have reversed the trial court's judgments on the ground that the Appellate Court did.

IV

We granted certification in the present case limited to the following issue: "Did the Appellate Court correctly reverse the trial court's judgment denying the custodian's petition to terminate the father's parental rights when it determined that the trial court's judgment was legally and logically inconsistent?" *In re Jacob W.*, 328 Conn. 902, 177 A.3d 563 (2018). The majority does not affirm the Appellate Court's judgment on the "legally and logically inconsistent" rationale of that court, however, but rather, it concludes that in addressing the "no ongoing parent-child relationship" prong, the trial court did not properly take account of the "children's negative feelings toward or lack of memory of the respondent," improperly focusing instead on the respondent's conduct. I do not believe we need to reach that issue, however (and I do not), because even if the trial court considered the "no ongoing parent-child relationship" prong under an incorrect standard, the trial court also found that the petitioner had failed to establish that "to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interest of the child."[5] In my view,

[5] The majority states that the trial court's holding under the dispositional phase of the proceedings that termination was not in the children's best interest also "was affected by its application of an incorrect legal test during the adjudicatory phase" and by these inconsistencies. These concerns do not apply to the trial court's finding under the "further time" prong. The "best interest" analysis under the second prong of § 45a-717 (g) (2) (C) is separate and distinct from the "best interest" analysis under subsection (g) (1).

the trial court's ruling on this second prong sufficed independently to deny the petitions.[6]

The majority does *not* hold, as the petitioner has asked us to hold, that the trial court's ruling on the

[6] Citing *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 675–76, 420 A.2d 875 (1979), the majority indicates that "[o]nly if" the trial court determines that the petitioner has proven the lack of an ongoing parent-child relationship "may it turn to the second part of the inquiry . . . ." The majority focuses on a single sentence from *In re Juvenile Appeal (Anonymous)*: "The 'best interests' standard . . . comes into play only if it has been determined that no ongoing parent-child relationship exists, in order to decide whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests." (Emphasis omitted.) Id. The majority and the Appellate Court have interpreted this sentence to mean that the trial court cannot and should not address the "further time" prong unless the "no ongoing parent-child relationship" prong has been established. If there is an ongoing relationship, then there is no reason or purpose for affording further time to establish such a relationship. Thus, according to the majority, if this court determines that the trial court's finding as to the first prong was clearly erroneous, it cannot affirm the trial court's decision on the basis of the second prong, but rather must remand the case for a new trial.

I do not agree with such an interpretation of *In re Juvenile Appeal (Anonymous)*, especially when reading the sentence at issue in context. In *In re Juvenile Appeal (Anonymous)*, the juvenile court found there to be no meaningful ongoing parent-child relationship, and, on appeal, the Superior Court upheld that decision, "characteriz[ing] the decision of the Juvenile Court as holding that 'it was in the best interest of said child that the petition for termination of parental rights be granted.' " *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675. In doing so, the Superior Court combined the first and second prongs of § 45a-717 (g) (2) (C), upholding the juvenile court's finding of no meaningful ongoing parent-child relationship under the first prong because it was in the children's best interest. This court in *In re Juvenile Appeal (Anonymous)* was holding that the Superior Court improperly upheld the juvenile court's finding as to the first prong on the basis of the child's best interest, which could be considered only as a part of the second prong. Based on this context, I do not read the sentence cited by the majority as prohibiting a trial court from considering the "further time" prong unless the "no ongoing parent-child relationship" prong is first established. Rather, this sentence establishes simply that "best interest" is considered only as part of the second prong, not the first prong.

If the cited sentence in *In re Juvenile Appeal (Anonymous)* is read to mean that the trial court cannot consider the second prong ("further time") before it has found the first prong to be established, in my view this court should overrule that holding. Although it is obvious that the trial court may not *grant* a termination petition if it does not find the lack of an ongoing parent-child relationship, because both prongs must be established, the petition can fail under either prong. Similarly, even if the trial court finds there is not clear and convincing evidence of no ongoing parent-child rela-

"further time" prong is clearly erroneous and that, therefore, this prong has in fact been established by clear and convincing evidence. This would be a difficult chore. Determining that a trial court's finding that the *failure to prove* an element by clear and convincing evidence is clearly erroneous is even more challenging an undertaking than contesting any other pedestrian finding.

The majority instead takes on a subordinate statement of the trial court: "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The majority protests that there *was* in fact "evidence presented that was relevant to this question" and that for the trial court to say otherwise was so clearly erroneous that a new trial is warranted. The examples the majority provides, however, are not in my view *directly* relevant to the finding that further time would not be *detrimental*, but instead relate to whether additional time will be *productive*.

For example, the majority states that there was evidence that the children had intensely negative feelings about the respondent (including feelings that he is a bad parent) or no present feelings at all. The children were not asking to see or speak with him and wanted to have their last name changed. The majority also claims that the trial court did not consider the recommendations of the department, the guardian ad litem, and the children's attorney to terminate the respondent's parental rights, along with whether the little "likelihood" of reestablishing a relationship, and the time it

tionship, there is no reason why the court cannot go on to determine whether further time would be detrimental as an alternative reason for denying the petitions. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 724, 183 A.3d 1164 (2018) ("whenever feasible, the far better practice would be for the trial court to fully address the merits of all theories litigated, even those that are legally inconsistent").

would have taken to do so, would have been detrimental to the children's best interest.

However, I do not agree with the majority that the trial court did not give consideration to all of the evidence the majority cites. In my view, a full and fair reading of the memorandum of decision does not support a conclusion that the trial court "did not accord any effect to," "did not consider," or "took no account of" such evidence. Judges presumptively consider whatever evidence is in front of them. See *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 128, 977 A.2d 772 ("There is nothing in the record that suggests that the court failed to review thoroughly the testimony and evidence submitted to it. . . . [A] judge is presumed to have performed his duty properly unless the contrary appears [in the record]." [Internal quotation marks omitted.]), cert. denied, 294 Conn. 904, 982 A.2d 647 (2009). And here, the trial court *did* expressly find and take note in its memorandum of decision of the children's negative and nonexistent feelings, as well as the department's report and the guardian ad litem's recommendation.

Thus, unlike the majority, I would not so strictly scrutinize the trial court's statement that there was "no evidence . . . that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The majority finds fault with this statement because, in its view, there was relevant evidence. Just because evidence is relevant, however, does not mean it clearly and convincingly establishes a fact. I read the trial court's statement as more likely meaning that the court found "no *direct* evidence"[7] or "no *persuasive* evidence" that more time

[7] In my view, an example of what would be direct evidence (or at least more direct evidence) might be where termination will lead to a different placement or some other contingency. But here, these children will be with the grandparents, regardless.

would be detrimental. "[W]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *In re Jason R.*, supra, 306 Conn. 453. The trial court might not have been *persuaded* by the evidence the majority believes it should have been persuaded by, but instead determined that there was not clear and convincing evidence that affording additional time would be detrimental to the children's best interests. Although the trial court's analysis may be sparse, it is clear to me from its factual findings that it considered all the evidence in reaching its determination as to the "further time" prong. In my view, the majority has substituted its judgment for the discretion of the trial court and called it clearly erroneous review.

For example, the trial court could have found that, although relevant, the children's statements of dislike of the respondent were not *direct* evidence of further time being detrimental to their best interest.[8] Although a trial court could have found that further time would be detrimental because the children were upset and any further contact with the respondent would serve only to upset them further, it also could have found that those negative feelings were going to exist regardless of whether the respondent's parental rights are termi-

[8] The majority takes issue with the trial court's statement that "[t]he statements of dislike by very young children with false information about [the respondent] does not establish by clear and convincing evidence that reestablishing a relationship would be detrimental." According to the majority, the trial court improperly discounted "the negative feelings of the children on the basis of the grandparents' alleged 'interference,' " and, if properly considered, these negative feelings would have been at least some evidence that further time would be detrimental, making the trial court's finding of "no evidence" clearly erroneous. The problem with this argument, however, is that it presupposes that the children's negative feelings necessarily equate to evidence that further time would be detrimental to their best interest. As explained previously, the children's negative feelings reasonably can be considered not to be direct evidence of detriment, but rather are open to interpretation by the trial court.

nated, that termination will not affect those feelings, and that additional time might provide an opportunity for the respondent to attempt to repair his relationship with his children. In fact, in many of such "no ongoing parent-child relationship" cases, the present feelings of the children may be negative or nonexistent. That is why the relationship has to be reestablished. And, that is what the additional time is for: things can change. Thus, when the trial court stated that "[t]he statements of dislike by very young children with false information about [the respondent] does not establish by clear and convincing evidence that reestablishing a relationship would be detrimental," I think that means no more than that: the quantum of evidence necessary was not met by the cited evidence.

Further, although the trial court acknowledged that the department had recommended termination of the respondent's parental rights, and that the guardian ad litem found it unlikely that further time would be productive on the basis of the respondent's incarceration and the ongoing protective order preventing contact between him and the children, it did not find this to be direct evidence of detriment if it allowed further time. Lack of productivity does not necessarily equate to detriment, but rather is a factor to consider in determining whether further time would be detrimental. Although the trial court in this case could have found that there was little likelihood of productivity because of the protective order, it also could have found that because the respondent could have sought to modify the protective order or set up some arrangement to have contact with his children, there was a possibility that further time would give the respondent an opportunity to reestablish his relationship with his children. Thus, although relevant, this evidence does not necessarily support a claim that additional time to reestablish a relationship with the children would be detrimental.

It is for the trial court to determine whether there is a lack of productivity and, if so, whether it would be detrimental. The trial court in the present case determined that any predicted lack of productivity in providing additional time did not equate to detriment—in *this* case, at *that* time—especially in light of the fact that the children had been thriving with their grandparents. In my view, this finding is not clearly erroneous. It is important that in reviewing such a finding, we do not substitute our own judgment for the trial court's judgment on an issue of fact entrusted to trial judges in our juvenile session because, especially in cases involving incarcerated parents, it will be a highly fact-bound question whether additional time is not likely to establish or reestablish the relationship. It is not necessarily true that in each of those cases, granting the additional time would be detrimental. Rather, this is, in my view, an issue best left to the trial judge, who is in the best position to weigh the evidence before her or him.

V

Hard cases make bad law. In my view, this case qualifies. The respondent's appalling conduct and its consequences would seem to make it highly unlikely that he will play a significant parenting role in his children's lives. I am concerned, however, that the majority's opinion will be read to require trial court judges to consider the "further time" prong to be more of a predictor of the *likelihood* of reestablishing a relationship. Although I agree that the likelihood that further time will be productive may be a factor in determining whether further time would be detrimental to the children's best interest, I am concerned that judges sitting in our juvenile session will interpret the majority's opinion as equating the probable lack of productivity with detriment.

Thus, in this case, I do not believe that any assumed lack of productivity should not be considered by the

trial court, but rather I believe that the trial court *did indeed* consider it and did not find it to be evidence of detriment. There is no requirement that a trial court make a finding of detriment even if there is little foreseeability of reestablishing a relationship. Rather, this is a fact-based issue that will differ under the circumstances of each case. Unless the court's finding is clearly erroneous, we should defer to the trial court's judgment on such an issue. Otherwise, I am concerned that appellate scrutiny will override and overshadow the trial court's prerogative to weigh the evidence and determine not only whether parental rights should be terminated, but when. I am simply unwilling to arrogate to myself the authority to make this determination, and unwilling to so strictly scrutinize the trial court's memorandum of decision in such a pursuit.

I am especially unwilling to do so when the reward the majority confers upon the petitioner is so meager. The majority's decision today will not hasten the termination of the respondent's parental rights. In fact, the appellate process might very well have delayed it. This is because all the petitioner has gained by prevailing before both the Appellate Court and this court is a new trial on a trio of two year old petitions. A Pyrrhic victory to be sure. Practically, this is no relief at all because any new trial that follows from a reversal of the trial court's denial of the petitions will necessarily have to measure any "ongoing" relationship as of the time of the new trial, not based on the date of the prior trial. See *In re Juvenile Appeal (83-DE)*, supra, 190 Conn. 318 ("the issue of whether termination of parental rights is appropriate must be decided upon the basis of conditions as they appear at the time of trial"). If a new trial on these petitions would be any different from a trial on *new* petitions alleging no ongoing parent-child relationship, that difference is lost on me. See footnote 3 of this dissenting opinion. It is little wonder that that

is not the relief the petitioner sought in the Appellate Court, but rather that she sought directed judgments based upon an appellate determination that all of the trial court's findings on the elements of the no ongoing parent-child relationship prong were clearly erroneous.[9] Thus, although my disagreement with the majority is fundamental, it results in little difference to the parties in this case. I therefore respectfully dissent.

WILLIAM O'BRIEN *v.* CITY OF NEW HAVEN
(SC 20069)

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

Argued December 13, 2018—officially released February 26, 2019

Procedural History

Action for indemnification of attorney's fees and costs incurred by the plaintiff in defending a separate action brought against him, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Frechette, J.*; judgment for the plaintiff, from which the defendant and the plaintiff filed separate appeals with the Appellate Court, where the appeals were consolidated; thereafter, the Appellate Court, *Sheldon*, *Prescott* and *Elgo*, *Js.*, affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

Proloy K. Das, with whom was *Rachel Snow Kindseth*, for the appellant (defendant).

Vincent F. Sabatini, for the appellee (plaintiff).

[9] In her appeal to the Appellate Court, the petitioner specifically asked the court to direct judgments terminating the respondent's parental rights on the ground that the trial court's findings as to § 45a-717 (g) (2) (C) were clearly erroneous because its subordinate findings establish that there was no ongoing parent-child relationship and that allowing further time would be detrimental to the children's best interest. Although the petitioner has repeated this argument before this court as an alternative ground for affirming the judgment of the Appellate Court, she has not specifically requested directed judgments from this court.

Opinion

PER CURIAM. The plaintiff, William O'Brien, the former tax assessor of the defendant, the city of New Haven (city), commenced this action, seeking indemnification pursuant to General Statutes § 7-101a (b)[1] for the attorney's fees and costs he incurred in successfully defending himself in a prior action brought by a third party, Tax Data Solutions, LLC. Following a court trial, the court rendered judgment for O'Brien and awarded him the attorney's fees and costs he incurred in that prior action. On appeal to the Appellate Court, the city claimed that the trial court incorrectly concluded that O'Brien's claim was not time barred under § 7-101a (d), which provides that no action against a municipality for indemnification under § 7-101a may be maintained unless that action is "commenced within two years after the cause of action therefor arose nor unless written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued." The Appellate Court rejected the city's claim, holding that the "cause of action" referred to in § 7-101a (d) is the cause of action for indemnification and not, as the city had maintained, the earlier, underlying action in which the attorney's fees and costs were incurred. See *O'Brien* v. *New Haven*, 178 Conn. App. 469, 487–88, 175 A.3d 589 (2017). The Appellate Court therefore concluded that the pre-

[1] General Statutes § 7-101a (b) provides generally that a municipality shall indemnify any municipal officer or employee who, having been sued for malicious, wanton or wilful acts, or ultra vires acts in the discharge of his or her duties, incurs "financial loss and expense, including legal fees and costs," arising out of such action, unless a judgment has been rendered against that officer or employee for any such acts. In its separate action against O'Brien, Tax Data Solutions, LLC, alleged that he had engaged in malicious, wanton or wilful acts or ultra vires acts, but the trial court in that case rendered judgment for O'Brien.

sent indemnification action did not arise until judgment had been rendered for O'Brien in the action brought against him by Tax Data Solutions, LLC. See id. Because O'Brien commenced the present action within two years of that date and provided the statutorily required notice within six months of that date, the Appellate Court further concluded that the trial court properly had determined that the present action was timely. See id., 488. We granted the city's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the judgment of the trial court interpreting when [O'Brien's] cause of action for indemnification accrued for the purposes of the notice requirement and time limitations set forth in . . . § 7-101a (d)?" *O'Brien* v. *New Haven*, 328 Conn. 909, 178 A.3d 1041 (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.

STATE OF CONNECTICUT *v.* MITCHELL HENDERSON (SC 19947)

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

Syllabus

The defendant, who had been convicted of, among other crimes, robbery in the first degree and attempt to escape from custody, appealed to the Appellate Court from the trial court's denial of his motion to correct an illegal sentence. The sentence imposed in connection with the defendant's robbery conviction had been enhanced pursuant to statute ([Rev. to 1991] § 53a-40 [a]) after he entered an *Alford* plea to the charge of being a persistent dangerous felony offender, and the sentence imposed

in connection with his conviction of attempt to escape from custody had been enhanced pursuant to § 53a-40 (b) after he entered an *Alford* plea to the charge of being a persistent serious felony offender. On appeal to the Appellate Court, the defendant claimed that the trial court improperly had denied his motion to correct because his enhanced sentences violated the multiple punishments provision of the double jeopardy clause of the United States constitution and were contrary to the legislative intent underlying the sentence enhancement provisions of § 53a-40 (a) and (b). The Appellate Court affirmed the trial court's denial of the defendant's motion. The Appellate Court concluded that there was no double jeopardy violation because the elements of the underlying crimes were entirely different and the robbery and attempt to escape from custody charges arose from two separate and distinct incidents or transactions. That court also concluded that the plain language of § 53a-40 (a) and (b) and the relevant legislative history did not limit the application of such sentence enhancements to one offense when a defendant stands convicted of multiple, qualifying offenses. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court having fully addressed the issues concerning the propriety of the trial court's denial of the defendant's motion to correct, this court adopted the Appellate Court's thorough and well reasoned opinion as a proper statement of the issues and the applicable law concerning those issues, and, accordingly, the judgment of the Appellate Court was affirmed.

Argued September 13, 2018—officially released February 26, 2019

Procedural History

Substitute two part information charging the defendant, in the first part, with two counts of the crime of assault in the third degree and one count each of the crimes of robbery in the first degree, criminal mischief in the third degree, threatening, and attempt to escape from custody, and, in the second part, with being a persistent dangerous felony offender and being a persistent serious felony offender, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the defendant was presented to the court, *Espinosa, J.*, on a plea of guilty to the crime of criminal mischief in the third degree and where the remaining counts were tried to the jury before *Espinosa, J.*; verdict of guilty of one count each of assault in the third degree, robbery in the first degree, threatening,

and attempt to escape from custody; thereafter, the defendant was presented to the court, *Espinosa*, *J.*, on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and the pleas, from which the defendant appealed to the Appellate Court, *O'Connell*, *Heiman* and *Schaller*, *Js.*, which affirmed the trial court's judgment; subsequently, the court, *Alexander*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js.*, which affirmed the trial court's denial of the defendant's motion, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Judie Marshall and *Walter C. Bansley IV*, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy* and *Anne F. Mahoney*, state's attorneys, for the appellee (state).

Opinion

PER CURIAM. In 1993, a jury found the defendant, Mitchell Henderson, guilty of robbery in the first degree and attempt to escape from custody, among other offenses.[1] Following the jury verdict, the defendant entered an *Alford*[2] plea to the charge in each of two part B informations, one of which charged him with

[1] The evidence adduced at the defendant's trial established that, on January 17, 1992, the defendant, who was wielding a knife, assaulted and robbed the victim, Victorene Hazel, on Baltimore Street in the city of Hartford after she and a companion left the Shawmut Bank. Shortly thereafter, the defendant was apprehended and arrested by the police and placed in a police cruiser. As he was being transported from the scene, the defendant attempted to escape from custody by kicking out the cruiser's rear window and trying to climb out of the cruiser while it was in motion. *State* v. *Henderson*, 37 Conn. App. 733, 736–38, 658 A.2d 585, cert. denied, 234 Conn. 912, 660 A.2d 355 (1995).

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

being a persistent dangerous felony offender pursuant to General Statutes (Rev. to 1991) § 53a-40 (a)[3] in connection with his conviction of first degree robbery, and the second of which charged him with being a persistent serious felony offender pursuant to § 53a-40 (b)[4] in connection with his conviction of attempt to escape from custody. Thereafter, the trial court, *Espinosa, J.*, sen-

[3] General Statutes (Rev. to 1991) § 53a-40 (a) provides in relevant part: "A persistent dangerous felony offender is a person who (1) stands convicted of manslaughter, arson, kidnapping, sexual assault in the first or third degree, sexual assault in the first or third degree with a firearm, robbery in the first or second degree, or assault in the first degree; and (2) has been, prior to the commission of the present crime, convicted of and imprisoned, under a sentence to a term of imprisonment of more than one year or of death, in this state or in any other state or in a federal correctional institution for any of the following crimes: (A) The crimes enumerated in subdivision (1), the crime of murder, or an attempt to commit any of said crimes or murder . . . ."

Hereinafter, all references to § 53a-40 are to the 1991 revision.

Section 53a-40 further provides in relevant part: "(f) When any person has been found to be a persistent dangerous felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 53a-35a for the crime of which such person presently stands convicted . . . may impose the sentence of imprisonment authorized by said section for a class A felony."

[4] General Statutes (Rev. to 1991) § 53a-40 (b) provides: "A persistent serious felony offender is a person who (1) stands convicted of a felony; and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) and the prior conviction was for a crime other than those enumerated in subsection (a)."

Section 53a-40 further provides in relevant part: "(g) When any person has been found to be a persistent serious felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35a for the crime of which such person presently stands convicted . . . may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony. . . ."

tenced the defendant to a term of imprisonment of twenty-five years for the crime of robbery in the first degree as a persistent dangerous felony offender, and to a consecutive term of imprisonment of twenty years, execution suspended after ten years, with five years of probation, for the crime of attempt to escape from custody as a persistent serious felony offender. The Appellate Court affirmed the judgment of the trial court. *State* v. *Henderson*, 37 Conn. App. 733, 749, 658 A.2d 585, cert. denied, 234 Conn. 912, 660 A.2d 355 (1995).

In 2014, the defendant filed a motion to correct an illegal sentence, which the trial court, *Alexander, J.*, denied. The defendant appealed from the trial court's ruling to the Appellate Court, claiming that the trial court improperly had denied his motion because (1) his sentence violated the multiple punishments provision of the double jeopardy clause of the fifth amendment to the United States constitution,[5] and (2) his sentence was contrary to the legislative intent underlying the two sentence enhancement provisions, namely, § 53a-40 (a) and (b). See *State* v. *Henderson*, 173 Conn. App. 119, 123, 128, 163 A.3d 74 (2017).

With respect to his first claim, the defendant maintained that his sentence violated the double jeopardy clause "because his classifications, and resulting enhanced sentence, as both a persistent dangerous felony offender and a persistent serious felony offender . . . arose out of the same occurrences [insofar as] they were both based on his prior felony convictions." Id., 128. The defendant further argued "that [subsections (a) and (b) of] § 53a-40 . . . are the same offense under [the test adopted in] *Blockburger* v. *United States*,

[5] The double jeopardy clause of the fifth amendment to the United States constitution is made applicable to the states through the due process clause of the fourteenth amendment. See *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)[6] [for determining whether two statutes criminalize the same offense], because § 53a-40 (b) does not require proof of any fact that § 53a-40 (a) does not also require." (Footnote added.) *State* v. *Henderson*, supra, 173 Conn. App. 128. With respect to his second claim, the defendant contended that the "legislature did not intend to simultaneously punish an individual as both a persistent dangerous felony offender and as a persistent serious felony offender." Id., 134.

In response to the defendant's first claim, the state asserted that the defendant had misapplied the *Blockburger* test because the relevant inquiry for purposes of determining whether a double jeopardy violation exists under *Blockburger* examines the underlying substantive crimes of which he was convicted, namely, robbery in the first degree and attempt to escape custody, and not the elements of § 53a-40 (a) and (b), which merely serve as the basis for a sentence enhancement. Id., 128. The state observed correctly that no double jeopardy violation occurred in the present case because the elements of the underlying crimes are entirely differ-

[6] "Traditionally we have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [When] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact [that] the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . .

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 689–90, 127 A.3d 147 (2015).

ent. See id. As the state further observed, the robbery and attempt to escape custody charges arose from two separate and distinct incidents or transactions. Id. In response to the defendant's claim that his sentence contravened the legislative intent behind the two sentence enhancement provisions, the state argued that the plain language of those provisions and the relevant legislative history "do not limit the application of [such] sentence enhancements to one offense when the defendant stands convicted of multiple qualifying offenses." Id., 134. The Appellate Court agreed with the state's arguments as to each of the defendant's claims; id., 128, 134; and, therefore, it affirmed the trial court's denial of the defendant's motion. See id., 143.

We granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the defendant's sentence was not illegal, does not violate the double jeopardy clause [of the United States constitution], and does not run contrary to legislative intent?" *State* v. *Henderson*, 326 Conn. 914, 173 A.3d 389 (2017).

After examining the record and briefs on appeal and considering the arguments of the parties, we conclude that the judgment of the Appellate Court should be affirmed. The Appellate Court's thorough and well reasoned opinion fully addresses the certified question, and, accordingly, there is no need for us to repeat the discussion contained therein. We therefore adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *Anderson* v. *Commissioner of Correction*, 308 Conn. 456, 462, 64 A.3d 325 (2013).

The judgment of the Appellate Court is affirmed.

ORDERS

CONNECTICUT REPORTS

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BENJAMIN WASHBURNE ET AL. *v.* TOWN OF MADISON ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 175 Conn. App. 613 (AC 38721), is denied.

Hugh D. Hughes, in support of the petition.

Nicholas N. Ouellette, *Samuel N. Rosengren* and *Ruth A. Kurien*, in opposition.

Decided February 13, 2019

ANGELA DIAZ *v.* DEPARTMENT OF SOCIAL SERVICES ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 184 Conn. App. 538 (AC 39993), is denied.

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

Angela Diaz, self-represented, in support of the petition.

Lisa Guttenberg Weiss, assistant attorney general, in opposition.

Decided February 13, 2019

STATE OF CONNECTICUT *v.* MARK YOUNG

The defendant's petition for certification to appeal from the Appellate Court, 186 Conn. App. 770 (AC 40581), is denied.

Jonathan R. Sills, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided February 13, 2019

JOLEN, INC. *v.* BRODIE AND STONE, PLC, ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 186 Conn. App. 516 (AC 40725), is denied.

Edward R. Scofield, in support of the petition.

Frank J. Silvestri, Jr., in opposition.

Decided February 13, 2019

JOHN K. FINNEY *v.* MICHELLE T. FINNEY

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 902 (AC 40740), is denied.

John K. Finney, self-represented, in support of the petition.

Decided February 13, 2019

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CASES ARGUED AND DETERMINED

IN THE

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CITY OF STAMFORD *v.* ISMAT RAHMAN ET AL. (AC 40883)

Alvord, Elgo and Bright, Js.

Syllabus

The plaintiff city sought to foreclose a blight lien on certain real property owned by the defendant R. In October, 2007, R executed a promissory note in the amount of $624,000 in favor of the predecessor of the defendant W Co., which was secured by a mortgage on the subject property that was recorded in the city land records. Approximately six months later, R executed a promissory note in the amount of $417,000 in favor of the predecessor of the defendant B Co., which was secured by a second mortgage on the subject property that was recorded in the city land records. Less than one month later, R executed a promissory note in the amount of $500,000 in favor of the defendant J Co., which was secured by a third mortgage on the subject property that was recorded in the city land records. At the closings of the two subsequent mortgages, R presented a fraudulent satisfaction of mortgage document that he had forged, which purported to release W Co.'s mortgage on the property. The satisfaction was not recorded in the city land records. Following the commencement of the foreclose action, all of the defendants, including R and W Co., were defaulted for failure to either appear or plead. Thereafter, the trial court rendered a judgment of foreclosure by sale, the property was sold and the remaining proceeds of the sale, approximately $348,097, were paid to the court clerk. B Co. subsequently filed a motion for a supplemental judgment requesting that the trial court disperse the remaining proceeds to it, arguing that W Co. had been defaulted and had not filed an affidavit of debt by which the court could determine what, if any, amount remained owed to it. B Co. further argued that W Co. had commenced and later withdrew a prior foreclosure proceeding

related to the subject property, in which B Co.'s predecessor appeared and asserted a special defense that W Co. had received payment in full and that the W Co. mortgage had been released by the satisfaction. The trial court rejected the motion for a supplemental judgment, stating that it needed verification of the release of the W Co. mortgage. Thereafter, B Co. filed a motion for reconsideration, in which it acknowledged that the satisfaction was never recorded in the land records but that, if the court denied its motion, the proceeds from the sale would be held indefinitely by the court, without any indication that any moneys were owed under the W Co. mortgage. The trial court reconsidered its decision and granted B Co.'s motion for a supplemental judgment, ordering the court clerk to disburse the remaining sale proceeds to B Co. More than three years later, counsel for W Co. filed an appearance, a motion to open the supplemental judgment and a motion for a supplemental judgment, arguing that the supplemental judgment had been procured by R's fraud in forging the satisfaction and that such fraud provided the court with authority to open the judgment after the four month limitation period set forth in the statute (§ 52-212a) that governs the opening of civil judgments. The trial court, applying the factors set forth in *Varley* v. *Varley* (180 Conn. 1), granted the motion to open the supplemental judgment, concluding that W Co. had sufficiently established fraud to invoke the fraud exception to the four month limitation in § 52-212a. The court then granted W Co.'s motion for a supplemental judgment and ordered B Co. to pay the subject proceeds to the court clerk and ordered the clerk to pay the proceeds to W Co. On B Co.'s appeal to this court, *held*:

1. The trial court erred in opening the supplemental judgment beyond the four month limitation period on the basis of fraud because its finding that W Co. satisfied the second *Varley* factor requiring diligence in trying to discover and expose the fraud was clearly erroneous: that court's finding that W Co. had proven diligence was improperly supported by its finding that W Co., as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any subsequent mortgages, W Co. having been in the best position to discover R's fraud in forging and presenting the fraudulent satisfaction, which occurred in 2008, but having failed to exercise any diligence in attempting to do so for more than nine years, as the trial court took judicial notice of two foreclosure actions instituted by W Co. or its predecessor with respect to the subject property, during the second action, which was commenced in 2009, B Co.'s predecessor had filed a special defense alleging that the W Co.'s note had been paid off and attached the satisfaction in support thereof, and, therefore, as of 2009, W Co. was aware of the existence of the satisfaction purporting to release its mortgage on the property, yet it did nothing to investigate the validity of the satisfaction for eight years; moreover, the trial court erred in determining, in support of its finding of diligence, that W Co. was entitled to notice of the proceedings on B Co.'s motion for a supplemental judgment, despite its

default for failure to appear, as the relevant rule of practice (§ 10-12 [a]) does not require service of motions on nonappearing, defaulted parties; furthermore, W Co. failed to demonstrate how its access to information regarding the satisfaction was limited in any way during the present action, it would have received notice of B Co.'s motion for a supplemental judgment, to which the satisfaction was attached, and its subsequent motion for reconsideration, which informed the court that the satisfaction had not been recorded in the land records, if it had filed an appearance, and W Co.'s counsel conceded during oral argument before this court that W Co. discovered the fraud in 2017 upon a review of its own files, and, thus, its apparent failure to conduct such a review sooner repudiated any diligence in trying to uncover fraud.

2. The trial court lacked the authority to open the supplemental judgment more than four years after it was rendered, as the judgment was not obtained by any fraud on the part of B Co.: the only claimed fraudulent conduct was committed by R years prior to the present litigation during which he was defaulted and did not participate, and W Co. failed to provide any authority to support the conclusion that fraud committed by a defaulted party years prior to litigation can support the opening of a judgment following the expiration of the four month period; moreover, W Co. stipulated that both it and B Co. were unaware of any evidence that B Co. had acted fraudulently with regard to the supplemental judgment, and the circumstances surrounding the supplemental judgment belied the conclusion that it was obtained by fraud, as a review of the relevant procedural history indicated that the trial court apparently was persuaded by B Co.'s argument that the court should not hold the remaining sale proceeds indefinitely, given W Co.'s default and failure to file any claim to the remaining sale proceeds.

Argued October 23, 2018—officially released February 26, 2019

Procedural History

Action to foreclose a blight lien on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. were defaulted for failure to appear and the defendant Countrywide Home Loans, Inc., et al. were defaulted for failure to plead; thereafter, the court, *Mintz, J.*, granted the plaintiff's motion for a judgment of foreclosure by sale and rendered judgment thereon; subsequently, Bank of America, N.A., was substituted as a defendant; thereafter, the court, *Truglia, J.*, rejected the motion for a supplemental judgment filed by the defendant Bank of America, N.A.; subsequently, the

court, *Truglia, J.*, granted the motion for reconsideration filed by the defendant Bank of America, N.A., granted the motion for a supplemental judgment and rendered a supplemental judgment for the defendant Bank of America, N.A.; thereafter, the court, *Tierney, J.*, granted the motions to open the supplemental judgment and for a supplemental judgment filed by the defendant Wells Fargo Bank, National Association, and rendered a supplemental judgment for the defendant Wells Fargo Bank, National Association, from which the defendant Bank of America, N.A., appealed to this court. *Reversed; judgment directed.*

Gerald L. Garlick, for the appellant (defendant Bank of America, N.A.).

Patrick T. Uiterwyk, for the appellee (defendant Wells Fargo Bank, National Association).

Opinion

ALVORD, J. The defendant Bank of America, N.A. (Bank of America), appeals from the judgment of the trial court opening the supplemental judgment that had been rendered in its favor and, thereafter, rendering a supplemental judgment in favor of the defendant Wells Fargo Bank, National Association (Wells Fargo), in the amount of $348,097.16.[1] On appeal, Bank of America claims that the court erred in granting Wells Fargo's motion to open the supplemental judgment more than four months after it was rendered on the basis of fraud committed by a homeowner in securing multiple mortgages years before this action to foreclose a blight lien commenced. We agree that the court erred and reverse the judgment of the trial court.[2]

[1] The plaintiff, the city of Stamford, also named as defendants in this action Ismat Rahman; JPMorgan Chase Bank, National Association; Fidelity National Title Group, Successor in Interest to Chicago Title Insurance Company; Countrywide Home Loans Servicing, LP; and Countrywide Home Loans, Inc., but they were defaulted for failure to appear or plead.

[2] Because we reverse the judgment of the court on the basis that it abused its discretion in opening the supplemental judgment, we need not address Bank of America's claim that the trial court committed plain error.

The following facts, as found by the trial court or as stipulated to by the parties,[3] and procedural history are relevant to this appeal. On October 29, 2007, the defendant Ismat Rahman acquired title to property located at 150 Doolittle Road in Stamford for a purchase price of $780,000. He executed a promissory note in favor of World Savings Bank, in the principal amount of $624,000. To secure the note, Rahman executed a mortgage in favor of World Savings Bank (Wells Fargo mortgage),[4] which was recorded in the Stamford land records in volume 9187 at page 347.

Approximately six months later, on April 8, 2008, Rahman executed a promissory note in favor of Countrywide Home Loans Servicing, LP, in the principal amount of $417,000, which note was secured with a mortgage on the property (Bank of America mortgage).[5] The Bank of America mortgage was recorded in volume 9318 at page 259 of the Stamford land records. Less than one month later, on May 2, 2008, Rahman executed a promissory note in favor of Washington Mutual Bank in the principal amount of $500,000, which note was secured with a mortgage on the property (JPMorgan Chase mortgage).[6] The JPMorgan Chase mortgage was recorded in volume 9346 at page 260 of the Stamford land records.

At the closing of the Bank of America mortgage, Rahman presented a document titled "Satisfaction of Mortgage" purportedly executed by Mortgage Electronic Registrations System, Inc., as nominee for World Savings Bank (satisfaction). The satisfaction was fraudulent and was never recorded on the Stamford land

[3] On August 28, 2017, the parties filed a stipulation of facts, which was accepted by the court.

[4] World Savings Bank was acquired by, and changed its name to, Wachovia Mortgage, FSB, which, later in 2009, merged with and became Wells Fargo.

[5] In July, 2008, Countrywide Home Loans Servicing, LP, was acquired by Bank of America.

[6] In 2008, Washington Mutual Bank was acquired by the defendant JPMorgan Chase Bank, National Association.

records. Rahman also presented the satisfaction at the closing of the JPMorgan Chase mortgage.

The defendant JPMorgan Chase Bank, National Association, filed a claim against its title insurance policy issued by the defendant Chicago Title Insurance Company, now known as Fidelity National Title Group, arising out of Rahman's presentation of the fraudulent satisfaction at the time of acquiring the JPMorgan Chase mortgage. Chicago Title Insurance Company, in turn, instituted a fraud action against Rahman and, on March 17, 2011, obtained judgment in its favor in the amount of $627,730.67 plus 6 percent per annum postjudgment interest. See *Chicago Title Ins. Co.* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-5013365-S (March 17, 2011). A judgment lien was recorded in the Stamford land records at volume 10193 at page 257 as to the property. Bank of America was neither a party to, nor had any knowledge of, the fraud action against Rahman.

Prior to this foreclosure action, three other foreclosure actions were commenced with respect to the property. The first was commenced on November 4, 2008, by Wells Fargo's predecessor, which withdrew the action on March 4, 2010. See *Wachovia Mortgage, FSB* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-5009298-S. The second was commenced on January 13, 2009, by JPMorgan Chase Bank, National Association, and was dismissed by the court on October 8, 2010, pursuant to Practice Book § 14-3, governing dismissal for lack of diligence. See *JPMorgan Chase Bank, National Assn.* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5010015-S (October 8, 2010). Wells Fargo's predecessor also commenced a third foreclosure action in 2009. Bank of America appeared in that action and filed an answer and special defense, dated

May 5, 2010, based on the satisfaction, which it attached to its pleading.[7]

On August 14, 2012, the plaintiff commenced the present action by way of a one count complaint seeking foreclosure of a blight lien held by the plaintiff and recorded in the Stamford land records. The complaint also named other defendants, including Wells Fargo, and alleged that these defendants may claim an interest in the property. See footnote 1 of this opinion. On October 23, 2012, the plaintiff filed a motion for default against Wells Fargo for failure to appear, which was granted by the clerk of the court on November 7, 2012. On February 19, 2013, the court rendered judgment of foreclosure by sale. The court found the total debt and attorney's fees due the plaintiff to be $28,618.75 and the fair market value of the property to be $410,000. The court set a sale date for May 4, 2013, and the property was sold for $400,000. On July 29, 2013, the plaintiff filed a motion for determination of priorities and supplemental judgment and subsequently filed a revised motion, which the court granted.[8] The remaining proceeds from the sale, in the amount of $348,097.16, were paid to the clerk of the court.

On February 6, 2014, Bank of America filed a motion for a supplemental judgment in which it claimed that the amount owed to it exceeded the remaining sale proceeds. It therefore requested a supplemental judgment disbursing the remaining sale proceeds to it. Bank of America argued that Wells Fargo had been defaulted

[7] The trial court also noted that Bank of America's predecessor had commenced a foreclosure action, which was dismissed in 2009. The court stated that Bank of America admitted in its complaint in that action that the Wells Fargo mortgage had priority over the Bank of America mortgage.

[8] Bank of America filed a memorandum of law in support of the plaintiff's motion and attached to it the satisfaction. The court, in its order granting the plaintiff's motion for a supplemental judgment, directed Bank of America to file a separate motion for a supplemental judgment, which it filed on February 6, 2014.

for failure to appear and had not filed an affidavit of debt by which the court could determine what, if any, amount remained owed to Wells Fargo. It further argued that Wells Fargo had commenced a prior foreclosure proceeding, in which Bank of America appeared and asserted a special defense, that Wells Fargo had received payment in full and that the Wells Fargo mortgage had been released by the satisfaction. Bank of America argued that after it filed a request for production seeking documents related to payment and release of the Wells Fargo mortgage, Wells Fargo withdrew its prior foreclosure complaint without having produced any such documents.

The court rejected Bank of America's motion for a supplemental judgment, stating that it needed "verification of release of the Wells Fargo mortgage that was filed on the land records prior to [the Bank of America mortgage]." On April 1, 2014, Bank of America filed a motion for reconsideration, in which it acknowledged that the satisfaction was never recorded on the land records. It argued, however, that in the event the court were to deny Bank of America's motion, "the net proceeds from the sale of this property will be held indefinitely by the court, without any indication that any money is still owed under the Wells Fargo mortgage." On April 17, 2014, the court reconsidered its decision and granted Bank of America's motion for a supplemental judgment, ordering the clerk of the court, following the expiration of the twenty day appeal period, to disburse to Bank of America $348,097.16, the amount of the sale proceeds remaining with the clerk.

More than three years later, on June 2, 2017, counsel for Wells Fargo filed an appearance and a motion to open the supplemental judgment, arguing that the judgment had been procured by fraud or mutual mistake. Wells Fargo contended that Rahman's fraud in forging the satisfaction provided the court with authority to

open the judgment after the four month period set forth in General Statutes § 52-212a. Wells Fargo did not contend that Bank of America, itself, had engaged in fraud but, rather, claimed that Bank of America had "unknowingly perpetuated [Rahman's] conduct when seeking the supplemental judgment." Wells Fargo requested that the supplemental judgment be opened and the remaining proceeds from the foreclosure sale be paid to Wells Fargo. Bank of America filed an objection, in which it argued, inter alia, that the supplemental judgment had not been procured by fraud because the court had been made aware that the satisfaction was never recorded and, thus, that Wells Fargo's mortgage had not been released from the land records.

On August 30, 2017, Bank of America and Wells Fargo appeared before the court for a hearing on the motion to open.[9] The parties subsequently submitted supplemental briefing concerning the legal standard applicable to a motion to open a judgment on the basis of fraud.[10] On September 22, 2017, the court issued a memorandum of decision in which it granted Wells Fargo's motion to open the supplemental judgment and its motion for a supplemental judgment.

[9] Both parties declined the opportunity to offer evidence during the hearing and presented oral argument only.

[10] Specifically, the parties were directed to address the following cases, *Varley* v. *Varley*, 180 Conn. 1, 3–4, 428 A.2d 317 (1980), and *Turner* v. *Commissioner of Correction*, 163 Conn. App. 556, 564, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016). *Turner*, quoting *Varley*, provides: "The question presented by a charge of fraud is whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Such relief will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered . . . (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud . . . (3) There must be clear proof of the perjury or fraud . . . [and] (4) There must be a substantial likelihood that the result of the new trial will be different." (Internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, supra, 564.

The court first found that Wells Fargo sufficiently had established fraud to invoke the exception to the four month limitation on opening or setting aside a judgment pursuant to § 52-212a. Applying the factors set forth in *Varley* v. *Varley*, 180 Conn. 1, 3–4, 428 A.2d 317 (1980); see footnote 10 of this opinion; the court found that there was no laches or unreasonable delay on the part of Wells Fargo. The court stated: "Due to the massive and continuing fraud perpetrated on three separate banks, that had the banks scrambling to protect their own interests, it is understandable to this court that considerable delay and confusion presented itself before [Wells Fargo] had a full understanding of all the facts." It further concluded that there was no indication of prejudice to Bank of America as a result of the delay.

Turning to the second *Varley* factor of diligence in trying to discover the fraud, the court found that Wells Fargo, as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any mortgages executed and recorded thereafter. It further concluded that Wells Fargo, having been defaulted for failure to appear, had not received notice of the motion for a supplemental judgment or the motion for reconsideration. Concluding that "[t]he supplemental judgment is a separate statutory proceeding and equity requires notice to all encumbrancers even if defaulted in the first part of the foreclosure action," the court determined that the "failure of notice itself should open the judgment."

The court then found that Wells Fargo had established the third and fourth *Varley* factors. As to the third factor of clear proof of the fraud, the court found that Rahman's presentation of the forged satisfaction at the time of the closing of the Bank of America and JPMorgan Chase mortgages, which was confirmed by the civil judgment obtained by Chicago Title Insurance

Company, satisfied this factor. Lastly, as to the fourth factor, the court determined that the Wells Fargo mortgage was first in time and, therefore, had priority over the Bank of America mortgage, such that there was a substantial likelihood that the result of a new trial would be different. Having concluded that Wells Fargo established all four *Varley* factors, the court granted its motion to open the supplement judgment. The court then granted Wells Fargo's motion for a supplemental judgment and ordered Bank of America to pay $348,097.16 to the clerk of the court and further ordered the clerk of the court to pay that sum to Wells Fargo. This appeal followed.

We first set forth the applicable legal principles. Section 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which 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. . . ." "Courts have interpreted the phrase, [u]nless otherwise provided by law, as preserving the common-law authority of a court to open a judgment after the four month period. . . . It is well established that [c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate [or open] any judgment obtained by fraud, duress or mutual mistake." (Citation omitted; internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 99, 168 A.3d 617 (2017).

"The party claiming fraud has the burden of proof." *Terry* v. *Terry*, 102 Conn. App. 215, 223, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007). "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed . . . ."

The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 173 Conn. App. 755, 765, 164 A.3d 702, cert. denied, 327 Conn. 906, 170 A.3d 2 (2017).

"For claims of fraud brought in a civil action, our Supreme Court has established the criteria necessary for a party to overcome the statutory time limitation governing a motion to open and set aside judgment. . . . To have a judgment set aside on the basis of fraud which occurred during the course of the trial upon a subject on which both parties presented evidence is especially difficult. . . . The question presented by a charge of fraud is whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Such relief will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered . . . (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud[11] . . . (3) There must be clear proof of the perjury or fraud . . . [and] (4) There must be a substantial likelihood that the result of the new trial will be different."[12] (Footnote added; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 163 Conn.

[11] Our Supreme Court subsequently abandoned the diligence factor imposed by *Varley* in the marital litigation context. See *Billington* v. *Billington*, 220 Conn. 212, 222, 595 A.2d 1377 (1991).

[12] Our Supreme Court later modified the fourth factor: "[W]e disavow the phrasing employed in *Varley* and rephrase the fourth prong to require a movant to demonstrate a reasonable probability, rather than a substantial likelihood, that the result of a new trial will be different." *Duart* v. *Dept. of Correction*, 303 Conn. 479, 491, 34 A.3d 343 (2012).

App. 556, 564, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016). A party seeking to overcome the statutory limitation on opening a judgment must satisfy all four *Varley* factors. See id., 565 ("[b]ecause the petitioner cannot succeed on the first *Varley* factor, we need not consider the remaining factors").

I

We begin by addressing Bank of America's alternative claim that the court erred in opening the supplemental judgment because Wells Fargo failed to satisfy the *Varley* factors. Specifically, it argues that Wells Fargo failed to satisfy the second factor requiring diligence in trying to discover and expose the fraud. We agree.

We first note the general standard of review applicable to a motion to open a judgment.[13] "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing [a motion] to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Dougherty* v. *Dougherty*, 109 Conn. App. 33, 38–39, 950 A.2d 592 (2008).

In the context of a motion to open a judgment beyond the four month time limitation on the basis of fraud, a court's "determinations as to the elements of fraud are findings of fact that we will not disturb unless they are clearly erroneous." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 173 Conn. App. 766; see

[13] The parties dispute the applicable standard of review. Bank of America argues that the proper standard of review is plenary because the "court's decision was based solely on a stipulation of facts and the oral and written arguments of counsel." Wells Fargo maintains that the decision to grant a motion to open a judgment is within the trial court's discretion and that appellate review requires every reasonable presumption in favor of the court's action.

also *Cromwell Commons Associates* v. *Koziura*, 17 Conn. App. 13, 16–17, 549 A.2d 677 (1988) ("[t]he existence of fraud for purposes of opening and vacating a judgment is a question of fact"). The determination as to whether the moving party used diligence in seeking to discover the fraud is also a factual determination, which may be rejected only upon a determination that it is clearly erroneous. See *Jucker* v. *Jucker*, 190 Conn. 674, 679, 461 A.2d 1384 (1983) ("A factual finding may be rejected by this court only if it is clearly erroneous. . . . The evidence bearing on the factual [matter] of . . . the plaintiff's exercise of due diligence adequately support[s] the conclusions drawn by the court. It cannot be said, therefore, that the finding was as a matter of law unsupported by the record, incorrect, or otherwise mistaken. . . . This court may not substitute its own opinion . . . for the factual finding of the trial court." [Citations omitted; internal quotation marks omitted.]).

"When a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud . . . ." *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). In *Chapman Lumber, Inc.*, our Supreme Court considered an appeal challenging the trial court's refusal to conduct an evidentiary hearing in connection with the defendant attorney's motion to open the judgment rendered against him in an action arising out of allegedly improper conduct in connection with his representation of a remodeling contractor. Id., 72. In affirming the trial court's denial of the motion to open, our Supreme Court stated that the issues the defendant wanted to explore at the hearing "had occurred years before trial and were related to proceedings to which the defendant had complete access." Id., 108. Citing *Varley*, the court held that "the

defendant clearly had not exercised the requisite diligence in uncovering the purported malfeasance." Id.

In the present case, we are convinced that the trial court's finding that Wells Fargo had proven diligence is clearly erroneous. The court's determination improperly was supported by its finding that Wells Fargo, as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any mortgages executed and recorded thereafter. The fraud of which Wells Fargo complained occurred in April and May, 2008, when Rahman, in what the trial court described as "blatant acts of forgery," presented the fraudulent satisfaction to two lenders in an effort to obtain multiple mortgages on the property. More than nine years later, on June 2, 2017, Wells Fargo filed a motion to open the supplemental judgment in this action. During that nine year period, Wells Fargo itself was in the best position to discover Rahman's fraud but failed to exercise any diligence in attempting to do so.

In fact, the trial court took judicial notice of not one, but two foreclosure actions instituted by Wells Fargo or its predecessor with respect to the property. In the second foreclosure action, commenced in October, 2009, Bank of America's predecessor had filed a special defense alleging that the Wells Fargo note had been paid off *and attached the satisfaction*. After the filing of the special defense and satisfaction, Wells Fargo withdrew its complaint.[14] Accordingly, as of 2009, Wells

[14] In the 2009 action, Bank of America's predecessor filed a motion for nonsuit on the basis of Wells Fargo's failure to respond to its requests for production. Although that motion was granted, a later motion for an extension of time to respond to the requests for production was also granted. In its motion for a supplemental judgment, Bank of America maintained that Wells Fargo never produced any documents in response to its requests for production, which it represented sought documentation regarding the Wells Fargo mortgage and payment and release of that mortgage. It is not clear from the file what documents were sought by the requests for production and whether Wells Fargo ever responded to the requests. It is clear, however, that Wells Fargo ultimately withdrew its complaint in that action.

Fargo was aware of the existence of the satisfaction purporting to release its mortgage on the property, yet it did nothing to investigate the validity of the satisfaction for *eight years*.

We also reject the determination underlying the court's finding of diligence that Wells Fargo was entitled to notice of the supplemental judgment proceedings despite its default for failure to appear "in the first part of the foreclosure action." Our rules of practice do not require service of motions on nonappearing, defaulted parties. See Practice Book § 10-12 (a) ("[i]t is the responsibility of counsel or a self-represented party filing the same *to serve on each other party who has appeared* one copy of every pleading subsequent to the original complaint, every written motion other than one in which an order is sought ex parte and every paper relating to discovery, request, demand, claim, notice or similar paper" [emphasis added]).[15]

Moreover, Wells Fargo did not demonstrate how its access to information regarding the satisfaction was limited in any way during the present action. In fact, during the hearing on the motion to open, Wells Fargo declined to offer any evidence at all beyond the stipulation.[16] Had it appeared in the present action, it would

[15] In its motion for default for failure to appear, the plaintiff's counsel certified that a copy of the motion was delivered to Wells Fargo, and the notice granting the motion for default indicates that Wells Fargo was provided notice of that order. See Practice Book § 10-12 (b) ("[i]t shall be the responsibility of counsel or a self-represented party at the time of filing a motion for default for failure to appear to serve the party sought to be defaulted with a copy of the motion").

Practice Book § 10-12 (c) requires that "[a]ny pleading asserting new or additional claims for relief against parties who have not appeared or who have been defaulted shall be served on such parties." Wells Fargo has not provided us with any authority, and we are aware of no such authority, that such a rule requires service on a defaulted party of a motion for a supplemental judgment.

[16] With respect to why Wells Fargo failed to respond to the complaint in this action, its counsel stated during the hearing on the motion to open that "I know that we've tried to figure out with Wells Fargo to determine why— who did—why didn't they respond to the original complaint. And this hap-

have received notice of the supplemental judgment proceedings, including Bank of America's motion for a supplemental judgment, to which it attached the satisfaction, and its subsequent motion for reconsideration, which informed the court that the satisfaction had not been recorded on the land records.

Lastly, we note that counsel for Wells Fargo conceded during oral argument before this court that Wells Fargo discovered the fraud in 2017 upon a review of its own files. Wells Fargo's apparent failure to conduct such a review sooner, either by its predecessor during the pendency of the two foreclosure actions it initiated or during the course of the present action, repudiates any diligence in trying to uncover fraud. Accordingly, we conclude that the trial court's finding that Wells Fargo had satisfied *Varley*'s second factor of "diligence in the original action, that is, diligence in trying to discover and expose the fraud," is clearly erroneous.[17] Because

pened so long ago that we've—they simply say we have no idea why we weren't involved earlier."

[17] In one paragraph of its appellate brief, Wells Fargo claims that the supplemental judgment was procured by mutual mistake, arguing that "at the very least, both Wells Fargo and Bank of America were deceived by . . . Rahman's fraudulent satisfaction . . . which Bank of America ultimately submitted to the court." Bank of America responds that there is no evidence to support the claim that the supplemental judgment was based on a mutual mistake and argues that Wells Fargo failed to raise its claim of mutual mistake in the trial court. Although the trial court recognized Wells Fargo's claim as one of both fraud and mutual mistake, it did not make any finding as to mutual mistake.

"A mutual mistake is one that is common to both parties and effects a result that neither intended." (Internal quotation marks omitted.) *Davis* v. *Hebert*, 105 Conn. App. 736, 741, 939 A.2d 625 (2008). "[A] unilateral mistake will not be sufficient to open the judgment." (Internal quotation marks omitted.) *Richards* v. *Richards*, 78 Conn. App. 734, 740, 829 A.2d 60, cert. denied, 266 Conn. 922, 835 A.2d 473 (2003). We agree with Bank of America that there was no evidence before the court to support a finding that the supplemental judgment was procured by mutual mistake. Wells Fargo, having been defaulted, did not participate in the supplemental judgment proceedings, during which it now claims mutual mistake. Moreover, Bank of America acknowledged in its motion for reconsideration that the satisfaction had never been recorded on the land records. Because there was no finding of mutual mistake and, indeed, no evidence in the record to support any such finding, we reject Wells Fargo's claim.

Wells Fargo failed to satisfy the second *Varley* factor,[18] the court erred in opening the supplemental judgment on the basis of fraud beyond the four month time limitation.

II

Bank of America also claims that the court erred in opening the supplemental judgment because the judgment was not procured by any fraud on its part. We agree.

The conclusion underlying the trial court's opening of the supplemental judgment, that the fraudulent action of a defaulted party prior to the litigation at issue satisfies the exception to the four month limitation for judgments obtained by fraud, 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 as they appear in the record." (Internal quotation marks omitted.) *Saggese* v. *Beazley Co. Realtors*, 155 Conn. App. 734, 751, 109 A.3d 1043 (2015); see also *Rome* v. *Album*, 73 Conn. App. 103, 108, 807 A.2d 1017 (2002) (plaintiff's challenge to court's general authority under § 52-212a to grant defendant's motion presents question of statutory construction over which review is plenary).

In response to Bank of America's claim of error, Wells Fargo has not provided this court with any authority to support the conclusion that fraud committed by a *defaulted* party years prior to litigation can support the opening of a judgment following the expiration of the four month period. Cf. *Grayson* v. *Grayson*, 4 Conn. App. 275, 296, 494 A.2d 576 (1985) ("[w]here . . . a

[18] Because we conclude that Wells Fargo failed to satisfy the second *Varley* factor, we need not consider the remaining factors. See *Turner* v. *Commissioner of Correction*, supra, 163 Conn. App. 565.

clear case is made under applicable law that a fraudulent and material misrepresentation *by one party* resulted in a substantial injustice to *the other party*, we must not hesitate to act" [emphasis added; internal quotation marks omitted]), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987). Although not binding on this court, we find instructive rule 60 (b) of the Federal Rules of Civil Procedure, which provides in relevant part that "the court may relieve a party or its legal representative from a final judgment . . . for the following reasons . . . fraud . . . misrepresentation, or misconduct *by an opposing party* . . . ." (Emphasis added.) Under rule 60 (b) (3) of the Federal Rules of Civil Procedure, "the movant must show that such fraud prevented him or her from fully and fairly presenting his or her case, and that the fraud is attributable to the party or, at least, to counsel." (Internal quotation marks omitted.) *L.I. Head Start Child Development Services, Inc.* v. *Economic Opportunity Commission of Nassau County, Inc.*, 956 F. Supp. 2d 402, 410 (E.D.N.Y. 2013).

Although Rahman was named as a defendant in this action, he never appeared before the trial court and was defaulted for failure to appear on November 7, 2012. He did not oppose, nor did he participate in, the supplemental judgment proceedings. His fraudulent actions did not occur during the course of this action. Cf. *Turner* v. *Commissioner of Correction*, supra, 163 Conn. App. 564 ("[t]o have a judgment set aside on the basis of fraud *which occurred during the course of the trial* upon a subject on which both parties presented evidence is especially difficult" [emphasis added; internal quotation marks omitted]). Moreover, Wells Fargo stipulated that both it and Bank of America "are unaware of any evidence that Bank of America acted fraudulently with regard to the entry of the supplemental judgment in this action." See *Sousa* v. *Sousa*, supra, 173 Conn. App. 772 (recognizing that "the defendant's

failure to establish the plaintiff's knowledge of the alleged misrepresentation is dispositive of the defendant's fraud claim").

In fact, we note that the circumstances surrounding the supplemental judgment belie the conclusion that the supplemental judgment was "obtained by fraud." After initially rejecting Bank of America's motion for a supplemental judgment on the basis of its failure to provide verification of the release of the Wells Fargo mortgage, the court ultimately granted that motion after being informed by Bank of America in its motion for reconsideration that the satisfaction had never been recorded on the land records. The court apparently was persuaded by Bank of America's argument that the court should not hold the remaining sale proceeds indefinitely, given Wells Fargo's default and failure to file any claim to the sale proceeds.

Accordingly, we agree with Bank of America that the supplemental judgment was not "obtained by fraud," where the only claimed fraudulent conduct was committed by Rahman years prior to the present litigation during which he was defaulted and did not participate. Thus, the court lacked authority to open the supplemental judgment more than four months after it was rendered.

The judgment is reversed and the case is remanded with direction to deny the motion to open the supplemental judgment.

In this opinion the other judges concurred.

DE ANN MAURICE *v.* CHESTER HOUSING ASSOCIATES LIMITED PARTNERSHIP ET AL. (AC 41741)

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

Syllabus

The plaintiff in error, W, a general and managing partner of the named defendant in the underlying action, brought this writ of error to challenge the trial court's imposition of sanctions against him for bad faith litigation misconduct. During the course of the underlying litigation, W sent an inappropriate e-mail of a harassing nature to R, counsel for the defendant in error. R reported the incident to the police, who warned W not to contact R again, and, for the next year, the underlying action proceeded toward trial. Immediately before opening statements were to begin, W, while standing outside the courtroom, made an inappropriate comment of a sexual nature about R that was loud enough to be heard by R and others present. Immediately thereafter, R made an oral motion for sanctions. Following a hearing, the court granted the motion, concluding that W's conduct was in bad faith and was intended to harass R in order to gain an advantage in the litigation, and awarded to the defendant in error attorney's fees in an undetermined amount, to be decided after a motion for attorney's fees was filed and a hearing held. On W's appeal to this court, *held*:

1. W could not prevail on his claim that the trial court exceeded the scope of its authority by awarding attorney's fees against him as a nonparty for his out-of-court conduct; it is well established that a trial court has the inherent authority to impose sanctions, including the award of attorney's fees, for both in-court and out-of-court conduct that abuses the judicial process, and although W was not a party to the underlying action, the trial court had the inherent power to sanction W for his bad faith litigation misconduct as a real party in interest, as W, being a general and managing partner of the named defendant in the underlying action, had a substantial interest in the outcome of the litigation and had substantially participated in the underlying proceedings, such that the award of attorney's fees against him for his out-of-court bad faith litigation misconduct was proper.
2. The trial court did not abuse its discretion in awarding attorney's fees as a sanction against W for his out-of-court conduct; contrary to W's claim, the trial court was not required to find that W's bad faith conduct had an effect on the outcome of the litigation in order to award attorney's fees, and given that W did not contest the court's factual finding that his conduct was intended to threaten, harass and intimidate R to gain an advantage in the litigation, that no exact award had yet been given

and that any such award may be appealed, it was not an abuse of discretion for the trial court to determine that an award of attorney's fees was an appropriate sanction against W in this case for W's bad faith litigation misconduct.

Argued November 26, 2018–officially released February 26, 2019

Procedural History

Writ of error from the order of the Superior Court in the judicial district of New London, *Vacchelli, J.*, granting the defendant's motion for sanctions, brought to the Supreme Court, which transferred the matter to this court. *Writ of error dismissed.*

Michael P. Carey, with whom, on the brief, was *Daniel L. King*, for the plaintiff in error (Douglas Williams).

Kelly E. Reardon, for the defendant in error (De Ann Maurice).

Opinion

LAVINE, J. The plaintiff in error, Douglas Williams, brings this writ of error after the trial court sanctioned him for bad faith litigation misconduct and determined that, following further proceedings, attorney's fees shall be awarded to the defendant in error, De Ann Maurice. In his writ, he claims that (1) the trial court acted outside of the scope of its authority and (2) even if the court had such authority, it abused its discretion by determining that an award of attorney's fees was an appropriate sanction against him for out-of-court conduct when he was not a party to the underlying matter. We dismiss the writ of error.

The following facts and procedural history are relevant to Williams' claims. The underlying action was a premises liability case brought in January, 2015, by the defendant in error against the defendants, Chester Housing Associates Limited Partnership (partnership), MJKH Property Services, LLC, and Something Natural, LLC, which resulted in a verdict for the defendants. Williams is a general partner and the managing partner

in the partnership but was not a defendant in the underlying matter. On January 15, 2016, at 11:02 p.m., Williams sent an inappropriate e-mail to the defendant in error's counsel, Kelly E. Reardon.[1] After receiving the e-mail, Reardon reported it to the police, who warned Williams not to contact Reardon again. For the next year, the litigation proceeded toward trial.

On April 27, 2017, while Reardon and others were standing in a hallway outside the courtroom immediately before opening statements were to begin, Williams stated to an unidentified individual, loud enough to be heard by those present, that he wanted Reardon to "sit on his fucking head." Shortly thereafter, Reardon reported to the court what had transpired and made an oral motion for sanctions. The court immediately held a hearing on the motion for sanctions,[2] which continued on May 3, 2017,[3] delaying the start of trial. On May 3, 2017, after the hearing, the court granted the motion and awarded the defendant in error attorney's

[1] The e-mail stated:

"Welcome to my web said the spider to the fly. Am I the fly or are you? I think I'm the fly. Fa[ir] enough! What would [you] like? What would you want me to do lie? I love women like you because you young girls have a direction that is 250% of what America is . . . about.

"Would you like to meet for coffee? Gee never had that one? Call if you want . . . . The people in the case are not very nice people. This is not for just shits and giggles. Coffee would be great! I have nothing against your people. I think [you're] great. [It's] just coffee. Have to [drive] 75 miles just to [en]joy a cup.

"Guess who is stupid? Me ok! You make my wheels turn. You are one sharp [woman]. Bet [you're] on top of your game. Did some MF say ATTORNEY. Call me to help me please.

"Thank you.

"[B]eauty is in the eye of me, [o]h ya.

"Not suppose to say this stuff so I will not say [you're] a fox!!!! But you are. You asked me to call you and you didn't give me your cell.

"Old Goat . . . ."

[2] The motion was not based on a claim of criminal or civil contempt.

[3] Williams was represented by counsel at the May 3, 2017 hearing.

fees in an undetermined amount, to be decided after a motion for attorney's fees was filed and a hearing held.[4]

In its oral decision, the trial court found that the purpose of Williams' e-mail "was obviously to threaten [Reardon], harass her, intimidate her, which the court believes was done for the purposes of getting some advantage in the case, to rattle her so that she'd do a poor job in representing her client, to scare her to get her to drop the case." As to the statement made in the hallway, the court found that "considering the context and the purpose, which was essentially a sexual harassment of [Reardon] to try to scare her and rattle her, and obviously had that exact effect because during the April 27 hearing when the motion was made, . . . Reardon was obviously very upset, almost in tears, and so he accomplished his purpose to try to knock her off her ability to proceed in the case, and to cause her distress for a litigation advantage." The court concluded that "these tactics were without any color of propriety and they were taken in bad faith . . . ." These factual findings are not contested.

On January 31, 2018, Williams filed a writ of error with our Supreme Court, which transferred it to this court on June 5, 2018.[5]

[4] We note that although the e-mail was brought up in the evidentiary hearing and discussed in the court's ruling, it was Williams' statement immediately outside of the courtroom that precipitated the motion for sanctions, not the e-mail, which was received more than a year beforehand.

[5] The writ of error was properly filed in the Supreme Court. See General Statutes § 51-199 (b) (10) (writs of error to be brought to Supreme Court); Practice Book § 72-1 (1) (a) (same). While the writ of error was pending before the Supreme Court, the defendant in error, De Ann Maurice, filed a motion to dismiss the writ, claiming that the Supreme Court lacked jurisdiction over it because the trial court did not render a final judgment when, on May 3, 2017, it ordered that Williams be sanctioned and that there be further proceedings to determine the amount of the concomitant award of attorney's fees. See Practice Book § 72-1 (a) (writ of error may be brought "from a final judgment of the [S]uperior [C]ourt"). The Supreme Court denied the motion to dismiss and subsequently transferred the writ of error to this court. See General Statutes § 51-199 (c) (Supreme Court may transfer cause from itself to Appellate Court).

I

Williams, asserting that his conduct did not occur in the courtroom itself or in the court's presence, first claims that the trial court exceeded the scope of its authority by awarding attorney's fees for out-of-court conduct by a nonparty. Specifically, he argues that the inherent power of the judiciary does not allow for the sanctioning of nonparties for out-of-court conduct. We disagree.

As a threshold matter, we address the standard of review. In the present case, the issue before us is whether the trial court properly determined that it had the inherent authority to impose sanctions for bad faith litigation misconduct against Williams. "Because this presents a question of law, our review is plenary." *Burton* v. *Mottolese*, 267 Conn. 1, 25, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

"It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice

On September 4, 2018, prior to oral argument of this case before this court, our Supreme Court released its decision in *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 191 A.3d 983 (2018). In *Ledyard*, the Supreme Court ruled that the Appellate Court wrongly dismissed, for lack of a final judgment, an appeal taken from a judgment that determined only that the defendant was liable for attorney's fees. The Supreme Court ruled that the trial court's determination that the defendant was liable for attorney's fees was an appealable final judgment, despite the fact that the amount of those fees had not yet been determined. The Supreme Court found that, in dismissing the appeal, the Appellate Court had wrongly relied on a footnote in *Paranteau* v. *DeVita*, 208 Conn. 515, 524 n.11, 544 A.2d 634 (1988), for the proposition that a trial court does not render a final judgment as to attorney's fees until it conclusively determines the amount of those fees. The Supreme Court held that the language in *Paranteau* applies only to "supplemental postjudgment awards of attorney's fees." *Ledyard* v. *WMS Gaming, Inc.*, supra, 90.

Here, the order that Williams be sanctioned and that he pay attorney's fees is a final judgment under *Ledyard*—notwithstanding the fact that the trial court has yet to determine the amount of those fees—because it does not constitute a supplemental postjudgment award of attorney's fees.

from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . . For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. . . . These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. . . .

"[I]t is firmly established that [t]he power to punish for contempts is inherent in all courts. . . . This power reaches both conduct before the court and that beyond the court's confines, for [t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial. . . .

"Because of their very potency, inherent powers must be exercised with restraint and discretion. . . . A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . . . [O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the court's discretion. . . . Consequently, the less severe sanction of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." (Citations omitted; internal quotation marks omitted.) *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43–45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

"As a substantive matter, [t]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable

[attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 844, 850 A.2d 133 (2004).

It is well settled that this bad faith exception applies both to counsel and parties. Id., 845. Williams argues that this exception, however, does not extend to nonparties under any circumstance. We are unpersuaded. Such a bright line approach that focuses only on the distinction between party and nonparty fails to take into account factual circumstances and situations in which a nonparty who has a close relationship with the litigation could, in bad faith, abuse the judicial process to the same degree and effect as a party and interfere with the orderly functioning of the court. Notably, the United States Supreme Court could have made such a bright line rule between parties and nonparties when it upheld sanctions against a person for his fraudulent and bad faith conduct before and after he became a party, but it chose not to do so.[6] See *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 36–37, 50–51 (order requiring sole shareholder of company operating television station to pay attorney's fees and expenses totaling almost $1 million upheld as inherent power of court). Yet, the inherent power of the judiciary is not absolute and is subject to limitations to protect against abuse

[6] Our Supreme Court also declined to make such a ruling in *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 523–25, 803 A.2d 311 (2002), in which the plaintiff in error brought a writ of error after the court sanctioned the insurer of the defendant in the underlying motor vehicle action for not increasing its settlement offer in a pretrial conference. Although the case did not involve sanctions pursuant to the court's inherent powers, the plaintiff in error similarly claimed that "the trial court's order of sanctions against it [was] void because it [was] not a party to the underlying action . . . ." Id., 523. Our Supreme Court, however, did not rule that sanctions could not be levied against a nonparty and, instead, reversed the order of sanctions on another ground. Id.

or unduly harsh punishment. Id., 44–47. To that end, we find persuasive the reasoning in *Helmac Products Corp.* v. *Roth (Plastics) Corp.*, 150 F.R.D. 563 (E.D. Mich. 1993) (*Helmac*), and adopt the test articulated therein.

In *Helmac*, the federal district court considered whether sanctions were proper against a nonparty corporate officer who was responsible for the destruction of documents that were responsive to a discovery request. Id., 564. In analyzing the issue, the court noted that "in the absence of the bright-line party—non-party distinction . . . courts must adopt a new boundary to limit the imposition of sanctions." Id., 566. The court reasoned that "the Court's power to sanction cannot possibly extend to everyone who interferes with litigation before the court," otherwise "the power to sanction would be so wide that it would be unenforceable." Id., 567. The court found, however, that in certain situations, the courts "should also have the power to sanction [a] corporate officer." Id., 568.

The court stated that "[t]he reasons for doing so are plain: the individual [can be] as much involved in the litigation as any party would be, and his participation in [certain conduct can be] tantamount to a direct snubbing of the Court's authority by that individual. In some circumstances, a corporate entity may have depleted assets, and an individual may avoid the penalty for his actions by hiding behind the corporate veil. This avoidance is not warranted. Logically, it seems incongruous for the Court not to be able to impose a penalty upon the individual." Id. The court concluded that "a rigorous application of a two-part test will provide the least possible power adequate to the end proposed. . . . To be subject to the Court's inherent power to sanction, a non-party not subject to court order must (1) have a substantial interest in the outcome of the litigation and (2) substantially participate in the proceedings in which he interfered. This test . . . effectively limit[s] the scope of the Court's inherent power

to sanction to those individuals who were either (1) parties, (2) subject to a court order, or (3) real parties in interest."[7] (Citations omitted; internal quotation marks omitted.) Id.

Applying the *Helmac* test to the facts of the present case, we conclude that the court had the inherent power to sanction Williams for his bad faith litigation misconduct as a real party in interest. Williams is a general partner and the managing partner of the partnership and, thus, had a substantial interest in the outcome of the litigation and had substantially participated in the proceedings.[8] It follows, therefore, that the court had the inherent power to sanction him for out-of-court bad faith litigation misconduct and award attorney's fees, as the court's inherent power "reaches both conduct before the court and that beyond the court's confines," and "an assessment of attorney's fees is undoubtedly

[7] This test has been applied in cases such as *In re White*, United States District Court, Docket No. 2:07CV342 (MSD), 2013 WL 5295652, *70 (E.D. Va. September 13, 2013) (nonparty who filed motion to quash had sufficient interest and participation in litigation to be subject to court's inherent power; sanctions for blog postings, however, were unwarranted as postings were "protected speech, beyond the confines of the Court, that did not apparently interfere with the administration of justice"); *Adell Broadcasting Corp.* v. *Ehrlich*, Docket Nos. 299061 and 299966, 2012 WL 468258, *9–10 (Mich. App. February 14, 2012) (president and director of companies who filed complaint on their behalf had sufficient interest and participation in litigation to be subject to court's inherent power; court erred by imposing sanctions without giving notice and opportunity to be heard); and *In re VIII South Michigan Associates*, 175 B.R. 976, 984 (Bankr. N.D. Ill. 1994) (nonparty expert witness did not have substantial interest or participation in proceedings to be subject to court's inherent authority under *Helmac*).

[8] Williams was deposed twice, acted as the representative of the partnership throughout the legal proceedings, and sat at counsel table prior to the imposition of an additional sanction that required him to sit in the back of the courtroom. Notably, in the initial hearing on sanctions, the partnership's counsel acknowledged that Williams was a real party in interest, as he argued that Williams *was* a party. He stated: "[The plaintiff in error] is a party, Your Honor, and until this is resolved I—I don't think Your Honor can remove him from the courtroom where he has been—his business has been sued. He is a party. . . . [h]e's the sole representative of the party."

within a court's inherent power . . . ." *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 44–45. We, therefore, conclude that it is within the court's inherent authority to award attorney's fees against Williams for his out-of-court bad faith litigation misconduct.[9]

II

Williams' second claim is that even if the court's inherent powers include the imposition of a sanction on a nonparty for bad faith litigation misconduct, the trial court abused its discretion by authorizing an award of attorney's fees as a sanction against him for out-of-court conduct. Specifically, Williams argues that the sanction was an abuse of discretion, as there was no evidence or allegation that his conduct affected the outcome of the litigation.[10] We disagree.

"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

[9] This conclusion is further supported by *Corder* v. *Howard Johnson & Co.*, 53 F.3d 225, 232 (9th Cir. 1994), in which the United States Court of Appeals for the Ninth Circuit concluded that "a court may impose attorney's fees against a non-party as an exercise of the court's inherent power to impose sanctions to curb abusive litigation practices."

[10] Reardon first suggested a $10,000 fine against Williams at the April 27 hearing, which was followed by attorney Robert Reardon, who represented Kelly Reardon and the defendant in error at the May 3 hearing, urging that the court enter a default judgment against the defendant partnership on the issue of liability or impose a $50,000 fine. The trial court, noting that the proceeding was for litigation misconduct and doubting that it had the authority to issue a fine, decided that an award of attorney's fees was appropriate. In her June 1, 2017 motion for attorney's fees, the defendant in error requested fees in the amount of $37,051.50.

of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 815, 43 A.3d 567 (2012).

"[S]ubject to certain limitations, a trial court in this state has the inherent authority to impose sanctions . . . for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated. . . .

"It is generally accepted that the court has the inherent authority to assess attorney's fees when the . . . party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . Moreover, the trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 844–45.

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle." *Berzins* v. *Berzins*, 306 Conn. 651, 662, 51 A.3d 941 (2012). "To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . ." (Internal quotation marks omitted.)

Maris v. *McGrath*, supra, 269 Conn. 845. Thus, "in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, supra, 663.

As an initial matter, we note that Williams does not contest the court's factual findings that his conduct was intended to "threaten [Reardon], harass her, intimidate her . . . for the purposes of getting some advantage in the case, to rattle her so that she'd do a poor job in representing her client . . . to cause her distress for a litigation advantage" and that "these tactics were without any color of propriety and they were taken in bad faith . . . ." Therefore, the question of whether Williams' conduct was properly deemed litigation misconduct is not before this court. Rather, Williams claims that the court abused its discretion by authorizing an award of attorney's fees against him and focuses his argument on the fact that he is a nonparty and was sanctioned for out-of-court conduct.

Williams appears to argue that the trial court's abuse of discretion lies in the absence of a finding of an *effect* on the outcome of litigation. In doing so, he misconstrues the findings needed for the bad faith exception to apply. Although the court must find that the sanctioned conduct was "entirely without color" and was done "for reasons of harassment or delay or for other improper purposes," it does not need to make a finding that the conduct had an effect on the outcome of the case. *Maris* v. *McGrath*, supra, 269 Conn. 845.

Williams also argues that the court abused its discretion by extending sanctions to cover his conduct when the court should only award such sanctions with restraint and discretion. He argues that "[s]anctions for

bad faith litigation have been consistently and historically applied based on meritless pleadings; [wilful] violations of court orders; and filings causing harassment or delay," and he attempts to distinguish his conduct by stating that "the specific focus for bad faith litigation is on litigation tactics," rather than out-of-court conduct. Although we agree that historically, bad faith litigation sanctions have been applied to situations that differ from the present case, this argument fails to take into account that the conduct under consideration here is highly atypical and flies in the face of "the decorum and respect inherent in the concept of courts and judicial proceedings." *Illinois* v. *Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).[11] Most detrimental to Williams' argument, however, is the fact that he does not raise as an issue the court's factual finding that his actions constituted bad faith litigation misconduct. As the court found that Williams' conduct was intended to harass Reardon in order to gain a litigation advantage, a finding that is left unchallenged by Williams, we see

[11] Although the United States Supreme Court in *Illinois* v. *Allen*, supra, 397 U.S. 343, held that a self-represented defendant's expulsion from a courtroom for disruptive conduct did not violate his constitutional rights, the reasoning of the Supreme Court as to the requisite decorum of judicial proceedings holds true here.

"It is essential to the proper administration of . . . justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with [improper conduct] must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." Id., 343. "[O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity." Id., 346.

With this same reasoning, Williams' argument that his conduct was protected by the first amendment to the United States constitution fails. See *United States* v. *Grace*, 461 U.S. 171, 178, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (court building and grounds, excluding the public sidewalks, are nonpublic forums "not . . . traditionally held open for the use of the public for expressive activities" and restrictions must only be "reasonable in light of the use to which the building and grounds are dedicated").

no reason to conclude that a litigation sanction in the form of an award of attorney's fees was a manifest abuse of discretion. In the case of imposing attorney's fees for bad faith litigation misconduct, a court has the "inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his [or her] opponent's obstinacy." (Internal quotation marks omitted.) *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 46.

In that same vein, we emphasize that the court should indeed exercise restraint and discretion in awarding attorney's fees, given the potential for abuse when a court relies on its "inherent authority," carefully scrutinize the documentation submitted in support of the fee request, and award only reasonable attorney's fees directly resulting from the misconduct. See id., 44.[12]

"[The United States Supreme Court] has made clear that such a sanction [of attorney's fees pursuant to a court's inherent powers] must be compensatory rather than punitive in nature. . . . In other words, the fee award may go no further than to redress the wronged

[12] An award of attorney's fees should be awarded in proportion to the harm and additional expense that occurred as a result of the sanctioned conduct. In *Maris*, our Supreme Court upheld an award of attorney's fees in the amount of $15,218.86, against a party who, in bad faith, brought meritless claims and repeatedly gave false testimony, leading to the trial court's conclusion that there was only one good faith litigant. *Maris* v. *McGrath*, supra, 269 Conn. 842–43.

In *Chambers*, the United States Supreme Court upheld an award of attorney's fees and expenses totaling $996,644.65 as G. Russell Chambers, the sanctioned individual, not only sought to deprive the court of jurisdiction by conveying the properties at issue into a trust but "devise[d] a plan of obstruction, delay, harassment, and expense sufficient to reduce [his opponent] to a condition of exhausted compliance . . . ." *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 37–41.

In the present case, Williams' statement and conduct outside of the courtroom resulted in the additional expense of a two day hearing. We caution the court to limit an award to *reasonable* attorney's fees that is proportional to the harm and expense caused by Williams' actions.

party for losses sustained; it may not impose an additional amount as punishment for the sanctioned party's misbehavior. . . .

"That means, pretty much by definition, that the court can shift only those attorney's fees incurred because of the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong. So . . . a sanction counts as compensatory only if it is calibrate[d] to [the] damages caused by the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. But if an award extends further than that—to fees that would have been incurred without the misconduct—then it crosses the boundary from compensation to punishment. Hence the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party.

"That kind of causal connection . . . is appropriately framed as a but-for test: The complaining party . . . may recover only the portion of his fees that he would not have paid but for the misconduct. . . .

"This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses—yet still allows it to exercise discretion and judgment." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Goodyear Tire & Rubber Co.* v. *Haeger*, U.S. , 137 S. Ct. 1178, 1186–87, 197 L. Ed. 2d 585 (2017).

"The essential goal in making a remedial award is to do rough justice, not to achieve auditing perfection, and, thus, the award may be based on reasonable estimations of the harm caused and the trial court's own superior understanding of the litigation . . . . The trial court's discretion, however, is not limitless. If the court elects to provide a remedial award, then the value of the award may not exceed the *reasonable value* of the

injured party's losses. . . . Although a trial court may choose to award less under the circumstances of a particular case, a decision to order an award greater than the party's loss would exceed the award's remedial purpose." (Citations omitted; emphasis added; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 104–105, 161 A.3d 1236 (2017).

Without a precise monetary award of attorney's fees to review, we cannot conclude that an award of *reasonable* attorney's fees would be an abuse of discretion.[13] An award of attorney's fees disproportionate to the harm caused by Williams' conduct, or based on excessive amounts of time expended on preparation or research, however, *would* abuse that discretion. Given that no exact award has yet been given and that any such award may be appealed, we conclude that the trial court did not abuse its discretion in determining that an award of attorney's fees is an appropriate sanction against Williams in this case.

The writ of error is dismissed.

In this opinion the other judges concurred.

TOWN OF CANTON *v.* CADLE PROPERTIES OF CONNECTICUT, INC.
(AC 40484)

Keller, Prescott and Pellegrino, Js.

Syllabus

The plaintiff town filed a petition for the appointment of a receiver of rents, alleging that the defendant had failed to pay real property taxes on certain of its property. After the trial court granted that motion, the intervening defendant, M Co., the current tenant of the subject property,

[13] We note that the record is bereft of any indication that Reardon was unable to take part in the trial. The record nonetheless reflects that Williams' statement did interfere with the trial and occasioned additional legal fees because it so upset Reardon and required an immediate judicial response and a hearing, which delayed the start of trial from April 27, 2017, until May 4, 2017.

filed a motion to remove the receiver, claiming, inter alia, that the receiver had exceeded its authority under statute (§ 12-163a) by serving it with a notice to quit and by bringing an action to collect back taxes and prior rents. M Co. appealed from the trial court's ruling denying its motion, and, following a remand, the receiver filed an interim accounting and moved the trial court to approve that accounting and its previous disbursal of funds. M Co. objected on the ground that the accounting submitted indicated that the receiver had failed to comply with the order of priorities for distributions under § 12-163a, which requires the receiver to pay the costs for utilities due on and after its appointment. The trial court approved an updated interim accounting and overruled M Co.'s objection, and M Co. appealed to this court. On appeal, M Co. claimed, inter alia, that a plain reading of § 12-163a does not limit the required, enumerated utility payments to those obligated to be paid by the owner of the property and, thus, that the trial court should not have approved the updated interim accounting because the receiver did not reimburse M Co. for its utility expenditures. *Held* that the trial court properly determined that, pursuant to § 12-163a, the receiver is mandated to pay only utility bills that are the obligation of the owner, not those incurred by tenants of the property: a literal adherence to the text of § 12-163a was unworkable in the present circumstances because an interpretation of the statute that relieves tenants of an obligation to pay for their own utility expenses and places the burden on the receiver appointed under § 12-163a will likely lead to considerably less money to satisfy delinquent taxes and, where necessary, the fees and costs of the receiver, thereby defeating the primary purpose of the receivership; moreover, where, as here, the plain meaning of the statutory text yields an unworkable result, courts may look for interpretive guidance to extratextual evidence, including the legislative history of § 12-163a, which indicated that it was enacted in order to give municipalities the same tools and authority to collect delinquent taxes that the legislature gave to utility companies pursuant to statute (§ 16-262f), and, thus, because, under § 16-262f, the legislature did not intend that a receiver acting on behalf of a utility pay utility expenses for which the owner had not been directly billed, it could be inferred that, in enacting § 12-163a, the legislature did not intend that a receiver acting on behalf of a municipality seeking delinquent taxes owed by the owner bore the burden of providing all of the occupants of the property with free utilities when, prior to the appointment of the receiver, those occupants had been paying their own utility bills; furthermore, common sense dictated that a statutory procedure designed to assist financially pressed municipalities with recoupment of delinquent taxes from property owners should not have its effectiveness diminished by an impractical interpretation that would give tenants the unexpected gift of free utilities by making a receiver responsible, not just for the owner's unpaid utility bills, but also for payment of each and every tenant's utility bills, and M Co.'s interpretation

of § 12-163a was further undermined by the fact that, in certain instances, it would jeopardize the receiver's ability to continue to collect any rental income at subject properties.

Argued November 13, 2018—officially released February 26, 2019

Procedural History

Petition for the appointment of a receiver of rents, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Graham, J.*; judgment granting the petition and appointing Boardwalk Realty Associates, LLC, as receiver of rents; thereafter, the court granted the receiver's motion to modify the order of appointment and granted the motion to intervene as a party defendant filed by M & S Associates, LLC; subsequently, the court denied the intervening defendant's motion to remove the receiver, and the intervening defendant appealed to this court, which reversed in part the trial court's judgment and remanded the case with direction to deny the receiver's motion to modify the receivership orders, and the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment in part and remanded the case to this court with direction to affirm the judgment of the trial court granting the receiver's motion for modification allowing the collection of back rent allegedly due; thereafter, the court, *Scholl, J.*, granted the receiver's motion to approve its interim accounting report and to disburse funds, and the intervening defendant appealed to this court. *Affirmed.*

Eric H. Rothauser, for the appellant (intervening defendant).

Logan A. Carducci, with whom were *Daniel J. Krisch* and, on the brief, *Kenneth R. Slater, Jr.*, for the appellee (plaintiff).

Opinion

KELLER, J. On April 26, 2011, the plaintiff, the town of Canton (town), filed a petition for an appointment of a receiver of rents after the named defendant, Cadle Properties of Connecticut, Inc. (Cadle), failed to pay

property taxes on real property it owns at 51 Albany Turnpike in Canton. The court granted the petition on June 20, 2011. In this appeal, the intervening defendant, M & S Associates, LLC, which currently occupies the subject property, appeals from the trial court's post-judgment order approving an interim accounting filed by the receiver of rents, Boardwalk Realty Associates, LLC (receiver).[1] The defendant claims that the trial court erred in granting the receiver's motion for approval of the interim accounting by misconstruing General Statutes § 12-163a[2] and finding that the receiver

[1] Both the named defendant, Cadle, which did not appear in the trial court, and the receiver are not participating in this appeal. This appeal addresses only the claim of error raised by M & S Associates, LLC, relating to the trial court's approval of the receiver's accounting. In this opinion, we refer to M & S Associates, LLC, as the defendant.

[2] General Statutes § 12-163a provides in pertinent part: "(a) Any municipality may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy for any property for which the owner, agent, lessor or manager is delinquent in the payment of real property taxes. The court or judge shall forthwith issue an order to show cause why a receiver should not be appointed, which shall be served upon the owner, agent, lessor, manager, mortgagees, assignees of rent and other parties with an interest in the rents or payments for use and occupancy of the property in a manner most reasonably calculated to give notice to such owner, lessor, manager, mortgagees, assignees of rent and other parties with an interest in the rents or payments for use and occupancy of the property as determined by such court or judge, including, but not limited to, a posting of such order on the premises in question. A hearing shall be had on such order no later than seventy-two hours after its issuance or the first court day thereafter. The sole purpose of such a hearing shall be to determine whether there is an amount due and owing between the owner, agent, lessor or manager and the municipality. The court shall make a determination of any amount due and owing and any amount so determined shall constitute a lien upon the real property of such owner. A certificate of such amount may be recorded in the land records of the town in which such property is located describing the amount of the lien and the name of the party who owes the taxes. When the amount due and owing has been paid, the municipality shall issue a certificate discharging the lien and shall file the certificate in the land records of the town in which such lien was recorded. The receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager. The receiver shall make payments from such rents or payments for use and occupancy, first for taxes due on and after the date of his appointment and then for electric, gas, telephone, water or heating oil supplied on and after

is not required to pay, from the date of the receiver's appointment, the defendant's utility costs at the subject property. We disagree.

In a prior appeal, our Supreme Court set forth the following undisputed facts and procedural history, all of which are relevant to the present appeal:[3] "[Cadle] . . . is the owner of real property in Canton . . . . After Cadle effectively abandoned the property, which is . . . environmentally contaminated[4] . . . the town . . . filed a petition seeking the appointment of a receiver of rents pursuant to § 12-163a. The petition

such date. The owner, agent, lessor or manager shall be liable for such reasonable fees and costs determined by the court to be due the receiver, which fees and costs may be recovered from the rents or payments for use and occupancy under the control of the receiver, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made. The owner, agent, lessor or manager shall be liable to the petitioner for reasonable attorney's fees and costs incurred by the petitioner, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made and after payments of reasonable fees and costs to the receiver. Any moneys remaining thereafter shall be used to pay the delinquent real property taxes and any money remaining thereafter shall be paid to such parties as the court may direct after notice to the parties with an interest in the rent or payment for use and occupancy of the property and after a hearing. The court may order an accounting to be made at such times as it determines to be just, reasonable and necessary. . . ."

[3] In the defendant's prior appeal, our Supreme Court considered the issue of whether § 12-163a authorizes a receiver (1) to evict a tenant from the property in the event of a default; (2) to lease the property to a new tenant; and (3) to use legal process to collect back rent allegedly due. *Canton* v. *Cadle Properties of Connecticut, Inc.*, 316 Conn. 851, 853, 114 A.3d 1191 (2015). Our Supreme Court concluded that the statute does authorize a receiver to use legal process to collect back rent allegedly due prior to the date of the receiver's appointment, but that neither the eviction of a tenant nor the leasing of the property to a new tenant fall within the scope of a receiver's authority. Id.

[4] On December 4, 2000, in a related case, the trial court, *Rubinow, J.*, ordered Cadle to comply with a pollution abatement order of the Department of Environmental Protection to address contaminated soil and groundwater and assessed a civil penalty in the amount of $2,143,000 against Cadle. *Holbrook* v. *Cadle Properties of Connecticut, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-97-0567429-S (December 4, 2000) (29 Conn. L. Rptr. 167).

alleged that Cadle had failed to pay real property taxes due to the town in the amount of $362,788.59, plus interest and lien penalties, for a total amount due of $884,263.04.[5] The petition further alleged that, during all relevant periods, the property was occupied by a Volkswagen dealership owned by [the defendant], which had a legal obligation to pay rent to Cadle. The court, having found that Cadle owed the town taxes . . . granted the petition to appoint the receiver, and issued orders authorizing the receiver to collect all rents or use and occupancy payments due with respect to the property.

"After the receiver served the [defendant] with a notice to quit possession of the property on the ground of nonpayment of rent, the [defendant] filed a motion to intervene in the town's action against Cadle in order to challenge the receiver's authority to take legal action against it. Shortly thereafter, the receiver filed a motion to modify the receivership order to authorize it to pursue an eviction of the [defendant] in the event of nonpayment of rent, to lease the property to a new tenant, and to use all legal process to collect back rent. Prior to acting on the [defendant's] pending motion to intervene, the court granted the receiver's motion to modify without objection.

"Subsequently, the trial court granted the [defendant's] motion to intervene in the action. The [defendant] then filed a motion to remove the receiver, asserting, inter alia, that the receiver had exceeded its authority under § 12-163a by serving it with a notice to quit and by bringing an action to collect back taxes and prior rents. The court denied the motion for removal . . . ." (Footnotes added and omitted.) *Canton* v. *Cadle*

[5] The petition was filed on April 26, 2011. On May 12, 2017, the town filed a report with the trial court indicating that the amount of real estate taxes due and owing for the period from June 23, 2011, the date the receiver was appointed, to April 25, 2017, including interest and lien fees, was $208,731.43.

Properties of Connecticut, Inc., 316 Conn. 851, 854–55, 114 A.3d 1191 (2015). The defendant appealed from the court's denial of its motion for removal. As noted previously, the defendant, in part, prevailed in its appeal because our Supreme Court ruled that the receiver only had authority under the statute "to use legal process to collect past due rent . . . ." Id., 862. The case was remanded to this court with direction to affirm the trial court's judgment with respect to its conclusion that the receiver has the authority to use legal process to collect past due rent. Id., 853, 863.

On March 3, 2017, the receiver filed an interim accounting, and moved the trial court to approve said accounting and its previous disbursal of funds. In relevant part, the defendant objected on the ground that the accounting submitted indicated that the receiver had failed to comply with the order of priorities for distributions under § 12-163a, in that "[t]here is no indication in the accounting of any payments being applied to utilities supplied after the date of the receiver's appointment."[6]

On April 24 and May 15, 2017, the court held a hearing on both the receiver's motion to approve its interim

[6] The receiver also initiated an action against the defendant in the Housing Session of the Superior Court for the judicial district of Hartford. The receiver sought damages for past due rent and/or use and occupancy; the defendant filed a counterclaim asserting that the receiver had failed to comply with the order of disbursements in § 12-163a, essentially raising the same issue presented in this appeal. Both parties moved for summary judgment as to liability on the receiver's complaint. On June 11, 2018, the court, *Miller, J.*, granted the defendant's motion for summary judgment, denied the receiver's motion and rendered judgment in favor of the defendant. The court did not rule on the defendant's counterclaim alleging improper disbursement. See *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, Superior Court, judicial district of Hartford, Housing Session, Docket No. CV-11-0008219-S (June 11, 2018). The receiver filed an appeal (AC 41831), which currently is pending in this court. According to the preliminary statement of issues, the receiver claims that the court improperly concluded that the receiver could not collect rent or use and occupancy from the defendant.

accounting and the defendant's objection to it. During the April 24, 2017 hearing, the court requested that the receiver file a more detailed accounting of the fees and expenses that it claimed. The receiver complied by filing an updated accounting on May 12, 2017. The defendant argued to the court that § 12-163a (a) requires the receiver to pay the costs for utilities due on and after its appointment, notwithstanding the fact that the expired lease agreement between the defendant and Cadle had provided that the defendant would pay for the cost of its utilities or, in continuing to operate its automobile dealership, the defendant had been paying the utilities supplying service to the dealership after the lease expired. The defendant pointed to the language of § 12-163a, arguing that the statute clearly did not distinguish between the owner's and the tenants' utility obligations. Accordingly, the defendant asserted that it was the obligation of the receiver to reimburse it for approximately $25,000 that it had expended for utilities provided to the property since the date of the receiver's appointment.

The receiver responded that the defendant's interpretation of the statute was "tortured," and that it would permit the defendant to "continue to squat on the property and have its utilities reimbursed from a nonexistent rent stream back into its pocket."[7] The receiver further asserted that the intent of the statute was to pay utility bills owed to the enumerated utilities by the owner/landlord but not those owed by the tenants. It declared that the defendant's interpretation was "absurd" because it would result in unjustly rewarding

[7] The defendant conceded that after the appointment of the receiver, in response to the threat of eviction, it made, without prejudice, eight rental payments to the receiver totaling $64,000 between October, 2011, and April, 2012, but then ceased making rental payments after taking the position that it no longer owed rent to Cadle and, consequently, owed no rent to the receiver. The updated accounting indicates that the town had been paid $49,165 for back taxes and interest.

a non-rent-paying "squatter" that had continued to operate its business on the property and utilized utilities only for its own business functions. The receiver, as of the date of the hearing, was collecting no rental payments and had collected, since 2011, only a small amount of rent, resulting in a little less than $50,000 being remitted to the town for its taxes.

In an oral decision, the trial court approved the updated interim accounting and overruled the defendant's objection, concluding that § 12-163a only requires the receiver to pay those utility costs "for the common areas or the areas that are the responsibility of the owner . . . ." The court concluded there was no authority that required the receiver to reimburse tenants for utility costs that they were already obligated to pay.[8] This appeal followed.

Whether § 12-163a mandates that a receiver pay utility bills incurred by a tenant or former tenant occupying

[8] The defendant has relied on the court's oral ruling of May 15, 2017. The record does not contain a signed transcript of the court's decision, as required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with § 64-1 (a). In some cases in which the requirements of § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised in the present appeal is not hampered because we are able to readily identify a sufficient, concise statement of the court's findings in the transcript of the proceedings. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006). We note our concern, however, that the trial court's noncompliance with § 64-1 is a reoccurring issue in appeals involving oral decisions. See, e.g., *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 25 n.2, 191 A.3d 212 (2018); *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 789 n.7, 185 A.3d 643 (2018); *Rose B.* v. *Dawson*, 175 Conn. App. 800, 803–805, 169 A.3d 346 (2017); *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 177 n.1, 167 A.3d 967 (2017); *State* v. *Chankar*, 173 Conn. App. 227, 234 n.7, 162 A.3d 756, cert. denied, 326 Conn. 914, 173 A.3d 390 (2017).

the property in question is an issue "of statutory construction subject to plenary review and well established principles." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 856. General Statutes § 1-2z instructs that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." See *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 372–81, 977 A.2d 650 (2009) (engaging in statutory analysis pursuant to § 1-2z).

Section 12-163a (a) mandates that a receiver of rents is to distribute funds collected from rental or use and occupancy payments in the following order of priority: (1) payment for taxes due on and after the date of its appointment; (2) payment for electric, gas, telephone, water or heating oil supplied on and after such date; (3) reasonable fees and costs determined by the court to be due the receiver; (4) reasonable attorney's fees and costs incurred by the petitioner; (5) delinquent taxes; and (6) amounts to such interested parties as the court may direct. See General Statutes § 12-163a (a).

The defendant claims that the court should not have approved the interim accounting because the receiver did not reimburse the defendant for its utility expenditures on behalf of its automobile dealership, which continues to operate on the property. It argues that a plain reading of the statute does not limit the required, enumerated utility payments to those obligated to be paid by the owner of the property, and that courts cannot add to and modify statutory language because they believe the legislature made drafting errors. The defendant notes that receivership statutes like § 12-163a,

which are sui generis, are to be strictly construed, as they are in derogation of the common law. See *Connecticut Light & Power Co.* v. *DaSilva*, 231 Conn. 441, 446, 650 A.2d 551 (1994) (in light of language, purpose and sui generis nature of General Statutes § 16-262f, trial court mistaken in assumption that appointment of rent receiver for protection of utility governed by wide-ranging equitable and discretionary principles of ordinary mortgage foreclosure proceedings); *Southern Connecticut Gas Co.* v. *Housing Authority*, 191 Conn. 514, 518–20, 468 A.2d 574 (1983) (utility rent receivership under § 16-262f is special statutory proceeding, not civil action, and proceeding is sui generis); *Canton* v. *Cadle Properties of Connecticut, Inc.*, 145 Conn. App. 438, 451, 77 A.3d 144 (2013) (§ 12-163a, like § 16-262f, is sui generis in derogation of common law), rev'd on other grounds, 316 Conn. 851, 114 A.3d 1191 (2015).

The town argues that the defendant's construction of § 12-163a yields an absurd or unworkable result. It argues that, if receivers must prioritize the tenant's utility bills in addition to the owner's outstanding utility obligations, tenants who, prior to the date of receivership, were responsible for their own utility bills will continue to occupy the property without being obligated to pay their utility bills. The town further argues that this absurd and unworkable result is particularly evident in the present case, in which the defendant already is occupying the property rent free and operating a business for profit. The town maintains that it defies common sense to conclude that the legislature created statutory rent receiverships for the purpose of relieving tenants of their prior obligation to pay their own utility expenses. After all, the town asserts, the statute exists to provide relief to municipalities by ameliorating an owner's delinquency for property taxes and, therefore, construing the language in a way that furthers this purpose is sensible.

We agree with the town that the facially plain and unambiguous language of the disputed portion of § 12-163a, which provides in relevant part that "[t]he receiver shall make payments from such rents or payments for use and occupancy . . . for electric, gas, telephone, water or heating oil supplied on and after [the date of its appointment]," leads to an unworkable result. This is because the plain statutory language appears to encompass not only the enumerated utilities the owner or landlord previously was obligated to pay at the time of the receiver's appointment, but all of the enumerated utilities serving the property, including those utilities that the tenants or other occupants of the property previously were obligated to pay.

A literal adherence to the text of the statute is unworkable in the present circumstances. An interpretation of the statute that relieves tenants of an obligation to pay for their own utility expenses and places the burden on the receiver appointed under § 12-163a will likely lead to considerably less money to satisfy the amount owed in unpaid property taxes and, where necessary, the fees and costs of the receiver, thereby defeating the primary purpose of the receivership. In addition, such an interpretation could create a situation where there may be insufficient funds collected by the receiver to commence paying all of the tenants' utility bills if the rents payable prior to the appointment of the receiver were never calculated to include payment for utilities provided to each and every rental unit. Such a scenario would create problems even for previously responsible tenants.

Because we have determined that the plain meaning of the statutory text yields an unworkable result, we may look for interpretive guidance to extratextual evidence, such as the legislative history and circumstances surrounding the enactment of § 12-163a, to the legislative policy it was designed to implement, and to its

relationship to existing legislation. "[U]nder § 1-2z, we are free to examine extratextual evidence of the meaning of a statute, including its legislative history, when application of the statute's plain and unambiguous language leads to an unworkable result. See General Statutes § 1-2z." (Footnote omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 18–19, 950 A.2d 1247 (2008).

Our Supreme Court's statutory analysis in *Rivers* is particularly instructive in the present case. In *Rivers*, our Supreme Court observed that our legislature has not defined the word "unworkable" as it is used in § 1-2z. Id., 17. In defining that term, our Supreme Court looked to the dictionary definition of "unworkable," and relied on the fact that "[t]he American Heritage Dictionary defines 'unworkable' as 'not capable of being put into practice successfully.' American Heritage Dictionary of the English Language (3d Ed. 1992)." (Footnote omitted.) *Rivers* v. *New Britain*, supra, 17–18.

The issue in *Rivers* was whether General Statutes § 7-163a, which was enacted to relieve municipalities of the responsibility to remove snow and ice on municipal sidewalks by permitting municipalities to adopt an ordinance that shifts that responsibility to "the owner or person in possession and control of land abutting a public sidewalk"; General Statutes § 7-163a (c) (1); should be interpreted such that it relieved municipalities that have passed such an ordinance from liability in situations in which the abutting landowner is the state. *Rivers* v. *New Britain*, supra, 288 Conn. 3. Our Supreme Court observed that, in enacting § 7-163a, the legislature did not waive the state's sovereign immunity from liability or suit, and that "§ 7-163a imposes no duty or liability on the state with respect to municipal sidewalks that abut state property." Id., 9. The court, mindful of the obvious public safety ramifications of its interpretation of the statute, concluded that "although the language of § 7-163a is facially plain and

unambiguous, its application yields an unworkable result when, as in the present case, the state is the abutting landowner because, under that factual scenario, neither the municipality nor the state has a duty to clear the sidewalk of ice and snow." Id.

Accordingly, our Supreme Court, after reviewing the legislative history of § 7-163a, exempted the state from the liability imposed by the facially plain and unambiguous statutory language in § 7-163a that allowed the city to shift responsibility to abutting landowners. Id., 12, 22–23. Our Supreme Court concluded that when the legislature referred to such owner or person in possession and control of the abutting land, it meant to permit the municipality to shift responsibility only to *private* abutting property owners or persons in possession and control. Id., 21–23.

In enacting § 12-163a, the legislature intended to assist municipalities in collecting delinquent taxes through rent receivers. The legislature also sought to give municipalities the same tools and authority to collect delinquent taxes that it gave to utility companies pursuant to § 16-262f. Because § 12-163a is modeled after § 16-262f, an examination of § 16-262f sheds light on the proper interpretation of § 12-163a.

Section 16-262f concerns petitions for receivership of rents and common expenses by electric distribution, gas and telephone companies. That statute states in relevant part: "(a) (1) Upon the default of the owner . . . of a residential dwelling who is *billed directly* by an electric distribution, gas or telephone company or by a municipal utility for electric or gas utility service furnished to such building, such company or municipal utility or electric supplier . . . may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy or common expenses, as defined in section 47-202, for

any dwelling for which the owner . . . is in default. . . ." (Emphasis added.) Section 16-262f is intended to address the owner's delinquencies with respect to utilities if the owner is directly billed for such expenses. It does not contemplate that once a receiver is appointed to collect rent or use and occupancy or common expenses normally paid to the owner, that the receiver also must pay the cost of utilities that, prior to its appointment, had been billed to the occupants of the subject premises because the owner had not defaulted on any obligation in connection with the occupants' personal utility bills. Our Supreme Court observed that the purpose of § 16-262f was to permit "public service companies to petition for a statutory rent receivership under limited circumstances that are statutorily linked to the [General Statutes] § 16-262e (a) prohibition on the termination of utility services. Under § 16-262e (a), a service may not be terminated: (1) to a residential dwelling; (2) despite nonpayment of a delinquent account; (3) for service billed directly to the residential building's . . . owner . . . and (4) when it is impracticable for occupants of the building to receive service in their own name. Unable to terminate service to such a residential dwelling, public service companies are expressly instructed, by § 16-262e (a), to pursue the remedy provided in [§] 16-262f." (Footnote omitted; internal quotation marks omitted.) *Southern Connecticut Gas Co.* v. *Housing Authority*, supra, 191 Conn. 518–19.

In 1995, when § 12-163a was enacted, Representative Robert D. Godfrey, the sponsor of House Bill No. 5331, stated: "You're hearing two bills of mine this morning . . . . What they have in common is they both enable municipalities to use tools that other entities already have at their disposal. . . . The second bill, 5331, which authorizes municipalities to petition for a

receiver of rents for the collection of delinquent property taxes . . . gives municipalities the same kind of power as we currently give to utilities, which can petition for receivership of rent for back payment of electric, water, power, whatever." Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 1, 1995 Sess., pp. 49–50. Because, under § 16-262f, the legislature did not intend that a receiver acting on behalf of a utility pay utility expenses for which the owner had not been directly billed, we may infer that, in enacting § 12-163a, the legislature did not intend that a receiver acting on behalf of a municipality seeking delinquent taxes owed by the owner bore the burden of providing all of the occupants of the property with free utilities when, prior to the appointment of the receiver, those occupants had been paying their own utility bills. To interpret § 12-163a in the manner the defendant proposes would undermine the stated legislative purpose of giving municipalities the "same kind of power" that § 16-262f gave to utilities. Such an interpretation would result in a costly and unworkable mechanism for municipalities to use in collecting delinquent property taxes.

Moreover, common sense dictates that a statutory procedure designed to assist financially pressed municipalities with recoupment of delinquent taxes from property owners should not have its effectiveness diminished by an impractical interpretation that would give tenants the unexpected gift of free utilities by making a receiver responsible, not just for the owner's unpaid utility bills, but also for payment of each and every tenant's utility bills. Such an unworkable result would, in many instances, significantly undermine the intent of the legislature to assist municipalities in collecting taxes by reducing the amount of rent that could be applied by the receiver to payment of delinquent

taxes and reimbursement for the fees and costs necessarily expended in filing the petition.

The defendant's interpretation of § 12-163a is further undermined by the fact that, in many instances, it would jeopardize the receiver's ability to continue to collect any rental income at subject properties. We may infer that the legislature, in requiring that the receiver distribute funds for utility payments *before* distributing other payments, including those for delinquent taxes, sought to ensure that the utilities at a subject property that are the responsibility of the owner would continue to be supplied to the property during the time in which a receiver is collecting rents or payments for use and occupancy. It is reasonable to assume that, if an owner fails to pay real property taxes because it is insolvent, it may be unable to pay for utilities at its rental property that are its responsibility, such as utilities that supply and benefit common areas that are not within the control of its tenants. It is not difficult to imagine a situation in which a lack of utilities in such common areas of a rental property would create problems for tenants and, thus, that the lack of utilities that would be supplied by an owner would jeopardize the property's continued ability to generate any rental income. Thus, although the legislature had a valid reason for ensuring that an owner's utility payments are satisfied by the receiver, such statutory purpose does not apply to the expenses incurred by tenants.

In light of the foregoing, we conclude that the trial court properly determined that, pursuant to § 12-163a, the receiver is mandated to pay only utility bills that are the obligation of the owner, not those incurred by tenants of the subject property.

The judgment is affirmed.

In this opinion the other judges concurred.

KRZYSZTOF WOLYNIEC *v.* MARLENA WOLYNIEC (AC 40292) (AC 40436)

Lavine, Alvord and Moll, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgments of the trial court rendered on several postjudgment motions of the parties. The plaintiff claimed that the trial court improperly ordered that the defendant could continue to reside at a residence owned by the plaintiff in Darien until the plaintiff satisfied an arrearage in unallocated alimony and child support owed to the defendant, and failed to find that the defendant's motion for contempt concerning the arrearage was barred by the equitable doctrine of laches. *Held*:

1. The trial court did not abuse its discretion in permitting the defendant to remain in the Darien residence until ninety days following her receipt of payment in full of the support arrearage owed by the plaintiff; a stipulation incorporated into the parties' dissolution judgment set forth the plaintiff's family support obligations, which unambiguously linked the monetary and residential forms of family support, identified expressly the obligation to provide the Darien residence as alimony and provided that the defendant was relying on her use of the residence in accepting the agreed upon amount of unallocated alimony and child support, and, thus, the court did not err in fashioning its postjudgment remedial order permitting the defendant to remain in the Darien residence as a remedy for the harm caused by the plaintiff's noncompliance with the monetary unallocated alimony and child support provision, and the court's remedial order to effectuate the judgment of dissolution was supported by competent evidence, as the court credited the defendant's testimony that she did not have money to pay for another residence and that she would be able to move out of the Darien residence if the plaintiff paid the arrearage he owed.
2. The plaintiff could not prevail on his claim that the trial court erred in failing to find that the defendant should be barred by laches from recovering the support arrearage: no evidence was admitted from which that court could have found that the plaintiff was prejudiced by the defendant's delay in filing her motion for contempt approximately six years after the plaintiff began reducing his support payments, as the plaintiff's claims of prejudice were premised on an alleged oral agreement between the parties, pursuant to which the plaintiff claimed he took on substantial additional costs for the children's college expenses that he was not obligated to assume, and the plaintiff's assumption of discretionary precollege preparation activity fees for the parties' children pursuant to the alleged oral agreement, for which the defendant testified she also made payments at the insistence of the plaintiff, did

not establish prejudice, the plaintiff having presented no evidence that the assumption of the activity fees constituted a change in his position or that the defendant's delay in filing her contempt motion led him to assume such expenses; moreover, the plaintiff's missed opportunity to file a motion for modification with the court, which was occasioned by his own decision to engage in self-help by entering into the alleged oral agreement, did not establish prejudice, as the plaintiff decided to engage in self-help rather than seek the guidance of the court.

Argued December 11, 2018—officially released February 26, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Colin, J.*, granted in part and denied in part the defendant's motion for contempt; subsequently, the court granted in part and denied in part the plaintiff's motion to enforce the dissolution judgment; thereafter, the court denied the plaintiff's motion for contempt, and the plaintiff appealed to this court; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Krzysztof Wolyniec, self-represented, with whom, on the brief, were *Tara C. Dugo* and *Norman A. Roberts, II*, for the appellant (plaintiff).

Opinion

ALVORD, J. In these consolidated appeals, the plaintiff, Krzysztof Wolyniec, appeals from the judgments of the trial court rendered on several postjudgment motions filed by him and the defendant, Marlena Wolyniec.[1] On appeal, the plaintiff claims that the court erred by (1) ordering that the defendant may continue to

[1] The defendant is not participating in these appeals. On May 21, 2018, this court ordered that the appeals would be considered on the basis of the plaintiff's brief and the record alone unless the defendant filed her brief on or before June 4, 2018, which she failed to do. Accordingly, on June 5, 2018, this court ordered that the consolidated appeals would be considered on the basis of the plaintiff's brief and the record alone.

reside at the plaintiff's Darien residence until he satisfies his acknowledged arrearage in unallocated alimony and child support,[2] and (2) failing to find that the defendant's motion for contempt as to the arrearage in unallocated alimony and child support was barred by the equitable doctrine of laches. We are not persuaded by either claim and, accordingly, affirm the judgments of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married on July 3, 1993, and they have two children. On January 30, 2007, the court rendered judgment dissolving the parties' marriage. The judgment incorporated by reference the parties' stipulation of the same date (stipulation).

As to family support, the stipulation provided that the plaintiff, commencing February 1, 2007, was to pay to the defendant unallocated alimony and child support in the sum of $10,000 per month, until her death, remarriage, or until May 30, 2016, which date fell shortly after the parties' younger child reached the age of eighteen. The plaintiff also agreed to purchase a house in Darien (Darien residence) for the use of the defendant and the parties' two children.[3] The defendant agreed to vacate

[2] The plaintiff represented to this court during oral argument that, as of the date of argument, he had not paid any of the family support arrearage that he conceded he owed. When asked if he filed a motion to stay the court's order requiring that he begin paying the arrearage, the plaintiff stated that he had merely filed an appeal. Our case law is well established that filing an appeal from a family support order does not automatically stay the order. See *Schull* v. *Schull*, 163 Conn. App. 83, 99, 134 A.3d 686, cert. denied, 320 Conn. 930, 133 A.3d 461 (2016); Practice Book § 61-11 (c) (no automatic stay for orders of support in certain family matters).

[3] The stipulation's provisions regarding the residence are as follows: "11. The Husband has agreed to purchase a house for the benefit of the Wife and the two minor children. The house is to be in Darien, Connecticut or such other town as the parties may agree. The selection of the house shall be by the mutual consent of the parties and shall be made on or before April 1, 2007. The Wife and the minor children shall have exclusive right to occupy said house. The Purchase price of the house shall not be in excess of $900,000.00 unless the parties otherwise agree. The husband may finance the balance of the purchase in any way that he may elect. The title to the

the Darien residence on March 1, 2016, or six months following the date the residence no longer served as the primary residence of the defendant and a minor child, whichever shall occur first.[4] The parties agreed that the plaintiff's "obligation to pay for said house is in the nature of alimony and as such is modifiable." The parties further agreed that "[i]n accepting the amount

house shall be in the Husband's sole name. The Wife shall acquire no legal or equitable interest in said house. The Wife agrees to cooperate with any financing or refinancing that the husband may elect. The Wife shall sign any documents reasonably required for such financing or refinancing. The Husband shall be solely responsible for all costs associated with said mortgage or refinancing and shall indemnify and hold the Wife harmless from any liability associated with said mortgage, interest and real estate taxes. In accepting the amount of unallocated alimony and support as provided for herein, the Wife is relying upon the Husband's securing of this house for her use and the use of the children. Should the Wife not have the use of said home for herself and the children, such fact shall be deemed a substantial change in circumstances warranting modification of the unallocated alimony and support herein. The Husband's obligation to pay for said house is in the nature of alimony and as such is modifiable. Although in the nature of alimony, the husband's payments associated with the maintenance of said house are not taxable to the Wife and are not [deductible] by the Husband as alimony, although they may be [deductible] under other provisions of the [Internal Revenue Service] code, i.e. second home, investment property or tax payments made by the husband.

"12. The Wife shall be solely responsible for any and all utilities and ordinary maintenance and repair of the home. Ordinary maintenance or repair is defined as any maintenance which is not extraordinary. Extraordinary maintenance or repair is defined as any such expense which exceeds $750.00. The Husband shall pay extraordinary maintenance and repairs to the home. The Wife shall be responsible for all appliances in the home. The Wife shall not incur any [nonemergency] repair or maintenance expense without notifying the Husband in advance and securing his consent, which consent shall not be unreasonably withheld. The Wife shall not make any capital improvements to the home without the husband's expressed written approval.

"13. The Wife agrees to keep the home in good condition and return it to him in broom clean condition at the termination of her occupancy. The husband shall be entitled to enter the home, with reasonable advance notice to the Wife no less than four times a year to inspect the condition of the home.

"14. The Wife shall vacate the home on March 1, 2016, or six months following the date the home no longer serves as the primary residence of the Wife and a minor child, whichever event shall first occur."

[4] We note that the stipulation required the defendant to vacate the Darien residence *before* the younger child turned eighteen, as conceded by the plaintiff during oral argument before this court.

of unallocated alimony and support as provided for herein, the [defendant] is relying upon the [plaintiff's] securing of this house for her use and the use of the children. Should the [defendant] not have the use of said home for herself and the children, such fact shall be deemed a substantial change in circumstances warranting modification of the unallocated alimony and support herein."

As to the division of marital property, the stipulation provided that each party would retain the property appearing on their respective financial affidavits, the plaintiff would pay to the defendant the sum of $400,000, and the plaintiff would purchase a new Volvo automobile for the defendant.

On May 6, 2016, the defendant filed a motion for contempt, claiming that the plaintiff owed an unallocated alimony and child support arrearage of $202,146.25, and the plaintiff filed an objection. On June 13, 2016, the plaintiff filed a motion for contempt, arguing that the defendant wilfully remained in the Darien residence beyond March 1, 2016, in violation of the express terms of the stipulation incorporated into the dissolution judgment.[5] On the same day, he also filed a motion to enforce the judgment of dissolution; that motion asserted many of the same facts as his motion for contempt and requested that the court order the defendant to vacate the Darien residence.

[5] The plaintiff further claimed that the defendant had failed to pay him any rent on the Darien residence since March 1, 2016, and that her holding over at the residence prevented him from either renting the residence or moving into the residence himself. The plaintiff also argued that he was prevented from obtaining a home equity credit line until such time as he became an occupant of the residence. He sought, among other relief, an order requiring the defendant to vacate the Darien residence, to reimburse the plaintiff the fair market rental value of the residence for the period of March 1, 2016, through the date of her vacatur of the Darien residence, and to reimburse the plaintiff the sum he expended on his own rental from June 1, 2016 through August 31, 2016.

The court held an evidentiary hearing on the parties' motions on March 7, 2017. At the beginning of the hearing, the parties introduced into evidence an "agreement as to facts at hearing" (agreement). The parties recognized that the dissolution judgment required the plaintiff to pay the defendant $10,000 monthly in unallocated family support commencing in February, 2007, and ending in May, 2016. The parties further agreed that the "dissolution of marriage judgment was never modified by the court." According to the agreement, the plaintiff acknowledged that he owed $122,145.25 in family support arrearage. Attached to the agreement was a yearly summary of family support owed and paid. The parties further agreed that the "defendant was to vacate [the] plaintiff's residence in Darien on March 1, 2016, which she has not done. [The] [d]efendant currently resides in the Darien home." Lastly, the parties agreed that the defendant had paid for three years of tuition, room, and board at Emory University for the parties' older child.[6]

During the hearing,[7] the self-represented plaintiff sought to inquire of the defendant as to whether she was aware that the plaintiff's income had dropped substantially in 2010. In response to the objection of the defendant's counsel on grounds of relevance, the plaintiff represented to the court that the parties had reached, postjudgment, the following oral agreement: "[W]e agreed that I will lower the alimony payment for a period [un]til the older [child] goes to college and

[6] With respect to postsecondary education, the stipulation incorporated into the dissolution judgment stated: "The parties hereby ask the court to retain jurisdiction over the issue of post majority support pursuant to [General Statutes §] 46b-56c." Neither party sought court guidance as to their respective responsibilities for the children's college tuition payments.

[7] Although the court first heard evidence on the defendant's motion for contempt and then turned to the plaintiff's motions for contempt and to enforce the judgment, the court, after hearing no objections from the parties, indicated that it would consider all the evidence in connection with all three motions.

then I'll cover all the . . . college costs after the expiration of the agreement. And that was precipitated by the fact that my income dramatically dropped, and I was—otherwise I intended to file for modification.'' The plaintiff further inquired of the defendant whether it was true that the parties had entered into such an oral agreement in 2010, although he described the terms of the agreement differently, asking whether they had agreed that he would reduce the unallocated support until the older child entered college, at which time he would ''return to paying—paying the full amount, and then after the conclusion of the divorce decree I will pay . . . for the last years of the older one's and the full . . . college cost of the younger one.''

The defendant gave various answers to questions asking whether such an oral agreement existed, testifying: ''[Y]ou have so many versions of all your agreements through our relationship that . . . I lost track with all your agreements''; ''[i]t's difficult to sift through what you say to me. You were promising me lots of things through our . . . marriage and after divorce. I cannot say what is true, what is false''; ''[i]t's difficult to say that this is agreement because all our relationship is like I do what you say''; and ''[w]e agreed about lots of things that didn't come up as a true, so at the certain moment in my life I stopped paying attention what you say. I just do . . . what is necessary to survive for my kids and me until the moment that I can start working and be independent person, and for my kids to go to college and be independent. Until then—I cannot say that I agreed; you forced me to agree about lots of things.''

The defendant testified at the hearing that she did not have much money left and did not have funds to pay for an apartment. She testified that she would be able to move out of the Darien residence if the plaintiff satisfied the support arrearage.

Following the hearing, on March 13, 2017, the court issued three orders. With respect to the defendant's motion for contempt, the court granted it in part and denied it in part. As to the plaintiff's claim of an oral agreement regarding his family support obligation, the court found that "[t]he credible evidence introduced at the hearing is insufficient for the court to find that such an agreement ever existed or, if it did exist, its specific terms." The fact that the defendant waited to file the motion for contempt, despite a period of the plaintiff's failing to pay the family support order in full, led the court to infer that the parties had some discussion that impacted the plaintiff's decision not to pay the full amount of support. Thus, the court found that the plaintiff's noncompliance was not wilful and that the defendant "failed to prove by clear and convincing evidence that the plaintiff wilfully and intentionally violated the alimony order." The court ordered the plaintiff to pay the undisputed family support arrearage of $122,145.25 in monthly installments of $10,000 beginning April 1, 2017. The order was made "without prejudice to either party's right to request a different payment schedule by filing an appropriate motion and current financial affidavits."[8]

The court then granted the plaintiff's motion to enforce the provisions of the judgment and denied his motion for contempt, finding that the plaintiff had failed to prove that the defendant wilfully and intentionally violated the dissolution judgment by failing to vacate the Darien residence by the date set forth in the parties' stipulation incorporated into the dissolution judgment. In denying the plaintiff's contempt motion, the court credited the defendant's testimony as to her financial

[8] The file reflects no request by the plaintiff to alter the monthly payment amount, and the plaintiff represented to this court during oral argument that he has not made any support arrearage payments pursuant to the court's March 13, 2017 order.

circumstances and noted that the plaintiff's failure to comply with the dissolution judgment's family support orders resulted in a substantial support arrearage. The court, to effectuate the judgment of dissolution, ordered that "the defendant shall vacate the premises within ninety days after she receives payment in full from the plaintiff in accordance with the court's ruling on [the defendant's motion for contempt]."[9]

On March 24, 2017, the plaintiff filed a motion to reargue his motion for contempt and to enforce the judgment. On April 3, 2017, while the plaintiff's motion to reargue was still pending, he filed an appeal from the court's ruling on the defendant's motion for contempt. After hearing argument on April 17, 2017, the court denied the motion to reargue on April 24, 2017. On May 12, 2017, the plaintiff filed a separate appeal from the court's rulings on his motions, including the motion to reargue. On February 20, 2018, this court granted the plaintiff's motion to consolidate the two appeals.

I

On appeal, the plaintiff first claims that the court erred in ordering that the defendant may continue to reside in the Darien residence until the plaintiff satisfies his unallocated alimony and child support arrearage. The plaintiff recognizes that the court has the authority to issue remedial orders but contends that the court's order "failed to take into account the defendant's use and occupancy of the Darien Residence." The plaintiff argues: "Without accounting for her use and occupancy of the Darien Residence and crediting the plaintiff with same, the trial court is no longer protecting the integrity of its original orders." Instead, he contends, the remedial support orders put him "in a far worse financial position" and awarded the defendant a windfall. We disagree.

[9] The court denied the plaintiff's additional requests for relief made in his motion to enforce the judgment.

We first set forth applicable principles of law and our standard of review. "In Connecticut, the general rule is that a court order must be followed until it has been modified or successfully challenged. . . . Our Supreme Court repeatedly has advised parties against engaging in self-help and has stressed that an order of the court must be obeyed until it has been modified or successfully challenged." (Citations omitted; internal quotation marks omitted.) *Culver* v. *Culver*, 127 Conn. App. 236, 242, 17 A.3d 1048, cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); see also *O'Brien* v. *O'Brien*, 326 Conn. 81, 97, 161 A.3d 1236 (2017) ("[a] party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in 'self-help' by disobeying a court order to achieve the party's desired end"); *Becue* v. *Becue*, 185 Conn. App. 812, 827, A.3d (2018) ("[t]here can be no dispute, our law is quite clear: An order of the court must be obeyed until it has been modified or successfully challenged" [internal quotation marks omitted]).

Additionally, "[c]ourts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This is so because [i]n a contempt proceeding, *even in the absence of a finding of contempt*, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Pressley* v. *Johnson*, 173 Conn. App. 402, 408, 162 A.3d 751 (2017). "[S]uch court action . . . must be supported by competent evidence." (Internal quotation marks omitted.) *Fuller* v. *Fuller*, 119 Conn. App. 105,

115, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992 A.2d 329 (2010).

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding on this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[10] (Internal quotation marks omitted.) Id., 115–16.

In the present case, the court properly determined that it had the authority to fashion remedial family

[10] The plaintiff contends that the standard of review is plenary, arguing that "[w]hether the trial court has jurisdiction to allow the defendant to remain in the Darien residence is a question of law and is subject to plenary review." In support, he cites *Rathblott* v. *Rathblott*, 79 Conn. App. 812, 818, 822–23, 832 A.2d 90 (2003), a case in which this court determined that the trial court lacked authority to issue a postjudgment order that certain marital property, which the court had failed to assign at the time of the dissolution, be sold at auction.

In the argument section of his appellate brief, by contrast, the plaintiff recognizes the court's authority to issue remedial orders, and claims that the court "failed to take into account the defendant's use and occupancy of the Darien residence." Such a claim requires us to determine whether the trial court abused its discretion by permitting the defendant to remain in the Darien residence. See *Behrns* v. *Behrns*, 124 Conn. App. 794, 822, 6 A.3d 184 (2010) (noting that trial court had power to vindicate its prior judgment and concluding that court did not abuse its discretion in restricting the defendant's encumbrance of his assets without leave of court, where trial court believed such order was necessary to secure defendant's debt to plaintiff); see also *Gong* v. *Huang*, 129 Conn. App. 141, 154–55, 21 A.3d 474 (court properly exercised discretion in compensating defendant for plaintiff's violation of court order), cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011).

support orders following the plaintiff's noncompliance with the stipulation incorporated into the dissolution judgment. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 101. The stipulation set forth the plaintiff's family support obligations, which included both monetary and residential support. As to monetary support, the plaintiff was to pay the defendant $10,000 per month in unallocated alimony and child support. As additional alimony, the plaintiff was to provide residential support in the form of a residence in Darien for the use of the defendant and the parties' children. See *Carasso* v. *Carasso*, 80 Conn. App. 299, 310–11, 834 A.2d 793 (2003) (noting different aspects of alimony obligations, including money payments and obligations to provide insurance), cert. denied, 267 Conn. 913, 840 A.2d 1174 (2004).

In their stipulation, the parties unambiguously linked the monetary and residential forms of family support. In addition to identifying expressly the obligation to provide the Darien residence as alimony, the stipulation further stated that the defendant was relying on her use of the residence in accepting the agreed upon amount of unallocated alimony and child support. The parties agreed that if she were not to have use of the residence, it would constitute a substantial change in circumstances warranting modification of the monetary portion of the support award. Thus, according to the unambiguous terms of the stipulation, the defendant accepted the residential support at the cost of a reduction in monetary support. Given that the parties themselves had linked the two forms of support in their stipulation, the court did not err in fashioning its postjudgment remedial order permitting the defendant to remain in the Darien residence as a remedy for the harm caused by the plaintiff's noncompliance with the monetary unallocated alimony and child support provision.

Moreover, the court's remedial order to effectuate the judgment of dissolution was supported by competent evidence.[11] See *Clement* v. *Clement*, 34 Conn. App. 641, 646–48, 643 A.2d 874 (1994) ($29,500 award to preserve original judgment's integrity, where plaintiff had failed to make mortgage payments as ordered by trial court resulting in foreclosure and loss of family residence, was supported by undisputed evidence that plaintiff failed to comply with court order). In the present case, the court had undisputed evidence before it that the plaintiff, without seeking a modification of his court-ordered family support obligation, commenced, in 2010, a reduction in the amount of support payments and ultimately accrued an arrearage of $122,145.25. As he conceded during oral argument before this court, such action constituted a violation of the terms of the dissolution judgment.[12] In fashioning its order, the court

[11] In his brief, the plaintiff alternatively argues that the court's order permitting the defendant to remain in the Darien residence was erroneous because it was a punitive order, an alteration of a terminated alimony order, or a new alimony order issued postjudgment. Because we conclude that the order was of a remedial nature and that the court did not abuse its discretion in issuing such an order, we reject the plaintiff's alternative arguments.

The plaintiff also argues that "[a]ssuming, arguendo, the divorce judgment orders relating to the Darien residence are in the nature of property orders, the trial court does not have the jurisdiction to modify said orders." Given that the stipulation incorporated into the dissolution judgment expressly designated the plaintiff's obligation to purchase the Darien residence for the use of the defendant and the parties' children as alimony, we reject the premise of the plaintiff's argument.

[12] We further note that the plaintiff's resort to self-help in reducing his support payments rather than using the judicial process to seek a modification is inconsistent with public policy. "Both state and national policy has been, and continues to be, to ensure that all parents support their children and that children who do not live with their parents benefit from adequate and enforceable orders of child support. . . . Child support is now widely recognized as an essential component of an effective and comprehensive family income security strategy. . . . As with any income source, the effectiveness of child support in meeting the needs of children is, of necessity, increased when payments are made regularly and without interruption." (Internal quotation marks omitted.) *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 92, 78 A.3d 860 (2013); see also *Sablosky* v. *Sablosky*, 258 Conn. 713, 721, 784 A.2d 890 (2001).

credited the competent evidence in the form of the defendant's testimony during the hearing that she did not have money to pay for an apartment and that she would be able to move out of the Darien residence if the plaintiff paid the support arrearage.[13]

Accordingly, we conclude that the court did not abuse its discretion in permitting the defendant to remain in the Darien residence until ninety days following her receipt of payment in full of the support arrearage.[14]

II

The plaintiff's second claim on appeal is that the court erred in failing to find that the defendant should be barred pursuant to the doctrine of laches from recovering the support arrearage owed by the plaintiff. Specifically, he argues that the court had before it evidence

[13] The plaintiff argues that the defendant had an obligation to pay the plaintiff a fair rental value in the form of use and occupancy of the Darien residence following March 1, 2016, and contends that the court erred in failing to account for and credit the plaintiff with her use and occupancy of the residence. We disagree. The court reasonably could have concluded that the defendant's inability to vacate the Darien residence on March 1, 2016, was the direct result of the plaintiff's noncompliance with the family support orders in the dissolution judgment. Therefore, the court's remedial order properly permitted her to remain in the residence in order to protect the integrity of the dissolution judgment.

[14] Given the defendant's history of failing to comply with the dissolution judgment, we also conclude that the court did not abuse its discretion in ordering the defendant to vacate the premises ninety days after the plaintiff pays her the arrearage he owes. As the plaintiff conceded during oral argument before this court, even after resuming what he described as full support payments in 2013, he did not make monthly payments of $10,000 as required by the stipulation incorporated into the dissolution judgment, but rather paid "varying amounts," which added up to the amounts reflected in the parties' agreement of facts entered into evidence during the hearing. Moreover, at the time of the defendant's filing of her motion for contempt in May, 2016, she alleged the plaintiff's arrearage amounted to $202,146.25. The parties agreed at the hearing that the plaintiff satisfied $80,000 of that arrearage in December, 2016, after the defendant had filed her motion for contempt. Finally, as noted in footnote 2 of this opinion, the plaintiff has not paid any amount of the court's remedial support order, which was not stayed.

of inexcusable delay, in that the plaintiff began reducing his support payments in 2010, and the defendant did not file a motion for contempt until 2016, after the plaintiff had served her with an eviction notice from the Darien residence. He further claims that the court heard evidence of prejudice to the plaintiff as a result of his reliance on an alleged oral agreement between the parties, in that he refrained from filing a motion for modification of the support orders and assumed additional costs for the children's precollege preparation activities, fees that he was not otherwise obligated to assume. We are not persuaded.

We begin by setting forth legal principles relevant to this claim. "Laches is an equitable defense that consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the defendant . . . as where, for example, the defendant is led to change his position with respect to the matter in question. . . . Thus, prejudicial delay is the principal element in establishing the defense of laches." (Citation omitted; internal quotation marks omitted.) *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 334–35, 983 A.2d 293 (2009). "Thus, even if there was an inexcusable delay by the moving party, the court will not find that party guilty of laches if the prejudice to the opposing party was not the result of the moving party. . . . Moreover, [t]he burden is on the party alleging laches to establish that defense." (Citations omitted; internal quotation marks omitted.) *Carpender* v. *Sigel*, 142 Conn. App. 379, 387, 67 A.3d 1011 (2013). "The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has been guilty of laches is one of fact . . . . We must defer to the court's findings of fact unless they are clearly erroneous." (Internal quotation marks omitted.) *Cifaldi* v. *Cifaldi*, supra, 335.

In the present case, the plaintiff did not assert the defense of laches in his objection to the defendant's motion for contempt but did argue, during the hearing that was scheduled approximately nine months after the filing of that objection, that laches barred the defendant's recovery of the arrearage. Although the court recognized in its order that the defendant waited a long time to pursue her motion to collect the arrearage, it did not make this observation in connection with a discussion of the evidence supporting a defense of laches. Rather, the court inferred from the delay that "the parties did have some type of discussion that impacted the plaintiff's decision to not pay the full amount," which inference supported its finding that the plaintiff's noncompliance with the support order was not wilful. Although the court made no express findings of fact with respect to laches, it concluded that "the plaintiff failed to establish any credible defense that would excuse his payment of alimony and he is not, therefore, excused from fulfilling his court-ordered alimony obligation." Thus, we infer from the court's order requiring the plaintiff to pay the support arrearage that the plaintiff did not carry his burden to establish the elements of laches.

After examining the record in the present case, we conclude that no evidence was admitted from which the court could have found that the plaintiff was prejudiced by the defendant's delay in filing her motion for contempt. See *Carpender* v. *Sigel*, supra, 142 Conn. App. 386–87 (noting that trial court had made no factual findings with regard to legal conclusion of laches and reversing on basis that no evidence was presented to show prejudice or that delay in filing motion for contempt was inexcusable). Indeed, both of the plaintiff's claims of prejudice are premised on the alleged oral agreement. The court, however, found the evidence presented insufficient to find that any agreement existed, or if it did exist, its specific terms.

First, the plaintiff argues that he was "prejudiced by his reliance on the [oral] agreement," in that he "took on substantial additional costs for the children's college expenses that he was neither obligated to assume, nor which he would have voluntarily assumed, but for the [oral] agreement." Although the defendant acknowledged during the hearing that the plaintiff had paid for certain college preparatory courses, she also testified that she incurred similar expenses in near equal amounts. Specifically, she testified: "I think that we shared most of those expense[s] you are talking about, because for every your expense you made sure that I am paying . . . for something similar so . . . if it's not fifty/fifty then it would be definitely forty/sixty. I paid a lot of expense[s] for lots of tutoring, lots of courses. When [the older child] was preparing himself for college he was taking courses in Columbia. . . . He was going to Philadelphia. And you always made sure that each time you were contributing to those expenses . . . I would be paying about the same amount. . . . You . . . were very, very particular checking that I am fifty/fifty."

Thus, the plaintiff's assumption of discretionary precollege preparation activity fees, for which the defendant testified she also made payments at the insistence of the plaintiff, cannot establish prejudice. The plaintiff presented no evidence that the parties' assumption of the activity fees constituted a change in his position or that the defendant's delay in filing her motion for contempt led him to assume such expenses. See *Carpender* v. *Sigel*, supra, 142 Conn. App. 387 (no evidence admitted on which court could have found plaintiff changed her position in reliance on the defendant's actions).

The plaintiff's second argument as to prejudice is that "had the parties not entered into the [oral] agreement, the plaintiff would have filed [a motion] for a modification of the alimony orders seven years prior."

As discussed more fully in part I of this opinion, our case law is clear: "[A]n order of the court must be obeyed until it has been modified or successfully challenged." (Internal quotation marks omitted.) *Culver* v. *Culver*, supra, 127 Conn. App. 242, 243 (court-ordered child support obligation was not modified by parties' subsequent oral agreement that was not made an order of the court); see also *Becue* v. *Becue*, supra, 185 Conn. App. 827 (defendant wilfully engaged in self-help by modifying court-ordered child support without permission of the court). The plaintiff's missed opportunity to file a motion for modification, which was occasioned by his own decision to engage in self-help by entering into an alleged oral agreement with the defendant, likewise cannot establish prejudice. Any conclusion to the contrary would condone the plaintiff's decision to engage in self-help rather than seek the guidance of the court.

The judgments are affirmed.

In this opinion the other judges concurred.

TAJAH S. MCCLAIN *v.* COMMISSIONER OF CORRECTION (AC 40541)

Prescott, Bright and Bishop, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, murder with a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance and that he was actually innocent. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that his trial counsel provided ineffective assistance:

a. The habeas court properly determined that the petitioner failed to show that he was prejudiced by his trial counsel's failure to present a third-party culpability defense and to produce evidence that another individual, V, shot the victim; the petitioner failed to demonstrate that there was a reasonable probability that, but for counsel's failure to present a third-party culpability defense, the outcome of his trial would have been different, as the descriptions of the shooter more closely matched the physical features of the petitioner than those of V, testimony at the habeas trial connecting V to the shooting was unreliable, unclear, and, at most, raised a bare suspicion that V may have been involved in a shooting, and even if a social media post in which V purportedly referred to the shooting had been found and properly authenticated, it failed to constitute an admission by V sufficient to raise a reasonable doubt as to the petitioner's culpability.

b. The petitioner failed to show that he was prejudiced by his trial counsel's failure to present evidence of an initial segment of a video recorded police interview of a witness for the state, which the petitioner alleged had been redacted; the petitioner failed to present any evidence, apart from his own allegation that he had viewed an original video, that an initial portion of the video existed or that if it did exist it was not shown to the jury, and trial counsel's cross-examination of the witness and the detective who recorded the interview allowed the jury to weigh their credibility regarding the nature of the video without the presentation of the purported initial segment of the video.

2. The habeas court properly denied the petition for certification to appeal with respect to the petitioner's claim of actual innocence, the petitioner having failed to establish by clear and convincing evidence that he was innocent of the murder for which he was convicted and that no reasonable fact finder would find him guilty of the crime; although the testimony of B presented by the petitioner at the habeas trial was newly discovered evidence, B's testimony was insufficient to prove by clear and convincing evidence that the petitioner was actually innocent in light of the overwhelming evidence of the petitioner's identification as the shooter at the criminal trial and the habeas court's conclusion, after viewing both the petitioner and V, that the petitioner more closely resembled the description of the shooter, and even if the testimony of two other witnesses presented by the petitioner at the habeas trial constituted newly discovered evidence, such testimony was unreliable and did not constitute clear and convincing evidence of the petitioner's actual innocence.

Argued November 27, 2018–officially released February 26, 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, *Sferrazza, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Jennifer B. Smith, assigned counsel, with whom, on the brief, was *Samuel A. Greenberg*, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Tajah S. McClain, appeals following the denial of his petition for certification to appeal 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 abused its discretion in denying his petition for certification to appeal and improperly rejected (1) his claim that his trial counsel rendered ineffective assistance, and (2) his claim of actual innocence. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of murder with a firearm in violation of General Statutes §§ 53a-54a (a) and 53-202k, assault in the first degree with a firearm in violation of General Statutes §§ 53a-59 (a) (5) and 53-202k, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The petitioner received a total effective sentence of sixty-five years incarceration. This court's opinion in the petitioner's direct appeal;

see *State* v. *McClain*, 154 Conn. App. 281, 283–84, 105 A.3d 924 (2014), aff'd, 324 Conn. 802, 155 A.3d 209 (2017); sets forth the following facts: "On July 17, 2010, a group of more than ten people were drinking alcohol in the area known as 'the X,' located behind the Greene Homes Housing Complex in Bridgeport [Greene Homes]. Shortly before 5:22 a.m., the victim, Eldwin Barrios, was sitting on a crate when all of a sudden the [petitioner] and at least two other men jumped on him, and started punching and kicking him. The victim kept asking them why they were hitting him, but no one answered. The [petitioner] then was passed a chrome or silver handgun and he fired one shot, intended for the victim. The bullet, however, struck one of the other men in the back of the leg. The man who had just been shot yelled, 'you shot me, you shot me, why you shot me,' to which the [petitioner] replied, 'my bad.' As this was happening, the victim got up and tried to run away, but the [petitioner] fired several shots at him. Three of the [petitioner's] shots hit the victim—one in the leg, one in the arm, and one in the torso—at which point, the victim fell to the ground and died.

"The [petitioner] was arrested three days after the murder. Following a jury trial, the [petitioner] was convicted and sentenced to a total effective sentence of sixty-five years incarceration." (Footnote omitted.) This court affirmed the petitioner's conviction on direct appeal. Id., 283.[1] Thereafter, our Supreme Court affirmed this court's judgment. *State* v. *McClain*, 324 Conn. 802, 805, 155 A.3d 209 (2017).

On September 3, 2013, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus. On April 1, 2016, the petitioner, represented by

[1] In his direct appeal, the petitioner claimed "that the trial court (1) improperly limited his cross-examination of an eyewitness, and (2) committed plain error by not instructing the jury on the doctrine of consciousness of guilt." *State* v. *McClain*, supra, 154 Conn. App. 283.

counsel, filed the operative amended petition. In the amended petition, the petitioner alleged that (1) his constitutional right to the effective assistance of trial counsel was violated, (2) his right to due process was violated by the state's failure to disclose or otherwise correct false testimony, pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (3) he was actually innocent. By memorandum of decision issued on May 11, 2017, the habeas court denied the amended petition, concluding that the petitioner did not meet his burden of proving a *Brady* violation, did not prove that he was prejudiced by his trial counsel's performance, and did not prove his actual innocence. The court thereafter denied the petition for certification to appeal from its decision. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in

favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 161 Conn. App. 434, 442–43, 127 A.3d 1096 (2015).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 561, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018).

I

The petitioner first claims that the habeas court abused its discretion by denying his certification to appeal from its decision regarding the petitioner's claim of ineffective assistance of trial counsel. Specifically, the petitioner claims that his trial counsel rendered ineffective assistance by failing to present (1) a third-party culpability defense and (2) evidence of an initial segment of a video recorded police interview of a state's witness that the petitioner alleges exists. In response, the respondent, the Commissioner of Correction, argues, in relevant part, that the habeas court properly denied the petition for a writ of habeas corpus because the petitioner failed to establish that he was prejudiced by an alleged deficiency in his trial counsel's performance. We agree with the respondent.

"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." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut. In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. 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. Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome

of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 106–107, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009).

Because the habeas court in the present case determined that the petitioner had not proven that he was prejudiced by the performance of his trial counsel without reaching the deficiency prong, "our focus on review is whether the court correctly determined the absence of prejudice." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, supra, 183 Conn. App. 565; see also *Weinberg* v. *Commissioner of Correction*, supra, 112 Conn. App. 108.

A

We first address the petitioner's argument that he was prejudiced by his trial counsel's failure to present a third-party culpability defense. Specifically, the petitioner argues that his trial counsel's failure to produce evidence that Carlos Vidal shot the victim constituted ineffective assistance of counsel.

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . .

nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, [our Supreme Court has] stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the [fact finder's] determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–610, 935 A.2d 975 (2007); see also *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 564, A.3d (2019).

The following additional facts are relevant to this claim. During the habeas trial, Donald J. Cretella, Jr., the petitioner's trial counsel, testified that he recalled seeing a police investigative report about the shooting that described an individual speaking with the police and referencing a man named Carlos Vidal. The habeas court subsequently admitted that report as an exhibit

for the purpose of showing what may have been available to Cretella at the time of trial. The petitioner's habeas counsel then asked Cretella to read the following portion of the report that was relevant to his testimony: "Jesenia Rhodes called me then came in to talk. She stated Fro's real name is Charlie or Carlos Vidal. He lives on Catherine [Street], he pulled a gun on a girl, she has a restraining order against him, [and] he lives at his aunt's house at 104 Catherine [Street] which is across the street from his girlfriend's house . . . . His mother is [Eleanor] and she lives at 59 Edwin. Jesenia on [July 19, 2010] went on Fro's MySpace account[2] . . . and found a picture of a tombstone that stated 'this is where niggas go when they fuck with me 1986.' This concern[ed] Jesenia because [the victim's] birth year is 1986. Jesenia took a picture of the tombstone before Fro removed it from the account. Jesenia stated someone . . . saw Vidal at Wentfield Park getting out of a rental car with a gun. . . . Before she left I showed her a picture of . . . Vidal [date of birth March 23, 1986,] and she stated that was Fro." (Footnote added.)

Cretella did not recall having a conversation with the petitioner about the report. He also did not investigate the information it contained because his strategy was to present an alibi defense, and, at the time, he believed

[2] "MySpace is a social networking website where members can create profiles and interact with other members. Anyone with Internet access can go onto the MySpace website and view content which is open to the general public such as a music area, video section, and members' profiles which are not set as private. However, to create a profile, upload and display photographs, communicate with persons on the site, write blogs, and/or utilize other services or applications on the MySpace website, one must be a member. Anyone can become a member of MySpace at no charge so long as they meet a minimum age requirement and register. . . . To establish a profile, a user needs only a valid email account. . . . Generally, a user creates a profile by filling out a series of virtual forms eliciting a broad range of personal data, culminating in a multimedia collage that serves as one's digital face in cyberspace." (Citation omitted; internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 511 n.19, 50 A.3d 882 (2012).

that the third-party culpability defense was weak. Sergeant John Losak, the Bridgeport police officer who authored the report, testified at the habeas trial that Rhodes had provided him with information regarding the MySpace post but indicated that there was nothing in the post that was exculpatory for the petitioner. Losak further recalled that the information compiled over the course of the investigation did not suggest that there was more than one suspect at the scene of the shooting.

The petitioner's habeas counsel also presented the testimonies of Silas Cox, a purported eyewitness to the shooting, Madeline Griffin, Vidal's aunt, and Shemayah Ben-Israel, an inmate who had shared a holding cell with Vidal in 2014. Cox testified that he was present at a section of the Greene Homes commonly referred to as the "X" in 2010 when the shooting occurred, and that he saw "a Spanish looking guy with a gun shoot and then run away." Cox described the shooter as having white skin and braided hair, not a shaved head as the petitioner had at the time of the shooting. During cross-examination, Cox described his extensive criminal record and acknowledged he had been in jail from February to November, 2010, which period encompasses the July, 2010 date of the shooting. Cox later backtracked from this acknowledgment and stated that he did not recall the exact dates that he had been incarcerated in 2010 because he had "an extensive history of coming back and forth to jail . . . ."

Griffin testified that the victim had robbed her, and that when she told Vidal that the victim had robbed her, he began waving a silver gun around. Griffin stated that this encounter happened before a 2010 car accident in which she had been involved. Griffin further testified that her sister, Eleanor, who is also Vidal's mother, had told her that someone named "Boo" had called Eleanor's house asking for Vidal to meet him in the

Greene Homes with the victim, and that "it had to do with a gun." Griffin also stated that Eleanor had asked her if Vidal could stay at her house because he had been shot. Griffin's statements regarding what Eleanor had said to her were admitted at the habeas trial, over hearsay objections, for the purpose of showing what information may have been available to Cretella at the time of the criminal trial. Griffin provided more information about her 2010 accident during cross-examination, stating that she had been involved in a car accident in June, 2010, and that, as a consequence, she had developed memory problems. She also stated that she had been diagnosed with mental health issues, including schizophrenia, for which she takes medication.

Ben-Israel testified that while he was in a holding cell in MacDougall-Walker Correctional Institution with Vidal in 2014, they had a conversation during which Vidal expressed his concern that "a warrant was going to pop up for his arrest . . . for that incident that happened in the [Greene Homes]." Ben-Israel also testified that Vidal had been talking about the petitioner, and that Vidal had told him that "he was supposed to turn himself in, but . . . he wasn't going to turn himself in for nobody. And that is pretty much what he said. He said fuck—he said fuck [the petitioner], basically." Ben-Israel further stated that he had been familiar with the case because he had seen a post that Vidal had made on Facebook in which he bragged "about what was done in the [Greene Homes]."[3] During cross-examination, Ben-Israel acknowledged that he was serving a twelve year sentence for robbery and that he had a previous criminal record under a different name. He

[3] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on a password protected profile." (Internal quotation marks omitted.) *State* v. *Kukucka*, 181 Conn. App. 329, 334 n.3, 186 A.3d 1171, cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

also acknowledged that the Facebook post by Vidal that he allegedly saw did not indicate that Vidal had killed the victim.

The petitioner also testified at the habeas trial. He stated that the only discussion he had with Cretella about Vidal was regarding Rhodes' reference to Vidal in Losak's report. The petitioner recalled that when he asked Cretella about sequestering Rhodes, Cretella cut him off and told him not to worry about her.

The habeas court explicitly addressed the MySpace post and Ben-Israel's testimony in rejecting the petitioner's claim that Cretella failed to investigate or present a third-party culpability defense. The court determined that it was unclear whether Cretella successfully could have authenticated the MySpace post as having been authored by Vidal. The court concluded that, even if the post had been admitted into evidence, it failed "to comprise a clear admission by Vidal that *he*, and not the petitioner, shot the victim"; (emphasis in original); and noted that "it was the petitioner, and not Vidal, whose appearance more closely resembled the shooter's description [given] by most witnesses."

After reviewing the record, we agree with the habeas court's conclusion that, despite the evidence presented, the petitioner failed to demonstrate that there was a reasonable probability that, but for the trial counsel's failure to present a third-party culpability defense, the outcome of his trial would have been different. We agree that even if a third-party culpability defense had been asserted at the petitioner's trial, the purported MySpace post, assuming that it was found and properly authenticated, would have failed to constitute an admission by Vidal sufficient to raise a reasonable doubt of the petitioner's culpability.[4] Sergeant Losak confirmed

[4] For a third-party culpability defense to succeed, a defendant need only present evidence that creates a reasonable doubt as to whether the defendant committed the offense. See *State* v. *Arroyo*, supra, 284 Conn. 609–610 ("evidence that establishes a direct connection between a third party and the

that he had been made aware of the post, but testified that the investigation of the shooting did not corroborate the information that the post allegedly contained. Moreover, we agree with the court's determination that, because Ben-Israel's testimony concerned a 2014 conversation he had with Vidal "that first came to light about one month before the habeas trial in 2017 . . . Cretella could hardly be faulted for not premising a third-party [culpability] defense on an event which had not yet occurred at the time of the petitioner's criminal trial in 2012."

Additionally, although the court did not specifically discuss the testimony of Cox and Griffin, the court reasonably could have concluded that their testimony did not help the petitioner because it was unclear whether Cox was in prison at the time of the shooting, and because Griffin's memory and mental health issues raise questions as to the reliability of her testimony. Additionally, the testimony of Cox and Griffin did not directly connect Vidal to the shooting in the present case but, rather, at the most, raised a bare suspicion that he may have been involved in a shooting. See *State* v. *Arroyo*, supra, 284 Conn. 609–610. Finally, as we will discuss further in part II of this opinion, the court found that the evidence at both the criminal and habeas trials provided descriptions of the shooter that more closely matched the physical features of the petitioner than those of Vidal.

Accordingly, the habeas court correctly determined that the petitioner was not prejudiced by Cretella's

charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense").

In the present case, although the habeas court may have overstated the quality of evidence adequate to sustain a third-party culpability defense in concluding that the MySpace post would have failed to constitute a "clear admission" by Vidal of his culpability, the record provides ample support for the court's conclusion that such a defense would not have been successful in raising a reasonable doubt as to the petitioner's culpability in this case.

alleged failure to investigate and present a third-party culpability defense.

B

The petitioner next argues that he was prejudiced by his trial counsel's failure to present evidence of an initial segment of a video recorded police interview of Eduardo Martorony, a witness for the state. The petitioner alleges that an initial portion of the video in which Detective Harold Dimbo intentionally left Martorony alone in the interview room had been redacted. We are not persuaded.

The following additional facts are relevant to this claim. Cretalla testified during the habeas trial that he recalled that, during the petitioner's criminal trial, the police video of Martorony was played to corroborate Martorony's trial testimony. During Cretella's testimony before the habeas court, the video was played to show what information had been available to Cretella. The video began by showing Martorony sitting alone in an interview room looking through police materials. Cretella recalled this initial portion of the video but did not recall whether that initial portion was played for the jury at the criminal trial or whether redactions were made to the first part of the video. Cretella did recall that redactions were made to the latter part of the video and that there was a portion of the video showing Martorony sitting alone in the room for a longer period of time than shown in the recording entered into evidence. He testified, however, that this portion may have occurred later in the interview.

Cretella additionally testified that he thought Martorony's review of the police material during the video could have suggested that he saw information that would have helped him testify about something he actually may not have witnessed. Cretella stated that he cross-examined Martorony regarding the material left

in the interview room and that, although he also cross-examined Dimbo about Martorony's interview, he did not recall whether he specifically asked Dimbo about the material left in the room because he did not want to walk into a "potential trap" by asking questions with potential answers he did not know. Finally, Cretella testified that, in his experience as an attorney, having viewed "hundreds" of police interviews, it is not uncommon for the videos of such interviews to start before the interviewer has entered the room.

Dimbo, who interviewed Martorony during the video, testified that he had met with Martorony before the interview to discuss the case. Dimbo stated that, at this initial meeting, Martorony had provided him with information about the shooting on his own accord. Specifically, Dimbo recalled that Martorony told him that he had witnessed a shooting and provided him with the nicknames of those involved. Dimbo then stated that, after hearing those nicknames, he suspected that the petitioner was the shooter. Dimbo also testified that the material Martorony was seen examining in the video contained only a photograph of the victim, Dimbo's notes from his previous discussion with Martorony, and a photo array. He stated, as well, that apart from the photo array, everything included in the material was information that had been provided directly to him by Martorony. Dimbo further testified that Martorony was left alone in the interview room before the recording began because he needed to leave the room to turn on the video recorder.

The petitioner testified that he had viewed an original video in which Dimbo had left Martorony alone in the interview room because he said he had forgotten something, and the petitioner contended that during his criminal trial, he wanted Cretella to question Dimbo about why he subsequently did not return to the room with anything.

In assessing the petitioner's claim that Cretella failed to present the alleged initial segment of the video recorded police interview, the habeas court determined that the allegation that the video had been redacted was "simply unproven speculation." The court concluded that no credible evidence supported the petitioner's suggestion that the recording began earlier than shown to the jury simply because it abruptly started with Martorony reviewing police material.

On the basis of our review of the record, we conclude that the habeas court reasonably determined that the petitioner offered insufficient evidence to support his allegation that an initial segment of the video existed or that, even if it existed, it was not shown to the jury. No evidence of an initial portion of the video was presented at the habeas trial apart from the petitioner's allegation that he had viewed an "original video." Moreover, the court found that Cretella's cross-examination of both Martorony and Detective Dimbo at the petitioner's criminal trial "decidedly put before the jury the possibility that Martorony previewed police documents, photographs, and/or notes and simply repeated information that he believed the police wanted to hear." Accordingly, we agree with the habeas court's assessment that because the jury was able to weigh Martorony and Dimbo's credibility regarding the nature of the video without the presentation of any purported initial segment of the video, no prejudice resulted from Cretella's alleged failure to present additional evidence regarding the nature of the video.

The record demonstrates that, even if Cretella had provided deficient performance regarding the third-party culpability defense or the purported missing portion of the video, the petitioner's ineffective assistance claims do not involve issues that are debatable among jurists of reason with respect to the prejudice prong of the *Strickland* test. We conclude, therefore, that the

habeas court did not abuse its discretion in denying the petition for certification to appeal from that court's determination that the petitioner failed to prove that he was prejudiced by the ineffective assistance of counsel at his criminal trial.

II

The petitioner also claims that the court abused its discretion in denying his petition for certification to appeal with respect to his claim of actual innocence. We are not persuaded.

We begin by setting forth the relevant legal principles that govern our analysis. "[T]he proper standard for evaluating a freestanding claim of actual innocence, like that of the petitioner, is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime. . . .

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime or that no crime actually occurred." (Citation omitted; internal quotation marks omitted.) *Carmon* v. *Commissioner*

of Correction, 178 Conn. App. 356, 371, 175 A.3d 60 (2017), cert. denied, 328 Conn. 913, 180 A.3d 961 (2018).

This court has held that "[a] claim of actual innocence must be based on newly discovered evidence. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 687, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017).

The following additional facts are relevant to this claim. During the habeas trial, the petitioner described Vidal as a light-skinned African American, approximately five feet, seven to eight inches tall, and with cornbraids. The petitioner additionally testified that he himself, as opposed to Vidal, never had cornbraids. Vidal also appeared with his counsel during the habeas trial through a video conference and, through his counsel, invoked his right against self-incrimination. When the petitioner's counsel indicated his desire to put Vidal's skin color, hairstyle, and other physical characteristics into the record, the court responded: "Well I can—certainly I can see Mr. Vidal presently, so I can take—my observations are certainly evidence in the case of how he appears. And with that, I don't think you can ask him how his hair was, etc." The court then asked Vidal if he would be willing to answer questions about his height and weight, and although his counsel did not agree to permit him to do so, Vidal did stand up and turn to the side when the court requested that he do so.

In its memorandum of decision, the habeas court first indicated that "[t]he newly discovered evidence

proffered by the petitioner" was the testimony of Ben-Israel. The court then found "that the petitioner . . . failed to satisfy his burden of proving, by clear and convincing evidence, affirmatively that [he] did not murder the victim." The court determined that "[a] combination of credible, newly discovered evidence with that previously produced at the petitioner's criminal trial show[ed] that the more accurate and persuasive description of the shooter more closely matched the physical features of the petitioner than those of Vidal." The court stated that it had "viewed Vidal's complexion and other physical characteristics personally." The court also noted that, during the criminal trial, it was established that three persons who knew the petitioner on the day of the shooting identified him as the gunman: (1) Kyle Mason, the other individual who was shot and who provided a recorded statement to police on the day of the incident; (2) Henry Brandon, who saw the petitioner receive a silver pistol from one of his companions and fire the shot that struck Mason; and (3) Martorony, who was speaking with the victim just as the assailants approached to attack and "identified the petitioner as the person who employed a chrome-colored, semi-automatic pistol to shoot the victim." The court concluded that, given the inculpatory evidence against the petitioner, "vague boasts [allegedly] by Vidal of some nonspecific involvement in the victim's demise falls far short of clear and convincing evidence of the petitioner's innocence."

On appeal, the petitioner argues that (1) Ben-Israel's testimony was newly discovered evidence that could not have been discovered prior to, or during, the petitioner's criminal trial despite the exercise of due diligence, and (2) the testimony of Cox and Griffin also could be considered newly discovered evidence provided that this court determines that the exercise of

due diligence would not have unearthed their testimony. The respondent argues that the petitioner's claim should "be rejected because the habeas court acted well within its role as fact finder in concluding that the proffered evidence was insufficient to meet the 'extraordinarily high' burden of proving the petitioner's actual innocence by clear and convincing evidence."

Because it is clear that Ben-Israel's testimony, which came to light one month before the 2017 habeas trial, could not have been discovered prior to the petitioner's 2012 criminal trial through due diligence, we agree with the habeas court that the testimony constitutes newly discovered evidence. We also agree with the habeas court that such testimony fails to establish clearly and convincingly that the petitioner is actually innocent.

In his testimony during the habeas trial, Ben-Israel stated that Vidal told him about the shooting in the Greene Homes, but also stated that he knew about the shooting apart from his conversation with Vidal. Moreover, Ben-Israel repeatedly stated that the social media post by Vidal that he allegedly saw was on Facebook, not MySpace, and that the post did not indicate that Vidal, and not the petitioner, had killed the victim. Ben-Israel's testimony was not only contradictory to the inculpatory evidence presented against the petitioner, but it also failed to unequivocally undermine such evidence. See *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 560, 22 A.3d 1196 (2011) ("[T]he clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . We equated the clear and convincing burden with an extraordinarily high and truly persuasive [demonstration] of actual innocence . . . ." [Citation omitted; internal quotation marks omitted.]). The habeas court considered the overwhelming evidence of the petitioner's identification as the shooter at the criminal trial with its own viewing of the petitioner and Vidal during the habeas trial, and reasonably

concluded that the petitioner, not Vidal, more closely resembled the shooter identified by eyewitnesses. As such, we conclude that, in light of the evidence presented at the habeas trial, Ben-Israel's testimony did not support the petitioner's actual innocence claim.

We next turn to the petitioner's argument, which was not raised during the habeas trial, that the testimony of Cox and Griffin could be newly discovered evidence.[5] In his brief before this court, the petitioner merely restates the relevant portions of Cox and Griffin's testimony without offering an argument or legal authority as to how such testimony could be considered newly discovered.

Even assuming, arguendo, that the testimony of Cox and Griffin could be considered newly discovered, we conclude that such testimony, when weighed against the other evidence presented against the petitioner at the habeas trial, did not constitute affirmative proof of the petitioner's innocence. "To disturb a long settled and properly obtained judgment of conviction, and thus put the state to the task of reproving its case many years later, the petitioners must affirmatively demonstrate that they are *in fact* innocent." (Emphasis in

[5] We may properly review the petitioner's argument that the testimony of Cox and Griffin could be considered newly discovered evidence because it is derived from the petitioner's actual innocence claim. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015) ("[w]e may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial" [internal quotation marks omitted]); see also *State* v. *Fernando A.*, 294 Conn. 1, 31 n.26, 981 A.2d 427 (2009) ("[although we are mindful that] the plaintiff did not [previously] raise . . . all of the theories that he raises in his writ . . . those theories are related to a single legal claim, and . . . there is substantial overlap between these theories under the case law" [internal quotation marks omitted]); *Rowe* v. *Superior Court*, 289 Conn. 649, 663, 960 A.2d 256 (2008) (same).

In the present case, the petitioner's argument regarding the testimony of Cox and Griffin is subsumed within his actual innocence claim raised before the habeas court. As such, we may review this argument.

original.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 567. As previously discussed in part I A of this opinion, the testimony of Cox and Griffin was unreliable and did not constitute clear and convincing evidence of the petitioner's actual innocence. *Carmon* v. *Commissioner of Correction*, supra, 178 Conn. App. 371 ("the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence . . . he is actually innocent of the crime of which he stands convicted" [internal quotation marks omitted]); see also *Turner* v. *Commonwealth*, 56 Va. App. 391, 411, 694 S.E.2d 251 (2010) ("the petitioner has not met his burden . . . because . . . relief [on a petition for a writ of actual innocence is available] only to those individuals who can establish that they did not, as a matter of fact, commit the crime for which they were convicted and not to those who merely produce evidence contrary to the evidence presented at their criminal trial" [internal quotation marks omitted]), aff'd, 282 Va. 227, 717 S.E.2d 111 (2011). On the basis of our own review, we conclude that the habeas court properly found that the petitioner had not established by clear and convincing evidence that he is innocent of the murder for which he was convicted, and the petitioner failed to establish that no reasonable fact finder would find him guilty of the crime.

On the basis of the foregoing, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. We are not persuaded that the issues, as presented by the petitioner, are debatable among jurists of reason, that they reasonably could be resolved differently, or that they raise questions deserving further appellate scrutiny.

The appeal is dismissed.

In this opinion the other judges concurred.

WILFREDO QUINONES *v.* R. W. THOMPSON COMPANY, INC. (AC 38256)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff, who was injured while he was employed by the defendant company, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner denying the plaintiff's motion to preclude the defendant from contesting the extent of the plaintiff's injuries. The defendant did not contest the plaintiff's claim for certain workers' compensation benefits by filing a form 43, as required by statute ([Rev. to 2009] § 31-294c). Nevertheless, the defendant later filed a form 36 seeking to discontinue the benefits it was paying the plaintiff, which was approved without objection. The plaintiff thereafter filed his motion to preclude and, after conducting a formal hearing but before ruling on that motion, the commissioner, T, died, and the case was assigned to a substitute commissioner, D. The parties sent letters to the Workers' Compensation Commission after they were informed that they could have a hearing de novo or request the commission to assign a substitute commissioner to decide the case upon review of the original record. The plaintiff objected to a trial de novo and claimed that a decision should be rendered upon review of the record, and the defendant had no objection to a decision rendered based upon a review of the record. Thereafter, the plaintiff filed an objection to D's order scheduling a formal hearing in order to open the record for articulation of the parties' positions and arguments, which D denied. Subsequently, D held a formal hearing, at which time he recalled the plaintiff for further questioning, and later issued a decision denying the plaintiff's motion to preclude. The plaintiff appealed to the board, which affirmed the denial of his motion to preclude. On appeal to this court, the plaintiff claimed, inter alia, that the board improperly found there was no error when D rejected an alleged stipulation that the case be decided on the original record. *Held*:

1. The plaintiff could not prevail on his claim that because the parties stipulated that the case would be decided on the original record before T, D improperly opened the record, ignored the stipulation and conducted a hearing de novo: D's opening of the record solely in order to question the plaintiff regarding payments that he received from the defendant was not a hearing de novo, and the board did not clearly err in finding that the letters that the parties sent separately to the commission did not constitute a contract between the parties that could be considered a stipulation, as there was no firm understanding between the parties nor a quid pro quo, and the letters were merely a statement by the parties of their respective positions at that time; moreover, even if a

stipulation existed between the parties, it would not have prohibited D from opening the record, as D recalled the plaintiff as a witness so that he could hear evidence he believed was essential to a proper evaluation of the case, and it was fully within D's power and authority, as a commissioner, to do so; accordingly, the board correctly determined that it was not improper for D to have opened the record.

2. The plaintiff could not prevail on his claim that the board improperly affirmed the denial of his motion to preclude, which was based on his claim that the defendant, by failing to file a form 43 to contest the compensability of the plaintiff's claim for benefits, failed to comply with § 31-294c and was, therefore, precluded from contesting the compensability or extent of the plaintiff's claimed injury; the defendant had no duty to file a form 43, as the compensability of the plaintiff's claim was not and had never been contested, the plaintiff timely received benefits until the commission approved a timely filed form 36, and there was no reason for the defendant to contest the extent of the plaintiff's injury until obtaining the information alleged in the form 36, namely, that the plaintiff was able to return to work.

Argued December 4, 2018—officially released February 26, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Sixth District denying the plaintiff's motion to preclude the defendant from contesting the extent of the plaintiff's injury and denying the plaintiff's motion to correct, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

Nicholas C. Varunes, with whom was *Christopher Young*, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff, Wilfredo Quinones, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Sixth District, Stephen B. Delaney, denying the plaintiff's motion to preclude the defendant, R. W. Thompson Co., Inc., from contesting

the extent of the plaintiff's injury. On appeal, the plaintiff claims that the board improperly (1) found there was no error when the commissioner rejected an alleged stipulation that the case be decided on the original record and (2) affirmed the denial of the plaintiff's motion to preclude despite the defendant's failure to file a form 43. We affirm the decision of the board.

The following facts and procedural history are relevant to our resolution of this appeal. On March 16, 2010, during the course of his employment with the defendant, the plaintiff sustained compensable injuries when the deck of a road paving machine fell on him. He began to receive workers' compensation benefits on March 23, 2010. Although the plaintiff timely filed a form 30C[1] claiming benefits on October 25, 2010, he refiled a form 30C on February 10, 2011, because he lost the return receipts from the postal service related to his first filing. The defendant did not contest the plaintiff's claim by filing a form 43[2] and began paying the plaintiff weekly indemnity payments in the amount of $328.58 from March 23, 2010, until November 8, 2011. On October 17, 2011, the defendant, however, sought to discontinue the benefits it was paying the plaintiff by filing a form 36,[3] alleging that the plaintiff was able

[1] "A form 30C is the document prescribed by the [W]orkers' [C]ompensation [C]ommission to be used when filing a notice of claim pursuant to the [Workers' Compensation Act]." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.3, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[2] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[3] "A form 36 is the official document an employer must file when seeking to discontinue an employee's benefits." *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 184 n.6, 801 A.2d 783 (2002).

to return to work.[4] The form 36 was approved without objection on November 2, 2011. Consequently, the plaintiff received no more compensation benefit payments after November 8, 2011. On February 29, 2012, the plaintiff filed a motion to preclude the defendant from denying him further compensation benefits. Commissioner Clifton Thompson conducted a formal hearing on April 18, 2012. After the hearing, but before the parties submitted posttrial briefs, Commissioner Thompson died, and the case was assigned to Commissioner Delaney.[5]

When the Workers' Compensation Commission (commission) contacted the parties regarding the former commissioner's death, the parties were told that they could have a hearing de novo or request the commission to assign a substitute commissioner to decide the case on the basis of a review of the transcript, exhibits, and as of yet unfiled briefs. The plaintiff objected to a trial de novo in a letter dated May 24, 2012, and stated that a decision should be rendered upon review of the record.[6] The defendant, in a letter dated May 24, 2012, stated that it "[had] no objection to [the] matter [being] reassigned to a new commissioner for a finding on the

[4] The defendant sought to discontinue the compensation benefits it was paying the plaintiff on the basis of surveillance video obtained by its compensation insurance carrier, which showed that the plaintiff had the capacity to work.

[5] Hereinafter, we refer to Commissioner Thompson as the former commissioner and Commissioner Delaney as the commissioner.

[6] The plaintiff's letter stated in relevant part: "This letter serves to memorialize our conversation that we had on May 24, 2012 . . . . It is [the plaintiff's] position that this matter is purely procedural, and does not involve credibility issues per se. The trial transcript is fifteen pages long and there are a total of four exhibits in the record. The record thus speaks for itself. The [plaintiff] objects to any trial de novo as it is unnecessary. The parties were given their fair and full opportunity to present evidence and argue their respective positions at the [f]ormal [h]earing. The [plaintiff's] brief is virtually complete . . . . More importantly, a trial de novo will cause an unreasonable delay in these proceedings. The [plaintiff] is currently without any benefits and is in acute financial distress. Thus, time is of the essence. Another commissioner should be selected to review the entire record and render a decision."

papers based on the April 18, 2012 formal hearing transcript and the briefs submitted by the parties."

On August 31, 2012, the commissioner scheduled a formal hearing to open the record for articulation of the parties' positions and arguments. On September 7, 2012, the plaintiff filed an objection to the commissioner's order to open the formal hearing. At a formal hearing on October 1, 2012, the commissioner heard the plaintiff's objection, and ruled that he had the authority to open the record and was recalling the plaintiff for further questioning. The plaintiff thereafter filed an appeal to the board on October 19, 2012, challenging the right of the commissioner to open the record and take further evidence. The board issued a decision on January 16, 2014, concluding that the matter was not ripe for review. On May 15, 2014, the commissioner held a formal hearing. On July 11, 2014, he issued his decision denying the plaintiff's motion to preclude. The plaintiff appealed to the board, arguing that the commissioner improperly opened the record in contravention of the parties' stipulation and denied his motion to preclude. On July 29, 2015, the board found that there was no stipulation between the parties, and even if there was a stipulation, the commissioner had the authority to open the record. The board affirmed his denial of the motion to preclude. This appeal followed.

As a threshold matter, we set forth the standard of review. "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the board]. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Where . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to

review the administrative decision." (Citations omitted; internal quotation marks omitted.) *Day* v. *Middletown*, 59 Conn. App. 816, 819, 757 A.2d 1267, cert. denied, 254 Conn. 945, 762 A.2d 900 (2000). "We [accord] deference to . . . a time-tested agency interpretation of a statute, but only when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable." *State Medical Society* v. *Board of Examiners in Podiatry*, 208 Conn. 709, 719, 546 A.2d 830 (1988).

"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 . . . . In seeking to determine that meaning . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"Moreover, [i]n applying these general principles, we are mindful that the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for

workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Kinsey* v. *World PAC*, 152 Conn. App. 116, 124, 98 A.3d 66 (2014).

"The powers and duties of workers' compensation commissioners are conferred upon them for the purposes of carrying out the stated provisions of the [act]. . . . It is well settled that the commissioner's jurisdiction is confined by the . . . act and limited by its provisions." (Citations omitted; internal quotation marks omitted.) *Tufaro* v. *Pepperidge Farm, Inc.*, 24 Conn. App. 234, 236, 587 A.2d 1044 (1991).

I

The plaintiff first claims that the commissioner improperly opened the record. Specifically, he argues that he and the defendant stipulated that the case would be decided on the record before the former commissioner, and that the commissioner improperly ignored that stipulation and conducted a hearing de novo. We disagree.

As an initial matter, we reject the plaintiff's characterization that the commissioner's opening of the record was a hearing de novo. After the matter was assigned to him, the commissioner reviewed the record and concluded that there was not enough evidence for him to make a decision. He stated that the record consisted of "a very short transcript [of the April 18, 2012 formal hearing], very short direct and [cross-examination] of the [plaintiff], and [that he had] a lot of questions [for]

the [plaintiff]."[7] As a result, he opened the record in order to question the plaintiff. At the hearing on May 15, 2014, the commissioner questioned the plaintiff solely about the payments he received. The plaintiff was unable to answer the commissioner's questions, even when shown his testimony from the October 1, 2012 hearing. The commissioner then asked counsel whether they could provide the information he requested concerning what payments the plaintiff received. Surprisingly, the plaintiff's counsel did not respond. The defendant's counsel offered a history of the benefits the defendant had paid the plaintiff. The commissioner accepted the history into evidence, which indicated that the plaintiff received weekly payments in the amount of $328.58, for a total of $28,257.88, as well as payment of medical bills totaling $66,996.09, for an overall total of $95,253.97.[8]

We also reject the plaintiff's characterization of the May 24, 2012 letters the parties sent separately to the commission as a stipulation. "[A stipulation] may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of

[7] The record discloses that direct examination of the plaintiff was very short in the April 18, 2012 formal hearing and did not include questions regarding benefit payments. Furthermore, the plaintiff objected to cross-examination questions about compensation as being outside of the scope of direct. As a result, the record of the payments received by the plaintiff was limited. The plaintiff, in his posttrial brief, even notes that he "did not confirm whether the [defendant] timely commenced [with] payments within the meaning of [General Statutes § 31-294c (b)]."

[8] The plaintiff additionally argues that the commissioner's opening the record is fundamentally unfair, as the evidence of payments that was introduced "cure[d] the deficiencies in the defendant's case alerted to him by [the] plaintiff's counsel." We disagree. We do not view the commissioner's taking steps necessary to determine whether payments commenced in accordance with General Statutes § 31-294c (b) to be fundamentally unfair to the plaintiff, who received significant timely benefits until the approval of a form 36 and has disingenuously attempted to keep evidence of such payments from being considered.

competent jurisdiction. . . . [It is] the result of a contract and its embodiment in a form which places it and the matters covered by it beyond further controversy. . . . The essence of the [stipulation] is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has [rendered] judgment conforming to the terms of the agreement." (Internal quotation marks omitted.) *Portfolio Recovery Associates, LLC* v. *Healy*, 158 Conn. App. 113, 118, 118 A.3d 637 (2015).

"Absent a clearly expressed intention of the parties, the construction of a stipulation is a question of fact committed to the sound discretion of the trial court. . . . Unless the language is so clear as to render its interpretation a matter of law, the question of the parties' intent in entering into a stipulation is a question of fact that is subject to the 'clearly erroneous' scope of review." (Citations omitted.) *Rosenfield* v. *Metals Selling Corp.*, 229 Conn. 771, 780, 643 A.2d 1253 (1994).

In its opinion affirming the denial of the motion to preclude, the board stated that its "examination of the documentary evidence . . . which purportedly serves as a 'stipulation' reveals that the May 24, 2012 correspondence from [the plaintiff's] counsel to the commission was primarily a position statement reflecting [the plaintiff's] objection to a trial de novo, while correspondence to the commission from [the defendant's] counsel of the same date indicates that the [defendant] '[had] no objection to [the] matter [being] reassigned to a new commissioner for a finding on the papers based on the April 18, 2012 formal hearing transcript and the briefs submitted by the parties.' . . . [N]either of these documents rises to a level of a 'stipulation,' and the evidentiary record contains no other document which even remotely resembles a stipulation." The board also concluded that even if there had been a stipulation, the commissioner would not have been bound by its terms in light of the powers entrusted to him by statute.

Upon review of the evidence, we conclude that the board did not clearly err in finding that the May 24, 2012 letters did not constitute a contract between the parties that could be considered a stipulation. There was no firm understanding between the parties nor a quid pro quo, just a statement by the parties of their respective positions at that time. We also agree with the board that, even if a stipulation existed between the parties, such a stipulation would not prohibit the commissioner from opening the record.

"[U]pon the death, disability or resignation of a judge[9] . . . during the pendency of a trial or hearing to the court, a successor judge should take the following steps pursuant to the authority granted by [General Statutes] § 51-183f: (1) become familiar with the entire existing record, including, but not necessarily limited to, transcripts of all testimony and all documentary evidence previously admitted; (2) determine, on the basis of such record and any further proceedings as the court deems necessary, whether the matter may be completed without prejudice to the parties; (3) if the court finds that the matter may not be completed without prejudice to the parties it should declare a mistrial, but if the court finds that the matter may be completed without prejudice to the parties then; (4) upon request of any party, or *upon the court's own request, recall any witness whose testimony is material and disputed and who is available to testify without due burden*; (5) take any other steps reasonably necessary to complete the proceedings; and (6) render a decision based on the successor judge's own findings of fact and conclusions of law." (Emphasis added; footnote added.) *Stevens* v. *Hartford Accident & Indemnity Co.*, 29 Conn. App. 378, 386, 615 A.2d 507 (1992).

[9] These principles have been applied to workers' compensation commissioners, as well as to judges. See *Schick* v. *Windsor Airmotive Division/Barnes Group, Inc.*, 34 Conn. App. 673, 675–77, 643 A.2d 286 (1994).

"Although . . . a successor judge [has the power] to make his or her findings of fact based solely on transcribed testimony and exhibits, no Connecticut court has . . . defined the power of litigants to stipulate to such a procedure, thereby circumventing the procedures required under § 51-183f. Although ordinarily stipulations of the parties are adopted, the court may disapprove the parties' agreement when it finds reason. . . . A stipulation, however, is not necessarily binding on the court and, under the circumstances of a particular case, the court may be justified in disregarding it." (Citations omitted.) *Gorelick* v. *Montanaro*, 94 Conn. App. 14, 22 n.14, 891 A.2d 41 (2006). "We are mindful that a judge is not a mere umpire . . . but a minister of justice, and it follows that an agreement is not necessarily binding on the court and may justifiably be disregarded in a particular case." *Central Connecticut Teachers Federal Credit Union* v. *Grant*, 27 Conn. App. 435, 438, 606 A.2d 729 (1992).

In the present case, the commissioner recalled the plaintiff as a witness so that he could hear evidence he believed essential to a proper evaluation of the case, that is, evidence of what payments had been made to the plaintiff. The plaintiff's testimony was material as to whether the defendant met the requirements of General Statutes (Rev. to 2009) § 31-294c.[10] It was fully within the commissioner's power and authority to do so. See General Statutes § 31-278 ("[e]ach commissioner shall . . . have power to summon and examine under oath such witnesses, and may direct the production of . . . such . . . records . . . in relation to any matter at issue as he may find proper"); General Statutes § 31-282 ("[i]f any compensation commissioner dies before the final settlement of any matter in which he had been acting in his official capacity, his successor in office

[10] Hereinafter, all references to § 31-294c in this opinion are to the 2009 revision of the statute.

may continue such matter to its completion"); and General Statutes § 31-298 ("[T]he commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."); see also *Delgaizo* v. *Veeder-Root, Inc.*, 133 Conn. 664, 667–68, 54 A.2d 262 (1947) ("The commissioner is not bound by common law or statutory rules of evidence or procedure. He may make inquiry in the manner best calculated to do so to ascertain the rights of the parties and to carry out the spirit of the act through oral testimony or written or printed records. . . . He may require the production of records . . . ." [Citation omitted.]). The plaintiff did not provide, nor have we found, any support for the notion that a stipulation—assuming one in fact existed—between parties that was not approved by the commissioner could limit the commissioner's power. See *Gorelick* v. *Montanaro*, supra, 94 Conn. App. 22 n.14. We, therefore, conclude that the board correctly determined that it was not improper for the commissioner to have opened the record.

II

The plaintiff's second claim is that the board improperly affirmed the denial of his motion to preclude, as the defendant failed to file a form 43. Specifically, the plaintiff argues that by failing to file a form 43 to contest the compensability of his original claim, the defendant failed to comply with § 31-294c[11] and is, therefore, precluded from contesting the compensability or extent of

[11] General Statutes § 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the

the plaintiff's claimed injury. We disagree and conclude that, given the circumstances, the board properly concluded that the defendant had no duty to file a form 43.

"In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted." *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 338, 49 A.3d 211, cert. granted, 307 Conn. 915, 54 A.3d 179 (2012) (appeal withdrawn September 25, 2013).

" 'The first two sentences of § 31-294c (b) address the procedure that an employer must follow if it wants to contest liability to pay compensation . . . . The statute prescribes therein that, within twenty-eight days of receiving a notice of claim, the employer must file a notice stating that it contests the claimant's right to compensation and setting forth the specific ground on which compensation is contested. The third sentence:

chairman of the Workers' Compensation Commission stating that the right to compensation is contested . . . . If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim . . . . Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

(1) provides that an employer who fails to file a timely notice contesting liability must commence payment of compensation for the alleged injury within that same twenty-eight day period; and (2) grants the employer who timely commences payment a one year period in which to "contest the employee's right to receive compensation on any grounds or the extent of his disability"; but (3) relieves the employer of the obligation to commence payment within the twenty-eight day period if the notice of claim does not, inter alia, include a warning that "the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day." . . . The fourth sentence provides for reimbursement to an employer who timely pays and thereafter prevails in contesting compensability. Finally, the fifth sentence sets forth the consequences to an employer who neither timely pays nor timely contests liability: "Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death." ' " (Citation omitted; emphasis omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 269–70, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

"Our Supreme Court, in discerning the legislative intent behind the notice requirement of General Statutes (Rev. to 1968) § 31-297 (b), now § 31-294c (b), explained that the statute is meant to ensure (1) that employers would bear the burden of investigating a

claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim. . . . The court noted that the portion of the statute providing for a conclusive presumption of liability in the event of the employer's failure to provide timely notice was intended to correct some of the glaring inequities of the workers' compensation system, specifically, to remedy the disadvantaged position of the injured employee . . . ." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 840, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

"The language of form 43 indicates that it is to be used by employers who are contesting their liability to pay alleged compensation benefits. The form does not include a space for those employers who initially accept liability but may later, after investigation, choose to contest the extent of the disability. This distinction is not a superficial one, as an employer who is contesting liability is distinguishable from one who solely contests the extent of the disability. . . .

"Although we have no doubt that employers may have previously used form 43 to disclaim only the extent of a disability and not liability, amending the form to suit their specific disclaimer needs, that procedure unfairly requires such employers either to amend the form or to state untruthfully their intention to contest liability in order to preserve their ability to later challenge the extent of disability. The legislature, however, designed preservation of such challenges by allowing an employer, *instead of filing a form 43*, to commence payment of compensation for the alleged injury within the twenty-eight day period; and granting the employer who timely commences payment a one year period in which to contest the employee's right to receive compensation on any grounds *or the extent of his disability* . . . ." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Dubrosky*

v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 271–73.

The commissioner found that while the defendant did not file a form 43, the plaintiff timely, within twenty-eight days, received benefits until the commission approved a form 36. In its decision, the board stated: "In light of the evidence presented, the . . . commissioner reasonably concluded that because the compensability of the claim was not and had never been contested, the [defendant was] never obligated to file a form 43." We agree.

In the present case, the defendant did not contest the liability of the plaintiff's injury and compensated him until the approval of a form 36. Additionally, there was no reason for the defendant to contest the extent of the plaintiff's injury until obtaining the information alleged in the form 36, which was filed less than a year after receiving the plaintiff's form 30C.[12] The plaintiff, therefore, was never in a disadvantaged position. "It is well settled that notice provisions under the [act] should be strictly construed. . . . As this court has recognized, however, [o]ur requirement of strict compliance . . . has presumed the possibility of compliance." (Citation omitted; internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 274. Considering the facts of the present case, the board did not misapply the law to the subordinate facts or draw an unreasonable conclusion. Therefore, we agree with the decision of the board.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[12] Although, as the commissioner noted in his decision, the notice of approval of the form 36 was sent on November 2, 2011, which is outside of the one year "safe harbor provision," we note that the form was received by the commission on October 17, 2011. While the first form 30C the plaintiff filed was dated September 7, 2010, the form was received on October 25, 2010.

JOSEPH W. KAMINSKY JR. *v.* COMMISSIONER OF EMERGENCY SERVICES AND PUBLIC PROTECTION ET AL. (AC 40546)

Sheldon, Keller and Moll, Js.

Syllabus

The plaintiff brought this action against the defendant Commissioner of Emergency Services and Public Protection, seeking a declaratory ruling that certain firearms were improperly seized and withheld from him by the defendant and, thus, that he was entitled to the return of those firearms. The plaintiff never obtained a certificate of possession or registered the three firearms at issue as assault weapons as required by Connecticut law, and the sole basis of the defendant's refusal to return the three firearms at issue was that they were never properly registered as assault weapons. The plaintiff claimed that because the subject firearms were manufactured prior to September 13, 1994, they were exempt from the registration requirement under statute (§ 53-202m). The trial court denied the plaintiff's request for a declaratory ruling and rendered judgment for the defendant, from which the plaintiff appealed to this court. On the basis of its interpretation of § 53-202m, the trial court had concluded that the plaintiff's firearms were not legally held by him because they were not exempt from the transfer or registration requirements for assault weapons. *Held* that the plaintiff's claim that the trial court erred in denying his request for a declaratory judgment was unavailing, the trial court having properly determined in a well reasoned memorandum of decision that the plaintiff was required to obtain a certificate of possession for certain of his assault weapons, which he failed to do, and, thus, that the guns at issue were contraband and not legally held by the plaintiff, who was not entitled to their return.

Argued December 3, 2018—officially released February 26, 2019

Procedural History

Action for a declaratory judgment to determine whether certain firearms were improperly seized and withheld from the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bright, J.*; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Rachel M. Baird, for the appellant (plaintiff).

James Belforti, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Stephen R. Sarnoski*, assistant attorney general, for the appellee (named defendant Commissioner).

Opinion

SHELDON, J. The plaintiff, Joseph W. Kaminsky, Jr., appeals from the trial court's judgment, rendered after a trial without a jury, denying his request for a declaratory judgment holding that certain firearms were improperly seized and withheld from him by the defendant, the Commissioner of Emergency Services and Public Protection,[1] and thus that he is entitled to the return of those firearms.[2] On appeal, the plaintiff claims that the trial court erred in denying his request on the basis of its misinterpretation of the applicable statutory provisions. We affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to our disposition of this appeal. The plaintiff has been a collector and dealer of firearms licensed by the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1988. While reviewing the plaintiff's application to renew his federal firearms license in 2011, the ATF discovered that he had a felony conviction in 1964 and, therefore, that he was ineligible

[1] The complaint named as an additional defendant the Chief of Coventry Police Department, Town of Coventry. The plaintiff withdrew the action as to that defendant. We refer to the Commissioner of Emergency Services and Public Protection as the defendant in this opinion.

[2] In particular, the plaintiff's petition requested that three of six firearms in the custody of the Connecticut State Police and twenty-four firearms of unknown location be returned to him. The trial court found that the plaintiff failed to prove the existence or location of the twenty-four firearms. The plaintiff does not address these firearms in his brief and, therefore, has abandoned any claim as to the twenty-four firearms on appeal. See *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 476, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

to have such a license or to possess any firearms. The ATF contacted the Connecticut State Police to alert them that the plaintiff was likely in illegal possession of firearms. In December, 2011, after being notified by state and local police that he was ineligible to possess any firearms, the plaintiff surrendered fifty-nine firearms to authorities. Three of those firearms, a B-West Arms AK-47-type rifle (AK-47), a Group Industries Uzi submachine gun (Uzi), and a SWD Cobray-11 submachine gun (M-11), are at issue in this appeal.

The firearms in question were all manufactured, and thereafter acquired by the plaintiff, prior to September 13, 1994. The plaintiff properly registered the Uzi and the M-11 as machine guns under both state and federal law, but he neglected to register the AK-47 as a machine gun. The plaintiff also never obtained a certificate of possession or registered the three firearms as assault weapons as required by Connecticut law. The Uzi and the M-11 each have a "selective-fire" mode that allows them to be fired in either automatic or semiautomatic mode, and the AK-47 firearm is explicitly listed under General Statutes § 53-202a as an assault weapon.

On August 6, 2014, the plaintiff brought an action pursuant to General Statutes § 52-291 seeking a declaratory ruling that the three firearms at issue had been improperly seized and withheld from him and that he was entitled to their return. The sole basis for the defendant's refusal to return the three firearms was that they were never properly registered as assault weapons pursuant to Connecticut law.[3] During the two day trial beginning on August 23, 2016, the plaintiff argued, in relevant part, that because the three firearms in question were manufactured prior to September 13, 1994, they are exempt from any registration requirement

[3] In 2013, the plaintiff received a full pardon from the 1964 conviction and had all of his federal, state, and local firearms licenses and permits reinstated, thus rendering him otherwise eligible to possess certain firearms.

under General Statutes § 53-202m. The defendant disagreed, arguing that the plain language of § 53-202m exempts only specific categories of assault weapons from the registration requirement and that the plaintiff's firearms did not qualify for such exemptions, thereby making their possession without registration illegal and subjecting them to seizure and destruction as contraband. The court agreed with the defendant and, thus, ruled that the plaintiff was not entitled to the declaratory relief he requested. This appeal followed.

The plaintiff claims on appeal that the trial court erred in its interpretation of § 53-202m by finding that only certain assault weapons manufactured prior to September 13, 1994, are exempt from registration thereunder. The plaintiff argues that No. 13-220 of the 2013 Public Acts (P.A. 13-220), as codified in the current revision of § 53-202m, is ambiguous because it refers to and incorporates by reference certain preexisting statutory provisions that were no longer in force and effect when the statute was enacted. Therefore, the plaintiff urges us to consider extratextual evidence in the form of an October 11, 2013 letter from Reuben Bradford, the former Commissioner of Emergency Services and Public Protection, declaring that it was the intent of the legislature in passing § 11 of P.A. 13-220 to exclude all assault weapons manufactured before September 13, 1994, from the statute's transfer restrictions and registration requirements. We disagree with the plaintiff's interpretation of the applicable statutory provisions.

"Statutory interpretation presents a question of law for the court. . . . Our review is, therefore, plenary." (Internal quotation marks omitted.) *Russo Roofing, Inc.* v. *Rottman*, 86 Conn. App. 767, 775, 863 A.2d 713 (2005). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the

statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 720, 6 A.3d 763 (2010).

We begin our analysis by setting forth the relevant statutory language. General Statutes § 53-202c criminalizes the possession of an assault weapon unless otherwise permitted by General Statutes §§ 53-202a through 53-202k and 53-202o. "[A]ny property, the possession of which is prohibited by any provision of the general statutes" is considered contraband under General Statutes § 54-36a (a).

Section 53-202c (c) exempts those individuals who, prior to July 1, 1994, lawfully possessed an assault weapon prior to October 1, 1993, from its prohibition against the possession of such weapons if the person otherwise complies with §§ 53-202a through 53-202k. To comply with General Statutes § 53-202d, any person who lawfully possesses an assault weapon must obtain a certificate of possession from the Department of Emergency Services and Public Protection. However, § 53-202m provides: "Notwithstanding any provision of the general statutes, sections 53-202a to 53-202*l*, inclusive, shall not be construed to limit the transfer or require the registration of an assault weapon as defined in subdivision (3) or (4) of subsection (a) of section 53-202a of the general statutes, revision of 1958, revised

to January 1, 2013, provided such firearm was legally manufactured prior to September 13, 1994."

We agree with the well reasoned decision of the trial court and thus adopt the following relevant portion of its memorandum of decision: "Section 53-202m, as amended, clearly limits the exemptions from transfer limitations and registration requirements to those assault weapons defined in subdivision (3) or (4) of subsection (a) of § 53-202a of the General Statutes, revision of 1958, revised to January 1, 2013. Based on this express language, one must look at the definitions of assault weapon in § 53-202a as that statute existed on January 1, 2013. Only those weapons that fall within subdivision (3) or (4) of subsection (a) are exempt from the registration requirement. Thus, the operative language is that adopted in Public Acts 2001, No. 130 § 1, the last revision of § 53-202a as of January 1, 2013. Under that statute, subdivision (3) of subsection (a) defines, in relevant part, an assault weapon as [a]ny semiautomatic firearm not listed in subdivision (1) of this subsection that meets the following criteria . . . . Thus, to fall within subdivision (3) or (4), the semiautomatic firearm, or part thereof, must not be listed in subdivision (1) of subsection (a).

"The problem for the plaintiff is that the Uzi, M-11, and AK-47 fall squarely within subdivision (1), which defines assault weapon as [a]ny selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semiautomatic firearms . . . Avtomat Kalashnikov AK-47 type. P.A. 01-130. The Uzi and M-11 are selective-fire firearms capable of fully automatic or semiautomatic fire at the option of the user. The AK-47 is an AK-47 type firearm. Because these firearms are listed either by name or feature in subdivision (1), by definition they cannot fall under subdivisions (3) and (4). Consequently they are not entitled to the exemption from registration set forth in § 53-202m, as amended.

The fact that Commissioner Bradford reached a different conclusion does not change the court's analysis. An agency's interpretation is not entitled to deference if it is plainly inconsistent with the clear language of the statute. See *Med-Trans of Connecticut* v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 168, 699 A.2d 142 (1997). That is the case here.

***

"The law is clear in that the plaintiff was required to obtain a certificate of possession for the Uzi, M-11, and AK-47 as assault weapons. The plaintiff failed to do so from 1993 when the requirement was first enacted until 2011 when the guns were seized from him. The guns were thus not legally held by the plaintiff. They are contraband and the plaintiff is not entitled to their return." (Citation omitted; internal quotation marks omitted.) It would serve no useful purpose for this court to engage in any additional discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM PATTY ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WILTON ET AL.
(AC 40710)

Alvord, Bright and Bear, Js.

Syllabus

The plaintiffs appealed to the trial court from the decision by the defendant Planning and Zoning Commission of the Town of Wilton granting an application of the defendant W Co. for an amendment to an existing special permit and for site plan approval to allow the installation of an artificial turf field at a school. The trial court rendered judgment dismissing the appeal, from which the plaintiffs, on the granting of certification,

appealed to this court. They claimed that the trial court improperly concluded that the commission's approval did not include alleged trailers on the property that were prohibited by the zoning regulations. *Held* that the plaintiffs having failed to raise their claim regarding the legality of the alleged trailers before the commission, this court declined to review the claim; because the plaintiffs failed to set forth their claim that certain storage containers shown on a site plan submitted by W Co. were trailers prohibited by the zoning regulations until their appeal to the trial court, the commission, which was in the best position to interpret its own regulations, was never provided with an opportunity to evaluate the claim.

Argued November 14, 2018—officially released February 26, 2019

Procedural History

Appeal from the decision of the named defendant granting the application of the defendant Wilton Youth Football, Inc., for an amendment to an existing special permit and for site plan approval to allow the installation of an artificial turf field at a school, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Jacobs, J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Paul A. Sobel, for the appellants (plaintiffs).

Matthew C. Mason, for the appellee (defendant Wilton Youth Football, Inc.).

Barbara M. Schellenberg, for the appellees (named defendant et al.).

Opinion

ALVORD, J. The plaintiffs, William Patty and Eliot Patty, appeal from the judgment of the trial court dismissing their appeal from the decision of the defendant Planning and Zoning Commission of the Town of Wilton (commission), granting the application of the defendant Wilton Youth Football, Inc.,[1] for an amendment to an

[1] We refer to Wilton Youth Football, Inc., as the defendant in this opinion.

existing special permit and for site plan approval to allow the installation of an artificial turf field at the Middlebrook School in Wilton.[2] On appeal, the plaintiffs claim that the court improperly concluded that the commission's approval did not include prohibited trailers on the property. Specifically, the plaintiffs claim that the only evidence in the record before the commission was that the defendant's application included trailers that were prohibited by § 29-4.C.9 of the Wilton Zoning Regulations (regulations). Our review of the record reveals that the plaintiffs failed to raise this claim before the commission, and, accordingly, we decline to review it.

The following facts and procedural history are relevant to this appeal. Middlebrook School is located at 131 School Road and is situated in an R-2A district. Schools are allowed in this district by special permit. The school property includes an athletic field, which is used for sports and other activities. On May 6, 2015, the defendant filed an application with the commission[3] to amend the existing special permit for Middlebrook School "to allow the renovation of the existing natural grass field to an artificial turf field . . . ." The defendant's application also provided for the relocation of existing field lighting and for the installation of new field lighting.

The commission held a public hearing on the defendant's application that commenced on June 22, 2015, and was further continued to July 13, July 27, and September 15, 2015. The plaintiffs, owners of abutting property, were represented by counsel at the hearing and vigorously opposed the application. Several other individuals attended the hearing, some speaking in favor of the proposal and others speaking against it. Numerous exhibits were submitted to the commission.

[2] The town of Wilton (town) is the owner of the subject property and was also named as a defendant in this action.

[3] The town, as the owner of the subject property, provided written authorization for the defendant to file the subject application with the commission.

After the public hearing was closed, the commission discussed the application on September 15, September 28, and October 13, 2015, as evidenced by the transcripts filed with this court. On October 13, 2015, the commission approved "the installation of an artificial turf field at Middlebrook School," subject to certain enumerated conditions, but denied "the relocation, placement or replacement of new or existing permanent and/or temporary lighting on the field site."

The plaintiffs appealed to the Superior Court, challenging the defendant's standing to file the application with the commission[4] and claiming that the commission's approval allowed for the relocation and continued use of outdoor storage trailers that are prohibited by the regulations. The plaintiffs filed their prehearing brief in support of their appeal on September 16, 2016, in which they argued, inter alia, that the commission's approval encompassed the defendant's use of prohibited storage trailers. The defendant's response in its prehearing brief filed on November 10, 2016, which was adopted by the commission and the town, was as follows: "Based on our review of the record, the *legality* of the existing storage containers on the [p]roperty was not raised before the [commission], only that they were unsightly, would have to be relocated as part of the project, and the [commission] [s]taff [r]eport suggested consideration of a more 'permanent solution.'" (Emphasis in original.) Additionally, the defendant stated that various submissions to the commission indicate that the alleged "trailers" were identified as "storage containers." Further, the defendant argued that the containers did not fall within the definition of "trailer" set forth in § 29-2.B.166 of the regulations.

In their reply brief filed on November 18, 2016, the plaintiffs argued that the commission's staff report

[4] The standing issue was adjudicated in favor of the defendant by the trial court, and that issue is not before this court.

referred to the containers as "storage trailers" and that the defendant's response to the staff report likewise described the containers as "trailers." The plaintiffs did not respond to the defendant's statement that the issue of the legality of the containers on the property had not been raised before the commission.

The trial court held a hearing on December 20, 2016.[5] On April 18, 2017, the court issued its memorandum of decision dismissing the plaintiff's administrative appeal. In its decision, the court noted that it had heard the testimony of witnesses and the arguments of counsel and that it had reviewed the trial exhibits and the record before the commission. After concluding that the defendant had standing to file the subject application with the commission, the court next addressed the issue regarding the alleged prohibited trailers. The court determined that (1) the comment in the commission's staff report about "trailers" addressed "their appearance and location" on the property, (2) the staff "did not raise the issue of whether [the containers] were prohibited" by the regulations, (3) the defendant's site layout plan "depicts and labels" the alleged trailers as "four storage containers," (4) the plaintiffs' counsel did not mention that the alleged trailers violated the regulations at the June 22, 2015 public hearing or in the letter he submitted to the commission in opposition to the defendant's application, and (5) no evidence was submitted to the commission to show that the containers were "vehicles," which is part of the definition of "trailers" set forth in the regulations.[6] The court then

[5] This court has not been provided with a transcript of the hearing before the trial court.

[6] Section 29-2.B.166 of the regulations provides: "TRAILER: Any vehicle which is, has been, or may be mounted on wheels designed to be towed or propelled by another vehicle which is self-propelled, and may or may not be equipped with sleeping or cooking accommodations, or afford traveling accommodations, or for the transportation of goods, wares or merchandise."

concluded that the commission's approval of the defendant's application "does not include the approval of prohibited trailers upon the subject property." The plaintiffs filed the present appeal after this court granted their petition for certification to appeal.

In their appellate brief, the plaintiffs argue that the only evidence before the commission was that the containers were prohibited trailers. In response, the defendant, the commission, and the town, in their appellate brief, argue that this court should not consider the plaintiffs' claim about the legality of the alleged trailers because that issue was never raised before and addressed by the commission. Our review of the record reveals that the plaintiffs failed to raise this claim before the commission.[7] Therefore, we decline to review it.

"Our Supreme Court has previously held that [a] party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. . . . *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992) . . . . Furthermore, [t]o allow a court to set aside an agency's determination upon a ground not theretofore presented . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (Citation omitted;

[7] During the four days of the public hearing on the subject application, the only mention of "trailers" was made by the defendant's counsel when he responded to the comments in the staff report. He indicated that the "trailers," which "store playing equipment," had to be relocated to accommodate "the grading for the field." At no point was the legality of the containers discussed at the public hearing or during the three days of deliberations by the commission when reviewing the defendant's application. Further, the commission's approval, with conditions, does not mention the containers.

internal quotation marks omitted.) *Ogden* v. *Zoning Board of Appeals*, 157 Conn. App. 656, 665, 117 A.3d 986, cert. denied, 319 Conn. 927, 125 A.3d 202 (2015).

The plaintiffs first raised this claim before the trial court. In his appellate brief and during oral argument before this court, the plaintiffs' counsel admitted that "the existence of the trailers issue was not known to the undersigned until reviewing the record in preparation of the appeal."[8] This claim should have been raised before the commission, so that it could determine whether the existing storage containers[9] on the property were prohibited trailers, as that term is defined in its regulations, and whether their relocation as proposed in the defendant's application would violate those regulations. "A local board or commission is in the most advantageous position to interpret its own regulations and apply them to the situations before it." (Internal quotation marks omitted.) *Doyen* v. *Zoning Board of Appeals*, 67 Conn. App. 597, 603, 789 A.2d 478, cert. denied, 260 Conn. 901, 793 A.2d 1088 (2002).

In the present case, the plaintiffs failed to set forth their claim that the storage containers shown on the defendant's plan were trailers prohibited by the regulations until their appeal to the trial court. As a result, the commission was never provided with an opportunity to evaluate this claim. Accordingly, we decline to review it.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] The same attorney represented the plaintiffs before the commission, the Superior Court, and this court, and, accordingly, he had all of the information he needed to challenge the containers as trailers at the time of the public hearing.

[9] There is no dispute that the containers were already on the property; the only issue before the commission regarding those containers was their relocation. If, indeed, the containers were trailers, as defined in the regulations, and their presence on the property was in violation of the regulations, an enforcement action by the zoning authority would have been an appropriate remedy.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 188

MEMORANDUM DECISIONS

JEANNE MILLER *v.* CITY OF BRIDGEPORT ET AL.
(AC 40323)

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

Argued January 30—officially released February 26, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Fairfield, *Kamp*, *J*.

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* LAMONT EDWARDS, SC 19899
Judicial District of New Haven

Criminal; Murder; Whether Trial Court Improperly Admitted Hearsay Evidence; Whether Trial Court Improperly Admitted Testimonial Hearsay in Violation of Defendant's Right to Confrontation; Whether Third Party Culpability Instruction Wrongly Omitted Names of Potential Third Party Culprits. The defendant was convicted of murder and assault in the first degree in connection with an incident in which two men opened fire on a car stopped at a New Haven street corner, killing one man and injuring two others. The defendant appeals from his conviction. He claims that the trial court improperly admitted hearsay evidence, through the testimony of a police officer, that two witnesses, Tora Moss and Matthew Mitchell, made out-of-court statements identifying the defendant as one of the shooters. The defendant acknowledges that Sec. 8-5 (2) of the Connecticut Code of Evidence provides that the hearsay rule does not preclude admission of an identification made by a declarant prior to trial where the identification is reliable and where the declarant is available for cross-examination at trial, but he argues that the state failed to show that either of the identifications was reliable and that he never had a meaningful opportunity to cross-examine the witnesses concerning the circumstances under which their identifications were made. The defendant also argues that the admission of Moss' out-of-court identification violated his right to confrontation where, because the state did not call Moss to testify at trial, he had no opportunity to cross-examine Moss as to the circumstances and reliability of his identification. Finally, the defendant argues that the trial court erred in instructing the jury as to third party culpability. He contends that the instruction wrongly omitted the names of two potential third party culprits.

STATE *v.* ANGEL M., SC 20106
Judicial District of Hartford

Criminal; Sentencing; Whether Defendant Penalized for Maintaining his Innocence at Sentencing Hearing; Whether Consideration of Defendant's Refusal to Admit Guilt Violates Right Against Self-Incrimination. The defendant was convicted of charges of sexual assault and risk of injury to a child arising out of his alleged

sexual abuse of the minor victim, his stepdaughter. He appealed, claiming that the trial court improperly increased his sentence to penalize him for invoking his fifth amendment privilege against self-incrimination when, at the sentencing hearing, he protested his innocence and refused to apologize to the victims. The Appellate Court (180 Conn. App. 250) rejected that claim and affirmed the defendant's conviction, finding that the trial court had not punished the defendant for exercising his rights against self-incrimination. The Appellate Court noted that, in *State* v. *Huey*, 199 Conn. 121, 128 (1986), the Supreme Court held that a sentencing judge was justified in considering the defendant's denial of his guilt in evaluating his prospects for rehabilitation, one of the factors to be properly considered in fashioning a sentence. The Supreme Court granted the defendant certification to appeal, and it will consider (1) whether the Appellate Court properly concluded that the trial court did not penalize the defendant for maintaining his innocence at the sentencing hearing, and (2) whether *State* v. *Huey* should be overruled because consideration of a defendant's refusal to admit guilt for any purpose at sentencing violates a defendant's right against self-incrimination.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Adopt CHESLA Scholarship Programs Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to adopt the CHESLA Scholarship Programs Program Manual (''Manual'') to set forth the guidelines, procedures and eligibility criteria for its scholarship programs.

The Manual shall be deemed adopted and effective on the date determined by the CHESLA Executive Director; provided that such date shall be no sooner than thirty (30) days after notice thereof has been published in the Connecticut Law Journal, unless the Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such thirty (30) day period that it would be desirable or appropriate to defer the adoption and effective date so that the CHESLA Board of Directors (''Board'') may reconsider the proposed Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's written notice thereof to the Board.

A copy of the proposed Manual is available upon request by contacting Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106, via email at jweldon@chesla.org or by telephone at (860) 520-4700.

All written comments, questions, and concerns regarding the proposed Manual may be submitted within thirty (30) days of the publication of this notice in the Connecticut Law Journal to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-K: Medical Equipment Devices and Supplies (MEDS) Fee Schedule Update and Special Services - Birth to Three Years Fee Schedule Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after March 1, 2019, SPA 19-K will amend Attachment 4.19-B of the Medicaid State Plan in order to make the changes described below. This SPA will incorporate the 2019 Healthcare Common Procedure Coding System (HCPCS) changes (additions, deletions and description changes) to the MEDS Fee Schedule and to the Special Services - Birth to Three Years fee schedule. These revisions are necessary to ensure that the fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA). In addition, the MEDS fee schedule also includes several pricing changes to several procedure codes, as described below. These changes apply to all MEDS reimbursed under the HUSKY Health programs (HUSKY A, B, C and D).

Special Services - Birth to Three Years

This SPA does not make any additional changes to reimbursement for Birth to Three services other than the HIPAA compliance update described above.

MEDS

The Department has added the following codes to the medical surgical supply fee schedule and the orthotic and prosthetic fee schedule:

Procedure Code	Procedure Code Description	Fee
A5514	Mult density insert dir carv/cam	$40.10
A9286	Hygienic item or device, any type	Manually priced
L8701	Power upper extremity . . . rom device . . . custom fabricated	Manually priced
L8702	Power upper extremity . . . rom device . . . finger..custom fabricated	Manually priced
L5859	Knee-shin pro flex/ext cont	$11,271
L6715	Term device, multi art digit	$2,452
L6880	Elec hand ind art digits	$18,559

The Department has discontinued several contralateral hearing aid codes and added the replacements codes that more accurately describe current hearing aid technology used to treat patients with single sided deafness or patients with some degree of hearing loss in one ear and an unaidable hearing loss in the other which reflects coding set revisions by the Centers for Medicare & Medicaid Services (CMS). Below is a list of the discontinued (D) codes and the replacement contralateral hearing aid codes which are being added (A):

Code	Modifier	Description	D = Discontinued A = Added	Fee
V5170	RB	Within ear cros hearing aid	D	Cost + 75
V5170		Within ear cros hearing aid	D	$ 410
V5171		Hearing aid monaural ite	A	$ 410
V5172		Hearing aid monaural itc	A	$ 410
V5180		Behind ear cros hearing aid	D	$ 410
V5180	RB	Behind ear cros hearing aid	D	Cost + 75
V5181		Hearing aid monaural bte	A	$ 410
V5210	RB	In ear bicros hearing aid	D	Cost + 75
V5210		In ear bicros hearing aid	D	$ 516
V5211		Hearing aid binaural ite/ite	A	$ 516
V5212		Hearing aid binaural ite/itc	A	$ 516
V5213		Hearing aid binaural ite/bte	A	$ 516
V5214		Hearing aid binaural itc/itc	A	$ 516
V5215		Hearing aid binaural itc/bte	A	$ 516
V5220		Behind ear bicros hearing aid	D	$ 516
V5220	RB	Behind ear bicros hearing aid	D	Cost + 75

V5221		Hearing aid binaural bte/bte	A	$ 516

These revisions to the contralateral hearing aids codes are anticipated to be cost neutral, as the Department priced the replacement codes at the same fee that was previously established for these contralateral hearing aid codes. Providers are allowed to submit prior authorization requests if the actual acquisition cost for the CROS hearing aid is greater than these previously established fees. In addition, repairs performed by the manufacturer's or third party vendor's continue to be limited to the manufacturer or third party vendor actual costs plus $75.

Effective on or after March 1, 2019, the Department has established fees for the following prosthetic procedure codes that used to be manually priced:

Code	Description	Fee
L5859	Addition to lower extremity prosthesis, endoskeletal knee-shin system . . . includes any type motors(s)	$11,271
L6715	Terminal device, multiple articulating digit . . . initial issue or replacement	$ 2,452
L6880	Electric hand, switch or myoelectric controlled, independently articulating digits . . . includes motor(s)	$18,559

Manually Priced Items

Complex rehab technology (CRT) items are paid at list price minus 18% as specified on the DSS Pricing Policy for MEDS Items. For procedure codes that are manually priced, providers refer to the DSS Pricing Policy for MEDS Items which is posted on the HUSKY Health Web Site at www.ct.gov/husky. To access the link, click on ''For Providers'' followed by ''Policies, Procedures and Guidelines'' under the ''Medical Management'' menu item. Scroll down to the ''Clinical Policies'' and click on the ''DSS Pricing Policy for MEDS Items''.

Several procedure codes which have the ''Lst-15'' fee listed under the repair modifier segment will be revised as the repairs require prior authorization and these codes are manually priced: E1009, E1011, E2295; E2512; E2599; E2609, E2617, E8000, E8001, E8002, K0669 and K0900.

Effective on or after March 1, 2019, the Department is creating a new modifier, ''UC – Upon Strict Review of the Department'' which will be used when reviewing medically necessary pediatric wheelchair trays requiring special consideration and will be covered pursuant to Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT) for HUSKY children under age 21. These specialty pediatric wheelchair trays will require prior authorization and will be reviewed for medical necessity and will be priced as determined by the Department. Please refer to the ''DSS Pricing Policy for MEDS Items'' for information on the UC modifier.

Fee Schedules are published at this link: https://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $9,600 in State Fiscal Year (SFY) 2019 and $40,000 in SFY 2020.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at the following link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-K: MEDS Fee Schedule Update and Special Services - Birth to Three Years Fee Schedule Update''.

Anyone may send DSS written comments about this SPA, including comments about access to the services for which this SPA proposes to reduce rates or restructure payments in a manner that could affect access. Written comments must be received by DSS at the above contact information no later than March 13, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-N: Publicly Operated Nursing Facility Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare and Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after April 1, 2019, SPA 19-N will amend Attachment 4.19-D of the Medicaid State Plan to add a reimbursement methodology for a publicly operated Chronic and Convalescent Nursing Home (CCNH) operated by the State of Connecticut Department of Veterans Affairs. This reimbursement methodology will be cost-based and will be based on cost reports and cost reimbursement methodology described in the state plan pages.

Fiscal Impact

Based currently available data, DSS estimates that this SPA will increase annual aggregate Medicaid expenditures by approximately $3.9 million in State Fiscal Year (SFY) 2019 and $26.8 million in SFY 2020.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS website at the following link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then

click on ''Updates''. Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: christoper.lavigne@ct.gov or write to: Christopher LaVigne, Office of Certificate of Need and Rate Setting, Department of Social Services, 55 Farmington Avenue, Hartford, CT 06105-3730 (Phone: 860-424-5719, Fax: 860-424-4812). Please reference ''SPA 19-N: Publicly Operated Nursing Facility Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than March 28, 2019.

NOTICES

Notice of Application for Reinstatement

On 2/8/19 John Blank filed in the Superior Court for the Judicial District of Fairfield at Bridgeport in docket number FBT-CV11-6017729-S an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Robert A. Wilock, II
Chief Clerk
Judicial District of Fairfield at Bridgeport

Notice of Certification as Authorized House Counsel

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

Certified as of February 15, 2019:

Conor L. Drury	AQR Capital Management, LLC
Lauren Garcia Hanson	Thomson Reuters
Anne C. Meyer	Frontier Communications Corp.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Interim Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on February 20, 2019 in Docket Number HHD-CV18-6103946:

1. Justin Freeman (juris# 418626) of Hartford, CT is placed on interim suspension from the practice of law effective immediately until further order of the court.
2. Pursuant to PB Section 2-64, Attorney Donald Howard, (juris # 432865 of Rockville, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients. The trustee will take control of the IOLTA account and disburse amounts as approved by the court. Respondent's clients' files have been previously distributed. The respondent must cooperate with the Trustee in this regard.
3. The respondent will cooperate with an audit of his IOLTA account currently being conducted by the Statewide Grievance Committee.
4. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

5. Should this suspension continue for a term exceeding one year then the respondent must seek reinstatement pursuant to Connecticut Practice Book Section 2-53.

David Sheridan
Presiding Judge

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Judicial District of Danbury

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 146 White Street, Danbury, CT 06810

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5014/83099

CLOSING DATE: March 15, 2019

Candidates may be required to handle a variety of situations, including afterhours work with police departments and scene investigation, as well as community involvement, such as citizens police academies. Demonstrated trial experience, ability to write well, knowledge of the judicial district and knowledge of computer assisted trial demonstration programs preferred. A legal writing sample should be submitted with the application.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the

Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information in order to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. Writing Sample

6. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov with a copy to DCJ.Danbury@ct.gov. All documents must be combined into a single pdf

(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **March 15, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Hartford Judicial District
G.A. 12 in Manchester

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 410 Center Street, Manchester, CT 06040

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5066/5091

CLOSING DATE: March 15, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information in order to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov, cc: DCJ.Hartford@ct.gov. All documents must be combined into a single pdf

(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **March 15, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Hartford Judicial District
G.A. 13 in Enfield

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 111 Phoenix Avenue, Enfield, CT 06082

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 5097

CLOSING DATE: March 15, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

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Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

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