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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

LAURA KOS ET AL. *v.* LAWRENCE + MEMORIAL HOSPITAL ET AL.
(SC 20256)

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

Syllabus

The plaintiffs, K and her husband, sought to recover damages from the defendants, G, a physician, and G's medical practice, for personal injuries that K had suffered in connection with G's alleged negligence in, inter alia, failing to perform a proper and adequate episiotomy repair after the birth of the plaintiffs' son. G had performed an episiotomy to facilitate the delivery of the plaintiffs' son. After the delivery, G evaluated K and diagnosed her with a third degree episiotomy extension, which G repaired. After the repair was completed, G performed a digital examination of K's rectum and determined that there were no breaks or defects in K's rectal mucosa. Although an exam of K's perineum the day after the delivery indicated no issues with the repair, K subsequently reported complications, including pain, an infection, and a rectovaginal fistula that required surgery. At trial, the plaintiffs' expert witness, Y, testified that the standard of care requires that a physician, after performing an episiotomy, correctly diagnose and repair the episiotomy and any extension thereof, which must involve a thorough rectal examination before the repair. Y also testified that G failed to satisfy the standard of care because, in failing to conduct a proper examination, G misdiagnosed and repaired the episiotomy extension as a third degree rather than a fourth degree extension, and that this error led to the rectovaginal fistula. According to the defendants' expert, L, G complied with the standard of care, which required that the rectal exam be performed after rather than before the episiotomy repair. L also testified that G had correctly diagnosed and repaired a third degree episiotomy extension. Finally, another expert witness presented by the defendants testified that K's rectovaginal fistula was not caused by an unrepaired fourth degree episiotomy extension but, rather, an infection. The trial court instructed the jury that the plaintiffs had alleged that G breached the standard of care by failing to identify a fourth degree episiotomy extension and by failing to properly examine and adequately repair a fourth degree extension. The court also charged the jury on the acceptable alternatives doctrine concerning the standard of care for conducting the digital rectal examination. The jury returned a verdict in favor of the defendants, finding that the plaintiffs had sustained their burden of establishing the standard of care but failed to sustain their burden of establishing that G breached the standard of care. On appeal, the plaintiffs claimed, inter alia, that the trial court improperly instructed the jury by including a charge on the acceptable alternatives doctrine and limiting their allegations regarding breach of the standard of care. *Held*:

1. Although the trial court improperly instructed the jury on the acceptable alternatives doctrine, that charge was harmless under the circumstances of the present case, and this court declined the plaintiffs' request to abolish that doctrine: the inclusion of an acceptable alternatives charge in the court's instructions was improper when the testimony of both parties' experts failed to establish that conducting a rectal examination either before or after the episiotomy repair was an acceptable method of diagnosing the particular degree of the extension, as Y testified that the examination should be performed before the repair, whereas L testified that it should be performed after the repair and that an examination prior to the repair generally was not an approved method of diagnosing the degree of the extension, and when the parties argued during summation that there was only one proper method of examination to properly diagnose the degree of the extension and neither party argued that G chose between two acceptable alternatives in performing the examination after the repair; nevertheless, the trial court's improper inclusion of an acceptable alternatives charge in its jury instructions was harmless, as that error would not have confused or misled the jury because, whether G properly performed the rectal examination mattered only if there was a fourth degree episiotomy extension, and the jury necessarily found that there was no fourth degree extension in finding that G did not breach the standard of care, and the improper charge did not otherwise interfere with the jury's determination regarding the credibility of the experts or exculpate G by suggesting that both methods of examination were accepted within the medical community; moreover, this court declined the plaintiffs' request to abolish the acceptable alternatives doctrine, as it determined that this case, in which the doctrine was held to be inapplicable, was not the appropriate case for deciding whether the doctrine should be abolished.
2. The trial court's supplemental instruction, in response to the jury's request for clarification, that the plaintiffs' expert, Y, testified that an internal rectal examination must be performed prior to an episiotomy repair as a required component of the standard of care, did not improperly limit the plaintiffs' allegations regarding breach of the standard of care: the trial court's response to the jury's request for clarification was consistent with the evidence presented at trial and how the plaintiffs' counsel had argued the case to the jury, and nothing in the supplemental instruction negated the plaintiffs' allegation that, by breaching the standard of care in failing to perform an examination before the repair, G failed to diagnose and repair a fourth degree extension; moreover, in reading the trial court's charge as a whole, this court determined that it was clear that the trial court instructed the jury that the plaintiffs' allegations regarding breach of the standard of care included insufficient inspection, diagnosis and repair of a fourth degree extension and, accordingly, would not have confused and misled the jury into determining that, even if a fourth degree extension had existed, the defendant did not breach the standard of care; furthermore, to the extent that the court's

supplemental instruction did limit the plaintiffs' allegations, a second supplemental instruction by the court, which contained language nearly identical to the language the plaintiffs sought to include in the first supplemental instruction, cured any error in the first supplemental instruction.

Argued October 15, 2019—officially released March 10, 2020

Procedural History

Action to recover damages for, inter alia, medical malpractice, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as to the named defendant et al.; thereafter, the case was tried to the jury before *Bates*, *J.*; verdict for the defendant Elisa Marie Girard et al.; subsequently, the court denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiffs appealed. *Affirmed.*

Alinor C. Sterling, with whom, on the brief, was *Kathleen L. Nastri*, for the appellants (plaintiffs).

Stuart C. Johnson, with whom were *M. Karen Noble* and, on the brief, *Michael R. McPherson*, for the appellees (defendant Elisa Marie Girard et al.).

Opinion

D'AURIA, J. In this medical malpractice case, the plaintiffs, Laura Kos and Michael Kos,[1] appeal following the trial court's denial of their motion to set aside the jury's verdict in favor of the defendants Elisa Marie Girard and Physicians for Women's Health, LLC,[2] on the ground that the trial court improperly instructed the jury by (1) including a charge on the acceptable alternatives doctrine, and (2) limiting their allegations regarding Girard's breach of the standard of care. Alter-

[1] Because Michael Kos' loss of consortium claims are derivative of Laura Kos' medical malpractice claims, we refer to Laura Kos as the plaintiff, to Michael Kos by his name, and to them collectively as the plaintiffs.

[2] Lawrence + Memorial Hospital and Thameside OB/GYN Center, P.C., also were named as defendants, but the plaintiffs withdrew the action as to those defendants prior to trial. We therefore refer in this opinion to Girard and Physicians for Women's Health, LLC, as the defendants.

natively, they request that this court abolish the acceptable alternatives doctrine. Although we agree with the plaintiffs that the trial court improperly instructed the jury on the doctrine of acceptable alternatives, because we find this error harmless and because we decline to take this opportunity to abolish the acceptable alternatives doctrine, we affirm the judgment of the trial court.

Reading the record, as we must, in the light most favorable to sustaining the verdict for the defendants, reveals that the jury reasonably could have found that, on August 19, 2011, the plaintiff gave birth to a son at Lawrence + Memorial Hospital in New London. Girard, who was employed by Physicians for Women's Health, LLC, in Groton, was the physician on call at the time. During labor, after the plaintiff had been pushing for approximately two hours, Girard decided to use a vacuum to assist in the delivery. When Girard's use of the vacuum was unsuccessful, Girard performed a median episiotomy—a surgical cut made in the perineum (the muscular area between the vagina and the anus) from the vagina toward the rectum—to reduce the tight band of tissue around the baby's head that restricted his movements. Girard testified that this episiotomy was the equivalent of a second degree laceration. See footnote 3 of this opinion.

After performing the episiotomy, Girard successfully delivered the plaintiffs' son. Because Girard had used a vacuum and had performed an episiotomy, the plaintiff was at risk of sustaining an extension of the episiotomy, requiring Girard to inspect the plaintiff's vaginal tissue. An extension of the episiotomy is diagnosed by degree, with first degree involving the least amount of tissue trauma and fourth degree involving the most severe trauma.[3]

[3] A first degree episiotomy extension is a superficial laceration involving the vaginal mucosa—the lining of the vagina—and the perineal body. A second degree episiotomy extension is a deeper tear into the tissue, going beyond the vaginal mucosa and perineal body into the bulbocavernosus muscles, as well as extending into the perineal body—the area between the

In conducting the inspection, Girard first inspected the plaintiff's cervix and surrounding tissue, looking for tears, bleeding, or hematomas. Upon finding no issues, Girard then used a laparotomy pad (gauze) to block any bleeding from the uterus, which usually bleeds after a vaginal birth, and to have an unobstructed view of the lower vagina, perineal tissue, and rectum. Girard focused on the area of the episiotomy, inspecting for an extension. Through visual inspection and physical manipulation by gloved hands, Girard determined that the episiotomy had extended through the plaintiff's anal sphincter, which was separated. Because of the injury to the anal sphincter, Girard was able to see the outer aspects of the rectal mucosa and to feel that it was intact. Because the rectal mucosa was intact but the anal sphincter was torn, Girard diagnosed the plaintiff with a third degree extension of the episiotomy, which she then repaired. See footnote 3 of this opinion.

After repairing the tear, Girard inspected the repair and conducted a digital rectal exam. Although Girard had examined the outer aspect of the rectal mucosa before the repair, she wanted to feel the internal side to ensure that the perineal body and sphincter muscles were adequately repaired, that bulk and tone were appropriate, that thickness between the tissue was appropriate, and that there were no breaks or defects. There was no indication of a tear or defect in the plaintiff's rectal mucosa. Girard did not conduct a digital rectal exam before the repair because she was trained to perform the exam *after* the repair to prevent contamination to the open wound.

The day after the delivery, prior to the plaintiff's discharge from the hospital, the repair of the perineum was inspected and found to be intact. The plaintiff's

anus and the vagina. A third degree episiotomy extension includes a second degree extension and extends to the perineal muscles and anal sphincter but does not include the rectal mucosa—the lining of the rectum. A fourth degree episiotomy extension includes a third degree extension and extends to the rectal mucosa.

medical records do not indicate that, as of that time, she was complaining of discharging stool or flatus (gas) from her vagina. In a follow-up appointment, however, on September 1, 2011, she reported vaginal discomfort and stool coming out of her vagina. An opening in the episiotomy site of less than half a centimeter was noted, along with discharge that looked and smelled like stool. In a subsequent follow-up appointment with another physician, although the plaintiff did not bring any medical records with her, she reported that she had sustained a fourth degree extension of the episiotomy during birth and a rectovaginal fistula—an opening between her vagina and rectum. At that time, she complained of perineal pain and was concerned about having developed an abscess. An examination did not establish the existence of a rectovaginal fistula, but the plaintiff's symptoms—including the discharge and the smell—were consistent with a rectovaginal fistula. The opening in the vagina that previously had been noted was not detected. Additionally, the examination established that the plaintiff suffered from a sphincter separation.

The plaintiff later reported concerns that she had an infection, complaining of drainage from a hole in her perineum. She also complained of pain and redness, which, along with the drainage, were signs of infection. No rectovaginal fistula was detected. Upon further examination, Richard Bercik, an urogynecologist, noted that the episiotomy repair was intact but discovered a small rectovaginal fistula just inside the posterior fourchette and sphincter complex. John Gebhart, a urogynecologist at the Mayo Clinic, also noted the existence of the rectovaginal fistula, as well as granulation tissue (a sign of infection), and two other openings in the vaginal wall, although neither led to the rectum. The size of the rectovaginal fistula was described as "a very small hole . . . ." The plaintiff thereafter under went surgery to repair the rectovaginal fistula and the sphincter separation.

The plaintiffs later filed this medical malpractice case. In counts one and three of the operative complaint the plaintiff alleged claims of medical malpractice against the defendants. In counts two and four, the plaintiffs alleged claims of loss of consortium against the defendants on behalf of Michael Kos. Specifically, they alleged that Girard was negligent in that she had failed to identify a fourth degree extension of the median episiotomy, failed to perform a proper and adequate episiotomy repair, and failed to properly examine the episiotomy repair after it was complete. They alleged that Physicians for Women's Health, LLC, Girard's employer, was vicariously liable for Girard's negligence. They further alleged that, as a result of Girard's negligence, the plaintiff sustained serious injuries, including a rectovaginal fistula and an anal sphincter defect.

At trial, the plaintiffs presented the plaintiff's medical records, testimony from physicians who treated her after the birth of her son, and expert testimony from Brett C. Young, a maternal fetal medicine specialist, obstetrician and gynecologist. The defendants presented expert testimony from Frank Wen-Yung Ling, an obstetrician and gynecologist, as to the standard of care, and from Michael K. Flynn, a urogynecologist, as to causation.

At the close of evidence, the defendants requested that the trial court include a charge on the acceptable alternatives doctrine concerning the standard of care for conducting the digital rectal exam. The plaintiffs objected, but the trial court overruled the objection and gave the requested charge. After requesting clarification of the court's instructions; see part I A of this opinion; the jury reached a verdict in the defendants' favor. According to the jury interrogatories, the jury found that the plaintiffs had sustained their burden of establishing the standard of care but had failed to sustain their burden of establishing that Girard had breached the standard of care. The plaintiffs then filed a motion

to set aside the verdict, arguing that the jury had been improperly instructed on the doctrine of acceptable alternatives. The trial court denied the motion. The plaintiffs appealed to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional facts will be set forth as required.

I

The plaintiffs first claim that the trial court improperly instructed the jury by including a charge on the acceptable alternatives doctrine because no evidence supported the charge. The plaintiffs argue that, to give the instruction, an expert had to testify that there was more than one proper technique for conducting the digital rectal exam, and that the experts' dueling opinions about when to conduct the exam—before or after the episiotomy repair—was not the equivalent of testimony that either option was an acceptable alternative.[4]

[4] The plaintiffs also contend that the acceptable alternatives charge was improper because it included language regarding "schools of thought" and "best judgment." The plaintiffs argue that the "schools of thought" wording improperly conflates the acceptable alternatives doctrine with the schools of thought doctrine, two separate and distinct doctrines. The plaintiffs also argue that the "best judgment" wording improperly injects a subjective standard into a medical malpractice action, excusing Girard from liability and interfering with the jury's credibility determination. The plaintiffs did not object to the wording of the charge at the time of trial. Rather, they took a general exception to the charge being given at all, arguing that no evidence supported it and that it improperly interfered with the jury's credibility determination because this kind of charge suggested that both methods of inspection were reasonable. At no time did the plaintiffs request that the trial court modify the language of the charge in any way. Although the plaintiffs mentioned the phrase, "schools of thought," they did not do so to object to the inclusion of this language in the charge but, in passing, in summarizing the holding of *Wasfi* v. *Chaddha*, 218 Conn. 200, 588 A.2d 204 (1991).

An objection to the giving of a jury instruction does not preserve an objection to the specific wording of the instruction. See *State* v. *Coleman*, 304 Conn. 161, 174, 37 A.3d 713 (2012); id., 173–74 (defendant failed to preserve specific objection to wording of charge when he objected at trial to charge on different ground); *State* v. *Johnson*, 288 Conn. 236, 287–88, 951 A.2d 1257 (2008) (same); *State* v. *Melendez*, 74 Conn. App. 215, 229, 811 A.2d 261 (2002) ("although defense counsel objected to giving the jury an

The plaintiffs further contend that this improper charge was harmful because it was inapplicable and its inclusion interfered with the jury's assessment of credibility by exculpating the defendants and implying that Girard's actions were reasonable. Alternatively, the plaintiffs ask this court to abolish the acceptable alternatives doctrine.

The defendants respond that the acceptable alternatives charge was proper because there was evidence that there was more than one approved technique within the medical community. They contend that the evidence supports the charge as long as there is expert testimony supporting more than one proper method, even if an expert does not specifically state that both methods are acceptable. Alternatively, the defendants argue that any impropriety was harmless because it did not affect the central issue regarding liability—whether a third or fourth degree extension of the episiotomy occurred. Moreover, the defendants contest the plaintiffs' argument that the charge exculpated the defendants or interfered with the jury's credibility determination.

We agree with the plaintiffs that the acceptable alternatives charge was improper but agree with the defen-

instruction on consciousness of guilt, he did not object at any time to the wording of the instruction as given and therefore failed to preserve that issue for review"), cert. denied, 262 Conn. 951, 817 A.2d 111 (2003).

Although we hold that the claim was not properly preserved, we note that this court in *Wasfi* indicated that the phrase, "schools of thought," should not be included as part of the acceptable alternatives charge; *Wasfi* v. *Chaddha*, supra, 218 Conn. 208–209; see also id., 208 (noting "unfortunate use" of schools of thought language); but nonetheless concluded that the inclusion of this phrase in the acceptable alternatives charge, which was otherwise substantively correct, did not constitute instructional error or confuse the jury, which would not have been aware of the legal difference between the two doctrines. Id., 209. We also rejected the argument that the acceptable alternatives doctrine opened a "Pandora's Box" by injecting a subjective standard into the objective medical malpractice test. Id., 211. Specifically, we disagreed that the doctrine would shield a defendant from liability when experts have differing opinions or would take credibility determinations away from the jury because the doctrine requires defendants to offer expert evidence that acceptable alternatives exist and to persuade the jury to credit this evidence. Id.

dants that it was harmless. Because we determine that any error was harmless, we decline to take this opportunity to abolish the acceptable alternatives doctrine.

A

The following additional facts and procedural history are necessary to our review of this claim. At trial, in addition to the plaintiff's medical records and testimony from her treating physicians, the plaintiffs offered Young's expert testimony. Young testified that the standard of care required that a doctor, after performing an episiotomy, must correctly diagnose and repair the episiotomy and any extension thereof. To do so, Young testified, a doctor must conduct a thorough examination before repairing the episiotomy and any extension. This includes a digital rectal exam, which involves placing a gloved finger into the anus and lifting up toward the vagina to identify whether the gloved finger can be seen from the vagina, meaning that a hole exists between the anus and the vagina. Young testified that the digital rectal exam must be conducted before repairing the episiotomy because, otherwise, the extension will be repaired as a third degree extension, not a fourth degree extension, and, once repaired, it is more difficult to examine the rectal mucosa because the vaginal tissue is no longer "splayed" open.

Young opined that Girard failed to satisfy this standard of care "because she failed to identify a fourth degree laceration . . . [which] subsequently had the complication of breaking down and opening the sphincter . . . causing [the plaintiff to experience] incontinence and pain." The basis for this opinion was that, by failing to conduct a proper exam, Girard misdiagnosed and repaired the episiotomy extension as third degree, rather than as fourth degree. Young testified that this error caused a rectovaginal fistula, which allowed for the passage of fecal matter and gas through the anus to the vagina, contaminating and weakening the repair of the anal sphincter. Young conceded, how-

ever, that, if the plaintiff had sustained only a third degree episiotomy extension, she had "no criticism of how [Girard] did the repair . . . ."

In contrast, Ling testified on behalf of the defendants that the standard of care required that a digital rectal exam be performed *after* an episiotomy repair, not before, and that Girard had complied with this standard of care. Specifically, he testified that, once the perineal muscles and anal sphincter tear, the rectal mucosa must be carefully inspected to determine whether there is a fourth degree extension. He testified that, first, the physician must conduct an external inspection using gloved hands to spread open the vaginal tissue to look at the laceration. Ling testified that a physician should be able to make a diagnosis after this visual inspection because, once the anal sphincter muscle is separated, the tissue will be splayed open so that the physician will either see the outside of the rectum (meaning there is a third degree extension) or the inside of the rectum and the rectal mucosa (meaning there is a fourth degree extension). He testified that it is "almost impossible" not to visually diagnose a fourth degree episiotomy extension.

Only after repairing the extension, according to Ling, does a physician then conduct a digital rectal exam, feeling for whether the rectal mucosa is intact and smooth. He explained that "[p]utting a gloved finger in the rectum before you do the repair is actually frowned upon by a lot of folks because of how easy it is to make a diagnosis without putting a gloved finger in the [rectum] and the fact that doing a gloved finger examination of the rectum is not itself innocuous, meaning there are negative consequences. . . . When you do fix it or repair it, it would be compromised by more bacteria or more contamination, which could cause a breakdown and can cause more problems . . . [like] a greater chance of infection or failure of that episiot-

omy [repair]. You might even worsen a problem by creating a hole by putting your finger in the rectum.'' Because of these risks, Ling opined, the standard of care does not require a rectal exam before the episiotomy repair, but, rather, such a procedure ''goe[s] beyond'' the standard of care by ''bring[ing] . . . additional risks . . . .''

Although Ling testified that Girard had complied with the standard of care regarding her inspection technique, he further testified that his opinion as to that issue was irrelevant because he also opined that Girard correctly had diagnosed and repaired a third degree extension. In other words, whether a digital rectal exam occurred before or after the repair mattered only if there was a fourth degree episiotomy extension because this exam was not required to diagnose and repair a third degree episiotomy extension. Nevertheless, Ling conceded that, if the plaintiff had sustained a fourth degree episiotomy extension, Girard would have breached the standard of care by diagnosing and repairing it as a third degree episiotomy extension, thereby not repairing the torn rectal mucosa.[5]

As to causation, the defendants offered the testimony of Flynn, who opined that the plaintiff's rectovaginal fistula was not caused by an unrepaired fourth degree episiotomy extension but, rather, by an infection. More specifically, Flynn explained that a fourth degree extension and a rectovaginal fistula are separate and distinct injuries. A fourth degree extension is an ''acute event'' where there has been a tear through the rectum, whereas a rectovaginal fistula is a ''chronic condition'' of an opening that connects the lumen of the rectum and the lumen of the vagina, usually brought about by infection. Even without a fourth degree extension, a

[5] Flynn testified that, even if Girard had breached the standard of care by diagnosing and repairing a fourth degree episiotomy extension as a third degree extension, the plaintiff would not have necessarily sustained any damages because such a small hole would have healed on its own.

rectovaginal fistula may result after a properly repaired third degree extension because the tissue has been stretched and compromised.

Flynn opined that this is what occurred in the present case: "The most likely reason she developed a fistula, she got an infection in the perineum and the episiotomy repair, a small infection. . . . That drained through the posterior fourchette, which is what [was seen at her first follow-up appointment]. As soon as that abscess drained . . . the infection's not gone, but that little pocket of pus is gone, it closed up. That's why on subsequent examinations it [was not discovered by any other physicians]. But the problem is, you still have that bacteria, you still have that pocket. . . . That infection hasn't resolved, and as that part closes off on the perineum, now it's tracking toward the rectum where you've got an area of weakened mucosa . . . where an infection can tract and it tract[s] right down to the anus where it opens up into the anus to create the fistula tract." He also opined that the anal sphincter separation was not a result of a fourth degree episiotomy extension but, rather, occurred because the anal sphincter is a muscle that is difficult to repair as the muscle causes the sutures to stretch and fail over time.

Flynn further opined that it was very unlikely that an undiagnosed fourth degree extension would have caused the plaintiff's rectovaginal fistula. First, the fistula did not occur in the area of the episiotomy repair but, rather, in the posterior fourchette. Second, if there had been a fourth degree laceration, it would have been difficult not to diagnose the rectovaginal fistula by visual inspection once the sphincter was separated, splaying the vagina open. Third, because the hole in the rectal mucosa was so small, if it had been present right after the delivery, it would have healed on its own once the other layers of the laceration had been repaired. Fourth, due to the small size of the hole in the rectal mucosa, only liquid stool, but not solid stool,

would have been able to pass through it—contrary to the plaintiffs' allegations. If liquid stool had been passing through this hole since the day of delivery, the bacteria would have permeated the entire repair, and the repair would have opened up completely within two to five days. Additionally, the hole would have grown in size over time. Instead, the episiotomy repair was found to be intact.

During closing argument, neither party referred to the acceptable alternatives doctrine, despite the fact that the defendants had requested an acceptable alternatives charge. Rather, both parties argued that there was only one proper method of conducting the digital rectal exam—the plaintiffs argued that it had to occur prior to the repair, and the defendants argued that it had to occur after the repair. Moreover, although both parties discussed Girard's inspection technique, both argued that the crux of the case came down to whether there was a third degree or a fourth degree episiotomy extension. The plaintiffs' counsel described the case as follows: "So, the issue in this case is, was there a fourth degree laceration, right? That's the whole issue. Because if it's there, we know she missed it. . . . Third degree is the defendants' case. . . . Fourth degree is the plaintiffs' case." Similarly, the defendants' counsel summarized the case as "revolv[ing] around [whether there was] a third degree laceration that was properly repaired or a fourth degree laceration . . . ."

The trial court then instructed the jury that the plaintiffs had alleged that Girard breached the standard of care by failing to identify a fourth degree extension of the median episiotomy, and by failing to properly examine and to adequately repair a fourth degree extension. The trial court also charged the jury on the acceptable alternatives doctrine.[6]

[6] The trial court instructed the jury as follows: "In this case, you have heard testimony from different physicians as to different ways to inspect and diagnose an episiotomy extension. Where there is more than one recognized

After being instructed, the jury sought clarification as to whether it could "use the total testimony of all witnesses to ascertain the plaintiffs' definition of [the] standard of care or only Dr. Young's testimony . . . ." The trial court responded by instructing the jury that it was "permitted to look at all of the evidence, including testimony, to determine the standard of care, and it is your obligation to determine the standard of care." The trial court then reread the standard charge on medical malpractice and the charge on reasonable alternatives. The plaintiffs' counsel again objected to the inclusion of the reasonable alternatives charge.

B

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint

method of treatment and not one of them is exclusively and uniformly used by all physicians in good standing, a health care provider is not negligent in selecting one, which, according to his or her best judgment, is best suited for the patient's needs, even if it turns out to be a selection not favored by another physician. Now, there may be more than one established system of treatment. The law does not favor or give exclusive recognition to any particular system of treatment over another. The law is that a physician is not bound to use any particular method or medical school of thought in treating a patient. When a physician of ordinary skill and learning recognizes more than one method of treatment as proper, the physician may adopt any such method without subjecting himself or herself to liability for an unfortunate result, so long as such method was consistent with the skill, care, and diligence ordinarily had and exercised by other specialists in her field in like cases at the time that she provided the treatment. Thus, if there was more than one established method of treatment recognized at the time, the test is not whether the physician adopted a method someone else might have adopted but, rather, whether the method adopted was one that was in compliance with reasonable skill, care, and diligence required of the particular school of thought embracing the method."

of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error." (Internal quotation marks omitted.) *State* v. *Flores*, 301 Conn. 77, 93, 17 A.3d 1025 (2011).

It is well established that it is error to instruct the jury on a doctrine or issue not supported by the evidence offered at trial. See, e.g., *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 484–85, 958 A.2d 1195 (2008); *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 575 and n.13, 898 A.2d 178 (2006); *Mack* v. *Perzanowski*, 172 Conn. 310, 312–13, 374 A.2d 236 (1977). "Jury instructions should be confined to matters in issue by virtue of the pleadings and evidence in the case." *Mack* v. *Perzanowski*, supra, 313. "[W]e review the evidence presented at trial in the light most favorable to supporting the proposed charge. . . . If . . . the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury." (Internal quotation marks omitted.) *Stokes* v. *Norwich Taxi, LLC*, supra, 484–85.

This court addressed the propriety of an acceptable alternatives instruction in *Wasfi* v. *Chaddha*, 218 Conn. 200, 588 A.2d 204 (1991). In *Wasfi*, a medical malpractice case, the central issue was whether a computerized axial tomography (CAT) scan should have been ordered before or after attempting to treat the plaintiff with carbogen inhalation therapy. Id., 202–203. "At the trial, experts on both sides testified concerning, inter alia, the propriety of [the defendant physician's] prescription of carbogen [inhalation] therapy prior to ordering a CAT scan. . . . [The physician's] counsel elicited expert testimony to the effect that the timing of the CAT scan—before . . . or after carbogen [inhalation] therapy—was a matter of professional opinion as to which physicians differed." Id., 203. On the basis of this testimony, this court held that the trial court prop-

erly instructed the jury on the acceptable alternatives doctrine, which we described as "the settled principle that where the treatment or procedure is one of choice among competent physicians, a physician cannot be held guilty of malpractice in selecting the one which, according to his best judgment, is best suited to the patient's needs." (Internal quotation marks omitted.) Id., 208.

Unlike the present case, *Wasfi* did not involve two experts with dueling opinions regarding the proper procedure, with neither expert agreeing that the alternative procedure was acceptable in the medical community. This court in *Wasfi*, therefore, did not address whether the acceptable alternatives charge could be supported by experts with differing opinions. Rather, in *Wasfi*, an expert specifically testified that both procedures—ordering the CAT scan before or after the carbogen inhalation therapy—were acceptable in the medical community. Id., 210–11.

Since *Wasfi*, this court has not addressed this issue. We find instructive, however, this court's decisions regarding the schools of thought doctrine. Although that doctrine is separate and distinct from the acceptable alternatives doctrine, it is similar in that both doctrines recognize that there may be more than one acceptable approach to treating a patient. Under this doctrine, "the law will not judge between different medical schools of thought so long as a physician acts according to the standards within that school. . . . [This charge is proper only if there is evidence that the practitioner] adhered to a recognized school of good standing, which has established rules and principles of practice for the guidance of all its members, as respects diagnosis and remedies, which each member is supposed to observe in any given case." (Citation omitted; internal quotation marks omitted.) Id., 207–208.

In determining whether there is sufficient evidence to support a schools of thought instruction, this court has held that "a conflict in the evidence of the experts, as is to be expected in [medical malpractice] cases," is not sufficient to support the charge. *Geraty* v. *Kaufman*, 115 Conn. 563, 571, 162 A. 33 (1932); see also *Katsetos* v. *Nolan*, 170 Conn. 637, 653, 368 A.2d 172 (1976) (schools of thought instruction is proper when there is evidence of more than one school of thought recognized in medical community and defendant followed different school of thought than plaintiff's expert). Rather, there must be testimony that different schools of thought exist and what each school of thought requires regarding procedure and treatment. *Geraty* v. *Kaufman*, supra, 571; see also *Savoie* v. *Daoud*, 101 Conn. App. 27, 38–39, 919 A.2d 1080 (2007) (proper to instruct on schools of thought doctrine when expert testified about existence of two schools of thought).

It is the nature of medical malpractice cases that there often will be conflicting expert testimony regarding the standard of care. *Wasfi* makes clear that, similar to the schools of thought doctrine, the acceptable alternatives doctrine does not apply in every medical malpractice case but, rather, applies only when there is evidence of more than one acceptable method of inspection, diagnosis, or treatment. See *Wasfi* v. *Chaddha*, supra, 218 Conn. 211 ("the defendant physician who claims that he employed one of several alternative methods accepted within his profession has no less a task than any defendant physician: to offer credible expert evidence that his conduct was accepted within the profession, and to persuade the jury to believe that evidence" (emphasis omitted)).

Consequently, as with the schools of thought doctrine, competing expert testimony by itself is not sufficient to support the acceptable alternatives charge. For example, if expert A testifies that the standard of care

requires diagnosis to be made using the X method, and expert B testifies that the standard of care requires diagnosis to be made using the Y method, the jury must decide between the two alternatives, with only one option satisfying the standard of care. There would be no evidence that both methods were acceptable alternatives because both experts testified that only one method would satisfy the standard of care. Rather, to justify the charge, a qualified expert must testify that there is more than one acceptable method of inspection, treatment, or diagnosis.

The evidence in the present case played out like the hypothetical just described: no expert testimony established that conducting the digital rectal exam either before the episiotomy repair or after the episiotomy repair was an acceptable method of diagnosing the level of degree of extension. Rather, the plaintiff's expert, Young, testified that the only acceptable method was to conduct this examination prior to the repair. In contrast, one of the defendants' experts, Ling, testified that this examination should be performed after the repair, to prevent contamination and infection. Additionally, Girard herself never testified that she made a choice regarding when to conduct the digital rectal exam but, rather, testified that she was trained to conduct this exam only after the episiotomy repair.

The defendants respond that there was evidence that both methods were acceptable alternatives because Ling never testified that a prerepair examination was a deviation from the standard of care; he merely testified that a prerepair examination was not required. The defendants focus on Ling's testimony that a prerepair digital rectal examination was "going beyond what the standard of care would require . . . ." The defendants take Ling's statement out of context, however. Ling did not testify that a prerepair examination went beyond the standard of care in that it satisfied the standard of care by doing more than the standard of care required

and, thereby, was an acceptable alternative to a postrepair examination. Rather, Ling testified that the standard of care does not require a prerepair examination because it "is actually frowned upon" and "discourage[d]" due to the increased likelihood of contamination and infection. Ling further testified that, because a prerepair examination can even create an opening in the rectum, "we don't encourage doing it unless it's absolutely necessary." Ling disagreed with Young that the standard of care required a prerepair examination, explaining that "[t]hat's going beyond what the standard of care would require, and it brings in the additional risks [of infection and creating an opening] by examining [the plaintiff] before the repair is done . . . ." Ling never opined that a prerepair examination was an acceptable alternative to a postrepair examination approved by the medical community. Rather, Ling testified that prerepair examination was a disapproved method of diagnosis unless "absolutely necessary."

Additionally, the defendants rely on Young's testimony to support the acceptable alternatives charge. Specifically, they point to Young's testimony that, although she opined that the standard of care required a prerepair examination, a postrepair examination could identify a fourth degree episiotomy extension. Again, the defendants take this testimony out of context. On cross-examination, Young testified that, in a previous deposition, she had testified that, after a repair is performed, a digital rectal exam can establish the existence of a fourth degree extension. Young clarified at trial that a tear of the rectum would be noticeable only during a digital rectal examination postrepair if the repair had been done improperly so that the three layers above the rectal mucosa remained torn, allowing the physician to see from the vagina through the tear to the rectal mucosa. In essence, Young's testimony was that a postrepair digital rectal exam was an acceptable alternative only if the physician was negligent in performing the

repair. Accordingly, this record did not support an acceptable alternatives charge.

Moreover, neither party at trial argued that the expert testimony established that Girard chose between two acceptable alternatives in performing the digital rectal examination postrepair. Both parties argued during summation that there was only one proper method of examination to properly diagnose the degree of the episiotomy extension—the plaintiffs' counsel argued that the exam had to occur prerepair, whereas the defendants' counsel argued that the exam had to occur postrepair. The defendants' counsel even went so far as to argue that she "couldn't believe [that] . . . Young would even suggest that [a prerepair examination] was a good idea, much less the standard of care." Similarly, the plaintiffs' counsel noted that there was "no agreement on the alternatives. . . . Young was very clear [that] the examination has to be done before you do the repair; [Ling] was very clear [that] you do the examination after the repair. There is no agreement on that." Although closing argument is not evidence itself, it is noteworthy that, at trial, not even the parties thought the evidence established that the competing inspection methods were acceptable alternatives.

In light of the evidence presented at trial, the trial court improperly instructed the jury on the acceptable alternatives charge.

C

The plaintiffs contend that this instructional error was harmful because merely injecting an inapplicable doctrine into the case creates a "substantial" likelihood of prejudice. More specifically, they argue that the charge " 'exculpate[d]' " the defendants and interfered with the jury's assessment of credibility by suggesting that both methods of inspection were reasonable as long as Girard used her "best judgment." The

plaintiffs argue that the harm of this charge is evident from the jury's request for additional guidance regarding the standard of care, the trial court's repetition of the charge in response to the jury's clarifying questions, and the fact that this charge was the last charge the jury heard.[7]

The defendants respond that the improper charge was harmless because the dispositive issue at trial was not whether Girard breached the standard of care by performing the digital rectal examination after the episiotomy repair but, rather, whether a fourth degree extension of the episiotomy existed. To establish liability,[8] the plaintiffs had to prove that Girard failed to identify a fourth degree episiotomy extension and failed to

[7] The plaintiffs further argue that the harm caused by the improper charge was worsened by the improper wording of the charge, confusing the acceptable alternatives doctrine with the schools of thought doctrine and injecting a subjective "best judgment" standard into the objective medical malpractice standard. As explained in footnote 4 of this opinion, the merits of these claims are unpreserved. Nevertheless, we note that, in *Wasfi*, we held that the inclusion of the phrase, "schools of thought," in an acceptable alternatives charge, although incorrect, does not confuse or mislead the jury. See footnote 4 of this opinion. The charge at issue in the present case is nearly identical to the charge in *Wasfi*, and, as in that case, we fail to discern how the inclusion of this phrase would create any additional confusion for the jury. Moreover, to the extent that the plaintiffs contend that the "best judgment" language was harmful, we address that argument, but, to the extent that the plaintiffs attempt to raise their unpreserved claim regarding whether the inclusion of the "best judgment" language was improper, we decline to review that issue.

[8] In the operative fifth amended complaint, the plaintiffs allege that Girard breached the standard of care by failing "to identify a [fourth] degree extension of the median episiotomy"; failing "to perform a proper and adequate episiotomy repair"; and failing "to properly examine the episiotomy repair after it was complete." To conform the allegations to the evidence presented at trial, the plaintiffs proposed to amend the complaint to allege that Girard breached the standard of care by failing "to identify a [fourth] degree extension of the median episiotomy" and by failing "to properly examine and adequately repair the [fourth] degree extension of the episiotomy." The trial court denied the plaintiffs' request to amend the complaint, but the trial court's instruction regarding the plaintiffs' allegations nevertheless tracked how the plaintiffs had set forth those allegations in their proposed sixth amended complaint.

properly examine and repair that fourth degree extension. The defendants contend that, because the jury found that Girard did not breach the standard of care, it necessarily found that no fourth degree extension existed, and, thus, the acceptable alternatives charge did not taint the verdict because whether Girard performed the proper exam mattered only if there was a fourth degree extension. The defendants contend that the instruction did not interfere with the jury's credibility determination or improperly exculpate Girard. We agree with the defendants.

"[N]ot every error is harmful. . . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict. . . . [W]e consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 400, 933 A.2d 1197 (2007); see also *Galligan* v. *Blais*, 170 Conn. 73, 78, 364 A.2d 164 (1976) ("for an error in the charge to be a ground for reversal, it must have been both material and prejudicial"). "A charge must be read in its entirety and is to be considered from the standpoint of its effect on the jury in guiding [it] to a correct verdict." (Internal quotation marks omitted.) *Dinda* v. *Sirois*, 166 Conn. 68, 74, 347 A.2d 75 (1974).

The inclusion of an inapplicable doctrine may be harmful if it confuses and misleads the jury, which may be evidenced by the jury's having requested additional guidance from the court on the doctrine; see, e.g., *State* v. *Torrence*, 196 Conn. 430, 438, 493 A.2d 865 (1985);

Conlon v. *G. Fox & Co.*, 165 Conn. 106, 113, 328 A.2d 708 (1973); by the inapplicable charge being the last charge that a jury hears; *State* v. *Torrence*, supra, 437–38; *Velardi* v. *Selwitz*, 165 Conn. 635, 640–41, 345 A.2d 527 (1974); *Laffin* v. *Apalucci*, 128 Conn. 654, 658, 25 A.2d 60 (1942); or by repetition of the improper charge. See *State* v. *Flowers*, 278 Conn. 533, 542–43, 898 A.2d 789 (2006) (twice repeated improper jury instruction required reversal of judgment of conviction); *State* v. *Owens*, 39 Conn. App. 45, 55, 663 A.2d 1108 (twice repeated improper jury instruction required reversal in part of judgment of conviction), cert. denied, 235 Conn. 927, 667 A.2d 554 (1995).

Despite an instructional error, if the error did not affect the jury's verdict, courts of this state have found the error to be harmless. See, e.g., *Burke* v. *Mesniaeff*, 334 Conn. 100, 121–22, 220 A.3d 777 (2019) (holding that improper instruction was harmless when it did not taint jury's verdict); *State* v. *Acklin*, 9 Conn. App. 656, 666, 521 A.2d 165 (1987) (holding that instructional error was not misleading and, thus, not harmful when error did not affect principal issue in case); see also *State* v. *Torrence*, supra, 196 Conn. 438 ("[a] faulty definition of cognitive insanity cannot prejudice a defendant who claims volitional insanity"); *Caron* v. *Adams*, 33 Conn. App. 673, 685, 638 A.2d 1073 (1994) (despite instructional error, "[a] verdict should not be set aside where the jury reasonably could have based its verdict on the evidence"). Cases in which the inclusion of an inapplicable doctrine have been held harmful have involved the submission of an issue or doctrine that affected the jury's determination of liability. See *Faulkner* v. *Reid*, 176 Conn. 280, 281, 407 A.2d 958 (1978) (instructing on inapplicable special defense that affected determination of liability); *Miller* v. *Porter*, 156 Conn. 466, 470, 242 A.2d 744 (1968) (same).

In the present case, all the experts agreed that, if there had been a fourth degree extension of the episiotomy, the standard of care would require Girard to diagnose it and to repair it as a fourth degree extension regardless of whether the digital rectal exam was performed before or after the episiotomy repair. Additionally, Young conceded that, if there was only a third degree extension, the repair was properly done and Girard did not breach the standard of care. Thus, regardless of whether the jury found either or both methods of *inspection* acceptable, there would be a breach of the standard of care only if the plaintiff had sustained a fourth degree episiotomy extension and Girard had failed to properly repair it. In other words, even if a prerepair exam was required for a fourth degree extension, if there was only a third degree extension, there would be no breach. If there was a fourth degree extension, regardless of whether a digital rectal exam was required before or after the repair, there would be a breach of the standard of care because the fourth degree extension was not diagnosed and repaired. The timing of the exam was relevant to the issue of breach only if the jury found there was a fourth degree episiotomy extension.

This is made clear by the court's recitation of the plaintiffs' allegations in its jury instruction, to which the plaintiffs did not take exception. See footnote 8 of this opinion. The trial court instructed that the plaintiffs had alleged that Girard breached the standard of care by failing "to identify a fourth degree extension of the median episiotomy" and by failing "to properly examine and adequately repair a fourth degree extension of the episiotomy." The allegations were premised on the existence of a fourth degree extension. Only if there had been a fourth degree extension would Girard have failed to properly inspect, diagnose, and repair it. In the absence of a fourth degree extension, there was no breach of the standard of care.

The jury interrogatories establish that the jury found that the plaintiffs had established the standard of care but that there was no breach of that standard of care. This necessarily means that the jury found that the plaintiff sustained a third degree, not a fourth degree, episiotomy extension. As explained, applying the plaintiffs' alleged standard of care, there would be a breach in the present case only if there had been a fourth degree extension, and there would be no breach only if there had been a third degree extension. Accordingly, whether Girard properly conducted the digital rectal exam did not affect the jury's verdict. As a result, the inapplicable acceptable alternatives charge, which was premised on the proper inspection technique, did not taint the jury's verdict. Because the jury's finding centered on whether there was a third or fourth degree episiotomy extension, the inclusion of this charge, which had no bearing on the degree of the extension, would not have confused or misled the jury and, therefore, was harmless. See *State* v. *Torrence*, supra, 196 Conn. 438 (holding that instructional error was not misleading, and thus not harmful, when error did not affect verdict, which was premised on different issue); *State* v. *Acklin*, supra, 9 Conn. App. 666 (same).

The out-of-state cases on which the plaintiffs rely in support of their argument that an inapplicable acceptable alternatives charge necessarily confuses and misleads the jury are distinguishable. In those cases, the erroneous acceptable alternatives charge was deemed harmful on the ground that it was reasonably probable that it affected the jury's verdict because the primary issue in each case was the propriety of the defendant physician's decision to use a certain inspection, diagnosis, or treatment method. See *Hirahara* v. *Tanaka*, 87 Haw. 460, 464–65, 959 P.2d 830 (1998) (improper wording of acceptable alternatives charge was harmful where charge was central to issue of liability); *Rogers* v. *Meridian Park Hospital*, 307 Or. 612, 619–20, 772

P.2d 929 (1989) (same); *Yates* v. *University of West Virginia Board of Trustees*, 209 W. Va. 487, 496, 549 S.E.2d 681 (2001) ("[b]ecause the primary issue . . . concerned the propriety of [the defendants'] decision to use interventional radiology rather than immediate surgery as the preferred method of treating [the plaintiff patient's] blockage, we find that there is a reasonable probability that the jury's verdict was influenced by the improper instruction"); see also *Leazer* v. *Kiefer*, 821 P.2d 957, 962 (Idaho 1991) (erroneous charge "misguided the jury in determining negligence").

The plaintiffs respond that harm is evident in the present case because the improper charge was repeated and it was the last charge presented to the jury. We have considered these factors in determining the prejudice of an inapplicable charge and have found them persuasive in cases in which the inapplicable charge tainted the jury's verdict and, thus, served to confuse and mislead the jury. See *Velardi* v. *Selwitz*, supra, 165 Conn. 639 (instructional error was harmful when it involved jury's determination of liability); *Conlon* v. *G. Fox & Co.*, supra, 165 Conn. 113 ("[the inapplicable charge] clearly was involved in [the jury's] deliberations"). As discussed, the acceptable alternatives charge did not taint the verdict in the present case because it did not affect the basis of the jury's verdict—the degree of the episiotomy extension. See, e.g., *Burke* v. *Mesniaeff*, supra, 334 Conn. 121–22 (holding that improper instruction was harmless when it did not taint jury's verdict).

Additionally, although the trial court repeated the acceptable alternatives charge in response to the jury's request for clarification, the court first reread the standard charge on medical malpractice, which was based on the model medical malpractice jury instructions on the Judicial Branch website. The court then reread the acceptable alternatives charge. The court continued its supplemental charge by reminding the jury that "the

plaintiffs have the burden of proving by a fair preponderance of the evidence that [Girard's] conduct represented a breach of the standard of care. Under our law, the plaintiffs must prove this by expert testimony. More specifically, they must establish through expert testimony both what the standard of care is and their allegation that [Girard's] conduct represented a breach of that standard. . . . Specifically . . . the plaintiffs have alleged that [Girard] . . . [breached the standard of care] in that she failed to identify a fourth degree extension of the median episiotomy and failed to properly examine and adequately repair a fourth degree extension of the episiotomy." Although the trial court repeated the acceptable alternatives charge, the court put it into context by reemphasizing that the plaintiffs' allegations were premised on a fourth degree extension, which must exist for the inspection technique issue to be material, thus diminishing any harm caused by the repetition of the inapplicable charge.[9]

The plaintiffs further argue that harm is evidenced by the jury's having sought clarification on the inapplicable charge. Although the jury sought clarification on the instruction, it did not seek clarification on the acceptable alternatives charge. Rather, the jury sought clarification on what evidence it could consider in determining whether the plaintiffs satisfied their burden of establishing the standard of care. The jury also sought clarification on whether the plaintiffs were asserting that a digital rectal exam had to be conducted before the repair to comply with the standard of care.

The plaintiffs argue that, although these questions were not specifically about the acceptable alternatives

[9] Additionally, contrary to the plaintiffs' contention, the acceptable alternatives charge was not the last charge that the jury heard, but, rather, the last charge was on the burden of proof and a summary of the plaintiffs' allegations centering on the disputed existence of a fourth degree extension. See *State* v. *Torrence*, supra, 196 Conn. 437–38 ("trial court's concluding instruction . . . refocused the jury's attention on the key concept [at issue] . . . and, in effect, acted as a curative instruction").

charge, they show that the jury was focused on the method of examination—the subject of the acceptable alternatives charge. We are not persuaded. These questions show that the jury was focused on the standard of care. As discussed, the standard of care involved the inspection technique only if the jury first found that a fourth degree extension had existed, which it did not find on the basis of its finding that there was no breach of the standard of care. Thus, the jury's focus on the standard of care did not necessarily suggest a focus on the acceptable alternatives charge.

Finally, the plaintiffs argue that the acceptable alternatives charge was harmful because it exculpated Girard and improperly interfered with the jury's determination of the experts' credibility by suggesting that both inspection methods were reasonable as long as Girard used her "best judgment." We disagree.

It is true that, if a jury finds that expert testimony establishes that there were acceptable alternative methods for conducting an inspection and that a defendant reasonably chooses from among those options, the defendant avoids liability. See *Wasfi* v. *Chaddha*, supra, 218 Conn. 209 ("physicians may choose between alternative acceptable methods without incurring liability solely because that choice may have led to an unfortunate result"). This does not mean, however, that charging the jury on the acceptable alternatives doctrine exculpates the defendant. As this court in *Wasfi* explained, the doctrine does not "[shield] a defendant physician from liability every time experts differ concerning his choice of techniques." Id., 211. Rather, the jury still must determine whether both of the competing methods were acceptable in the medical community and whether the defendant's use of a particular method breached the standard of care.

Despite its flaws, the acceptable alternatives charge did not require the jury to exculpate Girard. Rather, the

charge informed the jury that it must decide whether there was more than one recognized method of inspection and, if there was, then determine whether the "method [used] was consistent with the skill, care, and diligence ordinarily had and exercised by other specialists in her field in like cases at the time that she provided treatment." Similarly, the charge did not interfere with the jury's determination of credibility by suggesting that both methods of inspection were reasonable. The charge properly left the jury to determine whether the expert testimony established that both methods of inspection were accepted in the medical community. Moreover, the jury did not need to reach this issue unless it found that a fourth degree episiotomy extension had existed. It did not.

Accordingly, on the basis of this record, the trial court's improper inclusion of the acceptable alternatives charge was harmless.[10]

II

The plaintiffs' final claim of instructional error is that the trial court's supplemental charge to the jury improperly limited their allegations of breach of the standard of care to improper inspection, rather than more broadly to improper inspection, diagnosis, and repair

[10] Alternatively, the plaintiffs ask this court to abolish the acceptable alternatives doctrine because it is unnecessary in light of the standard jury instruction regarding medical malpractice, and because it misleads the jury and interferes with its credibility determination by suggesting that a physician is not liable if the physician's methods were subjectively reasonable. In light of this court's stare decisis jurisprudence and our holding that the acceptable alternatives charge in this case was harmless, we decline to take this opportunity to abolish the acceptable alternatives doctrine. "The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and *harmful* before it is abandoned." (Emphasis added; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 660–61, 680 A.2d 242 (1996). Moreover, because we conclude that the acceptable alternatives doctrine was not applicable in this case, we determine that this is not the appropriate case for deciding whether the doctrine should be abolished.

of a fourth degree episiotomy extension.[11] According to the plaintiffs, even if Girard properly conducted the inspection, she still could have breached the standard of care by failing to diagnose and repair a fourth degree episiotomy extension. The plaintiffs argue that this improper supplemental instruction was harmful because, by narrowing the allegations of breach to the inspection technique, the trial court focused the jury's attention on the improper acceptable alternatives charge, which was based on the inspection technique.

The defendants respond that the trial court's supplemental instruction was proper because, although the plaintiffs alleged that Girard improperly inspected, diagnosed, and repaired the episiotomy extension, the improper diagnosis and repair were premised on the improper inspection. In other words, the only evidence of breach of the standard of care was that Girard improperly conducted the digital rectal examination postrepair, causing her not to be able to visualize the tear in the rectal mucosa, and thereby causing her not to be able to diagnose and repair that tear. We agree with the defendants.

The following additional procedural history is relevant to this claim. After being instructed, the jury sought clarification on whether "the plaintiff[s] assert that an internal rectal exam must be completed before repair as a required component of the standard of care." The trial court proposed to respond that "[t]he plaintiffs' expert, [Young], testified that an internal rectal exam must be performed before a repair in order to comply with the standard of care." The plaintiffs' counsel objected, arguing that the jury did not ask what the

[11] Specifically, after the plaintiffs' counsel objected to the trial court's proposed supplemental instruction as being too narrow, counsel requested that the trial court respond to the jury's question that the plaintiffs' allegations were that Girard breached the standard of care by failing to "carefully inspect and properly diagnose a fourth degree laceration."

expert had testified to but what the plaintiffs were asserting, which was broader—that the standard of care required Girard to properly inspect, diagnose and repair the fourth degree extension. The plaintiffs' counsel recognized the specifics of Young's testimony but argued that the trial court's response was too narrow. The trial court disagreed and gave the supplemental instruction that it had proposed.

"In evaluating a claim that a supplemental charge is erroneous we must examine both the main and supplemental charge as a whole to determine whether the jury could reasonably have been misled. . . . We must recognize, however, that [a] supplemental charge . . . enjoy[s] special prominence in the minds of the jurors because it is fresher in their minds when they resume deliberation." (Citation omitted; internal quotation marks omitted.) *State* v. *Williams*, 199 Conn. 30, 41, 505 A.2d 699 (1986). Although "additional instructions given in immediate response to a request are more informal and expressed with less exactness than are studiously prepared formal charges"; (internal quotation marks omitted) id., 43; "[t]he test to be applied to the charge is whether it fairly presents the case to the jury." *State* v. *Edwards*, 163 Conn. 527, 537, 316 A.2d 387 (1972).

The trial court's response to the jury's question regarding the plaintiffs' allegations was consistent with the evidence presented at trial and how the plaintiffs' counsel had argued the plaintiffs' case to the jury. See *Blatchley* v. *Mintz*, 81 Conn. App. 782, 787–88, 841 A.2d 1203 ("court properly tailored its instructions to reflect the issues actually before the jury"), cert. denied, 270 Conn. 901, 853 A.2d 519 (2004); see also *Stokes* v. *Norwich Taxi, LLC*, supra, 289 Conn. 476, 485 (charge must be supported by evidence and adapted to issues in case). The evidence offered in support of the plaintiffs' theory that Girard breached the standard of care came from Young, who testified that Girard improperly

failed to conduct the digital rectal exam before the episiotomy repair, which caused her to misdiagnose and improperly repair the fourth degree extension as a third degree extension because a fourth degree extension can be identified only before the repair. The plaintiffs' allegations that Girard breached the standard of care by failing to diagnose and repair a fourth degree extension were premised on a failure to conduct the digital rectal exam prior to the repair. The plaintiffs' counsel argued in summation that the plaintiff sustained a fourth degree episiotomy extension and that, because there was a fourth degree episiotomy extension, the standard of care required a prerepair digital rectal exam, without which Girard could not properly diagnose and repair the degree of the extension.[12] Under the plaintiffs' theory of the case, the jury first had to find that a fourth degree episiotomy existed and then had to find that Girard failed to properly diagnose and repair it, which was caused by Girard's failure to conduct a prerepair digital rectal exam. In light of this and the more informal nature of supplemental instructions, it was proper for the trial court to instruct the jury that the plaintiffs were asserting that a prerepair digital rectal exam was a component of the standard of care.

The crux of the plaintiffs' argument appears to be that, in light of the trial court's improper charge on the acceptable alternatives doctrine, its supplemental charge was improper because, when looking at those two portions of the jury instructions together, the jury could have improperly found that, although there was

[12] The plaintiffs' counsel argued: "So, step one is, was it a fourth degree [laceration]? . . . It was clearly a fourth degree laceration. [Step two is, was] it properly repaired? Well, no, it wasn't because [Girard] diagnosed what she thought and repaired what she thought was a third degree because she didn't properly examine the perineum for the laceration. So, that gets you through the standard of care. Properly examine, properly diagnose, properly repair. She didn't see the fourth degree because she didn't do the examination, [so] she didn't repair the fourth degree because she thought it was a third degree."

a fourth degree episiotomy extension, insofar as both inspection methods were reasonable, there was no breach of the standard of care, which was limited to the inspection technique. We are not persuaded that the supplemental instruction improperly limited the allegations and had this effect.

The jury asked if a prerepair exam was *a component* of the plaintiffs' alleged standard of care. The trial court responded in the affirmative. Nothing about this response negates the plaintiffs' allegation that, as a result of breaching the standard of care by failing to perform a prerepair inspection, Girard failed to diagnose and repair a fourth degree extension. Under the plaintiffs' theory of the case, assuming there was a fourth degree episiotomy extension, a failure to perform the prerepair exam was a necessary first component in a breach of the standard of care.

Furthermore, this charge must be read in context as part of the entire instruction. See, e.g., *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 606, 662 A.2d 753 (1995). In its original charge, the trial court stated that the plaintiffs had alleged that Girard breached the standard of care "in that she, [a], failed to identify a fourth degree extension of the median episiotomy or, [b], failed to properly examine and adequately repair a fourth degree extension of the episiotomy." After the supplemental charge at issue, the jury requested clarification on what evidence it could consider in determining if the plaintiffs established the standard of care, in response to which the trial court again stated the plaintiffs' allegations regarding breach of the standard of care as "[a failure] to identify a fourth degree extension of the median episiotomy and [a failure] to properly examine and adequately repair a fourth degree extension of the episiotomy." This charge, which was nearly identical to the language that the plaintiffs sought to have the court include in the first supplemental charge, was the last charge the jury heard. See footnotes 9 and

11 of this opinion. Thus, to the extent that the first supplemental charge did limit the plaintiffs' allegations, the second supplemental charge cured any error. See *State* v. *Snook*, 210 Conn. 244, 271, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). When we examine the charge as a whole, as we must, we conclude that it is clear that the trial court instructed the jury that the plaintiffs' allegations regarding breach of the standard of care included insufficient inspection, diagnosis, and repair of a fourth degree episiotomy extension. The jury instructions as a whole would not have confused and misled the jury into determining that, even if a fourth degree episiotomy extension had existed, Girard did not breach the standard of care.

Accordingly, we conclude that the trial court did not improperly limit the plaintiffs' allegations regarding breach of the standard of care in responding to the jury's request for clarification of the jury instructions.

The judgment is affirmed.

In this opinion the other justices concurred.

JOHN COUGHLIN *v.* STAMFORD FIRE DEPARTMENT ET AL.
(SC 20319)

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

Syllabus

The named defendant, the Stamford Fire Department, appealed from the decision of the Compensation Review Board, which reversed the decision of the Workers' Compensation Commissioner denying the plaintiff's claim for benefits under the statute (§ 7-433c) governing compensation for municipal police officers or firefighters with hypertension or heart disease. While employed as a firefighter, the plaintiff filed a claim for hypertension benefits pursuant to § 7-433c. The plaintiff subsequently retired, and the commissioner issued a finding and award, concluding that the plaintiff's hypertension claim was compensable. Shortly there-

after, D, the plaintiff's physician, issued a report assigning a permanent partial disability rating of the heart for the plaintiff's hypertension, which was acknowledged in a subsequent stipulated finding and award, and D, in that report and a supplemental report, diagnosed the plaintiff with coronary artery disease. D concluded that the plaintiff's hypertension was a significant factor in the development of his coronary artery disease. The plaintiff then pursued compensation for his coronary artery disease, claiming that it flowed from his initial hypertension claim. Following a hearing, the commissioner found that the plaintiff was neither diagnosed with nor filed a claim under § 7-433c for coronary artery disease until after he had retired. The commissioner concluded that the plaintiff did not suffer from coronary artery disease or the resulting disability while he was on or off duty as a regular member of a municipal fire department and that D's opinion that the plaintiff was developing coronary artery disease while he was employed as a firefighter was not sufficient to render the claim compensable under § 7-433c. Accordingly, the commissioner dismissed the plaintiff's claim for benefits related to his coronary artery disease. The plaintiff appealed from that decision to the board, which reversed the commissioner's decision and remanded the case for further proceedings. The board concluded that, on the basis of D's unchallenged medical reports, it was reasonable to infer that the plaintiff's coronary artery disease was the sequela of his compensable claim for hypertension and that a cardiac event that occurs subsequent to an initial injury that is compensable under § 7-433c is not necessarily a new injury that would require the filing of a new notice of claim. On the defendant's appeal from the board's decision, *held* that the defendant could not prevail on its claim that the plaintiff was not entitled to benefits under § 7-433c for his coronary artery disease insofar as he was not diagnosed with such disease until after he retired from his position as a firefighter and as his coronary artery disease was a separate and distinct injury from his hypertension: a claim for heart disease that occurs after an initial, compensable claim for hypertension under § 7-433c may qualify for benefits without the need to file a notice of new claim, as long as there is a causal connection between the two injuries or conditions, and a claimant may pursue such a claim for heart disease even after retirement, as long as causation between the injury or condition that formed the basis for the initial, compensable claim and the subsequent heart disease is established; accordingly, because it was undisputed that the plaintiff's initial claim for hypertension was timely and compensable under § 7-433c, and because the record contained unchallenged medical reports in which R concluded that the plaintiff's hypertension was a significant factor in the development of his coronary artery disease, the evidence was sufficient to uphold the board's conclusion that the plaintiff was entitled to compensation for his coronary artery disease under § 7-433c.

Argued November 12, 2019—officially released March 10, 2020

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District dismissing the plaintiff's claim for certain workers' compensation benefits, brought to the Compensation Review Board, which reversed the commissioner's decision and remanded the case for further proceedings, and the defendants appealed. *Affirmed.*

Scott Wilson Williams, for the appellants (defendants).

Andrew J. Morrissey, for the appellee (plaintiff).

Opinion

KAHN, J. The named defendant, the Stamford Fire Department,[1] appeals[2] from the decision of the Compensation Review Board (board), which reversed the decision of the Workers' Compensation Commissioner for the Seventh District (commissioner) denying benefits to the plaintiff, John Coughlin, pursuant to General Statutes § 7-433c (a).[3] *Coughlin* v. *Stamford Fire Dept.*,

[1] PMA Management Corporation of New England, a third-party administrator for the city of Stamford, is a defendant in the present case and joined in this appeal. In the interest of simplicity, we refer to the Stamford Fire Department as the defendant throughout this opinion.

[2] The defendant appealed from the decision of the Compensation Review Board to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] General Statutes § 7-433c (a) provides: "Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor

No. 6218, CRB 5-17-9 (February 15, 2019). On appeal, the defendant asserts that the board incorrectly determined that the plaintiff's heart disease claim was timely because, at the time of his diagnosis and disability, the plaintiff had retired as a firefighter and was no longer employed by the defendant. Additionally, the defendant asserts that a claim for a new injury of heart disease cannot be established on the basis of its causal relationship to the plaintiff's initial compensable claim for hypertension because § 7-433c mandates that hypertension and heart disease be treated as separate and distinct injuries. The plaintiff responds that his heart disease claim was timely because it flowed from his compensable claim for hypertension, and neither a plain reading of § 7-433c nor this court's interpretation of that statute requires hypertension and heart disease to be treated as separate diseases when they are causally related. We agree with the plaintiff and, accordingly, affirm the decision of the board.

The record reveals the following undisputed facts and procedural history. The plaintiff was hired by the defendant as a regular member of its fire department on November 26, 1975.[4] While employed as a firefighter,

benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467."

[4] Section 7-433c (b) provides in relevant part that "those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section." In the present case, it is undisputed that the plaintiff was hired on November 26, 1975.

the plaintiff filed a claim for hypertension benefits pursuant to § 7-433c based on a January 28, 2011 date of injury. The plaintiff retired from his position as a firefighter on April 5, 2013, based on his years of service. On March, 22, 2016, the commissioner issued a finding and award, concluding that the plaintiff's claim for hypertension was compensable. Following that finding and award, Donald Rocklin, the plaintiff's physician, issued a report dated May 21, 2016, that assigned a 6 percent permanent partial disability rating of the heart for the plaintiff's hypertension, which was acknowledged in a subsequent stipulated finding and award dated August 20, 2016. In addition, both Rocklin's May 21, 2016 report and supplemental report dated June 29, 2016, diagnosed the plaintiff with coronary artery disease. In those reports, Rocklin concluded that the plaintiff's hypertension was a significant factor in the development of his coronary artery disease. The plaintiff then pursued compensation for his coronary artery disease, claiming that it flowed from his January 28, 2011 hypertension claim.

Following a hearing on the heart disease claim, the commissioner found that the plaintiff was neither diagnosed with coronary artery disease nor filed a claim for that disease under § 7-433c until after he had retired. Citing our decision in *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 149 A.3d 165 (2016), and the Appellate Court's decision in *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017), the commissioner concluded that the plaintiff's coronary artery disease and resulting disability were not suffered while the plaintiff was on or off duty as a regular member of a municipal fire department. Furthermore, the commissioner concluded that Rocklin's opinion that the plaintiff was developing coronary artery disease while he was employed by the defendant was not sufficient to

make the claim compensable under § 7-433c. Accordingly, on September 7, 2017, the commissioner issued a finding and dismissal as to the plaintiff's claim for benefits related to his heart disease. The plaintiff then appealed from that decision to the board.

In accordance with its decision in *Dickerson* v. *Stamford*, No. 6215, CRB 7-17-8 (September 12, 2018), the board stated that it did not believe that "a cardiac event that occurred at a later date from an initial compensable injury [pursuant to § 7-433c] *must*, as a matter of law, be deemed a new injury." (Emphasis in original; internal quotation marks omitted.) The board observed that "benefits pursuant to § 7-433c claims are to be awarded in the same amount and the same manner as that provided under [the Workers' Compensation Act (act), General Statutes § 31-275 et seq.]," and "[w]ere the [plaintiff] to have sustained the sequelae of a compensable injury under [the act], he would not be expected to file a new notice of claim." (Internal quotation marks omitted.) On the basis of the unchallenged medical reports from Rocklin concluding that the plaintiff's hypertension was a significant factor in the development of his coronary artery disease, the board concluded that it was reasonable to infer that the plaintiff's coronary artery disease was the sequela of his accepted § 7-433c claim for hypertension. Accordingly, the board reversed the decision of the commissioner and remanded the case for further proceedings. This appeal followed.

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, 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. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Footnote omitted; internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 611–13. In addition, "we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This proposition applies as well to the provisions of [§] 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits that may be awarded to a [claimant] under . . . [the act]. . . . We also recognize, however, that the filing of a timely notice of claim is a condition precedent to liability and a jurisdictional requirement that cannot be waived." (Internal quotation marks omitted.) Id., 613.

"The plain language of § 7-433c demonstrates that a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department is entitled to benefits under the statute when the officer meets the following requirements: (1) has passed a preemployment physical; (2) the preemployment physical failed to reveal any evidence of hypertension or heart disease; (3) suffers either off duty or on duty any condition or impairment of health; (4) the condition or impairment of health was caused by hypertension or heart disease; and (5) the condition or impairment results in his death or his temporary or permanent,

total or partial disability. The statute contains no other requirements to qualify for its benefits." Id., 616–17. "It is settled that, because . . . § 7-433c (a) does not set forth a limitation period for filing a claim but provides for the administration of benefits 'in the same amount and the same manner as that provided under [the act] if such death or disability was caused by a personal injury which arose out of and in the course of his employment,' the one year limitation period of [General Statutes] § 31-294c (a) governs claims filed under § 7-433c." *Ciarlelli* v. *Hamden*, 299 Conn. 265, 278, 8 A.3d 1093 (2010).

As the Appellate Court has previously recognized, § 7-433c was intended to "eliminate two of the basic requirements for coverage under [the act], namely the causal connection between hypertension and heart disease and the employment, and the requirement that the illness was suffered during the course of employment." *Salmeri* v. *Dept. of Public Safety*, 70 Conn. App. 321, 331, 798 A.2d 481, cert. denied, 261 Conn. 919, 806 A.2d 1055 (2002). "More specifically, the legislature's intent was to afford the named occupations with a bonus by way of a rebuttable presumption of compensability when, under the appropriate conditions, the employee suffered heart disease or hypertension." (Internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 617.

This is not the end of the inquiry, however, because § 7-433c applies only to the injured worker's establishment of a compensable claim in the first instance. "[O]nce § 7-433c coverage is established, the measurement of the plaintiff's benefits under this statute is identical to the benefits that may be awarded to a plaintiff under [the act]." *Felia* v. *Westport*, 214 Conn. 181, 185, 571 A.2d 89 (1990); see also *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987) ("§ 7-433c entitles a qualified, hypertensive or [heart disabled] firefighter or police officer to receive compen-

sation and medical care equivalent to that available under [the act]"); *Salmeri* v. *Dept. of Public Safety*, supra, 70 Conn. App. 338–39 ("once the conditions of § 7-433c are met, benefits must be paid by the municipality in accordance with the [act]"). As a result, although there is no requirement that a claimant demonstrate that the initial injury was causally related to employment under § 7-433c, compensability of subsequent injuries flowing from that initial injury is assessed in accordance with the act.

Under the act, an employee, having suffered a compensable primary injury during the course of his employment, may also be compensated for a subsequent injury that occurs outside the course of employment when the subsequent injury is "the direct and natural result of a compensable primary injury." (Internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 380, 44 A.3d 827 (2012). In addition, the plaintiff's failure to comply with the notice provision under § 31-294c (a) will not bar a claim when the "late claimed condition was causally related to a timely reported incident for which the employer furnished medical care." *Carter* v. *Clinton*, 304 Conn. 571, 581, 41 A.3d 296 (2012). "Consequently, all the medical consequences and sequelae that flow from the primary injury are compensable"; *Sapko* v. *State*, supra, 381; so long as there exists the "requisite causal connection between the primary injury and the subsequent injury." Id., 386. It follows that a claim for a heart disease that occurred after an initial compensable claim for hypertension pursuant to § 7-433c may qualify for benefits without the need to file a new notice of claim, as long as there is a causal connection between the two injuries, as required by the act.

In interpreting the act, this court has previously noted that, "[u]nless causation under the facts is a matter of common knowledge, the plaintiff has the burden of introducing expert testimony to establish a causal link

between the compensable workplace injury and the subsequent injury." Id. "When . . . it is unclear whether an employee's [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion. . . . Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee's employment." (Citation omitted; internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 591–92, 986 A.2d 1023 (2010).

To illustrate the relationship between § 7-433c and the act, we offer the following examples, each of which assumes that the claimant was a firefighter or police officer employed by a paid municipal department whose employment began before July 1, 1996, and that he or she passed a preemployment physical that did not reveal any evidence of hypertension or heart disease. If such a claimant—while still employed—suffers a condition or impairment from hypertension or heart disease that results in a disability, that claimant may file a claim under § 7-433c.[5] If the claim is found to be compensable, that claimant may also be eligible for benefits related to a subsequent condition—including related heart disease—as long as the causation requirements set forth in the act are met. Cf. id.; *Hernandez* v. *Gerber Group*, 222 Conn. 78, 86, 608 A.2d 87 (1992). Such a claimant may pursue claims for subsequent, related injuries, regardless of whether he or she is still employed; the act does not require that sequelae be causally related to the claimant's employment directly, as long as a subsequent injury is causally

[5] The claimant also could file a claim under the act if he or she could demonstrate a causal link between his or her hypertension or heart disease and his or her employment. See, e.g., *Solonick* v. *Electric Boat Corp.*, 111 Conn. App. 793, 799–800, 961 A.2d 470 (2008), cert. denied, 290 Conn. 916, 965 A.2d 555 (2009).

related to a primary, compensable injury. See, e.g., *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 591–92; see also *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 617 (when requirements are met and compensable claim is established, § 7-443c creates rebuttable presumption that claimant's employment caused primary injury). To conclude, as the defendant suggests—that heart disease claims occurring after retirement are not compensable, even if such claims flow from a primary compensable claim—would run afoul of the clear legislative intent underlying § 7-433c.

The defendant cites *Holston* for the proposition that "the legislature intended for hypertension and heart disease to be treated as two separate diseases for the purposes of § 7-443c," and draws our attention to a particular footnote in that decision addressing causal relationships between injuries in the context of a new claim. See *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 616, 618 n.7. *Holston*, however, is factually distinguishable. In *Holston*, the plaintiff—who was employed as a municipal police officer when his claim was filed—was diagnosed with hypertension in October, 2009, and suffered a myocardial infarction on March 10, 2011. Id., 610. The plaintiff filed a claim for benefits on March 14, 2011, for both hypertension and heart disease, which he claimed were causally related. Id., 610–11. It was undisputed on appeal to this court that the plaintiff's hypertension claim was untimely because he did not file it within one year of his diagnosis. Id., 614. This court held, however, that his failure to file a timely compensable claim for hypertension did not bar his subsequent claim for heart disease that was timely and met the requirements of § 7-433c.[6] Id.,

[6] In *Holston*, this court explained that, for purposes of establishing a new claim, the use of the disjunctive term "or" in § 7-433c when determining benefit eligibility for a claimant who suffers a disability caused by hypertension or heart disease "indicates that the legislature intended for hypertension and heart disease to be treated as two separate diseases . . . ." (Internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 616. This is true even if a previous diagnosis of hypertension—for

616–17, 619. Unlike *Holston*, the present case does not involve the filing of a new claim for heart disease because the plaintiff established a compensable claim for hypertension while he was employed as a municipal firefighter.

Section 7-433c was intended to place "[police officers and firefighters] who die or are disabled as a result of hypertension or heart disease in the same position vis-à-vis compensation benefits as [police officers and firefighters] who die or are disabled as a result of service related injuries." (Internal quotation marks omitted.) *Staurovsky* v. *Milford Police Dept.*, supra, 164 Conn. App. 197. When § 7-433c is applied as set forth in this opinion, heart disease diagnosed after a claimant retires is compensable, regardless of whether that disease flows from an initial claim of hypertension brought under § 7-433c, or from an initial claim brought under the act (e.g., an injury suffered when responding to a fire). Such a construction effectuates the legislature's intent to provide firefighters and police officers with the same benefits under § 7-433c as they would have obtained under the act.

If a claimant, however, does not experience any condition or impairment of health related to hypertension or heart disease while employed as a firefighter or police officer and subsequently retires or otherwise leaves employment, then such postemployment claims of hypertension or heart disease are not compensable pursuant to § 7-433c. See id., 200–201 ("to qualify for benefits pursuant to § 7-433c, the claimant must estab-

which a claim was not sought or was untimely—is a significant factor leading to a subsequent diagnosis of a related heart condition for which a new claim is filed, as long as the five requirements set forth in § 7-433c are met and timely notice is given for the new claim. See id. ("[a]ccordingly, we conclude that the plain language of the statute demonstrates that the failure to file a timely claim for benefits related to hypertension does not bar a later timely claim for heart disease").

lish the existence of a condition or impairment of health caused by hypertension or heart disease during [his or her period of employment], which results in the claimant's death or disability" (internal quotation marks omitted)). The rebuttable presumption that employment caused the claimant's hypertension or heart disease is clearly limited to claims filed while the claimant is employed as a municipal firefighter or police officer, thereby limiting the responsibility of the municipality.

Having clarified the relationship between § 7-433c and the act, we now turn to the defendant's claim that the plaintiff is not entitled to benefits related to his heart disease because (1) he was not diagnosed until after he retired and (2) his heart disease was a separate and distinct injury from his hypertension. In the present case, it is undisputed that the plaintiff's initial claim for hypertension met the five requirements of § 7-433c, was timely, and was compensable. As a result, the plaintiff may submit claims for subsequent injuries that flow from his primary claim for hypertension pursuant to the requirements of the act. In addition, the evidentiary record contains unchallenged medical reports from a qualified expert, Rocklin, concluding that the plaintiff's hypertension was a significant factor in the development of his heart disease. Rocklin's reports, which were credited by both the commissioner and the board, provide a reasonable basis for the board's conclusion that the plaintiff's heart disease was the sequela of his hypertension, which was the injury at issue in his primary claim. This evidence is sufficient to uphold the board's conclusion that the plaintiff is entitled to compensation for his heart disease.

The decision of the Compensation Review Board is affirmed.

In this opinion the other justices concurred.

GEORGE R. DICKERSON *v.* CITY OF STAMFORD ET AL.
(SC 20244)

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

Syllabus

The named defendant, the city of Stamford, appealed from the decision of the Compensation Review Board, which vacated the Workers' Compensation Commissioner's dismissal of the plaintiff's claim for benefits under the statute (§ 7-433c) governing compensation for municipal police officers or firefighters with hypertension or heart disease. In 2000, while employed as a police officer with the Stamford Police Department, the plaintiff was diagnosed with hypertension, and, in 2004, the commissioner concluded that the plaintiff's hypertension was compensable under § 7-433c. The plaintiff retired from the police department in 2004, and, in 2014, he suffered a myocardial infarction as a result of coronary artery disease. The plaintiff then filed a claim under § 7-433c for compensation for his coronary artery disease and myocardial infarction, asserting that these events or conditions were the sequelae of his compensable claim for hypertension. The commissioner concluded that hypertension and heart disease are two separate diseases for purposes of § 7-433c and that the plaintiff failed to file a notice of new claim within one year of his diagnosis of heart disease, in accordance with the notice provisions of the Workers' Compensation Act (§ 31-275 et seq.), and dismissed his claim. The plaintiff appealed from the commissioner's decision to the board, which vacated the commissioner's decision, concluding that a cardiac event that occurs subsequent to an initial, compensable injury under § 7-433c need not be deemed a new injury and that to require a new notice of claim for a subsequent manifestation of a compensable injury would be inconsistent with the way in which workers' compensation claims have been previously handled under the act. The board remanded the case to the commissioner to make independent factual findings with respect to whether the plaintiff's heart disease was caused by his hypertension or constituted a new injury. On the city's appeal from the decision of the board, *held*:

1. Contrary to the city's claim, the plaintiff satisfied the jurisdictional prerequisites of § 7-433c and was not required to file notice of new claim in order to pursue benefits under § 7-433c for his heart disease, and, accordingly, this court upheld the board's decision to vacate the commissioner's dismissal of the plaintiff's claim for benefits on the basis of the plaintiff's failure to file a notice of new claim; this court adopted the reasoning and result of the companion case of *Coughlin* v. *Stamford Fire Dept.* (334 Conn. 857), in which this court held that, when a plaintiff

has a compensable claim for hypertension under § 7-433c, he also may be eligible for benefits for subsequent heart disease if the heart disease is causally related to the hypertension.

2. This court determined that a claimant who suffers a compensable primary injury may also be compensated for a subsequent injury under § 7-433c when the subsequent injury is the direct and natural result of the compensable primary injury, and whether a sufficient nexus of proximate cause exists between the two injuries requires a workers' compensation commissioner to use a substantial factor causation standard; accordingly, because the commissioner in the present case dismissed the plaintiff's claim for benefits without making an independent factual finding as to causation, this court directed that, on remand, the commissioner shall determine whether the plaintiff's hypertension was a substantial factor in the development of his heart disease.

Argued November 12, 2019—officially released March 10, 2020

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District dismissing the plaintiff's claim for certain workers' compensation benefits, brought to the Compensation Review Board, which vacated the commissioner's decision and remanded the case for further proceedings, and the defendants appealed. *Affirmed*; *further proceedings*.

Scott Wilson Williams, for the appellants (defendants).

Andrew J. Morrissey, for the appellee (plaintiff).

Opinion

KAHN, J. The named defendant, the city of Stamford,[1] appeals[2] from the decision of the Compensation Review Board (board), which vacated the decision of the Workers' Compensation Commissioner for the Seventh District (commissioner) dismissing the claim for benefits

[1] PMA Management Corporation of New England, a third-party administrator for the city of Stamford, is a defendant in the present case and joined in this appeal. In the interest of clarity, we hereinafter refer to the city of Stamford as the defendant.

[2] The defendant appealed from the decision of the Compensation Review Board to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

that the plaintiff, George R. Dickerson, brought pursuant to General Statutes § 7-433c (a).[3] *Dickerson* v. *Stamford*, No. 6215, CRB 7-17-8 (September 12, 2018). On appeal, the defendant asserts that the board incorrectly determined that the commissioner had jurisdiction over the plaintiff's claim because, at the time of his diagnosis and disability, the plaintiff had retired and was no longer a uniformed member of the Stamford Police Department (department). Furthermore, the defendant asserts that a claim for a new injury of heart disease cannot be established on the basis of its causal relationship to

[3] General Statutes § 7-433c (a) provides: "Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467."

the plaintiff's initial compensable claim for hypertension because § 7-433c mandates that hypertension and heart disease be treated as separate and distinct injuries. Therefore, the defendant claims, the plaintiff was required to give a separate, timely notice of his heart disease claim within one year of his diagnosis. The plaintiff responds that the jurisdictional prerequisites of § 7-433c were met and that his heart disease claim was timely because it flowed from his compensable claim for hypertension, and neither a plain reading of § 7-433c nor this court's interpretation of that statute requires hypertension and heart disease to be treated as separate diseases when they are causally related. Finally, the defendant argues that, even if the plaintiff met the jurisdictional prerequisites and his claim for heart disease was timely, the plaintiff's hypertension must be the sole contributing factor to his heart disease for the latter claim to be eligible for benefits. The plaintiff responds that the long-standing substantial factor standard that applies to subsequent injury claims brought under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., also applies to his claim. We agree with the plaintiff and, accordingly, affirm the decision of the board.

The record reveals the following undisputed facts and procedural history. The plaintiff became a regular member of the department in 1984.[4] While employed as a police officer, the plaintiff was diagnosed with hypertension on July 17, 2000, and filed a timely claim for benefits pursuant to § 7-433c. The commissioner, in an October 7, 2004 finding and award on that claim, concluded that the plaintiff's hypertension was compensable and awarded a 40 percent permanent partial disability. The plaintiff retired from the department in 2004.

[4] General Statutes § 7-433c (b) provides in relevant part that "those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section." In the present case, it is undisputed that the plaintiff was hired in 1984.

On September 4, 2014, the plaintiff suffered an inferior wall myocardial infarction as a result of coronary artery disease and underwent an emergency angioplasty with a stent placement in his right coronary artery. The plaintiff then filed a heart disease claim, seeking compensation for both his coronary artery disease and myocardial infarction. In doing so, the plaintiff asserted that these diagnoses were the sequelae of his compensable claim for hypertension. Following a hearing on the heart disease claim, the commissioner issued an amended finding and dismissal dated August 28, 2017.[5] The commissioner, relying on this court's decision in *Holston* v. *New Haven Police Dept.*, 323 Conn. 607, 149 A.3d 165 (2016), determined that hypertension and heart disease are two separate diseases for the purpose of § 7-433c and that the plaintiff failed to file a notice of new claim within one year of his diagnosis of heart disease in accordance with the notice provisions of the act. Accordingly, the commissioner found that the plaintiff was not entitled to benefits for heart disease and dismissed his claim. The plaintiff appealed from that decision to the board.

In its decision, the board stated that it "[did] not believe [that] a cardiac event that occurred at a later date from an initial compensable injury [pursuant to § 7-433c] *must*, as a matter of law, be deemed a new injury." (Emphasis in original; internal quotation marks omitted.) The board observed that this court has consistently held that § 7-433c "provides for the administration of benefits in the same amount and the same manner as that provided under [the act]," and "to require a future manifestation of a compensable injury to require a new notice of claim . . . would be incon-

[5] The plaintiff filed a motion to correct the initial finding and dismissal, dated August 17, 2017, seeking the omission of any references to *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017), which the plaintiff claimed had not been an issue for consideration at the formal hearing. The commissioner granted the motion, resulting in the amended finding and dismissal.

sistent with the way [workers' compensation] claims have been handled since the inception of the [act]." (Internal quotation marks omitted.) Accordingly, because the commissioner did not present independent factual findings related to whether the plaintiff's heart disease was caused by his hypertension or constituted a new injury, the board vacated the commissioner's amended finding and dismissal and remanded the case for further proceedings. See footnote 6 of this opinion. This appeal followed.

I

STANDARD OF REVIEW

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, 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. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Footnote omitted; internal quotation marks omitted.) *Holston* v. *New Haven Police Dept.*, supra, 323 Conn. 611–13. In addition, "we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This

proposition applies as well to the provisions of [§] 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits that may be awarded to a [claimant] under . . . [the act]. . . . We also recognize, however, that the filing of a timely notice of claim is a condition precedent to liability and a jurisdictional requirement that cannot be waived." (Internal quotation marks omitted.) Id., 613.

II

JURISDICTION AND TIMELINESS

We first consider the defendant's claims that the plaintiff did not meet the jurisdictional prerequisites of § 7-433c because he was retired when he pursued his claim for heart disease and that the plaintiff failed to give timely, separate notice of his heart disease claim. In *Coughlin* v. *Stamford Fire Dept.*, 334 Conn. 857, A.3d (2020), which we also decide today, we held that, when a plaintiff has a compensable claim for hypertension under § 7-433c, the plaintiff may also be eligible for benefits for subsequent heart disease if, as required by the act, the plaintiff's heart disease is causally related to his hypertension. We adopt the reasoning and result of that decision herein and, therefore, conclude that the plaintiff met the jurisdictional prerequisites of § 7-433c. We hold that the plaintiff was not required to file a notice of new claim in order to pursue benefits for his heart disease.

III

CAUSATION

We next turn to the defendant's contention that the plaintiff's hypertension must be the sole contributing factor to his heart disease for the plaintiff to be eligible for benefits. "[O]nce § 7-433c coverage is established, the measurement of the plaintiff's benefits under this statute is identical to the benefits that may be awarded

to a plaintiff under [the act]." *Felia* v. *Westport*, 214 Conn. 181, 185, 571 A.2d 89 (1990); see also *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987). Under the act, a claimant, having suffered a compensable primary injury during the course of his employment, may also be compensated for a subsequent injury when the subsequent injury is "the direct and natural result of a compensable primary injury." (Internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 378–80, 44 A.3d 827 (2012).

Whether a sufficient nexus of proximate cause exists between the two injuries for the subsequent injury to be compensable requires commissioners to use a "substantial factor" causation standard. See, e.g., *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 408–409, 953 A.2d 28 (2008). This court has construed the requirement to mean that there must exist "some causal connection" between the two injuries. (Emphasis omitted; internal quotation marks omitted.) Id., 410. "It has been determined that the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury . . . . The term substantial, however, does *not* connote that the employment must be the major contributing factor in bringing about the injury . . . [or] that the employment must be the sole contributing factor in development of an injury. . . . [T]he substantial factor causation standard simply requires that the employment, or the risks incidental thereto, contribute to the development of the injury in *more than a de minimis* way." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 412–13; see also *Filosi* v. *Electric Boat Corp.*, 330 Conn. 231, 244–45, 193 A.3d 33 (2018).

In interpreting the act, this court has previously noted that, "[u]nless causation under the facts is a matter of common knowledge, the plaintiff has the burden of introducing expert testimony to establish a causal link between the compensable workplace injury and the subsequent injury." *Sapko* v. *State*, supra, 305 Conn.

386. "When . . . it is unclear whether an employee's [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion. . . . Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee's employment." (Citation omitted; internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 591–92, 986 A.2d 1023 (2010).

In the present case, the commissioner dismissed the plaintiff's claim without making an independent factual finding as to whether the plaintiff's hypertension was a substantial factor in the development of his heart disease. On appeal, the board remanded the case to the commissioner for further proceedings, noting that, "[i]n matters [in which] it is not definitive whether a plaintiff's cardiac ailment is the manifestation of a prior injury or a new injury, the commissioner must reach a factual determination on the issue prior to proceeding forward."[6] We conclude that, on remand, the commissioner shall determine whether the plaintiff's hypertension was a substantial factor in his subsequent development of heart disease.

The decision of the Compensation Review Board is affirmed and the case is remanded to the board with direction to remand the case to the commissioner for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

[6] The commissioner noted that the parties stipulated to a number of facts, including that the plaintiff's long-standing hypertension was a significant contributing factor in his development of coronary artery disease that ultimately resulted in his myocardial infarction. The plaintiff also submitted, and the commissioner admitted into evidence as full exhibits, two letters from the plaintiff's treating physician, Steven H. Kunkes. Neither party, however, challenged the board's decision to remand the case to the commissioner for further proceedings, and, therefore, we affirm the decision of the board without intimating a view on how the issue of causation is to be resolved by the commissioner on remand.

ORDERS

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DANIEL W. E. *v.* COMMISSIONER OF CORRECTION

The petitioner Daniel W. E.'s petition for certification to appeal from the Appellate Court, 193 Conn. App. 905 (AC 41715), is denied.

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

Emily Graner Sexton, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided February 25, 2020

T & M BUILDING CO., INC. *v.* WILLIAM HASTINGS

The plaintiff's petition for certification to appeal from the Appellate Court, 194 Conn. App. 532 (AC 38614), is denied.

C. Michael Budlong and *Brandon B. Fontaine*, in support of the petition.

Kevin M. Deneen, in opposition.

Decided February 25, 2020

ALIREZA JAMALIPOUR *v.* FAIRWAY'S EDGE ASSOCIATION, INC., ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 194 Conn. App. 224 (AC 40866), is denied.

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

Anita M. Varunes, in support of the petition.

Alireza Jamalipour, self-represented, in opposition.

Decided February 25, 2020

STATE OF CONNECTICUT *v.* JAMES MITCHELL

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 199 (AC 41769), is denied.

James E. Mortimer, assigned counsel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided February 25, 2020

DARRIN ANDREW LA MORTE *v.* TOWN OF DARIEN ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 195 Conn. App. 901 (AC 42086), is denied.

Darrin Andrew La Morte, self-represented, in support of the petition.

Robert J. Burney, in opposition.

Decided February 25, 2020

FELIPE ALONSO *v.* CONSUELO MUNOZ

The plaintiff's petition for certification to appeal from the Appellate Court, 195 Conn. App. 901 (AC 42100), is denied.

David V. DeRosa, in support of the petition.

Douglas J. Lewis, in opposition.

Decided February 25, 2020

MARASH GOJCAJ *v.* CONNECTICUT STATE'S ATTORNEY

The plaintiff's petition for certification to appeal from the Appellate Court (AC 42381) is denied.

Stephan E. Seeger, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided February 25, 2020

WELLS FARGO BANK, N.A., AS TRUSTEE *v.* ALYSSA S. PETERSON ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 43354) is denied.

Alyssa S. Peterson, self-represented, in support of the petition.

Brian D. Rich and *Laura Pascale Zaino*, in opposition.

Decided February 25, 2020

JOHN L. THORNTON ET AL. *v.*
BRADLEY JACOBS ET AL.

The defendant Lamia Jacobs' petition for certification to appeal from the Appellate Court (AC 43364) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss, as frivolous, the appeal of a nonparty witness from the trial court's order enforcing a subpoena for an out-of-state lawsuit?"

Jeffrey R. Babbin, *James I. Glasser* and *Tadhg Dooley*, in support of the petition.

Daniel J. Krisch and *Joshua M. Auxier*, in opposition.

Decided February 25, 2020

REBECCA MCKEOWN *v.* KIRK MCKEOWN

The plaintiff's petition for certification to appeal from the Appellate Court (AC 43763) is denied.

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

Yakov Pyetranker, in support of the petition.

Kenneth J. Bartschi and *Michael S. Taylor*, in opposition.

Decided February 25, 2020

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Defamation; Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); claim that defendant engaged in deceptive business practice by conducting pay to play scheme in which it rated vendors in its market research reports in biased manner, on basis of amount of consulting services that vendors purchased from defendant; whether trial court properly granted defendant's motion for summary judgment on ground that allegedly false statements made by defendant in market research report constituted protected speech under first amendment to United States constitution; whether allegedly defamatory statements constituted expressions of opinion or were factual or implied undisclosed facts.

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Peek *v.* Manchester Memorial Hospital (Order) . . . 906
Perez *v.* Commissioner of Correction (Order) . . . 910
Peters *v.* Senman (Order) . . . 924
Puff *v.* Puff . . . 341

Dissolution of marriage; postjudgment motion for modification of alimony; motion for contempt and for sanctions; certification from Appellate Court; whether Appellate Court properly reversed trial court's contempt order; civil contempt, discussed; whether trial court failed to make specific findings that plaintiff acted in bad faith and did not advance colorable claims in support of its award of, inter alia, attorney's fees to defendant for plaintiff's purported litigation misconduct; remand for further proceedings on defendant's motion for sanctions.

Reale *v.* Rhode Island (Order) . . . 901
Robbins Eye Center, P.C. *v.* Commerce Park Associates, LLC (Orders) . . . 912
Robert S. *v.* Commissioner of Correction (Order) . . . 913
Rutter *v.* Janis . . . 722

Negligence; summary judgment; claim that trial court improperly granted defendant motor vehicle dealer's motions for summary judgment; whether Appellate Court correctly concluded that trial court had properly excluded date of loan of dealer license plate in computing thirty day period under statute (§ 14-60 (a) (3)) that permits motor vehicle dealer to loan dealer license plate to purchaser of vehicle for period of not more than thirty days while registration of vehicle is pending; whether genuine issue of material fact existed as to whether parties intended day of loan to be counted in thirty day calculation under § 14-60 (a).

Saunders *v.* Briner . . . 135

Limited liability companies; standing; subject matter jurisdiction; whether, in absence of authorization in limited liability company's operating agreement, members or mangers lack standing to bring derivative claims in action brought under Connecticut Limited Liability Company Act ([Rev. to 2017] § 34-100 et seq.) or under common law; whether trial court may exempt single-member limited liability company from direct and separate injury requirement necessary to bring direct action; policy considerations applicable in determining whether to treat action raising derivative claims as direct action, discussed; under what circumstances, if any, trial court may apportion award of attorney's fees under Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); claim that trial court abused its discretion in declining to order defendants to reimburse limited liability company for fees incurred by joint, court-appointed fiduciary retained to wind up limited liability companies.

Saunders *v.* Commissioner of Correction (Order) . . . 917
Seminole Realty, LLC *v.* Sekretaev (Order) . . . 905
State *v.* Alexis (Order) . . . 904
State *v.* Blaine . . . 298

Conspiracy to commit robbery first degree; certification from Appellate Court; claim that trial court's failure to instruct jury on requisite intent necessary to find defendant guilty of conspiracy to commit robbery in first degree constituted plain error; whether Appellate Court correctly concluded that trial court did not commit plain error by failing to instruct jury that, to find defendant guilty of conspiracy

to commit first degree robbery, it had to find that he intended and specifically agreed that he or another participant in robbery would be armed with deadly weapon.

State *v.* Bradley (Order) 925
State *v.* Bryan (Order) 906
State *v.* Cane (Order) 901
State *v.* Cecil (Order) 915
State *v.* Collymore 431

Felony murder; attempt to commit robbery first degree; conspiracy to commit robbery first degree; criminal possession of firearm; prior inconsistent statements; statutory (§ 54-47a) immunity from prosecution in exchange for testimony during state's case-in-chief; fifth amendment right against self-incrimination; motion for reconsideration in light of this court's decision in State *v.* Dickson *(322 Conn. 410), pursuant to which in-court identification that has not been preceded by successful identification during nonsuggestive identification procedure must be prescreened by trial court; certification from Appellate Court; claim that defendant's rights to due process and to compulsory process were violated when state declined to extend immunity that it had granted under § 54-47a to certain witnesses during state's case-in-chief to their testimony during defendant's case-in-chief; whether state's alleged violation of § 54-47a was constitutional in nature; defendant's failure to establish that testimony that he was prevented from offering owing to state's decision not to extend immunity beyond its case-in-chief was not cumulative; whether state's purported revocation of immunity or trial court's warnings to witnesses regarding lack of clarity of law regarding whether immunity extended to their testimony as defense witnesses was so threatening or coercive as to drive those witnesses from witness stand; claim that defendant's right to due process was violated, pursuant to* Dickson, *when two witnesses purportedly gave first time in-court identification testimony about him; scope of rule announced in* Dickson, *discussed; whether defendant's identity as shooter was at issue with respect to criminal charges against him for purposes of determining whether purported first time in-court testimony of two witnesses violated defendant's right to due process; whether admission of such testimony was harmless beyond reasonable doubt.*

State *v.* Crewe (Order) 901
State *v.* DeJesus (Order) 909
State *v.* Edwards. 688

Murder; conspiracy to commit murder; assault first degree; conspiracy to commit assault first degree; claim that trial court improperly admitted, in violation of hearsay rule, out-of-court statements of two witnesses identifying defendant as shooter; whether defendant properly preserved his hearsay claim; claim that admission of out-of-court statement of witness who did not testify at trial violated defendant's right to confrontation; whether any error in admission of witness' out-of-court statement was harmless; claim that trial court improperly instructed jury on third-party culpability by omitting names of alleged third-party culprits.

State *v.* Gomes (Order) 902
State *v.* Holmes 202

Felony murder; home invasion, conspiracy to commit home invasion; criminal possession of firearm; claim that trial court improperly overruled defendant's objection, pursuant to Batson *v.* Kentucky *(476 U.S. 79), to prosecutor's use of peremptory challenge to excuse prospective African-American juror; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court had properly overruled defendant's* Batson *objection; whether prosecutor's explanation for exercising challenge was race neutral; claim that this court should overrule* State *v.* King *(249 Conn. 645) and its progeny, holding that distrust of police and concern regarding fairness of criminal justice system constitute race neutral reasons for exercising peremptory challenge; shortcomings of* Batson *in addressing implicit bias and disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, discussed;* Batson *reform in Connecticut, including convening of Jury Selection Task Force to study issue of racial discrimination in selection of juries and to propose necessary changes, discussed.*

State *v.* Jackson 793

Murder; conspiracy to commit murder; assault first degree; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court had not abused its discretion when it allowed state's belatedly disclosed expert witness on

cell site location information to testify without first granting defense reasonable continuance to obtain its own expert; claim that trial court did not abuse its discretion in declining to order continuance because defense counsel abandoned his request by not renewing it after state's direct examination of expert witness; whether trial court's error of allowing state's expert witness to testify without first affording defense reasonable continuance to obtain its own expert was harmful; whether certain claims that defendant raised on appeal were sufficiently likely to arise during defendant's retrial such that this court should address them.

State *v.* Jarmon (Order). . . . 925
State *v.* Joseph (Order) . . . 915
State *v.* Lebrick . . . 492

Felony murder; home invasion; conspiracy to commit home invasion; burglary first degree; attempt to commit robbery first degree; assault first degree; certification from Appellate Court; claim that Appellate Court incorrectly concluded that defendant's constitutional right to confrontation was not violated; claim that admission of witness' former testimony violated defendant's right to confrontation; standard of review for determination of whether witness was unavailable to testify for purposes of confrontation clause, discussed; whether state demonstrated that it undertook reasonable, diligent and good faith effort to procure attendance of unavailable witness at defendant's trial; whether defendant's right to confrontation was violated by admission of expert witness' testimony about ballistic evidence that was based in part on ballistic report prepared and photographs generated by former employee of state's forensic laboratory who was unavailable to testify because he had died before defendant's trial.

State *v.* Mekoshvili (Order) . . . 923
State *v.* Mitchell (Order) . . . 927
State *v.* Moon (Order). . . . 918
State *v.* Moore . . . 275

Murder; certification from Appellate Court; claim that trial court improperly denied defendant's motion to strike venire panel; whether Appellate Court correctly concluded that data pertaining to entire African-American population in Connecticut and New London county did not constitute probative evidence of underrepresentation of African-American males in jury pool; claim that Appellate Court should have exercised its supervisory authority over administration of justice to require jury administrator to collect and maintain prospective jurors' racial and demographic data in accordance with statute (§ 51-232 [c]) concerning the issuance of questionnaires to prospective jurors; certification improvidently granted.

State *v.* Ortega (Order) . . . 922
State *v.* Palumbo (Order) . . . 909
State *v.* Patel (Order) . . . 921
State *v.* Pernell (Order) . . . 910
State *v.* Ramos (Order) . . . 923
State *v.* Raynor. . . . 264

Assault first degree as accessory; conspiracy to commit assault first degree; certification from Appellate Court; whether Appellate Court correctly concluded that record was inadequate to review defendant's challenge under Batson *v.* Kentucky *(476 U.S. 79) to prosecutor's exercise of peremptory challenge to strike prospective juror; adoption of Appellate Court's well reasoned opinion as proper statement of certified issue and applicable law concerning that issue.*

State *v.* Salters (Order) . . . 913
State *v.* Sentementes (Order) . . . 902
State *v.* Turner . . . 660

Felony murder; robbery first degree; conspiracy to commit robbery first degree; certification from Appellate Court; claim that Appellate Court incorrectly determined that defendant was not entitled to review under State *v.* Golding *(213 Conn. 233), as modified by* In re Yasiel R. *(317 Conn. 773), of his unpreserved claim, based on this court's recent decision in* State *v.* Edwards *(325 Conn. 97) that trial court violated his federal due process right to fair trial by admitting testimonial and documentary evidence concerning location of defendant's cell phone without first conducting hearing pursuant to* State *v.* Porter *(241 Conn. 57); whether unpreserved claim regarding trial court's failure to hold* Porter *hearing was constitutional in nature; claim that trial court's failure to conduct* Porter *hearing constituted plain error; claim that this court should adopt federal plain error standard under which determination of whether error was clear is*

made on basis of law existing at time of appeal rather than time of trial; request that this court exercise its supervisory authority over administration of justice to review defendant's unpreserved claim.
State *v.* Ward (Order) . . . 911
State *v.* White . . . 742
Assault first degree; claim that trial court abused its discretion and violated defendant's state and federal constitutional rights in denying his motion for public funding for procuring DNA expert to assist in his criminal defense; whether allegedly indigent defendant represented by privately retained defense counsel had fourteenth amendment due process right to secure such funding; whether trial court properly declined to find defendant indigent when defendant chose not to apply for public funding for ancillary defense costs and public defender's office did not make indigency determination; claim that trial court abused its discretion in denying motion to preclude victim's statements, made shortly after she identified defendant in photographic array and at trial, regarding her confidence in her identification; claim that court should adopt categorical rule precluding evidence of witness' confidence in his or her identification, unless such evidence stems from earliest identification procedure that complies with statute (§ 54-1p) containing guidelines that police must follow in conducting eyewitness identification procedures.
State *v.* Vasquez (Order) . . . 922
State *v.* Zillo (Order) . . . 923
Stevens *v.* Khalily (Order) . . . 918
Summit Saugatuck, LLC *v.* Water Pollution Control Authority (Order) . . . 916
T & M Building Co. *v.* Hastings (Order) . . . 926
Tatoian *v.* Tyler (Order) . . . 919
Thornton *v.* Jacobs (Order) . . . 929
Wachovia Mortgage, FSB *v.* Toczek (Order) . . . 921
Watts *v.* Commissioner of Correction (Order) . . . 919
Wells Fargo Bank, N.A. *v.* Caldrello (Order) . . . 905
Wells Fargo Bank, N.A. *v.* Magana (Order) . . . 904
Wells Fargo Bank, N.A. *v.* Magana (Order) . . . 920
Wells Fargo Bank, N.A. *v.* Peterson (Order) . . . 928
Wiederman *v.* Halpert . . . 199
Limited liability companies; breach of fiduciary duty; motion to open; claim that trial court improperly exercised subject matter jurisdiction over plaintiff's claims because her alleged injuries were derivative of harm suffered by limited liability companies of which she and certain defendants were members; certification from Appellate Court; whether Appellate Court properly upheld determination of trial court that plaintiff had standing to sue; certification improvidently granted.
Wozniak *v.* Colchester (Order) . . . 906
Zhou *v.* Zhang . . . 601
Dissolution of marriage; postnuptial agreements; purported agreement to revoke prior postnuptial agreement during divorce mediation; whether trial court correctly concluded that parties' written agreement purporting to revoke their postnuptial agreement was unenforceable; whether party seeking to have court declare revocation agreement unenforceable understood that that agreement was binding only if parties reached full and final settlement of disputed issues during mediation; whether trial court properly considered parol evidence in evaluating defendant's claim that revocation agreement was not binding without final settlement of disputed issues during mediation; claim that trial court had incorrectly determined that parties' postnuptial agreement was enforceable because it was fair and equitable at time of execution and not unconscionable at time of dissolution; whether plaintiff's decision to enter into postnuptial agreement was voluntary and not product of duress; whether trial court abused its discretion when it granted defendant final decision-making authority with respect to parties' children; claim that trial court improperly based its custody orders on testimony of guardian ad litem on ground that she testified that she had not seen children in two years.
Zillo *v.* Commissioner of Correction (Order) . . . 924

CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE GEOFFREY G.*
(AC 43066)

Alvord, Moll and Devlin, Js.

Syllabus

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child, G. The mother claimed for the first time on appeal that the trial court violated her due process rights by failing to order, sua sponte, an evaluation of her competency to assist her counsel at trial. *Held* that the respondent mother could not establish a violation of her right to due process: although the mother claimed that certain evidence demonstrated that her mental health issues interfered with her ability to provide her counsel at trial with truthful, relevant data in the presentation of her case and, although it was undisputed that the mother had severe mental health issues, the

* 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.

court did not abuse its discretion in declining to order a competency evaluation; rather, the record, which included the court's two canvasses of the mother, the mother's testimony, and the mother's frequent interjections during trial, permitted the court to conclude that the mother exhibited the ability to assist her counsel with a rational understanding of the proceedings against her; the court's first canvass of the mother, undertaken to determine whether she had waived her right to confidentiality prior to the testimony of her treating psychiatrist, J, revealed that she understood her right to confidentiality, desired to waive that right, appreciated the centrality of J's testimony to her defense to the allegation that she had failed to rehabilitate, and made a rational decision to waive her right to confidentiality with J in exchange for his testimony; the court's second canvass, conducted before the mother's testimony, revealed that she discussed her decision to testify with her counsel to her satisfaction, understood that she had a right not to testify, voluntarily chose to testify and be subjected to cross-examination, and had explicitly stated that she needed to defend herself; moreover, during the mother's testimony, she indicated that she had followed specific steps she was ordered to follow, displaying an understanding that her compliance was important to her defense, she was an accurate historian of the events relevant to the petition to terminate her parental rights, and, although the mother emphasized to this court a portion of her testimony that she claimed was not rational, historically accurate, or reliable, this court did not agree that, even when evaluated in isolation, her testimony indicated incompetency because, despite the mother's digressions, her testimony showed that she rationally sought to assist her counsel by articulating her efforts to bring stability to her and G's life; furthermore, the mother's frequent interjections during trial expressed an understanding of and disagreement with the allegations in the petition to terminate her parental rights, as her interruptions demonstrated that she was attentive, understood that the court may credit against her the testimony of witnesses that she disputed, rationally sought to refute such testimony, and the court was best positioned to observe the mother's demeanor, attentiveness, canvass responses and testimony at trial.

Argued January 7—officially released February 28, 2020**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Litchfield, Juvenile Matters at Torrington, and transferred to the judicial district

** February 28, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed*.

Albert J. Oneto IV, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent Jeana G. appeals from the judgment of the trial court terminating her parental rights with respect to the minor child, Geoffrey G.[1] On appeal, the respondent claims that the court improperly failed to order, sua sponte, an evaluation of her competency to assist her counsel at trial, in violation of her due process rights under the fourteenth amendment to the United States constitution. We affirm the judgment of the court.

The following facts and procedural history, as set forth by the court in its memorandum of decision, are relevant to this appeal. Geoffrey was born in January, 2016. In the years prior to Geoffrey's birth, the respondent had an extensive history of mental health issues for which she received inconsistent treatment. In light of the respondent's mental health issues, those treating her for those mental health issues encouraged her to maintain her psychotropic medication during pregnancy. Geoffrey was born prematurely and spent additional days in the neonatal intensive care unit for his needs, including medical issues relating to withdrawal from the effects of the respondent's medication.

[1] On June 12, 2018, the court also terminated by consent the parental rights of Geoffrey's father, Richard S. The father has not appealed from that judgment. Therefore, we refer only to Jeana G. as the respondent throughout this opinion.

After his discharge from the neonatal intensive care unit, Geoffrey was in the custody of the respondent. The respondent cared for Geoffrey with the assistance of his maternal grandparents. The respondent did not live with Geoffrey's father, with whom she had a short-term and volatile relationship. On May 23, 2016, the respondent was arrested for an altercation with the maternal grandmother. In addition, it was reported that the respondent was not properly taking her medication. On May 24, 2016, the petitioner, the Commissioner of Children and Families, invoked a ninety-six hour administrative hold on behalf of Geoffrey. On May 27, 2016, the petitioner filed a neglect petition on behalf of Geoffrey, and the court, *Kaplan*, *J.*, issued an ex parte order granting the petitioner temporary custody of Geoffrey. At the time, the respondent was hospitalized at Backus Hospital in Norwich. On June 3, 2016, the respondent appeared in court and contested the order of temporary custody, but she waived her statutory right to a hearing within ten days. On August 4, 2016, the respondent pleaded nolo contendere to the petitioner's neglect petition, and Geoffrey was adjudicated neglected. Geoffrey was returned to the respondent's custody. The court ordered twelve months of protective supervision by the Department of Children and Families (department) and specific steps for the respondent to follow. On June 6, 2017, the petitioner filed a motion to change venue from the judicial district of Litchfield, Juvenile Matters at Torrington to the judicial district of New London, Juvenile Matters at Waterford, which was granted.

On July 10, 2017, the respondent arrived with Geoffrey in the emergency department of Backus Hospital. The respondent appeared disheveled, was seeking medication, and was seemingly under the influence. The respondent began screaming and had to be hospitalized. Hospital staff took Geoffrey from the respondent for his own safety. On that date, the petitioner invoked a ninety-six hour administrative hold on behalf of Geoffrey. On

July 12, 2017, the petitioner obtained from the court an ex parte order of temporary custody of Geoffrey. On August 1, 2017, the respondent appeared in court and agreed to the commitment of Geoffrey to the custody of the petitioner. Geoffrey has been committed to the custody of the petitioner ever since.

On May 16, 2018, the petitioner filed a petition to terminate the respondent's parental rights as to Geoffrey. The petitioner alleged that the respondent had failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of Geoffrey, she could assume a responsible position in Geoffrey's life. A trial on the petition was held before the court, *Driscoll*, *J.*, on December 17, 2018, and January 7, 2019. Judge Driscoll filed a memorandum of decision on May 7, 2019, in which he granted the petition terminating the respondent's parental rights as to Geoffrey. This appeal followed.

On appeal, the respondent claims that the court improperly failed to order, sua sponte, an evaluation of her competency to assist her counsel at trial, in violation of her due process rights under the United States constitution. The respondent did not preserve this claim and, thus, seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "The respondent can prevail under *Golding* only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *In re Glerisbeth C.*,

162 Conn. App. 273, 279, 130 A.3d 917 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1094 (2016).

The first prong of *Golding* is satisfied because the record is adequate to review the respondent's claim. The respondent also satisfies the second prong of *Golding* because "her claim is based upon the alleged violation of her fundamental constitutional right not to be deprived of her liberty—specifically, her basic constitutional right to raise and remain together with her [child] free from interference by the state—without due process of law." Id., 279–80; see also *In re Alexander V.*, 223 Conn. 557, 560, 613 A.2d 780 (1992). The respondent, however, cannot establish a violation of her constitutional right to due process because we conclude that the court did not improperly fail to order, sua sponte, an evaluation of her competency to assist her counsel at trial. Therefore, her claim fails under the third prong of *Golding*.

We begin by setting forth the established principles of law and the standard of review. In *In re Alexander V.*, supra, 223 Conn. 565–66, our Supreme Court held that, "under certain circumstances, due process requires that a hearing be held to determine the legal competency of a parent in a termination case." The court stated "that due process does not require a competency hearing in all termination cases but only when (1) the parent's attorney requests such a hearing, or (2) in the absence of such a request, the conduct of the parent reasonably suggests to the court, in the exercise of its discretion, the desirability of ordering such a hearing sua sponte. In either case, the standard for the court to employ is whether the record before the court contains specific factual allegations that, if true, would constitute substantial evidence of mental impairment. . . . Evidence is substantial if it raises a reasonable doubt about the [parent's] competency . . . ." (Citations omitted; internal quotation marks omitted.) Id., 566. "[T]he trial court must be attuned to the potential of any evidence in the case before it to raise doubt

as to the [parent's] competency to stand trial. Evidence, for this purpose, includes all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court." (Internal quotation marks omitted.) *In re Glerisbeth C.*, supra, 162 Conn. App. 282.

"Whether evidence of record raises a reasonable doubt as to a parent's competency to stand trial depends, in the first instance, upon its generic potential, if credited, to raise doubt about the parent's mental competency. By definition, a mentally incompetent person is one who is unable to understand the nature of the termination proceeding and unable to assist in the presentation of his or her case. . . . If, then, any evidence of record is found to have the potential to raise doubt as to a respondent parent's ability to understand the proceedings against her and to assist her counsel in the presentation of her case, the court must determine, in the exercise of its sound discretion, whether such evidence actually raises a reasonable doubt about the parent's present competency to stand trial in the context of the entire case. . . . This second, discretionary step is essential because the true focus of a competency inquiry is not the long-term mental health history of the respondent parent, but her present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [she] has a rational as well as factual understanding of the proceedings against [her]." (Citations omitted; internal quotation marks omitted.) Id.

"Because the true focus of the competency inquiry is the parent's present ability to assist her counsel with a rational understanding of the proceedings against her at the time of trial, [t]he trial judge is in a particularly advantageous position to observe a [respondent's] conduct . . . and has a unique opportunity to assess a [respondent's] competency. A trial court's opinion,

therefore, of the competency of a [respondent] is highly significant. . . . [W]e [thus] give deference to the trial court's [competency determination] because the trial court has the benefit of firsthand review of the [respondent's] demeanor and responses during the [proceeding]." (Citation omitted; internal quotation marks omitted.) Id., 283.

"In determining whether a trial court has abused its discretion, an appellate court must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Accordingly, review of [discretionary] rulings is limited to questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . This standard of review applies no less to a discretionary determination not to act sua sponte when to do so is required by law in particular circumstances than to a discretionary ruling expressly granting or denying a request by counsel that the court so act." (Citations omitted; internal quotation marks omitted.) Id.

The respondent argues that the court "denied her the due process of law by failing to conduct a competency evaluation of her in the face of specific evidence in the record that her schizoaffective disorder, at the time of trial, interfered with her ability to provide her newly retained counsel with truthful, relevant data in the presentation of her case." The respondent relies heavily on this court's analysis in *In re Glerisbeth C.* to frame her argument. The respondent states that, like the mother in *In re Glerisbeth C.*, she "suffered from longstanding mental health issues, including schizoaffective disorder, which made it difficult for her to distinguish fantasy from reality." Distinguishing herself from the mother in *In re Glerisbeth C.*, who last had a psychotic episode approximately one year before her trial; *In re Glerisbeth C.*, supra, 162 Conn. App. 286; the respondent argues that "her psychotic symptoms had not abated

by the time of trial, but manifested themselves in the months and weeks leading up to the trial, climaxing with her testimony to the trial court, wherein she expressed her psychotic hallucinations to the trial judge as if her fantasies, for which she had recently been hospitalized, were truthful and real." The respondent further identifies specific record evidence that she argues had raised a reasonable doubt as to her competency to assist her counsel at trial, including the following: the respondent's three psychiatric hospitalizations between July and November, 2018, that occurred despite treatment she received with medication and thirty-six rounds of transcranial magnetic stimulation (TMS) from March through November 16, 2018; court-appointed psychologist Nancy Randall's evaluation of the respondent, and Randall's testimony that the respondent had issues with her quality of thinking and "some paranoia and delusional thinking that takes precedence over the mood disorder"; testimony of the respondent's psychiatrist, Walide Jaziri, who, although he did not concede that she suffered from schizoaffective disorder, acknowledged that she continued to suffer from delusional and paranoid thinking and opined that she would require at least six more months of treatment with the injectable anti-psychotic drug Invega and further rounds of TMS therapy before she could become psychiatrically stabilized; and the respondent's own testimony at trial, which, the respondent argues, "devolved into an exhibition of her psychotic delusions, which she sought to present to the court as reality." We are not persuaded.

The parties do not dispute that the respondent has severe mental health issues, which can cause her to have paranoid and delusional thinking. The court found that the respondent had "severe mental health issues, which she is unable or unwilling to treat for a sustained period of time, [which] will prevent . . . any capacity for stability in [her] life." Nevertheless, we cannot

conclude from our review of the trial record that the court improperly failed to order, sua sponte, an evaluation of the respondent's competency. Rather, the record reflects that the respondent exhibited a "present ability to assist her counsel with a rational understanding of the proceedings against her at the time of trial . . . ." See *In re Glerisbeth C.*, supra, 162 Conn. App. 283. Specifically, the court's canvasses of the respondent, the entirety of the respondent's testimony, and the respondent's frequent defensive interjections during trial permitted the court to conclude that the respondent had both a rational understanding of the proceedings and a present ability to assist her counsel, without the need for an evaluation of her competency.

At trial, the court canvassed the respondent twice. These two canvasses support the court's conclusion that the respondent was competent at trial and, thus, that no evaluation of her competency was necessary.

During the first canvass, the court determined whether the respondent was waiving her right to confidentiality with her psychiatrist, Jaziri, before he could testify.[2] See General Statutes §§ 52-146d and 52-146e. The respondent answered all of the court's questions

[2] The following colloquy transpired prior to Jaziri's testimony:

"The Court: And . . . before we proceed, I understand that . . . Jaziri is not a court-appointed evaluator, that he's [the respondent's] private provider. So . . . for . . . Jaziri's benefit and the benefit of the record, I want it clear that you are waiving any claim of confidentiality. Under our state statutes . . . Jaziri is not allowed to reveal the content of your discussions in your treatment.

"[The Respondent]: He can.

"The Court: So you have no objection to his answering questions about your treatment with him?

"[The Respondent]: That is correct.

"The Court: You understand those—

"[The Respondent]: Yes, I do.

"The Court: —those questions are going to be asked by all the lawyers.

"[The Respondent]: Right. Yes, I do.

"The Court: So they may be delving into areas that you will be uncomfortable with or that you feel may not be helpful to you, and you understand that if that happens, you can't say, well, I don't want those questions answered, only my questions.

"[The Respondent]: Right."

in the affirmative, indicating that she understood her statutory right to confidentiality with her psychiatrist and that she desired to waive that right. The canvass further reveals that the respondent appreciated the centrality of Jaziri's testimony to her defense to the allegation that she had failed to rehabilitate. In his testimony, Jaziri stated his diagnosis of the respondent, which differed from the one provided by Randall. Whereas Randall diagnosed the respondent with schizoaffective disorder, Jaziri diagnosed her as having "[m]ajor depression with psychotic features and [a] history of [obsessive compulsive disorder] and anxiety." Jaziri's diagnosis, which was more favorable to the respondent, when combined with his opinion that "[s]he needs more time for the medication to work," reflected an optimistic prognosis of the respondent's ability to rehabilitate. Relying on Jaziri's testimony, the respondent requested that the court grant her additional time to further rehabilitate before terminating her parental rights as to Geoffrey G. Therefore, the respondent's rational decision to waive her right to confidentiality with Jaziri in exchange for his beneficial testimony supports the court's determination that she understood the nature of the proceedings and that she was assisting her counsel at trial by facilitating the testimony of a witness favorable to her.

The second time the court canvassed the respondent was prior to her own testimony.[3] As she had done pre-

[3] The court's second canvass of the respondent proceeded in relevant part as follows:

"The Court: Have you had enough time to talk to your lawyer?

"[The Respondent]: Yes, I have.

"The Court: Okay. . . . [A]re you satisfied with the advice and the assistance of your counsel?

"[The Respondent]: Yes, I am.

"The Court: Okay. And you understand you do not have to be a witness? . . .

"[The Respondent]: Yes, I do. . . .

"The Court: No lawyer has requested that [an adverse inference be drawn against you for not testifying]. So if you don't testify I'm not going to draw any conclusions at all based upon your not being a witness.

"[The Respondent]: Okay.

viously when canvassed regarding Jaziri's testimony, the respondent responded affirmatively to each of the court's questions, which ensured that she had the opportunity to discuss her decision to testify with her counsel and was satisfied with his advice, and that she understood that she had a right not to testify, could not be forced to testify, and was freely and voluntarily choosing to testify and to be subject to cross-examination. In a notable exchange during the canvass, the court asked the respondent if it was her "desire to be a witness," to which she responded, "[y]es, I need to defend myself." In addition, just prior to the court's canvass of the respondent, her counsel stated: "[The respondent] would like to testify, Your Honor. I've been discussing this with her since we were last in court periodically as well as for the past hour, hour-and-a-half here today. I informed her of all of the rights and responsibilities and the impact of her testifying with me as well as with the other counsel and she's prepared to go forward."

"The Court: So it's not going to be held against you in any way, you understand that?

"[The Respondent]: I understand that.

"The Court: Okay. But it's your desire to be a witness?

"[The Respondent]: Yes, I need to defend myself. . . .

"The Court: But you understand, you've been through the process now—

"[The Respondent]: Right.

"The Court: —so you know how it works. [Your counsel] will be asking questions.

"[The Respondent]: Yes.

"The Court: But then [the petitioner's counsel], and [counsel for the minor child]—

"[The Respondent]: Yes.

"The Court: —and even the court may ask you questions and some of those questions you may say ooh, this is not comfortable for me or this information is not going to help my case.

"[The Respondent]: Okay.

"The Court: And if that's the situation, one, you have to answer truthfully and two, it's too late then to say I changed my mind I don't want to be a witness.

"[The Respondent]: I understand. . . .

"The Court: Okay. And this is your voluntary act?

"[The Respondent]: It sure is.

"The Court: Nobody's forcing you to do this?

"[The Respondent]: Nobody is forcing me."

The statement by the respondent's counsel advising the court of the respondent's intention to testify, the statement of the respondent that she needed to defend herself, and the court's canvass as a whole reveal that the respondent made an informed and voluntary decision to testify on her own behalf. During the canvass, she professed to the court an understanding that she did not have to testify and that there were risks to doing so. She further acknowledged having discussed this decision with her counsel, which her counsel confirmed, and to being satisfied with the advice provided to her. Although there was no requirement that she testify and she knew of the risks of doing so, the respondent explicitly stated her concern that she must testify in her own defense. Thus, this second canvass provides further support for the conclusion that the respondent understood both the nature of the proceedings and the allegations being made against her, and that she provided assistance to her counsel by deciding to testify on her own behalf.

The respondent's testimony, as a whole, also reinforces the court's conclusion that the respondent understood the proceedings and assisted her counsel at trial. The respondent testified that she recognized a document outlining the specific steps that she was ordered to follow. The respondent testified to having followed those steps, thereby displaying an understanding that her compliance was important to her defense against the petitioner's allegation that she failed to rehabilitate. The respondent further testified as to the progress being made toward addressing her mental health issues as a result of her treatment with Jaziri. The respondent stated that as a result of Jaziri's treatment she is "absolutely more clearheaded," and that she "think[s] more clearly," "act[s] more clearly," and "feel[s] [she is] doing very well." This testimony contradicted evidence offered by the petitioner that the respondent had failed to rehabilitate from her mental health issues, reflect-

ing her understanding of the substance of the proceedings and exemplifying assistance provided by her to her counsel.

While testifying, the respondent was an accurate historian of the events that were relevant to the petition to terminate her parental rights. When asked about the document containing her specific steps, the respondent accurately stated that it was given to her more than one year earlier. The respondent recited in detail her past residences and the length of time she resided at each location. The respondent stated the precise amount of money she receives from Social Security benefits, Medicaid, and food stamps, which comprised her monthly income. Lastly, the respondent testified as to the parenting education, individual counseling, and medication management services she had received, including when and where she had received those services. The accuracy of the respondent's testimony supported the conclusion that she had a rational and factual understanding of the proceedings, and that she assisted her counsel at trial.

In her brief, the respondent emphasizes a portion of her testimony that "devolved into an exhibition of her psychotic delusions" to argue that the court should have ordered a competency hearing sua sponte. According to the respondent, this testimony was "neither rational, historically accurate, nor reliable." While the parties do not dispute that the portion of her testimony that the respondent highlights arguably exhibits paranoid and delusional thinking, we do not agree that, even when evaluated in isolation, it is indicative of incompetency.

In the relevant testimony, the respondent was asked by her counsel why she moved from one of her previous residences. Her counsel asked, "[w]ith respect to Thamesview . . . what happened there between June 6 and November 16, [2018] that caused you to leave?" The respondent began her response by stating that she

"wanted a stable place for [her] son." The respondent then digressed, stating, in part, that "[s]omeone was spreading rumors that my father molested me. So when I got out of the car people were screaming that I was molested by my father. . . . Fights were breaking out at Thamesview in my defense." After this aside, the respondent reiterated that "I just—that's why I'm looking for a different place to live and I'm more stable out of Thamesview right now." On cross-examination, when the respondent was asked about an incident in which she "called the police to report a suspicious incident that [she] had seen [her] ex-husband . . . in the complex," she answered incoherently. She stated, inter alia, that "tenants were coming up to [her and] telling [her] that they had the police believing [she] was hearing voices," and that "other tenants were trying to help [her] in calling [the police and] . . . telling [the police] that fights were breaking out, they're laughing hysterically at [her], they were . . . saying stop making fun of her, her father molested her."

Even though parts of this testimony arguably reveal paranoid and delusional thinking, the court did not abuse its discretion by concluding that the respondent was competent during this testimony. In response to the question from her counsel, the respondent explained that her move from her prior residence was made in an effort to bring stability to her life and Geoffrey G.'s life should they be reunified. This part of the respondent's answer was consistent with testimony of Jaziri, who stated that "in psychiatry the treatment is bio-psycho-social. . . . So you have to treat them biologically but they have to have a stable and social and psychological life which means she has to have some kind of stable home . . . ." Stability has been recognized as significant to the development of minor children in termination of parental rights cases. See *In re Jacob W.*, 330 Conn. 744, 774, 200 A.3d 1091 (2019) ("[our Supreme] [C]ourt has repeatedly recognized that

stability and permanence are necessary for a young child's healthy development" [internal quotation marks omitted]). Thus, despite the respondent's digressions in her answers to counsel's questions, her testimony nonetheless shows that she understood the nature of the proceedings and that she rationally sought to assist her counsel by articulating her efforts to bring stability to her and Geoffrey's life.

Moreover, even assuming that we agreed with the respondent that she exhibited incompetence in the isolated portion of her testimony discussed in the preceding paragraphs, we do not agree that this instance was representative of her level of competency throughout the trial. As discussed previously, the remainder of the respondent's testimony was largely coherent and historically accurate.

During trial, the respondent interjected several times in ways that also expressed an understanding of, and disagreement with, the allegations in the petition to terminate her parental rights. Furthermore, by refuting testimony of others that she believed was inaccurate, the respondent was seeking to assist her counsel. For instance, during her counsel's cross-examination of Pamela Jones, a former independent contractor for the Family Network Agency and Geoffrey's visitation supervisor, Geoffrey's developmental deficiencies were discussed. When those deficiencies were attributed to the respondent, she interrupted the questioning, stating, "[n]ot my fault." At another point, while cross-examining Meredith Bonagura, an employee of the department, the respondent's counsel asked: "[W]hat were the concerns that were reported from Backus Hospital on July 12, [2017] other than that [the respondent] had presented with a report of being sexually abused?" Bonagura responded that "[the respondent] dropped Geoffrey," prompting the respondent to state, "[n]o, I didn't." Bonagura also was asked during cross-examination by counsel for the minor child whether the respondent was arrested in 2016 for assaulting Geoffrey's maternal

grandmother, to which the respondent interjected, "[i]t's nolled. It isn't true. It didn't happen." Finally, when Jaziri was asked about the respondent's living situation, Jaziri answered that the respondent was living near her parents, specifically, he believed, in Milford. The respondent corrected Jaziri, stating, "I live in Branford now." While it is inappropriate for a litigant to interject during the testimony of other witnesses, we acknowledge that it is an understandable impulse of a parent defending against a petition to terminate his or her parental rights. In this case, the respondent's interruptions show that she was attentive during trial, understood that the court may credit against her the testimony of witnesses that she disputed, and rationally sought to refute such testimony. Therefore, the court reasonably could have concluded from these interruptions that the respondent possessed a rational understanding of the proceedings and was able to assist her counsel at trial.

In addition, we reiterate that the court was best positioned to observe the respondent's demeanor, attentiveness, canvass responses, and testimony at trial. See *In re Glerisbeth C.*, supra, 162 Conn. App. 283 ("[a] trial court's opinion . . . of the competency of a [respondent] is *highly significant*" (emphasis added; internal quotation marks omitted)). The court's advantageous position lends additional support to our conclusion that its disinclination to order, sua sponte, an evaluation of the respondent's competency was not improper.

For the foregoing reasons, we conclude that the court did not abuse its discretion by declining to order, sua sponte, an evaluation of the respondent's competency to assist her counsel at trial. Therefore, the court did not violate the respondent's due process rights under the United States constitution and, accordingly, her claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE GABRIEL C.*
(AC 42961)

IN RE CATALEYA M.
(AC 42962)

IN RE ISABELLA M.
(AC 42963)

IN RE SAVANAH F.
(AC 42964)

Elgo, Devlin and Sheldon, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children. The trial court found, pursuant to statute (§ 17-112 (j) (3)), that the mother had failed to achieve a degree of personal rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the children's lives. The mother claimed that the court, inter alia, improperly denied her motion to disqualify the attorney acting as the guardian ad litem for the children on the ground that the attorney had acted as the mother's guardian ad litem when the mother was a minor, and that the court had improperly admitted into evidence social studies submitted by the Department of Children and Families because the social studies consisted of hearsay and were not ordered by the court in accordance with the applicable statutes (§§ 17a-112 (j) and 45a-717). *Held*:

1. The trial court did not abuse its discretion in denying the respondent's motion to disqualify, as the mother failed to meet her burden of demonstrating that the proceedings in which the attorney served as the mother's guardian ad litem in 2005 were substantially related to the issues addressed in the 2019 termination of parental rights trial; rule 1.9 of the Rules of Professional Conduct was not implicated as the information

* 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2012); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

received by an attorney acting as a guardian ad litem for a minor child was not subject to attorney-client confidentiality pursuant to the Judicial Branch's Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, the mother made only conclusory statements that the attorney for the minor child might divulge confidential information regarding the mother from the 2005 proceeding, the mother provided no record of the issues in the 2005 proceeding, and the material that might have been confidential in the 2005 proceeding was no longer confidential as the mother had addressed her earlier history and made statements to that effect in the 2019 proceedings, the minor children had a strong interest in having the attorney serve as their guardian ad litem because she had been involved in the matter for three years and was well acquainted with the issues and with the children's interests, which provided a compelling reason for her to serve as their advocate, and to have delayed the trial on the mother's disqualification claim would have severely undermined the children's interests; moreover, contrary to the mother's argument that the appearance of impropriety warranted an absolute preclusion, it was only one factor to consider when balancing the competing interests in disqualifying an attorney, it was not dispositive and did not outweigh other considerations.

2. The respondent mother could not prevail on her claim that the social studies were improperly admitted as they contained hearsay and had not been ordered by the court; the mother failed to specify to which hearsay statements contained in the social studies she objected, which denied the petitioner, the Commissioner of Children and Families, the opportunity to argue which hearsay exception applied to which statement, and, although the court admitted the social studies before it had formally requested them from the department, to interpret §§ 17a-112 (j) and 45a-717 in the manner claimed by the mother would frustrate the underlying purpose of those statutes, which was to put parents on notice of the allegations that need to be explained or denied, and would have resulted in unnecessary delays in the proceedings.

3. The trial court properly found by clear and convincing evidence, on the basis of its factual findings and reasonable inferences drawn therefrom, that the respondent mother failed to achieve sufficient rehabilitation that would have encouraged the belief that, within a reasonable time, she could have assumed a responsible position in the children's lives; the supportive testimony by the mother's recent service providers was undercut by their lack of specific knowledge about the depth of the mother's difficulties, the record refuted the claims by the mother that she had moved away from abusive relationships and that she had the legal income to support her needs and her children's needs, and, contrary to the mother's claim that the court's determination was based primarily on events preceding 2018, the record demonstrated that the court considered all potentially relevant evidence, including the mother's continued engagements with partners who posed a risk of domestic violence through 2018 and 2019, her inability to be candid and truthful with her

providers or the department, and her lack of progress in parenting, domestic violence, and mental health therapy despite years of engaging services.

Argued October 8, 2019—officially released March 4, 2020**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Middletown, Juvenile Matters, and tried to the court, *Quinn*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother filed separate appeals to this court; thereafter, the appeals were consolidated. *Affirmed.*

David E. Schneider, *Jr.*, for the appellant (respondent mother).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and Benjamin Zivyon, assistant attorney general, for the appellee (petitioner).

Hilliary Horrocks, for the minor children in Docket Nos. AC 42961, AC 42962, and AC 42963.

Deborah Dombek, for the minor child in Docket No. AC 42964.

Opinion

ELGO, J. The respondent mother appeals from the judgments of the trial court terminating her parental rights with respect to her minor children, Gabriel C., Savanah F., Cataleya M., and Isabella M., and appointing the petitioner, the Commissioner of Children and Families (commissioner), as the statutory parent of the children.[1] The respondent contends that the court improperly (1) denied her petition to disqualify the attorney

** March 4, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Pursuant to Practice Book § 67-13, the attorney for Savanah F. filed a statement adopting the respondent's brief in her appeal. We further note

for her children Gabriel C., Cataleya M., and Isabella M., (2) admitted into evidence social studies during the termination of parental rights trial, and (3) concluded that she failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112 (j). We affirm the judgments of the trial court.

The following procedural history and facts, which the trial court found by clear and convincing evidence or are otherwise undisputed, are relevant to the resolution of this appeal. Throughout her childhood, the respondent was the subject of both abuse and sexual assault beginning at a young age. By the time the respondent was approximately twelve years old, problems concerning her mental health began to arise. Such problems included post-traumatic stress disorder, attention deficit hyperactivity disorder, and conduct disorder. She also suffered from mood disorder and experienced suicidal ideation. By the age of fifteen, the respondent's difficult situation at home—coupled with her mental health struggles—led to her placement in the custody of the commissioner.

In September, 2010, the respondent had her first child, Gabriel C. Her relationship with Gabriel's father, Jesus C., lasted only three years and was riddled with instances of domestic violence. Jesus' abuse of the respondent was coupled with his heroin addiction. When his relationship with the respondent ended, Jesus ceased all contact with Gabriel.

The respondent thereafter began an intimate relationship with Fernando F., despite her knowledge of his violent criminal background. This relationship too was marked by instances of domestic violence, including one in which he attacked the respondent with a knife.

that the attorney for Gabriel C., Cataleya M., and Isabella M. filed a brief adopting the commissioner's position with respect to the issues concerning the admission of the social studies and the trial court's termination of the respondent's parental rights.

In 2012, the respondent had her second child, Savanah F., fathered by Fernando.

Throughout 2013 and 2014, a number of events occurred that led to the removal of Gabriel and Savanah from the respondent's custody. The Department of Children and Families (department) became concerned about the respondent's inconsistency in taking her medication for her mental health, her hospitalization for a drug overdose, and her reports to hospital staff that she was having great difficulty managing Gabriel's behavior. The respondent was also very rough with her children and was unable to manage them in a loving and caring manner. In order to address these issues, the respondent agreed to comply with visiting nurses in order to consistently take her medication and further agreed to work with an in-home parenting program and therapeutic day care. These efforts, however, proved to be ineffective. The respondent routinely missed appointments with providers, including those who administered her medication. She would use profane language toward them and also failed to begin therapeutic day care with her children. Moreover, the respondent and Fernando continued to engage in episodes of domestic violence in front of the children, including one instance in which Fernando threatened to kill the respondent.

On September 4, 2014, Gabriel and Savanah were removed from the respondent's care pursuant to an order of temporary custody. On that same date, the respondent was issued specific steps requiring her, in part, to engage in parenting, substance abuse, and domestic violence counseling. On November 3, 2014, Gabriel was adjudicated neglected and committed to the care of the commissioner. On December 23, 2014, Savanah was also adjudicated neglected and committed to the care of the commissioner. Both were placed into foster homes. At this point, the respondent was no longer in a relationship with Fernando and had begun a new relationship with Drashawn M.

In May, 2015, the respondent had her third child, Cataleya M.[2] Due to the verbal and physical domestic violence between the respondent and Drashawn, specific steps were again issued by the department to the respondent as she continued receiving services. Only a few months after Cataleya's birth, the department received numerous reports of abuse that prompted serious concerns. These reports concerned incidents including public fights between the respondent and Drashawn, including an incident in which the respondent stabbed Drashawn while he was holding Cataleya and an incident in which the respondent was severely beaten by Drashawn. Neither parent took any responsibility for these increasingly violent encounters.[3] As a result, the respondent thereafter agreed to be placed with Cataleya at a domestic violence shelter. Notwithstanding her placement at the shelter, she remained in frequent contact with Drashawn and became verbally abusive toward staff when they confronted her about it. When the respondent was found to have breached safety protocols, she was asked to leave the shelter and Cataleya was placed into foster care on August 31, 2015. On September 4, 2015, the department filed an order for temporary custody as to Cataleya. On February 22, 2016, the order of temporary custody was sustained, and Cataleya was adjudicated neglected and committed to the custody of the commissioner.

In May, 2016, the respondent and Drashawn completed an intimate partner violence program. In August, 2016, the respondent gave birth to her fourth child, Isabella M. Although Isabella was initially removed from the respondent's care, the court, *Turner*, *J.*, returned her to the respondent on October 13, 2016, follow-

[2] Although the department was under the impression that Cataleya was the child of Drashawn M., a paternity test would later reveal that Fernando F. was, in fact, Cataleya's father.

[3] For instance, after beating the respondent, Drashawn downplayed the incident and stated that he had only "mushed" her face.

ing five days of evidence in a contested temporary custody hearing. On October 21, 2016, Isabella was adjudicated neglected and was placed under an order of protective supervision for the following six months. The respondent was also ordered to comply with specific steps, which included taking part in domestic violence and anger management counseling, taking prescribed medications, taking part in medication management, and avoiding any contact with Drashawn in any form.

Shortly thereafter, the respondent underwent a court-ordered psychological assessment with Inés Schroeder, a psychologist. Schroeder found that the respondent was unable to recognize incidents of domestic violence or to accurately report those events. Schroeder also observed that the respondent had "great difficulty putting into context all that has happened with her past relationships and truly understanding the impact of DV (domestic violence) on her and her children. She is still struggling with continued problems with [Drashawn] despite multiple attempts to educate her and to help her realize how destructive the relationship is . . . ." Schroeder further noted that the respondent admitted to a domestic violence incident that had occurred on October 5, 2016,[4] and vowed to refrain from contacting Drashawn in the future. The respondent also admitted to having discontinued her mood disorder medications. In the evaluation, Schroeder recommended that the respondent's children remain in foster care until the respondent "can demonstrate some stability in housing and counseling services and no further engagement with [Drashawn]."

[4] The October 5, 2016 domestic violence incident occurred approximately one week before the court vacated the temporary custody order regarding Isabella. In a police report of the incident, the respondent admitted that Drashawn had choked and slammed her head during an argument about her possessions, and she further admitted to smashing his car window with a hammer as he left.

Pursuant to the court order of October 21, 2016, and Schroeder's recommendations, the respondent began domestic violence counseling with Evan LeClair in December of that year. Together, a safety plan was developed and the respondent completed a confidential address application to ensure that her address was kept safe. At this point, the respondent had moved to a confidential residence in another town. Her safety plan consisted of not contacting Drashawn, maintaining a confidential residence with cameras, having a peephole in her door, and having a panic button in her apartment.

On March 9, 2017, Kelly McGinley-Hurley, a department supervisor, conducted a scheduled home visit with the respondent. During the visit, the respondent admitted to McGinley-Hurley that she had remained in telephone contact with Drashawn, explaining that she felt obligated to keep him informed about her case. On March 13, 2017, four days after the in-home visit, the respondent had another physical altercation with Drashawn in her apartment. Arriving at the scene, responding police officers were told by the respondent that Drashawn had stabbed her with a steak knife and had thrown her into a wall. The officers found Isabella on the respondent's bed and further observed drops of blood around Isabella's bassinet. In a statement to the police, the respondent reported that she had invited Drashawn to her apartment so that he could remove a pair of pitbulls. According to the respondent, Drashawn suddenly attacked her and she was cut by a knife as a scuffle ensued over the bassinet where Isabella was sleeping. The police officer noted in his report that, "[b]ased on the totality of circumstances, I did not believe the incident occurred precisely as described by [the respondent]. However, based on her injuries and statement, it did appear that an instance of domestic violence did transpire."

On March 15, 2017, Isabella was again removed from the respondent's care pursuant to an order of temporary custody. The respondent contested the order, and hearings were held in April and July, 2017.[5] On September 29, 2017, the court, *Turner*, *J.*, found that the department had proven by a preponderance of the evidence that the respondent had failed to safeguard Isabella or comply with her specific steps. The court noted that the respondent had provided inconsistent testimony with respect to her version of the events that occurred on March 13, 2017. It further found that the respondent had recently begun a romantic relationship with Josue C., who had a long criminal history of violence. Accordingly, on October 2, 2017, Isabella was committed to the custody of the commissioner.

In July, 2017, the commissioner filed petitions to terminate the parental rights of the respondent with respect to Gabriel, Savanah, and Cataleya.[6] Distrusting authority figures and providers referred by the department, the respondent referred herself for services. She inaccurately reported her history to those providers, however, and prevented them from receiving information from the department in a timely manner. As a result, the respondent's self-selected providers lacked specific knowledge about the depth of her difficulties and the ongoing nature and severity of domestic violence in her life. For example, the respondent insisted that she had no need for medication for her mood disorders and was not candid concerning domestic violence incidents with Drashawn. In addition to compromising her own

[5] These consolidated hearings addressed both the order for temporary custody and the motion to modify protective supervision.

[6] The petitions also respectively named the respondent fathers of the children: Jesus, Fernando, and Drashawn, the last of whom was presumed to be the father of Cataleya at the time. It was not until August 2, 2017, that a paternity test revealed that Fernando was Cataleya's father. A motion to amend the petition to reflect this fact was granted on August 22, 2017. The commissioner withdrew her petition as to Drashawn on September 15, 2017.

services, as the court repeatedly found, the respondent undermined the ability of her providers to offer accurate and credible testimony to the court.

The court found that the respondent continued to contact Drashawn and maintained her intimate relationship with Josue, who also proved to be repeatedly violent. On November 2, 2017, a social worker observed bruising on the respondent's neck during an intake meeting with Community Mental Health Affiliates (CMHA). According to the respondent, she had been involved in a car accident while driving Josue, although her story of the accident changed with each retelling of what had transpired and, inexplicably, no police report regarding the incident existed. On January 11, 2018, the respondent admitted to Kenneth R. Armstrong, a counselor with Franciscan Life Center, that Josue had been physically abusive toward her.

Despite consistently attending visitation sessions with her children, including four courses of supervised visitation and parenting education, the respondent routinely sabotaged her own progress toward rehabilitation. She continued to inflict corporal punishment on the children, spoke with the children during visits about their legal proceedings, and engaged in intimate relationships with people who had histories of domestic violence. For instance, Schroeder reported that the respondent was currently in a relationship with Sean W., who also had a criminal record for assault. Significantly, the respondent did not inform the department about this new relationship. Schroeder reported that the respondent had minimal insight as to how her abusive relationships affected her children. Although the respondent had a long history of engaging in treatment that proved unsuccessful, Schroeder recommended that she continue to seek therapy. At the same time, due to the respondent's consistently poor choices with respect to her intimate partners and her inability to

maintain a safe home environment, Schroeder concluded that it would not be in the children's best interests to attempt reunification.

On April 18, 2018, the commissioner filed a petition for the termination of the parental rights of the respondent and Drashawn with respect to Isabella.[7] This petition, along with the petitions filed with respect to Gabriel, Savanah, and Cataleya, alleged the adjudicatory ground of failure to rehabilitate pursuant to § 17a-112 (j).[8] A trial on the termination of parental rights petitions was held on March 5, March 6, March 7, March 11, and March 12, 2019. On April 10, 2019, the court, *Quinn*, *J.*, rendered a decision granting the commissioner's petitions to terminate the parental rights of the respondent, Jesus, and Drashawn.[9] In a comprehensive and well reasoned memorandum of decision, the court found that the department had proven by clear and convincing evidence that (1) the department had made reasonable efforts to locate the respondent and the

[7] On June 12, 2018, the petitions for the termination of parental rights with respect to all four children were consolidated.

[8] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[9] The court adjudicated Jesus as having failed to rehabilitate and terminated his parental rights by default after the department published notice in his last known location. Fernando consented to the termination of his parental rights.

three fathers and to reunify the four children with the respondent and the fathers, (2) the respondent, Jesus, and Drashawn had failed to rehabilitate to the degree that they could assume a responsible parenting position in their children's lives, and (3) termination of each parent's rights would be in the best interests of the children. Accordingly, the court appointed the commissioner as the statutory parent of the children. This appeal followed.[10]

I

The respondent first claims that the court improperly denied her motion to disqualify Attorney Hilliary Horrocks. The respondent argues that, pursuant to the policy considerations of rule 1.9 (a) of the Rules of Professional Conduct,[11] Horrocks should have been disqualified because she had previously served as the respondent's guardian ad litem approximately thirteen years earlier. In response, the petitioner asserts that, even if we assume that rule 1.9 applied to Horrocks while she was serving as guardian ad litem for the respondent, the court was well within its discretion in denying the respondent's motion to disqualify. We agree with the petitioner.

The following additional facts are relevant for the resolution this claim. On April 21, 2017, during the consolidated hearings on the order for temporary custody and the motion to modify protective supervision regarding Isabella, the respondent made an oral motion to disqualify Horrocks from acting as the guardian ad litem

[10] Neither Fernando nor Drashawn have appealed from the judgments terminating their parental rights.

[11] Rule 1.9 (a) of the Rules of Professional Conduct provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

for the children.[12] The respondent argued that, because Horrocks had acted as her guardian ad litem during a 2005 hearing when the respondent was a minor, she might be privy to confidential information about the respondent obtained in that earlier proceeding. When probed as to what particular confidential information Horrocks could use against her, the respondent speculated that the information might concern her history of abuse and trauma that could impact her parenting abilities. In response, Horrocks stated that she had no recollection of the particulars of her previous position as guardian ad litem for the respondent and further argued that no confidentiality existed as guardian ad litem that would implicate the attorney-client privilege. The court orally denied the respondent's motion, finding that Horrocks' previous service as guardian ad litem for the respondent was too remote in time and that Horrocks did not, thereby, acquire information that could be used against the respondent in the current proceedings. The respondent did not appeal the court's denial of her motion to disqualify Horrocks, nor did she appeal the court's granting of the order of temporary custody or the order committing Isabella to the custody of the petitioner.

On March 5, 2019, the first day of the termination of parental rights trial, counsel for Drashawn, Joseph Geremia, advised the court and all counsel that he had represented the respondent in the past during a delinquency hearing. Geremia further noted that (1) the issue of a potential conflict of interest was addressed by

[12] The respondent's oral motion to disqualify also sought to disqualify Joseph Geremia, counsel for Drashawn, arising out of his previous representation of the respondent when she was a child. The court denied the respondent's motion as to Geremia, noting that Geremia, as counsel for Drashawn, did not appear for any portion of the hearing, nor did he participate in any manner. The respondent did not appeal from the court's denial of her motion, nor has she appealed Judge Quinn's denial of her motion to disqualify Geremia.

Judge Turner on April 21, 2017, during the order of temporary custody proceedings, (2) Drashawn did not believe there was a conflict, and (3) he had no recollection of his previous representation of the respondent. In response, the respondent orally renewed her motion to disqualify Geremia "on the grounds that he was her attorney when she was involved as a child with the [department]." Counsel for the respondent argued that, "[t]o the extent that this court might consider evidence of my client's past, which included her past dealings with the department as a youth, she believes that it would be prejudicial to her." Carolyn Signorelli, counsel for the petitioner, argued that any issue regarding disqualification "should have been addressed two, three, however many years ago. And for the [respondent] to now renew the objection on the eve of a trial that's been continued several times is not in the best interest of the children." Signorelli further asserted that Geremia's previous representation of the respondent did not concern a matter that was the same or substantially related to the one before the court—the termination of her parental rights. She also argued that any confidential information obtained by Geremia would be "obsolete or generally known by all the parties in this case, not only based upon the [department] record but also [the respondent's] own admissions and histories that [she] provided to the psychological evaluator."

When the court asked if there was anything further, Horrocks stated that, "in the interest of full disclosure as well," she had previously acted as the guardian ad litem for the respondent in 2005. Horrocks asserted that the issue of her potential conflict was fully addressed by Judge Turner on April 21, 2017. In response, the respondent's counsel simply made the following statement to the court: "And just that [the respondent] makes the same argument as to Attorney Horrocks." The court

rejected the respondent's arguments as to both Geremia and Horrocks, finding that rule 1.9 of the Rules of Professional Conduct was not implicated "because the issues are not the same or substantially the same as they were then." It further found that any material that might have been confidential in the past was "certainly not confidential any longer in that [the respondent], herself, has addressed some of her earlier history and statements to that effect."

Thereafter, when asked by the court if there were any other preliminary issues, counsel for the respondent stated that there was "one other matter." Specifically, the respondent 's counsel orally objected to Deborah Dombek, attorney for the minor children, withdrawing as counsel for Gabriel, Cataleya, and Isabella. Counsel for the respondent's oral objection also pertained to the change in Horrock's role as the guardian ad litem for all four children to her role as the attorney for Gabriel, Cataleya, and Isabella. In support of his objection, the respondent's counsel proffered only two arguments: (1) Dombek and Horrocks did not seek permission from the court to switch their roles; and (2) the change in roles would affect "any zealous advocacy of the children who were formerly being represented by Dombek . . . ." In response, Dombek argued that there was a need to separate the children due to Savanah's decision to take a different position than her siblings. Therefore, Dombek felt that she could not zealously advocate for both Savanah's position and the position of her siblings. This change in circumstances prompted Dombek's withdrawal and Horrocks to file an appearance on behalf of Gabriel, Cataleya, and Isabella. Horrocks additionally argued that her extensive involvement in the case and her familiarity with the children positioned her as a proper candidate to act as an attorney on behalf of Savanah's siblings. The court

agreed and overruled the objections made by the respondent's counsel.[13]

We begin by setting forth the standard of review governing our resolution of this claim.[14] "The standard of review for determining whether the court properly denied a motion to disqualify counsel is an abuse of

[13] The court's ruling on this issue is not before us on appeal.

[14] The petitioner also argues that the respondent's March 5, 2019 oral motion to disqualify submitted to Judge Quinn was a collateral attack on Judge Turner's April 21, 2016 ruling on the same issue. We do not believe collateral estoppel is applicable under the current circumstances.

"Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was *actually litigated* and *necessarily determined* in a prior action between the same parties upon a different claim." (Emphasis in original; internal quotation marks omitted.) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 772, 770 A.2d 1 (2001). "Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 58, 808 A.2d 1107 (2002). "If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may releitigate the issue in a subsequent action." *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 260, 773 A.2d 300 (2001).

Even in the absence of a determination as to whether Horrocks had a conflict of interest that warranted her dismissal, a judgment on the neglect petitions—which were the basis of the proceedings before Judge Turner—could have been validly rendered. See *In re Kyllan V.*, 180 Conn. App. 132, 139, 181 A.3d 606, cert. denied, 328 Conn. 929, 182 A.3d 1192 (2018). Thus, a determination of that issue was not "essential to the judgment" for purposes of collateral estoppel. See *Jarosz* v. *Palmer*. 766 N.E.2d 482, 436 Mass. 526, 529 (2002) (for purposes of collateral estoppel, " 'essential to the judgment' " refers to issue that is essential to final determination on merits of underlying claim).

We recognize that counsel for a minor child and a guardian ad litem have a unique role in acting on behalf of a minor child during juvenile proceedings; see footnote 19 of this opinion; and that repeated attacks on intermediate findings leading up to termination proceedings reflect the policy concerns that are the basis for the doctrine of collateral estoppel. See *In re Stephen M.*, 109 Conn. App. 644, 663–65, 953 A.2d 668 (2008) (discussing importance of collateral estoppel in context of child welfare proceedings). Given our well settled law governing collateral estoppel, however, that doctrine is not applicable under the current circumstances to bar relitigation of Horrocks' alleged conflict of interest.

discretion standard. The Superior Court has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court. . . . In its execution of this duty, the Superior Court has broad discretionary power to determine whether an attorney should be disqualified for an alleged breach of confidentiality or conflict of interest. . . . In determining whether the Superior Court has abused its discretion in denying a motion to disqualify, this court must accord every reasonable presumption in favor of its decision. Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"Disqualification of counsel is a remedy that serves to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information. . . . In disqualification matters, however, we must be solicitous of a client's right freely to choose his counsel . . . mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and may lose the benefit of its longtime counsel's specialized knowledge of its operations." (Citation omitted; internal quotation marks omitted.) *In re Nyasia H.*, 146 Conn. App. 375, 380–81, 76 A.3d 757 (2013).

"The competing interests at stake in the motion to disqualify, therefore, are: (1) the [respondent's] interest in protecting confidential information; (2) the [petitioner's] interest in freely selecting counsel of [its] choice; and (3) the public's interests in the scrupulous administration of justice. . . . Rule 1.9 (a) expresses the same standard that we had applied under the Code of Professional Responsibility when a claim of disqualification based on prior representation arose. Thus, an attorney should be disqualified if he has accepted employment adverse to the interests of a former client on a matter substantially related to the prior representation. . . . This test has been honed in its practical application

to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is patently clear or when the issues are identical or essentially the same. . . . Once a substantial relationship between the prior and present representation is demonstrated, the receipt of confidential information that would potentially disadvantage a former client is presumed." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bergeron* v. *Mackler*, 225 Conn. 391, 398–99, 623 A.2d 489 (1993).

Citing to the commentary of rule 1.9 of the Rules of Professional Conduct, the respondent argues on appeal that the 2005 matter was "substantially related" to the 2019 termination of parental rights proceedings because there was a substantial risk that Horrocks may use confidential information that she could have obtained in 2005. The commentary states, in relevant part, that "[m]atters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rules of Professional Conduct 1.9, commentary.

First and foremost, we note that any information received by an attorney acting as a guardian ad litem for a minor child is not subject to attorney-client confidentiality.[15] See State of Connecticut, Judicial Branch, Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, available at https://www.jud.ct.gov/family/GAL_code.pdf. (last visited February 27, 2020). Thus, the information received by Horrocks when acting as the guardian ad litem for the respondent in 2005

[15] Horrocks' prior representation of the respondent as the guardian ad litem is easily distinguishable from Geremia's, whose previous representation of the respondent occurred as an attorney during a child delinquency proceeding.

was not confidential for purposes of an attorney-client relationship.[16]

Even if a guardian ad litem were bound by rule 1.9 of the Rules of Professional Conduct, the court would still have been acting well within its discretion in denying the respondent's motion to disqualify. We agree with the court's finding that rule 1.9 was not implicated because the issues in the respondent's termination of parental rights trial are not the same or substantially the same as the issues in the 2005 proceeding.[17] Aside from conclusory statements, the respondent provided no record to support her claim that the issues involved in the 2005 proceeding, in which Horrocks served as the respondent's guardian ad litem, had a substantial relationship with the issues addressed in the 2019 trial of the respondent's termination of parental rights. The material issues addressed at the termination of parental rights trial concerned whether (1) the respondent had achieved rehabilitation to the extent that she could provide care for her children within a reasonable time and (2) termination of the respondent's parental rights

[16] The respondent also cites to part II (g) of the Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem for the proposition that an attorney for the minor child or the guardian ad litem should "[a]void any actual or apparent conflict of interest or impropriety in the performance of his or her responsibilities." That part, however, extends discretion to the attorney for the minor child and the guardian ad litem for making a determination as to whether a conflict of interest exists. More importantly, the Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem does not displace our case law governing disqualifications of attorneys under rule 1.9 of the Rules of Professional Conduct. To hold otherwise would contradict explicit language in the preface to the Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, which provides that its provisions be "[c]onsistent with . . . other applicable statutes and rules of court . . . ." See also *In re Christina M.*, 280 Conn 474, 491, 908 A.2d 1073 (2006) ("[t]he primary role of any counsel for the child including the counsel who also serves as guardian ad litem, shall be to advocate for the child in accordance with the Rules of Professional Conduct")

[17] In ruling on these motions, the court was not asked to distinguish its findings between Geremia's representation of the respondent as her former attorney and Horrocks' role as the respondent's guardian ad litem in 2005.

and the children's commitment to the care of the commissioner was in their best interests. The respondent does not propose how the issues addressed during Horrocks' time as the respondent's guardian ad litem in 2005 are substantially related to the issues before the court in 2019, nor can we conceive of any basis to conclude as much. Therefore, the respondent has failed to meet her burden of demonstrating that the two proceedings are substantially related.

Moreover, the court found that any material that might have been confidential during the 2005 proceeding was "certainly not confidential any longer in that [the respondent], herself, has addressed some of her earlier history and statements to that effect." Notably, the respondent does not point to any potentially confidential information to which Horrocks was privy, or to that which she herself did not disclose to her providers, Schroeder, or the department.[18] Accordingly, the court properly concluded that there would be no risk of the inadvertent disclosure of confidential information.

We further agree with the petitioner's position that Gabriel, Cataleya, and Isabella had a strong interest in having Horrocks act as their attorney and as their

[18] As counsel for the respondent candidly admitted at oral argument before this court, there was nothing in the record that suggests some taking of confidential information during the 2005 proceedings that would not have already been disclosed in the ordinary circumstances of the termination of parental rights proceedings. Counsel for the respondent could not point to any specific confidential information that the respondent was seeking to protect.

Moreover, in responding to Schroeder's request for her personal history, the respondent gave specific and detailed information about numerous instances of early trauma as a child and teenager, including sexual and physical assault, suicidal ideation, substance abuse, and domestic violence between her parents. Likewise, the social studies filed by the petitioner document in the family history section the respondent's similarly detailed accounts of her exposure to domestic violence and extreme physical abuse, her placement at various facilities, suicidal ideation, and her psychiatric diagnoses as a youth, much of which was confirmed by her juvenile record, which itself included several evaluations of the respondent.

guardian ad litem. Having been involved in the matter for approximately three years, Horrocks was well acquainted with the subject matter of the case and with the interests of the children. See, e.g., *American Heritage Agency, Inc.* v. *Gelinas*, 62 Conn. App. 711, 725, 774 A.2d 220 (courts should be mindful of attorney's specialized knowledge of client's operations when assessing disqualification), cert. denied, 257 Conn. 903, 777 A.2d 192 (2001). Her role as guardian ad litem for the children and her familiarity with their interests thus provided a compelling reason to allow her to remain as their advocate.[19] See, e.g., *In re Samuel R.*, 163 Conn.

[19] We note that the nature of the relationship between an attorney for the minor child and the child he or she represents is particularly important in the context of juvenile proceedings. The significance of that relationship was discussed at length by our Supreme Court in *Carrubba* v. *Moskowitz*, 274 Conn. 533, 877 A.2d 773 (2005). Holding that attorneys for the minor child were entitled to absolute immunity from suit, our Supreme Court recognized that, by virtue of their appointment to represent the child's best interest, they, like guardians ad litem, are obliged to represent children with "a higher degree of objectivity . . . than that for an attorney representing an adult" with "functions integral to the judicial process in carrying out the purpose of [General Statutes] § 46b-54—to assist the court in determining and serving the best interests of the child." Id., 545–46. This heightened degree of representation by an attorney for a minor child applies equally in child protection proceedings.

Moreover, the petitioner's concern for the practical consequences of disrupting a relationship between a child and his or her representative is well founded. We have long observed that repeated disruption in the relationships a child has makes them more vulnerable in their ability to attach and form trusting relationships. See, e.g., *In re Nevaeh W.*, 317 Conn. 723, 732–33, 120 A.3d 1177 (2015) (noting that "[c]hildren need secure and uninterrupted emotional relationships with adults who are responsible for their care" and that continuous foster care placements make a child "more vulnerable and make each subsequent opportunity for attachment less promising and less trustworthy than the prior ones"); *In re Davonta V.*, 285 Conn. 483, 495, 940 A.2d 733 (2008) ("[r]epeatedly disrupted placements and relationships can interfere with the children's ability to form normal relationships when they become adults" [internal quotation marks omitted]). To the extent that counsel and the guardian ad litem for a child seek to advocate for a child's best interest in stable and trustworthy relationships, the quality of their advocacy is necessarily premised on the trust developed between them and the child over time. Courts cannot sever those relationships based on the insufficient evidence of the sort that was presented to the trial court.

App. 314, 322, 134 A.3d 752 (2016) ("[c]hildren involved in termination proceedings have a strong interest in the speedy resolution of such proceedings"). Gabriel and Savanah have been in foster homes since 2014, thus compounding the need for the children to have their stable living arrangements resolved in an expeditious manner. Over the course of several years, Horrocks had engaged with the children extensively pursuant to her role as their guardian ad litem. As discussed in part I A of this opinion, to disqualify Horrocks—on the first day of trial, no less—would have clearly delayed the court's ability to render judgment on the petitions for the termination of parental rights, three of which had been filed approximately twenty months before trial on the petitions commenced. Therefore, delaying the trial on this basis would have severely undermined the interests of the children.

Although the respondent argues that even the appearance of impropriety warrants an absolute preclusion, such a per se disqualification standard has been rejected by our Supreme Court. See *Bergeron* v. *Mackler*, supra, 225 Conn. 400 (it was abuse of discretion for court to disqualify plaintiff's counsel solely on basis of appearance of impropriety). We are mindful that the appearance of impropriety is a factor to consider when balancing the competing interests in disqualifying an attorney. Id. It is not, however, dispositive and certainly does not outweigh the other considerations in this instance. We conclude, therefore, that the court did not abuse its discretion in denying the respondent's motion to disqualify.

We further take issue with the perfunctory fashion in which the respondent's counsel sought to disqualify Horrocks, seeking to disqualify her on the first day of the termination of parental rights trial. Our courts have underlined the necessity for termination proceedings to proceed in an expeditious manner, irrespective of the outcome. See *In re Stephen M.*, 109 Conn. App. 644, 665, 953 A.2d 668 (2008); see also *In re Samuel R.*, supra, 163 Conn. App. 322.

II

The respondent next claims that the court improperly admitted into evidence social studies submitted by the department. According to the respondent, the court abused its discretion by admitting the social studies because they (1) consisted of hearsay and (2) were not ordered by the court itself.[20] We disagree.

The standard of review governing claims of improper evidentiary rulings is well settled. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable

[20] The respondent also argues that the social studies exceed the scope of General Statutes § 45a-717 (e) (1). It is unclear, however, whether this assertion pertains to the content contained in the social studies itself—an argument she made in support of her motion in limine—or if it is merely descriptive of the claimed error that the court never ordered the social studies to be prepared. Even if we assume that the respondent sought to repeat her assertion made at oral argument on the motion in limine—that the social studies had exceeded the scope of the relevant statute because they were adjudicatory in nature—we also find this argument to be without merit. Section 45a-717 (e) (1) clearly provides the department with discretion to include "facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child . . . ." This includes "any other factors which the commissioner . . . finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child." Id. Accordingly, simply because the information contained in a social study appears to be adjudicatory does not render the social study impermissibly excessive.

Furthermore, "any mandated department social study reports submitted for the court's use in the dispositional phase . . . may be filed or considered by the court or used by counsel during the adjudicatory phase of the hearing." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Angelica W.*, 49 Conn. App. 541, 549, 714 A.2d 1265 (1998). Nevertheless, it is clear from the record that the court's adjudication of the respondent's failure to rehabilitate was not based solely on the social studies but, rather, on a plethora of testimony from service providers, social workers, and the respondent herself, along with other documentation submitted by the petitioner.

presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *In re Harlow P.*, 146 Conn. App. 664, 681, 78 A.3d 281, cert. denied, 310 Conn. 957, 81 A.3d 1183 (2013).

Under General Statutes § 45a-717 (e) (1) and (3), "[t]he court may, and in any contested case shall, request the [commissioner] . . . to make an investigation and written report to it, within ninety days from the receipt of such request. The report shall indicate the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents, and any other factors which the commissioner . . . finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child. . . . The report shall be admissible in evidence, subject to the right of any interested party to require that the person making it appear as a witness, if available, and subject himself to examination."

Practice Book § 35a-9 further provides that "no disposition may be made by the judicial authority until any mandated social study has been submitted to the judicial authority. Said study shall be marked as an exhibit subject to the right of any party to be heard on a motion in limine requesting redactions and to require that the author, if available, appear for cross-examination." Moreover, the statute governing the termination of parental rights incorporates the requirements of § 45a-717 when rendering judgment on such petitions. See General Statutes § 17a-112 (j) ("[t]he Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section").

A

The respondent first argues that the social studies were inadmissible because they contained hearsay. The respondent, however, does not specify to which hearsay statements contained in the social studies she objects. In fact, her motion in limine argued only that the social studies did not satisfy the business record exception to the rule against hearsay.

Notwithstanding her argument, "[t]he respondent did not state with any specificity which parts of the reports she believed were inadmissible hearsay. Thus, the petitioner was not given the opportunity to argue which hearsay exception applied to which statement . . . . The respondent failed to apprise the court adequately as to what statements by which declarants she objected." (Citations omitted; internal quotation marks omitted.) *In re Tayler F.*, 111 Conn. App. 28, 51–52, 958 A.2d 170 (2008), aff'd, 296 Conn. 524, 995 A.2d 611 (2010). Accordingly, we decline to review this claim.

B

The respondent next argues that the social studies were improperly admitted because the court had not requested their production pursuant to § 45a-717 (e). In response, the petitioner argues that the social studies were submitted to the court as a proactive measure to comply with §§ 17a-112 (j) and 45a-717 (e) (1). According to the petitioner, to preclude the social studies merely because the court had not first requested their production—which it was statutorily mandated to do—would elevate form over substance and serve only to delay the proceedings. We agree with the petitioner.

The respondent does not argue that the social studies were irrelevant, nor does she dispute that the court was obligated by statute to consider the social studies before judgment on the petitions could be rendered. Rather,

the respondent asks this court to hold that the court abused its discretion by admitting the social studies before it had formally requested them from the department. The issue, however, is not whether the department or the court completely failed to satisfy a statutory requirement in rendering judgment on the petitions for the termination of parental rights. See, e.g., *In re Shaiesha O.*, 93 Conn. App. 42, 43–44, 887 A.2d 415 (2006) (it was reversible error when court failed to hold department to its statutory burden to show it made reasonable efforts to reunify respondent with daughter). Instead, the respondent takes issue with the fact that the department sought to comply proactively with the relevant statutes in a manner that would expedite the proceedings.[21] Yet, for all intents and purposes, the court and the department did precisely what the statute required it to do: to produce the social studies before judgment on the petitions was rendered.

Thus, we decline the respondent's invitation to read §§ 17a-112 and 45a-717 (e) in a manner that plainly would frustrate the underlying purposes that these two statutes serve. As our Supreme Court has explained: "The purpose of the social study is to put parents on notice of allegations that need to be explained or denied." *In re Juvenile Appeal (84-AB)*, 192 Conn. 254, 260, 471 A.2d 1380 (1984). Moreover, "[b]ecause the parent-child relationship is at issue, all relevant facts and family history should be considered by the trial court when deciding whether to terminate the respondent's parental rights. . . . The entire picture of [the parent-child relationship] must be considered whenever the termination of parental rights is under consideration

[21] Notably, the respondent does not establish that she suffered any harm as a result of the admission of the social studies before the court had mandated their production. See *In re Amneris P.*, 66 Conn. App. 377, 382–83, 784 A.2d 457 (2001) (even assuming it was error to admit evidence, respondent mother failed to show error was harmful).

by a judicial authority." *In re Brianna F.*, 50 Conn. App. 805, 814, 719 A.2d 478 (1998). It is axiomatic that "[w]e construe a statute in a manner that will not . . . lead to absurd results." (Internal quotation marks omitted.) *In re Jusstice W.*, 308 Conn. 652, 670, 65 A.3d 487 (2012). To hold otherwise would not only defeat the purposes of the statutes governing the admission of social studies but would also result in an unnecessary delay in the proceedings at issue here. Accordingly, the court did not abuse its discretion by admitting the social studies into evidence.

III

Lastly, the respondent claims that the court improperly found that the department had proven by clear and convincing evidence that she had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the lives of the children.[22]

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. In the adjudicatory phase of the proceeding, the court must decide whether there is clear and convincing evidence that a statutory ground for the termination of parental rights exists." *In re Jennifer W.*, 75 Conn. App. 485, 493, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003). "Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate rights pursuant to § 17a-112." (Internal quotation marks omitted.) *In re Briana G.*, 183 Conn. App. 724, 728, 193 A.3d 1283 (2018).

[22] The respondent does not argue that a different conclusion should have been reached based on the evidence adduced at trial but, rather, that there was insufficient evidence to support the court's finding that she had failed to rehabilitate.

"The trial court is required, pursuant to § 17a-112, to analyze the [parents'] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "As part of the analysis, the trial court must obtain a historical perspective of the respondent's child caring and parenting abilities, which includes prior adjudications of neglect, substance abuse and criminal activity." (Internal quotation marks omitted.) *In re Damian G.*, 178 Conn. App. 220, 238, 174 A.3d 232 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018).

"While . . . clear error review is appropriate for the trial court's subordinate factual findings . . . the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings

and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587–88.

"An important corollary . . . is that the mere existence in the record of evidence that would support a *different* conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is *enough* evidence in the record to support the finding that the trial court made." (Emphasis in original.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

In its comprehensive memorandum of decision, the court found by clear and convincing evidence that the department had offered the respondent a "multitude of services" in an effort to facilitate reunification with her children. The court further found by clear and convincing evidence that the children had been previously adjudicated as neglected. The court also found by clear and convincing evidence that, despite the numerous services she engaged with, the respondent had not "rehabilitated to the extent that [she] could care for these children within a reasonable period of time, given the children's ages and need for permanency." Upon our review of the record, the factual findings made

by the court in its decision are well supported by the evidence it credited.

The court found that beginning in 2014, the department offered several support services to the respondent pursuant to a reunification plan after Gabriel and Savanah were removed from her care. These services included visiting nurse services to ensure that she received her daily medication and an in-home parenting program and therapeutic day care. The court found that the respondent "sabotaged the plan" by regularly missing appointments and never beginning the therapeutic day care for the children. The court further found that when the respondent was given specific steps in relation to the order of temporary custody of Gabriel and Savanah, she exhibited the same issues that "remain today: inconsistent engagement with mental health and medication management, a demonstrated lack of benefit from treatment, intimate partner violence and a significant need for parenting skills."

The continued issues with domestic violence and repeated engagement with partners who had a history of domestic violence were highlighted by the court. For instance, the court found that it was not even three months after Cataleya's birth before several new domestic violence incidents occurred between Drashawn and the respondent. This included an incident in which Drashawn had "severely beaten" the respondent, with the court finding that neither had assumed any responsibility "for these increasing violent encounters." The court also found that, despite entering a shelter, the respondent was verbally abusive toward staff and was eventually asked to leave after she threatened to reveal the shelter's location to the media.

The court further highlighted the domestic violence incident of March 13, 2017, and the respondent's "varying ways in which [she] reported [such incidents] to authorities over time . . . ." As the court noted, "[t]he

report by the police officer on the scene on March 13, 2017 is very different than [the respondent's] sworn testimony in court some months later. Her later report demonstrates how she changed her description of the events to cast herself as the entirely blameless participant in the domestic violence." The court continued to emphasize the fact that, despite the safety protocols in place, she violated each one when she invited Drashawn to her undisclosed apartment location and allowed him to enter. Taking judicial notice of Judge Turner's findings, the court noted that the respondent's "sworn testimony about this event in court fails to report that she invited Drashawn to her apartment, as she had told the police officer in her sworn statement at the time of the incident. . . . Her inability to be honest about her own participation in the events which ensued is apparent. That inability has had important consequences for her ultimate rehabilitation and ability to care safely for her children and take steps to keep them from harm." The court continued, finding that, "[d]espite many years of services from numerous service providers to the present time, [the respondent] had not yet learned to protect herself and avoid situations in which intimate partner violence could occur. Her inability to act on what she was taught was demonstrated as late as . . . January, 2019, when [the respondent] attempted to contact Drashawn by calling his mother. The court credits the paternal grandmother's testimony about the many times [the respondent] called her in the past. During the last contact in January, 2019, [the respondent] wanted Drashawn to help fix her car."

In addition, the court noted the respondent's repeated engagements with Drashawn and her relationship with Josue. When she began her relationship with Josue, the respondent "denied there were any difficulties" as their relationship progressed or that his conduct constituted domestic violence. This was despite her knowledge that

Josue had a violent criminal history. The court also found that the respondent made efforts to conceal these issues from the department, specifically failing to disclose her relationship with Josue to her domestic violence counselor despite learning of his criminal history. Moreover, the court found the respondent's explanation for injuries she had sustained to be dubious. As the court explained, the respondent's explanation that she had been the victim of a hit and run "was not consistent or believable. Her inconsistent reports to [the department] call her veracity [into] doubt. The court finds, from all the testimony and other evidence, as well as the reasonable inferences to be drawn from it, that once again, that [the respondent] was concealing a domestic violence incident with Josue."

The court further found that, despite the many parenting skill services provided to her, the respondent failed to benefit meaningfully from those services. As the court explained, the respondent "is unable to understand that corporal punishment is self-defeating and inappropriate, when managing and disciplining young children. Further, she continues, up to the present time and at nearly every visit, to engage her children about legal matters before this court and their return home to her care." The court noted the respondent's continued engagement with services provided to her, including parenting counseling and the fact that she maintained a strong connection with her children. However, despite being capable of conducting herself appropriately since the time of Cataleya's removal, "[s]he maintained then, as she does now, that her beliefs concerning threats and other forms for punishment if the children do not comply with her direction are appropriate."[23]

[23] While reasonable corporal punishment by a parent is recognized by General Statutes § 53a-18 (a) (1); see *Lovan C.* v. *Dept. of Children & Families*, 86 Conn. App. 290, 296–97, 860 A.2d 1283 (2004); it is clear from the record that corporal punishment was not an appropriate form of discipline given the children's history of exposure to physical abuse and trauma. Megan Duffy-Knight, a social worker for the department, testified that, given

As the court found, the respondent "continues to lack to the present time, any growing insight into her own role in her difficult life. Her inability to truthfully examine her own behavior is a principal reason that [the respondent's] progress toward rehabilitation has only been minimal. Her conduct has been to the detriment of her ability to grow and mature in her ability to deal with her past trauma and current deficits. It renders [her] unable to care safely for herself and prevents her from being able to safely care for her children, despite her claims and protestations to the contrary. The events of March 13, 2017, and the varying ways in which [the respondent] reported them to authorities over time, clearly demonstrates her inability to recount important events accurately."

In challenging those findings, the respondent cites various trial testimony concerning (1) her recent treatment with a provider, (2) her moving away from abusive relationships, and (3) her legal income to support the needs of her children. The respondent also asserts that the court did not take into consideration events after 2017. As previously discussed, our determination on review is only "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]." *In re Shane M.*, supra, 318 Conn. 588.

First, the respondent points to her engagement with Jada Brown, an individual and family therapist with whom the respondent began treatment in February, 2018. The respondent cites to Brown's trial testimony in which Brown stated that the respondent "does very

Gabriel's past exposure to physical abuse by Fernando and the children's constant exposure to domestic violence, using corporal punishment as a form of discipline "could be retraumatizing to them. It's not effective for them because of the history that they've experienced."

well utilizing what we talk about. . . . [S]he's . . . doing very well managing her emotions considering the circumstances." Brown further suggested in her testimony that the respondent did not need psychotropic medication to manage her mental health. The trial court, however, found that, despite the most recent providers giving testimony supportive of the respondent's efforts, "the weight of the testimony of all these supportive providers was undercut by their lack of specific knowledge about the depth of [the respondent's] difficulties as well as the ongoing nature of and the severity of the domestic violence incidents in her life. The lack of proper interaction with [the department] regarding [the respondent's] background hampered their ability to provide the services to [the respondent] that she required. When asked on cross-examination about such matters, each had [admitted the need to] reevaluate their positions about [the respondent's] progress." Indeed, the record reveals that the respondent had failed to disclose to Brown (1) that she had not followed the safety protocol preceding the incident of March 13, 2017, and (2) the nature and extent of her relationship with Josue. Moreover, the respondent's argument is contradicted by her own testimony in which she outright rejected Brown's definition of domestic violence as well as denying that Josue's emotional abuse of her constituted domestic violence.

Second, the respondent's claim that she had moved away from abusive relationships is refuted by the record. As the court found, the respondent's inability to disengage from partners prone to domestic violence was illustrated by her most recent attempt to contact Drashawn in January, 2019, and that she had routinely attempted to reach Drashawn through his mother. The record further reveals that she had continued an intimate relationship with Josue as late as December, 2018, despite testimony from her current boyfriend, Philip

H., that his impression was that Josue and the respondent had separated three months earlier. Thus, the court's finding that the respondent remains "prone to relationships with domestic violence" is well supported by the evidence.

Third, the respondent argues that she has the legal income to support her needs and the needs of the children. The court, however, found that, although Philip could provide financial support, "this is not an established relationship and appears to have much to do with her need for financial support from others. The court finds that it is far too little too late. Her new relationship cannot begin to address [the respondent's] own psychological issues . . . ." Notably, the two had been dating consistently only for approximately five months and see each other only twice per week. Accordingly, the court's belief that this new relationship would not provide the requisite financial stability for the respondent or for her children is well founded.

The respondent's final claim is that the court's determination was based largely on events preceding 2018. This claim is without merit. We first note that "the court in a termination of parental rights hearing should consider *all* potentially relevant evidence, no matter the time to which it relates. . . . In order for the court to make a determination as to the respondent's prospects for rehabilitation, the court was required to obtain a historical perspective of the respondent's child caring and parenting abilities. . . . Because the parent-child relationship is at issue, all relevant facts and family history should be considered by the trial court when deciding whether to terminate the respondent's parental rights. . . . The entire picture of that relationship must be considered whenever the termination of parental rights is under consideration by a judicial authority." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Christopher B.*, 117 Conn. App. 773, 787, 980 A.2d 961 (2009). Additionally, "[i]n the adjudicatory phase, the court *may* rely on events

occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis in original; internal quotation marks omitted.) *In re Jennifer W.*, supra, 75 Conn. App. 495.

In the instant matter, the court highlighted the pattern of domestic violence and inconsistent medication management that the respondent had engaged in over a sustained period of time, notwithstanding the concerted efforts by the department to have her engage in services to address these long-standing problems. Thus, the court was well within "its discretion in considering evidence of the department's involvement with the respondent and [the children] before the [2017 petitions], and in according appropriate weight to that evidence." *In re Christopher B.*, supra, 117 Conn. App. 787–88. Moreover, the court's findings in its memorandum of decision are, in many respects, focused on her continued attempts to contact Drashawn and her continued interactions with Josue throughout 2018. As previously noted, the court credited the testimony of Drashawn's mother that the respondent had contacted her as late as January, 2019, in an attempt to reach Drashawn. Additionally, the court took into account Schroeder's evaluations in March and April, 2018, when it assessed the progress that the respondent had made in her rehabilitation.

Given the respondent's representations concerning her contact with Josue, the court properly considered their arrest for criminal trespass in March, 2018. The evidence before the court demonstrates that the respondent admitted to her counselor in January, 2018, that Josue was abusive but she was no longer in a relationship with Josue and denied knowing about his history of domestic violence until several months into the relationship. Finally, the court considered the respondent's

testimony at trial in March, 2019, during which the respondent claimed that she had sustained a head injury in November, 2017, as a result of a pedestrian hit and run accident that she inexplicably failed to report. The court found the respondent so lacking in credibility that it concluded that the respondent was concealing yet another incident of domestic violence with Josue, and that, therefore, she could not maintain her own stability and safety. While we reiterate that the court was not required to do so for adjudicatory purposes, the respondent's claim that the court failed to consider relevant evidence after 2017 is belied by the record.

In sum, it is clear that the court's memorandum of decision was based on its considerations of the respondent's continued engagement with partners who pose a risk of domestic violence, her inability to be candid and truthful with her providers or the department, and her lack of progress in parenting, domestic violence, and mental health therapies despite years of engaging such services. "Although the respondent encourages us to focus on the positive aspects of [her] behavior and to ignore the negatives, we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." *In re Shane M.*, supra, 318 Conn. 593. Therefore, we conclude that the court reasonably could have determined, on the basis of its factual findings and the reasonable inferences drawn therefrom, that the respondent failed to achieve sufficient rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the children's lives.

The judgments are affirmed.

In this opinion the other judges concurred.

THE OFFICE CONDOMINIUM ASSOCIATION, INC. *v.* MARGUERITE ROMPRE ET AL.
(AC 41458)

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

Syllabus

The plaintiff condominium association sought to foreclose a statutory lien for, inter alia, unpaid common charges on a condominium unit owned by the defendant M, and, thereafter, M filed a counterclaim. The trial court granted M's motion for summary judgment on the foreclosure complaint and M amended her counterclaim to add counts, including vexatious litigation and slander of title. The condominium association filed a motion for summary judgment on the counterclaim, which the trial court granted on all counts except the count for attorney's fees pursuant to statute (§ 47-278), a provision of the Common Interest Ownership Act. Thereafter, M and the defendant B appealed to this court. *Held* that this court lacked subject matter jurisdiction over the appeal and, accordingly, the appeal was dismissed; the appeal was not taken from a final judgment as the trial court left a substantive claim unresolved, the claim for attorney's fees having been based on alleged underlying violations of the Common Interest Ownership Act that required the court to conduct a hearing on the merits to determine whether any such violation occurred during the foreclosure and not simply the amount of attorney's fees to be awarded after a violation has been found, and, therefore, a count remained open following the court's ruling on the condominium association's motion for summary judgment.

Argued October 24, 2019—officially released March 10, 2020

Procedural History

Action to foreclosure a statutory lien for, inter alia, unpaid common charges on a condominium unit owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Hartford, where the named defendant filed a counterclaim; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the named defendant's motion for summary judgment as to the complaint; subsequently, the court, *Moukawsher, J.*, granted in part the plaintiff's

motion for summary judgment as to the amended counterclaim and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Appeal dismissed.*

Taryn D. Martin, with whom, on the brief, was *Robert A. Ziegler*, for the appellants (named defendant et al.).

Keith P. Sturges, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendants Marguerite Rompre and Bertrand Rompre[1] appeal from the grant of summary judgment in favor of the plaintiff, The Office Condominium Association, Inc. On appeal, the defendants raise a number of challenges to the trial court's decision.[2] We do not address these claims, however,

[1] For clarity, we refer to the defendants Marguerite Rompre and Bertrand Rompre by their first names where appropriate throughout this opinion. Although additional defendants were named in the complaint, they are not parties to this appeal.

[2] The defendants claim: (1) "[t]he trial court erred when [it] misapplied the burden of proof in its review of the summary judgment motion and objection and further failed to view the evidence in a light most favorable to the nonmoving party"; (2) "[t]he trial court further erred in granting summary judgment on the first counterclaim wherein it overlooked and misinterpreted evidence, especially as it related to damages, misinterpreted the [Common Interest Ownership Act, General Statutes § 47-200 et seq.] (CIOA), and rendered a decision that was not legally or logically correct"; (3) "[t]he trial court further erred in granting summary judgment on the vexatious litigation counterclaim, (a) in finding there was probable cause when there clearly was not, (b) in relying upon the flawed argument that the bald assertion of reliance upon the advice of counsel is an absolute defense without any evidence to satisfy the elements of the defense, and (c) in granting the plaintiff's motion as it pertained to vexatious litigation, sua sponte, when it had no authority to do so"; (4) "[t]he trial court further erred when grant[ing] summary judgment on the breach of contract counterclaim when the declaration, bylaws and CIOA, that have been legally established to be a contract between the association and unit owner were the elements of a cause of action were established and the duties breached resulting in damages"; (5) "[t]he trial court further erred in granting summary judgment on the breach of implied duty of good faith and fair dealing where it misinterpreted that bad faith can be established through evidence of neglect or refusal to fulfill a duty or contractual obligation, and can further be established by inaction"; (6) "[t]he trial court further erred in granting

because we conclude that the defendants' appeal was not taken from a final judgment. Accordingly, we dismiss the appeal.

The following facts and procedural history are relevant to the disposition of this appeal. On October 22, 2013, the plaintiff commenced the underlying foreclosure action against the defendants[3] for failing to pay various costs associated with ownership of a condominium unit, including common charges, late fees, fines, and interest. The unit at issue is located in Building B of The Office Condominium at 325 Main Street, Farmington. On November 20, 2014, Marguerite filed an answer denying the allegations of the complaint. She also filed a counterclaim alleging violation of the Connecticut Common Interest Ownership Act, General Stat-

summary judgment on the negligence claim, in misconstruing and overlooking the evidence before the court, misinterpreting the statutory authorization to award attorney's fees and costs, and failed to view the evidence in the light most favorable to the nonmoving party"; (7) "[t]he trial court further erred in granting summary judgment on the breach of fiduciary claim, in misreading and overlooking the evidence before the court, misinterpreting the statutory authorization to award attorney's fees and costs, and failed to view the evidence in the light most favorable to the nonmoving party"; (8) "[t]he trial court further erred in granting summary judgment on the slander of title claim, in misconstruing and overlooking the evidence before the court as to the filing lacked good faith, misinterpreting the statutory authorization to award attorney's fees and costs, failing to view the evidence in the light most favorable to the nonmoving party"; (9) "[t]he trial court further erred in granting summary judgment on the claim brought pursuant to General Statutes § 47-278, wherein it misinterpreted the statutory language, which proscribes that other damages are deemed collectable, aside from attorney's fees and costs when a unit owner seeks to enforce a right granted or obligation imposed by the declaration, bylaws and/or CIOA"; (10) "[t]he trial court further abused its discretion in granting the plaintiff permission to file for summary judgment when a trial was scheduled, with the knowledge that it had just recently denied discovery motions filed by the defendants to compel discovery, and barred discovery even further in its standing orders all to the prejudice of the defendants."

[3] The plaintiff filed the underlying foreclosure action against both Marguerite Rompre and Bertrand Rompre. Bertrand, however, was not an owner of the property. Bertrand was subsequently removed by the plaintiff. The parties were asked by this court to address the issue of Bertrand's standing at oral argument. In light of our dismissal of the entire appeal, we do not address this issue.

utes § 47-200 et seq., breach of contract, breach of the implied duty of good faith and fair dealing, negligence, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110 et seq. She also sought appointment of a receiver. On June 9, 2015, Marguerite filed a motion for summary judgment as to the foreclosure complaint in which she argued that the plaintiff failed to comply with General Statutes § 47-258 (m) (1)[4] and (2)[5] and, therefore, could not foreclose the property. On July 15, 2015, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted Marguerite's summary judgment motion.

Following the granting of the motion, on September 22, 2015, Marguerite filed an amended counterclaim

[4] General Statutes § 47-258 (m) (1) provides: "An association may not commence an action to foreclose a lien on a unit under this section unless: (A) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association pursuant to subsection (a) of section 47-257; (B) the association has made a demand for payment in a record and has simultaneously provided a copy of such record to the holder of a security interest described in subdivision (2) of subsection (b) of this section; and (C) the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit."

[5] General Statutes § 47-258 (m) (2) provides: "Not less than sixty days prior to commencing an action to foreclose a lien on a unit under this section, the association shall provide a written notice by first class mail to the holders of all security interests described in subdivision (2) of subsection (b) of this section, which shall set forth the following: (A) The amount of unpaid common expense assessments owed to the association as of the date of the notice; (B) the amount of any attorney's fees and costs incurred by the association in the enforcement of its lien as of the date of the notice; (C) a statement of the association's intention to foreclose its lien if the amounts set forth in subparagraphs (A) and (B) of this subdivision are not paid to the association not later than sixty days after the date on which the notice is provided; (D) the association's contact information, including, but not limited to, (i) the name of the individual acting on behalf of the association with respect to the matter, and (ii) the association's mailing address, telephone number and electronic mail address, if any; and (E) instructions concerning the acceptable means of making payment on the amounts owing to the association as set forth in subparagraphs (A) and (B) of this subdivision. Any notice required to be given by the association under this subsection shall be effective when sent."

and alleged three additional counts.[6] These additional counts included vexatious litigation, breach of fiduciary duty and slander of title. On December 4, 2015, Marguerite filed a motion to cite Bertrand in as a counterclaim plaintiff to prosecute the counterclaim. On March 8, 2016, the court granted the motion to cite in Bertrand.

On January 2, 2018, the plaintiff filed a motion for summary judgment as to the counterclaim filed by Marguerite. On February 7, 2018, the court, *Moukawsher*, *J.*, granted the motion in favor of the plaintiff on all counts except the count for attorney's fees pursuant to General Statutes § 47-278 (a), a provision of the Common Interest Ownership Act.[7] In addressing that count, the court concluded that the statute "does provide [that] 'the court may' award attorney's fees as part of winning a claim to 'enforce a right granted or an obligation imposed' under [the Common Interest Ownership Act]. Thus, any fee award is for the court to decide, not a jury. And if the language of the statute isn't clear enough, in 2002 the Appellate Court affirmed in *Original Grasso Construction Co.* v. *Shepherd*, [70 Conn. App. 404, 419, 799 A.2d 1083, cert. denied, 261 Conn. 932, 806 A.2d 1065 (2002)] that the question of whether to award statutory attorney's fees is a question of law for the court to decide.

"So if the [plaintiff] foreclosed in violation of the statute, why can't its victim recover the fees it spent to defend against it? Must you prove bad faith? The statute doesn't say anything of the kind. Were the violations somehow technical? Would that matter? The statute doesn't say anything on that score either. It merely

[6] On that same day, September 22, 2015, and subsequently on March 18, 2016, the defendants filed additional claims against other parties associated with the plaintiff. These claims and parties are not at issue in this appeal.

[7] General Statutes § 47-278 (a) provides: "A declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs."

says 'the court *may* award reasonable attorney's fees and costs.' And must those reasonable attorney's fees only relate to the counterclaim as opposed to the underlying claim?

"The counterclaim *is* about beginning the underlying [foreclosure] in violation of the statute, so either way the violations are pertinent. In any case, the question is for the court's discretion and the court finds enough dispute over the facts and how to apply the law to them to merit a hearing on whether to exercise its discretion to award fees and, if so, the amount of any fees. At this hearing, the parties may present appropriate testimony, written evidence and arguments." (Emphasis in original; footnote omitted.) As the court noted, a claim under the Common Interest Ownership Act requires that a violation of the act occurred during a foreclosure. The court determined that there was sufficient disagreement about the facts to require a subsequent hearing to establish whether a violation of the act had occurred. Thus, this count under the Common Interest Ownership Act remained open following the court's ruling on the plaintiff's motion for summary judgment. Accordingly, there was no final judgment. See Practice Book § 61-2 (providing that judgment is final when judgment has been rendered on entire counterclaim).

Prior to this appeal, Marguerite filed a motion for written determination of finality for the purposes of appeal under Practice Book § 61-4 (a),[8] demonstrating

[8] Practice Book § 61-4 (a) provides in relevant part: "This section applies to a trial court judgment that disposes of at least one cause of action where the judgment does not dispose of either of the following: (1) an entire complaint, counterclaim, or cross complaint, or (2) all the causes of action in a complaint, counterclaim or cross complaint brought by or against a party. . . . Such a judgment shall be considered an appealable final judgment only if the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs. . . ." (Emphasis in original.)

an awareness that a final judgment had not been rendered by the trial court. The court, *Moukawsher*, *J.*, granted the motion. Marguerite,[9] however, did not file a motion seeking permission from the Chief Judge of this court to file an appeal under Practice Book § 61-4 (b).[10] The defendants' appeal to this court followed. Before oral argument, this court notified the parties "to be prepared to address at oral argument whether the appeal should be dismissed for lack of a final judgment on the ground that the trial court's judgment did not dispose of the entire counterclaim."

We begin by setting forth the applicable standard of review and legal principles that guide our review. "When judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment. . . . As a general rule, however, a judgment that disposes of only a part of a complaint is not final, unless it disposes of all of the causes of action against the appellant." (Citation omitted; internal quotation marks omitted.) *Meribear Productions*, *Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018). "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review is plenary. . . . Neither the parties nor the trial court . . . can confer jurisdiction upon [an appellate] court. . . . The right of appeal is accorded only if the conditions fixed by statute and the rules of court for taking and prose-

[9] Only Marguerite filed the Practice Book § 61-4 (a) motion.

[10] Practice Book § 61-4 (b) provides in relevant part: "Within twenty days after notice of such a determination in favor of appealability has been sent to counsel, any party intending to appeal shall file a motion for permission to file an appeal with the clerk of the court having appellate jurisdiction. The motion shall state the reasons why an appeal should be permitted. . . . The motion and any opposition papers shall be referred to the chief justice or chief judge to rule on the motion. . . ."

cuting the appeal are met. . . . It is equally axiomatic that, except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review . . . appellate jurisdiction is limited to final judgments of the trial court." (Citation omitted; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 84, 191 A.3d 983 (2018); see also General Statutes § 52-263.

On appeal, the defendants argue that all that is left to be resolved in this case is the amount of attorney's fees to be awarded under the Common Interest Ownership Act. Thus, they argue that, pursuant to *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988), their appeal is from a final judgment. This case, however, does not fall within the parameters of *Paranteau* because the Common Interest Ownership Act count remains unresolved. It is well settled that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 85. This bright line rule applies even to cases " 'in which the application of the bright line [rule] would mean that an attorney's fees award that would otherwise be considered integral to the judgment on the merits would nevertheless be severable from that judgment for purposes of finality,' "; id., 87; such as in foreclosure actions. See also *Paranteau* v. *DeVita*, supra, 208 Conn. 522–23.

Our Supreme Court in *Hylton* v. *Gunter*, 313 Conn. 472, 97 A.3d 970 (2014), "conclude[d] that an appealable final judgment existed when all that remained for the trial court to do was determine the amount of the attorney's fees comprising the common-law punitive damages that it previously had awarded." Id., 487. Similarly, our Supreme Court in *Ledyard* determined that

there was an appealable final judgment when "[a]ll that remained to be done after the trial court's decision was for the plaintiff to file a motion for attorney's fees, which it did, and for the court to conduct a hearing on that motion to determine the amount of those fees . . . ." *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 89.

Here, unlike in *Hylton* or *Ledyard*, more than a determination of the amount of attorney's fees remained to be done. The court here left a substantive claim unresolved. As noted previously in this opinion, the court explained that the claim for attorney's fees was based on alleged underlying violations of the Common Interest Ownership Act. The court determined that there were "enough disputes over the facts and how to apply the law to them to merit a hearing on *whether to exercise its discretion to award fees* and, if so, the amount of any fees." (Emphasis added.) Therefore, the court still must determine whether a violation of the Common Interest Ownership Act occurred during the foreclosure and not simply the amount of attorney's fees to be awarded after a violation has been found. This requires, as the court concluded, a subsequent hearing on the merits. Thus, contrary to the defendants' argument, this case does not fall within the rule announced in *Paranteau* and its progeny. Accordingly, this court lacks subject matter jurisdiction over the appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

CARLTON JOLLEY *v.* CAPTAIN VINTON ET AL. (AC 41989)

Lavine, Devlin and Bear, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendant, a former state correctional institution administrative captain, claiming violations of his federal constitutional rights. The plaintiff alleged that the defendant retaliated against him for providing legal advice to his fellow inmates by ordering the search of the plaintiff's cell, the seizure of items from his cell, and the removal of the plaintiff from his job at the prison's gym. Following a trial to the court, the court rendered judgment in favor of the defendant, finding that the plaintiff failed to prove that he was engaged in an activity protected by the first amendment, that he was denied access to the courts in a specific, pending, personal action, and that there was any causal connection between his alleged protected conduct and the defendant's alleged retaliatory acts. From that judgment, the plaintiff appealed to this court. *Held* that the trial court properly rendered judgment in favor of the defendant, as that court's finding that the plaintiff had failed to prove a causal connection between his conduct and the defendant's alleged retaliation was not clearly erroneous: the court concluded that there was no evidence of a retaliatory motive on the basis of the defendant's testimony, which the court expressly found was credible, and the court noted that the only evidence to establish a causal relationship between the discharge of the plaintiff from his gym job and any claimed protected activity was that of temporal proximity, which the court found insufficient to establish a causal connection; ample evidence supported the court's finding that the defendant's actions that the plaintiff alleged were retaliatory were premised solely on legitimate motives, and, although the plaintiff pointed to evidence that he asserted supported his claim of retaliation, the mere existence of evidence to support an alternative conclusion is not sufficient to reverse a trial court's findings of fact.

Submitted on briefs December 11, 2019—officially released March 10, 2020

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this

court, *Alvord*, *Keller*, and *Beach*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings; thereafter, the plaintiff filed an amended complaint and the case was tried to the court, *Noble*, *J.*; judgment in favor of the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Carlton Jolley, self-represented, the appellant (plaintiff), filed a brief.

Janelle R. Medeiros, assistant attorney general, and *William Tong*, attorney general, filed a brief for the appellee (named defendant).

Opinion

DEVLIN, J. The self-represented plaintiff, Carlton Jolley, appeals from the judgment rendered in favor of the defendant, Captain Brian Vinton, a former administrative captain at the Enfield Correctional Institution (Enfield), in this action brought pursuant to 42 U.S.C. § 1983,[1] alleging that the defendant retaliated against the plaintiff for providing legal advice to his fellow inmates while incarcerated at Enfield. Because we conclude that the trial court's finding that the plaintiff failed to prove a causal connection between his conduct and the alleged retaliation was not clearly erroneous, we affirm the judgment of the trial court.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant. The plaintiff alleged that, at various times

[1] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

while incarcerated, he provided legal assistance to his fellow inmates. He further alleged that he primarily assisted with postconviction motions and petitions for writs of habeas corpus. In 2011, the defendant was an administrative captain at Enfield, where the plaintiff was then incarcerated. In that role, the defendant was responsible for investigating gang activity and security issues that threatened the safety of inmates or staff.

At some point prior to March 28, 2011, the defendant became aware that the plaintiff was providing legal assistance and had a reputation as a "jailhouse lawyer." Concerned that the plaintiff might have been using his legal work to smuggle contraband, the defendant alerted the warden to the plaintiff's activities and, together, they determined that the plaintiff's cell should be searched. On March 28, 2011, correction officers carried out a search of the plaintiff's cell and confiscated forty-one free postage legal mail envelopes, sixty-two plain white envelopes, seven homemade cassette tapes, four reams of typing paper, and twenty-six manila envelopes. A correction officer determined that all of the items seized were contraband and the plaintiff pleaded guilty to possessing contraband. Around this time, five large legal storage boxes were also seized from the plaintiff's cell. Inmates were limited to only two boxes in their cells. The plaintiff was instructed to examine the boxes to determine whether any of the contents pertained to active cases. The plaintiff was permitted to retain any of the contents regarding active cases with the caveat that if the contents exceeded two boxes, the excess would be stored elsewhere. All of the boxes not pertaining to active cases would be sent to the plaintiff's home address. Ultimately, three of the boxes were sent to the plaintiff's home.

In the spring of 2011, the plaintiff was working in the recreational office of Enfield's gym. Later that year, the defendant learned that the plaintiff was working

multiple shifts per day in that position, which was unusual. The defendant was concerned that the plaintiff may have been using the multiple shifts either to have illicit contact with other inmates or to establish inappropriate relationships with the staff. Subsequently, on December 16, 2011, the plaintiff was removed from his job, as were three other inmates due to the length of time they had held those positions. The plaintiff was allowed to apply for another job after his removal and was later assigned to work as a janitor.

On July 29, 2011, the self-represented plaintiff commenced the present action against the defendant and Attorney General George Jepsen. The plaintiff sought monetary damages pursuant to § 1983 for alleged violations of his rights under the first, eighth, and fourteenth amendments to the United States constitution. The trial court initially dismissed this action on grounds of statutory and sovereign immunity. See *Jolley* v. *Vinton*, 171 Conn. App. 567, 567, 157 A.3d 755 (2017). On appeal, this court affirmed the dismissal in regard to Attorney General Jepsen but reversed the dismissal as to the defendant. Id., 567–68. After the case was remanded, the plaintiff filed an amended complaint on December 7, 2017, clarifying his claims against the defendant. In the amended complaint, the plaintiff alleged that he suffered retaliation for the exercise of his first amendment rights. Specifically, he claimed that the defendant ordered (1) the search of the plaintiff's cell, (2) the seizure of numerous items from the plaintiff's cell, and (3) the removal of the plaintiff from his job, in retaliation for the plaintiff's provision of legal advice to fellow inmates.

The trial court, *Noble*, *J.*, conducted a two day trial on July 10 and July 11, 2018. The court heard testimony from both the plaintiff and the defendant. In particular, the defendant testified that the alleged retaliatory actions were prompted by concerns for safety and

security. According to the defendant, when inmates assist one another in legal matters, there is a potential for bribery or extortion to occur by using the personal information gathered while providing legal advice. In addition, the defendant testified that inmates often use legal work to disguise contraband. Moreover, the defendant testified that the items seized from the plaintiff's cell each posed potential dangers, as they could be used for bartering, concealing weapons and other contraband, or—in the case of the reams of paper—even used as a weapon. Likewise, in regard to the legal storage boxes, the defendant testified that those boxes pose a fire hazard and may be used to conceal contraband; hence, the inmates were prohibited from having more than two boxes in their cells. Lastly, the defendant recalled that he had the plaintiff removed from his job in accordance with an institutional policy of not allowing inmates to work in the same job for a long period of time. This policy, according to the defendant, arose from concerns that extended periods of work enhanced the risk that the supervising staff would become too comfortable and complacent with the inmates, which, in turn, could result in bribery, threats, or the smuggling of contraband. Further, the defendant testified that the plaintiff's removal from his job was not a disciplinary measure, and, therefore, the plaintiff was allowed to seek another job as soon as he was removed.

On July 11, 2018, the court issued its decision from the bench, rendering judgment in favor of the defendant. Specifically, the court found that the plaintiff had failed to prove that (1) he was engaged in an activity protected by the first amendment, (2) he was denied access to the courts in a specific, pending, personal action, and (3) there was any causal connection between his alleged protected conduct and the alleged retaliatory acts. This appeal followed.

Before turning to the claims on appeal, we set forth the applicable law governing first amendment retaliation claims and our scope and standard of review. "A first amendment retaliation claim under § 1983 requires that a prisoner establish three elements: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." (Internal quotation marks omitted.) *Townsend* v. *Hardy*, 173 Conn. App. 779, 785–86, 164 A.3d 824, cert. denied, 327 Conn. 909, 170 A.3d 679 (2017). Failing to establish any of the three elements is fatal to a first amendment retaliation claim. See, e.g., id., 787 (affirming summary judgment in favor of defendant where plaintiff failed to prove second element); *Higginbotham* v. *Sylvester*, 741 Fed. Appx. 28, 31–32 (2d Cir. 2018) (affirming summary judgment in favor of defendant where plaintiff failed to prove third element); *Otte* v. *Brusinski*, 440 Fed. Appx. 5, 6–7 (2d Cir. 2011) (affirming summary judgment in favor of defendant where plaintiff proved neither first nor third element). We conclude that the trial court properly determined that the plaintiff failed to establish causation and, thus, the plaintiff's claim must fail.

"To establish causation, a plaintiff must show that the protected speech was a substantial motivating factor in the adverse . . . action . . . . A plaintiff may establish causation indirectly by showing his speech was closely followed in time by the adverse . . . decision." (Citations omitted; internal quotation marks omitted.) *Cioffi* v. *Averill Park Central School District Board of Education*, 444 F.3d 158, 167–68 (2d Cir.), cert. denied, 549 U.S. 953, 127 S. Ct. 382, 168 L. Ed. 2d 270 (2006). The United States Court of Appeals for the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship,"

but nonetheless previously has opined that temporal proximity alone may be insufficient to establish causation. *Gorman-Bakos* v. *Cornell Cooperative Extension Assn. of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001); *Colon* v. *Coughlin*, 58 F.3d 865, 872–73 (2d Cir. 1995) (commenting that, if only evidence of causal connection were temporal proximity, "we might be inclined to affirm the grant of summary judgment based on the weakness of [the plaintiff's] case"). Even where a plaintiff establishes a retaliatory motive, a defendant may still prevail "if he can show dual motivation, i.e., that even without the improper motivation the alleged retaliatory action would have occurred." *Scott* v. *Coughlin*, 344 F.3d 282, 287–88 (2d Cir. 2003).

A trial court's factual findings as to the essential elements of a first amendment retaliation claim are subject to the clearly erroneous standard of review. See *Jackson* v. *Monin*, 763 Fed. Appx. 116, 117 (2d Cir. 2019). "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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 183 Conn. App. 200, 210, 192 A.3d 439, cert. granted on other grounds, 330 Conn. 920, 193 A.3d 1214 (2018). Moreover, "the mere existence in the record of evidence that would support a *different* conclusion, without more, is not sufficient to undermine the finding of the trial court." (Emphasis in original.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

In deciding that the plaintiff had not met his burden of establishing a causal connection, the court made the

following factual findings. The court expressly found the defendant's testimony credible. On the basis of that testimony, the court concluded that there was no evidence of a retaliatory motive and, further, that "there was no evidence of even a dual motivation; that is, there was no better or weightier evidence that the actions, any of the actions undertaken by [the defendant] were for any reason other than legitimate, penological interest related to prison security and the orderly and safe administration of the prison." Furthermore, the court noted that "only evidence that would demonstrate a causal relationship between the discharge from the gym job and any claimed protected activity was that of temporal proximity," which the court found was insufficient to establish a causal connection.

After a careful review of the record before the trial court, we conclude that there was ample evidence to support the court's finding that the several retaliatory actions the plaintiff alleged—namely, the search of his cell; the seizure of legal, writing, and mailing materials from his cell; and the removal from his job—were premised solely on legitimate motives. Although the plaintiff does point to evidence in his brief that he asserts supports his claim of retaliation and, in particular, the temporal proximity between his actions and the alleged retaliation, the mere existence of evidence to support an alternative conclusion is not sufficient to reverse a trial court's findings of fact. See *In re Jayce O.*, supra, 323 Conn. 716. The court's finding that there was no retaliatory motive or causal connection to support the plaintiff's first amendment claim of retaliation was not clearly erroneous. Therefore, the plaintiff failed to establish an essential element of his claim and the trial court properly rendered judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JERMAIN V. RICHARDS (AC 43140)

Keller, Prescott and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crime of murder, the defendant appealed. The victim, who had been the defendant's long-term girlfriend, had last been seen in the company of the defendant by the defendant's mother and, shortly thereafter, the victim's cell phone stopped making and receiving any form of communication. One month after the victim's disappearance, two of her limbs, which had been severed from her body using a sharp instrument, were discovered approximately 1.5 miles from the defendant's residence, although her body has never been recovered. Prior to the victim's disappearance, the defendant, a licensed practical nurse, had stated to an acquaintance, J, that, as a nurse, he knew how to get rid of someone. On appeal, the defendant claimed that there was insufficient evidence to support a murder conviction, specifically, that the state failed to prove the manner, means, place, cause, and time of death. He further claimed that the trial court erred in not giving a special credibility instruction with respect to the testimony of J, a cooperating witness, and that his right to due process was violated by his retrial because the state had twice failed to meet its burden of proof. *Held*:

1. The evidence presented at trial was sufficient to support the defendant's conviction of murder: the jury reasonably could have inferred that the defendant intended to cause the victim's death and did in fact cause her death as there was evidence presented that the defendant was controlling and domineering toward the victim, he had choked the victim one month before her disappearance, the victim had expressed a desire to end her relationship with him, the defendant made a statement that, as a nurse he knew how to get rid of someone, the victim had last been seen alive at the defendant's residence, two of the victim's severed limbs were discovered approximately 1.5 miles from the defendant's residence, some of the victim's personal belongings were discovered in a trash bag at the defendant's residence, the bathtub, sink, and other plumbing materials had been removed from the defendant's other residence, and the interior of the defendant's car had been detailed shortly after the victim's disappearance.
2. The trial court did not commit plain error in failing to give a special credibility instruction with respect to J's testimony; although there are three categories of witnesses that require such an instruction, as set forth by our Supreme Court in *State* v. *Diaz* (302 Conn. 93), J did not fit into any of those categories, and the court gave both a general credibility instruction as well as a credibility instruction with regard to J, who was an individual with a criminal record on probation at the time of his testimony.

3. The defendant could not prevail on his claim that the state's decision to prosecute him for a third time after his two previous trials had ended in mistrials violated his right to due process; a mistrial that has been declared following a hung jury does not terminate original jeopardy and, therefore, a subsequent trial does not violate the prohibition against double jeopardy.

Argued November 19, 2019—officially released March 10, 2020

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed*.

Norman A. Pattis, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Joseph T. Corradino*, senior assistant state's attorney, and *Ann F. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Jermain V. Richards, appeals from the judgment of conviction, rendered after a third jury trial, of murder in violation of General Statutes § 53a-54a (1).[1] On appeal, the defendant claims that (1) there was insufficient evidence to support a conviction and (2) the court erred in not giving a special credibility instruction applicable to the testimony of a cooperating witness.[2] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In April, 2013, the victim was a sophomore at

[1] The first two trials, in 2015 and 2016, ended in hung juries.

[2] The defendant also claims that his third trial violated his right to due process under our state's constitution and the federal constitution because the state had twice previously failed to meet its burden of proof. More specifically, the defendant argues that successive prosecutions ought to be barred when the state fails to meet its burden because jeopardy attaches once a jury is sworn in and there is no manifest necessity to declare a mistrial when a jury cannot reach a unanimous verdict. The defendant's

Eastern Connecticut State University (ECSU). At that time, she had been dating the defendant, who was ten years her senior, since she was in high school. The victim often stayed with her grandmother, especially on the weekends, at her grandmother's house in West Haven. At the time of the victim's disappearance, the defendant resided in the basement area of his mother's house at 115 Beardsley Park Terrace in Bridgeport; however, he also owned a two-family housing unit at 1719 Hubbell Avenue in Ansonia. The defendant rented out the second floor unit of the Ansonia property.

In the days following April 20, 2013, after the victim had failed to respond to various phone calls and text messages and after she had failed to attend her classes, the ECSU Department of Public Safety commenced a missing person investigation with the assistance of the Connecticut State Police. Over the course of that investigation and in order to ascertain the victim's whereabouts, approximately forty-five investigators conducted 400 interviews, executed nineteen search

position essentially asks this court to determine how many times the state can be allowed to prosecute the defendant for the same crime, following a hung jury, before his rights have been violated. It is well established by our Supreme Court and the United States Supreme Court that a mistrial following a hung jury does not terminate original jeopardy; thus, a subsequent trial does not violate the Connecticut or federal constitutional prohibition against double jeopardy. See *Richardson* v. *United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) ("[A] trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [the defendant] was subjected. . . . [J]eopardy does not terminate when the jury is discharged because it is unable to agree."); *State* v. *James*, 247 Conn. 662, 673–74, 725 A.2d 316 (1999) ("It is axiomatic that a mistrial required by the manifest necessities of the case does not terminate jeopardy. . . . The jury's inability to reach a unanimous verdict on a count may compel the trial court to declare a mistrial . . . ." (Citations omitted.)). In the present case, the defendant was charged three times with murder. At the completion of each of the first two trials, the jury was unable to give a unanimous verdict, prompting the court to declare a mistrial. We decline to fashion a rule that identifies the specific number of times a defendant can be charged, following the failure of the jury to reach a unanimous verdict, before successive prosecutions would become unconstitutional. Therefore, in accordance with federal and Connecticut jurisprudence, we conclude that, in the present case, the state's third attempt to prosecute the defendant was not a violation of the federal or the Connecticut constitutions. Accordingly, this claim fails.

warrants, and searched more than twenty-five different locations. The defendant became a person of interest on or about April 26, 2013, when the police learned that he was the last person to have been with the victim. Police suspicion of the defendant's involvement in the victim's disappearance heightened upon learning more about the nature of the relationship between the victim and the defendant, including events that transpired in the months leading up to her disappearance. Those events tended to show that the defendant was seeking to control the victim to the extent that, at times, he stalked her when she sought to go out without informing him of her whereabouts and, over the months leading up to the victim's disappearance, he had become increasingly violent toward her.

Specifically, prior to her disappearance, and throughout the course of her relationship with the defendant, the victim was constantly on her phone texting or speaking with the defendant, even while she was spending time with her family and friends. The victim's sister, Chaharrez Landell,[3] described the defendant as possessive, obsessive, controlling, and manipulative because he always had to know where she was, with whom, and what she was doing. If, and when, the defendant was unable to connect with the victim, he would contact her friends, Chaharrez, and her brother-in-law, Dumar Landell, to ascertain her activities and location. Once, the defendant went so far as to call Dumar, after speaking to Chaharrez, to confirm the veracity of Chaharrez' answers with regard to the victim's whereabouts, and he explained to Dumar that "[w]e can't trust these bitches."

Additionally, in the year prior to her disappearance, there were three separate instances in which the defendant either showed up uninvited to the location where

[3] Because the victim's sister and the sister's husband, Dumar Landell, both share the same last name, both will be referred to by their first name throughout this opinion.

the victim was or the defendant was spotted waiting for the victim, without prior communication or permission. More specifically, one night when the victim, Chaharrez, and Dumar were coming back from a club in Bridgeport and were heading for her grandmother's home in West Haven, they discovered the defendant parked on a hill near the home. Prior to their arrival, the victim had ignored phone calls from the defendant or directed them to her voicemail. When the victim saw the defendant's car, she instructed Dumar to keep driving while she ducked down in her seat to avoid being seen. All three of them waited around the corner for a few hours until they saw that the defendant was no longer in the area.

On another occasion, the victim, Chaharrez, and Dumar, again, were returning from a club in Bridgeport when they stopped at a restaurant to use the restroom. When the victim came out of the restaurant, she spotted the defendant in the parking lot and immediately went to talk with him for a few minutes before returning to Chaharrez and Dumar in order to go back to ECSU. Prior to that interaction, the defendant was not invited by the victim to join her, nor had the victim shared with the defendant where she intended to be. On another night, when the victim was staying with Chaharrez and Dumar in their Waterbury apartment, the fire alarm went off, requiring immediate evacuation of the building. Once outside, Dumar, Chaharrez, and the victim were surprised to discover that the defendant was also outside, without having previously made his presence known to the victim.

In March, 2013, approximately one month before the victim's disappearance, she called Chaharrez asking for a ride from a house in Norwalk, where she was staying with the defendant. Chaharrez stated that the victim was frantic, scared, and spoke in a whisper. The victim told Chaharrez that she and the defendant had gotten into an argument during which the defendant choked

her. The victim said that the defendant had put her in a headlock, thrown her on the bed, and tried to suffocate her. Additionally, the victim told Chaharrez that she could not breathe and she implored her to come and pick her up immediately. Chaharrez further testified that, once she and her husband arrived, the victim snuck out of the house while the defendant was asleep, got her belongings out of the trunk of the defendant's car, and got into Chaharrez' car where she presented as upset, crying, and relieved to have been picked up. Once in the car, the victim said that she did not want to be in a relationship with the defendant anymore, but did not know how to break up with him. Chaharrez stated that this incident was not reported to the police and that, even though the victim lived with her for the remainder of the school break, she saw the victim in the company of the defendant just three days after this incident and learned that the defendant had purchased new clothes for the victim and groceries to bring back to school.

At a point in time close to the choking incident, the defendant purchased a car from a former high school acquaintance, Jevene Wright. Upon returning to pick up license plates for his new car, the defendant confided in Wright that the victim had cheated on him and broken up with him using Facebook.[4] The defendant also told Wright that the victim "doesn't know who she's messing with, you know, I'm a nurse and I'll get rid of her." At a later date, shortly before the victim's disappearance, the defendant and Wright spoke over the phone, during which the defendant admitted that he had choked the victim because he was "upset" at the time. Later, the victim told Chaharrez and Dumar that she was looking to end her relationship with the defendant, but did not know how to do it.

[4] "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.

On April 20, 2013, the victim was scheduled to attend a luncheon with one of the ECSU organizations for which she was the secretary. The victim, however, informed friends and colleagues that she would be unable to attend because she needed to go home to her grandmother. Video surveillance footage revealed that the victim exited her campus residence hall at or about 12:25 p.m. on April 20, 2013, and, shortly thereafter, entered the defendant's car to leave campus. The defendant's mother, Leonie McQueen, said she encountered the victim, in the company of the defendant, briefly at her Bridgeport residence at or about 2:15 p.m. on April, 20, 2013, while she was getting ready for work. The victim was never again seen alive.

After the victim was reported missing and the search for her had commenced the week following April 20, 2013, police made several discoveries that culminated in the defendant's arrest and subsequent prosecution. First, the police learned that the defendant failed to report for his shift at work on Sunday, April 21, 2013, from 3 to 11 p.m., but made it to his second shift, that same day, beginning at 11 p.m. Second, the state police's K9 unit discovered human remains, in the form of an arm and a leg, approximately 1.5 miles from the defendant's Bridgeport residence. The DNA of both limbs matched the DNA from the victim's toothbrush, which was obtained from her ECSU residence. Third, the defendant was a licensed practical nurse, and the two medical examiners determined that the limbs were removed postmortem, by the use of a sharp instrument.[5] Fourth, the defendant's 2009 Nissan was searched and seized on April 26, 2013, and, when examined, the interior of the car appeared to the police to have been

Kukucka, 181 Conn. App. 329, 334 n.3, 186 A.3d 1171, cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

[5] There was evidence that the defendant, as a licensed practical nurse, had taken courses in anatomy and biology as part of his training. Although this educational information does not bear directly on his knowledge of how to sever body parts, it is some indication that his knowledge of human anatomy was enhanced by his specialized education.

recently detailed. Fifth, cellular site location information analysis revealed that the victim's phone last connected to a tower closest to the defendant's Bridgeport residence at or around 4:02 p.m. on April 20, 2013, reasonably creating the inference that either the phone had been turned off or discarded at around that time on the same date as her disappearance. Sixth, the police searched both the defendant's Bridgeport and Ansonia residences. At the Ansonia residence, in the unit belonging to the defendant, the police discovered that the bathroom was under construction and the sink, bathtub, and other plumbing materials were missing. Lastly, in the Bridgeport residence, the police found the victim's birth control prescription and her gold necklace in a black garbage bag in the basement next to the washer and dryer.[6]

The defendant was arrested on May 18, 2013, for murder. He entered a plea of not guilty and subsequently was tried by a jury. The first two trials resulted in hung juries; thus, the court declared mistrials in each trial. The state's attorney's office elected to prosecute the defendant a third time and, at the conclusion of the jury trial, the defendant was found guilty. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support a murder conviction.[7] More specifically, he argues that the state failed to prove the manner,

[6] We note with concern that, in its brief, the state made the following assertion: "[n]o blood or DNA was found in either location despite the fact that, at least with respect to the Bridgeport residence, the victim had been a regular visitor." This assertion is misleading based upon our careful review of the trial transcript. The detective and the crime scene technician who processed the scene testified that they searched for evidence of blood and found none. They did not testify that they searched for or tested other biological samples and no lab reports were admitted into evidence that suggested any items in the residence were tested for the presence of human DNA.

[7] The defendant moved for a judgment of acquittal at the close of the state's evidence, arguing that no reasonable juror could convict him with the evidence presented. The court, however, denied the motion from the

means, place, cause, and time of death and, as a result, the jury convicted him on the basis of speculation rather than by proof beyond a reasonable doubt. Additionally, the defendant contends that the inferences apparently drawn by the jury were unreasonable because the state failed to prove any criminal acts committed by the defendant or that he intended to commit such acts. In response, the state argues that the cumulative effect of all the evidence and inferences reasonably to be drawn from it established beyond a reasonable doubt that the defendant intended to cause the death of the victim and that he did, in fact, cause the victim's death.

We begin our analysis by setting forth the well settled standard of review applicable to a sufficiency of the evidence claim, wherein we apply a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

bench. The defendant did not renew his motion at the close of all the evidence.

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Leniart*, 166 Conn. App. 142, 169–70, 140 A.3d 1026 (2016), rev'd in part on other grounds, 333 Conn. 88, 93, 215 A.3d 1104 (2019).

Additionally, given the nature of this appeal, it is important to underscore that there is a fine line between the making of reasonable inferences and engaging in speculation—the jury is allowed only to do the former. See, e.g., *Curran* v. *Kroll*, 303 Conn. 845, 857, 37 A.3d 700 (2012). "However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the

evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.) Id.

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 166 Conn. App. 170.

Section 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ." Thus, in order for the defendant to have been found guilty of murder, the jury needed to have concluded beyond a reasonable doubt that (1) he had the intent to cause the death of the victim and (2) that he did, in fact, cause her death. General Statutes § 53a-54a (a). We address each element in turn.

A

"The specific intent to kill is an essential element of the crime of murder. . . . To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Intent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . This does not require that each subordinate

conclusion established by or inferred from evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable. . . . An intent to cause death may be inferred from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and *the events leading to and immediately following the death*." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *White*, 127 Conn. App. 846, 851–52, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). "Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct. . . . In addition, intent to kill may be inferred from evidence that the defendant had a motive to kill." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 67, 43 A.3d 629 (2012).

Moreover, a jury is permitted "to posit a chain of inferences, each link of which may depend for its validity on the validity of the prior link in the chain. That is essentially what circumstantial evidence means, however, and it is what our case law generally permits." *State* v. *Sivri*, 231 Conn. 115, 130–31, 646 A.2d 169 (1994).

We conduct our analysis in a manner similar to that of our Supreme Court in *Otto*, by recognizing the defendant's contention that there are pieces of evidence absent from this case that have existed in other cases with regard to supporting an inference of an intent to kill. Just as in *Otto*, in the case at hand, "there was no evidence of the cause and manner of death or the specific type of wound inflicted on the victim" that led to her death. *State* v. *Otto*, supra, 305 Conn. 67. Nevertheless, we conclude that there was sufficient evidence presented to the jury that the defendant had the specific intent necessary to support a conviction of murder.

The jury heard testimony regarding domestic violence from Duane de Four, a consultant who does violence prevention and education work, focusing on dating violence, sexual assault, harassment, and stalking. Without making specific references to the present case, he testified that the elements involved in dating violence include the recurring tendencies of an abusive partner. According to de Four, dating violence usually involves one person "trying to establish power and control [and] dominance over another person in that relationship . . . ." When asked to elaborate, de Four testified that "somebody who is trying to establish power and control over their partner might do things like try and control who they see, who they spend time with . . . and that's often present[ed] in the form of jealousy. . . . [S]talking is often a part of that as well. Stalking . . . is a very common part of abusive relationships where the stalking is used to create fear in the victim. So the perpetrator of that violence is . . . doing whatever, whether that's some sort of online stalking or following the person where they live, where they work, that sort of thing to make them feel feared and, you know, that this other person has some control over me. You know, then, of course, physical violence . . . ."

He explained in depth the common stages in which dating violence occurs. He described the "cycle of abuse"—where the relationship may alternate between honeymoon phases and incidents of abuse, with the abuse increasing in severity, perhaps starting with verbal attacks and attitudes of disparagement but, in time, intensifying to include physical violence. He indicated that, in an abusive relationship, violence starts off as something like name-calling and then spirals into something that "gets more and more violent, whether that's physically or emotionally . . . it might become longer lasting or more intense" and then returns to the honeymoon phase. According to de Four, victims of abusive

relationships attempt to leave the relationship several times "before being able to leave for good. And . . . once that person leaves, we see, often times, that's where violence gets . . . ramped up . . . ." This testimony, from an expert in domestic violence with insight into how verbal abuse may escalate into physical violence, reasonably set the stage for the jury to piece together and put into context the state's evidence regarding the course of the abusive relationship between the defendant and the victim, particularly as it related to its history of increasing abuse and the victim's alternating attempts to break free of the defendant intermixed with resumptions of their relationship.

There was testimony from multiple witnesses, which the jury could have credited, to support the inference and, thus, the conclusion that the defendant intended to cause the victim's death. At the beginning of trial, the jury heard evidence that the defendant was constantly reaching out to the victim to ascertain her location and, when he was not satisfied with the information that he had received, he would seek information from friends and family members of the victim. Additionally, prior to the victim's disappearance, there were at least three instances in which the defendant appeared, uninvited, in places where the victim was located, or places to which she was en route. From this evidence, the jury reasonably could have inferred that the defendant was controlling, domineering, and always needed to know the victim's whereabouts. Indeed, the evidence suggests that the defendant intended to exercise a form of ultimate control over the victim by causing her death.

Additionally, three witnesses testified regarding an incident that occurred one month prior to the victim's disappearance, in which the defendant choked and threw the victim. The victim's sister, Chaharrez, and brother-in-law, Dumar, both testified about having to drive, in the middle of the night, to pick up the victim

because she had just been choked by the defendant while they were in the midst of an argument. Wright testified, as well, that the defendant admitted to him that he choked the victim and when Wright asked why, the defendant explained that he did it because he was "upset." Such conduct, in and of itself, can be considered to be evidence of intent to commit murder. See, e.g., *State* v. *Edwards*, 247 Conn. 318, 322, 721 A.2d 519 (1998) (arguments between defendant and victim can be evidence that defendant intended to cause victim's death).

Prior to her disappearance, the victim had expressed to Chaharrez and Dumar that she wanted to break up with the defendant. Additionally, according to Wright, the defendant told him that the victim had cheated on him and broken up with him through Facebook. In that same conversation, the defendant professed that, because he was a nurse, he knew how to "get rid of her." The defendant's statement reasonably would have allowed the jury to infer that he made the decision to kill the victim because his comment insinuated that he had thought previously about how he would use his medical training to, in fact, murder her. The inference of the defendant's plan to kill was bolstered by evidence that, after the victim's disappearance, the police found the victim's left arm and left leg, severed from her body, approximately 1.5 miles from the defendant's residence in Bridgeport. Testimony also revealed that the victim's limbs had been severed using a sharp instrument. The defendant's statements to Wright, in conjunction with the fact that pieces of her dismembered body, which were severed with a sharp device, were later found in close proximity to the defendant's home after he had admitted that the victim broke up with him, allowed the jury to reasonably infer the defendant's intent to murder the victim. See, e.g., *State* v. *Crafts*, 226 Conn. 237, 251, 627 A.2d 877 (1993) (evidence of prearranged

plan to kill victim and conceal her remains deemed sufficient evidence of intent).

The jury also heard evidence that the victim was last seen alive on the ECSU campus next to the defendant's car around noon and then, a few hours later, was last seen with the defendant by the defendant's mother at or about 2:15 p.m. on April 20, 2013, shortly before the victim disappeared. Additionally, the jury learned that the victim's cell phone stopped making and receiving any form of communication after 4 p.m., less than two hours after she was seen with the defendant. Thereafter, the victim was never seen or heard from again, until two of her severed limbs were found one month later. Based on this information, it would have been reasonable for the jury to infer that the victim, who had repeatedly stated her desire to break up with the defendant, attempted to break up with the defendant on April 20, 2013, and, as a result, the defendant, in light of his controlling nature, had a motive to kill her, and thus exercised the ultimate form of control over her. See *State* v. *Gary*, 273 Conn. 393, 407, 869 A.2d 1236 (2005) ("Intent to cause death may be inferred from . . . events leading to . . . the death. . . . In addition, intent to kill may be inferred from evidence that the defendant had a motive to kill." (Citation omitted; internal quotation marks omitted.)).

Finally, there were several pieces of physical evidence, or lack thereof, which would have enabled the jury to reasonably infer an intent to commit murder. As noted, pursuant to various warrants, the police searched the defendant's car and his residences in Ansonia and Bridgeport. During the search of the car, the police obtained DNA evidence belonging to the victim from the seat cushion, which, by itself, is not itself a remarkable finding because the victim had been known to travel in the defendant's car. More significantly though, the investigating officers noted that the car appeared to have been detailed. With regard to the

search of the Ansonia residence, the police discovered that the bathroom had been ripped apart and was missing a bathtub, sink, and other plumbing materials. As a result of the search of his Bridgeport residence, the police found the victim's birth control prescription and her gold necklace in a black garbage bag in the defendant's basement. In *Otto*, our Supreme Court concluded that the defendant's attempt to clean and demolish the locations associated with the murder was evidence of the defendant's consciousness of guilt and that such "consciousness of guilt evidence [is] part of the evidence from which a jury may draw an inference of an intent to kill." *State* v. *Otto*, supra, 305 Conn. 73.

On the basis of the foregoing evidence, *and* because the victim was last seen alive at the defendant's residence after leaving the ECSU campus in his car, it would have been reasonable for the jury to infer that the defendant intended to kill the victim and then took a series of steps to cover up any evidence that would connect him to her disappearance and murder. We conclude that because these inferences are not so unreasonable as to be unjustifiable, they are more than mere speculation or conjecture and, therefore, cross over the proverbial line as reasonable inferences drawn by the jury.

B

During oral argument before this court, counsel for the defendant repeatedly asserted that there was no evidence to show the cause of death, meaning that the state failed to prove beyond a reasonable doubt that the defendant caused the death of the victim. As our precedent makes clear, however, "proof of death by criminal means or proof of the exact cause of death is not required" to show that the defendant caused the death of the victim. *State* v. *Wargo*, 53 Conn. App. 747, 766, 731 A.2d 768 (1999), aff'd, 255 Conn. 113, 763

A.2d 1 (2000). Additionally, "[t]he state does not have to connect a weapon directly to the defendant and the crime." (Internal quotation marks omitted.) *State* v. *Torres*, 168 Conn. App. 611, 621–22, 148 A.3d 238 (2016), cert. granted in part on other grounds, 325 Conn. 919, 163 A.3d 618 (2017).

"Causation is an essential element of the crime of murder. . . . In order for legal causation to exist in a criminal prosecution, the state must prove beyond a reasonable doubt that the defendant was both the cause in fact, or actual cause, as well as the proximate cause of the victim's injuries. . . . In order that conduct be the actual cause of a particular result it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that but for the antecedent conduct the result would not have occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Guess*, 44 Conn. App. 790, 797–98, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 715 A.2d 643 (1998).

"Proximate cause in the criminal law does not necessarily mean the last act of cause, or the act in point of time nearest to death. The concept of proximate cause incorporates the notion that an accused may be charged with a criminal offense even though his acts were not the immediate cause of death. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, *unbroken by an efficient, intervening cause, to the resulting death*. It is the cause without which the death would not have occurred and the predominating cause, the substantial factor, from which death follows as a natural, direct and immediate consequence." (Emphasis in original; internal quotation marks omitted.) Id., 800. In short, "the defendant's conduct must contribute substantially and materially, in a direct manner, to the victim's injuries; and . . . the defendant's

conduct cannot have been superseded by an efficient, intervening cause that produced the injuries." *State* v. *Leroy*, 232 Conn. 1, 13, 653 A.2d 161 (1995).

As noted, the jury was presented with various pieces of evidence that, when placed in context, pointed to the defendant's culpability for the victim's death. That evidence included statements by the defendant that, as a nurse, he knew how to get rid of the victim if she decided to "mess" with him. "[A] declaration *indicating* a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed." (Emphasis added.) *State* v. *Farnum*, 275 Conn. 26, 35, 878 A.2d 1095 (2005). It would have been reasonable for the jury to credit the defendant's statement that, as a nurse, he knew how to get rid of the victim, as an indication of a then-present intent to cause her death as evidence that he did, in fact, cause her death. See id. This, in conjunction with all the other evidence adduced at trial, would have allowed the jury to reasonably infer that an action by the defendant was the actual and proximate cause of the victim's death.

For comparison, we turn to our Supreme Court's decision in *Sivri*. In that case, the court found that the fact that the state presented no evidence of precisely how the victim died did not undermine the conclusion that the defendant in fact killed her. More specifically, our Supreme Court recognized that there was "no body or evidence of body parts . . . no evidence of the specific type of weapon used . . . no evidence of the specific type of wound inflicted on the victim . . . and no evidence of prior planning, preparation or motive." (Citations omitted.) *State* v. *Sivri*, supra, 231 Conn. 127. Additionally, in that case, the state's forensic scientist was unable to determine what caused the victim's death. Id., 123. Nevertheless, the court concluded that

the circumstantial evidence and reasonable inferences drawn therefrom were sufficient to support the jury's finding that the defendant, in fact, caused the victim's death. Id., 129–30.

By contrast, in the present case, despite the fact that there was no evidence of a murder weapon, there *was* evidence, unlike in *Sivri*, of prior planning, preparation, and motive, and there *were* body parts found in close proximity to the defendant's residence shortly after the victim was last seen alive in the company of the defendant. Lastly, unlike in *Sivri*, there was testimony from the chief medical examiner that the cause of death was "homicidal violence."

In sum, it would have been reasonable for the jury to find that the defendant was a domestic abuser whose violence against the victim escalated as her desire to end their relationship became more apparent to him. That conclusion is supported by the following evidence presented to the jury: (1) the defendant was a controlling boyfriend who always wanted to know the whereabouts of the victim; (2) he followed and stalked her several times over the course of their relationship; (3) the victim wanted to break up with the defendant but was unsure how; (4) the defendant and the victim got into an argument one month before she disappeared and, at that time, the defendant choked the victim and threw her; (5) the defendant told Wright that, because he was a nurse, he knew how to get rid of the victim and, shortly thereafter, he choked her because he was "upset"; (6) he was the last person to be seen with the victim prior to her disappearance; (7) the victim tried to break up with the defendant on April 20, 2013; (8) he removed the bathtub, sink, and counter from his Ansonia residence; (9) he had his car detailed in order to remove any DNA evidence of the victim; and (10) the defendant placed some of the victim's personal belongings in a garbage bag in his basement in order

to throw them out at a later date and time. From these facts, the jury reasonably could have concluded that the defendant murdered the victim at or around 4 p.m. on April 20, 2013, the day she went missing, and that the defendant severed the limbs of the victim and placed a portion of her remains 1.5 miles from his Bridgeport residence.

During oral argument before this court, counsel for the defendant set forth possible alternatives as to why several of the facts adduced during the state's case-in-chief do not lead to the conclusion that the defendant committed murder. We are reminded, however, of our scope of review: "[W]e give deference not to the hypothesis of innocence posed by the defendant, but to the evidence and the reasonable inferences drawable therefrom that support the jury's determination of guilt. On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." *State* v. *Sivri*, supra, 231 Conn. 134. Mindful of our standard of review, which requires us to view the evidence in the light most favorable to sustaining the jury's verdict, we reject the defendant's claim and conclude that the evidence was sufficient to sustain a conviction of murder.

II

Next, the defendant claims that the court erred in not giving, sua sponte, a special credibility instruction with regard to a witness who testified under a cooperation agreement. Specifically, the defendant posits that a special credibility instruction, similar to that which is given for a jailhouse informant who has been promised a benefit for his testimony, is warranted in cases in which a witness does not testify in the first trial but

does so in subsequent trials.[8] Despite not raising this matter before the trial court, the defendant asks this court to conclude that the court's failure sua sponte to provide the instruction amounted to plain error pursuant to Practice Book § 60-5. In response, the state contends that the factual predicate for the defendant's claim and proposed rule, namely, that Wright did not testify in all three trials, was not supported by the record as it reflects that Wright did, indeed, testify in all three trials. The state claims, therefore, that because the linchpin of the defendant's claim—that Wright only testified in the third trial—is unsupported, we should summarily reject this claim.

From our review of the record and at oral argument before this court, it appears that the defendant, when confronted with the fact that Wright testified in all three trials, shifted his argument to urge this court, on the basis of plain error, to adopt an instructional rule to apply whenever a witness for the state who is on probation testifies. The defendant's claim is based on the notion that the incentive for a person on probation is sufficiently similar to one who is still in custody and, therefore, the special credibility charge given by the court regarding jailhouse informants should apply equally to probationers. In response to this claim, the state argues that the defendant is not entitled to reversal under the plain error doctrine because there was no error or manifest injustice resulting from the court's failure to give such an instruction as a result of the fact that the court gave a general instruction on credibility. We agree with the state.

We begin by setting forth the relevant legal principles. Generally, claims not raised in the court below

[8] Jevene Wright, the cooperating witness at issue in the defendant's claim, pleaded guilty to larceny in the first degree for theft of $1.4 million from his employer and $76,000 from another employer. Wright agreed to a suspended sentence and probation in exchange for his truthful testimony against the defendant.

are not ripe for review by this court; however, "[t]he plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 101, 25 A.3d 594 (2011). "[Previously], [our Supreme Court] described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

"With respect to the first prong, the claimed error must be patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . With respect to the second prong, an appellant must demonstrate that the failure to grant relief will result in manifest injustice.

. . . [Our] Supreme Court has described that second prong as a stringent standard that will be met only upon a showing that, as a result of the obvious impropriety, the defendant has suffered harm so grievous that fundamental fairness requires a new trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 178 Conn. App. 16, 20–21, 173 A.3d 974 (2017), cert. denied, 327 Conn. 998, 176 A.3d 557 (2018).

The defendant appears to argue that it was plain error for the court not to give a special credibility instruction because the defendant and Wright were both, in some manner, in the care and custody of the Commissioner of Correction—the defendant in physical custody pending the outcome of the trial and Wright as a probationer. The defendant, therefore, in essence, argues that because both he and Wright were under the control of the commissioner, the court should have given an instruction modeled after that given for confidential informants. Our case law does not support such a conclusion.

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely. . . . [Our Supreme Court] has held, however, that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses, accomplices and jailhouse informants. . . . Typically, a jailhouse informant is a prison inmate who has testified about confessions or inculpatory statements made to him by a fellow inmate . . . . The rationale for requiring a special credibility instruction for jailhouse informants is that an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 101–102.

As the state correctly points out, Wright does not fall within any of the categories of witnesses requiring a special credibility instruction as provided by our Supreme Court. Specifically, Wright was not a complaining witness, nor was he an accomplice. Additionally, Wright, as conceded by the defendant, was not an informant. The defendant, however, argues that an individual on probation is in a similar situation as that of an incarcerated witness and, thus, has a powerful incentive to testify falsely. The defendant asks this court to craft a rule requiring a special credibility instruction applicable to probationers akin to the rule for jailhouse informants. We decline to do so.

To characterize someone on probation as being in the same light as an incarcerated individual interprets too broadly the categories of witnesses identified by our Supreme Court in *Diaz*. Additionally, even if we were to decide that a witness on probation required a special credibility instruction, "[our Supreme Court] . . . has held that the trial court's failure to give . . . [such an] instruction . . . does not constitute plain error when the trial court has instructed the jury on the credibility of witnesses and the jury is aware of the witness' motivation for testifying." *State* v. *Diaz*, supra, 302 Conn. 103.

During Wright's testimony, in the present case, the jury learned that he was twice arrested for stealing from his employer. The jury also learned that Wright was testifying pursuant to a plea agreement in which he would not be sent to prison for his crimes so long as he cooperated with the state in the prosecution of the defendant. Additionally, the jury heard from Wright that this was his third time testifying against the defendant. The court, without objection from the defendant, gave the jury a general credibility instruction.[9] Lastly, the

[9] The court's general credibility instruction provided: "I want to discuss the subject of credibility by which I mean the believability of testimony. You have observed the witnesses. The credibility, the believability of the witnesses and the weight to be given to their testimony are matters entirely

court, also without objection, gave a credibility instruction with regard to Wright as an individual with a criminal record.[10] Upon our review of the foregoing, and as our Supreme Court concluded in *Diaz*, we do not con-

within your hands. It is for you alone to determine their credibility. Whether or not you find a fact proven is not to be determined by the number of witnesses testifying for or against it. It is the quality not the quantity of the testimony which should be controlling, nor is it necessarily so that because a witness testifies to a fact and no one contradicts it you are bound to accept that fact as true. The credibility of the witness and the truth of the fact is for you to determine.

"In weighing testimony of the witnesses, you should consider the probability or improbability of their testimony. You should consider their appearance, conduct and demeanor while testifying in court and any interest, bias, prejudice or sympathy which a witness may apparently have for or against the state or the accused or in the outcome of the trial. With each witness you should consider his or her ability to observe facts correctly, recall them and relay them to you truly and accurately. You should consider whether and to what extent witnesses needed their memories refreshed while testifying. You should, in short, size up the witnesses and make your own judgment as to their credibility and decide what portion, all, some or none of any particular witness' testimony you will believe based on these principles. . . . In short, you should bring to bear upon the testimony of the witnesses the same considerations and use the same sound judgment you apply to questions of truth and veracity as they present themselves to you in everyday life.

"You are entitled to accept any testimony which you believe to be true and to reject either wholly or in part the testimony of any witness you believe has testified untruthfully or erroneously. The credit that you will give to the testimony offered is, as I have told you, something which you alone must determine. Where a witness testifies inaccurately and you either do or do not think that the inaccuracy was consciously dishonest, you should keep that in mind and scrutinize the whole testimony of that witness. The significance you attach to it may vary more or less with a particular fact as to which the inaccuracy existed or with the surrounding circumstances. You should bear in mind that people sometimes forget things. On the other hand, if a witness has intentionally testified falsely you may disregard the witness' entire testimony but you are not required to do so. It is up to you to accept or reject all or any part of any witness' testimony."

[10] The credibility instruction given with regard to Wright as a witness with a criminal record provided: "The evidence that one of the state witnesses, Jevene Wright, was previously convicted twice of a crime of larceny in the first degree, that [Wright] has admitted to stealing and lying is only admissible on the question of the credibility of a witness, that is the weight that you will give the witness' testimony. The witness' criminal record and or admission of acts of stealing and lying bears only on the witness' credibility. It is your duty to determine whether this witness is to be believed wholly or partly or not at all. You may consider the witness' prior convictions and acts of stealing and lying and weigh the credibility of this witness and give such weight to those facts that you decide is fair and reasonable in determining the credibility of this witness."

clude that the court's failure to give a special credibility instruction in the present case "constitute[d] an error that was so obvious that it affect[ed] the fairness and integrity of and public confidence in the judicial proceedings, or of such monumental proportion that [it] threaten[ed] to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 104.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PRINCE A.*
(AC 41962)

Lavine, Bright and Devlin, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his alleged sexual abuse of the victim, his daughter, who did not report the assault until a few years later. On cross-examination of the victim, the defendant challenged her credibility and her delay in reporting the assault. After the state offered the testimony of A, a constancy of accusation witness, the defendant elicited on cross-examination of A that she believed that the victim had reported the assault contemporaneously, without delay. The defendant then moved to strike A's testimony on the ground that there was no justification for having a constancy of accusation witness testify when the witness testifies that there was no delay in the victim's reporting of the assault. The trial court denied the defendant's motion on the ground that, under the Supreme Court's modification of the constancy of accusation doctrine in *State* v. *Daniel W. E.* (322 Conn. 593), the state was permitted to present A's testimony because the defendant had challenged the victim's credibility and her delay in reporting the assault. On appeal, the defendant claimed that the trial

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

court improperly admitted A's testimony to refute any negative inferences the jury might have drawn from the victim's delay in reporting the assault. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to strike A's testimony, that court having properly applied the constancy of accusation doctrine as modified in *Daniel W. E.*; A's testimony was proper because the defendant undisputedly challenged the victim's credibility on cross-examination when he inquired about her delayed reporting, such delay was for the jury to consider in evaluating the weight to be given to the victim's testimony, it was the fact of the victim's having reported her complaint to A that was relevant, and any inaccuracy in A's belief as to the delay in reporting did not preclude the admission of A's testimony but, rather, went to A's credibility.

Argued January 9—officially released March 10, 2020

Proceedings

Substitute information charging the defendant with two counts of the crime of risk of injury to a child, and with one count each of the crimes of sexual assault in the first degree and sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to one count of risk of injury to a child; verdict and judgment of guilty of one count of risk of injury to a child, and sexual assault in the first degree and sexual assault in the fourth degree, from which the defendant appealed to this court. *Affirmed.*

John C. Drapp III, assigned counsel, for the appellant (defendant).

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

Opinion

DEVLIN, J. The defendant, Prince A., appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the fourth

degree in violation of General Statutes (Rev. to 2009) § 53a-73a (a) (1) (A) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the trial court improperly admitted testimony of a constancy of accusation witness to refute any negative inferences the jury might have drawn from the victim's delay in reporting the sexual assault because that witness mistakenly believed that there had been no delay.[1] We affirm the judgment of the trial court.

The jury reasonably could have found the following relevant facts. The victim is the defendant's daughter. In 2010 or 2011, when the victim was either ten or eleven years old, the defendant sexually assaulted the victim while they were alone in his apartment. Initially, the victim did not report the assault because she felt uncomfortable and scared. A few years later, in 2013, the victim told a friend at school about the assault. Shortly thereafter, the victim met with Iris Adgers, a behavior technician at the victim's school, and described the assault. Following this meeting, the Hartford Police Department was notified of the assault and investigated the defendant.

The following procedural history also is relevant to this appeal. On November 13, 2017, the state charged the defendant with sexual assault in the first degree,

[1] On appeal, the defendant additionally claims that the trial court should not have admitted portions of the testimony of the constancy of accusation witness that were irrelevant and cumulative. The state argues, and the defendant conceded at oral argument before this court, that these claims were not presented to the trial court and, thus, were unpreserved for appeal. Accordingly, we decline to review these unpreserved evidentiary claims. See *State* v. *Artiaco*, 181 Conn. App. 406, 412, 186 A.3d 789, cert. granted on other grounds, 329 Conn. 906, 185 A.3d 594 (2018); id., 411 ("Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.)).

sexual assault in the fourth degree, and two counts of risk of injury to a child, one count under § 53-21 (a) (1) and one count under § 53-21 (a) (2). Trial commenced on November 27, 2017.

During trial, the jury heard testimony from the victim. When the defendant's trial counsel, William Gerace, cross-examined the victim, he challenged her credibility and her delay in reporting the assault. Following the victim's testimony, the state offered Adgers as a constancy of accusation witness whose testimony, as the court later explained in a limiting instruction to the jury, was offered solely "to negate any inference that [the victim] failed to tell anyone about the sexual offense and, therefore, that [the victim's] later assertion could not be believed. . . . Constancy evidence is not evidence that the sexual offense actually occurred or that [the victim] is credible. It merely serves to negate any inference that because of [the victim's] assumed silence the offense did not occur." Adgers offered brief testimony confirming that the victim had reported the sexual assault to Adgers. Immediately following the state's direct examination of Adgers, the court gave a limiting instruction to the jury regarding constancy of accusation testimony. On cross-examination, Adgers testified that, as far as she knew, the victim had reported the assault contemporaneously, without delay.[2] Following Adgers' testimony, Gerace moved to strike her testimony, arguing that there was no justification for having a constancy of accusation witness testify when that witness testifies that there was no delay in the victim's reporting of the assault. The court denied the motion, noting that because the defendant had challenged the victim's credibility and her delay in reporting the assault, the state was permitted to present constancy testimony.

[2] Adgers also testified on cross-examination that she would not have been surprised if she were mistaken and that the assault had occurred years earlier.

Following three days of evidence, the case was submitted to the jury. During its final charge to the jury, the court again offered a limiting instruction regarding Adgers' testimony. After deliberating, the jury found the defendant guilty of sexual assault in the first degree, sexual assault in the fourth degree, and one count of risk of injury to a child in violation of § 53-21 (a) (2).[3] The court then sentenced the defendant to serve a total effective term of seventeen years of imprisonment, followed by three years of special parole. This appeal followed.

Before turning to the claim on appeal, we set forth the applicable law governing the constancy of accusation doctrine and our scope and standard of review. The constancy of accusation "doctrine traces its roots to the fresh complaint rule . . . [t]he narrow purpose of [which] . . . was to negate any inference that because the victim had failed to tell anyone that she had been [sexually assaulted], her later assertion of [sexual assault] could not be believed. . . . [B]ecause juries were allowed—sometimes even instructed—to draw negative inferences from the woman's failure to complain after an assault . . . the doctrine of fresh complaint evolved as a means of counterbalancing these negative inferences. Used in this way, the fresh complaint doctrine allowed the prosecutor to introduce, during the case-in-chief, evidence that the victim had complained soon after the [sexual assault]. Its use thereby forestalled the inference that the victim's silence was inconsistent with her present formal complaint of [assault]. . . . In other words, evidence admitted under this doctrine effectively served as anticipatory rebuttal, in that the doctrine often permitted the prosecutor to bolster the credibility of the victim before her credibility had first been attacked. . . . The fresh

[3] After the close of evidence, the court granted the defendant's motion for a judgment of acquittal as to the second count of risk of injury to a child in violation of § 53-21 (a) (1).

complaint doctrine thus constituted a rare exception to the common-law rule that prohibited rehabilitative evidence in the absence of an attack on the [witness'] credibility.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Daniel W. E.*, 322 Conn. 593, 618–19, 142 A.3d 265 (2016).

Presently, the constancy of accusation doctrine, as modified by our Supreme Court in *Daniel W. E.*, permits "the victim in a sexual assault case . . . to testify on direct examination regarding the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. . . . Thereafter, if defense counsel challenges the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting, the state will be permitted to call constancy of accusation witnesses subject to [certain] limitations . . . . If defense counsel does not challenge the victim's credibility in any fashion on these points, the trial court shall not permit the state to introduce constancy testimony but, rather, shall instruct the jury that there are many reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent the victim delayed in reporting the offense, the delay should not be considered by the jury in evaluating the victim's credibility."[4] (Citation omitted; internal quotation marks

[4] Following *Daniel W. E.*, § 6-11 of the Connecticut Code of Evidence was revised to reflect our Supreme Court's modification of the constancy of accusation doctrine. Section 6-11 (c) of the Connecticut Code of Evidence presently provides in relevant part: "(1) If the defense impeaches the credibility of a sexual assault complainant regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, the state shall be permitted to call constancy of accusation witnesses. . . .

"(2) if the complainant's credibility is not impeached by the defense regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, constancy of accusation testimony shall not be permitted, but, rather, the trial court shall provide appropriate instructions to the jury regarding delayed reporting."

The revision to § 6-11 of the Connecticut Code of Evidence did not go into effect until February 1, 2018, whereas the trial concluded in the present

omitted.) Id., 629. A constancy of accusation witness is limited to testifying "only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator." (Internal quotation marks omitted.) Id., 620.

"[W]hether evidence is admissible under the constancy of accusation doctrine is an evidentiary question that will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . An appellate court will make every reasonable presumption in favor of upholding the trial court's evidentiary rulings. . . . To the extent that the evidentiary ruling in question is challenged as an improper interpretation of a rule of evidence, our review is plenary." (Citation omitted; internal quotation marks omitted.) *State* v. *Gene C.*, 140 Conn. App. 241, 247–48, 57 A.3d 885, cert. denied, 308 Conn. 928, 64 A.3d 120 (2013).

The defendant's claim on appeal is that the trial court abused its discretion by admitting Adgers' testimony under the constancy of accusation doctrine because she believed that the victim had not delayed in reporting the sexual assault. We disagree.

The defendant's claim is premised on an inaccurate reading of *Daniel W. E.* In *Daniel W. E.*, our Supreme Court established that the *only* prerequisite for the introduction of constancy testimony is the "defense

case on November 30, 2017. Nonetheless, the Supreme Court released its decision in *Daniel W. E.* on August 23, 2016, prior to the commencement of the evidentiary portion of the present trial, and, thus, the modified constancy of accusation doctrine applied to the present case. See *State* v. *Daniel W. E.*, supra, 322 Conn. 630.

counsel challeng[ing] the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting . . . ." *State* v. *Daniel W. E.*, supra, 322 Conn. 629. It is undisputed that Gerace, in fact, did challenge the credibility of the victim and her delay in her reporting. Such delay is a matter for the jury to consider in evaluating the weight to be given to the victim's testimony. See id. As to constancy of accusation witnesses, it is the fact of the victim's complaint to them that is relevant. See id., 622. Any inaccuracy in the constancy witness' belief as to the delay in reporting does not preclude the admission of such testimony but, rather, goes to that witness' credibility.

We therefore conclude that the trial court properly applied the constancy of accusation doctrine and did not abuse its discretion in denying the defendant's motion to strike Adgers' testimony.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVID S. BORNSTEIN (AC 40991)

Alvord, Moll and Beach, Js.

Syllabus

The defendant, who had been charged with the crimes of violation of a civil protection order and harassment in the second degree, appealed to this court from the trial court's denial of his motion to dismiss the charges. The charges stemmed from interactions the defendant had with a juvenile member of the softball team for which the defendant served as a volunteer coach. The juvenile and her mother had obtained an ex parte civil protection order against the defendant. At the hearing on the order, however, the court denied the request for a civil protection order. On the basis of the civil protection order hearing, the defendant moved to dismiss the criminal charges on the ground of collateral estoppel. The trial court denied the defendant's motion and the defendant appealed

to this court. On appeal, the defendant claimed that the facts had been fully and fairly litigated in the civil protection order hearing and that allowing the state to pursue criminal charges based on those same facts implicated the right against double jeopardy. *Held* that this court lacked jurisdiction over the defendant's interlocutory appeal from the denial of a motion to dismiss; the defendant failed to put forth a colorable claim of double jeopardy because the civil protection order hearing was not a prosecution, which is brought only by only by public officials representing the state, whereas a civil protection order pursuant to statute (§ 46b-16a) may be sought by any person who has been the victim of certain conduct and the language of § 46b-16a (e) provides that a civil protection order proceeding does not preclude a criminal prosecution based on the same facts.

Argued October 8, 2019—officially released March 10, 2020

Procedural History

Substitute information, in the first case, charging the defendant with the crime of violation of a civil protection order, and substitute information, in the second case, charging the defendant with the crimes of harassment in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Britain, where the defendant moved to dismiss the charges in both cases; thereafter, the court, *D'Addabbo*, *J.*, dismissed the charge of risk of injury to a child but denied the defendant's motion to dismiss the charges of harassment in the second degree and violation of a civil protection order, and the defendant appealed to this court. *Appeal dismissed.*

Matthew D. Dyer, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Louis J. Luba, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, David S. Bornstein, appeals from the denial of his motion to dismiss charges of harassment and violation of a civil protection order. The motion asserted that the state was collaterally estopped from pursuing the charges against him.

The state argues that the defendant's appeal should be dismissed for lack of a final judgment or, in the alternative, denied on its merits. We agree with the state and dismiss the appeal.

The following background is relevant to this appeal. "The defendant was assisting the Newington High School girls softball team in the capacity of a volunteer coach. The juvenile complainant (juvenile) was a member of that team. In an effort to improve her softball playing skills and abilities, the defendant agreed to provide the juvenile with private coaching during August and September, 2015. In October, 2015, the juvenile's mother learned that the defendant had been personally e-mailing and texting the juvenile on a regular basis concerning issues that were about the juvenile's personal life. The mother of the juvenile believed that these text messages were inappropriate, coming from a man in his late sixties to a fifteen year old girl.

"The juvenile's mother brought these messages to the Newington High School girls softball team head coach, as well as the Newington High School athletic director. As a result of the messages, the defendant was relieved from his position with the Newington High School softball team and advised to stop all communication with the juvenile. The defendant was not arrested for this conduct, but was warned by the Newington police of possible arrest if the defendant initiated contact with the juvenile.

"The defendant had no contact with the juvenile from October, 2015 to sometime in March, 2016, when at a nonschool softball event, the defendant was seen near the juvenile's team dugout. Shortly after this contact, the defendant sent a text message to the juvenile.

"After this activity, the juvenile and her mother obtained an ex parte civil protection order on April 7, 2016. A hearing on the order was conducted on April

25 and May 3, 2016. The bas[es] of the request for the civil [protection] order [were] messages that occurred in October of 2015, the defendant's attendance at the site of the juvenile's softball game in March of 2016, and a cell phone call to the juvenile on April 22, 2016. At the conclusion of this hearing, the court . . . denied the request for a civil [protection] order. It is this hearing which serves as the basis of the defendant's claim of collateral estoppel."[1]

"On October 20, 2016, the defendant was arrested for harassment in the second degree for his conduct with the juvenile in October, 2015 [in violation of General Statutes § 53a-183]."[2] In Docket No. H15N-CR16-0285241-S, he was charged with harassment in the second degree in violation of General Statutes § 53a-183 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (1).

The defendant moved to dismiss the charges in both dockets, on the ground that the state was collaterally estopped from pursuing them.[3] He contended that the relevant factual allegations previously had been the subject of a full evidentiary hearing regarding the civil

[1] In denying the application for the civil protection order, Judge Shortall concluded that the defendant had not "knowingly violated the stalking statute [General Statutes § 53a-181d]," and that the evidence did not support the need for an order to prevent him from committing acts that might violate the stalking statute in the future. The court expressly cautioned that its decision was "not meant to express the [c]ourt's opinion on any other proceedings or official actions that may arise or may have arisen out of these events."

[2] On April 29, 2016, the defendant was charged in Docket No. H15N-CR16-0283065-S with violation of a civil protection order in violation of General Statutes § 53a-223c. This charge arose from the April 22, 2016 cell phone call, which occurred while the ex parte civil protection order was in effect.

[3] The defendant also sought to dismiss the charges in Docket No. H15N-CR16-0285241-S on different grounds. The trial court granted that motion to dismiss as to the risk of injury count. No issue regarding the dismissal of that count is before us. The counts before us are harassment in the second degree in Docket No. H15N-CR16-0285241-S and the violation of a civil protection order in Docket No. H15N-CR16-0283065-S.

protection order in April and May, 2016; therefore, according to the defendant, the state was precluded from pursuing those allegations a second time because the facts already had been fully and fairly litigated and the parties were in privity with each other.

The court, *D'Addabbo*, *J.*, denied the motion, holding that, although "the facts presented at the civil [protection] order hearing and at a criminal trial may be similar . . . the issues presented are quite different." The court noted that the standards of proof are different in each proceeding, and the issue of "whether the elements of the crimes of harassment in the second degree and violation of a [protection] order have been . . . proven" was not determined in the civil proceeding. The court concluded that the state's interest was different from that of the proponents of the protection order; therefore, "the [defendant] cannot establish the privity of the parties, which is essential to the application of collateral estoppel." Accordingly, the court declined to dismiss the charges against the defendant on the basis of collateral estoppel. This appeal followed.

The threshold issue is whether we have jurisdiction over this interlocutory appeal from the denial of a motion to dismiss. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law. . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *State* v. *Thomas*, 106 Conn. App. 160, 165–66, 941 A.2d 394, cert. denied, 287 Conn. 910, 950 A.2d 1286 (2008).

"[W]e have stated, however, [that] [t]here is a small class of cases that meets the test of being effectively unreviewable on appeal from a final judgment and, therefore, is subject to interlocutory review. The paradigmatic case in this group involves the right against double jeopardy." (Internal quotation marks omitted.) *State* v. *Crawford*, 257 Conn. 769, 775, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002).

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . Although the Connecticut constitution has no specific double jeopardy provision, we have held that the due process guarantees of article first, § 9, include protection against double jeopardy." (Citations omitted; internal quotation marks omitted.) Id., 774. "[The] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense [in a single trial]." (Footnotes omitted.) *North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by *Alabama* v. *Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); see also *State* v. *Crawford*, supra, 257 Conn. 776.

Our Supreme Court in *State* v. *Curcio*, 191 Conn. 27, 463 A.2d 566 (1983), stated: "The appealable final judgment in a criminal case is ordinarily the imposition of a sentence. . . . In both criminal and civil cases, however, we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for the purposes of appeal. An . . . interlocutory order is appealable in two circumstances: (1)

where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Citation omitted; internal quotation marks omitted.) Id., 31.

"*Curcio* attempted to clarify the murky, amorphous area that lies between those appeals that are final judgments for purposes of interlocutory appellate review and those that are not by providing a rule to test the difference. Since *Curcio*, a number of cases have tested which side of the gray area the claimed right to interlocutory appellate review falls." (Internal quotation marks omitted.) *State* v. *Thomas*, supra, 106 Conn. App. 167.

One such class of cases that is effectively unreviewable on appeal from a final judgment and, therefore, is amenable to interlocutory review, involves the right against double jeopardy. Id. "Because jeopardy attaches at the commencement of trial, to be vindicated at all, a colorable double jeopardy claim must be addressed by way of interlocutory review. The right not to be tried necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial, and, consequently, falls within the second prong of [*Curcio*]." (Internal quotation marks omitted.) Id. "Thus . . . an interlocutory appeal is permitted [on the basis of double jeopardy] only when the defendant asserts a colorable double jeopardy claim and has raised that claim by a motion to dismiss." Id., 168. "For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Crawford*, supra, 257 Conn. 776.

In the present case, the defendant contends that the facts found in the civil protection order proceeding were identical to those necessary to determine whether the defendant is guilty of harassment; therefore, the

state is collaterally estopped from pursuing the criminal charges. The defendant further argues that the civil protection order was punitive in nature and the right against double jeopardy is implicated, such that the second factor of *Curcio* is satisfied and this court has jurisdiction to decide the interlocutory appeal. We are not persuaded and hold that the defendant's double jeopardy claim is not colorable because the first action was not a prosecution.

In *State* v. *Crawford*, supra, 257 Conn. 776, our Supreme Court stated that the first two variations of the right against double jeopardy, protecting against prosecution for the same offense after acquittal and after conviction, "may be regarded as constituting . . . [protection against] 'successive prosecution[s].' " "The third prong, which is analytically different from the first two, involves multiple punishments for the same offense in a single prosecution." Id., 777. The court explained: "The rationale for the rule permitting a criminal defendant to file an interlocutory appeal from the denial of a motion to dismiss on double jeopardy grounds is based on the first two prongs of the double jeopardy protection—protections against successive prosecutions for the same offense, namely, (1) a subsequent prosecution after a prior acquittal, and (2) a subsequent prosecution after a prior conviction." Id. The court concluded that an interlocutory appeal is allowed from the denial of a motion to dismiss "to give meaning to the successive prosecution part of the protection against double jeopardy . . . so long as that motion presents a colorable double jeopardy claim." Id. Accordingly, for this court to have jurisdiction on this basis, the defendant must present a colorable successive prosecution claim.

The defendant claims that, because the court in the civil proceeding was not persuaded that the defendant had the requisite intent for the purpose of that proceeding, and found that he was not likely to offend again,

a subsequent criminal proceeding based on the same underlying conduct was barred as a successive prosecution.

We are not persuaded by the defendant's argument. The prior civil proceeding was not a prosecution. Our Supreme Court has defined prosecution as "[a] criminal proceeding in which an accused person is tried . . . ." *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 153, 12 A.3d 948 (2011) (citing Black's Law Dictionary (9th Ed. 2009) p. 1341); see also *State* v. *Kluttz*, 9 Conn. App. 686, 718, 521 A.2d 178 (1987) ("in the context of a criminal prosecution, by definition, the accused is always charged with the 'violation of a law' "). Criminal prosecutions are brought by district attorneys, "public official[s] appointed or elected to represent the state in criminal cases in a particular judicial district; prosecutor[s]." Black's Law Dictionary (11th Ed. 2019) p. 598. Conversely, a civil protection order pursuant to General Statutes § 46b-16a (a)[4] may be sought by *any* person "who has been the victim of sexual abuse, sexual assault or stalking."[5] The state is simply not involved in the application for a civil protection order.

[4] General Statutes § 46b-16a (a) provides: "Any person who has been the victim of sexual abuse, sexual assault or stalking may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15. As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety."

[5] No court, to our knowledge, has considered a prior civil hearing on a protection order to be a prosecution for double jeopardy purposes. Rather, the consensus of authority supports the proposition that the purpose of a civil protection order is remedial. See *State* v. *Manista*, 651 A.2d 781, 784 (Del. Fam. 1994) (protection order act "is not targeted at punishing the wrongdoer; rather, its purpose is to help protect the victim against further acts of violence or abuse"); *People* v. *Wouk*, 317 Ill. App. 3d 33, 40–41, 739 N.E.2d 64 (2000) ("focus of an order-of-protection proceeding is the immediate protection of abused family or household members, not the guilt of the accused and the more general protection of society"); *State* v. *Brown*,

Finally, § 46b-16a (e) provides that "[a]n action under this section shall not preclude the applicant from subsequently seeking any other civil or criminal relief based on the same facts and circumstances." It is clear from the language of this subsection that the legislature intended a civil protection order proceeding not to preclude a criminal prosecution based on the same facts, and, as noted previously, Judge Shortall expressly and appropriately observed that his ruling would have no effect on potential future proceedings.[6] See footnote 1 of this opinion.

We conclude that the defendant has not asserted a colorable claim of double jeopardy and, therefore, we lack jurisdiction over the appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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394 N.J. Super. 492, 504, 927 A.2d 569 (App. Div. 2007) (protection order act "designed to protect an individual victim, [which] is quite different than a criminal case in which the [s]tate prosecutes a defendant on behalf of the public interest"); see also *State* v. *Alexander*, 269 Conn. 107, 120, 847 A.2d 970 (2004) (restraining order not punitive for purposes of double jeopardy).

[6] We also note that a prior administrative order ordinarily does not bar a subsequent criminal proceeding on the same facts. See, e.g., *State* v. *Tuchman*, 242 Conn. 345, 362, 699 A.2d 952 (1997) (prosecution on larceny charge not barred after sanctions had been imposed in administrative proceeding before administrative agency), cert. dismissed, 522 U.S. 1101, 118 S. Ct. 907, 139 L. Ed. 2d 922 (1998); *State* v. *Santiago*, 240 Conn. 97, 101, 689 A.2d 1108 (1997) (prosecution on weapons charge does not give rise to double jeopardy clause violation after administrative discipline by prison officials); *State* v. *Hickam*, 235 Conn. 614, 628, 668 A.2d 1321 (1995) (prosecution for driving while under influence was not barred after suspension of driver's license in administrative proceeding), cert. denied, 517 U.S. 1221, 116 S. Ct. 1851, 134 L. Ed. 2d 951 (1996); *State* v. *Fritz*, 204 Conn. 156, 171-77, 527 A.2d 1157 (1987) (prosecution for illegally prescribing narcotic substance was not barred after administrative proceeding before consumer protection department).

MEMORANDUM DECISIONS

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WELLS FARGO BANK, N.A. *v.* WIDOW, HEIRS AND/OR CREDITORS OF THE ESTATE OF ELSI SAVVIDIS ET AL.
(AC 41971)

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

Submitted on briefs February 19—officially released March 10, 2020

Appeal by the defendant Andreas K. Savvidis from the Superior Court in the judicial district of Stamford-Norwalk, *Genuario*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

U.S. BANK TRUST, N.A., TRUSTEE
v. MARK E. O'BRIEN ET AL.
(AC 43004)

Keller, Bright and Bishop, Js.

Argued February 18—officially released March 10, 2020

Named defendant's appeal from the Superior Court in the judicial district of Litchfield at Torrington, *Hon. John W. Pickard*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

STEVEN K. STANLEY *v.* COMMISSIONER OF CORRECTION
(AC 42754)
(AC 42756)

Alvord, Elgo and Devlin, Js.

Argued February 18—officially released March 10, 2020

Petitioner's appeals from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeals are dismissed. See *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 505, A.3d (2020) (because petitioner failed to address threshold question of whether habeas court abused its discretion in denying petition for certification to appeal, he was not entitled to appellate review).

ANTHONY HANNON *v.* BOARD OF EDUCATION OF THE TOWN OF NORTH HAVEN ET AL.
(AC 42368)

Prescott, Bright and Moll, Js.

Argued February 19—officially released March 10, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Hon. Jon C. Blue*, judge trial referee.

Per Curiam. The judgment is affirmed.

IVONNE SOLOMON *v.* SARAH DOE ET AL.
(AC 42110)

Alvord, Prescott and Moll, Js.

Submitted on briefs February 20—officially released March 10, 2020

Named defendant's appeal from the Superior Court in the judicial district of New Haven, Housing Session, *Cordani*, *J.*

Per Curiam. The judgment is affirmed.

ABIGAIL HOLT *v.* CAROL DOLCE ET AL.
(AC 42749)

Keller, Bright and Bishop, Js.

Argued February 18—officially released March 10, 2020

Appeal by defendant Donald Dolce from the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, *Spader*, *J.*

Per Curiam. The appeal is dismissed for lack of subject matter jurisdiction. See *Young* v. *Young*, 249 Conn. 482, 488–89, 733 A.2d 835 (1999).

RICHARD E. CONSIGLIO (EXECUTOR OF THE ESTATE OF FLORA CONSIGLIO), ET AL.
v. AL DENTE, LLC, ET AL.
(AC 42611)

Prescott, Bright and Moll, Js.

Argued February 19—officially released March 10, 2020

Defendants' appeal from the Superior Court in the judicial district of New Haven, *Wilson*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* CHARLES SPELLS
(AC 42701)

Alvord, Prescott and Moll, Js.

Argued February 20—officially released March 10, 2020

Defendant's appeal from the Superior Court in the judicial district of Waterbury, *Hon. Roland D. Fasano*, judge trial referee.

Per Curiam. The judgment is affirmed. See *State* v. *Lytell*, 206 Conn. 657, 665–67, 539 A.2d 133 (1988).

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Bordiere *v.* Ciarcia Construction, LLC 70
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Brown *v.* Commissioner of Correction (Memorandum Decision) 902

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Cheswold (TL), LLC, BMO Harris Bank, N.A. *v.* Kwong 279
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Compass Bank *v.* Dunn 43
Foreclosure; whether trial court incorrectly granted motion for default for failing to disclose defense on ground that no "valid" defense was asserted; whether rule of practice (§ 13-19) allows trial court to pass on legal sufficiency of proposed defense; claim that defendants interposed valid defense to foreclosure action.

Consiglio *v.* Al Dente, LLC (Memorandum Decision) 904

Dickau *v.* Mingrone 59
Property; breach of contract; claim that trial court erred in finding that city building department had not made determination regarding use and occupancy status of plaintiff's property; whether record was sufficient to support trial court's finding; claim that trial court erred in not finding that plaintiff established existence of damages.

Hannon *v.* Board of Education (Memorandum Decision) 903

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In re Gabriel C. 333
Termination of parental rights; whether trial court improperly denied respondent mother's motion to disqualify counsel acting as minor child's guardian ad litem on ground that attorney previously acted as mother's guardian ad litem when

mother was minor; claim that trial court improperly admitted social studies pursuant to governing statutes (§§ 17a-112 (j) and 45a-717) and on ground that social studies contained hearsay; claim that trial court improperly concluded that mother failed to achieve requisite degree of personal rehabilitation required by § 17a-112.

In re Geoffrey G.. 316

Termination of parental rights; whether trial court improperly failed to order, sua sponte, evaluation of respondent mother's competency to assist her counsel at trial; whether mother established violation of her right to due process; claim that evidence in record demonstrated that mother's mental health issues, at time of trial, interfered with her ability to provide her newly retained counsel with truthful, relevant data in presentation of her case.

Jepsen *v.* Camassar 97

Declaratory judgment; action seeking declaration that certain modifications made by beach association to restrictive covenants in beach deed were invalid; claim that trial court improperly denied plaintiffs' postjudgment motion for equitable relief because this court's order of remand in first appeal required trial court to address their claims for quiet title and injunctive relief; claim that trial court improperly denied postjudgment motion for fees and costs; claim that, even assuming that this court's mandate in first appeal did not encompass claims of certain plaintiffs to quiet title, equitable relief, and fees and costs, trial court improperly denied their motion to open to provide them with their requested relief; claim that trial court violated several state and federal constitutional rights of certain plaintiffs by failing to hear or grant their postjudgment motions.

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Alleged deprivation of plaintiff's federal constitutional rights; whether trial court's finding that plaintiff failed to prove causal connection between plaintiff's conduct and defendant's alleged retaliation was clearly erroneous.

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Temporary and permanent injunction; easement; motion to disqualify; claim that trial court wrongly issued permanent injunction; claim that plaintiff did not allege irreparable harm or lack of adequate remedy at law; whether complaint provided adequate notice of plaintiff's claim for permanent injunction; whether there was substantial likelihood that, in absence of judicial intervention, plaintiff stood to lose valuable asset; whether defendant could prevail on his claim that trial court improperly allowed plaintiff to modify dissolution judgment by granting injunction; whether trial court erred by allowing plaintiff to present evidence that contradicted alleged judicial admissions in her pleadings; whether trial court abused its discretion by denying defendant's motion to disqualify trial judge; whether trial court erred in denying defendant hearing before another judge.

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Office Condominium Assn., Inc. *v.* Rompre 370

Foreclosure of statutory (§ 47-258) common charges lien; Common Interest Ownership Act (§ 47-200 et seq.); summary judgment; whether this court lacked subject matter jurisdiction over appeal; whether trial court left substantive claim unresolved following its decision that granted in part condominium association's motion for summary judgment on counterclaim; whether appeal was taken from final judgment; whether more than determination of amount of attorney's fees remained to be done.

Peterson *v.* Torrington 52

Declaratory judgment; summary judgment; tax sale; whether appeal was moot; whether there was unchallenged, alternative ground for affirming judgment of trial court; whether trial court could grant practical relief; whether Appellate Court was without subject matter jurisdiction.

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Declaratory judgment; whether trial court properly granted motion to dismiss plaintiff's declaratory judgment action on ground that claims were not ripe for adjudication because they were pending before Probate Court at time complaint was

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Interpleader; interpleader action to determine rights of defendants to certain shares of plaintiff's common stock; motion to dismiss; subject matter jurisdiction; standing; claim that trial court lacked subject matter jurisdiction over interpleader action; whether plaintiff lacked standing because its nonparty transfer agent allegedly held subject shares on plaintiff's behalf; claim that trial court improperly denied defendant companies' motion to dismiss for mootness; claim that trial court improperly rendered interlocutory judgment of interpleader; whether it was premature for this court to consider merits of parties' purportedly adverse claims to shares; whether trial court properly exercised its authority to remand matter to clarify arbitration award as to ownership of shares; whether trial court violated doctrine of functus officio.
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State *v.* Bornstein 420
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State *v.* Prince A. 413
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Foreclosure; motion for summary judgment as to liability; motion for judgment of strict foreclosure; bankruptcy; motion to reenter judgment of strict foreclosure; claim that trial court erred by concluding that defendant lacked standing to object to plaintiff's motion to reenter judgment; whether defendant lacked standing to pursue her defense to plaintiff's interest in property because her failure to notify bankruptcy trustee of defense by not disclosing it as asset of bankruptcy estate precluded her from raising defense after discharge of bankruptcy estate; whether Beck & Beck, LLC v. *Costello* (178 Conn. App. 112) was applicable; whether plaintiff's reliance on *Beck & Beck, LLC*, conflated debtor's claim for money damages as asset of bankruptcy estate with debtor's defense to enforcement of invalid lien; whether defendant's claim that either bankruptcy trustee or any creditor could move to reopen bankruptcy estate if trial court were to find mortgage invalid ignored threshold issue that defendant lacked legal capacity to raise that defense.
U.S. Bank Trust, N.A. *v.* O'Brien (Memorandum Decision) 903
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Foreclosure; motion for summary judgment as to liability; motion for judgment of strict foreclosure; motion to reargue; claim that trial court lacked subject matter jurisdiction because plaintiff did not have standing because it was not holder of subject note; claim that note was nonnegotiable instrument pursuant to relevant statute (§ 42a-3-104 (a)) because it was not for fixed amount of money and was governed by federal law; claim that trial court improperly granted plaintiff's motion for summary judgment as to liability; whether trial court abused its discretion by granting motion for judgment of strict foreclosure; whether plaintiff complied with requirement in applicable rule of practice (§ 23-18) that preliminary statement of monetary claim be filed no less than five days prior to hearing on motion for judgment of strict foreclosure; claim that trial court abused its discretion when it denied defendant's motion to reargue judgment of strict foreclosure.
Wells *v.* Wells 309
Dissolution of marriage; postjudgment motion for order; whether trial court improperly interpreted provision of separation agreement; whether trial court improperly denied motion for order.
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Administrative appeal; appeal from decisions by defendant Public Utilities Regulatory Authority concerning plaintiff's petition, pursuant to statute (§ 16-243a), to compel defendant utility to enter into contract with plaintiff for purchase of energy and capacity from solar electric generating facilities; whether trial court improperly granted authority's motion to dismiss appeal; whether trial court properly concluded that it lacked subject matter jurisdiction because plaintiff had failed to plead facts sufficient to establish aggrievement and because plaintiff's appeal was moot.
Young *v.* Hartford Hospital 207
Medical malpractice; certificate of good faith and opinion required by statute (§ 52-190a) for negligence action against health care provider, discussed; whether trial court improperly granted defendant's motion to dismiss plaintiff's action on ground that plaintiff failed to provide certificate of good faith and opinion pursuant to § 52-190a; whether plaintiff's claims were based on ordinary negligence or medical malpractice.

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Availability of List of Municipalities Exempt from the Affordable Housing Appeals Procedure

In accordance with § 8-30-g of the Connecticut General Statutes, the Department of Housing (DOH) has prepared the list of municipalities that are exempt from the affordable housing appeals procedure and those municipalities that are not exempt. This list is effective March 1, 2020. A copy of this list is available on the agency website at www.ct.gov/doh. For additional information please write to Laura Watson, Economic and community Development Agent, 505 Hudson Street, Hartford, CT 06106 or call at (860) 270-8169.

NOTICES

Superior Court Operations

Small Claims/Motor Vehicle Magistrate Appointments

The Judicial Branch is now accepting applications for Small Claims/Motor Vehicle Magistrate appointments pursuant to C.G.S. § 51-193*l*. Attorneys interested in being considered for appointment for the term beginning July 1, 2020 should complete and email an application and supporting materials to magistrate matters at Magistrate.Matters@jud.ct.gov. Fillable PDF versions of the forms are available at www.jud.ct.gov. Applications will be considered on a rolling basis.

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 21, 2020:

Joseph M. Salamunovich	RBC Bearings, Inc.

Certified as of February 24, 2020:

Matthew B. Carney	Pratt & Whitney

Certified as of February 28, 2020:

Daniel G. Agius	Nordex, Inc.
Robert L. Branham	Amphenol Corporation
Chris J. Fisher	Xerox Corporation
Jules P. Kaufman	Gartner, Inc.
Marc L. Kesselman	Purdue Pharma L.P.
Jessica H. Mayes	XPO Logistics, Inc.
Michelle Torres	NBC Sports Group

Hon. Patrick L. Carroll III
Chief Court Administrator

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2020-1, February 20, 2020

Question Presented: **The petitioner asks if faculty members at the Connecticut Community Colleges (''CCC'') may accept free trips from private travel vendors in exchange for recruiting CCC students to sign up (and pay thousands of dollars) for the trips, helping to organize the trips, and chaperoning the students on the trips, which take place during school breaks, when faculty members are off-contract and on their personal time.**

Brief Answer: **Based on the facts presented, we conclude that the Code of Ethics for Public Officials does not permit this faculty-led travel model.**[1]

At its September 19, 2019 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by Attorney Ernestine Yuille Weaver (''Petitioner'' or ''Attorney Weaver'') on behalf of the Connecticut Community Colleges (''Community Colleges'' or ''CCC''). The Board also ordered the matter set for a hearing pursuant to § 1-92-39 of the Regulations of Connecticut State Agencies.[2]

The Office of State Ethics (''OSE'') issued notice of the hearing on September 30, 2019, announcing a 30-day public comment period to run from October 1 to October 31, 2019, to allow those interested in the petition to submit relevant facts, legal arguments, and opinions. By the period's end, the OSE received a single comment, from an anonymous person (''Anonymous Commenter''), which detailed many concerns with the activity that is the subject of this opinion.

Meanwhile, at its October 17, 2019 regular meeting, the Board designated members Attorney Beth Cook and Vice Chairman Jason Farrell as Hearing Officers, pursuant to General Statutes § 1-80 (e).

The hearing to receive public comments (relevant facts, legal arguments, and opinions) from persons interested in the matter was scheduled for and held on November 13, 2019 (''November 13th hearing'').[3] Four persons appeared and provided comments at the hearing:

[1] We stress that our conclusion here is confined to the specific facts outlined in the ''Facts'' section, and that there may be other models that present no concerns under the Code.

[2] The regulations provide, in relevant part, that ''[i]f the Citizen's Ethics Advisory Board deems a hearing necessary or helpful in determining any issue concerning the request for an advisory opinion, the Citizen's Ethics Advisory Board may schedule such hearing and give such notice thereof as is appropriate.'' Regs., Conn. State Agencies § 1-92-39 (c).

[3] An audio recording of the November 13th hearing is available at the OSE.

- Attorney Weaver;
- Kevin Bechard, former professor at Manchester Community College;
- William J. Dunn, General Counsel for EF Education First (''EF General Counsel''); and
- Mark Comeau, a professor at Three Rivers Community College.

The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code''), chapter 10, part I, of the General Statutes.

Facts

In her petition, Attorney Weaver inquired specifically as to the following:

> How to comply with the . . . Code . . . while enabling educational travel opportunities for CCC students when these opportunities must be purchased from third parties who rely on CCC faculty to recruit and coordinate students to travel during breaks and while faculty are on their personal time; and, in exchange, faculty are provided the opportunity to participate on the excursion free of cost.

Petition for Advisory Opinion (Sept. 16, 2019). She noted that the Community Colleges recognize ''the educational value of travel,'' but do not ''contract directly'' with private travel vendors due to the ''[a]dditional liability for international travel; personnel costs and collective bargaining issues for employment of faculty while off contract, and the collection of funds from students and providing them to a third party.'' *Id.* She noted too that, although some of the Community Colleges have ''allowed a private travel organization to work with faculty to provide travel opportunities,'' the faculty members do not act on behalf of the respective colleges, and ''the trips occur when classes are not in session and the faculty are engaging in the activity on their personal time.'' *Id.*

At the November 13th hearing, Attorney Weaver presented comments submitted by the heads of nine of the twelve Community Colleges, and Professor Comeau provided verbal comments on behalf of one of the other community colleges. *Testimony of Attorney Weaver; Testimony of Mark Comeau; Exhibit 2 (Comments submitted at hearing by Counsel Ernestine Weaver on behalf of 9 of the 12 Connecticut Community Colleges).* Attorney Weaver noted that the ''fervor'' in support of the travel model at issue—under which faculty members receive a free trip in exchange for recruiting students for the trip, helping to organize the trip, and chaperoning the students on the trip—diminished significantly upon dissemination of the comments submitted by the Anonymous Commenter, which raised ''concerns'' amongst the CCC heads. *Testimony of Attorney Weaver.*

The Anonymous Commenter expressed several concerns with what he or she described as the ''educational travel abroad practices that have occurred in at least one Connecticut Community Colleges,'' including the following:

- The significant dollar cost of the trip to the students (who are ''often economically disadvantaged''), in contrast to the zero-dollar cost to the faculty members ''in exchange for recruiting and coordinating students''; and

- The lack of academic rigor, in that the trips were typically not tied to specific lessons or assignments, and that sometimes the faculty member did not have specific expertise related to the particular trip.[4]

Exhibit 1 (Comments submitted by Anonymous Commenter (Oct. 30, 2019)).

Presenting a different perspective at the November 13th hearing was the EF General Counsel. He stated that EF Education First (''EF'') provides various tour packages to different types of travelers, including EF College Study Tours (''EFCST''), which is a division of EF targeted to college and university populations. *Testimony of EF General Counsel*. In turn, EFCST offers several models. *Id.* In some instances (but not with the community colleges at issue here), colleges and universities contract directly with EF to administer the travel abroad (the ''college-led travel model''). *Id.* In other instances (such as here), individual faculty members sign a contract (Group Leader Release) in their individual capacity with EFCST, and the students sign a separate contract (Booking Conditions) with EFCST. *Id*.

It is this second model—referred to as the ''faculty-led travel model''—that is the subject of this opinion. The testimony and exhibits stemming from the November 13th hearing indicate that the model generally works like this:

- A faculty member contacts EFCST and either selects a pre-existing itinerary or works with EFCST to customize a unique itinerary for a trip abroad. *Testimony of EF General Counsel*.
- Functioning as the ''group leader,'' the faculty member takes on certain responsibilities, including organizing and selecting a travel program, recruiting travelers (mostly, if not entirely, comprised of students), and supervising travelers during the trip. *Testimony of EF General Counsel; Exhibit 4 (EFCST Group Leader Release)*.
- With respect to recruiting travelers, the faculty member typically does so by discussing the trip with students in his or her classes, sending emails to students (sometimes via the CCC email system), communicating with other faculty members, and posting material about the trip on bulletin boards at the college where the faculty member teaches. *Testimony of Attorney Weaver; Testimony of Kevin Bechard; Testimony of EF General Counsel*.
- The EFCST website expressly provides that EF will assist faculty members in recruiting student travelers. *See* EF College Study Tours website, link for ''Leading a Program'' (''Step 2 – Enroll Students. At EF, we'll help you get administrative approval, spread the word about your program, and inform, excite, and prepare students to travel in no time. Plus, each Faculty Group Leader's travel is funded for each six students enrolled'').
- If requested by a faculty member, EF provides materials for the faculty member to use to recruit travelers. *Testimony of EF General Counsel; see also* EF College Study Tours website, link for ''Leading a Program'' (''Resources and Materials. We'll provide all the tools you need to promote your program, including emails, recruiting support, and customized materials'').
- In return, EFCST allows its group leaders to go on the trip, without personal cost, as a ''removal of a barrier that would otherwise be there'' and would otherwise prevent this travel model from operating. *Testimony of EF General Counsel*.

[4] In his testimony at the November 13th hearing, Kevin Bechard expressed many of the same concerns with the existing travel model.

- For every six paying travelers recruited, EFCST provides one complimentary package, which it refers to in its Group Leader Release as a ''free place ratio,'' for a faculty member group leader. *Testimony of EF General Counsel*; *Exhibit 4 (EFCST Group Leader Release).*[5]

- A typical tour package includes round-trip airfare, lodging, airport transfers and transportation between destination cities, transportation to all included activities, most meals, a Tour Director available 24 hours a day, sightseeing tours and excursions led by licensed local guides, and entrance fees to museums, theatres, and other sites. *Testimony of EF General Counsel*; *Exhibit 3 (EFCST Booking Conditions).*

- Although faculty members serve as group leaders, there is no requirement that the trip be structured around a faculty member's area of expertise. *Testimony of Kevin Bechard; Testimony of EF General Counsel; Exhibit 1 (Comments submitted by Anonymous Commenter (Oct. 30, 2019)).* As noted above, EFCST provides tour guides to lead the excursions. *Testimony of EF General Counsel*; *Exhibit 3 (EFCST Booking Conditions).* In some instances, the faculty member group leader may have contacts in the destination country who provide additional services to the students, or may provide further information based on his or her knowledge and experience. *Testimony of EF General Counsel*; *Testimony of Mark Comeau*.

- Although each trip is different and there is no ''one size fits all'' price, a typical trip costs each traveler at least several thousand dollars. *Testimony of EF General Counsel*; *see Exhibit 6 (EFCST sample Program Price quote for a seven-day trip to London: the City Experience (2015))* (departing from Boston and quoting a price of $3,153 (triple occupancy room) or $3,303 (double occupancy room), with a base program price of $2,638); EF College Study Tours link to Professor Comeau's March 2020 nine-day trip to Greece (last accessed Feb. 5, 2020), departing from Hartford CT ($4,835 for individuals under 30 years of age, and $5,235 for travelers 30 years of age or older).

Additional facts will be set forth as necessary.

Analysis

As to the preliminary issue of jurisdiction, the Code defines ''State employee'' to include, among others, ''any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . .'' General Statutes § 1-79 (13). According to the Connecticut State Register and Manual (2019), the State System of Higher Education is part of the executive branch of state government. And according to General Statutes § 10a-1, the state system of public higher education includes, among other entities, ''the regional community-technical colleges . . . .'' Accordingly, as employees of the regional community-technical colleges, CCC faculty members are ''state employees'' and thus are subject to the Code, including its conflict provisions.

[5] In some instances, at least some of these ''free place ratios'' have been used to provide scholarships to students. *Testimony of Mark Comeau.* Alternatively, the faculty members organizing the trip could, if they so chose, opt to split the value of the free place ratio amongst *all* travelers, which would defray the cost to the students. *Exhibit 1 (Comments submitted by Anonymous Commenter (Oct. 30, 2019)* (''EF Tours offered two options for funding the trip: accept a blanket discount for all travelers, students and faculty, **or**, enroll a certain number of students (6, 10, etc.) so one faculty member can go for free.'')

1. Application of General Statutes § 1-84 (c): ''use'' of ''public position'' for personal ''financial gain''

The core issue here is whether the faculty-led travel model outlined above violates any of those conflict provisions, particularly § 1-84 (c), which provides, in relevant part, as follows: ''no . . . state employee shall use his public . . . position . . . to obtain financial gain for himself . . . .'' That language, broken into its essential parts, requires that, for § 1-84 (c) to be violated, there must be three things: (1) a ''state employee'' who (2) ''uses his public . . . position'' to (3) ''obtain financial gain for himself . . . .'' We have already concluded that CCC faculty members are ''state employees,'' so we need only concern ourselves with § 1-84 (c)'s second and third prongs.

A. ''Use'' of ''public position''

As for the second prong, we must determine whether, under the faculty-led travel model, CCC faculty members ''use'' their ''public positions,'' as those terms are employed in § 1-84 (c), to recruit students for the trips. To do so, we turn to a relatively recent court decision involving not just § 1-84 (c) but, more specifically, the meaning of the term ''use,'' namely, *Dickman* v. *Office of State Ethics*, Superior Court, judicial district of New Britain, Docket No. CV-10-6003844-S (August 31, 2011); aff'd 140 Conn. App. 754; cert. denied, 308 Conn. 934 (2013).

In *Dickman*, the Superior Court reviewed whether this Board had properly concluded that the respondent, a University of Connecticut Health Center microbiologist, violated § 1-84 (c) by using state resources (i.e., state time, computers, telephones, etc.) to conduct her private businesses. *Dickman* v. *Office of State Ethics*, supra, Superior Court, Docket No. CV-10-6003844-S. In claiming that the Board erred, the respondent argued that § 1-84 (c) ''only censures personal use of state facilities for private financial gain to the extent that such use directly relates to her *position*, that is, the employment for which she was hired.'' (Emphasis in original.) *Id*. She offered this example: ''[I]f a microbiologist furnishes a lab report prepared on state time to a physician in exchange for private compensation, '' 1-84 (c) is violated; but if the microbiologist conducts a jewelry business at work using a state computer, § 1-84 (c) is not violated.'' *Id*. The Board responded that ''the legislature passed '' § 1-84 (c) to halt the use of one's position for financial gain, whether such use was directly or indirectly related to one's state position or job description.'' *Id*.

In siding with the Board, the Superior Court discussed a series of in-state and out-of-state court decisions, but zeroed in on a decision of the Oregon Supreme Court, involving an interpretation of language ''identical'' to that in § 1-84 (c). *Id*. About that decision, the Superior Court said this:

> In *Davidson* v. *Oregon Ethics Commission*, 300 Or. 415, 712 P.2d 87 (Or. 1985), the court held that a state employee had used his office for financial gain when he obtained an automobile for himself at a discount as an ''add-on'' to a state fleet purchase order. *Davidson* did not accept the argument made there, and here as well, that the Oregon (and hence the Connecticut) statute applied only to misusing the power and influence inherent in the public office itself. *Id.*, at 92.
>
> According to *Davidson*, the employee *''used his public office because he 'availed himself of' the add-on purchase by buying a car at a price available only to him only as a public official.* As a private citizen he could not have walked into the car dealership, asked for an add-on purchase fleet discount and received it. Only

> because he was an employee [of the agency] did he qualify for the [agency] purchase price discount. The term 'use' is not restricted only in influence peddling. The concept of public trust extends to all matters within the duties of the public office. The broad policy of the ethics laws is to ensure that government employees do not gain personal financial advantage through their *access to the assets and other attributes of government*.'' *Id.*

(Emphasis added.) *Dickman* v. *Office of State Ethics*, supra, Superior Court, Docket No. CV-10-6003844-S. Applying the reasoning in *Davidson*, the Superior Court concluded that ''the [respondent's] use of state facilities [to support her private businesses] logically falls within the jurisdiction of § 1-84 (c) as the [respondent] obtained financial gain through 'her access to the assets and other attributes of government.' '' *Id.*

The respondent appealed, arguing that the Superior Court erred, in that ''there must be a nexus between the objectionable conduct and the duties, obligations and responsibilities that she had as a state employee microbiologist in order to find a violation of § 1-84 (c).'' *Dickman* v. *Office of State Ethics*, supra, 140 Conn. App. 766. The Appellate Court disagreed:

> [Section 1-84 (c)] prohibits the *use* of the state employee's position to obtain financial gain. Here, the board found that the [respondent] used state computers and telephones, as well as the time for which she was paid by the state to perform her duties as a microbiologist, to conduct a jewelry business and to provide services as a travel agent. *The [respondent's] access to the state equipment was made possible because of her position as a state employee at the health center.*[6]

(Emphasis added.) *Id.*, 768-69.

So too here: CCC faculty members' access to CCC students and resources is made possible because of their positions as state employees at the Community Colleges. Indeed, at the November 13th hearing, the petitioner was asked the following question:

> And in terms of *access* to the students . . . if any member of the public wanted to engage in this type of activity that the faculty members are engaging in . . . soliciting students [for the travel abroad trips], would they have the . . . exact same *access* that these faculty members have? Could they come in there and start putting stuff up on the bulletin board? Can they . . . speak to classes?

(Emphasis added.) The petitioner's answer: ''No, there's not a random solicitation on our campuses.''

Not only that, the viability of the faculty-led travel model hinges *entirely* on CCC faculty members' access to, and relationship with, CCC students. This truth was borne out clearly at the November 13th hearing, during which a Hearing Officer posed the following questions to the EF General Counsel:

[6] The Appellate Court continued: ''Even if the statutory language could be deemed ambiguous, the legislative history supports the board's interpretation. Representative Patricia T. Hendel stated that the intent of the proposed bill was 'to pass a stronger code of ethics bill this year. I think its important that we help increase public trust and improve the total image of our state government. . . .' '' *Id.*, 679.

> But for the professor bringing it to the attention of the students, there would not be a trip run by you guys . . . in the model where you contract with the professor, not the university or college? So it's but for this professor's relationship with his class?

The EF General Counsel's response:

> *I think that's probably a . . . fair characterization in terms of . . . the importance of the faculty member*. I think . . . that the faculty member is an important component of it. . . . I think *if the faculty member wasn't motivated or inspired to do the program, then it would be some other, it would be outside of our educational division*.

(Emphasis added.) Put more bluntly, CCC faculty members' access to, and relationship with, CCC students is the glue that binds the faculty-led travel model, and without it the model crumbles.[7]

At bottom, then, *but for* CCC faculty member's access to, and relationship with CCC students, the faculty-led travel model is stripped of its viability, and *but for* their public positions, CCC faculty members would not have that access or those relationships. We conclude, therefore, that, under the faculty-led travel model, CCC faculty members ''use'' their ''public positions,'' as those terms are employed in § 1-84 (c), to recruit students for the travel abroad trips at issue.[8]

B. ''Financial gain''

Having so concluded, we turn to the third prong of the § 1-84 (c) analysis, namely, whether CCC faculty member's use of their public positions as described above is ''to obtain *financial gain* for'' themselves. (Emphasis added.) Although the Code does not define ''financial gain,'' the regulations do—and in very broad terms:

> Pursuant to subsection (c) of section 1-84 . . . ''financial gain'' shall mean *any benefit valued in excess of one hundred dollars* per person per year that is received by or agreed to be received by a state employee or public official, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated.

(Emphasis added.) Regs., Conn. State Agencies § 1-81-16a. The question, then, is whether, under the faculty-led travel model, a typical travel package provided to a CCC faculty member by a private tour vendor constitutes a ''benefit'' valued more than $100. From the November 13th hearing, we glean that such a package has a fair market value of several thousand dollars, meaning that the $100 threshold is easily met, and that we need only focus on whether the package constitutes a ''benefit.''

[7] Bolstering that conclusion is the EF General Counsel's response to the question of whether outside professors (e.g., a professor at the University of Hartford) would ever be asked by his company to recruit CCC students for these trips: ''The short answer is no.''

[8] At the November 13th hearing, the EF General Counsel argued that CCC faculty members are not using their state positions, because (in his words) ''[t]hese professors and faculty are doing this on their personal time. They're doing it during breaks; it's not during the school year.'' While this may be true for the chaperoning portion of the group leader's duties (the trip itself), it is not true for the recruiting portion (the time period prior to the actual trip), where CCC faculty members, as noted above, clearly use their access to CCC students and resources (e.g., discussing trips with students in their classrooms, communicating with students and other CCC faculty members about the trips via state e-mail, posting trip flyers on CCC property).

Neither the Code nor the regulations define the word ''benefit,'' and ''[i]f a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary.'' (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn.* v. *State*, 278 Conn. 77, 84 (2006). In that case, our Supreme Court looked to the common understanding of ''benefit'' as expressed in two dictionaries, noting as follows: ''The American Heritage Dictionary (4th Ed. 2000) defines 'benefit' as '[s]omething that promotes or enhances well-being; an *advantage* . . . .' Similarly, Black's Law Dictionary (6th Ed. 1990) defines the word 'benefit' as an '*[a]dvantage*; profit; fruit; privilege; gain; interest. . . .'' (Emphasis added.) *Id.*

Applying those definitions here, a CCC faculty member's receipt of what the EF General Counsel described as an ''all inclusive'' travel package certainly affords faculty members an ''advantage'' (as well as a ''privilege,'' ''fruit,'' ''gain,'' etc.)—namely, the advantage of free world travel. As noted earlier, the travel package includes round-trip airfare, lodging, airport transfers and transportation between destination cities, transportation to all included activities, most meals, a Tour Director available 24 hours a day, sightseeing tours and excursions led by licensed local guides, and entrances to various museums and theatres and other sites. In the EF General Counsel's words, faculty members ''are getting what the student is getting, but they're not paying.'' Not having to pay the several thousand dollars that student travelers have to pay is an ''advantage'' and thus a ''benefit.'' Because the ''benefit'' is (as noted above) easily valued over $100, we conclude that it constitutes ''financial gain'' under § 1-81-16a's definition of that term.[9]

Other ethics commissions have reached similar conclusions in addressing similar scenarios. In *Advisory Opinion No. 2000-04*, the Ohio Ethics Commission (''Ohio Commission'') was asked if ''Ohio Ethics Laws . . . prohibit . . . public school officials and employees from accepting compensation from a private tour company for performing administrative and other duties associated with a school trip, or acting as chaperones on school trips.'' *Id.* Under one such law, public officials and employees could not ''use or authorize the use of the authority or influence of office or employment to secure anything of value . . . .'' *Id.* In assessing whether ''anything of value'' included an ''expense-paid trip,'' the Ohio Commission concluded that it did, reasoning as follows: ''[t]he term 'anything of value' is defined . . . to include . . . everything of value''; ''[a] definite, pecuniary benefit is considered to be a thing of value''; and because an expense-paid trip is a definite, pecuniary benefit, it would ''be within the definition of 'anything of value.' '' *Id.*

Further, in *Advisory Opinion No. 2000-62*, the Alabama Ethics Commission (''Alabama Commission'') addressed whether ''a complimentary travel package for a public employee, who is accompanying and supervising students on an officially sanctioned school field trip, constitutes a thing of value as defined by Alabama Ethics Law[.]'' *Id.* After noting that the term ''thing of value'' is defined to include, among other things, any ''gift'' or ''benefit,'' the Alabama Commission concluded that ''a free trip . . . for the chaperones does fall within the definition of a thing of value.'' *Id.*

[9] At the November 13th hearing, the EF General Counsel argued, to the contrary, as follows: ''[T]his is not a situation where a state employee is getting a direct *monetary* personal gain. *They're not being paid anything. They are receiving . . . the ability to go on a tour without expending further costs* . . . .'' (Emphasis added.) In so arguing, the EF General Counsel mistakenly assumed that the term ''financial gain'' is confined to ''monetary'' (i.e., money) gain, but as noted above, the term sweeps much more broadly, defined as it is to include ''*any benefit* valued in excess of one hundred dollars . . . .'' Regs., Conn. State Agencies § 1-81-16a. It is certainly a ''benefit'' (i.e., ''advantage'') to be able to (as the General Counsel puts it) ''go on tour without expending further costs . . . .''

Moreover, in *Advisory Opinion No. 2015-1*, the Hawaii State Ethics Commission (''Hawaii Commission'') tackled the issue of ''whether teachers and other [Department of Education] employees . . . who serve as chaperones on student educational trips . . . [could accept] free travel and other benefits from tour companies through which the teachers plan and organize these trips.''[10] *Id*. As to whether the ''free travel and other benefits'' were prohibited ''gifts,'' the Hawaii Commission stated:

> [T]he free travel and other benefits offered to teachers by a tour company are intended both as an incentive for the teachers to promote the trip to as many students/parents as possible and a reward for the teachers' efforts in generating revenue for the tour company. Therefore, the free travel and other benefits are prohibited gifts.

Id. In so concluding, the Hawaii Commission rejected the teachers' argument to the contrary (an argument that has been asserted here too), namely, ''that the trip is a 'working trip' for them, and they do not construe the free travel . . . as a 'gift.' '' *Id*. Its response (with which we agree) was this: ''The Commission does not doubt that a teacher who serves as a chaperone takes on additional responsibilities. *At the same time, however, the free travel package has substantial monetary value that provides a personal benefit to the teacher by allowing the teacher to travel for free.*''[11] (Emphasis added.) *Id*.

To sum up, then, all three of § 1-84 (c)'s essential prongs are satisfied under the faculty-led travel model: We have (1) ''state employees'' (i.e., CCC faculty members) who are (2) ''using'' their ''public positions'' (i.e., availing themselves of their access to CCC students and resources to recruit such students for trips) (3) in order to ''obtain financial gain'' for themselves (i.e., all-inclusive travel packages valued at several thousand dollars). Accordingly, we conclude that the faculty-led travel model is prohibited by § 1-84 (c).

2. Application of the Code's outside employment rules

Even assuming, for argument's sake, we were to accept the argument that the trips are ''working trips'' for CCC faculty members, and the free travel is remuneration for the work they perform on behalf of the private travel vendors, the arrangement would still be barred, under the Code's primary outside ''employment'' provisions, subsections (b) and (c) of § 1-84.[12]

Section 1-84 (b) bars a state employee from ''accept[ing] other employment which will . . . impair his independence of judgment as to his official duties or

[10] The Hawaii State Teachers Association appealed Advisory Opinion 2015-1 to the Hawaii Circuit Court of the First Circuit, which did not rule on the merits, but invalidated the opinion, ruling that the Hawaii Commission violated the administrative statutes by failing to engage in the formal rulemaking process. The parties subsequently reached a settlement agreement. *See* HSTA v. Hawaii State Ethics Comm'n, CV 15-1-2453-12 (RAN) Settlement Agreement.

[11] The Anonymous Commenter echoed this sentiment in his or her submittal during the comment period: ''EF Tours handles the registration of students, itinerary planning, and supports throughout the trip. *There is not such an undue burden on faculty to recruit and chaperone students on their 'personal time' as to warrant a nice trip abroad, free of cost.*'' (Emphasis added.)

[12] Section 1-81-14 of the Regulations of Connecticut State Agencies defines ''employment'' as follows:

> [T]he term employment shall be construed to include any work or endeavor, whatever its form, undertaken in order to obtain financial gain (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.). The term shall not, however, include any endeavor undertaken only as a hobby or solely for charitable, educational, or public service purposes, when no compensation or other financial gain for the individual, his or her immediate family or a business with which the individual is associated is involved.

employment,'' and § 1-84 (c), again, bars a state employee from ''us[ing] his public . . . position . . . to obtain financial gain for himself . . . .'' As explained in the OSE regulations,

> [t]hese provisions do not, however, prevent a . . . state employee from using his or her expertise, including expertise gained in state service, for personal financial gain as long as no provision of the Code . . . is violated. Generally, [these provisions] are violated when the . . . state employee accepts outside employment with an individual or entity which can benefit from the state servant's official actions. . . .

Regs., Conn. State Agencies § 1-81-17.

This Board and its predecessor have interpreted that language myriad times, and stemming from those interpretations are various outside employment rules, many of which would be violated under the facts here:

First, ''a state employee may never use state time, materials or personnel to further his private work.'' *Advisory Opinion No. 2005-2*. Here, CCC faculty members use state time and resources to recruit CCC students for the trips, by, for example, discussing trips with students during class time (when the faculty members are ''on the clock''), sending emails about the trips via the CCC email system, posting trip materials on CCC bulletin boards, etc.

Second, ''it must be clear . . . that the employee is not being hired [for outside employment] because of his or her state position . . . .'' *Advisory Opinion No. 93-3; see also Advisory Opinion No. 2001-24* (concluding that a Community College president could not accept a stipend for serving on a bank's advisory board because ''the authorization of compensated work resulting directly from one's state position creates an unacceptable precedent under . . . [t]he Code''). Here, as discussed earlier, private tour vendors select CCC faculty members more for their ''public positions''—and their consequent access to, and relationships with, CCC students—than for their expertise. See footnote 3 (EFCST typically would not engage faculty members from another university system to solicit students for EFCST trips).

Third, ''it is . . . troublesome that the state employee may be offered a position at least in part because the outside employer believes that the state employee may have an 'in' at the agency, thereby allowing the outside employer to receive special treatment.'' *Advisory Opinion No. 94-7*. Here, private tour vendors select CCC faculty members precisely because they believe they will have an ''in'' at the Community Colleges—more specifically, an ''in'' with CCC students. Recall that the EF General Counsel testified that, but for CCC faculty members' relationships with the students, the faculty-led travel model would not be viable. And, when asked whether EFCST would seek individuals with expertise *outside* the college (i.e., individuals who are *not* affiliated with the college) to serve as group leaders and solicit students, or whether faculty members at a specific community college were sought because students would tend to trust their professors, the EF General Counsel explained that for ''practical reason[s]'' and ''from a business perspective''

> if there were a community member that was an expert in [a particular subject], . . . that wouldn't be who we were generally looking for . . . . what would be the outside expert's real motivation to run [a program]? They just practically wouldn't really want to do it, where we find faculty members who want to . . . participate in these programs is usually because usually they want to provide something, an opportunity or an experience,

> to the students that they know or that they have a relationship with.

Testimony of EF General Counsel.

Fourth, ''use of one's state title to promote one's outside employment, including a paid promotion for an unrelated third party, would be an impermissible use of state position.'' Advisory Opinion No. 98-11; see also *Advisory Opinion No. 2000-1* (state employee may not, in efforts to market private products, ''use any indicia of state authority in such endeavors''). Here, CCC faculty members use their state titles and—by discussing trips during classes and using the CCC email system and campus bulletin boards to promote the trips—use other ''indicia of state authority'' to recruit students for the trips.

And fifth, ''it is not appropriate for [a state employee or official] to accept outside employment as a consultant with a private [entity] targeting the very population served by [his or her state agency].'' *Advisory Opinion No. 1998-15; see also Request for Advisory Opinion No. 3060* (2002) (school resource officer at a State Technical School who accepted outside employment selling prepaid legal service plans could ''not attempt to market said . . . plans to anyone at the State Technical School where he works, or anyone within the Technical School system that he comes into contact with through his state employment''). Here, as noted above, in recruiting students at the Community Colleges where they teach, CCC faculty members are targeting the very population over which they have state authority.

This non-exhaustive list of outside employment concerns stemming from the faculty-led travel model shows that, even if the arrangement is deemed outside employment, it is still barred by the Code.

3. Discussion of other ethics agencies' opinions

Although neither this Board nor its predecessor have previously addressed this issue, other states have formally determined that a faculty-led travel model—under which faculty members solicit students to sign up for trips and, in exchange, receive a free travel spot—violates their respective ethics codes. As noted above, the ethics agencies in Ohio, Alabama, and Hawaii have issued advisory opinions addressing scenarios similar to the one before us, and in each opinion, the faculty-led travel model would be barred:

- In *Advisory Opinion No. 2000-04*, the Ohio Commission concluded that public school officials and employees are barred from ''accepting or soliciting any form of compensation from a private tour company . . . except their public employer, for scheduling, organizing, chaperoning, or performing any other duties associated with, a school trip''; but that they may accept ''necessary travel expenses to accompany students on a school trip, *so long as the travel expenses are provided in connection with the contract between the [school] district and the tour company to provide tour services* . . . .'' (Emphasis added.)

- In *Advisory Opinion No. 2000-62*, the Alabama Commission concluded that ''[e]mployees of the Jefferson County Board of Education may accept an expense-paid trip to Washington, D.C. while serving as chaperones for County students *in a Board-sanctioned event; provided, the School System determines which employees will attend the event as chaperones, and that the School Board employees did not solicit students to participate in the event, as the number of students participating dictates the number of free trips offered to chaperones*.'' (Emphasis added.)

- In *Advisory Opinion No. 2015-1*, the Hawaii Commission concluded that ''[t]he State Ethics Code . . . prohibits teachers from accepting free travel and other benefits from tour companies for serving as chaperones on student educational trips, where the teachers are directly involved in planning a trip and selecting a tour company to help organize the trip, promoting the trip to students and their parents, deciding who will chaperone the students, and/or requesting [Department of Education] approval of the trip.''

Although the language of the states' statutes varies, and is not identical to our Code, the ultimate conclusions are resoundingly consistent: that this type of faculty-led travel model raises serious ethics concerns and typically triggers multiple ethics code violations.

4. Application of General Statutes § 1-84 (r)

Before closing, we must address a tangential issue raised in the petition, wherein the petitioner states:

> *In accordance with . . . General Statutes § 1-84(r)*, CCC faculty as members of bargaining units may enter into consulting agreements provided the agreement does not conflict with the member's employment with the College. CCC's administrators support travel activities and view the opportunity as a benefit to the students.''

(Emphasis added.) We do not dispute the general educational value of travel abroad (which is not at issue here). We do, however, take issue with the suggestion that the arrangements between CCC faculty members and the private tour vendors (under the faculty-led travel model) are ''consulting'' agreements, as that term is used in § 1-84 (r), such that they fit within the carve-out set forth in that provision.

Section 1-84 (r) operates as a carve-out from the Code's main outside employment rules—§ 1-84 (b) and (c)—for certain employees of the state colleges and universities who engage in ''consulting'' agreements or ''research'' projects. In its first subdivision, § 1-84 (r) sets forth the general rule:

> *Notwithstanding the provisions of subsections (b) and (c) of this section*, a member of the faculty or a member of a faculty bargaining unit of a constituent unit of the state system of higher education *may enter into a consulting agreement or engage in a research project with a public or private entity*, provided such agreement or project does not conflict with the member's employment with the constituent unit, as determined by policies established by the board of trustees for such constituent unit.[13]

[13] In its second subdivision, § 1-84 (r) defines ''consulting'' and ''research,'' and requires each constituent unit's board of trustees to establish policies and procedures governing the ''consulting'' and ''research'' of its faculty members (e.g., ''prior to any such member entering into any such agreement or engaging in any such project,'' he or she must get ''approval by the chief academic officer of the constituent unit, or his or her designee''). In its third subdivision, § 1-84 (r) requires each constituent unit to create a nine-member committee to (among other things) monitor the unit's compliance with those policies and procedures. And in its last subdivision, § 1-84 (r) provides that, if a faculty member ''enters such a consulting agreement or engages in such a research project without prior approval'' of the chief academic officer of the constituent unit, the carve-out does not apply.

(Emphasis added.) In other words, if a faculty member's ''consulting'' agreement or ''research'' project does not conflict with the member's state employment—as determined under policies created by the constituent unit's board of trustees—then the § 1-84 (r) carve-out applies, meaning that § 1-84 (b) and (c), as interpreted by the Office of State Ethics, do not.

But the § 1-84 (r) carve-out does not apply here. For it to be triggered, the arrangements between CCC faculty members and the private tour companies must fit within § 1-84 (r)'s definition of either ''consulting'' or ''research.'' The petitioner attempts to squeeze the arrangements into the former, i.e., ''consulting,'' which subdivision (2) of § 1-84 (r) defines as follows:

> ''consulting'' means the provision of services for compensation to a public or private entity by a member of the faculty or member of a faculty bargaining unit of a constituent unit of the state system of higher education: *(I) When the request to provide such services is based on such member's expertise in a field or prominence in such field, and (II) while such member is not acting in the capacity of a state employee* . . . .

(Emphasis added.) Neither prong of that definition is met here.

As to the first prong, testimony from the November 13th hearing sinks the claim that CCC faculty members are asked to provide services based on their ''expertise'' or ''prominence.'' As noted above, the EF General Counsel was asked whether, *but for CCC faculty member's relationship with CCC students*, the faculty-led travel model would be viable, and his answer, recall, was no, suggesting that CCC faculty members are targeted by private tour companies—*not* for their expertise—but for their relationship with CCC students. Bolstering that suggestion is testimony showing the lack of any requisite nexus between CCC faculty member's expertise and the services they provide for private tour companies. Kevin Bechard, the former Manchester Community College professor, noted: ''[T]he . . . trip for EF Tours was shopped around trying to tie into a course. It wasn't in the faculty members' area of expertise. The faculty members also being recruited were not content experts in that area.'' In a similar vein, at the November 13th hearing, a Hearing Officer asked the EF General Counsel this question: ''So do they [CCC faculty] have to show some sort of a nexus to an academic pursuit, or can it be just, I'm on the faculty and I'd like to do this?'' He responded: ''Is there a firm requirement that an Italian professor has to go to Italy? No . . . . [T]here's no rule that is enforced in terms of a direct nexus between a specific specialty area and specific tour that they're allowed to do.''

As to the second prong, testimony from the November 13th hearing suggests that CCC faculty members are indeed ''acting in the capacity of . . . state employee[s]'' in performing at least some of the services on behalf of private tour vendors. Although the actual travel occurs during school breaks, while CCC faculty members are ''off-contract,'' there was ample and uncontroverted testimony (discussed at length above) that, *during the period leading up to the trip*, CCC faculty members use state time and resources to promote the trips. The most conspicuous evidence of CCC faculty members ''acting in the capacity of . . . state employee[s]'' is the fact that they promote trips to CCC students in the context of their own classes.

Given, then, that neither prong of § 1-84 (r)'s definition of ''consulting'' is met here, the § 1-84 (r) carve-out does not apply, meaning that § 1-84 (b) and (c), as we interpreted those provisions above, do.

Conclusion

Based on the facts presented, we conclude that the faculty-led travel model is not permitted by the Code, and that it does not fit within carve-out set forth in § 1-84 (r).

By order of the Board,

Dated: February 20, 2020

/s/Dena M. Castricone
Chairperson