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Notice of the Meeting of the Rules Committee of the Superior Court Under Practice Book Section 1-9B, the rules suspended, and the one new rule adopted by the Rules Committee under that authority appear beginning on Page 1PB. The suspended rules and the new rule adopted by the Rules Committee as well as an audio file of the Rules Committee meeting held on March 24, 2020, are posted on the Judicial Branch website at www.jud.ct.gov/Committees/rules/default.htm#Meeting.

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STATE OF CONNECTICUT *v.* GERJUAN RAINER TYUS

The defendant's petition for certification to appeal from the Appellate Court, 184 Conn. App. 669 (AC 40093), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the defendant's right to confrontation was not violated when the trial court allowed a substitute firearms examiner to testify about the findings of the primary examiner, who was unavailable to testify at trial?

"2. Pursuant to *Carpenter* v. *United States*, U.S. , 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), were the defendant's fourth amendment rights violated when the police obtained the defendant's cell phone records, including his cell site location information, without a warrant?

"3. Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in joining the defendant's case with that of his codefendant because the evidence in both cases was cross admissible?

"4. Did the Appellate Court properly uphold the trial court's refusal to give a limiting instruction concerning the firearms examiner's testimony?"

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

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

Paul J. Narducci, senior assistant state's attorney, in opposition.

Decided March 18, 2020

PAUL DOMBROWSKI *v.* CITY OF NEW HAVEN ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 194 Conn. App. 739 (AC 40899), is denied.

Christopher J. Petter, in support of the petition.

Decided March 18, 2020

STATE OF CONNECTICUT *v.* NOEL BERMUDEZ

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 780 (AC 41864), is granted, limited to the following issues:

"1. Did the Appellate Court properly uphold the trial court's admission of evidence that the defendant was a gang member and that the state's chief witness was relocated out of state after providing her statement to the police inculpating the defendant?

"2. Did the Appellate Court correctly conclude that the trial court's erroneous preclusion of sexually explicit letters the state's chief witness wrote to the defendant was harmless and that the trial court's limitation on the defendant's cross-examination of her was proper?

"3. Did the Appellate Court properly uphold the trial court's rulings limiting the defendant's cross-examination of the state's chief witness on topics regarding her credibility?"

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

Timothy F. Costello, assistant state's attorney, in opposition.

Decided March 18, 2020

NATIONSTAR MORTGAGE, LLC *v.* ANNETTE L. WASHINGTON ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 42819) is denied.

Annette L. Washington, self-represented, and *Basil Washington*, self-represented, in support of the petition.

Christopher J. Picard, in opposition.

Decided March 18, 2020

NATIONSTAR MORTGAGE, LLC *v.* ANNETTE L. WASHINGTON ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 42819) is denied.

Annette L. Washington, self-represented, and *Basil Washington*, self-represented, in support of the petition.

Christopher J. Picard, in opposition.

Decided March 18, 2020

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
v. CAROL J. ROTHERMEL

The defendant's petition for certification to appeal from the Appellate Court (AC 43152) is granted, limited to the following issues:

"1. Did the Appellate Court properly dismiss as moot the defendant's appeal from the trial court's denial of a motion to open the judgment of strict foreclosure, raising equitable grounds involving alleged misrepresentations by the plaintiff relating to the strict foreclosure proceedings, when the motion to open was filed by the defendant one day after title vested in the plaintiff?

"2. If the answer to the first question is 'no,' did the trial court properly deny the defendant's motion to open the judgment of strict foreclosure pursuant to General Statutes § 49-15?"

Christopher G. Brown, in support of the petition.

Geraldine A. Cheverko, in opposition.

Decided March 18, 2020

FEDERAL NATIONAL MORTGAGE ASSOCIATION
v. STEPHEN D. TROJAN ET AL.

The defendant Harold Ellis Beale, Jr.'s petition for certification to appeal from the Appellate Court (AC 43645) is denied.

Harold Ellis Beale, Jr., self-represented, in support of the petition.

Decided March 18, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 196

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* CHARLES NICHOLAS PETERSEN
(AC 41907)

Lavine, Prescott and Moll, Js.

Syllabus

Convicted, after a jury trial, of the crime of failure to appear in the first degree, the defendant appealed to this court. The defendant had been arrested and charged with a felony offense; a trial was scheduled to commence at 10 a.m. on October 3, 2017. The defendant was not present in court on the scheduled date and time and the court ordered the defendant's bond forfeited and that he be rearrested. The defendant entered the courthouse at 10:34 a.m., then briefly went outside to telephone his attorney, W. The defendant and W reentered the courthouse and the court ordered that jury selection proceed; the defendant, however, left the courthouse and, subsequently, he was charged with failure

to appear. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to sustain his conviction. *Held*:

1. The evidence was sufficient to support the defendant's conviction of failure to appear in the first degree: the evidence admitted at trial and the reasonable inferences from that evidence that the jury was permitted to draw were sufficient to establish that the defendant wilfully failed to appear, as the defendant knew that he must appear in court to commence jury selection, he admitted that he could have walked to the courthouse from his home and arrived on time but chose not to do so, and the jury reasonably could have inferred from that decision that he did not intend to appear; moreover, the defendant's conduct after arriving at the courthouse provided a basis for the jury reasonably to have inferred that he wilfully failed to appear in court at the place and time to which the charges against him were continued, the court provided an opportunity for the defendant to remedy his failure to appear by stating that, even though it ordered a rearrest, it was willing to commence with jury selection that day and reopened a courtroom to do so, and, despite knowing of this opportunity, the defendant fled the courthouse; furthermore, the defendant did not remedy his failure to appear in the following days and failed to surrender to authorities for more than one month, from which the jury reasonably could have inferred that his failure to appear was not accidental but, instead, demonstrated an intent to avoid any incarceration that might result from his criminal trial and, thus, his conduct after arriving at the courthouse and in the weeks that followed October 3, 2017, arguably demonstrated a consciousness of guilt regarding his intention to appear in court at 10 a.m.
2. The defendant could not prevail on his claim that the trial court abused its discretion by admitting evidence of the events that occurred after he arrived at the courthouse, which was based on his claim that the evidence was irrelevant because once the court forfeited his bond and ordered him rearrested, he was no longer obligated to appear; the defendant's conduct after entering the courthouse was probative of his state of mind as to whether he intended to appear in a courtroom at all that day, and the jury reasonably could have inferred that the defendant's failure to appear at the continued proceeding was part of his scheme to avoid the commencement of his trial.
3. The defendant's claim that the trial court improperly admitted W's testimony because it did not place the burden on the state to demonstrate a compelling need for the testimony, and that the state did not show a compelling need, was unavailing: the court understood that it must apply the compelling need test and was satisfied that the state met that burden, and, even if the court's decision was ambiguous, this court presumes the court applied the correct legal standard; moreover, W was uniquely positioned to testify about what he told the defendant and his impression of the defendant's understanding of the situation, and W's testimony was, thus, relevant to the defendant's state of mind.

4. The trial court properly instructed the jury on the third element of failure to appear in the first degree: despite the defendant's claim that the court instructed the jury in a manner that permitted the jury to convict him on the basis of conduct that occurred after he was no longer required to appear, the court's instructions were consistent with the applicable statute (§ 53a-172 (a)) and case law, the instructions directly quoted the statutory language the defendant contended was necessary, and, thus, the jury understood that it could convict the defendant only if he wilfully failed to appear when legally called according to the terms of his bail bond; moreover, the court's use of the phrase "as required" in explicating the third element of the offense was a shorthand reference to § 53a-172 (a), and, read in context, tied the defendant's obligation to appear at the time and place he was legally called according to the terms of his bail bond; furthermore, when the court forfeited the defendant's bond, it stated that it was willing to proceed with jury selection if W could get the defendant to the courthouse, and the practical effect of that statement was to condition the forfeiture of the bond until later in the day to give the defendant an opportunity to cure his failure to appear and, accordingly, the defendant's bond continued to obligate him to appear in a courtroom after he arrived at the courthouse.

Argued October 18, 2019—officially released March 31, 2020

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of failure to appear in the first degree, and, in a second part, with having committed an offense while on release, brought to the Superior Court in the judicial district of New Britain, geographical area fifteen, where the first part of the information was tried to the jury before *Graham*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty to having committed an offense while on release; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Andrew S. Marcucci, assigned counsel, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Dave Clifton*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Charles Nicholas Petersen, appeals from the judgment of conviction, rendered after a jury trial, of failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). The defendant claims that (1) there was insufficient evidence to prove beyond a reasonable doubt that he had wilfully failed to appear in court when the court forfeited his appearance bond, (2) the court improperly admitted evidence of the conduct in which he engaged after the court had forfeited his bond, (3) the court improperly permitted the state to call his former attorney as a witness because there was no compelling need for his testimony, and (4) the court improperly instructed the jury on the elements of failure to appear in the first degree. We affirm the judgment of the trial court.

The following procedural history and facts, as reasonably could have been found by the jury, are relevant to this appeal. The defendant was arrested on May 7, 2015, and charged with a felony offense.[1] He was released from custody that same day in accordance with the terms of a nonsurety appearance bond, pursuant to which he promised to appear in court on the date and time specified on the bond, and "at any other place and time to which the charge(s) against me may be continued . . . ." Consistent with the language of the bond, the defendant also acknowledged that "if I fail to appear, in accordance with the foregoing promises . . . I will be committing the crime of Failure to Appear" and be subject to arrest. Attorney William Watson filed an appearance on behalf of the defendant on March 29, 2017.

[1] Although the jury was not informed about the specific charges pending against the defendant at the time of his failure to appear, the record indicates that the defendant had been charged with possession of narcotics, an unclassified felony; two misdemeanor drug offenses; and two motor vehicle violations.

A jury trial with respect to the unclassified felony and the other charges was scheduled to commence at 10 a.m. on October 3, 2017, in the Superior Court in New Britain. The defendant knew that his presence in court was required at that time and place.

At 10 a.m. on October 3, 2017, the court, *Hon. Edward J. Mullarkey*, judge trial referee, the prosecutor, the clerk, and Watson were present in courtroom 4A, where jury selection was to be held. The defendant, however, was not. The court passed the matter to give Watson time to find the defendant. During that time, judicial marshals also searched the courthouse for the defendant. He still was not present at 10:25 a.m. Accordingly, the court ordered that the defendant's bond be forfeited and that he be rearrested. The court also ordered counsel and the clerk to remain available in case the defendant appeared later that day. Watson returned to his office across the street from the courthouse.

The defendant entered the courthouse at 10:34 a.m. After being unable to locate his attorney, the defendant briefly went outside the courthouse and contacted Watson by telephone. Watson told the defendant that they needed to be in the courthouse because the judge had stated that he would "deal with the outstanding rearrest orders . . . and we would continue with jury selection" if the defendant appeared. Watson informed the defendant that they needed to address the defendant's outstanding failure to appear, and he also told the defendant what steps the court might take with respect to his failure to appear in court at 10 a.m. Watson testified that he intended to ask the court to vacate the rearrest order.

The defendant and Watson met and reentered the courthouse at approximately 10:45 a.m. They proceeded to courtroom 4A together, but it was locked. The clerk received word that Watson had found the defendant and that the defendant was in the courthouse.

She conveyed this information to the court. Upon learning this, the court ordered that the defendant be taken into custody. The court also ordered that jury selection proceed in a courtroom on the third floor that had direct access to the courthouse lockup facilities, which would be necessary if the defendant were taken into custody. The court ordered the clerk to inform counsel of this change. Watson, in turn, informed the defendant that he was required to appear in the courtroom on the third floor.

Court was opened in a third floor courtroom to continue the proceedings. The prosecutor, the clerk, and Watson appeared in that courtroom, but the defendant did not. Surveillance footage later showed that the defendant had left the courthouse. The court indicated that its prior rearrest order would remain in effect. Per the court's instructions, counsel and the clerk remained on standby until approximately noon, in case the defendant appeared again. Although the defendant had entered the courthouse at 10:34 a.m. on October 3, 2017, at no time did he appear in a courtroom before a judge as required. Jury selection did not proceed, and an arrest warrant charging the defendant for failure to appear in the first degree in violation of § 53a-172 was later issued. The defendant waited approximately one month before he surrendered to law enforcement, during which time he claimed he needed to "put [his] affairs in order . . . ."

The defendant subsequently was arraigned on the charge of failure to appear in the first degree for "wilfully fail[ing] to appear in court when legally called according to the terms of his bail bond . . . ." The state also charged the defendant in a part B information with being a subsequent offender in possession of a controlled substance and with committing an offense while on release.

Following the grant of a motion to suppress filed by the defendant, the court dismissed all of the charges pending against the defendant except for the charge of failure to appear in the first degree and the charge of committing an offense while on release. The defendant pleaded not guilty to the remaining charges and elected to be tried by a jury with respect to the charge of failure to appear in the first degree and by the court with respect to the charge in the part B information.

Trial commenced on March 8, 2018. After the state rested, the court, *Graham*, *J.*, denied the defendant's motion for a judgment of acquittal. The defendant testified that on October 3, 2017, he awoke at 7 a.m. and was ready for court at approximately 8 a.m. He admitted that he had to be in court for jury selection that day, so he planned to arrive at court at 9:30 a.m. The defendant testified that, the night before, he had arranged for his friend, Jason Nadeau, to drive him to court because the defendant did not own a vehicle and his license had been suspended. The defendant lived 1.6 miles from the courthouse, and he testified that the drive was approximately fifteen minutes long. He also testified that he briskly could have walked that distance in thirty minutes.

The defendant testified that he tried to confirm his ride with Nadeau at approximately 9:20 a.m. on October 3, 2017, but did not receive a response from him. He began looking for another ride to court. According to the defendant, he contacted his sister at approximately 9:25 or 9:30 a.m., then contacted his friend Shawn, and then Amanda Russo. The defendant called Todd Russo (Russo) at approximately 9:30 a.m.; Russo returned that call at approximately 9:45 a.m. Russo agreed to drive the defendant to court and arrived at the defendant's house at approximately 10 a.m.

The defendant testified that when he arrived at the courthouse and contacted Watson by telephone, Watson told him that "they revoked [his bond]. They issued

a cash only bond and a warrant . . . .'' He also testified that Watson did not tell him to go to a different courtroom. Instead, he claimed that Watson told him that there was nothing more he could do.

Russo also testified on behalf of the defendant. He had known the defendant for the defendant's entire life. At approximately 9:45 a.m. on the morning of October 3, 2017, he received a call from the defendant, who asked for a ride to court. Following that call, Russo got dressed and went to the defendant's house. It took approximately fifteen to twenty minutes to get there. After picking the defendant up, Russo drove straight to the courthouse. Russo testified that they arrived at the courthouse ''later than [10 a.m.] but not by much'' and that he watched the defendant enter the courthouse. During closing arguments to the jury, the state argued that, as demonstrated by the defendant's continuing course of conduct throughout the day of October 3, 2017, the defendant wilfully had failed to appear in court on that date for trial on his pending felony charge. The state contended that the defendant's intent was to prevent the commencement of his trial, and that even though he had gone to the courthouse that morning, he never intended to appear in the courtroom for the commencement of trial. The state argued that the jury should consider his flight from the courthouse as consciousness of guilt evidence from which it could infer that his failure to appear in court for jury selection that day was wilful.

In response, the defendant argued to the jury, through counsel, that his conduct in failing to appear in the courtroom at 10 a.m. on October 3, 2017, was not wilful. The defendant asserted that if he truly had not intended to appear in court that day, he never would have bothered coming to the courthouse at all. With respect to his decision to leave the courthouse after he had met with Watson, the defendant argued that he knew that he likely was to be taken into custody and that he

became "understandably upset and frustrated about the fact that no one seemed to care that he had done his best to get to court on time that day . . . ." Finally, the defendant argued to the jury that it should not consider his conduct in leaving the courthouse because, by that time, his bond already had been forfeited as a consequence of Judge Mullarkey's order and, thus, he no longer was under an obligation to appear in a courtroom. In sum, the defendant contended to the jury that he unsuccessfully had tried to get to court on time and that his decision to leave the courthouse was a "red herring" and should not be considered as evidence of wilfulness because he was no longer obligated to come to court and simply was frustrated that he likely was going to be taken into custody during his trial.

The jury found the defendant guilty of failure to appear in the first degree. The defendant then elected to plead guilty to the charge in the part B information, conditioned on his right to file this appeal. See Practice Book § 61-6. The court subsequently imposed on the defendant a total effective sentence of five years of incarceration, and this appeal followed.

I

The defendant first claims that there was insufficient evidence to support his conviction of failure to appear in the first degree because "[n]o reasonable fact finder could determine . . . that the defendant's failure to appear prior to 10:25 a.m. on October 3, 2017 was wilful." With respect to this claim, the defendant makes two related arguments. First, the defendant asserts that any evidence regarding the events that occurred after he arrived at the courthouse was legally irrelevant to the jury's assessment of whether he wilfully failed to appear prior to the forfeiture of his bond because, once his bond had been forfeited, he no longer was under a legal obligation to appear in a courtroom. Second, the defendant argues that, in the absence of the

evidence regarding his conduct after he arrived at the courthouse, the remaining evidence was insufficient to prove that he wilfully failed to appear in court at the time that his bond was forfeited. In this regard, the defendant asserts that the facts of his case are nearly identical to the facts in *State* v. *Khadijah*, 98 Conn. App. 409, 909 A.2d 65 (2006), appeal dismissed, 284 Conn. 429, 934 A.2d 241 (2007), in which this court concluded that the evidence was insufficient to prove that the defendant in that case wilfully failed to appear. We are not persuaded that the evidence in the present case was insufficient to prove beyond a reasonable doubt that the defendant's failure to appear for trial was wilful, and we find the defendant's reliance on *Khadijah* unconvincing.

We begin our analysis with the well established standard of review for assessing an insufficiency of the evidence claim. "In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] 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 [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] 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. . . .

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"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 [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Shin*, 193 Conn. App. 348, 357–58, 219 A.3d 432, cert. denied, 333 Conn. 943, 219 A.3d 374 (2019).

As a preliminary matter, we first address the defendant's assertion that, in assessing the sufficiency of the evidence, this court should not consider as part of that calculus any evidence presented to the jury regarding his conduct after the court revoked his bond and ordered him rearrested. We reject this assertion because it is inconsistent with the well established rule that the sufficiency of the evidence must be assessed in light of all of the evidence submitted to the jury, including evidence that the defendant argues was improperly admitted.

As we recently stated, established case law commands us to "review claims of evidentiary insufficiency in light of *all of the evidence* [adduced at trial]. . . . *State* v. *Morelli*, 293 Conn. 147, 153, 976 A.2d 678 (2009). In other words, we review the sufficiency of the evidence as the case was tried . . . . Accordingly, we have traditionally tested claims of evidentiary insufficiency by reviewing no less than, and no more than, the evidence introduced at trial. . . . [Id.]; see also *State* v. *Adams*, 139 Conn. App. 540, 550, 56 A.3d 747 (2012) (appellate review of evidentiary insufficiency claim incorporates all evidence, even inadmissible evidence, adduced at trial), cert. denied, 308 Conn. 928, 64

A.3d 121 (2013)." (Citations omitted; internal quotation marks omitted.) *State* v. *Cancel*, 149 Conn. App. 86, 94, 87 A.3d 618, cert. denied, 311 Conn. 954, 97 A.3d 985 (2014).

In light of this rule, we next discuss the sufficiency of the evidence as a whole and the defendant's reliance on *State* v. *Khadijah*, supra, 98 Conn. App. 409. We begin with the elements of the offense for which the defendant was charged. Section 53a-172 (a) provides in relevant part: "A person is guilty of failure to appear in the first degree when (1) while charged with the commission of a felony and while out on bail or released under other procedure of law, such person wilfully fails to appear when legally called according to the terms of such person's bail bond or promise to appear . . . ." The defendant's insufficiency of the evidence claim focuses only on the state's obligation to demonstrate that his failure to appear was wilful.

"To prove the wilful element of failure to appear the state must prove beyond a reasonable doubt . . . that the defendant received and deliberately ignored a notice to appear . . . . [T]he word wilful means doing a forbidden act *purposefully* in violation of the law. It means that the defendant acted *intentionally* in the sense that his conduct was *voluntary* and not inadvertent . . . . Thus, wilful misconduct is intentional misconduct, which is conduct done purposefully . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Bereis*, 114 Conn. App. 554, 561, 970 A.2d 768, cert. denied, 293 Conn. 902, 975 A.2d 1278 (2009).

"[T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of

mind is usually [proven] by circumstantial evidence . . . . For example, intent may be proven by conduct before, during and after [the commission of the crime]. Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude . . . that is probative of the defendant's mental state." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015).

The evidence admitted at trial, and the reasonable inferences from that evidence that the jury was permitted to draw, were more than sufficient to establish that the defendant wilfully failed to appear in court for the commencement of his jury trial. The defendant knew that he must appear in court on October 3, 2017, at 10 a.m. to commence jury selection. The defendant lived only 1.6 miles from the courthouse and admitted in his testimony that he could have walked to the courthouse and arrived by 10 a.m. He deliberately chose not to do so, and the jury reasonably could have inferred from that choice that he did not really intend to appear in court.

Additionally, the defendant's conduct after arriving late to the courthouse also provides a basis for the jury reasonably to have inferred that he wilfully chose not to appear in court "at the place and time to which the charges against [him had been] continued . . . ." The court provided the defendant an opportunity to remedy his failure to appear in court at 10 a.m. by communicating to the defendant through his attorney that, even though he had ordered a rearrest of the defendant, it was still willing to commence with jury selection that day and, in fact, reopened a courtroom to do so. Despite knowing of an additional opportunity to appear for jury selection, and his attorney's direction to the defendant that he must appear in a courtroom on the third floor, the defendant instead chose to flee the courthouse. From this evidence, the jury reasonably could have inferred that, in spite of his protestations, the

defendant had never intended to appear in a courtroom for jury selection at any point that day even though he had come to the courthouse that morning. See *State* v. *Turmon*, 34 Conn. App. 191, 196, 641 A.2d 138 (evidence sufficient to prove wilful failure to appear even though defendant came to courthouse on required date but left because of alleged intestinal illness without appearing in courtroom or notifying court personnel), cert. denied, 229 Conn. 922, 642 A.2d 1216 (1994).

Moreover, despite knowing that he had failed to appear in court for the commencement of jury selection, the defendant did nothing to remedy that failure in the following days, such as filing a motion to vacate the rearrest order. He did not surrender to authorities for more than one month, a fact from which the jury reasonably could have inferred that his failure to appear at 10 a.m. on October 3, 2017, was not accidental but, instead, demonstrated an intent to avoid, at least temporarily, any incarceration that might result following the completion of his criminal trial. Thus, his conduct after arriving at the courthouse late and in the weeks that followed October 3, 2017, arguably demonstrated a consciousness of guilt regarding his intention to appear in court at 10 a.m. See *State* v. *Oliveras*, 210 Conn. 751, 759, 557 A.2d 534 (1989) ("[e]vidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, is ordinarily the basis for a charge on the inference of consciousness of guilt").[2]

In large measure, the defendant's insufficiency of the evidence claim is premised on the misguided assertion that the jury was obligated to credit his testimony that his conduct prior to 10:34 a.m. demonstrated that he

[2] The trial court characterized the defendant's conduct as evincing a consciousness of guilt, and the jury was free to consider it on that basis. In our view, however, this evidence is better described as circumstantial evidence of the defendant's state of mind regarding whether he wilfully chose not to appear.

had intended to appear in court as required. See, e.g., *State* v. *Gibson*, 114 Conn. App. 295, 303, 969 A.2d 784 (2009) (jury was free to not credit defendant's "testimony about why he missed his court date"), reversed in part on other grounds, 302 Conn. 653, 31 A.3d 346 (2011).[3] For example, the jury was not obligated to credit the defendant's testimony (1) regarding the alleged efforts that the defendant made to arrange transportation to the courthouse, (2) that he had called the clerk's office to inform the court that he would be late, and (3) that he left the courthouse because Watson had told him in the hallway "nothing could be done" to vacate the order of a rearrest.

In support of the defendant's contention that his failure to appear was not wilful, he relies primarily on *State* v. *Khadijah*, supra, 98 Conn. App. 409, in which this court concluded that the evidence was insufficient to prove that the defendant in that case wilfully failed to appear. Id., 418–19. *Khadijah*, however, is distinguishable from the present case.

In *Khadijah*, the defendant appeared for the first day of jury selection in a criminal prosecution of various felony charges. Id., 411. At the end of the first day of jury selection, the court ordered the parties to return to court the next day at 10:45 a.m. to resume the proceedings. Id. The defendant then went to work delivering newspapers from 1 to 8 a.m. Id., 415. When the defendant returned home after her shift, she sat on her couch and told her boyfriend to wake her if she inadvertently fell asleep. Id. The defendant, in fact, fell asleep, but she did not wake up until her attorney telephoned her from the courthouse. Id. The defendant

[3] In *Gibson*, this court concluded that the evidence presented at trial was sufficient to support the defendant's conviction for failure to appear in the first degree but awarded him a new trial because of prosecutorial impropriety during closing argument. *State* v. *Gibson*, supra, 114 Conn. App. 303–304, 319. Following certification to appeal, our Supreme Court reversed this court's decision after concluding that the prosecutor's remarks during closing argument were not improper. *State* v. *Gibson*, supra, 302 Conn. 663.

immediately departed for court but arrived at approximately 11:30 a.m., forty-five minutes after the proceeding was scheduled to begin. Id., 415 n.6. Later that day, the trial court refused to vacate the rearrest that had been ordered. Id., 412.

On the basis of these facts, a jury found that the defendant wilfully failed to appear for the second day of jury selection. Id. On appeal, however, this court concluded that "[w]orking late the night before a court appearance, pursuant to a regularly kept work schedule, failing to set an alarm clock or asking a friend to awaken her from a potentially inadvertent doze does not amount to purposefully and intentionally absenting oneself from the courthouse." Id., 418.

The present case differs substantially from *Khadijah*. In the present case, the defendant admitted that he could have walked to the courthouse and arrived in time for the commencement of jury selection. Additionally, the defendant's conduct after arriving at the courthouse, unlike the defendant's conduct in *Khadijah*, provided a basis for the jury to infer that the defendant never intended to appear in court on that day. Despite being given an opportunity by the court to commence jury selection even though he had arrived late, the defendant in the present case decided to flee the courthouse rather than attempt to persuade the court to vacate the order of rearrest. From this conduct, the jury was free to infer that the defendant had never intended to appear in court at the time and place to which the charges had been continued in order to commence jury selection. By contrast, the defendant in *Khadijah* appeared in a courtroom, albeit late, and took steps to persuade the court that jury selection should resume.

In sum, the jury in the present case reasonably could have inferred that the defendant's conduct throughout the day evinced an intent to avoid the commencement of his trial. The jury was free to discredit the defen-

dant's version of events and his testimony that he fully intended to appear in court that day and only fled the courthouse after he had been told by his attorney that nothing could be done with respect to the court's decision to order a rearrest earlier that morning. See *State* v. *Whitford*, 260 Conn. 610, 627 n.9, 799 A.2d 1034 (2002) ("[i]t is axiomatic that the jury, in its role as fact finder, may choose to believe all, some or none of a witness' testimony"). Instead, the jury reasonably could have considered the defendant's conduct throughout the day of October 3, 2017, and in the weeks that followed, as evidence that the defendant never had intended to appear in court at 10 a.m. for the commencement of jury selection. We therefore conclude that there was sufficient evidence from which the jury reasonably could have found the defendant guilty beyond a reasonable doubt.

II

The defendant next claims that the trial court abused its discretion by admitting evidence of the events that occurred after he entered the courthouse at 10:34 a.m. on October 3, 2017. Such evidence consisted of (1) testimony and video footage regarding the defendant's movements within and departure from the courthouse, (2) testimony regarding discussions he had with his attorney regarding the proceeding after he arrived at the courthouse, and (3) evidence that the defendant failed to surrender to law enforcement authorities in the weeks that followed his failure to appear.

The defendant's principal argument in this regard is that such evidence was irrelevant because, once the trial court had forfeited his bond and ordered him to be rearrested at 10:25 a.m., he no longer was under any obligation to appear. Thus, according to the defendant, his conduct after arriving at the courthouse, including his decision to depart the courthouse, was not probative

of any material issue in the case. We disagree because, even if we accept for purposes of argument, the premise of his assertion that he no longer was under a legal obligation to appear in court after 10:25 a.m. when the court revoked his bond, his subsequent conduct was probative of whether he ever had intended, in the first instance, to appear in a courtroom at any time that day.[4]

At trial, the defendant filed a motion in limine to exclude evidence of the events that occurred after he entered the courthouse. Upon hearing oral argument on the motion, the court ruled as follows: "I understand why the defense would prefer this evidence not come in but based on the pieces of factual information available to me, it sounds like a classic consciousness of guilt testimony. And on that basis alone it's admissible whether it has some greater relevance beyond that we will see but certainly *at least* as a consciousness of guilt, it's admissible, so the motion [in limine] by the defendant is denied."[5] (Emphasis added.)

"We begin by setting forth the standard of review and legal principles applicable to this claim. To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . .

"It is axiomatic that [if premised on a correct view of the law, the] trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary

[4] We ultimately also reject the premise for the defendant's argument for the reasons stated in part IV of this opinion.

[5] The defendant did not ask the court to give a limiting instruction to the jury regarding the appropriate use of this testimony.

matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 243–44, 215 A.3d 116 (2019).

We conclude that the court did not abuse its discretion by ruling that evidence of the events that occurred after the defendant entered the courthouse was relevant and admissible. "Relevant evidence, that is, evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence . . . generally is admissible . . . unless its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence." (Internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn. App. 92, 101, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007); see also Conn. Code Evid. § 4-1. Evidence that the defendant was told by Watson that his case had been continued in a reassigned courtroom and, upon hearing that information, he departed the courthouse, was probative of the defendant's state of mind regarding whether he wilfuly had chosen not to appear in court prior to the time that his bond was called. Indeed, the evidence reasonably could have supported an inference that the defendant's departure from the courthouse later in the morning and his failure to appear at the continued proceeding was part of his overall scheme that day to avoid the commencement of his trial. Thus, even if we accepted the premise of the defendant's argument that he was no longer under an obligation to appear in court

after his bond had been forfeited, the evidence of his conduct after arriving at the courthouse was still independently relevant to the defendant's state of mind. Accordingly, we reject the defendant's evidentiary claim.[6]

III

The defendant next claims that the court abused its discretion by admitting Watson's testimony because it failed to place the burden on the state to demonstrate a compelling need for the testimony and that there was, in fact, no compelling need shown by the state. We disagree with the defendant.

The following additional facts are relevant to our disposition of this claim. Watson did not represent the defendant at his trial on the charge of failure to appear. Prior to the start of trial, the defendant filed two motions in limine to prevent Watson from testifying. In the motions in limine, the defendant asserted that Watson's testimony was irrelevant and otherwise protected by the attorney-client privilege and work product doctrine. The motions in limine did not assert, however, that the state would be unable to demonstrate a compelling need for Watson's testimony. The court deferred resolution of the motions until trial.

At trial, the state proffered Watson's testimony outside the presence of the jury. The defendant objected on the basis that another witness could testify as to the defendant's contact with Watson's law firm as well as the defendant's movements within the courthouse. During argument on the motions, the court indicated that

[6] The defendant baldly states in his brief that the court's admission of this evidence violated his "constitutional rights to due process and fair trial." In our view, this is an evidentiary claim masquerading as a constitutional claim. See, e.g., *State* v. *Walker*, 215 Conn. 1, 5, 574 A.2d 188 (1990) ("the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved" [internal quotation marks omitted]).

it needed to apply the compelling need test set forth in "the *Ullmann* case . . . ." See *Ullmann* v. *State*, 230 Conn. 698, 716–21, 647 A.2d 324 (1994). Defense counsel asserted to the court that, in his view, the state had failed to meet its burden to demonstrate a compelling need for Watson's testimony.

In response, the state requested that the court defer its ruling on the defendant's objection until after the October 3, 2017 courtroom clerk had testified because the clerk's testimony would illustrate that Watson's testimony would concern facts to which only he was privy. The court granted the state's request.

After hearing testimony from the courtroom clerk, a marshal, and the deputy chief clerk of the criminal division at the courthouse, the court heard additional argument regarding the motions in limine, during which defense counsel again argued that the state had failed to meet its burden to establish a compelling need for the testimony. Defense counsel argued that a clerk or marshal could testify to the defendant's movements within the courthouse but did not identify anyone in particular who may have such knowledge. In response, the state argued that it knew of no one else who could testify as to the information that Watson had conveyed to the defendant in the courthouse.

The court ultimately denied in part the defendant's motions in limine. In doing so, the court explicitly referred to the compelling need test and determined that the state had met its burden in this case. It specifically reasoned that it had not heard any witness testify as to whether and how the defendant had been informed of his trial date, Watson's efforts to inform the defendant of the court date, Watson's course of action after the court ordered the defendant's rearrest, the defendant's contact with Watson and the extent of their discussions, and the defendant's movements within the courthouse. Thus, the court permitted the state to call Watson as a

witness, but ordered that the state would not be allowed to elicit attorney-client privileged communications from him.

In *Ullmann* v. *State*, supra, 230 Conn. 716–21, our Supreme Court held that the state may call a defendant's prior defense counsel to testify as a witness in his criminal prosecution provided that the state demonstrates a "compelling need" for that testimony. In so holding, the court adopted the "compelling need" test applied by federal courts in criminal cases in which a party seeks testimony from the prosecuting attorney. (Internal quotation marks omitted.) Id., 716, 718. In describing the parameters of the test, the court explained as follows: "When either party in a criminal case seeks testimony from the prosecuting attorney, the federal courts have applied a 'compelling need' test. . . . Under this test, the party wishing to call a prosecutor to testify must show that the testimony of the prosecutor is 'necessary and not merely relevant,' and that all other available sources of comparably probative evidence have been exhausted." (Citations omitted; footnote omitted.) Id., 716–17. According to our Supreme Court, the "same or analogous concerns" underlying the compelling need test with respect to prosecuting attorneys "exist if the prospective witness is or had been counsel for the defendant." Id., 717. The court believed "that the policy concerns underlying the compelling need test are valid and adopt[ed] that test as the criteria to be applied when either side in a criminal case seeks to call a prosecutor or defense attorney, who is or has been professionally involved in the case, to testify. The compelling need test strikes the appropriate balance between the need for the information and the potential adverse effects on the attorney-client relationship and the judicial process in general." (Footnote omitted.) Id., 717–18.

"[T]he trial court is charged with making the determination of the materiality of the witness' testimony and

must, of course, honor the defendant's constitutional rights of confrontation and compulsory process. . . . [T]he vast weight of authority indicates that any decision whether or not to allow an attorney to be called is left to the discretion of the trial judge. Therefore, in reviewing [the] appellant's claims we will only reverse the decision of the trial court if there was an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Ullmann* v. *State*, supra, 230 Conn. 721.

We disagree with the defendant's contention that the trial court did not properly apply the compelling need test and, instead, placed the burden on him to demonstrate why there was not a compelling need for Watson's testimony. The court's comments in denying the motion make clear that it fully understood that it must apply the compelling need test as set forth in *Ullmann* and that it was satisfied that the state had met its burden in that regard. Moreover, even if the court's decision was ambiguous, it is well settled that, in the absence of a contrary indication, we must presume that the court applied the correct legal standard. See, e.g., *In re Jason R.*, 306 Conn. 438, 456, 51 A.3d 334 (2012).

We also disagree with the defendant's claim that the court abused its discretion by concluding that there was, in fact, a compelling need for Watson's testimony. Although it is possible that other witnesses might have been available to testify as to the defendant's movements within the courthouse, Watson was uniquely positioned to testify about what he told the defendant and his impression of the defendant's understanding of the situation facing him on October 3, 2017. We, therefore, conclude that the court did not abuse its discretion by finding that Watson's testimony was necessary and that all other sources of comparably probative evidence had been exhausted. Moreover, for the reasons discussed in part II of this opinion, Watson's testimony was relevant to the defendant's state of mind on October 3, 2017. Accordingly, we conclude that the

court did not abuse its discretion in permitting Watson to testify.

IV

The defendant's final claim is that the court's jury instruction on the third element of failure to appear in the first degree was improper because, in essence, it informed the jury that the state must prove that he wilfully failed to appear "as required" rather than "when legally called according to the terms of [his] bail bond . . . ." General Statutes § 53a-172 (a). Specifically, the defendant argues that the court improperly instructed the jury in a manner that permitted it to find that the defendant was guilty of failure to appear on the basis of conduct that occurred after he was no longer under an obligation to appear in court because his appearance bond already had been forfeited by the court.[7]

In response, the state contends that the court properly instructed the jury because the instructions were based on a proper interpretation of the elements of the offense contained in § 53a-172. We agree with the state that the court's instructions were proper under the circumstances of this case.

The following facts and procedural history are relevant to this claim. The defendant submitted a written request to charge on the elements of failure to appear

[7] The defendant argues that the court's instruction misled the jury, as evidenced by the jury's note requesting clarification as to whether "the wilful failure to appear charge appl[ied] to [the defendant's] failure to appear at 10 a.m.? Or failure to appear in the court before a judge that day?" (Internal quotation marks omitted.) Before the court was able to respond to the substance of this note, however, the court was required to replace a member of the jury, who had telephoned the court to report that she had a sick child at home and could not continue her service. The court replaced that juror with an alternate member of the jury and instructed the newly constituted jury that it must start its deliberations from the beginning. The court also informed the jury that it was not going to respond to the jury note because it came from the "prior jury." The newly constituted jury did not send out a similar note before reaching its verdict. We see no error in the manner in which the court proceeded.

in the first degree. That request to charge stated in relevant part: "The defendant is charged in count one with failure to appear in the first degree. The statute defining this offense reads in pertinent part as follows: a person is guilty of failure to appear in the first degree when while charged with the commission of a felony and while out on bail or released under other procedure of law, he wilfully fails to appear when legally called according to the terms of his bail bond or promise to appear. . . .

"The third element is that the defendant wilfully failed to appear when legally called according to the terms of his bail bond. as required[8] . . . .

"In summary, the state must prove beyond a reasonable doubt that (1) the defendant was released on bail on the condition that he appear personally in connection with his criminal proceeding at a later date, (2) he was required to appear in court on October 3, 2017, and (3) he wilfully failed to appear on that date when legally called according to the terms of his bail bond." (Footnote added.) The defendant's request to charge did not seek an instruction to the jury that it was prohibited from finding the defendant guilty for failing to appear in court at a date and time after his bail bond had been forfeited.

During the afternoon of the first day of evidence, the court distributed its draft charge to the parties. With respect to the instructions on the elements of failure to appear, the court's proposed charge directly quoted the language of § 53a-172 (a) (1). The draft charge thereafter discussed each of the individual elements of the offense. With respect to the third element, the charge stated: "The third element is that the defendant wilfully failed to appear as required."

[8] This sentence fragment appears in the original. It is unclear whether the defendant intended to delete the phrase "as required" from the proposed request to charge or whether the period following the word "bond" is a scrivener's error.

During the charge conference, defense counsel objected to the court's proposed instruction on the third element of failure to appear because the instruction did not specifically state that a person is guilty of failure to appear if he wilfully failed to appear *when legally called according to the terms of his bond*. Defense counsel argued that the court's proposed use of the phrase "as required" unduly broadened the scope of the statute because, in his view, the jury could only consider the defendant's failure to appear at the time that the clerk "recite[d] the bond, call[ed] for the defendant, and the defendant [did] not show himself before the court." In the defendant's view, once the bond had been forfeited at 10:25 a.m., he was no longer under any obligation to appear in a courtroom. The court's instruction, the defendant contended, permitted the jury to find him guilty on the basis of conduct that occurred at a time that he was no longer legally called according to the terms of his bail bond. The court subsequently overruled his objection and instructed the jury in accordance with the language used in the draft charge.[9]

[9] With respect to the charge of failure to appear in the first degree, the court instructed the jury as follows: "The defendant is charged with failure to appear in the first degree. The statute defining this offense reads in pertinent part as follows: a person is guilty of failure to appear in the first degree when while charged with the commission of a felony and while out on bail or released under other procedure of law, he wilfully fails to appear when legally called according to the terms of his bail bond.

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: Element 1—released on bail or promise to appear.

"The first element is that the defendant was released on bail upon the condition that he appear personally in connection with his criminal proceeding at a later date. The [statute] requires that the crime with which the defendant was charged when he was released must be a felony. Element 2—Duty to appear. The second element is that on October 3, 2017, the defendant was required to appear before a court in connection with a felony charge.

"Element 3—Failure to appear. The third element is that the defendant wilfully failed to appear as required. An act is done wilfully if done knowingly, intentionally, and deliberately. In order to prove this element, the state must prove beyond a reasonable doubt either that the defendant received and knowingly, intentionally, and deliberately ignored a notice to appear or that the defendant knowingly, intentionally, and deliberately embarked on a

Our standard of review pertaining to a claim of instructional error is well established. "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Browne*, 84 Conn. App. 351, 366, 854 A.2d 13, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004).

For the following reasons, we conclude that the court's instruction on the third element of failure to appear in the first degree was consistent with the plain meaning of the statute as well as case law interpreting the statute, and did not improperly permit the jury, under the circumstances of this case, to convict the defendant solely on the basis of conduct that occurred after he no longer was under a legal obligation to appear in court.

First, it is important to note that the court's instructions on the elements of the offense began by directly quoting the statutory language that the defendant contends was necessary to confine the offense to its proper limits. Thus, the jury necessarily understood that it could convict the defendant only if "he wilfully fail[ed]

course of conduct designed to prevent him from receiving such notice. Please recall and apply my earlier instruction on knowledge.

"Conclusion: In summary, the state must prove beyond a reasonable doubt that (1) the defendant was released on bail on the condition that he appear personally in connection with his criminal proceeding at a later date, (2) he was required to appear in court on October 3, 2017, and (3) he wilfully failed to appear on that date."

to appear when legally called according to the terms of [his] bail bond."

Second, we conclude that the court's use of the phrase "as required" in further explicating the third element of the offense was simply a shorthand reference back to the language of the statute: "when legally called according to the terms of [his] bail bond . . . ." The defendant's bail bond "required" him to appear in court at 9 a.m. on May 21, 2015, and "at any other place and time to which the charge(s) against me may be continued . . . ." The court's use of the phrase "as required," in our view, and when read in context, sufficiently tied the defendant's obligation to appear at the time and place he was "legally called according to the terms of [his] bail bond . . . ."

Third, the court's instructions were also consistent with this court's statement that, to secure a conviction for failure to appear, "the state must prove beyond a reasonable doubt that the defendant was legally ordered to appear under the terms of his bail bond, that he failed to appear and that such failure was wilful." (Internal quotation marks omitted.) *State* v. *Pauling*, 102 Conn. App. 556, 568, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007).[10]

Fourth, we reject the defendant's assertion that the court's instructions improperly permitted the jury to convict the defendant for conduct in which he may have engaged after the court forfeited his bond at 10:25 a.m. The court's instructions adequately informed the jury that it could find the defendant guilty if they concluded that the defendant failed to appear in court, as

[10] The instruction at issue was nearly identical to the model jury instruction provided on the Judicial Branch website. See Connecticut Criminal Jury Instructions 4.4-1 (December 1, 2007), available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited March 25, 2020). Although the model jury instructions are "not dispositive of the adequacy of the [jury] instruction, an instruction's uniformity with the model instructions is a relevant and persuasive factor in our analysis . . . ." (Internal quotation marks omitted.) *State* v. *Gomes*, 193 Conn. App. 79, 88, 218 A.3d 1063, cert. granted on other grounds, 334 Conn. 902, 219 A.3d 798 (2019).

required by the terms of his bail bond, with respect to a felony charge at 10 a.m. on October 3, 2017, and that his failure to appear at that time and place was wilful.

Even if we were to agree that the court's instructions permitted the jury to find the defendant guilty on the basis of conduct that occurred after the court forfeited his bond at 10:25 a.m., we disagree with the defendant that a verdict of guilty on that basis would be inconsistent with § 53a-172 (a) (1). When the court ordered the defendant's bond forfeited, it also indicated that it was willing to proceed with jury selection if Watson was able to get his client to the courthouse. Watson explained this fact to the defendant and told him to appear in the courtroom that the court was opening for that purpose. The practical effect of the court's statement was to stay or condition the forfeiture of the defendant's bond until later in the day in order to give the defendant the benefit of an opportunity to cure his failure to appear. Although the court could have been clearer regarding its intent to condition its order forfeiting the defendant's bond and ordering him rearrested, we conclude that no particular formalities such as vacating or formally staying the forfeiture were necessary in order to, in effect, grant the defendant additional time to appear in court without simultaneously terminating his legal obligation to do so. Accordingly, in our view, the defendant's bond continued to obligate him to appear in a courtroom after he had arrived at the courthouse.[11] Under these circumstances, we are unpersuaded that the court's instructions permitted the jury to find the defendant guilty for conduct occurring at a time when he was no longer required to appear according to the terms of his bail bond.

The judgment is affirmed.

In this opinion the other judges concurred.

[11] The defendant failed to do so twice—once at 10 a.m. and again later in the morning on the third floor.

THOMAS PRIORE *v.* STEPHANIE HAIG
(AC 41748)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages for defamation in connection with statements made by the defendant about the plaintiff at a public hearing before the Greenwich Planning and Zoning Commission on the plaintiff's application for a special permit to construct a new residence and new sewer line on his property. At the hearing, the defendant addressed the commission to share her concerns regarding the plaintiff's application. In addition to her concern that the proposed sewer line would have an impact on the health of trees, she stated that the plaintiff had not been trustworthy, had a serious criminal past, and had paid more than $40,000,000 in fines to the Securities and Exchange Commission. The press was in attendance and published parts of the defendant's statement. The defendant filed a motion to dismiss the plaintiff's action claiming, inter alia, that the trial court lacked subject matter jurisdiction because her statements were entitled to absolute litigation immunity, which the court granted. The plaintiff filed a motion to reargue, claiming that the trial court incorrectly concluded that the hearing was quasi-judicial in nature, improperly considered whether the defendant's statements were pertinent rather than relevant to the subject matter of the hearing, applied the wrong standard to a motion to dismiss, and failed to hold an evidentiary hearing to resolve disputed jurisdictional facts. The court denied the motion and the plaintiff appealed to this court claiming, inter alia, that the trial court incorrectly granted the motion to dismiss and denied his motion to reargue. *Held*:

1. The trial court properly decided the defendant's motion to dismiss on the basis of the complaint, the transcript of the hearing, and the defendant's affidavit, and did not abuse its discretion in declining to conduct an evidentiary hearing or in denying the plaintiff's motion to reargue; the plaintiff failed to present evidence to establish a dispute as to a material jurisdictional fact and did not request an evidentiary hearing until after the court decided the defendant's motion to dismiss.
2. The trial court correctly determined that the defendant's statements were entitled to absolute litigation immunity: the planning and zoning commission hearing was quasi-judicial in nature because the commission exercised discretion in deciding whether to approve the plaintiff's special permit application, it engaged in fact-finding, it had the ability to approve, deny, or table the plaintiff's application for further proceedings, its decision whether to grant or deny the plaintiff's application had the power to affect the property rights of private persons, and it heard the testimony of several witnesses; moreover, public policy interests in encouraging citizen participation in the deliberations and decisions of

their local governments supported a finding that the hearing was quasi-judicial in nature; furthermore, the defendant's statements concerned the credibility of the plaintiff, which the plaintiff put into issue by submitting a special permit application that contained representations on which the zoning and planning commission would rely in reviewing that application and, therefore, the defendant's statements were pertinent to the subject matter of the proceeding.

Argued October 22, 2019—officially released March 31, 2020

Procedural History

Action to recover damages for defamation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the defendant's motion to dismiss; thereafter, the court, *Povodator*, *J.*, denied the plaintiff's motion to reargue and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Eric D. Grayson, for the appellant (plaintiff).

Richard W. Bowerman, with whom, on the brief, was *Jacob Pylman*, for the appellee (defendant).

Opinion

PRESCOTT, J. This is a defamation action brought by the plaintiff, Thomas Priore, against the defendant, Stephanie Haig, seeking to recover damages for injuries that he claims to have sustained as a result of allegedly defamatory statements made by the defendant during a hearing before the Greenwich Planning and Zoning Commission (commission). The plaintiff appeals from the judgment of the trial court granting the defendant's motion to dismiss on the ground that the court lacked subject matter jurisdiction because the defendant's statements were entitled to absolute litigation immunity.

On appeal, the plaintiff claims that the trial court (1) improperly dismissed the action and denied his motion to reargue because the trial court failed to hold an evi-

dentiary hearing necessary to resolve jurisdictional facts in dispute, and (2) incorrectly determined that the defendant's statements were entitled to absolute litigation immunity because (a) the proceeding of the commission, at which the commission considered the plaintiff's special permit application and the materials submitted in support thereof, was not quasi-judicial in nature, and (b) the statements concerning the plaintiff that the defendant made to the commission were not "pertinent" to the commission's proceeding. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts in the record before the trial court, derived from the complaint, the transcript of the commission's hearing, and the defendant's affidavit, viewed in the light most favorable to the plaintiff, and procedural history are relevant to our review. The plaintiff is the chairman of a company that is one of the nation's leading credit card payment processors. The industry in which the plaintiff works is "heavily reputation dependent . . . ." In January, 2015, the plaintiff, through a limited liability company, purchased a property located at 15 Deer Park Meadow Road in Greenwich (property). The property is part of a private subdivision known as the Deer Park Association (association), which consists of fifteen to seventeen lots. When the plaintiff bid on the property, it was understood that he would demolish the dwelling on the property and construct an entirely new home. The plaintiff also agreed that he would have a new sewer line installed on his property. Through an easement that the plaintiff agreed to grant, the sewer line would be accessible to others in the association for access and repairs.

As part of the process for obtaining the commission's approval to construct a new residence and to place a sewer line on his property, the plaintiff was required to and, indeed, did submit an application for a special

permit. This application, as well as the final site plan submitted in support thereof, were the subject of discussion and deliberation at the commission's public hearing on January 12, 2016 (hearing). The hearing was slated to be the final hearing concerning the approval of the plaintiff's application. The record does not indicate whether the plaintiff attended the hearing.

Anthony D'Andrea, the plaintiff's engineer, was the first person to address the commission concerning the plaintiff's application. He discussed various aspects of the plan to install the sewer line, including drainage and the way in which the installation of the sewer line might affect some of the existing trees on the property. D'Andrea stated that trees had been "removed during the demolition of the house" and that he believed a planting plan would be submitted "that [would] include at least twenty trees." In sum, D'Andrea stated that the sewer line was being placed in a way that would protect the trees in the area and that the goal was to maximize the number of trees that could be preserved.

After D'Andrea spoke, members of the public were invited to address the commission. The first speaker was the president of the association (president), who alerted the commission to subsequent speakers that would address the commission about trees that were important to members of the association. According to the president, the trees were important because they "provide[d] privacy [and were] part of the character" of the neighborhood.

Following the president's remarks, Michael Finkbeiner, a surveyor and consulting professional forester retained by an association member, addressed the commission. Finkbeiner noted that an "existing conditions plan" was missing from the plaintiff's submission to the commission. Finkbeiner stated that this document had not been included in the submission because it would have disclosed that the plaintiff had clear-cut the property of certain trees. He implored the commission to

consider "additional regulations [to protect] sites in advance of special permit applications" to prevent "applicants [from] com[ing] in for a special permit after they have clear-cut the site." Indeed, Finkbeiner stated that, as a result of the plaintiff's representations, the commission may have "been deceived into thinking [that the trees shown in the topographic survey are] existing trees, but they are no more."

After Finkbeiner spoke, the defendant addressed the commission. The defendant stated that she was concerned that the plaintiff's proposed sewer line would impact the health of the trees that she claimed to "co-own" with the plaintiff. She also stated that the plaintiff had been "very disrespectful of the neighbors" in the way in which he managed alterations to his property. She also said that the plaintiff has "a criminal past."[1] Indeed, she stated that the plaintiff had "a serious criminal past" and that he had "paid over $40,000,000 in fines to the [Securities and Exchange Commission (SEC)]." These remarks prompted a commission staff member to interject that these comments were "not of relevance to the planning and zoning commission." The defendant also added that she was "very concerned going forward that there is real good oversight from Greenwich on how [the plaintiff] deals with this property because he has not been trustworthy in the first dealings with us and there are many more dealings to go." She then added, "as a citizen and as a next-door neighbor I want to have a nice development with [the plaintiff], but [he hasn't] really been . . . playing ball nicely."

[1] The press was in attendance at the hearing. A local newspaper published parts of the defendant's statement, which included her allegation that the plaintiff was a "criminal" and that he has "a serious criminal past and paid over $40 million in fines." "Deer Park Clear-Cutting without P+Z Consent Stalls Thomas Priore's Dream House," Greenwich Free Press, January 17, 2016, available at https://greenwichfreepress.com/news/government/deer-park-clear-cutting-without-pz-consent-stalls-thomas-priores-greenwich-dream-house-56771/ (last visited March 20, 2020).

D'Andrea subsequently returned to the microphone to address the issue of the trees. He admitted that a drawing of the property submitted by the plaintiff misrepresented the current presence or absence of trees on the property. He claimed, however, that the trees that the plaintiff had since removed were present on the property at the time the plaintiff submitted the application. Moreover, he stated that, although the plaintiff had been removing trees, the plaintiff did not consult with him about doing so.

Indeed, one member of the commission stated that the drawing that the plaintiff had submitted was "incomplete" because it did not depict certain trees. The chairman of the commission asked D'Andrea to work to reconcile the drawing in light of the information that Finkbeiner had submitted to the commission, to which D'Andrea agreed. D'Andrea also agreed that he was only a "representative" of the plaintiff, and could not control the plaintiff's decision to cut trees.

The hearing adjourned with the commission tabling the decision on whether to approve the application until the plaintiff or his representatives provided it with the clarifications and information that it had requested. At a later time, the commission ultimately approved the plaintiff's application "with very little change or requirements from the town . . . ."

The plaintiff commenced this action on October 12, 2016. In his five count second revised complaint sounding in libel per se, libel per quod, slander per se, slander per quod, and defamation, the plaintiff alleged that he had suffered "reputational damage . . . in his standing in the community and in his profession" because the defendant falsely accused him of criminal misconduct and of being untrustworthy. The defendant filed an answer and six special defenses. In her third special defense, the defendant claimed that she was immune from suit for defamation, libel, and slander because she

made these statements in the course of a quasi-judicial proceeding. The plaintiff responded by moving to strike this defense as well as the defendant's first and second special defenses.

The defendant filed an objection to the plaintiff's motion to strike and, in the same pleading, moved to dismiss the plaintiff's action, claiming, inter alia, that the court lacked subject matter jurisdiction over the plaintiff's action because the statements that she made during the commission's hearing were entitled to absolute litigation immunity. The defendant attached to her motion to dismiss the transcript of the hearing of the commission at which she made the alleged defamatory remarks about the plaintiff and a sworn affidavit of the defendant's attorney averring that the transcript was a true and accurate copy.

In response, the plaintiff filed an objection to the defendant's motion to dismiss. The sole exhibit that the plaintiff attached to his objection was the same transcript of the commission hearing that the defendant had attached to her motion to dismiss. Importantly, in neither his objection to the defendant's motion to dismiss nor at oral argument on the motion did the plaintiff assert that the court was required to conduct an evidentiary hearing to resolve disputed jurisdictional facts.

On January 23, 2018, the trial court granted the defendant's motion to dismiss and issued a comprehensive and well reasoned memorandum of decision. In that decision, the trial court concluded, on the basis of the plaintiff's complaint, the defendant's affidavit, and the transcript of the hearing submitted by both parties, that it did not have subject matter jurisdiction over the plaintiff's claims because the statements that the defendant made about the plaintiff at the commission's hearing were entitled to absolute litigation immunity. In reaching this conclusion, the court determined that

the commission's hearing, in which it considered whether to approve the plaintiff's special permit application, constituted a proceeding that was quasi-judicial in nature. The court also determined that the defendant's statements were pertinent to the subject matter of the proceeding because they concerned the plaintiff's credibility, which the commission had to weigh when reviewing the representations he and his agents made to it in order to decide whether to approve his application.

The plaintiff then filed a motion to reargue and for reconsideration (motion to reargue) in accordance with Practice Book §§ 11-11 and 11-12. In this motion, the plaintiff argued that the court incorrectly concluded that the commission's hearing was quasi-judicial in nature. He also argued that the court improperly considered whether the defendant's statements were *pertinent* to the subject matter of the proceeding. The plaintiff asserted that the court should have considered whether the statements were *relevant* and, ultimately, should have concluded that they were not. Moreover, the plaintiff argued that the court applied the wrong standard for deciding a motion to dismiss. The plaintiff also asserted, for the first time, that the court was required to conduct an evidentiary hearing to resolve jurisdictional facts that were in dispute.[2] The defendant then filed an objection to the plaintiff's motion to reargue, to which the plaintiff filed a reply.

On May 24, 2018, the court denied the plaintiff's motion to reargue and issued a memorandum of decision setting forth its reasoning. In its memorandum of decision, the court reiterated its conclusion that the

[2] The plaintiff attached two exhibits to his motion to reargue. The first is the transcript of the oral argument on the defendant's motion to dismiss. The second is a memorandum of decision issued in *Pursuit Partners, LLC* v. *UBS AG*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-4013452-S (July 3, 2014). The plaintiff asserted in his motion to reargue that this decision bolstered his claim that the trial court should have provided an evidentiary hearing.

commission's hearing on the plaintiff's application was quasi-judicial in nature and that the defendant's statements about the plaintiff were pertinent to the subject matter of that proceeding. With respect to the plaintiff's claim that he was entitled to an evidentiary hearing, the court stated that it properly based its decision to grant the motion to dismiss on the complaint and the transcript of the commission's hearing. The court also stated that there were no jurisdictional facts in dispute that necessitated an evidentiary hearing. This appeal followed.

I

The plaintiff first claims that the trial court incorrectly granted the defendant's motion to dismiss and denied his motion to reargue because he was entitled to an evidentiary hearing to resolve disputed jurisdictional facts; namely, (1) "the exact nature of the special permit and site plan application before [the commission]," (2) whether "trees had been 'clear cut' [by the plaintiff] without [the commission's] knowledge or as otherwise indicated in the site plan," and (3) whether the "defendant's comments were . . . relevant or pertinent to [any] matter raised in the special permit application." The plaintiff argues that, because these jurisdictional facts were in dispute and no evidentiary hearing was held, the court improperly concluded that the proceeding of the commission was quasi-judicial in nature and that the defendant's statements about the plaintiff were pertinent to the commission's proceeding. We disagree.

We first set forth the well settled principles governing a trial court's resolution of a pretrial motion to dismiss for lack of subject matter jurisdiction and our corresponding standard review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia,

whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . .

"Trial courts addressing motions to dismiss . . . pursuant to [Practice Book] § 10–30 (a) (1) may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed. . . .

"[I]f the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint,

but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 650–54, 974 A.2d 669 (2009).

To the extent that the plaintiff also seeks review of the court's denial of his motion to reargue, we review a court's decision on this type of motion for an abuse of discretion. See, e.g., *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014); *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 100–102 and n.39, 919 A.2d 1002 (2007). Similarly, we review a trial court's decision to deny a party's request for an evidentiary hearing under the abuse of discretion standard. See *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 102, 952 A.2d 1 (2008); see also *St. Denis-Lima* v. *St. Denis*, 190 Conn. App. 296, 303, 212 A.3d 242 ("[w]e review the denial of a request for an evidentiary hearing under the abuse of discretion standard"), cert. denied, 333 Conn. 910, 215 A.3d 734 (2019). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *Weiss* v. *Smulders*, supra, 261.

This court has stated that "[a] court is required to hold an evidentiary hearing before adjudicating a motion to dismiss only if there is a genuine dispute as to some [material] jurisdictional fact." *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 749, 138 A.3d 290 (2016). "[I]t is [however] the *plaintiff's burden* both to *request* an evidentiary hearing *and* to *present evidence* that establishes disputed factual allegations in support of an evidentiary hearing . . . ." (Emphasis added; internal quotation marks omitted.) *St. Denis-Lima* v. *St. Denis*, supra, 190 Conn. App. 306; see also *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 371, 996 A.2d 1195 (2010). "[If] the plaintiff fail[s] to do either, [then] the court [may] properly [decide] the motion on the basis of the pleadings and affidavits." (Internal quotation marks omitted.) *St. Denis-Lima* v. *St. Denis*, supra, 306; see also *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, supra, 371. For the reasons that follow, we conclude that the plaintiff failed to satisfy his obligation to request an evidentiary hearing and his burden to present evidence demonstrating that a material jurisdictional fact was in dispute. Accordingly, the trial court appropriately decided the defendant's motion to dismiss on the basis of the complaint, the transcript of the commission's hearing, and the affidavit submitted by the defendant. It also did not abuse its discretion by declining to conduct an evidentiary hearing and denying the plaintiff's motion to reargue.

The plaintiff did not request that the court conduct an evidentiary hearing until he filed his motion to reargue, which was after the court had decided the motion to dismiss. This court has held that a motion to reargue is generally an inappropriate vehicle for a party to request that a court conduct an evidentiary hearing when that party had a prior opportunity to present evidence. See *Gibbs* v. *Spinner*, 103 Conn. App. 502, 507, 930 A.2d 53 (2007); see also *Opoku* v. *Grant*, 63 Conn. App. 686,

692–93, 778 A.2d 981 (2001) (motion to reargue should not be used to correct deficiencies in prior motion).

The plaintiff in the present case had ample opportunity to offer evidence to the court to satisfy his burden of establishing a genuine dispute as to a material jurisdictional fact. In response to the defendant's motion to dismiss, the plaintiff could have attached counteraffidavits or other evidence to his objection to the defendant's motion. See *Conboy* v. *State*, supra, 292 Conn. 652; see also Practice Book § 10-31 (a). Indeed, the plaintiff clearly was aware of his ability to proffer evidence to the court before it decided the defendant's motion to dismiss because he attached the transcript of the commission's hearing to his objection to the defendant's motion. Furthermore, the plaintiff could have requested an evidentiary hearing before the court decided the defendant's motion to dismiss by filing a request with the court. Practice Book § 10-31 (b). Indeed, it was the plaintiff's burden to request an evidentiary hearing. See *St. Denis-Lima* v. *St. Denis*, supra, 190 Conn. App. 306; see also *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, supra, 121 Conn. App. 371. The plaintiff, however, did not request an evidentiary hearing until *after* the court had ruled on the motion to dismiss.[3] Because this court has determined that a party may not use a motion to reargue to obtain an evidentiary hearing when he or she had an opportunity to proffer evidence before the court decided the underlying motion, we conclude that the plaintiff failed to meet his burden of requesting an evidentiary hearing.[4]

[3] At oral argument before this court, the plaintiff stated that he did not request an evidentiary hearing before the trial court decided the defendant's motion to dismiss because he believed that the trial court would deny the defendant's motion to dismiss. This is a classic example of a party improperly using a motion to reargue to obtain a second bite of the apple. See *Gibbs* v. *Spinner*, supra, 103 Conn. App. 507.

[4] The plaintiff asserts that this court's decision in *Hayes Family Ltd. Partnership* v. *Glastonbury*, 132 Conn. App. 218, 219–24, 31 A.3d 429 (2011), supports his claim that this court should reverse the trial court's granting of the motion to dismiss and remand with instructions to the trial court to

We are also unpersuaded that any jurisdictional facts were in dispute when the court decided the defendant's motion to dismiss. The plaintiff, however, contends that three jurisdictional facts were in dispute. The first jurisdictional fact that he argues was in dispute concerned the nature of the special permit application and site plan before the commission. This fact, however, was not in dispute when the court decided the defendant's motion to dismiss. The complaint states that the hearing at which the defendant made the statements about the plaintiff was a "final meeting . . . held [by] the Greenwich Planning and Zoning Commission to approve [the] plaintiff's application for a new sewer permit . . . ." In addition, the transcript of the hearing states that the commission was considering the "final site plan and special permit [for the plaintiff's property]." Thus, it is undisputed from the complaint and the transcript that the commission was considering a final site plan and special permit application for construction on the plaintiff's property, which included installing a sewer line on the property. To the extent that there was any dispute about the nature of the application, the plaintiff failed to proffer any evidence to the trial court that tended to demonstrate that the nature of the commission's proceeding was different than as described by him in his complaint.

conduct an evidentiary hearing. In its memorandum of decision concerning the plaintiff's motion to reargue, the trial court stated, and we agree, that *Hayes Family Ltd. Partnership* is "inapposite" to the present case.

In that case, the trial court granted the defendant's motion to dismiss based on the complaint and the affidavits submitted by both parties, even though a "critical fact" remained in dispute. *Hayes Family Ltd. Partnership* v. *Glastonbury*, supra, 132 Conn. App. 223–24. Thus, this court reversed the trial court's judgment and remanded with instructions to conduct an evidentiary hearing on the factual issue in dispute. Id., 224.

The present case clearly is distinguishable from *Hayes Family Ltd. Partnership*. Indeed, the plaintiff has failed to satisfy his burden of proffering evidence and establishing that a genuine dispute exists as to a material jurisdictional fact. See *St. Denis-Lima* v. *St. Denis*, supra, 190 Conn. App. 306; *Property Asset Management, Inc.* v. *Lazarte*, supra, 163 Conn. App. 749. Thus, we conclude that *Hayes Family Ltd. Partnership* does not control our decision on the plaintiff's claim that the trial court incorrectly denied him an evidentiary hearing.

The second jurisdictional fact—whether the plaintiff had cut down trees without the commission's knowledge or as otherwise indicated in the site plan—was not material to the court's decision as to whether the defendant was absolutely immune from suit for defamation. The trial court determined that the defendant's statements were pertinent to the commission's proceeding because they concerned the plaintiff's credibility. The plaintiff's credibility was put at issue before his clear-cutting of trees was raised to the commission. Indeed, the plaintiff's credibility was put at issue when he submitted a special permit application and made representations in support of the application on which the commission would rely to approve or deny it. Thus, whether the plaintiff did in fact cut down the trees was not a material jurisdictional fact.

Finally, the third jurisdictional "fact"—whether the "[d]efendant's comments were . . . relevant or pertinent to [any] matter raised in the special permit application"—is not a question of fact. Rather, the court's determination of whether a statement is pertinent to the subject matter of a proceeding is a *legal* conclusion. See *Gallo* v. *Barile*, 284 Conn. 459, 467, 935 A.2d 103 (2007) ("[i]n making [the] determination [of whether a particular statement is made in the course of a judicial proceeding], *the court must decide as a matter of law* whether the allegedly [false and malicious] statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding, so as to qualify for the [immunity]" (emphasis added; internal quotation marks omitted)); see also 1 D. Pope, Connecticut Actions and Remedies: Tort Law (1993) § 10:12 p. 10-31 (whether statement is relevant to proceeding is question of law for court to decide). To the extent that the plaintiff's argument addresses the content of the defendant's statements, both the defendant *and* the plaintiff proffered a copy of the transcript of the commission's hearing to the court for its consideration

before it decided the motion to dismiss. The transcript contained what the defendant said verbatim during the hearing, and the plaintiff offered no evidence to the court disputing the accuracy of the transcript. Because neither the complaint, the transcript of the commission's hearing, nor the defendant's affidavit established a genuine dispute regarding a material jurisdictional fact, we conclude that the trial court properly granted the motion to dismiss and did not abuse its discretion by denying the plaintiff's subsequent request for an evidentiary hearing and by denying his motion to reargue.[5]

II

The plaintiff's second claim is that the trial court incorrectly determined that it lacked subject matter jurisdiction over his defamation claim because the defendant's statements about the plaintiff that she made at the commission's hearing were entitled to absolute litigation immunity.[6] In support of this claim, the plaintiff argues that the trial court incorrectly concluded

[5] In his appellate brief, the plaintiff states that the trial court deprived him of his due process rights and his right to access the court system, as guaranteed by article first, § 10, of the Connecticut constitution, by not applying the proper standard when deciding the defendant's motion to dismiss and by denying him an evidentiary hearing on jurisdictional facts that, he claims, were in dispute. Because we conclude that those claims are inadequately briefed, we decline to address them. See *State* v. *Randolph*, 284 Conn. 328, 375 n.12, 933 A.2d 1158 (2007) (state constitutional claims that are inadequately briefed are deemed abandoned).

[6] "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . . To establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement." (Citations omitted; internal quotation marks omitted.) *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 217, 837 A.2d 759 (2004). "Defamation is comprised of the torts of libel and slander. . . . Slander is oral defamation. . . . Libel . . . is written defamation." (Citation omitted; internal quotation marks omitted.) *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, 77 Conn. App. 846, 851–52, 825 A.2d 827, cert. denied, 267 Conn. 901, 838 A.2d 210 (2003).

that (1) the proceeding of the commission, at which it considered the his special permit application and the materials submitted in support thereof, was quasi-judicial in nature and (2) the statements about him that the defendant made to the commission were pertinent to the commission's proceeding. We disagree with the plaintiff.

Before addressing the plaintiff's two arguments pertaining to this claim, we begin by considering the well settled principles and policy interests concerning absolute litigation immunity.[7] In sum, absolute litigation immunity prevents a person from being sued for defamation for a statement made in the course of a judicial or quasi-judicial proceeding so long as the statement is pertinent to the subject matter of the proceeding. See, e.g., *Kelley* v. *Bonney*, 221 Conn. 549, 565–66, 606 A.2d 693 (1992). "Once it is determined that a proceeding is [judicial or] quasi-judicial in nature, the absolute [immunity] that is granted to statements made in furtherance of it extends to every step of the proceeding until final disposition." (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 84, 856 A.2d 372 (2004). Moreover, "[t]he effect of an absolute [immunity] in a defamation action . . . is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously." *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 788, 865 A.2d 1163 (2005).

Our Supreme Court has articulated the public policy reasons supporting absolute litigation immunity and its relation to civil actions for defamatory statements made in the course of judicial and quasi-judicial proceedings:

[7] "Absolute immunity for defamatory statements made in the course of judicial proceedings has been recognized by common-law courts for many centuries . . . ." *Simms* v. *Seaman*, 308 Conn. 523, 531, 69 A.3d 880 (2013); see also *Villages, LLC* v. *Longhi*, 166 Conn. App. 685, 699, 142 A.3d 1162, cert. denied, 323 Conn. 915, 149 A.3d 498 (2016). The courts of this state have also "long recognized the litigation [immunity]." *Simms* v. *Seaman*, supra, 536; see also *Villages, LLC* v. *Longhi*, supra, 699.

"The doctrine of absolute immunity as applied to statements made in the context of judicial and quasi-judicial proceedings is rooted in the public policy of encouraging witnesses, both complaining and testimonial, to come forward and testify in either criminal or civil actions. The purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the [immunity] by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a [bar to] certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; internal quotation marks omitted.) *Rioux* v. *Barry*, 283 Conn. 338, 343–44, 927 A.2d 304 (2007); see also *Simms* v. *Seaman*, 308 Conn. 523, 538, 69 A.3d 880 (2013) (absolute litigation immunity "was founded [on] the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements, but should speak out the whole truth, freely and fearlessly" (internal quotation marks omitted)). Moreover, our Supreme Court has stated that a court faced with determining whether absolute litigation immunity applies to statements made during a

judicial or quasi-judicial proceeding should apply the immunity generously. See, e.g., *Gallo* v. *Barile*, supra, 284 Conn. 467 ("[t]he test for relevancy is generous, and judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials" (internal quotation marks omitted)).

When deciding whether absolute immunity applies, however, our Supreme Court has been mindful that "[a]bsolute immunity . . . is strong medicine . . . ." Id., 471. A determination that a defendant's alleged defamatory statements are entitled to absolute litigation immunity closes the courthouse doors to a plaintiff wishing to sue that defendant for harm that those statements may have caused the plaintiff. See *Hopkins* v. *O'Connor*, 282 Conn. 821, 829, 925 A.2d 1030 (2007). Thus, "in determining whether a statement is made in the course of a judicial proceeding [and, pending its pertinence to the proceeding, subjecting it to absolute immunity], it is important to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of absolute immunity provides." (Internal quotation marks omitted.) Id., 839. Put differently, "whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests." *Gallo* v. *Barile*, supra, 284 Conn. 471.

In balancing competing interests to determine whether absolute litigation immunity applies to statements that are pertinent to the judicial or quasi-judicial proceeding in which they are made, our Supreme Court has acknowledged that "[a]bsolute immunity in defamation . . . presents a conflict or antinomy between two principles equally regarded by the law—the right of the individual, on [the] one hand, to enjoy his reputation unimpaired by defamatory attacks, and, on the other hand, the necessity, in the public interest, of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of government." Id.,

470. The court, however, has concluded that absolute immunity shielding a defendant from suit for these types of statements is often necessary to "[further] the public policy of encouraging participation and candor in [these] proceedings." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 828. Otherwise, "[t]his objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." (Internal quotation marks omitted.) Id., 828–29. Moreover, "[w]ith respect to statements made in the course of a judicial proceeding, it is widely accepted that the public's interest in the unhampered operation of the government, when exercising [its judicial] functions, outweighs an individual's interest in the preservation of reputation." (Internal quotation marks omitted.) *Gallo* v. *Barile*, supra, 284 Conn. 470.

Thus, our Supreme Court has "consistently . . . applied the doctrine of absolute immunity to defamation actions arising from judicial or quasi-judicial proceedings." *Rioux* v. *Barry*, supra, 283 Conn. 345. In making this determination, the court has concluded that, even though a plaintiff may incur harm as a result of a defendant's defamatory statement about him or her, "the policy concerns underlying absolute immunity—encouraging complaining and testimonial witnesses to come forward—[outweigh] the interest of the private individual in being free from defamation." Id.

In sum, these cases teach important principles of which we are mindful when deciding whether to shield the defendant in the present case from suit for her alleged defamatory statements about the plaintiff. Indeed, in cases in which a person has been sued for making allegedly defamatory statements to a government body that is engaged in a function that is quasi-judicial in nature, a court should err on the side of granting the immunity. That is not to say that a court should not carefully consider the consequences that

granting absolute immunity might create, and, if the consequences of absolutely immunizing a defendant from suit outweigh the benefits, then a court should determine that the defendant's statements are not entitled to absolute immunity. A court must be mindful, however, that a person wishing to speak before a government body is not obligated to weigh beforehand whether the body before which he or she is about to speak is performing a quasi-judicial function. Requiring a person to do this would chill the very engagement with government bodies that the immunity seeks to protect and encourage.

Moreover, in the interest of information flowing freely between citizens and government officials, a court must liberally construe whether a statement made during a public hearing is pertinent to the proceeding. See *Gallo* v. *Barile*, supra, 284 Conn. 467. This does not mean that a person always is permitted to make a defamatory statement at a public hearing with impunity. Mindful of these principles, we conclude that the trial court in the present case correctly determined that the defendant's statements were entitled to absolute litigation immunity.

A

In claiming that the trial court incorrectly determined that the defendant's statements about the plaintiff at the commission's hearing were entitled to absolute litigation immunity, the plaintiff first argues that the court improperly concluded that the commission's consideration of the plaintiff's final site plan and special permit application constituted a proceeding that was quasi-judicial in nature. The plaintiff argues that all six factors used by our Supreme Court in *Kelley* v. *Bonney*, supra, 221 Conn. 567–71, to determine whether a proceeding is quasi-judicial in nature militate against concluding that the proceeding at which the commission consid-

ered his special permit application was quasi-judicial.[8] We disagree.

Our Supreme Court has stated that "[t]he judicial proceeding to which the [absolute litigation] immunity attaches . . . includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes for example, lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 246, 510 A.2d 1337 (1986).

Furthermore, our Supreme Court has articulated six factors that may be relevant in determining whether a proceeding is quasi-judicial in nature. See *Kelley* v. *Bonney*, supra, 221 Conn. 567–71. In making this determination, the court considered "whether the body has the power to: (1) exercise judgment and discretion; (2)

[8] Furthermore, the plaintiff contends that, when determining whether to approve a special permit, the commission is performing an inherently "administrative" function. In stating this, the plaintiff assumes that a proceeding that is "administrative" in nature cannot be quasi-judicial. The plaintiff, however, relies on a false dichotomy, because our Supreme Court has stated that a proceeding can be both administrative *and* quasi-judicial. See *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 150, 653 A.2d 798 (1995) ("[t]he discretion of a legislative body, because of its constituted role as formulator of public policy, is much broader than that of an *administrative board, which serves a quasi-judicial function*" (emphasis added)); see also *Petyan* v. *Ellis*, 200 Conn. 243, 246, 510 A.2d 1337 (1986) ("*administrative* officers, such as boards and commissions" are *quasi-judicial* if they possess discretion in applying law to facts (emphasis added)). Indeed, "[*a*]*dministrative* enforcement agencies often perform multiple functions, *some but not all* of which are *quasi-judicial*. [For example] [c]onducting hearings on the prosecution of violations resembles the inherently *discretionary* roles of judge and prosecutor, and state administrative proceedings are *sufficiently comparable* to judicial proceedings to warrant the extension of immunity to an *administrative* hearing officer engaging in a function that is *quasi-judicial in nature*." (Emphasis added; footnotes omitted.) 2 Am. Jur. 2d 522, Administrative Law § 562 (2014).

hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties." Id., 567. These factors, however, are not exclusive nor must all factors militate in favor of a determination that a proceeding is quasi-judicial in nature for a court to conclude that the proceeding is, in fact, quasi-judicial. See *Mercer* v. *Blanchette*, 133 Conn. App. 84, 91–92, 33 A.3d 889 (2012). Indeed, in addition to considering the six factors, our Supreme Court stated in *Kelley* that "it is important [for a court] to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of absolute immunity provides." *Kelley* v. *Bonney*, supra, 567. In the present case, we conclude, based on the record and the statutes and regulations applicable to the commission, that the first five factors weigh in favor the determination that the commission's proceeding concerning the plaintiff's special permit application was quasi-judicial in nature.[9]

With respect to the first factor—whether the commission exercised discretion in deciding whether to approve the plaintiff's special permit application; id.; the plaintiff contends that, when "determin[ing] whether the [plaintiff's] proposal [met] the standards set forth in the zoning regulations," the commission was not required to "exercise [any] judgment [or] discretion in deciding whether to grant or deny the [plaintiff's] special permit application." In essence, the plaintiff claims that, when faced with a special permit application, the commission has such minimal discretion in making a decision on the application that the commission is, in effect, a rubber stamp for approving it.

[9] The trial court concluded that the sixth factor—whether the body has the power to "enforce decisions or impose penalties"—is "inapplicable" to the present case. Even if we assume, without deciding, that the commission lacks this power and, thus, that this factor weighs in favor of the plaintiff, we nevertheless conclude that the commission's proceeding was quasi-judicial in nature because the other five factors support this conclusion.

Our Supreme Court, however, has concluded that "the special permit process is, in fact, discretionary." *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 626, 711 A.2d 675 (1998); see also *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 594, 170 A.3d 73 (2017) ("[a] zoning commission can exercise its discretion during the review of the proposed special [permit], as it applies the regulations to the specific application before it" (internal quotation marks omitted)). In support of this conclusion, the court in *Irwin* stated that "[w]hen ruling upon an application for a special permit . . . it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." (Citations omitted; internal quotation marks omitted.) *Irwin* v. *Planning & Zoning Commission*, supra, 627–28.

Moreover, similar to the plaintiff in the present case, the plaintiff in *Irwin* argued "that the [c]ommission ha[d] no independent discretion to deny a plan [that] satisfies the standards contained in the special permit regulations." (Internal quotation marks omitted.) Id., 628. Our Supreme Court, however, rejected that claim, stating that "[a]lthough it is true that the zoning commission does not have discretion to deny a special permit when the proposal meets the standards, it does have discretion to determine whether the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally

true. Thus, the zoning commission can exercise its discretion during the review of the proposed special exception, as it applies the regulations to the specific application before it." (Emphasis omitted.) Id.

In the present case, the commission did, indeed, exercise such discretion. In fact, the Greenwich zoning regulations *require* it. Section 6-17 (a) of the Greenwich Municipal Code, which pertains to authorizations for use by special permit, provides in relevant part that the "[c]ommission *shall* determine that the proposed use conforms with the overall intent of these regulations and the purposes of each zone . . . ." (Emphasis added.) Moreover, § 6-17 (d) states that the commission "*shall* consider all the standards contained in [§] 6-15 (a)" and that it "*shall* consider" twelve enumerated attributes of the proposed use in the special permit application.[10] (Emphasis added.) In its review of the

[10] "In reviewing special permits, the . . . [c]ommission shall consider all the standards contained in [§] 6-15 (a). In granting any special permit the [c]ommission shall consider in each case whether the proposed use will:

"(1) Be in accordance with the Plan of Development.

"(2) Not prevent or inhibit the orderly growth of the retail business development of the area.

"(3) Not adversely affect storm drainage, sewerage disposal or other municipal facilities. (6/11/86)

"(4) Not materially adversely affect adjacent areas located within the closest proximity to the use.

"(5) Not materially obstruct significant views which are important elements in maintaining the character of the Town for the purpose of promoting the general welfare and conserving the value of buildings.

"(6) Preserve or enhance important open space and other features of the natural environment and protect against deterioration of the quality of the environment, as related to the public health, safety and welfare. (6/11/86)

"(7) Not interfere with pedestrian circulation, most particularly as related to retail shopping patterns.

"(8) Not adversely affect safety in the streets nor increase traffic congestion in the area so as to be inconsistent with an acceptable level of service nor interfere with the pattern of highway circulation. (6/11/86)

"(9) Be in scale with and compatible with surrounding uses, buildings, streets and open spaces.

"(10) Preserve land, structures or features having special historical, cultural, or architectural merit. (3/1/82)

"(11) Will not materially adversely affect residential uses, nor be detrimental to a neighborhood or its residents, nor alter a neighborhood's essential characteristics. (6/13/84)

application, "the [c]ommission [is allowed to] require [the applicant] for [a] special permit to prepare and submit any additional data and studies as necessary to allow the [c]ommission to arrive at its determinations." Greenwich Municipal Code § 6-17 (e). Thus, the commission's decision on the plaintiff's special permit application was not merely a foregone conclusion, as the plaintiff suggests. Indeed, the commission was obligated to deliberate over the plaintiff's special permit application in accordance with the Greenwich zoning regulations and was permitted to require that the plaintiff provide data and studies before the commission ultimately exercised its discretion and determined whether the application complied with the standards set forth in the zoning regulations.

Moreover, the transcript of the commission's hearing is replete with examples of the commission exercising its discretion by entertaining and engaging in discussion over the plaintiff's special permit application. This discussion, at times, involved the standards set forth in § 6-17 of the Greenwich Municipal Code. For example, the discussion at the hearing encompassed whether the placement of the sewer line, as proposed, would impact (1) a historic stone wall, (2) the health of trees that may have important aesthetic value to the neighborhood, and (3) pavement, drainage, and utilities.[11] For these reasons, we conclude that the first factor militates in favor of determining that the commission's proceeding pertaining to the plaintiff's special permit application was quasi-judicial in nature.

"(12) Preserve where possible existing housing stock so as to maintain and contribute to a diversity of housing opportunities within the Town. (6/11/86)." Greenwich Municipal Code § 6-17 (d).

[11] Indeed, commission member Margarita Alban, in an exchange with D'Andrea, raised § 6-17 of the Greenwich Municipal Code and one of the standards—a special permit's effect on the character of the town and the neighborhood—of that regulation that requires the commission to consider when deciding whether to approve a special permit. Alban offered to read § 6-17 aloud, to which D'Andrea declined.

The second factor—whether the commission could ascertain, hear, and decide facts; see *Kelley* v. *Bonney*, supra, 221 Conn. 567; also militates in favor of determining that the proceeding was quasi-judicial in nature. Indeed, the commission was empowered to require that the plaintiff, as a special permit applicant, "prepare and submit any additional data and studies as necessary to allow the [c]ommission to arrive at its determinations." Greenwich Municipal Code § 6-17 (e). Moreover, at the public hearing, the commission was engaged in fact gathering concerning the plaintiff's application; it heard the statements of D'Andrea, Finkbeiner, and the defendant. Because the commission was engaged in—and, indeed, empowered to engage in—fact-finding pertaining to the plaintiff's special permit application, the second factor weighs in favor of the determination that the proceeding was quasi-judicial in nature.

Likewise, the third factor—whether the commission was empowered to "make binding orders and judgments"; *Kelley* v. *Bonney*, supra, 221 Conn. 567; weighs in favor of determining that the proceeding of the commission was quasi-judicial in nature. The hearing at which the defendant made statements about the plaintiff was a "final meeting . . . to approve [the] plaintiff's application for a new sewer permit . . . ." Moreover, the chairman of the commission noted that a decision on the plaintiff's application would be left "open," which meant that "[the plaintiff had] work to do before [coming] back to [the commission]." From this undisputed information contained in the plaintiff's complaint and the transcript of the hearing, as well as the statutes and regulations applicable to the commission, we conclude that the commission had the ability to approve the plaintiff's application, deny it, or table the issue until a further proceeding. Thus, the third factor weighs in favor of the determination that the commission's proceeding was quasi-judicial in nature.

The fourth factor—whether the commission had the power to "affect the personal or property rights of private persons"; *Kelley* v. *Bonner*, supra, 221 Conn. 567; also supports a conclusion that the commission's proceeding was quasi-judicial in nature. Our Supreme Court has recognized that "[z]oning regulations . . . are in derogation of [common-law] property rights . . . ." *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). Indeed, if the commission applied the standards under § 6-17 of the Greenwich Municipal Code and denied the plaintiff's special permit application, it would restrict the plaintiff's ability to use his property in a manner he desires. If, however, the commission approved his application, the sewer line that the plaintiff would place on his property might affect the properties of those in the neighborhood. For these reasons, the fourth factor weighs in favor of the determination that the commission's proceeding was quasi-judicial in nature.

The fifth factor—whether the commission had the power to "examine witnesses and hear the litigation of the issues [at] a hearing"; *Kelley* v. *Bonney*, supra, 221 Conn. 567; also militates in favor of concluding that the commission's proceeding was quasi-judicial in nature. The transcript of the hearing indicates that multiple witnesses spoke about the plaintiff's application during the hearing, including D'Andrea, Finkbeiner, and the defendant. Although these individuals were not addressing the commission under the sanction of an oath, the fact that a witness is not under oath when providing testimony at a hearing does not weigh against determining that a proceeding is quasi-judicial in nature. See *Petyan* v. *Ellis*, supra, 200 Conn. 251 ("[t]he common law absolute [immunity] itself is not confined to the testimony of a witness but extends to any statement made in the course of a judicial proceeding, whether or not given under oath, so long as it is pertinent to the controversy"); see also 3 Restatement (Second),

Torts, Witnesses in Judicial Proceedings § 588, comment (b), p. 250 (1977) ("[Absolute immunity for defamatory statements] protects a witness while testifying. It is not necessary that he give his testimony under oath; it is enough that he is permitted to testify."). Moreover, the absolute immunity applies to "witnesses, whether they testify voluntarily or not . . . ." (Footnote omitted.) W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 114, pp. 816–17. Because the commission heard the testimony of several witnesses at a public hearing on the plaintiff's application, we conclude that the fifth factor supports the conclusion that the commission's proceeding was quasi-judicial in nature.

Lastly, we weigh the final consideration that our Supreme Court utilizes to evaluate whether a government body's proceeding is quasi-judicial in nature: is there "a sound public policy reason for permitting the complete freedom of expression that a grant of absolute immunity provides." *Kelley* v. *Bonney*, supra, 221 Conn. 567.[12] In analyzing whether public policy interests support a conclusion that a defendant's statements should

[12] In determining whether statements are entitled to absolute immunity, our Supreme Court has utilized six factors to determine whether a proceeding is quasi-judicial in nature and, as part of a more overarching inquiry, whether public policy justifies entitling statements to absolute immunity under the circumstances. See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 85, 92–93; *Kelley* v. *Bonney*, supra, 221 Conn. 567, 571. We construe these analyses to be two separate inquiries. The first analysis considers whether a proceeding is quasi-judicial in nature by assessing whether the government body conducting the proceeding has powers that are characteristic of a body acting in a quasi-judicial capacity. See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 84–90; *Kelley* v. *Bonney*, supra, 221 Conn. 567–71. The second inquiry asks, regardless of whether a proceeding is quasi-judicial in nature, should the statements at issue made during the proceeding be entitled to absolute immunity as a matter of public policy. See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 85, 95-96; *Kelley* v. *Bonney*, supra, 221 Conn. 571; *Mercer* v. *Blanchette*, supra, 133 Conn. App. 91–92.

be entitled to absolute litigation immunity, we are mindful that "[t]he rationale for extending the absolute [immunity] to statements made during quasi-judicial proceedings rests in the public policy that every citizen should have the unqualified right to appeal to governmental agencies for redress without the fear of being called to answer in damages . . . . The absolute [immunity] for communications in the context of quasi-judicial proceedings is intended to protect the integrity of the process and ensure that the quasi-judicial decision-making body gets the information it needs. The policy furthering the general public's right to appeal freely to governmental entities for redress without the fear of lawsuits for libel based on statements made in the context of a quasi-judicial proceeding is of such importance that it is entitled to protection even at the expense of damage to a particular individual." (Footnotes omitted.) 50 Am. Jur. 2d 666–67, Libel and Slander § 283 (2017). Indeed, "*every* judicial or quasi-judicial proceeding creates a potential defamation claim based upon the statements made in connection therewith. Protection against such claims is essential to ensure candor within and fair access to the proceedings." (Emphasis in original; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 636, 79 A.3d 60 (2013).

These important policy interests that are fundamental to encouraging citizen participation in the deliberations and decisions of their local governments are implicated in the present case. Indeed, the defendant attended a hearing of her town's planning and zoning commission at which the commission was considering whether to approve the plaintiff's application, which involved, in part, the placement of a sewer line on his property that could affect the defendant's property and the neighborhood in which she resides. After D'Andrea discussed the site plan and the special permit application and answered questions from members of the commission,

members of the public were invited to offer comments. In offering remarks at the hearing, the defendant provided information to the commission that arguably was helpful to that body in assessing the accuracy and truthfulness of the representations made in the plaintiff's submissions.

We conclude that the strong public policy interests in allowing a citizen to offer information to a local government commission on an issue under consideration by it without fear of being sued weighs heavily in favor of determining that the commission's proceeding in this case was quasi-judicial in nature. Indeed, a private citizen wishing to comment on an issue under consideration by a government body at a hearing should not be expected to conduct on the spot legal research to make sure the body before which he or she is about to speak is performing a quasi-judicial function. If we were to conclude that the defendant's statements were not entitled to absolute litigation immunity in this case, then Connecticut residents, fearing suit for defamation, may be chilled from offering information to their local governments on issues related to important decisions that local government officials must make. In light of these policy interests, we conclude that the commission's proceeding, at which it deliberated over the plaintiff's special permit application, was quasi-judicial in nature because the first five factors used by our Supreme Court in *Kelley* v. *Bonney*, supra, 221 Conn. 567, and public policy reasons support this conclusion.

B

The plaintiff next argues that, even if the commission's consideration of the plaintiff's final site plan and special permit application constituted a proceeding that was quasi-judicial in nature, the court improperly concluded that the defendant's statements about the plaintiff were pertinent to the subject matter of the commission's proceeding. Instead, the plaintiff argues that

these statements were neither pertinent nor relevant to the commission's proceeding because whether the plaintiff (1) "[was] not . . . trustworthy," (2) "[had] a serious criminal past," and (3) had "paid over $40,000,000 in fines to the SEC" was completely unrelated to "the application and whether a certified site plan complies with municipal regulations." Moreover, the plaintiff contends that his credibility was neither pertinent nor relevant to whether his engineers would place the sewer line on his property in accordance with the site plan and whether he had the right to cut trees on his property. The plaintiff asserts that, because the defendant's statements about the plaintiff's criminal past and trustworthiness were neither pertinent nor relevant to the commission's approval of his special permit application, the court incorrectly concluded that the defendant was shielded from suit for defamation by absolute litigation immunity. We disagree.[13]

It is well settled that "[a]t common law, communications uttered or published in the course of judicial proceedings are [entitled to absolute immunity] so long as they are in some way pertinent to the subject of the controversy. . . . [L]ike the [immunity] which is gener-

[13] On appeal, the plaintiff claims that the trial court incorrectly analyzed whether the defendant's statements were "pertinent" to the subject matter of the proceeding. Instead, he asserts that the court should have considered whether the statements were "relevant" because the statements were made during a quasi-judicial proceeding, not a judicial proceeding. We are unpersuaded, however, because the terms "pertinent" and "relevant" have been used interchangeably by our courts, and no courts have attached different meanings to these terms when determining whether a defendant is entitled to absolute litigation immunity. Compare *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 84 ("[l]ike the [immunity] which is generally applied to *pertinent* statements made in formal *judicial* proceedings, an absolute [immunity] also attaches to *relevant* statements made during administrative proceedings which are *quasi-judicial* in nature" (emphasis added)), with *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 257, 907 A.2d 1269 ("[t]he . . . issue . . . is whether the statements [made in the course of the *quasi-judicial* proceeding] were *pertinent* to the subject of the controversy" (emphasis added; internal quotation marks omitted)), cert. denied, 280 Conn. 951, 912 A.2d 483 (2006).

ally applied to pertinent statements made in formal judicial proceedings, an absolute [immunity] also attaches to relevant statements made during administrative proceedings which are quasi-judicial in nature. . . . Once it is determined that a proceeding is quasi-judicial in nature, the absolute [immunity] that is granted to statements made in furtherance of it extends to every step of the proceeding until final disposition." (Citation omitted; internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, supra, 272 Conn. 787–88.

Whether statements are pertinent to the subject matter of that proceeding is a question of law for the court to decide. See, e.g., *Gallo* v. *Barile*, supra, 284 Conn. 467; see also 1 D. Pope, supra, § 10:12, p. 10-31 ("[i]t is a question of law for the court to decide whether [a] defamatory [statement] is relevant or material to the particular judicial proceeding"). "In making such a determination, the test is not one of legal relevance, but rather whether the statement has some relation to the judicial proceeding." D. Pope, supra, § 10:12, p. 10-31. Importantly, "[*t*]*he test for relevancy is generous*." (Emphasis added.) *Gallo* v. *Barile*, supra, 467. This court has tempered this standard, however, stating that, "[a]lthough the test for relevance is very generous, we must balance it against the requirement to construe the evidence in the light most favorable to jurisdiction." *Chamerda* v. *Opie*, 185 Conn. App. 627, 645, 197 A.3d 982, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

Furthermore, this court has held that an alleged defamatory statement made in the course of a judicial or quasi-judicial proceeding that concerns the credibility of an interested party or witness is pertinent as a matter of law to the subject matter of the proceeding and thus is entitled to absolute litigation immunity. See *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 259, 907 A.2d 1269 ("[i]n assessing the *credibility* of speakers at a public hearing, or the reliability of information provided

in support of or in opposition to a pending application, statements as to the motivation of an abutting property owner could be *pertinent to the subject of the controversy*" (emphasis added; internal quotation marks omitted)), cert. denied, 280 Conn. 951, 912 A.2d 483 (2006); *Alexandru* v. *Dowd*, 79 Conn. App. 434, 438–41, 830 A.2d 352 (defendant's alleged defamatory statements were pertinent to proceeding because plaintiff had put her emotional state and physical condition at issue, which were pertinent to the subject of the reliability of the plaintiff's expert witnesses), cert. denied, 266 Conn. 925, 835 A.2d 471 (2003); cf. *Mercer* v. *Blanchette*, supra, 133 Conn. App. 94 (defendant panel member's statements entitled to absolute litigation immunity "[b]ecause the . . . statements . . . whether true or not, related to the subject matter of the proceeding in that the defendant was expressing his basis for questioning the plaintiff's credibility"). This court also has determined that a person can put his or her credibility at issue by making a representation to a government body that concerns a matter on which that body is deliberating. See *Dlugokecki* v. *Vieira*, supra, 258–59 (plaintiff put credibility at issue by making representations to commission in opposition to defendant's application, to which defendant responded "by exposing the plaintiff's bias or improper motive for making negative comments [about his application]").

Turning to the present case, the defendant stated to the commission that the plaintiff had been "very disrespectful" toward the neighbors in the manner in which he was making changes to his property. After expressing some concern for the welfare of the trees if the sewer line was placed in the manner proposed in the application, the defendant stated to the commission that the plaintiff (1) "[was] not . . . trustworthy," (2) "[had] a serious criminal past," and (3) that he had "paid over $40,000,000 in fines to the SEC."

Because the plaintiff put his credibility at issue by submitting a special permit application that was accompanied by representations on which the commission would rely to approve or deny the application, this court must determine not simply whether the alleged defamatory statements were pertinent to the commission's evaluation of the standards set forth in § 6-17 of the Greenwich Municipal Code and its ultimate decision on the plaintiff's application; more precisely, we must decide whether the defendant's statements were pertinent to the plaintiff's credibility and, thus, the reliability of the representations he and those representing him made to the commission in support of his application. Mindful of this analytical framework, we consider each of the plaintiff's alleged defamatory statements and conclude that each was pertinent to the plaintiff's credibility.

The first statement—that the defendant believed that the plaintiff was not trustworthy—clearly is probative of whether the plaintiff should be believed. This court has already held that statements regarding the reliability of testimony or evidence that an interested person or witness has offered during a proceeding is, indeed, pertinent to the subject matter of that proceeding. See *Dlugokecki* v. *Vieira*, supra, 98 Conn. App. 257–59; *Alexandru* v. *Dowd*, supra, 79 Conn. App. 440–41; cf. *Mercer* v. *Blanchette*, supra, 133 Conn. App. 94. In the present case, the defendant's comment that the plaintiff was not trustworthy addressed whether, from her knowledge of the plaintiff's reputation and in her opinion, she believed that the plaintiff's representations were reliable. Under the "generous" standard for determining whether a statement is pertinent to the subject matter of a quasi-judicial proceeding; see *Gallo* v. *Barile*, supra, 284 Conn. 467; the defendant's statement concerning the plaintiff's untrustworthiness was pertinent to the proceeding because it undoubtedly concerned the plaintiff's credibility.

Turning to the defendant's comments concerning the plaintiff's alleged criminal history and misconduct, we conclude that these, too, were pertinent to his credibility and, thus, the reliability of the representations that he and his representatives made to the commission in support of his special permit application. Indeed, albeit in the context of impeaching a witness, our legislature and the Connecticut Code of Evidence recognize that a person's criminal history can bear on that person's credibility. See General Statutes § 52-145 (b) ("[a] person's . . . conviction of crime may be shown for the purpose of affecting his credibility"); Conn. Code Evid. § 6-7 (a). Moreover, evidence of specific acts of conduct that are indicative of a lack of veracity may also be used to discredit the reliability of a person's representations. See Conn. Code Evid. § 6-6 (b).

In the present case, the defendant offered what could be considered either testimony supporting a conclusion that the defendant had been convicted of a crime or that he had engaged in conduct that evidences a lack of veracity. Indeed, the defendant's statement that the plaintiff had a "serious criminal past" easily could be interpreted as an offer by the defendant of information to the commission that the defendant had been convicted of a crime.[14] In addition, her comment that the SEC had imposed a $40,000,000 fine on the defen-

[14] To the extent that the plaintiff relies on our Supreme Court's decision in *Gallo* v. *Barile*, supra, 284 Conn. 471, to support a conclusion that false statements concerning criminal wrongdoing are not entitled to absolute immunity, that case is distinguishable from the present case because the statements in *Gallo* were not made in the course of a judicial or quasi-judicial proceeding. Indeed, our Supreme Court concluded that its decision in *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88–90, did not control the outcome of *Gallo* because "the statements at issue in *Craig* fell squarely within the [immunity] for statements made in the course of a quasi-judicial proceeding." *Gallo* v. *Barile*, supra, 284 Conn. 474. Moreover, the court in *Gallo* acknowledged that "[i]t is well established that allegations contained in a complaint in a quasi-judicial proceeding, like allegations contained in a complaint in a judicial proceeding, are [entitled to absolute immunity]." Id.

dant reasonably could be interpreted as the defendant's offering—albeit imprecisely—information that the plaintiff previously engaged in conduct that is indicative of him being dishonest. Indeed, the SEC regularly sanctions individuals for engaging in dishonest conduct. See *Kornman* v. *Securities & Exchange Commission*, 592 F.3d 173, 187 (D.C. Cir. 2010) (stating that "the importance of honesty for a securities professional is so paramount that [the SEC has sanctioned] individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business" (internal quotation marks omitted)).

The defendant's statements reasonably could be construed as information being offered to the commission that tended to demonstrate that the plaintiff's representations in support of his application were unreliable. Indeed, the credibility of the representations in support of the application that the plaintiff and his agents made to the commission was necessarily pertinent to the subject matter of the proceeding, which was to determine whether the commission should approve the plaintiff's application *based, in part, on the plaintiff's representations*. Moreover, because the test for whether a statement is pertinent to a proceeding is "generous"; see *Gallo* v. *Barile*, supra, 284 Conn. 467; we conclude that the defendant's statements regarding the plaintiff's alleged criminal history and other misconduct, which concerned his credibility, fell within the ambit of what was pertinent to the subject matter of the commission's proceeding.

In affirming the judgment of the trial court, we take this occasion to express our concern that this case arguably lies near the outer boundaries of the public policy justifications that underlie the absolute litigation immunity doctrine. This decision should not be construed to indicate that such immunity will always extend to any generalized attack on the character of a person who has made factual representations in a judicial or quasi-judicial proceeding. If, for example, the

defendant had made defamatory statements about the plaintiff that bore less of a connection to his veracity, then we may be disinclined to conclude that such defamatory statements should enjoy the "strong medicine" of immunity. We leave, however, those issues to a later day.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH V.*
(AC 42295)

Keller, Bright and Flynn, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, risk of injury to a child and conspiracy to commit risk of injury to a child in connection with his abuse of the minor victim, the defendant appealed. He claimed, inter alia, that the trial court improperly sanctioned a nonunanimous jury verdict against him when it denied his motion for a bill of particulars and his request that the court give the jury a specific unanimity instruction as to the sexual assault charge. The defendant and the victim were first cousins. The defendant and T, who also were first cousins, had had an ongoing sexual relationship since childhood. After T and the victim's father moved to a new residence when the victim was seven years old, the defendant began to sexually abuse the victim there when the victim stayed overnight during visits with his father. The defendant's sexual abuse of the victim lasted until the victim was ten years old and involved the victim's performing oral sex on the defendant and the defendant's anal penetration of the victim. During that period of time, the defendant and T often sexually abused the victim together. The victim testified that the first incident of sexual abuse occurred after he saw the defendant and T exchange a "look." The state's information alleged that the defendant had engaged in sexual intercourse with the victim through fellatio and anal intercourse in violation of subdivision (2) of the statutory (§ 53a-70 (a)) subsection proscribing sexual assault in the first degree. The information also alleged that the defendant

* 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 the victim's identity may be ascertained. See General Statutes § 54–86e.

violated subdivision (2) of the statutory (§ 53-21 (a)) subsection proscribing risk of injury to a child, in that he had contact with the victim's intimate parts and subjected the victim to contact with his intimate parts. The conspiracy count alleged that the defendant and T had conspired to commit risk of injury to a child in the manner alleged in the risk of injury count. The defendant filed a motion for a bill of particulars prior to trial, claiming that the information was duplicitous in that it contained allegations that could have been stated as separate offenses and gave rise to a risk that he would not be afforded a unanimous verdict because different jurors could reach a guilty verdict on the same count on the basis of findings as to different incidents of abuse. The trial court concluded, inter alia, that the information was not duplicitous and that the jury was not required to unanimously agree that the defendant had engaged in a specific act among different acts that would give rise to criminal liability. The court thereafter denied the defendant's request for a specific unanimity instruction as to the crime of sexual assault in the first degree, reasoning that the jury did not have to agree unanimously as to whether the sexual intercourse consisted of fellatio or anal intercourse. The court instructed the jury that, to find the defendant guilty of each offense, it must unanimously agree that the state proved each essential element of the charged offense beyond a reasonable doubt and that, if it were unable to do so, it must find him not guilty. The court also denied the defendant's motion to preclude evidence that he had had an ongoing sexual relationship with T from childhood through the time of the sexual assaults of the victim. *Held*:

1. The defendant could not prevail on his claim that the trial court sanctioned a nonunanimous verdict when it denied his motion for a bill of particulars and his request for a specific unanimity instruction as to the charge of sexual assault in the first degree: the court properly instructed the jury with respect to the charge of sexual assault in the first degree, as § 53a-70 (a) (2) proscribed a single type of conduct, sexual intercourse, which can be proven by different types of specific acts, including fellatio and anal intercourse, and, although the risk of injury and conspiracy counts potentially were premised on the violation of alternative statutory subdivisions and, thus, gave rise to a risk that the jurors were not unanimous with respect to the alternative bases of criminal liability, it was of no consequence that the defendant was charged with having engaged in those acts at different times and in distinct scenarios, as the state presented evidence of both types of violations of § 53-21 (a) in that the defendant had contact with the victim's intimate parts and subjected the victim to contact with the defendant's intimate parts; moreover, although the information was duplicitous as to the risk of injury and conspiracy counts, a specific unanimity instruction was not required with respect to those counts, as the court's instructions did not expressly sanction a nonunanimous verdict, and the court provided general unanimity instructions to the jury as well as unanimity instructions in the context of the instructions pertaining to those counts.

2. The trial court did not abuse its discretion when it admitted evidence that the defendant and T had had a sexual relationship since childhood: the long-term sexual relationship between the defendant and T was relevant to the jury's assessment of T's credibility, it was probative, circumstantial evidence that the defendant and T had intended to conspire to engage in conduct constituting the crime of risk of injury to a child and that their sexual activities with the victim were overt acts in furtherance of the conspiracy, the evidence was relevant to whether the defendant and T could have discussed matters of a sexual nature, whether they were likely to trust one another to conspire to commit a crime of a sexual nature against a child, and the evidence made it more likely that the "look" the defendant and T shared before they sexually abused the victim together for the first time was evidence that they had agreed to sexually abuse the victim and engaged in conduct in furtherance of the conspiracy; moreover, the court minimized the risk of prejudice by limiting T's testimony about his sexual relationship with the defendant and expressed its readiness to provide the jury with a limiting instruction, which the defendant requested not be delivered, and the graphic evidence of the sexual activities the defendant and T engaged in with the victim undermined the possibility that the limited evidence of the sexual relationship between the defendant and T unduly aroused the jurors' emotions; furthermore, the evidence, which was not of a violent or sexually graphic nature, was not introduced as or characterized as prior misconduct by the defendant or evidence of his propensity to sexually abuse the victim, and, contrary to the defendant's assertion, the trial court never suggested that the sexual relationship between the defendant and T was a basis from which to infer that they were motivated to engage in sexual conduct with children, as the jury reasonably may have inferred that the relationship between the defendant and T began as sexual exploration between young children, and the potential that the fact that the defendant and T were first cousins could arouse negative emotions in the jurors was not so significant that it outweighed the probative value of the evidence of their sexual relationship.

Argued October 9, 2019—officially released March 31, 2020

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, risk of injury to a child and conspiracy to commit risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the court, *K. Murphy, J.*, denied the defendant's motions for a bill of particulars and to preclude certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Megan L. Wade, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Matthew C. Eagen*, assigned counsel, and *Emily L. Graner Sexton*, assigned counsel, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Amy L. Sedensky* and *Don E. Therkildsen, Jr.*, senior assistant state's attorneys, for the appellee (state).

Opinion

KELLER, J. The defendant, Joseph V., appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and conspiracy to commit risk of injury to a child in violation of General Statutes §§ 53a-48 (a) and 53-21 (a) (2).[1] The defendant claims that the trial court improperly (1) sanctioned a nonunanimous verdict and (2) denied his motion to preclude evidence that he was engaged in a sexual relationship with his coconspirator, T. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The male victim has a half brother, T, and a first cousin, the defendant. T and the defendant, who are first cous-

[1] The court imposed a total effective sentence of twenty years of incarceration, execution suspended after ten years, followed by ten years of probation with special conditions, including lifetime inclusion on the state's sex offender registry. For the offense of sexual assault in the first degree, the court imposed a sentence of twenty years of incarceration, execution suspended after ten years, followed by ten years of probation with special conditions, including lifetime inclusion on the state's sex offender registry. For the offense of risk of injury to a child, the court imposed a sentence of five years of incarceration. For the offense of conspiracy to commit risk of injury to a child, the court imposed a sentence of five years of incarceration. All three sentences were to run concurrent to each other.

ins, were born two days apart. The victim is more than eight and one-half years younger than T and the defendant.

When the victim was four or five years of age, T began frequently abusing the victim in a sexual manner.[2] This included T's taking advantage of moments alone with the victim to engage in a variety of sexual acts that included rubbing his penis between the victim's legs, causing the victim to touch his penis, performing oral sex on the victim, and causing the victim to perform oral sex on him. Later, T anally penetrated the victim with his penis.

Prior to 2006, the victim lived with his mother, father, and T In 2006, when the victim was approximately seven years of age, the victim's mother and father ended their relationship and decided to live separately. The victim's father moved to a new residence. T, at that time a sophomore in high school, lived at the new residence with his father. T had his own bedroom at the residence, as did his father. The victim, who continued to reside with his mother, frequently visited his father and stayed at the new residence for overnight visits. The victim, however, did not have his own bedroom at the new residence but slept on a sofa or in his father's bedroom. The defendant lived at the new residence for a period of time, but he did not have his own bedroom and slept on a downstairs sofa. T's abuse of the victim continued at the new residence.

[2] Prior to the trial, T entered into a written plea agreement with the state in which he agreed to cooperate fully and truthfully with respect to the investigation and charges brought against the defendant. In exchange for T's cooperation and testimony at the defendant's trial, the state agreed to limit the charges against T to risk of injury to a child in violation of § 53-21 (a) (1) and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A). The state also agreed that, following T's guilty plea, it would recommend to the sentencing court that he receive a total effective sentence of five years of incarceration, execution suspended after eighteen months, followed by five years of probation, including sex offender registration.

Both prior to and following the time that the victim's father and T moved to the new residence, the defendant had a close relationship with T. The defendant and T spent a lot of time together while engaging in activities such as playing baseball, basketball, and video games. From a young age, the defendant and T had an ongoing sexual relationship, as well. After the victim's father and T moved to the new residence, when the defendant was fifteen years of age, the defendant began to sexually assault the victim. Frequent sexual abuse of the victim by the defendant, which often involved simultaneous sexual abuse of the victim by T, occurred until the victim was ten years of age.[3]

The first time that the defendant sexually abused the victim occurred in T's bedroom after the defendant, T, and the victim had been playing video games. After the gaming system was turned off, the victim was on T's bed. The defendant and T exchanged a knowing glance just before the defendant put his hand on the victim's hand and made the victim stroke his penis.[4] Thereafter, T and the defendant took turns rubbing their penises between the victim's legs, near his buttocks. At one

[3] As we discuss in this opinion, the victim testified concerning three distinct incidents of abuse at the hands of the defendant. T testified with respect to a fourth distinct incident. The victim also testified that, beyond the incidents he described, many other incidents of sexual abuse involving the defendant and T had "blurred together because there [were] too many to count and distinguish between." These incidents, which always occurred at the home of the victim's father, involved the touching of intimate parts, oral sex, and anal sex. The victim recalled that the defendant and T abused him simultaneously and would frequently take turns or "trade off" in terms of the sexual acts that they committed against him.

[4] Both the victim and T testified about this incident of abuse. The victim testified that the defendant initiated the abuse. T, however, testified that he had initiated the abuse. T testified in relevant part: "Me and the defendant looked at each other, and I believe I started touching [the victim's] butt at that point." With respect to the "look" that he and the defendant shared just prior to their abuse of the victim, T explained, "I don't know how to describe it. It's just like you can't describe a look that a mom would give to a daughter to let you know that there's trouble. . . . It's a look."

point during this incident, T attempted to anally penetrate the victim with his penis while the defendant made the victim perform oral sex on him.

Another incident involving the defendant occurred when he and the victim were watching television in the bedroom of the victim's father. While the defendant and the victim were lying in bed, the defendant took the victim's hand and made the victim stroke his penis. Then, the defendant made the victim, who was fully clothed, perform oral sex on him. When the defendant heard someone approaching the bedroom, he quickly closed his pants to avoid detection by another person.

The defendant sexually abused the victim during another incident that occurred in T's presence, although T did not participate.[5] This incident occurred at night, after the victim, the defendant, and T had been watching television in the living room, which was downstairs at the residence of the victim's father. The defendant partially undressed himself and partially undressed the victim before making the victim perform oral sex on him. The defendant also rubbed his penis between the victim's legs. The defendant quickly stopped his sexual activity when he heard the victim's father, who was on the second floor of the residence, walking toward the staircase that led to the living room.

In another incident involving the defendant, which occurred when the victim was ten years of age, the defendant and the victim were alone together at the residence of the victim's father after other family members had left to purchase food. The defendant, who was on the couch in the living room with the victim, partially removed his pants and the victim's pants and anally penetrated the victim with his penis. Thereafter, the defendant made the victim perform oral sex on him. When the defendant completed the assault, he closed

[5] The victim did not refer to this incident during his testimony. T, however, described this incident during his testimony.

his pants and instructed the victim not to tell the victim's father what had occurred.

Between the ages of ten and thirteen, the victim came to recognize that the sexual contact had been wrong, and he was left with many unanswered questions about what had occurred between him, T, and the defendant. The victim, however, did not yet feel comfortable telling anyone close to him about what had occurred. He first revealed the sexual abuse to a third party in 2013, when he was thirteen years of age. The victim visited a website that was operated by The Trevor Project, which, as testified to by its vice president of programs, is a California based "accredited, national suicide prevention and crisis intervention organization for lesbian, gay, bisexual, transgender and questioning youth."[6] The victim sent a digital correspondence to the organization in which, among other things, he revealed that he had been sexually abused from a young age by his brother and his cousin, that he grappled with emotional issues, and that he sometimes thought about harming himself and about suicide. After he did not receive an immediate response, the victim visited the website once again and used an instant messaging feature to speak with a counselor. During the instant messaging conversation between the victim and the counselor, the victim reiterated that his brother and cousin had abused him sexually until he was ten years of age, stated that he pre-

[6] The victim testified that he did not tell anyone about the sexual abuse he endured until he contacted The Trevor Project when he was thirteen years of age. The victim's mother, however, testified that when the victim was "a baby," perhaps three years of age, he told one of his two older sisters that T had touched his private parts. The victim's mother testified that the victim's father promptly addressed the matter at that time by having a conversation with the victim. Following the conversation, the victim's father told her that everything was "fine." The victim's mother testified that she had no reason to suspect or even imagine that T had touched the victim in a sexual manner, and she believed that the victim's complaint was the result of "how boys can play around with each other." Accordingly, the victim's mother did not take any further action.

viously had suicidal thoughts, and that he still had questions about what had occurred. At one point during the conversation, he questioned whether it was "[his] fault for letting it happen for all those years." The victim's goal in reaching out to the organization was to share his experiences with a third party who might be able to help him feel better, but he was afraid of the consequences of involving anyone who had the ability to take action against his abusers.

Unbeknownst to the victim, the counselor that he spoke with at The Trevor Project was required by law to report allegations of child sexual abuse to the California Department of Children and Family Services (department) in Los Angeles. After the counselor concluded his conversation with the victim, he reported the abuse to the department. The department contacted the police department for the Connecticut municipality in which the victim resided and provided information that led the police to the residence of the victim and his mother. Thus, within hours of the victim's instant messaging conversation with a counselor, police officers were at his residence to investigate the representations of sexual abuse, at which time the victim admitted that he had been sexually abused by the defendant and T. The arrests of the defendant and T followed.

I

First, the defendant claims that the court improperly sanctioned a nonunanimous jury verdict in violation of his constitutional right to a unanimous jury verdict.[7] We disagree.

[7] The defendant has not set forth an independent analysis of the present claim under our state constitution. Thus, our analysis is limited to the rights afforded under the federal constitution. The sixth amendment to the United States constitution, made applicable to the states by the fourteenth amendment, guaranteed the defendant, who was tried by a jury comprised of six members, the right to a unanimous verdict. See *Burch* v. *Louisiana*, 441 U.S. 130, 131–34, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979) ("conviction by a nonunanimous [six member] jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury").

The following additional facts are relevant to this claim. On November 2, 2015, during a prior trial related to the events underlying the charges of which the defendant stands convicted,[8] the state filed a substitute information, which consisted of four counts, against the defendant.[9] On December 15, 2015, following a mistrial in the prior action and before the commencement of the present trial, the defendant filed a motion for a bill of particulars, as provided for in Practice Book § 41-20.[10] Essentially, the motion sought to compel the state

[8] The prior trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

[9] In count one, the substitute information of November 2, 2015, stated: "That the said [defendant] did commit the crime of sexual assault in the first degree in violation of [§] 53a-70 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant] did engage in sexual intercourse (fellatio) with another person [the victim], and such other person was under thirteen years of age and [the defendant] was more than two years older than such person."

Count two provided: "That the said [defendant] did commit the crime of sexual assault in the first degree in violation of [§] 53a-70 (a) (2) on a date between December 26, 2009, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant] did engage in sexual intercourse (anal intercourse) with another person [the victim], and such other person was under thirteen years of age and [the defendant] was more than two years older than such person."

Count three provided: "That the said [defendant] did commit the crime of risk of injury to a child in violation of [§] 53-21 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant] did have contact with the intimate parts of a child under the age of sixteen years [the victim], and subjected a child under sixteen years of age [the victim] to contact with [the defendant's] intimate parts, in a sexual and indecent manner likely to impair the health and morals of such child."

Count four provided: "That the said [defendant] did commit the crime of conspiracy to commit risk of injury to a child in violation of [§§] 53a-48 (a) and 53-21 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant], with intent that conduct constituting the crime of risk of injury to a child be performed, did agree with one or more persons, namely, [T], to engage in and cause the performance of such conduct, and any one of them committed an overt act in pursuance of such conspiracy."

[10] "The purpose of a bill of particulars is to inform the defendant of the charges against him with sufficient precision to enable him to prepare his defense and to avoid prejudicial surprise. . . . A bill of particulars limits the state to proving that the defendant has committed the offense in substantially the manner described." (Citation omitted; internal quotation marks omitted.) *State* v. *Steve*, 208 Conn. 38, 44, 544 A.2d 1179 (1988).

to provide additional information with respect to each of the charges.[11] On September 2, 2016, before the court heard argument on the defendant's motion, the state filed a substitute information that was the operative information at the time of the present trial. This information consisted of three counts.[12]

On September 6, 2016, the defendant filed a memorandum of law in support of his motion for a bill of particulars. On September 14, 2016, the court heard argument on the motion. Consistent with the arguments set forth in the memorandum of law, defense counsel, rely-

[11] The motion for a bill of particulars stated in relevant part: "In order to properly prepare a defense, the defendant, by his attorney, moves that the state of Connecticut make more particular its charges by stating:

"(1) The specific nature of the offense or offenses which the defendant is charged with.

"(2) The time, place and manner in which this offense was committed.

"(3) The specific acts performed by the defendant which constitute all necessary elements of the crime charged.

"(4) The general circumstances surrounding the alleged crime.

"(5) State with particularity, the date, time of said alleged violation and the section of the Connecticut General Statutes violated.

"(6) State with particularity, the name or names, including addresses, of all persons the state alleges were involved in said violations."

[12] In count one, the substitute information of September 2, 2016, provided in relevant part: "That the said [defendant] did commit the crime of sexual assault in the first degree in violation of [§] 53a-70 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant] did engage in sexual intercourse (fellatio and anal intercourse) with another person [the victim], and such other person was under thirteen years of age and [the defendant]was more than two years older than such person."

Count two provided: "That the said [defendant] did commit the crime of risk of injury to a child in violation of [§] 53-21 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant] did have contact with the intimate parts of a child under the age of sixteen years [the victim], and subjected a child under the age of sixteen years of age [the victim] to contact with [the defendant's] intimate parts, in a sexual and indecent manner likely to impair the health and morals of such child."

Count three provided: "That the said [defendant] did commit the crime of conspiracy to commit risk of injury to a child in violation of [§§] 53a-48 (a) and 53-21 (a) (2) in that on or about diverse dates between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father], the said [defendant], with intent that conduct constituting the crime of risk of injury to a child be performed, did agree with one or more persons, namely, [T], to engage in and cause the performance of such conduct, and any one of them committed an overt act in pursuance of such conspiracy."

ing primarily on *State* v. *Saraceno*, 15 Conn. App. 222, 545 A.2d 1116, cert. denied, 209 Conn. 823, 824, 552 A.2d 431 (1988), argued that the state's information, which contained "several allegations that could have been stated as separate offenses," was duplicitous in light of the policy considerations set forth in *Saraceno*.[13] Defense counsel argued that the information gave rise to a "grave concern" that, in light of the anticipated evidence to be presented at trial, the jury might arrive at a finding of guilt with respect to one or more counts without having agreed on specific conduct or facts as to each count.

Defense counsel, referring to the evidence presented during the prior trial, observed that, on the one hand, the state was expected to present testimony that the defendant had engaged in sexual activities with the victim during three or four separate incidents. On the other hand, the victim was expected to testify that countless other incidents of abuse occurred in which the defendant engaged in such criminal acts but that he was unable to describe these incidents in any detail. Defense counsel argued that the state, in its substitute information, provided few details concerning the manner in which the defendant committed the crimes alleged. Thus, defense counsel argued, there was a risk that one or more jurors could reach a guilty verdict with respect to a count on the basis of their findings with respect to an incident of abuse proven by the state, and one or more jurors could reach a guilty verdict on the same count, but on the basis of their findings with respect to a *different* incident of abuse proven by the state. Defense counsel stated: "That

[13] In *Saraceno*, the court stated that the policy considerations underlying the doctrine against duplicitous charges "include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution." (Internal quotation marks omitted.) *State* v. *Saraceno*, supra, 15 Conn. App. 229.

is our concern here, that [the defendant would] not be afforded a unanimous verdict because the jurors would not agree as to *a particular factual basis* for each and every count . . . .'' (Emphasis added.)

Defense counsel stated that, if the court denied the motion for a bill of particulars, the defense would request that the court remedy the risk of a nonunanimous verdict by providing a specific unanimity instruction to the jury ''to ensure that the jurors are unanimous as to what specific conduct occurred [with respect to each] count.'' Defense counsel argued that the request for a specific unanimity instruction was being made pursuant to *State* v. *Famiglietti*, 219 Conn. 605, 595 A.2d 306 (1991). Defense counsel clarified that she did not take issue with the fact that, in the information, the state was relying on the fact that the alleged criminal conduct occurred on ''diverse dates'' but argued that the state needed to provide a bill of particulars to be more succinct in terms of the ''actual underlying conduct'' that formed the basis of each charge.

The prosecutor argued that the information was legally sufficient. Relying on the theory of defense raised during the prior trial, the prosecutor argued that the defense was expected to argue that the state had not proven *any* allegation of sexual assault by the defendant because the victim was not credible. The prosecutor, relying on case law, argued that because the theory of defense ''turns 100 percent on the credibility of the [victim], the concern [about unanimity] that [defense] counsel has does not exist.''

The court, in denying the motion, stated that the information was not duplicitous simply because it was based on several criminal acts that could have been stated as separate offenses. Additionally, the court stated that it had considered the five policy implications discussed in *Saraceno*; see footnote 13 of this opinion; and concluded that they did not warrant the giving of

a specific unanimity instruction in the present case. With respect to the policy implication on which the defendant most heavily relied, jury unanimity, the court explained that, contrary to the arguments advanced by defense counsel, the law did not require the jury to unanimously agree that the defendant had engaged in conduct that violated the statutes at issue on a specific date or by engaging in a specific act among different acts that would give rise to criminal liability. Instead, the court stated, that, before returning a finding of guilt, the jury was required to unanimously agree that the defendant had engaged in the type of conduct that was proscribed by the statutes during the time frame alleged. The court stated that, for example, if the state bore the burden of proving that an act was committed in furtherance of the conspiracy count, it was not necessary for the jury to agree unanimously with respect to a particular act. Similarly, if the state bore the burden of proving that sexual intercourse occurred, it was not necessary for the jury to agree unanimously with respect to whether sexual intercourse consisted of fellatio or anal intercourse. The court also stated that "the issue in this case is going to be whether the main witness, [the victim], is telling the truth. So, this is not a situation where the defendant is going to take the [witness] stand and say, well, yeah, I did X, which might constitute a crime, but I didn't do Y. Sometimes, that does happen, but in this case, the defense, in the last trial, and what I assume will be the defense in this trial, is that he didn't do it at all, didn't touch [the victim] in a sexual way. And [the victim's] position is, he did. It's really going to come down to whether the jury believes [the victim] or does not. So, with that in mind, there really isn't an issue regarding unanimity." The court, however, stated that it would consider requests for a specific unanimity instruction if either the state or the defendant believed such an instruction was required.

Thereafter, the defendant filed a request to charge that included a specific unanimity instruction for the

crime of sexual assault in the first degree.[14] Although defense counsel's prior arguments concerning unanimity expressly encompassed all three counts of the state's substitute information, the defendant did not file a similar request for a specific unanimity instruction with respect to the other two counts, namely, risk of injury to a child and conspiracy to commit risk of injury to a child.

The court provided counsel with a copy of its proposed jury charge and, later, outside of the presence of the jury, held a charge conference. The court addressed the defendant's request that the court deliver a specific unanimity instruction with respect to the sexual assault count. The court, referring to relevant precedent,[15] stated that it was not inclined to deliver

[14] The requested instruction provided in relevant part: "The state has alleged that the defendant . . . has committed the offense of sexual assault in the first degree. The state alleges in the first count the act of sexual assault in the first degree by way of fellatio and anal intercourse.

"You may find the defendant guilty of the offense of sexual assault in the first degree only if you all unanimously agree on the manner in which the state alleges the defendant committed the offense and that it occurred during the time and place alleged by the state.

"This means you may not find the defendant guilty on the first count of sexual assault in the first degree unless you all agree that the state has proved beyond a reasonable doubt that the [defendant] did engage in sexual intercourse by fellatio and anal intercourse with [the victim] and [the victim] was under [thirteen] years of age and [the defendant] was more than [two] years older than [the victim]. The state alleges these crimes were committed between August 23, 2006, and December 25, 2010, at or near [the new residence of the victim's father]. If the state has not met its burden of proving sexual assault in the first degree by way of fellatio and anal intercourse at said time and place, you must return a verdict of not guilty. As I have instructed you, when you reach a verdict, it must be unanimous on all elements of the offense."

[15] The court referred to *United States* v. *Schiff*, 801 F.2d 108 (2d Cir. 1986), cert. denied, 480 U.S. 945, 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987); *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977); *State* v. *Dyson*, 238 Conn. 784, 680 A.2d 1306 (1996); *State* v. *Tucker*, 226 Conn. 618, 629 A.2d 1067 (1993); *State* v. *Famiglietti*, supra, 219 Conn. 605; *State* v. *Jennings*, 216 Conn. 647, 583 A.2d 915 (1990); *State* v. *James*, 211 Conn. 555, 560 A.2d 426 (1989); *State* v. *Bailey*, 209 Conn. 322, 551 A.2d 1206 (1988); *State* v. *Mancinone*, 15 Conn. App. 251, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989); and *State* v. *Flynn*, 14 Conn. App. 10, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988).

the proposed instruction. Reiterating the rationale that it had set forth previously, the court stated that, with respect to the sexual assault count, the jury had to agree unanimously that the defendant engaged in the statutorily prohibited conduct of sexual intercourse with the underage victim at the time and place alleged, but the jury did not have to agree unanimously with respect to the specific conduct that constituted sexual intercourse. Specifically, the court stated that the jury did not have to agree unanimously with respect to whether sexual intercourse consisted of fellatio or anal intercourse. The court reasoned that, in the present case, the charged offense was not premised on the defendant's having committed alternative types of statutorily prohibited conduct but on his commission of a single type of statutorily prohibited conduct, namely, sexual intercourse, regardless of the fact that sexual intercourse could be proven through the defendant's commission of different proscribed actions. Defense counsel asked the court for additional time to respond to its ruling, and the court consented to that request.

The following day, outside the presence of the jury, defense counsel revisited the request for a specific unanimity instruction. Defense counsel broadened her argument by expressly linking the request to the arguments advanced in support of her motion for a bill of particulars and emphasizing that the defendant sought a specific unanimity instruction that pertained to all *three counts* of the substitute information. In relevant part, defense counsel stated: "[B]ecause we made the argument for . . . specificity with the bill of particulars, we would also want to be consistent in asking for a separate unanimity [instruction] in keeping with the argument that was made for the bill of particulars, in that it is the defense contention that there's a fear that there could be a conviction on one of [the] . . . *three charges*, and yet the factual underpinnings that are agreed upon by the jurors would not be the same."

(Emphasis added.) Defense counsel attempted to distinguish the present case from those cases in which defense counsel, for the first time on appeal, raised a claim related to a trial court's failure to deliver a specific unanimity instruction. As defense counsel observed, and the court agreed, in the present case, defense counsel both moved for a bill of particulars and requested a specific unanimity instruction.

The court did not deliver the specific unanimity instruction requested by defense counsel. Prior to delivering to the jury instructions concerning each of the three offenses with which the defendant was charged, the court instructed the jury that it must consider each count separately and return a separate, unanimous verdict for each count.[16] In the context of its detailed instructions with respect to each of the three counts, the court also instructed the jury that, to find the defendant guilty of each offense, it must unanimously agree that the state proved each essential element of the offense beyond a reasonable doubt and that, if it is unable to do so, it must find the defendant not guilty.[17] At the

[16] The court stated: "The defendant is charged with three counts in the information. The defendant is entitled to and must be given by you a separate and independent determination of whether he is guilty or not guilty as to each of the counts. Each of the counts charged is a separate crime. The state is required to prove each element in each count beyond a reasonable doubt. Each count must be deliberated upon [by] you separately. The total number of counts charged does not add to the strength of the state's case.

"You may find that some evidence applies to more than one count. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity.

"You must consider each count separately and return a separate verdict for each count. This means that you may reach opposite verdicts on different counts. A decision on one count does not bind your decision on another count. Remember that your verdict as to each count must be unanimous; all six jurors must agree as to the verdict as to each separate count."

[17] During its instructions with respect to the sexual assault count, the court instructed the jury that the first element of the offense was that "the defendant engaged in sexual intercourse with the [victim]. In this count, sexual intercourse means fellatio or anal intercourse." The court also stated: "In order to convict the defendant on this count, you must be unanimous that at least one violation of this statute by one of the methods alleged occurred between the defendant and [the victim] during the time frame indicated.

conclusion of the court's charge, defense counsel took an exception to the court's failure to deliver a specific intent instruction, as had been requested earlier that day.

"You will note that each count in the information contains within it the alleged time, date and location of the offense. The state does not have to prove the exact time, date or location of the offense beyond a reasonable doubt. However, the state must prove each element of each offense, including identification of the defendant, beyond a reasonable doubt.

"If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of sexual assault in the first degree, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty."

During the court's instruction with respect to the second count, which alleged risk of injury to a child, the court stated in relevant part that the state bore the burden of proving the essential element of contact with intimate parts. The court stated that this required proof beyond a reasonable doubt "that the defendant had contact with the intimate parts of the minor or subjected the minor to contact with the defendant's intimate parts . . . ."

With respect to the risk of injury charge, the court also stated in relevant part: "In order to convict the defendant on this count, you must be unanimous that at least one violation of this statute occurred between the defendant and [the victim] during the time frame indicated. The state does not have to prove the exact time, date or location of the offense beyond a reasonable doubt. However, the state must prove each element of each offense, including identification of the defendant, beyond a reasonable doubt.

"If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of risk of injury to a [child], then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty."

During its instruction with respect to the charge of conspiracy to commit risk of injury to a child, the court instructed the jury in relevant part that the state bore the burden of proving beyond a reasonable doubt that (1) "there was an agreement between the defendant and one or more persons to engage in conduct constituting the crime of risk of injury to a child, which conspiracy the defendant specifically intended to join"; (2) "there was an overt act in furtherance of the subject of the agreement by any of those persons"; and (3) "the defendant specifically intended to commit the crime of risk of injury to a child."

Later, in the context of its instructions concerning conspiracy to commit risk of injury to a child, the court stated: "The state does not have to prove the exact time, date or location of the offense beyond a reasonable doubt. However, the state must prove each element of each offense, including identification of the defendant, beyond a reasonable doubt.

"If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of conspiracy to commit risk of injury to a child, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty."

In arguing before this court that the trial court sanctioned a nonunanimous verdict, the defendant reiterates many of the arguments that he advanced before the trial court. His appellate argument consists of two legal arguments that are inherently intertwined. First, he argues that the state relied on a duplicitous information and that the court erroneously denied his request for a bill of particulars. In relevant part, he argues: "[T]he jury was presented with evidence of four incidents, any of which could have served as the basis for a conviction of sexual assault and risk of injury [as] presented to [it] in the state's information. Additionally, the jurors were presented, through the testimony of [T] with multiple possibilities of conspiracy. Defense counsel requested, first, a bill of particulars that would have more clearly delineated the criminal conduct [that] the state sought to prove, and then, after the close of evidence, a jury charge to ensure that the jury understood [that] it needed to be unanimous as to the specific conduct that formed the basis of the criminal charge. Both requests were denied by the trial court . . . . Because multiple allegations were combined into a single count of the information, and because the facts of this case implicate the policy considerations behind the prohibition against duplicitous charging documents, the jury may not have been unanimous as to any one count of the crimes charged." (Citation omitted.) See footnote 13 of this opinion.

Second, the defendant argues that he took steps to lessen the risk of a nonunanimous verdict by requesting that a specific unanimity instruction be given to the jury. The defendant suggests that, after the court denied his motion for a bill of particulars, the court erred in failing to deliver a specific unanimity instruction. This error, the defendant argues, tainted the conviction of all three offenses, as he advanced a concern at trial "that the jury would convict the defendant of a charge, but that it would not be unanimous in the factual underpinnings of such a charge." The defendant argues that

the court "created a significant possibility that the jury convicted [him] without being unanimous as to the criminal conduct that served as the basis for the convictions." Specifically addressing the sexual assault count, the defendant argues that "[t]he problems created by the state's duplicitous information were exacerbated by the trial court's jury instructions. In its jury charge, the trial court instructed that, 'in order to convict the defendant [of sexual assault in the first degree], you must be unanimous that at least one violation of this statute by one of the methods alleged occurred between the defendant and [the victim] during the time frame indicated.' . . . [T]he plain meaning of the trial court's words made clear that the jury must agree that at least one violation of the statute occurred, but not necessarily the same one. Indeed, the trial court made clear to both parties that it did not believe that the jury had to be unanimous as to *which* criminal act occurred, [as] long as they were unanimous that *a* criminal act occurred." (Citation omitted; emphasis in original.) The defendant reiterates that it was imperative that the jury unanimously agree with respect to the manner in which he committed prohibited acts, not merely that he had engaged in one or more acts prohibited by the statute during the time frame alleged by the state. He argues: "In this case, the specific incidents the state focused on were separated by time and intervening events, but the jury instruction did not require the jury to agree upon the specific criminal conduct that took place in order to find the defendant guilty."

We observe that "[t]he denial of a motion for a bill of particulars is within the sound discretion of the trial court and will be overturned only upon a clear showing of prejudice to the defendant. . . . A defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of

the information." (Internal quotation marks omitted.) *State* v. *Joseph B.*, 187 Conn. App. 106, 117, 201 A.3d 1108, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019); see also *State* v. *Caballero*, 172 Conn. App. 556, 564, 160 A.3d 1103 (whether to grant a "motion for a bill of particulars is addressed to the sound discretion of the trial court" (internal quotation marks omitted)), cert. denied, 326 Conn. 903, 162 A.3d 725 (2017).

As our previous discussion of what transpired at trial reflects, the defendant's arguments with respect to the motion for a bill of particulars were based on the belief that, unless the state more specifically tailored the counts in the information to allege the exact nature of the prohibited acts constituting the crimes charged, the risk of the jury's returning a nonunanimous verdict existed. The defendant argued that it was necessary for the court to take steps to ensure that individual jurors unanimously agreed on the manner in which prohibited acts were committed in light of the fact that the state might rely on multiple factual allegations for each count. The defendant's arguments in support of the motion were of constitutional dimension. Thus, despite the fact that whether to grant a motion for a bill of particulars is left to the sound discretion of the trial court, we recognize that the court's exercise of discretion must be evaluated on appeal in light of the underlying constitutional claim, that is, whether the information was duplicitous because it infringed on the defendant's constitutional right to a unanimous verdict. See *State* v. *Kemah*, 289 Conn. 411, 422, 957 A.2d 852 (2008) (reviewing court affords plenary review to questions of law).

"Duplicity occurs when two or more offenses are charged in a single count of the accusatory instrument. . . . It is now generally recognized that [a] single count is not duplicitous merely because it contains several allegations that could have been stated as separate offenses. . . . Rather, such a count is only duplicitous

where the policy considerations underlying the doctrine are implicated. . . . These [considerations] include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution." (Citations omitted; internal quotation marks omitted.) *State* v. *Saraceno*, supra, 15 Conn. App. 228–29.

In the present case, counts one, two, and three of the state's substitute information of September 2, 2016, each alleged multiple commissions of the same offense.[18] In count one, the state alleged that the defendant, "on or about diverse dates between August 23, 2006 and December 25, 2010," engaged in "sexual intercourse (fellatio and anal intercourse)" with the victim. In count two, the state alleged that, "on or about diverse dates between August 23, 2006, and December 25, 2010," the defendant had contact with the victim's intimate parts and subjected the victim to contact with his intimate parts. In count three, the state alleged that, "on or about diverse dates between August 23, 2006, and December 25, 2010," the defendant and T conspired to commit the crime of risk of injury to a child. As defense counsel anticipated in arguments on the motion for a bill of particulars, in light of the evidence presented during the prior trial, the state thereafter presented testimony in the present trial from the victim as well as T that multiple incidents of sexual abuse occurred during the time frames alleged.

We focus, as does the defendant, on the risk of a nonunanimous verdict. This court has addressed a claim of this nature in several prior decisions. For example, in *Saraceno*, the state's information contained

[18] See footnote 12 of this opinion.

counts, under which the defendant was convicted, that alleged multiple violations of the same offense.[19] *State* v. *Saraceno*, supra, 15 Conn. App. 228. The court determined, however, that the consideration related to the possible lack of unanimity did not render the information duplicitous. Id., 231. The court reasoned: "[W]ith regard to the evidence adduced in this case, it was not possible for the jury to return a verdict which was not unanimous. Given the complainant's age and her relative inability to recall with specificity the details of separate assaults, the jury was not presented with the type of detail laden evidence which would engender differences of opinion on fragments of her testimony. In other words, the bulk of the state's case rested on the credibility of the young complainant. When she testified, for example, that on many occasions the defendant forced her to engage in fellatio while in a motor vehicle parked on the banks of the Connecticut River, the jury was left, primarily, only with the decision of whether she should be believed. With such general testimony, the spectre of lack of unanimity cannot arise." Id., 230.

Presented with a similar claim of constitutional magnitude, this court, in *State* v. *Marcelino S.*, 118 Conn. App. 589, 595–97, 984 A.2d 1148 (2009), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010), followed the rationale of *Saraceno* and rejected a claim that a defendant, who was convicted of committing sexual offenses against a victim who was between approximately nine and eleven years of age, was prejudiced by a duplicitous information.[20] This court stated: "In the present case, [the victim] testified that the defendant touched her breasts,

[19] In *Saraceno*, the defendant was convicted of three counts of sexual assault in the second degree and two counts of risk of injury to a child. *State* v. *Saraceno*, supra, 15 Conn. App. 224.

[20] In *Marcelino S.*, the defendant was convicted of risk of injury to a child and sexual assault in the fourth degree. *State* v. *Marcelino S.*, supra, 118 Conn. App. 590–91.

In *Marcelino S.*, "[t]he state's long form information, dated December 17, 2007, stated in relevant part: In the Superior Court of Connecticut, judicial

buttocks and vagina, over her clothes, on more than one occasion over a period of time. Of course, [t]he state has the duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have. Neither the sixth amendment [to] the United States constitution nor article first, [§ 8, of] the Connecticut constitution requires that the state choose a particular moment as the time of an offense when the best information available to the state is imprecise. . . . [I]n a case involving the sexual abuse of a very young child, that child's capacity to recall specifics, and the state's concomitant ability to provide exactitude in an information, are very limited. The state can only provide what it has. This court will not impose a degree of certitude as to date, time and place that will render prosecutions of those who sexually abuse children impossible. To do so would have us establish, by judicial fiat, a class of crimes committable with impunity." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 596–97. The court rejected the argument that there was a danger that the members of the jury did not agree unanimously on the acts that constituted the basis for two offenses of which the defendant was convicted, reasoning that "the bulk of the state's case rested on the credibility of [the victim]; the primary

district of New Haven . . . [the assistant state's attorney] accuses the defendant . . . of risk of injury to a minor, and charges that on divers dates, between August, 2003, and April, 2005 . . . the defendant . . . had contact with the intimate parts of a child under the age of sixteen, to wit: a minor . . . child . . . in a sexual and indecent manner likely to impair the health and morals of such child, in violation of [subdivision] (2) of subsection (a) of section 53-21 of the Connecticut General Statutes. . . .

"[The assistant state's attorney] further accuses the defendant . . . of sexual assault in the fourth degree, and charges that on divers dates, between August, 2003, and April, 2005 . . . the defendant . . . intentionally subjected another person to sexual contact who was under fifteen years of age, to wit: a minor . . . child . . . in violation of [subparagraph] (A) of [subdivision] (1) of subsection (a) of section 53a-73a of the Connecticut General Statutes." (Emphasis omitted; internal quotation marks omitted.) Id., 593.

decision for the jury was whether [the victim] should be believed." Id., 597.

Also, in *State* v. *Michael D.*, 153 Conn. App. 296, 322, 101 A.3d 298, cert. denied, 314 Conn. 951, 103 A.3d 978 (2014), this court considered a defendant's claim that the state's information was duplicitous because it posed the risk that the jury would not unanimously agree on the manner in which the offenses were committed.[21] The defendant argued that, "because the consolidated counts of the substituted information were premised on separate and distinct incidents, some jurors may have credited the victim's testimony as to one act, but not all, whereas other jurors may have credited her testimony as to other acts, thereby giving rise to concerns that the jury's verdict was not unanimous." Id., 325.

[21] In *Michael D.*, "[t]he state based each of its charges on three separate incidents of sexual misconduct allegedly occurring in 2001, 2002, and 2003. The state initially charged the defendant in a fifteen count information with several different charges, each of which was alleged to have been committed in the course of one of the three incidents identified therein by the year of its alleged occurrence. Prior to trial . . . the state filed a substitute information, consolidating the fifteen counts into the three counts on which he went to trial.

"In the first count of the substitute information, the state charged the defendant with sexual assault in the first degree. In the second count of the substitute information, the state charged the defendant with risk of injury to a child, and alleged that 'on . . . diverse dates from 2001–2003 . . . the [defendant] had contact with the intimate parts, as defined in [General Statutes §] 53a-65, of a child under the age of sixteen years or subjected a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, said conduct being in violation of section 53-21 (2) of the Connecticut General Statutes.'

"In the third count, the state charged the defendant with risk of injury to a child, and alleged that 'on . . . diverse dates from 2001–2003 . . . the [defendant] did wilfully or unlawfully cause or permit a child under the age of sixteen years to be placed in such a situation that its life or limb was endangered, or its health was likely to be injured, or its morals likely to be impaired, or did an act likely to impair the health or morals of such child, such conduct being in violation of section 53-21 (1) of the Connecticut General Statutes.' " *State* v. *Michael D.*, supra, 153 Conn. App. 321–22.

In *Michael D.*, this court, although it held that the information was duplicitous, rejected the argument that the information, considered in light of the evidence presented at trial, gave rise to a concern that the jury's verdict was not unanimous.[22] The court stated: "The record reflects that the question of the victim's credibility was front and center throughout the trial. The defendant took particular aim at the victim's testimony in closing argument, where he repeatedly suggested that she was not believable, and that she had manufactured her testimony. The defendant implored the jury to consider the question of his guilt, mindful that his fate ultimately came down to the victim's word . . . .

"As the defendant argued to the jury, the state's case rested on the victim's testimony. . . . He cannot now argue, convincingly, that the jury reviewed his case and the evidence, and arrived at a verdict without unanimously agreeing on the factual basis for it. In a case such as this, the spectre of lack of unanimity cannot arise." (Citations omitted; internal quotation marks omitted.) Id., 325–26.

The state urges us to conclude that the circumstances at issue in the present case are similar to those in *Saraceno*, *Marcelino S.*, and *Michael D.*, and that this court likewise should conclude that the information

[22] In *Michael D.*, this court, citing *State* v. *Benite*, 6 Conn. App. 667, 674, 507 A.2d 478 (1986), observed that "[t]he unanimity requirement mandates that the jury agree on the factual basis of the charge." *State* v. *Michael D.*, supra, 153 Conn. App. 324. Because this court explicitly relied on *Benite* for this proposition, and mindful of the well settled interpretation of *Benite* and its progeny that we will discuss in detail in our analysis of the present claim, we construe this statement to mean that a jury must unanimously agree on *the statutorily prohibited conduct* in which a defendant engaged, not necessarily the specific manner in which a defendant engaged in the statutorily prohibited conduct. Stated otherwise, when a defendant is charged with committing an offense that may be proven by alternative types of statutorily prohibited conduct, the jury is required to agree unanimously only on the *type* of statutorily prohibited conduct that underlies a finding of guilt.

was not duplicitous or that any duplicity did not create a risk of a nonunanimous verdict. The state argues: "The defendant did not present a particularized challenge to any of the individual incidents of sexual assault. Rather, he merely attempted to portray the victim as a troubled teenager whose testimony was riddled with inconsistencies. Therefore, because there is no indication that the jury would have credited some, but not all, of the victim's testimony, this case did not present a circumstance that created a risk of a nonunanimous verdict."

Beyond arguing that the facts of the present case are distinguishable from those at issue in cases such as *Saraceno*, *Marcelino S.*, and *Michael D.*, the defendant urges us to reject what he characterizes as "flawed" logic in *Saraceno*. The defendant argues that this court's all or nothing view of evaluating credibility, as reflected in *Saraceno* and its progeny, is at odds with the well settled principle that a fact finder properly may choose to credit all, part, or none of the testimony of any witness.[23] The defendant posits that, "[i]n this case, where [the victim] provided extensive testimony about the various alleged incidents that formed the basis of the charged conduct, it is not inconceivable that some jurors credited certain aspects of his testimony, while other jurors discredited those aspects and instead credited different aspects of [the victim's] testimony in arriving at the guilty verdicts."

Beyond questioning the rationale in *Saraceno* and its progeny, the defendant argues that the rationale, if legally sound, is inapplicable to the present case because, at trial, defense counsel cross-examined the victim with respect to the three specific incidents that he described in his testimony. Additionally, the defendant argues that the fact that the state presented some

[23] As the defendant correctly observes, the court delivered the following instruction to the jury in the present case: "In deciding what the facts are, you must, of course, consider all the evidence. In doing so, you must decide which testimony to believe and which testimony not to believe. You may believe all, any part of, or none of any witness' testimony."

evidence concerning specific incidents of abuse in the present case, rather than simply generalized testimony that abuse had occurred several times, distinguishes the present case from cases such as *Saraceno*, in which the victim did not describe specific incidents of abuse but a general pattern of abuse.

Setting aside any doubts that we may share with the defendant concerning the "all or nothing" approach to credibility, as is set forth in *Saraceno* and as followed in cases that included *Marcelino S.* and *Michael D.*, we agree with the defendant that the rationale does not neatly apply to the circumstances in the present case. As we have set forth previously, in the present case, the state presented generalized testimony from the victim that multiple instances of abuse involving the defendant had occurred.[24] The state, however, also presented evidence that four specific instances of abuse involving the defendant had occurred; the victim described three of the four specific instances and T described two of the four specific instances. Not surprisingly, because the state's case rested on the testimony of the victim and T, at trial, defense counsel vigorously attempted to demonstrate that neither the victim nor T were credible witnesses. As the defendant argues, at trial, defense counsel attempted to undermine the credibility of the victim and T not merely in general terms but with respect to their testimony concerning specific instances of abuse. It suffices to observe that, by the use of questioning *and* argument, defense counsel attempted to cast doubt on the ability of the victim and T to recall accurately the events at issue and whether they occurred in the manner described. In light of the foregoing, we are not persuaded that it is fair to characterize the situation as one in which the jury was presented with an all or nothing credibility assessment of a witness who allegedly was sexually abused as a child. The state

[24] See footnote 3 of this opinion.

presented testimony concerning, inter alia, four distinct incidents in which the defendant sexually abused the victim. It belies the manner in which we expect juries to carefully weigh the evidence to presume that the jury was *required* to find that, if the state had proven one or more factually distinct incidents of sexual abuse, then it was required to find that they all had been proven. Rather, it was within the jury's prerogative as the finder of fact to draw reasonable inferences from its finding that testimony concerning one or more of the incidents was credible. Certainly, the fact that the state's key witness was a child when the sexual abuse occurred did not immunize his testimony from the scrutiny that the jury was expected to apply to the testimony of all of the state's witnesses, and the court did not suggest otherwise. Thus, we do not conclude that the jury was left, primarily, only with the decision of whether the victim was credible generally. This conclusion, though, does not end our inquiry.

The dispositive consideration in our evaluation of whether the state's substitute information posed a risk that the jurors may not have been unanimous in their finding of guilt with respect to any one of the offenses with which the defendant was charged, thus requiring the court to deliver a specific unanimity instruction, comes down to whether the defendant's criminal liability for each offense was premised on his having violated one of multiple statutory subsections or elements.

In *State* v. *Benite*, 6 Conn. App. 667, 674–75, 507 A.2d 478 (1986), in considering of a claim that the trial court improperly failed to deliver a specific unanimity instruction, this court stated: "If the actions necessary to constitute a violation of one statute or subsection of a statute are distinct from those necessary to constitute a violation of another, then jurors who disagree on which one the state proves cannot be deemed to agree on the actus reus: the conduct the defendant committed. Where the evidence presented supports both alterna-

tives, the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest. Under such circumstances, the jurors should be told that they must unanimously agree on the same alternative. . . . [A specific unanimity instruction] is required only where a trial court charges a jury that the commission of any one of several alternative actions would subject a defendant to criminal liability, and those actions are conceptually distinct from each other, and the state has presented some evidence supporting each alternative. The determination of whether actions are conceptually distinct must be made with reference to the purpose behind the proposed charge: to ensure that the jurors are in unanimous agreement as to what conduct the defendant committed."

This court, in *Benite*, analyzed and relied heavily on *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977). See *State* v. *Benite*, supra, 6 Conn. App. 672–73. "In essence, the unanimity requirement as enunciated in *Gipson* and its progeny requires the jury to agree on the factual basis of the offense. The rationale underlying the requirement is that a jury cannot be deemed to be unanimous if it applies inconsistent factual conclusions to alternative theories of criminal liability." *State* v. *Bailey*, 209 Conn. 322, 334, 551 A.2d 1206 (1988).

This court has further explained the relevant principle: "The rule which we articulated in *Benite* is limited to a case in which the actions necessary to constitute a violation of one statute or subsection of a statute are distinct from those necessary to constitute a violation of another . . . . The word another as used in *Benite* obviously refers to another subsection of the same statute, or to another statutory way of committing a violation of the same statutory subsection. Thus, the *Benite* rule, which requires the trial court in appropriate circumstances to give, even in the absence of a proper request or exception, a fact-specific and closely focused

unanimity instruction, only applies where the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved. It does not apply, and such an instruction is not required of the court, where the multiple factual allegations do not amount to multiple statutory subsections or to multiple statutory elements of the offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Mancinone*, 15 Conn. App. 251, 273–74, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed. 2d 194 (1989); see also *State* v. *Douglas C.*, 195 Conn. App. 728, 754, A.3d (trial court "is not required . . . to provide a specific unanimity instruction when the state charges a defendant with having violated one statutory subsection one time and proffers evidence at trial that amounts to the defendant having violated that single statutory subsection on multiple occasions"), cert. granted on other grounds, 335 Conn. 904, A.3d (2020).

"This limitation on the *Benite* rule, moreover, comports with common sense and sound principles by which to view jury verdicts. In most criminal trials, the evidence will allow to one degree or another differing but reasonable views regarding what specific conduct the defendant engaged in which formed the basis of the jury's verdict of guilt. For example, different witnesses may present different versions of the defendant's conduct; and the same witness may testify inconsistently in his description of that conduct, and thus present differing versions of that conduct. In such cases, it is a familiar principle that the jury is free to accept or reject all or any part of the evidence. . . . In such cases, however, there is nothing in the constitutional requirement of jury unanimity that requires a specific instruction that the jury must be unanimous with regard

to any one of those varying factual versions. As long as the jurors are properly instructed on the legal elements of the crime which must be proved beyond a reasonable doubt, they need not be further instructed that they must all agree that the exact same conduct constituted the prohibited act. In such cases, we safely rely on the presumption that the jury understands and properly follows the court's instruction that its verdict must be unanimous . . . and we do not attempt to divine whether that presumption is valid.

"Where, however, the jury is presented with alternative, conceptually distinct statutory subsections, or with alternative, conceptually distinct elements of the same statute, as possible bases for guilt, the principles of *Benite* come into play, because it is in those situations that the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest. . . . In those situations, therefore, we require a specific unanimity instruction as an additional corollary to the usual unanimity instruction." (Citations omitted; internal quotation marks omitted.) *State* v. *Mancinone*, supra, 15 Conn. App. 275–76.

In *State* v. *Famiglietti*, supra, 219 Conn. 619–20, our Supreme Court clarified the analysis that a reviewing court should apply to a claim that a trial court violated a defendant's sixth amendment right to due process by failing to deliver a specific unanimity instruction. The analysis applies in the types of cases governed by *Benite* and its progeny, specifically, cases in which criminal liability may be premised on the violation of one of several alternative subsections of a statute. Our Supreme Court explained in relevant part: "[W]e have not required a specific unanimity charge to be given in every case in which criminal liability may be premised on the violation of one of several alternative subsections of a statute. We have instead invoked a multipartite test to review a trial court's omission of such an instruction.

We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." Id.; see also *State* v. *Dyson*, 238 Conn. 784, 791–94, 680 A.2d 1306 (1996) (applying *Famiglietti* test); *State* v. *Anderson*, 211 Conn. 18, 34–35, 557 A.2d 917 (1989) (discussing principles codified in *Famiglietti* test); *State* v. *Bailey*, supra, 209 Conn. 334 (same).

Having set forth relevant principles of law, we turn to the charges at issue in the present case. With respect to sexual assault in the first degree in violation § 53a-70 (a) (2),[25] we observe that the court properly instructed the jury that the state bore the burden of proving beyond a reasonable doubt that (1) the defendant engaged in sexual intercourse with the victim, (2) the victim was younger than thirteen years of age at the time of the sexual intercourse, and (3) the defendant was more than two years older than the victim. The statutory subsection under which the defendant was charged was not comprised of conceptually distinct alternative methods for committing the offense. The single type of criminal conduct that is prohibited by § 53a-70 (a) (2) is sexual intercourse, which may be proven by different types of specific acts, including fellatio and anal intercourse. Thus, by its nature, this

[25] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

charge is not implicated by the rule in *Benite*. Contrary to the defendant's arguments, the claim that the sexual assault count was duplicitous and required the use of a specific intent instruction lacks merit. With respect to the sexual assault count, the defendant has not demonstrated that a risk of a nonunanimous verdict existed and, thus, that the court erred in denying the motion for a bill of particulars or in not delivering the specific unanimity instruction that he requested.

We next turn to the second count, in which the defendant was charged with risk of injury to a child in violation of § 53-21 (a) (2),[26] and the third count, in which the defendant was charged with conspiracy to commit risk of injury to a child in violation of §§ 53a-48 (a) and 53-21 (a) (2).[27] With respect to the risk of injury charge, the court properly instructed the jury that the state bore the burden of proving beyond a reasonable doubt that (1) the defendant had contact with the victim's intimate parts *or* subjected the victim to contact with his intimate parts, (2) the contact with intimate parts took place in a sexual and indecent manner, (3) the contact was likely to injure or weaken the health or morals of the victim, and (4) the victim was younger than sixteen years of age. Unlike the statutory subsection underlying count one, the statutory subsection that formed the basis of count two prohibited two types of conduct, namely, the defendant's making contact with the victim's intimate parts and, in the alternative, the defendant's subjecting the victim to contact with his intimate parts. With

[26] General Statutes § 53-21 provides in relevant part: "(a) Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ."

[27] General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ."

respect to the conspiracy to commit risk of injury charge, the court properly instructed the jury that the state bore the burden of proving beyond a reasonable doubt that the defendant (1) agreed with one or more persons to engage in conduct constituting the crime of risk of injury to a child, (2) at least one of the coconspirators committed an overt act in furtherance of the conspiracy, and (3) the defendant specifically intended that every element of the planned offense be committed. Because, as alleged in the present case, the charge of risk of injury to a child could have been based on alternative types of statutorily prohibited conduct, the conspiracy count likewise rested on alternative bases of criminal liability. Moreover, as our recitation of the facts reflects, the state presented evidence of both types of violations of the risk of injury statute. The state presented evidence that, in a statutorily prohibited manner, the defendant had contact with the victim's intimate parts and that the defendant subjected the victim to contact with his intimate parts. This increased the possibility that the jury was not unanimous with respect to the specific type of statutorily prohibited conduct that occurred.

Because the second and third counts potentially were premised on the violation of alternative portions of the risk of injury statute, these counts are encompassed by the rule in *Benite* because there was a risk that the jurors were not unanimous with respect to the alternative bases of criminal liability. Contrary to the arguments that he advanced before the trial court, the defendant argues before this court that the *Famiglietti* test does not apply in the present situation because "[he] was not charged with alternative acts but, rather, with . . . committing the same criminal act at different times and in distinct scenarios." For the reasons we previously have discussed, the defendant's argument in this regard is not persuasive. In counts two and three, the defendant was charged with having committed alternative types of criminal acts, and it is of no consequence

to our analysis of the issue of unanimity that the state charged him with having engaged in these acts at different times and in distinct scenarios.

Relying on the portions of the court's charge set forth previously in this claim, we observe that our careful review of the court's charge reflects a complete absence of language sanctioning a nonunanimous verdict, thus compelling a conclusion that the defendant cannot prevail in demonstrating that a specific unanimity instruction was required.[28] See, e.g., *State* v. *Senquiz*, 68 Conn. App. 571, 589, 793 A.2d 1095, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002); *State* v. *Cramer*, 57 Conn. App. 452, 461, 749 A.2d 60, cert. denied, 253 Conn. 924, 754 A.2d 797 (2000). As we have stated previously, the court, in its general instructions, charged the jury in relevant part: "You must consider each count separately and return a separate verdict for each count. . . . Remember that *your verdict as to each count must be unanimous*; all six jurors must agree as to the verdict as to each separate count." (Emphasis added.) See footnote 16 of this opinion. With respect to the risk of injury count, the court instructed the jury in relevant part: "In order to convict the defendant on this count *you must be unanimous that at least one violation of this statute occurred* between the defendant and [the victim] during the time frame indicated." (Emphasis added.) See footnote 17 of this opinion. With respect to the conspiracy count, the court instructed the jury in relevant part: "If you *unanimously find* that the state has proved beyond a reasonable doubt each of the elements of the crime of conspiracy to commit risk of injury to a child, then you shall find the defendant guilty." (Emphasis added.)

[28] Accordingly, we need not consider whether the defendant can satisfy the remaining parts of the *Famiglietti* test, including whether he can demonstrate that the alternative acts prohibited by § 53-21 (a) (2), for which the state presented evidence, are conceptually distinct. See, e.g., *State* v. *Dyson*, supra, 238 Conn. 793 (discussing fact that General Statutes § 53a-8 (a) does not present conceptually distinct bases of liability); *State* v. *Smith*, 212 Conn. 593, 606–607, 563 A.2d 671 (1989) (same).

See id. Thus, the court's instructions with respect to the risk of injury and conspiracy counts did not expressly sanction a nonunanimous verdict, and the court provided general unanimity instructions to the jury as well as unanimity instructions in the context of the instructions pertaining to the counts at issue. Even though the court did not provide a specific unanimity instruction with respect to the statutory alternatives that were possible in the jury's evaluation of counts two and three, we decline to interpret the instruction provided as implicitly sanctioning a nonunanimous verdict. As our Supreme Court explained in *State* v. *Dyson*, supra, 238 Conn. 793, it is not appropriate for a reviewing court to conclude that a charge implicitly sanctioned a nonunanimous verdict; a trial court's "silence" with respect to the need for unanimity regarding statutory alternatives is not the equivalent of an instruction that expressly sanctions a nonunanimous verdict. Id.

Thus, despite the fact that the information was duplicitous with respect to counts two and three, the defendant is unable to demonstrate that a specific unanimity instruction was required. See, e.g., *State* v. *Famiglietti*, supra, 219 Conn. 619–20. Accordingly, the defendant has failed to demonstrate that the risk of a nonunanimous verdict existed and, thus, that he is entitled to relief with respect to the court's denial of his motion for a bill of particulars or his request that a specific unanimity instruction be given to the jury.

II

Next, the defendant claims that the court improperly denied his motion to preclude evidence that he had been engaged in a sexual relationship with his coconspirator, T. We disagree.

The following additional facts are relevant to this claim. Prior to trial, the defendant filed a motion in limine in which he asked the court to prohibit the state from presenting testimony from T. "regarding his

claimed past sexual involvement with the defendant." The motion stated: "The state has indicated that, during interviews with [T], he has revealed information regarding claims of his own sexual involvement with the defendant dating back to a time when they were seven or eight years old. The defendant and [T] were born two days apart." In the motion, the defendant objected to the evidence on the ground that it was unduly prejudicial, it was "irrelevant and immaterial to the allegations of sexual assault or conspiracy alleged to have occurred when the defendant and [T] were between the ages of fifteen and nineteen" and that it "improperly places the defendant's character in evidence."

During oral argument with respect to the motion in limine, the prosecutor represented that, during the prior trial, which resulted in a mistrial, the court had permitted the state to ask T only whether "the defendant and [T] had had an ongoing sexual relationship from the ages of seven or eight that continued up until their teen years." The prosecutor argued that she sought similar leeway in her examination of T during the present trial because, pursuant to §§ 4-1 through 4-3 of the Connecticut Code of Evidence, the evidence of an intimate sexual relationship was relevant to the issues before the jury.

The prosecutor explained that the state would present evidence that, during one of the specific incidents of abuse, T given "a look" to the defendant before T and the defendant began to sexually assault the victim. The prosecutor argued that this evidence was relevant to proving that a conspiracy existed, "but the fact [that] these two gentlemen had an already existing sexual relationship amongst themselves clearly makes the fact of the conspiracy more probable, the fact [that] they had engaged in sexual relations themselves. Clearly, that particular relationship is probative of the conspiracy.

"And while the state agrees . . . there's prejudice to the defendant in that it is an embarrassing, perhaps, thing to them, or some jurors might find that it's something that they perhaps would not engage in, the probative value . . . based on the fact [that] we have charged conspiracy, based on the fact [that] conspiracy is a charge which generally is proven by evidence such as this, the relationship of the two parties as opposed to written agreement, it's clearly probative. And that probative value outweighs the prejudicial effect. . . .

"[I]t's the state's position . . . [that] this is not uncharged misconduct. There's no violation of the law here. So, we are proceeding under just a relevancy argument and probative value outweighing prejudicial effect."

Defense counsel responded that the evidence at issue was not relevant for purposes of proving that a conspiracy existed. Defense counsel argued that, essentially, the state was attempting to introduce the evidence for the improper purpose of demonstrating the defendant's propensity to engage in the conduct with which he was charged. Moreover, defense counsel argued that the probative value of the evidence, if any, was outweighed by the prejudice it would likely cause the defendant. Defense counsel stated in relevant part: "It's not misconduct when they reach a certain age and it's consensual between them, if, in fact, it occurred. It does not show a propensity to engage in aberrant and compulsive sexual misconduct. And certainly children who are under the age . . . of fifteen years old cannot be charged with a crime for this kind of sexual conduct or misconduct, however it's classified. . . .

"[T]his wasn't criminal conduct. If there were certain other allegations, it may have been considered delinquency conduct. But there's no bad act here. This is something that, if it's testified to, becomes public. We seek to protect children from behaviors that are repugnant in society, whether they be the perpetrator or

the victim. And I would argue the public policy behind the juvenile laws that [seeks] to protect any kind of identification of children under the age of fifteen who engage in sexual behavior. It is not part of our . . . civilized society where that would be acceptable to anybody. It's repugnant information. It's private information. . . .

"We recognize that children do not have the capacity to understand the right and wrong of that type of behavior. Certainly, seven and eight year olds, which is what the state is seeking to get in, up through the teenage years, where, at a certain age then, under our law, it becomes consensual behavior. However . . . many people in our society still hold to the belief that same sex relationships are also repugnant. Certainly, the behavior that they are alleging when they were young children should not be revealed, should not be allowed, whether it's true or not . . . . It has nothing to do with conspiracy." Defense counsel then argued that the evidence tended to malign the defendant's character and was inadmissible under § 4-4 of the Connecticut Code of Evidence,[29] and that the evidence was not relevant to proving motive, intent, or identity.

The prosecutor responded to the arguments of defense counsel by reiterating that the state did not seek to present the evidence to show the defendant's propensity to engage in aberrant sexual behavior with children. Instead, the prosecutor argued, the state sought to introduce the evidence for the purpose of demonstrating that there was an agreement between the defendant and T, which was highly relevant to demonstrating that the state had proven its conspiracy charge. The prosecutor proposed that the court could deliver a limiting instruction in this regard. Finally, the

[29] Section 4-4 (a) of the Connecticut Code of Evidence provides in relevant part: "Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion . . . ."

prosecutor expressed her belief that the evidence was not as prejudicial as defense counsel believed it to be in light of current societal norms.

The court stated that it did not believe that it was appropriate to view the evidence as misconduct evidence, for "a relationship between two consenting individuals at one time seven or eight years old and, later, at the outside, fifteen years old, sixteen years old or a little older, [was not] something of such a shocking nature that it should be analyzed according to the misconduct [case law]." The court stated that the sexual relationship between the defendant and T was relevant for two reasons. First, "it goes to the credibility of [T], that is . . . [it] could be argued that [T] had a lack of motive to falsify [his testimony] and a lack of animus toward the defendant. So, that relationship, which is of an intimate and positive nature, I think goes to the credibility of [T]." Second, the court found that the evidence was relevant to explaining the circumstances in which the defendant and T engaged in sexual abuse of the victim. The court explained: "[T]he jury is going to wonder how, out of the blue, the defendant and [T] would have started to engage in this type of conduct with [the victim]. And . . . the fact that the defendant and [T] had previously engaged in some type of sexual relationship prior to this event that occurred with [the victim], it makes much more sense to the trier of fact that there is an ongoing or, had been, an ongoing sexual relationship between the defendant and [T] and that [the victim] was somehow drawn into that. So, I think that fact is very relevant. I think it's extremely relevant."

The court stated that it was not persuaded by the arguments advanced by defense counsel that the evidence was unduly prejudicial. The court stated that "the fact that they were seven or eight when they started this and fifteen or sixteen when it ended, I think that actually makes the nature of that relationship even less prejudicial. . . . [I]t's not outrageous, it's not shocking . . . and it is consensual."

The court denied the motion in limine, stating that it would permit the state to engage in a very limited inquiry with respect to this issue during its direct examination of T but would permit further inquiry if it was warranted by the questions asked, if any, during cross-examination. The court stated that a limited inquiry that did not explore any details of the relationship "balances and filters out any undue prejudice."

During the state's direct examination of T, the following colloquy between the prosecutor and T occurred:

"Q. Now, you know, we just talked a minute ago about sort of fun things you and the defendant would do as boys—playing baseball, hanging out—but isn't it true that in addition to that, that for a number of years, from the time that you were really small, you and the defendant had an ongoing sexual relationship as well?

"A. Correct."

Shortly thereafter, while T was testifying with respect to the first time that he and the defendant abused the victim while in T's bedroom, the following colloquy between the prosecutor and T occurred:

"Q. And at this point in your life, as you said before, you and the defendant had, since you were younger, been engaging in sexual activity between the two of you?

"A. Correct."

The prosecutor did not conduct a further inquiry with respect to the sexual relationship that existed between the defendant and T. Prior to T's direct examination, the court asked if defense counsel sought a limiting instruction related to the evidence at issue. Defense counsel stated that she would decide later that day. Later that day, prior to T's cross-examination, the court, in the absence of the jury, noted that it had conferred with counsel concerning a potential limiting instruction

regarding the proper use of the evidence at issue, and that defense counsel had "indicated that they would prefer an instruction at the end or that they will decide by the end of the case as opposed to [the court delivering] one right now." During a charge conference several days later, defense counsel stated that she had reviewed a proposed limiting instruction that was drafted by the court but that her preference was that the court not deliver the instruction because it would "highlight" the evidence at issue. The court stated that it would delete the proposed limiting instruction from its draft jury charge and made clear that it would consider alternative language. The court stated, "[i]f there is any other instruction that you're requesting, please let me know . . . ." Thereafter, no request for a limiting instruction was made, the court did not deliver a limiting instruction in its charge, and the defendant did not take an exception on that ground.

The defendant's arguments on appeal, which were adequately preserved at trial, are slightly narrower than those that he raised before the trial court. He argues that the court erroneously determined that the evidence had any probative value with respect to the conspiracy charge. He argues: "[T]here is simply no basis in Connecticut or federal case law that supports the proposition that two people in a sexual relationship are more likely to engage in a conspiracy to commit risk of injury to a [child] as a result of that relationship." The defendant argues that the evidence did not provide a *motive* for the defendant and T to engage in sexual abuse of the victim. Additionally, the defendant argues that because T testified that his relationship with the defendant came to an end after he agreed to cooperate with the police in the present case, to the defendant's detriment, the evidence was not relevant to demonstrate that T may have had any lingering affection for the defendant and, thus, may have lacked the motive to testify untruthfully. The defendant urges us to conclude

that "there remains a significant cultural taboo concerning sexual relationships with first cousins" and that the notion of first cousins marrying or having children is not socially acceptable but is "disturbing or even repulsive."[30]

We begin our analysis of the claim by observing that there is no claim that the court misinterpreted a rule of evidence but, rather, that the court abused its discretion in applying relevant rules of evidence. It is well settled that "[t]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's 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 presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Anwar S.*, 141 Conn. App. 355, 374–75, 61 A.3d 1129, cert. denied, 308 Conn. 936, 66 A.3d 499 (2013).

First, we address the defendant's argument that the court improperly determined that the evidence at issue was relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. Unless there is a basis in law to exclude relevant evidence, it is admissible. See Conn. Code Evid. § 4-2. "Relevant evidence is evidence that has a logical tendency to aid the trier in

[30] The defendant supports his arguments in this regard by citing to a 2009 New York Times newspaper article that discussed societal views toward sexual relations involving first cousins. Setting aside any concern that the 2009 article on which the defendant relies may not apply to societal views of jurors empaneled in 2016, we observe that this article was not presented to the trial court and, thus, is not part of the grounds on which the defendant objected to the evidence at issue.

the determination of an issue . . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [A]buse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . .

"Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . . Furthermore, [t]he fact that the [trier of fact] would have . . . to rely on inferences to make [a] determination does not preclude the admission of . . . evidence. . . . The trial court [however] properly could [exclude] evidence where the connection between the inference and the fact sought to be established was so tenuous as to require the [trier of fact] to engage in sheer speculation. . . . Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience. . . .

"[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. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts." (Citations omitted; internal quotation marks omitted.) *State* v. *Halili*, 175 Conn. App. 838, 862–64, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017).

We agree with the trial court that the evidence at issue was relevant to one or more issues before the jury with respect to the conspiracy charge. "[C]onspiracy is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 460, 108 A.3d 1083 (2015). "The existence of a formal agreement between the parties, however, need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. . . . Because of the secret nature of conspiracies, a conviction is usually based on circumstantial evidence. . . . Consequently, it is not necessary to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words we have an agreement. . . . Indeed, a conspiracy can be inferred from the conduct of the accused." (Citations omitted; internal quotation marks omitted.) *State* v. *Elijah*, 42 Conn. App. 687, 695–96, 682 A.2d 506, cert. denied, 239 Conn. 936, 684 A.2d 709 (1996).

Here, the state bore the burden of demonstrating beyond a reasonable doubt that the defendant conspired with another person, T, to engage in the crime of risk of injury to a child. The nature of the relationship between the defendant and T was highly relevant to proving that a conspiracy existed because it was probative circumstantial evidence that made it more likely that the defendant specifically intended to conspire with T to engage in conduct constituting the crime of risk of injury to a child and whether, when the defendant and T participated in sexual activities with the victim, such conduct was an overt act in furtherance of the conspiracy. We are persuaded that the court reasonably determined that the evidence helped to provide an explanation of how the victim was "drawn into" the existing sexual relationship because it would have been reasonable for the jury to infer that the lengthy *sexual* relationship made it more likely that the defendant and T would have discussed matters of a sexual nature with each other and that they had agreed to engage in sexual activities not only with one another, but with a third person.

As we have explained, circumstantial evidence to prove a fact, such as the conspiracy at issue, is relevant if it tends to support a relevant fact even to a slight degree. Such evidence need not be conclusive proof of the fact for which it is offered or susceptible to just one reasonable interpretation. Viewed in the context of the unique factual issues that existed in the present case, the existence of a long-term sexual relationship tended to reflect that the defendant and T had trust and confidence in each other and, thus, made it more likely than it would have been in the absence of the evidence at issue that they would feel more comfortable agreeing to commit a crime of a sexual or forbidden nature. The evidence also shed light on the meaning of the "look" that was shared between the defendant and T immediately before they first sexually abused the

victim together. It made it more likely that the "look" was evidence that T and the defendant, who were sexual partners, had agreed to commit sexual abuse against the victim and were engaging in conduct in furtherance of the conspiracy.

According to the state's proffer, the sexual aspect of the relationship between the defendant and T was not fleeting, but had lasted for years prior to the time at which the defendant and T sexually abused the victim. Beyond the evidence of the familial relationship, the evidence of the sexual aspect of their relationship was highly relevant to an evaluation of whether they would have been likely to have trusted one another to conspire to commit a crime of a sexual nature against a child. As the court aptly observed, it would have been logical for the jury to have questioned the circumstances under which the defendant and T had agreed to conspire to commit the crime at issue. The evidence that the defendant and T had been engaged in a lengthy sexual relationship was probative circumstantial evidence in this regard.

We briefly address the defendant's argument that the prior sexual relationship between the defendant and T "did not provide a *motive* that would explain why the defendant and [T] would have entered into an agreement to sexually assault [the victim]." (Emphasis added.) The court never stated that the evidence was relevant to motive to enter into the conspiracy. Instead, the evidence was relevant because it made the existence of a conspiracy more likely than it would be without the evidence. Neither the prosecutor nor the trial court suggested, and we certainly do not suggest, that evidence that the defendant and T were in a long-term sexual relationship was a basis on which to infer that they were motivated to engage in sexual conduct with children. Like the trial court, we merely conclude, for the reasons already explained, that the sexual relationship tended to make the existence of a conspiracy more likely than it would be without the evidence.

Similarly, we agree with the court that the evidence of the lengthy sexual relationship was relevant to the jury's assessment of T's credibility. Evidence of such a relationship reasonably suggested that, at some point in time, T had a romantic or an emotional bond with the defendant. It can hardly be disputed that if the historical relationship between the defendant and T was distant or merely familial, it would not have produced the type of emotional bond that logically could be inferred from a sexual relationship. The existence of an emotional bond or strong feelings, in turn, was relevant to an assessment of whether T lacked a motive to testify unfavorably against the defendant.

The defendant urges us to consider as dispositive the fact that, during the state's direct examination of T at trial, T testified that, after he provided a statement to the police in which he implicated the defendant in the crimes, his relationship with the defendant came to an end.[31] The defendant argues that this testimony undermined the court's belief that the evidence of a sexual relationship bolstered a finding that T lacked a motive to testify falsely. This argument is not persuasive because the jury could have discredited T's testimony in this regard and found the evidence of the long-term sexual relationship that existed between the defendant and T to be more probative circumstantial evidence with respect to the affection, if any, that T felt for the defendant. Setting that rationale aside, however, the flaw in the defendant's argument is that we must evaluate the court's ruling to admit the evidence at the time that the ruling was made, not in light of evidence that was presented at a later time. See, e.g., *State* v. *Harris*,

[31] The defendant refers us to the following colloquy between the prosecutor and T:

"Q. . . . Once you gave the additional information and cooperated [with the police with respect to the sexual abuse allegations of the victim], so to speak, and you told the police that the defendant had done what he did, did [the defendant] have any relationship with you after that? . . .

"A. No . . . there was nothing after that. We were done."

32 Conn. App. 476, 481 n.4, 629 A.2d 1166 ("[w]e are bound to evaluate the propriety of the trial court's rulings on the basis of the facts known to the court at the time of its rulings"), cert. denied, 227 Conn. 928, 632 A.2d 706 (1993).

Having concluded that the evidence of a conspiracy was relevant, we address the defendant's remaining argument that the court abused its discretion by failing to conclude that the evidence should not be admitted because it was unduly prejudicial. "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . ." Conn. Code Evid. § 4-3. As this court frequently has observed, "[a]ll evidence adverse to a party is, to some [degree, prejudicial]. To be excluded, the evidence must create prejudice that is undue and so great as to threaten injustice if the evidence were to be admitted." (Internal quotation marks omitted.) *State* v. *Bullock*, 155 Conn. App. 1, 40, 107 A.3d 503, cert. denied, 316 Conn. 906, 111 A.3d 882 (2015).

"The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . .

"Our Supreme Court has identified four factors relevant to determining whether the admission of otherwise probative evidence is unduly prejudicial. These are: (1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Citation omitted; internal quotation

marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 404, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

The defendant's arguments are limited to the risk that the evidence at issue aroused in the jurors negative emotions or hostility that was prejudicial to him. The evidence related to the existence of a sexual relationship between first cousins of the same age that began when they were "really small" or "younger." The evidence was not introduced as or characterized as prior misconduct or propensity evidence on the part of the defendant relative to the sexual abuse of a much younger, nonconsenting child, nor was it of a violent or sexually graphic nature.

The court carefully considered the risk of prejudice to the defendant and took steps to minimize the risk of prejudice by limiting the testimony in the manner that it did. The court expressed its readiness to provide the jury with a limiting instruction with respect to the evidence but the defendant requested that it not be delivered to the jury. Even in the absence of such an instruction, we are not persuaded that the generalized description of when the sexual relationship began was likely to have aroused the emotions of the jurors, for the general details provided in the evidence reasonably may have led the jurors to infer that the relationship began as sexual exploration between young children. Although the sexual relationship that continued beyond childhood was not characterized by anyone at trial as being akin to incest,[32] we recognize that the fact that

[32] General Statutes § 53a-191 (a) provides: "A person is guilty of incest when he marries a person whom he knows to be related to him within any of the degrees of kindred specified in [General Statutes §] 46b-21."

General Statutes § 46b-21 provides: "No person may marry such person's parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any marriage within these degrees is void."

Although § 46b-21 was amended during the time frame within which the crimes at issue were alleged to have occurred, because that amendment is not relevant to the claims on appeal we refer to the current revision of § 46b-21.

it existed between first cousins had the potential to arouse negative emotions in the jurors. However, we are not persuaded that this potential was so significant that it outweighed the probative value of the evidence. Also, we are mindful that the jury was presented with a great deal of graphic evidence that the defendant and T had engaged in a variety of sexual activities with the victim, who was a child at the time that the events in question occurred. The fact that this other graphic evidence was before the jury undermines the possibility that the extremely limited evidence of the sexual relationship between the defendant and T unduly aroused the jurors' emotions.

For the foregoing reasons, we conclude that the court's admission of the evidence at issue did not reflect an abuse of its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES W. ROCKWELL, JR. *v.*
DONATE S. ROCKWELL
(AC 42185)

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

Syllabus

The plaintiff sought to recover damages, including treble damages pursuant to statute (§ 52-568), for vexatious litigation, alleging that the defendant had brought an action against him in 2009 without probable cause and with malicious intent. In a prior action brought in 2013 concerning the 2009 action, the plaintiff had sought to recover damages for vexatious litigation from the defendant as well as her attorney, C. In May, 2015, the trial court dismissed the action as to the defendant for lack of personal jurisdiction. Thereafter, the court granted C's motion to bifurcate the trial and have the issue of probable cause decided first by the trial court. Following a hearing, the court concluded that C had probable cause to bring the 2009 action and rendered judgment for C in October, 2015, which was affirmed by this court. In May, 2016, the plaintiff commenced the present action against the defendant pursuant to the accidental failure of suit statute (§ 52-592). The defendant filed a motion to

dismiss and/or motion for summary judgment in which she argued that the present action was time barred and not saved by § 52-592. The trial court denied the defendant's motion, and the defendant filed an answer and special defenses asserting, inter alia, that the present action was barred by the doctrines of res judicata and/or collateral estoppel because the trial court in 2013 found that there was probable cause for the 2009 action and she was in privity with her attorney, C. The defendant then moved for summary judgment on the special defense of res judicata and/or collateral estoppel, which the court denied, concluding that those doctrines were inapplicable because the 2013 action involved what information C possessed when he filed the action and the present action involved what information the defendant possessed when she pursued the 2009 action. On appeal to this court, the defendant claimed that the trial court improperly denied her motions. *Held*:

1. The trial court did not err in denying the defendant's motion for summary judgment predicated on the special defense of res judicata and/or collateral estoppel; the 2013 action involved whether C had probable cause to commence the 2009 action on the basis of his knowledge at the time whereas the present case concerned whether the defendant had probable cause to pursue the 2009 action on the basis of her knowledge at the time, and genuine issues of material fact existed as to this issue.
2. This court declined to review the defendant's claim that the trial court improperly denied her motion to dismiss predicated on her claim that the present action was time barred and not saved by § 52-592; the denial of a statute of limitations defense is not a final judgment and, therefore, was not reviewable on appeal; moreover, although in some situations a statute of limitations claim may be inextricably linked with a res judicata and/or collateral estoppel claim and, thus, reviewable, the defendant's statute of limitations claim in her motion to dismiss was not inextricably intertwined with her claims of res judicata and/or collateral estoppel in her summary judgment motion.

Argued February 6—officially released March 31, 2020

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hon. Arthur A. Hiller*, judge trial referee, denied the defendant's motion to dismiss; thereafter, the court, *Stevens, J.*, denied the defendant's motion for summary judgment, and the defendant appealed to this court. *Affirmed in part*; *appeal dismissed in part.*

Donate S. Rockwell, self-represented, the appellant (defendant).

James W. Rockwell, Jr., self-represented, the appellee (plaintiff).

Opinion

MOLL, J. The self-represented defendant, Donate S. Rockwell, appeals following the trial court's denial of her motion for summary judgment against the self-represented plaintiff, James W. Rockwell, Jr.[1] On appeal, the defendant claims that the court improperly denied (1) her motion for summary judgment on her special defense of res judicata and/or collateral estoppel, and (2) her motion, entitled "motion to dismiss and/or motion for summary judgment," in which she asserted that the present action is time barred and cannot be saved pursuant to General Statutes § 52-592,[2] the accidental failure of suit statute. We affirm the judgment denying the defendant's motion for summary judgment based on res judicata and/or collateral estoppel grounds, and we dismiss, for lack of a final judgment, the remaining portion of the appeal taken from the denial of the defendant's "motion to dismiss and/or motion for summary judgment" on the basis of § 52-592.

[1] This appeal constitutes the latest dispute in the unfortunate and tortuous history between the parties, who are former spouses.

[2] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. In 2009, the defendant commenced an action against the plaintiff alleging that the plaintiff had breached an agreement, executed by the parties in 1994, concerning a joint investment in certain unspecified securities. See *Rockwell* v. *Rockwell*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5008114-S (2009 action). The defendant was represented by Attorney Ian A. Cole in the 2009 action. On March 31, 2010, following a jury trial, the jury returned a verdict in favor of the plaintiff, and the trial court, *Radcliffe*, *J.*, rendered judgment in accordance therewith. The defendant did not appeal from that judgment.

In March, 2013, the plaintiff filed a vexatious litigation action against the defendant and Cole, alleging that they had commenced and prosecuted the 2009 action without probable cause and with malicious intent to unjustly vex and trouble him. See *Rockwell* v. *Rockwell*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-13-5010935-S (2013 action). As relief, the plaintiff sought compensatory damages and treble damages pursuant to General Statutes § 52-568.[3] A jury trial commenced in May, 2015. On May 12, 2015, the first day of evidence, the trial court, *Stevens*, *J.*, dismissed the 2013 action as to the defendant for lack of personal jurisdiction.[4] The case continued as to Cole.

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

[4] On May 13, 2013, the defendant filed a motion to dismiss the 2013 action as to her for lack of personal jurisdiction on the ground that the plaintiff had not served her at the proper address. The plaintiff filed an objection thereto, which the court, *Markle*, *J.*, sustained on March 3, 2014. On May 12, 2015, the court, *Stevens*, *J.*, upon reconsideration, granted the defendant's motion to dismiss.

Thereafter, following a medical emergency suffered by the plaintiff, the court released the jury and, in granting a motion filed by Cole, bifurcated the trial such that, as an initial matter, the court would decide the issue of probable cause. On October 14, 2015, following a hearing, the court rendered judgment in favor of Cole on the basis of its conclusion that Cole had probable cause to commence the 2009 action. The judgment was affirmed on appeal. *Rockwell* v. *Rockwell*, 178 Conn. App. 373, 400, 175 A.3d 1249 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018).

In April, 2016, the plaintiff commenced the present action against the defendant. In his one count complaint, the plaintiff alleges that the defendant commenced and prosecuted the 2009 action without probable cause and with malicious intent to unjustly vex and trouble him. As relief, he seeks, inter alia, compensatory damages and treble damages pursuant to § 52-568. Additionally, the plaintiff asserts in the complaint that, in accordance with § 52-592, he commenced the present action within one year following the dismissal of the 2013 action against the defendant.

On May 24, 2016, the defendant filed a motion, entitled "motion to dismiss and/or motion for summary judgment" (May, 2016 motion), in which she claimed that the statute of limitations governing the plaintiff's vexatious litigation claim, set forth in General Statutes § 52-577,[5] had expired on March 31, 2013, and § 52-592 did not apply to save the present action. On September 19, 2016, the trial court, *Hon. Arthur A. Hiller*, judge trial referee, issued an order summarily denying the May, 2016 motion. Thereafter, the defendant filed an answer and special defenses asserting, inter alia, that the present action is barred under the doctrines of res

[5] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

judicata and/or collateral estoppel.[6] The plaintiff, in turn, denied the defendant's special defenses.

On March 8, 2018, the defendant filed a motion for summary judgment on her special defense of res judicata and/or collateral estoppel, to which the plaintiff filed an objection on May 10, 2018. On September 20, 2018, the court, *Stevens*, *J.*, issued a memorandum of decision denying the defendant's motion for summary judgment and sustaining the plaintiff's objection thereto. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied her motion for summary judgment predicated on her special defense asserting that the present action is barred pursuant to the doctrines of res judicata and/or collateral estoppel.[7] We disagree.

We begin by setting forth the standard of review and legal principles governing our resolution of this claim. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[6] The defendant also asserted as a special defense that the present action is time barred. Subsequently, the defendant amended her special defenses to plead a third special defense asserting advice of counsel. The defendant's special defense asserting res judicata and/or collateral estoppel is the only defense pertinent to this appeal.

[7] The denial of the defendant's motion for summary judgment on her special defense of res judicata and/or collateral estoppel is a final judgment for purposes of this appeal. See *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 174 Conn. App. 573, 578 n.4, 166 A.3d 716 (2017) ("[O]rdinarily, the denial of a motion for summary judgment is not an appealable final judgment. . . . When the decision on a motion for summary judgment, however, is based on the doctrine of collateral estoppel, the denial of that motion does constitute a final judgment for purposes of appeal. . . . That precept applies to the doctrine of res judicata with equal force." (Internal quotation marks omitted.)), aff'd, 331 Conn. 379, 204 A.3d 664 (2019).

In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law. . . . Our review of the trial court's decision to [deny] the defendant's motion for summary judgment is plenary. . . . In addition, the applicability of res judicata or collateral estoppel presents a question of law over which we employ plenary review." (Internal quotation marks omitted.) *Pollansky* v. *Pollansky*, 162 Conn. App. 635, 644–45, 133 A.3d 167 (2016).

"Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Internal quotation marks omitted.) *Smith* v. *BL Cos.*, 185 Conn. App. 656, 664, 198 A.3d 150 (2018). "Before collateral estoppel applies . . . there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding." (Internal quotation marks omitted.) *Barry* v. *Board of Education*, 132 Conn. App. 668, 675, 33 A.3d 291 (2011).

In the present action, as he had in the 2013 action, the plaintiff is raising a claim sounding in vexatious litigation. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of

action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 554, 944 A.2d 329 (2008).

In moving for summary judgment on her special defense of res judicata and/or collateral estoppel, the defendant asserted that the trial court in the 2013 action concluded, and this court agreed on appeal, that probable cause existed to commence the 2009 action against the plaintiff. The defendant further contended that, although the 2013 action was dismissed as to her for lack of personal jurisdiction, there was privity between her and Cole such that the judgment in Cole's favor in the 2013 action barred the plaintiff from pursuing an identical vexatious litigation claim against her in the present action. In opposition to the motion for summary judgment, the plaintiff argued that (1) the issue litigated in the 2013 action was whether *Cole* had probable cause to commence the 2009 action, whereas the distinct issue to be litigated in the present action is whether *the defendant* had probable cause to file the 2009 action, and (2) there is no authority in Connecticut supporting the defendant's contention that a client and his or her lawyer are always in privity for vexatious litigation purposes.

In denying the defendant's motion for summary judgment, the trial court concluded that the doctrines of res judicata and/or collateral estoppel were inapplicable because "the present case presents matters not litigated in the 2013 action . . . ." Specifically, the court deter-

mined: "The decisions of this court and the Appellate Court in the 2013 action describe in detail what information *Cole* possessed when he filed the 2009 action against the plaintiff. . . . In contrast, in the trial of the present action, the focus will be on what *the defendant* knew, or should have known, when the 2009 action was commenced. According to the plaintiff, what the defendant knew differed from what Cole knew, because the defendant was not forthright with Cole. . . . The defendant denies the plaintiff's claim that she intentionally or maliciously gave Cole wrong information. This factual dispute cannot be resolved by this court through a motion for summary judgment."[8] (Citations omitted; emphasis in original.)

We reject the defendant's contention that the court erred in denying her motion for summary judgment. As the court correctly determined, the crux of the 2013 action was whether *Cole* had probable cause to commence the 2009 action on the basis of the knowledge that he had at that time. In contrast, the present case concerns whether *the defendant* had probable cause to commence the 2009 action predicated on the knowledge that she possessed at that time. There are genuine issues of material fact to be resolved in order to determine whether the defendant had probable cause to pursue the 2009 action. Accordingly, the defendant's claim fails.

II

The defendant next claims that the trial court improperly denied her May, 2016 motion predicated on her assertion that the present action is time barred and cannot be saved pursuant to § 52-592. We decline to address the merits of this claim because we conclude that the denial of the May, 2016 motion is not a final judgment.

[8] The court did not reach the defendant's claim regarding her privity with Cole.

"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." (Internal quotation marks omitted.) *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 651, 161 A.3d 657 (2017).

As we observed earlier in this opinion, the denial of the defendant's motion for summary judgment on her special defense of res judicata and/or collateral estoppel is a final judgment for purposes of this appeal. See footnote 7 of this opinion. The denial of the defendant's May, 2016 motion predicated on her statute of limitations claim, however, does not constitute a final judgment. See *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354 n.9, 63 A.3d 940 (2013) ("the denial of a statute of limitations defense is not itself an appealable final judgment"). We recognize that "[i]n some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so inextricably intertwined with another argument, the appealability of which is established that we should assume jurisdiction over both." (Internal quotation marks omitted.) *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 90, 10 A.3d 498 (2010). In some situations, a statute of limitations claim may be inextricably intertwined with a res judicata and/or collateral estoppel claim. See, e.g., *Santorso* v. *Bristol Hospital*, supra, 354 n.9 (concluding that interlocutory review of claim that action was barred by statute of limitations and statute of repose, and not saved by § 52-592, was permissible because it was inextricably intertwined with res judicata claim).[9] On the basis of the record before us in the present action, in which the defendant

[9] In her appellate brief, the defendant cites *Santorso* for the proposition that the denial of her May, 2016 motion is inextricably intertwined with the denial of her motion for summary judgment. We do not construe *Santorso* as establishing that a statute of limitations claim, in every instance, is inextricably intertwined with a res judicata and/or collateral estoppel claim.

raised her statute of limitations claim and her res judicata and/or collateral estoppel claim in wholly separate motions, and where we cannot discern any meaningful connection between those claims, we conclude that the denial of the May, 2016 motion is not inextricably intertwined with the denial of the motion for summary judgment. Accordingly, we lack subject matter jurisdiction to entertain the portion of the appeal challenging the denial of the May, 2016 motion.[10]

The judgment denying the defendant's motion for summary judgment based on res judicata and/or collateral estoppel is affirmed; the appeal is dismissed with respect to the denial of the defendant's May 24, 2016, "motion to dismiss and/or motion for summary judgment" for lack of a final judgment.

In this opinion the other judges concurred.

KIMBERLY KENNESON *v.* CELIA EGGERT ET AL. (AC 42170)

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

Syllabus

The plaintiff sought to recover damages from the defendant attorney E, and the defendant insurance company, N Co., claiming that E had committed fraud against the plaintiff and that N Co. was vicariously liable for E's actions. The plaintiff had previously brought an action for, inter alia, negligence against A, who was insured by N Co., and another individual, R. A was represented by E on behalf of N. Co. in the negligence action, in which the jury awarded the plaintiff damages against both A and R. Pursuant to a settlement agreement in that action, the plaintiff signed a general release and withdrawal form in exchange for settling the case against A. The plaintiff later discovered that she would be unable to recover damages from R, and moved to open the judgment in the negligence action, claiming that E had engaged in unfair and deceptive behavior by instructing her to sign the release without explaining what it was and how it could affect the judgment in that action. After the trial court

[10] We emphasize that nothing in this opinion should be considered as a ruling on the merits of the plaintiff's claim or the defendant's special defenses.

in the negligence action denied her motion to open and concluded that there was no evidence that E had coerced the plaintiff into signing the release, the plaintiff commenced the present action alleging fraud against E and N Co. Thereafter, the court granted the defendants' motion for summary judgment, concluding that the plaintiff was collaterally estopped from asserting her fraud action because the issue had been addressed in the negligence action, and the plaintiff appealed to this court. This court reversed in part the judgment of the trial court, concluding that the trial court improperly granted the defendants' motion for summary judgment as to the plaintiff's claim for intentional misrepresentation because there were genuine issues of material fact whether that claim had been fully and fairly litigated at the hearing on the motion to open the negligence action, and remanded the case for further proceedings. Following the remand, the defendants filed a motion to dismiss the action on the ground that the litigation privilege barred the plaintiff's claim. The trial court rendered judgment dismissing the action, concluding that the defendants had satisfied the requirements for absolute immunity under the litigation privilege, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claims that the trial court erred in concluding that the litigation privilege implicated the subject matter jurisdiction of the court and that the defendants timely filed their motion to dismiss; the doctrine of absolute immunity concerns a court's subject matter jurisdiction and challenges to a court's subject matter jurisdiction can be raised at any time and cannot be waived.
2. The trial court properly granted the motion to dismiss and concluded that E's statements were protected by the litigation privilege; E's statements made during a postverdict settlement conference were made during a judicial proceeding, there is no requirement that statements be made in a courtroom, under oath, or in a pleading in order to be considered part of a judicial proceeding and the postverdict settlement conference was part of the ongoing litigation between the parties and was judicial in nature, and the statements were relevant to the subject matter of the judicial proceeding, as the purpose of the conference was for the defendants to reach an agreement with the plaintiff and, thus, E's statements about signing the withdrawal were relevant to the conference.

Argued November 19, 2019—officially released March 31, 2020

Procedural History

Action to recover damages for fraud, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the defendants' motion for summary judgment

and rendered judgment thereon, from which the plaintiff appealed to this court, *Keller*, *Beach and Harper*, *Js.*, which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, *Brazzel-Massaro*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kimberly Kenneson, self-represented, the appellant (plaintiff).

Andrew P. Barsom, with whom, on the brief, was *Robert D. Laurie*, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. After the trial court granted the motion to dismiss filed by the defendants, Celia Eggert and Nationwide Mutual Fire Insurance Company (Nationwide), the self-represented plaintiff, Kimberly Kenneson, filed this appeal. On appeal, the plaintiff contends that the court erred by concluding that the defendants' statements and actions were protected under the litigation privilege.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and relevant procedural history, as recited in an earlier decision of this court involving

[1] The plaintiff also argues that the court erred in concluding that the litigation privilege implicates the subject matter jurisdiction of the court and that the defendants timely filed their motion to dismiss. Both of these arguments fail. First, "the doctrine of absolute immunity concerns a court's subject matter jurisdiction." *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 724, 161 A.3d 630 (2017). Second, the subject matter jurisdiction of the court can be challenged at any time. See *Stroiney* v. *Crescent Lake Tax District*, 205 Conn. 290, 294, 533 A.2d 208 (1987) ("[a] motion to dismiss for lack of subject matter jurisdiction may be made at any time"). Furthermore, challenges to the court's subject matter jurisdiction cannot be waived. See Practice Book § 10-33 ("[a]ny claim of lack of jurisdiction over the subject matter cannot be waived; and whenever it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action").

these parties, are relevant to this appeal. See *Kenneson* v. *Eggert*, 176 Conn. App. 296, 170 A.3d 14 (2017). "In January, 2007, the plaintiff commenced a civil action against Carl Rosati and Michael Altman for negligence, battery and recklessness [arising from a physical altercation between Rosati and Altman that injured the plaintiff]. Altman was insured by Nationwide, and Nationwide agreed to provide Altman with a defense. Nationwide arranged for the Law Offices of John Calabrese to represent Altman. Eggert, an attorney with that firm, represented Altman at trial. The plaintiff represented herself at trial and obtained a jury verdict in her favor. The jury awarded the plaintiff damages of $67,556.07 against Altman [for negligence] and $380,037.38 against Rosati [$45,037.38 in negligence and $335,000 in recklessness]. Although he was served with process, Rosati did not appear at trial. After the verdict was accepted by the court, Altman filed a motion to set aside the verdict and a motion for collateral source reduction.

"Several weeks later, on July 18, 2011, the plaintiff, Eggert and a Nationwide claims adjuster [Shane Gingras] appeared in court for a hearing [on a motion to seal filed by the plaintiff] and a settlement conference [that Eggert requested]. At the settlement conference, Nationwide offered the plaintiff $57,000 to settle the case against Altman, which the plaintiff declined. Nationwide then offered the plaintiff $67,000, which she ultimately accepted." (Footnote omitted.) Id., 299–300.

"Pursuant to the settlement agreement, the plaintiff signed a general release and withdrawal form. The release provided, in relevant part, that '[b]y signing this release, [the plaintiff] expressly acknowledges that he/she has read this document with care and that he/she is aware that by signing this document he/she is giving up all rights and claims and causes of action, and any and all rights and claims that he/she may now have or which may arise in the future . . . against [Nationwide

and Altman] . . . . Knowing this . . . he/she signs this document voluntarily and freely without duress.' The release also stated that '[the plaintiff] further acknowledges that no representation of fact or opinion has been made to him/her by [Nationwide and Altman] . . . which in any manner has induced [the plaintiff] to agree to this settlement.' " Id., 300. The plaintiff then filed the withdrawal form with the court the following day on July 19, 2011.

"The plaintiff subsequently discovered that she was unable to collect damages against Rosati, who had been uninsured and had died without assets in August, 2013. On April 28, 2014, the plaintiff filed a motion to open the judgment and a motion to reinstate Altman as a defendant. The plaintiff argued that she did not know that signing the release would prevent her from reallocating the damages, at least in part, against Rosati to Altman and Nationwide, and that Eggert had engaged in 'unfair and deceptive' behavior when she instructed her to sign the release 'without explaining what it was and how it can affect a judgment.'

"Altman filed an objection, arguing that the release was valid and that the plaintiff was aware of the nature of the document when she signed it. On June 20, 2014, the court, *Pellegrino*, *J.*, heard oral argument on the plaintiff's motion to open. During oral argument, Judge Pellegrino questioned the plaintiff regarding the alleged fraud committed by Eggert. Judge Pellegrino ultimately denied the plaintiff's motion, noting that there was no evidence that Eggert had coerced the plaintiff into signing the release, and that the release, by its terms, provided that the plaintiff had read the document with care. The plaintiff did not appeal from Judge Pellegrino's decision.

"On July 17, 2014, the plaintiff commenced the present action against the defendants, alleging that Eggert had committed fraud against the plaintiff and that

Nationwide was vicariously liable for her actions. . . . The court heard oral argument and denied the plaintiff's motions [for compliance with the court's discovery orders]. The court held that . . . the plaintiff had offered '[n]o quantum of proof . . . to support a claim of civil fraud which would permit the privilege to be pierced.'

"On December 4, 2014, the defendants filed a motion for summary judgment, arguing that the plaintiff's claim was barred by the doctrine of collateral estoppel, because Judge Pellegrino's decision on the plaintiff's motion to open in the negligence action had previously addressed the fraud issue. They also argued that the claim was barred by the terms and conditions of the release. The plaintiff filed a memorandum of law in opposition to the motion to which the defendants replied, and the parties appeared for argument on August 8, 2015. The court held that the plaintiff was collaterally estopped from asserting her fraud claims and that, even if collateral estoppel did not apply, the defendants were entitled to summary judgment because the plaintiff was unable to prove her claims for common-law fraud." Id., 300–302.

The plaintiff then appealed to this court. In that appeal, she argued that the court erred by concluding that the intentional misrepresentation aspect of her fraud claim was barred by collateral estoppel. Id., 299. This court noted that, in her amended complaint filed in December, 2014,[2] the plaintiff essentially alleged two claims of fraud: intentional misrepresentation and fraudulent nondisclosure. The plaintiff first alleged that Eggert "falsely represented to the plaintiff . . . that she would not get any of her $67,556.07 award against . . . Altman unless she signed a document . . . to settle the judgment . . . ." (Internal quotation marks omitted.) Id., 303. Second, the plaintiff alleged that

[2] This complaint remains the operative complaint for the present appeal.

"Eggert, with the intent to deceive the plaintiff, knowingly failed to disclose and/or concealed that [the release and the withdrawal] would result in the loss of the plaintiff's right to reallocate damages . . . ." (Internal quotation marks omitted.) Id., 303. This court reversed the trial court's determination that there was no genuine issue of material fact on the plaintiff's intentional misrepresentation claim; id., 307; but affirmed the court's determination that she was collaterally estopped from raising the fraudulent nondisclosure aspect of her fraud claim. Id., 312. The matter was remanded back to the trial court. Id., 314.

Following the remand, the defendants filed the motion to dismiss that is the subject of this appeal. In their memorandum of law in support of the motion, the defendants argued that the litigation privilege[3] barred the plaintiff's claim and, as a result, the court lacked subject matter jurisdiction. The trial court, *Brazzel-Massaro*, *J.*, agreed with the defendants and granted their motion to dismiss. The court found that the defendants had satisfied the requirements for absolute immunity under the litigation privilege. This appeal followed. Additional facts will be set forth as necessary.

We begin with the well established standard of review for reviewing a trial court's decision on a motion to dismiss. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied

[3] The terms "absolute immunity" and "litigation privilege" are used interchangeably throughout this opinion.

from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." *Metcalf* v. *Fitzgerald*, 333 Conn. 1, 6–7, 214 A.3d 361 (2019), cert. denied, U.S. , 140 S. Ct. 854, L. Ed. 2d (2020).

We next set forth the relevant law applicable to the litigation privilege. "As the doctrine of absolute immunity concerns a court's subject matter jurisdiction . . . we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . The question before us is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive dismissal on the grounds of absolute immunity." (Internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 724–25, 161 A.3d 630 (2017).

"Connecticut has long recognized the litigation privilege . . . [and has extended it] to judges, counsel and witnesses participating in judicial proceedings." (Citations omitted; internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 536–37, 69 A.3d 880 (2013). This court recently summarized the state of the litigation privilege in Connecticut: "In *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 79 A.3d 60 (2013), our Supreme Court explained: In *Simms* [v. *Seaman*, supra, 531], we noted that the doctrine of absolute immunity originated in response to the need to bar persons accused of crimes from suing their accusers for defamation. . . . We further noted that . . . [t]he general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . . [W]e further discussed the expansion of absolute immunity to bar retaliatory civil actions beyond claims of

defamation. For example, we have concluded that absolute immunity bars claims of intentional interference with contractual or beneficial relations arising from statements made during a civil action. See *Rioux* v. *Barry*, [283 Conn. 338] 350–51, [927 A.2d 304 (2007)] (absolute immunity applies to intentional interference with contractual relations because that tort comparatively is more like defamation than vexatious litigation). We have also precluded claims of intentional infliction of emotional distress arising from statements made during judicial proceedings on the basis of absolute immunity. See *DeLaurentis* v. *New Haven*, 220 Conn. 225, 263–64, 597 A.2d 807 (1991). Finally, we have most recently applied absolute immunity to bar retaliatory claims of fraud against attorneys for their actions during litigation. See *Simms* v. *Seaman*, supra, 545–46. In reviewing these cases, it becomes clear that, in expanding the doctrine of absolute immunity to bar claims beyond defamation, this court has sought to ensure that the conduct that absolute immunity is intended to protect, namely, participation and candor in judicial proceedings, remains protected regardless of the particular tort alleged in response to the words used during participation in the judicial process." (Citations omitted; internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 725–27.

In this appeal, the plaintiff contends that the court erred by finding that the statements Eggert made as part of the postverdict settlement conference were protected by the litigation privilege. The defendants argue that the court correctly found that the statements were protected by the litigation privilege and, accordingly, that the court lacked jurisdiction over the plaintiff's intentional misrepresentation claim.[4] We agree with the defendants.

[4] As set forth previously in this opinion, the plaintiff's December, 2014 amended complaint contained two fraud claims: intentional misrepresentation and fraudulent nondisclosure. Her fraudulent nondisclosure claim was

The applicability of the litigation privilege depends on whether the statement or action at issue, here, intentional misrepresentation, took place during a judicial proceeding. "[I]n determining whether a statement is made in the course of a judicial proceeding, it is important to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of absolute immunity provides. . . . In making that determination, the court must decide as a matter of law whether the . . . statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding, so as to qualify for the [litigation] privilege. The test for relevancy is generous, and judicial proceeding has been defined liberally to encompass more than civil litigation or criminal trials." (Citation omitted; internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 839, 925 A.2d 1030 (2007). "The judicial proceeding to which [absolute] immunity attaches has not been defined very exactly. It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes for example, lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) *Kelley* v. *Bonney*, 221 Conn. 549, 566, 606 A.2d 693 (1992).

Accordingly, we first determine whether the trial court properly found that the statements at issue in this case were made during a judicial proceeding. If so, we then consider whether the trial court properly found that the alleged misrepresentation is sufficiently relevant to the issues involved in those proceedings. See

found to be collaterally estopped, but her intentional misrepresentation claim survived the defendants' previous motion for summary judgment. See *Kenneson* v. *Eggert*, supra, 176 Conn. App. 314.

Ravalese v. *Lertora*, 186 Conn. App. 722, 730, 200 A.3d 1153 (2018) ("we must determine whether the proceedings at issue in this case were judicial or quasi-judicial in nature and, if so, we then must consider whether the [statement] is sufficiently relevant to the issues involved in those proceedings").

Here, the plaintiff argues that the statements made by the defendants are not covered by the litigation privilege because the settlement discussion occurred outside of a courtroom. The crux of the plaintiff's argument is that because the statements were not made in pleadings or other documents, nor under oath or before the court, the statements were not made in the course of a judicial proceeding. We disagree with the plaintiff.

There is no requirement under Connecticut jurisprudence that to be considered part of a judicial proceeding, statements must be made in a courtroom or under oath or be contained in a pleading or other documents submitted to the court. Indeed, "[t]he privilege extends beyond statements made during a judicial proceeding to preparatory communications that may be directed to the goal of the proceeding." (Internal quotation marks omitted.) *Tyler* v. *Tatoian*, 164 Conn. App. 82, 88, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). In addition, our Supreme Court has "recognized that the absolute privilege that is granted to statements made in furtherance of a judicial proceeding extends to every step of the proceeding until final disposition." *Hopkins* v. *O'Connor*, supra, 282 Conn. 826.

Here, the discussion in the hallway, as part of the postverdict settlement conference, was a step in the ongoing judicial proceeding. A postverdict settlement conference, such as the one in the present case, is judicial in nature. The conference was part of the ongoing litigation between the plaintiff and Eggert's client, Michael Altman. On July 11, 2011, Eggert sent a letter

to Judge Ozalis to request a postverdict settlement conference for July 18, 2011. On that date, the parties appeared before Judge Matasavage for the conference. In requesting the conference, Eggert expressly stated that the goal for the conference was that an "agreement . . . be reached with the plaintiff with the court's assistance." Accordingly, the plaintiff's argument that Eggert's statements were not made during a judicial proceeding fails.

We now turn to the question of whether the court properly concluded that the statements were "sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding . . . ." *Hopkins* v. *O'Connor*, supra, 282 Conn. 839. As discussed above, "[t]he test for relevancy is generous . . . ." Id.

The plaintiff argues that Eggert's statements about signing the withdrawal were not relevant to the subject matter of the proceeding. She further argues that the statements did not contain any facts, law or arguments that were relevant to the original underlying tort claim that she had brought against Altman and Rosati. Therefore, the plaintiff contends, those statements are not covered by the litigation privilege. The defendants counter that the court correctly concluded that the statements were relevant to the underlying subject matter of the judicial proceeding. We agree with the defendants.

The record reveals that Eggert's statements at issue are relevant to the subject matter of the judicial proceeding. The parties met to settle the action brought by the plaintiff against Altman, Eggert's client. Indeed, the purpose of the postverdict conference was to reach an "agreement . . . with the plaintiff with the court's assistance." As the court noted, the statements at issue were part of a conference to resolve the underlying tort action initiated by the plaintiff. Accordingly, the court correctly found that the absolute immunity of the litigation privilege applied to bar the action.

In accordance with our Supreme Court precedent, the plaintiff's claim of fraud based on statements made during the postverdict settlement conference is barred by the litigation privilege. Absolute immunity applied to the statements made by Eggert that are at issue in this appeal. The statements were made during a judicial proceeding, and they were relevant to the subject matter of the ongoing litigation. Therefore, the trial court lacked subject matter jurisdiction over the plaintiff's fraud claim against Eggert and Nationwide. The court properly granted the defendants' motion to dismiss.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

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[5] We note that the plaintiff was not without alternative remedies. See *Simms* v. *Seaman*, supra, 308 Conn. 552–54 (summarizing other avenues that can be used to hold attorneys accountable for misconduct, such as filing motion to open judgment, or filing grievance against attorney under Rules of Professional Conduct, among others).

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 196

LUIS ROJAS *v.* COMMISSIONER
OF CORRECTION
(AC 40045)

Lavine, Prescott and Bishop, Js.

Submitted on briefs March 16—officially released March 31, 2020

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

Per Curiam. The judgment is affirmed.

TYE THOMAS *v.* COMMISSIONER
OF CORRECTION
(AC 42454)

Prescott, Devlin and Bishop, Js.

Argued March 9—officially released March 31, 2020

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

Per Curiam. The judgment is affirmed.

STEPHEN J. WILLIAMS *v.* COMMISSIONER
OF MOTOR VEHICLES
(AC 41811)

Elgo, Devlin and Harper, Js.

Argued March 12—officially released March 31, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Gleeson*, *J.*

Per Curiam. The judgment is affirmed.

LUCIA CINOTTI *v.* SHRED IT U.S.A., LLC, ET AL.
(AC 43136)

Elgo, Devlin and Harper, Js.

Argued March 12—officially released March 31, 2020

Appeal by the plaintiff in error from the Superior Court in the judicial district of Ansonia-Milford, small claims session, *Elaine A. Braffman*, small claims magistrate.

Per Curiam. The writ of error is dismissed.

WILLIAM JACKSON *v.* WATERBURY
POLICE DEPARTMENT ET AL.
(AC 42597)

DiPentima, C. J., and Keller and Bright, Js.

Argued March 5—officially released March 31, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *Brazzel-Massaro, J.*

Per Curiam. The judgment is affirmed.

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cation because they were pending before Probate Court at time complaint was filed in Superior Court; adoption of trial court's memorandum of decision as statement of facts and applicable law on issues.

Priore *v.* Haig 675

Defamation; absolute litigation immunity; claim that trial court improperly granted motion to dismiss and denied motion to reargue because evidentiary hearing should have been held; whether trial court incorrectly determined that planning and zoning commission hearing was quasi-judicial in nature and that defendant's statements were pertinent to hearing.

Professional Electrical Contractors of Connecticut, Inc. *v.* Stamford Hospital 430

Unjust enrichment; quantum meruit; mechanic's lien; substitution of bond; summary judgment; whether defendant presented evidence of genuine issue of material fact as to plaintiff's claims; whether recovery was barred to second tier subcontractor when general contractor had paid first tier subcontractor in full; whether lienable fund was exhausted.

RCN Capital, LLC *v.* Chicago Title Ins. Co. 518

Breach of contract; foreclosure action; claim that trial court improperly calculated damages due to breach of contract claim using tax foreclosure sale price of property instead of estimated fair market value of property at time plaintiff brought foreclosure action to determine actual loss.

Rockwell *v.* Rockwell 763

Vexatious litigation; res judicata; collateral estoppel; statute of limitations; accidental failure of suit statute (§ 52-592); lack of final judgment; claim that trial court improperly denied motion for summary judgment based on res judicata and/or collateral estoppel; claim that trial court improperly denied motion to dismiss based on statute of limitations.

Rojas *v.* Commissioner of Correction (Memorandum Decision) 906

Sherman *v.* Commissioner of Correction (Memorandum Decision). 905

Solomon *v.* Doe (Memorandum Decision) 904

Stanley *v.* Commissioner of Correction (Memorandum Decision) 903

Starboard Resources, Inc. *v.* Henry 80

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.

State *v.* Albert D. 155

Risk of injury to child; sexual assault in fourth degree; sexual assault in first degree; attempt to commit sexual assault in first degree; claim that defendant was entitled to new trial on basis of alleged prosecutorial improprieties during state's rebuttal closing argument; whether prosecutor's remarks on own credibility and credibility of witness constituted improper vouching for state's credibility; whether prosecutor's comments that state's experts were not allowed as matter of law to meet with victims were improper and constituted impropriety; whether law prohibits expert witnesses from meeting with children who are complainants of sexual assault; whether prosecutorial impropriety deprived defendant of due process right to fair trial under test set forth in State v. *Williams* (204 Conn. 523).

State *v.* Bloom (Memorandum Decision) 905

State *v.* Bornstein 420

Interlocutory appeal; violation of civil protection order; harassment in second degree; motion to dismiss; claim that state was collaterally estopped from pursuing criminal charges because relevant factual allegations had been subject of full evidentiary hearing at hearing on request for civil protection order that was denied; lack of final judgment; whether Appellate Court had jurisdiction to hear interlocutory appeal; double jeopardy.

State *v.* Bradbury 510

Criminal possession of firearm; carrying pistol without permit; assault in first degree; criminal attempt to commit robbery in first degree; claim that, in light of jury's not guilty finding on certain charges, there was insufficient evidence

to support conviction as demonstrated by inconsistency of jury's verdict; whether defendant's attempt to obtain review of legal inconsistency between conviction and acquittal by recasting it as claim of evidentiary insufficiency changed nature of claim; whether state presented sufficient evidence to support defendant's conviction; whether defendant's argument that jury's not guilty verdict on certain charges meant that jury necessarily rejected victim's testimony in its entirety was availing.

State *v.* Bunn 549

Murder; conspiracy to commit murder; carrying pistol without permit; whether alleged prosecutorial impropriety deprived defendant of his due process right to fair trial.

State *v.* Hargett 228

Murder; claim that trial court's exclusion of evidence deprived defendant of right to present defense; whether defendant demonstrated relevancy of alleged statement; whether defendant laid evidentiary foundation for claim of self-defense; whether there was causal relationship between toxicology report and cause of death of victim; whether there was evidence that defendant had reason to believe deadly physical force was required; claim that trial court violated defendant's right to due process by refusing to give self-defense jury instruction; whether reasonable juror could have concluded that defendant believed himself to be in imminent or immediate danger; whether trial court properly denied defendant's motion for new trial or to dismiss charges for state's late disclosure of firearm related evidence; whether late disclosure constituted bad faith; whether defendant was prejudiced in plea bargaining or trial by late disclosure of evidence; claim that defendant was denied fair trial by prosecutorial impropriety in closing argument; whether prosecutor's improper statement harmed defendant.

State *v.* Joseph V. 712

Sexual assault in first degree; risk of injury to child; conspiracy to commit risk of injury to child; whether trial court improperly sanctioned nonunanimous jury verdict when it denied motion for bill of particulars and request that court give jury specific unanimity instruction as to charge of sexual assault in first degree; claim that information was duplicitous in that it contained allegations that could have been stated as separate offenses; claim that information gave rise to risk that defendant would not be afforded unanimous verdict because different jurors could reach guilty verdict on same count on basis of findings as to different incidents of abuse; claim that trial court abused its discretion when it admitted evidence that defendant and coconspirator had had sexual relationship since childhood.

State *v.* Petersen 646

Failure to appear; whether evidence was sufficient to support defendant's conviction of failure to appear in first degree; claim that evidence of events after defendant arrived at courthouse was irrelevant to whether defendant wilfully failed to appear prior to forfeiture of bond; claim that trial court abused its discretion by admitting evidence of events after defendant arrived at courthouse; claim that trial court improperly admitted testimony of defendant's former attorney; whether trial court properly instructed jury on third element of failure to appear in first degree.

State *v.* Prince A. 413

Sexual assault in first degree; sexual assault in fourth degree; risk of injury to child; constancy of accusation doctrine discussed; whether trial court improperly denied motion to strike testimony of constancy of accusation witness who testified that it was her belief that victim had reported assault contemporaneously, without delay; application of constancy of accusation doctrine as modified in State *v.* Daniel W. E. *(322 Conn. 593), under which constancy of accusation testimony is permissible if defendant challenges victim's credibility on cross-examination.*

State *v.* Richards 387

Murder; whether evidence was sufficient to support conviction; whether jury reasonably could have inferred that defendant intended to cause death of victim and did in fact cause her death; whether trial court committed plain error in failing to give special credibility instruction regarding testimony of cooperating witness; whether state's decision to prosecute defendant in third trial after two previous trials ended in mistrials violated defendant's right to due process.

State *v.* Rosa 480

Murder; assault in first degree; criminal possession of firearm; unpreserved claim that state suppressed DNA evidence that was material to defense in violation of

Brady *v.* Maryland *(373 U.S. 83) and did not disclose it until after jury returned verdict; claim that DNA match between sweatshirt found in vicinity of crime scene and DNA sample of convicted felon constituted material evidence; claim that lack of evidence of DNA match at trial undermined trial's fairness and resulted in verdict that was not worthy of confidence.*

State *v.* Spells (Memorandum Decision) 905

State *v.* Torres (Memorandum Decision) 902

Thomas *v.* Commissioner of Correction (Memorandum Decision) 907

Thompson *v.* Commission of Correction (Memorandum Decision) 901

Turek *v.* Zoning Board of Appeals 122

Zoning; claim that trial court incorrectly concluded that plaintiffs demonstrated legally cognizable hardship; claim that trial court erroneously determined that plaintiffs' application to zoning board for variance qualified under exception to hardship requirement set forth in Adolphson *v.* Zoning Board of Appeals *(205 Conn. 703).*

U.S. Bank, National Assn. *v.* Madison. 267

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

Wachovia Mortgage, FSB *v.* Toczek. 1

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.

Wells Fargo Bank, N.A. *v.* Widow, Heirs and/or Creditors of Estate of Elsi Savvidis (Memorandum Decision) 902

Williams *v.* Commissioner of Motor Vehicles (Memorandum Decision) 907

Windham Solar, LLC *v.* Public Utilities Regulatory Authority 287

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.

SUPREME COURT PENDING CASES

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

STATE *v.* DARIUS ARMADORE, SC 20248
Judicial District of New London

Criminal; Murder; Search and Seizure; Whether Appellate Court Erred in Denying Defendant's Motion for Supplemental Briefing re Admissibility of Cell Site Location Information Under *Carpenter* v. *United States*; Whether Defendant Sufficiently Preserved Evidentiary Claim for Appellate Review. The defendant and Gerjuan Tyus were charged with murder in connection with the shooting death of Todd Thomas outside of Ernie's Caf in New London. The defendants' cases were joined for trial. At trial, the state introduced the testimony of a special agent with the Federal Bureau of Investigation, who testified that cell site location information (CSLI) obtained from Tyus' and the defendant's wireless carriers placed the defendant and Tyus in the vicinity of Ernie's Caf minutes before a 911 call was received reporting the shooting. The defendant and Tyus were convicted of murder, and the defendant appealed. Following oral argument before the Appellate Court (186 Conn. App. 140), the defendant filed a motion seeking permission to file supplemental briefing addressing the United States Supreme Court's recent decision in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), which held that the state generally must obtain a search warrant supported by probable cause before acquiring a person's CSLI from a wireless carrier. The Appellate Court denied the motion for supplemental briefing and affirmed the defendant's murder conviction. In doing so, that court declined to review the defendant's claim that the trial court erred in admitting into evidence hearsay statements made by state's witness Eduardo Guilbert, finding that the defendant's "bald objection" to that testimony—absent any articulation of the basis for his objection—was insufficient to preserve the claim for appellate review. The Supreme Court granted the defendant's petition for certification to appeal, and it will consider whether the Appellate Court properly denied the defendant's motion for permission to file supplemental briefing and whether that court properly declined to review the defendant's evidentiary claim on the basis that it was not properly preserved. The Supreme Court also directed the parties to brief, in addition to the certified questions, the relevance of *Carpenter* and the court's decision in *State* v. *Brown*, 331 Conn. 258 (2018), to the defendant's claim that the CSLI evidence was admitted into evidence in violation of the defendant's fourth amendment rights.

STATE *v.* MANUEL T., SC 20250
Judicial District of Hartford

Criminal; Hearsay; Whether Appellate Court Applied Proper Standard in Determining that Forensic Interview Evidence in Child Sexual Abuse Case was Admissible Under Medical Diagnosis or Treatment Hearsay Exception; Whether Appellate Court Properly Affirmed Exclusion of Text Message Evidence. The defendant was convicted of sexual assault and risk of injury to a child in connection with the sexual abuse of the minor victim, his stepdaughter. He appealed, and the Appellate Court (186 Conn. App. 51) affirmed the judgment of conviction. The Appellate Court rejected the defendant's claim that the trial court improperly admitted video evidence of statements made by the victim during a forensic interview conducted by a clinical services coordinator at Saint Francis Hospital and Medical Center under the medical diagnosis or treatment exception to the hearsay rule. The exception is codified in § 8-3 (5) of the Connecticut Code of Evidence and provides in relevant part that a statement is not excluded by the hearsay rule when it is "made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." The defendant argued that the exception did not apply because the primary, if not singular, purpose of the interview was criminal investigation and prosecution, not medical diagnosis or treatment. The Appellate Court disagreed, noting that it had established in previous cases involving the exception that "the statements of a declarant may be admissible under the . . . exception if made in circumstances from which it may be inferred that the declarant understands that the interview has *a* medical purpose." It accordingly concluded that the trial court did not abuse its discretion in admitting the forensic interview evidence under the exception because it could be reasonably inferred from the circumstances apparent to the victim that she understood the interview to have a medical purpose. The Appellate Court also rejected the defendant's claim that the trial court improperly excluded from evidence screenshots of text messages between the victim and her stepcousin on the ground that they were not properly authenticated. The defendant argued that he had made a prima facie showing that the victim was the author of the messages, and the Appellate Court disagreed, noting that the screenshots lacked context and identifying information and that the stepcousin's trial testimony regarding the messages lacked certain details and was "categorically contradicted" by the victim's trial testimony. The defendant was granted certification

to appeal, and the Supreme Court will decide whether the Appellate Court applied the proper standard in determining the admissibility of the forensic interview evidence under the medical diagnosis or treatment hearsay exception. The Supreme Court will also decide whether the Appellate Court properly concluded that the trial court did not abuse its discretion in excluding the text message evidence.

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

STATE *v.* ALANNA R. CAREY, SC 20273
Judicial District of New Britain

Criminal; Whether Appellate Court Correctly Concluded that, Assuming that Hearsay Testimony was Improperly Admitted, Error was Nonetheless Harmless in Light of Overwhelming Evidence of Consciousness of Guilt. The defendant was convicted of murder in connection with the shooting death of Edward Landry, her ex-boyfriend with whom she had a tumultuous relationship. She appealed, claiming, among other things, that the trial court improperly admitted the testimony of Mark Manganello, a friend of the victim, about conversations that Manganello had with the victim. The state sought to admit the testimony in order to explain the victim's fear of the defendant and to rebut the defendant's claim of self-defense. The defendant argued that Manganello's testimony constituted inadmissible double hearsay. The Appellate Court (187 Conn. App. 438) affirmed the defendants' conviction, concluding that, even assuming that the trial court improperly admitted Manganello's testimony under the state of mind or residual exceptions to the hearsay rule, any error was harmless in light of the overwhelming evidence of the defendant's consciousness of guilt. The Appellate Court noted that the defendant did not call 911 after the shooting, that she left the motel room where the shooting occurred, and that she refused to call 911 even when urged to do so by family members. The Appellate Court also observed that the defendant returned to the motel room and staged the scene and that, when she called 911 approximately three hours after the shooting, she misled the 911 operator by suggesting that the shooting had just occurred, stating "I don't think [he's moving]" and "I didn't even know if I hit him." In light of this evidence, the Appellate Court concluded that any error in the admission of Manganello's testimony was harmless because it did not substantially affect the verdict. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that

the allegedly improper admission of Manganello's hearsay testimony constituted harmless error.

STATE *v.* JOSE RUIZ, SC 20275
Judicial District of New Haven

Criminal; Eyewitness Identification; Whether Appellate Court Properly Concluded that One-on-One Showup Identification Procedure was not Unnecessarily Suggestive. The victim reported that a Hispanic male with a tattoo under his eye and wearing dark clothing had attempted to rob him while he was at a store. When police officers arrived at the store, they detained the defendant, who matched the victim's description, and they placed him in handcuffs in a police cruiser in the parking lot. The officers then took the victim's statement and brought the victim back to the store to identify the defendant. Less than an hour after he initially reported the incident, the victim returned to the parking lot and immediately identified the defendant, who was positioned next to a police cruiser with a spotlight aimed at him, as the robber. The defendant was arrested and charged with, among other things, attempted robbery and threatening. The defendant was serving a term of probation at the time of his arrest and, following the arrest, the defendant was charged with being in violation of his probation. Prior to the violation of probation hearing, the defendant moved to suppress the victim's identification, claiming that the one-on-one showup identification was unnecessarily suggestive and unreliable. The trial court denied the motion after a hearing. Thereafter, the court found that the defendant violated his probation and sentenced him to serve the remaining portion of his sentence. The defendant appealed, claiming that the identification procedure employed by the police was unnecessarily suggestive because he was forced to stand next to a police cruiser, in handcuffs, surrounded by police officers, with a spotlight shone on him. The Appellate Court (188 Conn. App. 413) affirmed the judgment revoking the defendant's probation, concluding that, while the one-on-one showup identification procedure was suggestive, an exigency existed to justify the use of the suggestive procedure such that it was not *unnecessarily* suggestive. The court reasoned that, given the short amount of time between when the incident occurred and when the identification occurred, it was necessary to provide the victim with an opportunity to identify the defendant while his memory of the incident was still fresh and to assist the police in determining whether they had detained the correct person. The defendant was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly con-

cluded that the one-on-one showup identification was not unnecessarily suggestive. The state claims that the Appellate Court properly concluded that the identification procedure was not unnecessarily suggestive and it argues that the Appellate Court's judgment can be affirmed on the alternative ground that the due process standard for the admission of identification evidence at a criminal jury trial does not apply to probation revocation proceedings.

SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION et al., SC 20325
Judicial District of Hartford

Sovereign Immunity; Statute of Limitations; Whether Appellate Court Correctly Concluded that Wrongful Death Action Against the State was Properly Dismissed as Untimely Under § 4-160 (d) Despite Fact that Action was Timely Filed Under § 52-555. Isaiah Boucher was diagnosed with cancer while he was incarcerated and in the care and custody of the Department of Correction, and he underwent surgery. On July 16, 2015, the claims commissioner gave Boucher authorization to bring a medical malpractice action against the state. General Statutes § 4-160 (d) provides that when a person has been granted authorization to sue the state, the action must be brought within one year from the date of the claims commissioner's authorization. Boucher died as the result of the progression of his cancer on September 26, 2015, without having filed an action. On March 23, 2016, the plaintiff was appointed the administratrix of Boucher's estate, and she brought this wrongful death action against the state on September 29, 2016. The state moved to dismiss the action, claiming that it was untimely under § 4-160 (d) and barred by sovereign immunity because it was not filed within one year after authorization was granted. The plaintiff objected, contending that the applicable statute of limitations for wrongful death actions is General Statutes § 52-555, which allows an administrator to bring a wrongful death action within two years from the date of the decedent's death, such that the action was timely notwithstanding the one-year limitation period in § 4-160 (d). The trial court granted the motion to dismiss, and the plaintiff appealed, claiming that the two-year limitation period in § 52-555 supersedes the one-year limitation period in § 4-160 (d). The Appellate Court (189 Conn. App. 93) disagreed and affirmed the judgment of dismissal. The court held that, in order to timely bring an action against the state, a person must comply with both § 4-160 (d) and the applicable statute of limitations. In this certified appeal,

the Supreme Court will decide whether the Appellate Court correctly concluded that the plaintiff's wrongful death action was time barred under § 4-160 (d), notwithstanding the time limitations in § 52-555.

PENNY OUDHEUSDEN *v.* PETER OUDHEUSDEN, SC 20330
Judicial District of Stamford-Norwalk at Stamford

Dissolution of Marriage; Whether Trial Court "Double Dipped" By Awarding Plaintiff Both Income Generated by Defendant's Businesses and Percentages of Those Businesses; Whether Trial Court Abused Its Discretion in Dividing Marital Estate and in Awarding Nonmodifiable Lifetime Alimony. The plaintiff brought this action in 2016, seeking dissolution of the parties' thirty-year marriage. At the time of trial, the plaintiff was fifty-five years old and had not been employed since 1988, when she left her job as a teacher to raise the parties' children. The defendant was fifty-eight years old and owned and managed two businesses, from which he derived all of his income. The trial court rendered a judgment of dissolution, finding that the defendant was at fault for the breakdown of the marriage, that he had been the sole financial support for the family since 1988, and that the plaintiff had made significant nonfinancial contributions to the family. The trial court also found that the defendant's gross annual income was $550,000 and that the fair market value of his businesses was $904,000. The trial court ordered the defendant to pay the plaintiff nonmodifiable lifetime alimony in the amount of $18,000 per month. With respect to the defendant's businesses, the trial court ordered that, while the defendant would retain 100 percent ownership interests, he would pay $452,000, or 50 percent of the businesses' fair market value, to the plaintiff. The defendant appealed, and the Appellate Court (190 Conn. App. 169) reversed the trial court's judgment. The Appellate Court agreed with the defendant that the trial court improperly double counted the defendant's businesses for purposes of the alimony and property division awards. It concluded that the defendant's businesses provided the stream of income by which he was to pay his alimony obligation and that, by awarding 50 percent of their value to the plaintiff, the trial court had left the defendant without resources that would allow him to comply with its financial orders. The Appellate Court also agreed with the defendant that the trial court abused its discretion in dividing the marital estate, reiterating its conclusion regarding the trial court's improper double counting of the defendant's businesses for alimony and property division purposes. It also determined that the trial court's award of nonmodifiable lifetime alimony was unsupported by the facts,

noting that the award did not account for the defendant's ability to generate income as he grew older or the lack of testimony by the plaintiff that her age or physical condition limited her employment prospects. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the trial court erroneously engaged in "double dipping" by awarding the plaintiff alimony from income generated by the defendant's businesses and a percentage of the value of those businesses in its property division. The Supreme Court will also decide whether the Appellate Court correctly concluded that the trial court abused its discretion in dividing the marital estate.

STATE *v.* RAMON A. G., SC 20358
Judicial District of New Britain

Criminal; Jury Instructions; Use of Reasonable Force in Defense of Property; Whether Defendant's Written Request to Charge Preserved Claim of Instructional Error; Whether Defendant Implicitly Waived Claim of Instructional Error Under *State* v. *Kitchens*. The victim and the defendant had been in a romantic relationship and, after their relationship ended, there was a protective order in place that prohibited the defendant from having any contact with the victim. Despite the protective order, the defendant contacted the victim via text message indicating that he wanted to meet. After spending some time at the defendant's apartment, the victim left, taking the keys to the defendant's mother's car with her. She discarded the keys in a bush while she was walking home. The defendant intercepted the victim as she walked home, angrily demanding that she return the car keys. The defendant grabbed the victim's backpack and began to swing her around by it, causing her to fall to the ground. The defendant kicked the victim in the head, back and stomach, and he took the backpack. The defendant was charged with robbery, assault and criminal violation of a protective order in connection with the incident. At trial, the defendant admitted that he had confronted the victim while she was walking back home, but he claimed that all he had wanted was that she return the car keys. He submitted a written request to charge, seeking that the jury be instructed, pursuant to General Statutes § 53a-21, that the defendant was justified in using reasonable physical force upon the victim to the extent that he reasonably believed such force was necessary in order to regain property he reasonably believed to have been stolen. After a preliminary charge conference, the court stated it was granting the defendant's request to charge on use of force in defense of property, and the court circulated draft jury instructions

that indicating that the defense of property instruction applied only to the robbery charge, and not to the assault or criminal violation of a protective order charges. The next day, the defendant's counsel confirmed that he had reviewed the draft instructions and sought only one change unrelated to the defense of property instruction, and the defendant did not object after the trial court instructed the jury that the defense of property "defense" applied only to the robbery charge. The defendant was convicted of assault and criminal violation of a protective order, and he appealed, claiming that the trial court improperly declined to instruct the jury that the defense applied to the assault charge. The Appellate Court (190 Conn. App. 483) rejected that claim and affirmed the defendant's conviction, finding that the defendant failed to preserve the claim for appellate review because neither his written request to charge nor anything else in the record demonstrated that he alerted the trial court to the claimed instructional error. Moreover, the court also held that the defendant had impliedly waived his claim of instructional error under *State* v. *Kitchens*, 299 Conn. 447 (2011). In *Kitchens*, the Supreme Court held that a defendant waives a claim of instructional error when he has sufficient notice of, and acquiesces in, a jury instruction given by the trial court. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly concluded that the defendant failed to preserve his claim of instructional error, and, if not, whether it correctly concluded that he had implicitly waived that claim under *Kitchens*.

VICTOR DEMARIA *v.* CITY OF BRIDGEPORT, SC 20359
Judicial District of Fairfield

Personal Injury; Evidence; Whether Appellate Court Properly Determined that Physician Assistant's Medical Records Were not Admissible Pursuant to § 52-174 (b) Because Defendant was Precluded from Cross-examining Physician Assistant. The plaintiff brought this action against the city of Bridgeport pursuant to the municipal defective highway statute, General Statutes § 13a-149, seeking damages for injuries he sustained when he fell on a city sidewalk. The plaintiff sought medical treatment at a veterans affairs hospital after the fall, where he consulted with his primary care provider, physician assistant Miriam Vitale, and other medical professionals. Vitale wrote a report for the plaintiff's medical file, in which she concluded that the plaintiff's injuries were caused with a reasonable degree of medical certainty by his fall on the sidewalk. Prior to trial, the city filed a motion in limine, seeking to preclude the admission of

Vitale's records, reports, findings and conclusions at trial. The city claimed that Vitale's treatment records and report should not be admitted under General Statutes § 52-174 (b), which provides that a physician assistant's signed reports may be admitted in evidence in personal injury actions as business records. The city argued that Vitale's report was not admissible under the statute because the city would have no opportunity to cross-examine Vitale, as she was prevented from testifying by a federal regulation that forbids Department of Veterans Affairs personnel from providing opinion or expert testimony in any legal proceedings involving veterans affairs. The trial court denied the city's motion in limine, and, following trial, the trial court rendered judgment on the jury's $93,000 verdict for the plaintiff. The city appealed, and the Appellate Court (190 Conn. App. 449) reversed the judgment and remanded the case for a new trial, finding that the trial court improperly admitted into evidence Vitale's treatment records and report under § 52-174 (b). The Appellate Court ruled that because, by virtue of the federal regulation, the city did not have an opportunity to cross-examine Vitale either at a deposition or at trial, the medical records she authored should not have been admitted into evidence. The plaintiff was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly reversed and ordered a new trial on concluding that Vitale's records were improperly admitted into evidence pursuant to General Statutes § 52-174 (b).

FARMINGTON-GIRARD, LLC *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD, SC 20374
Judicial District of Hartford

Zoning; Administrative Appeals; Whether Plaintiff Failed to Exhaust Administrative Remedies in Failing to Appeal Zoning Administrator's Decision Declaring Special Permit Application Void. The plaintiff owns property in the city of Hartford, and it sought to construct a restaurant with a drive-through service window. On December 10, 2012, the plaintiff submitted a special permit application for its proposed restaurant to the defendant zoning commission. The plaintiff's property is located in a B-3 zone that once permitted drive-throughs, but, on December 11, 2012, the defendant changed its zoning map such that the property is now zoned B-4, which prohibits drive-throughs. On December 19, 2012, the city sent the plaintiff a letter stating that the application it submitted was incomplete because it did not contain all the materials required by the zoning regulations. The plaintiff appealed the December 11, 2012 zoning change to the

Superior Court, which found that the change was invalid due to insufficient notice. The defendant again amended its zoning regulations on September 23, 2014, to prohibit drive-throughs. On October 20, 2014, the plaintiff sent a letter to Khara L. Dodds, the city's zoning administrator, with the remaining materials required for its application. On October 28, 2014, Dodds responded that the plaintiff's special permit application was void because it did not contain all the required materials. Dodds' letter stated that, as a result, the plaintiff was required to submit a new application that complied with any new zoning regulations. The plaintiff filed separate zoning appeals in the Superior Court to challenge the defendant's several changes to the zoning regulations and maps, which all had the effect of prohibiting a drive-through at the plaintiff's restaurant. The appeals were consolidated, and the trial court dismissed the appeals, finding that the plaintiff had failed to exhaust its administrative remedies. The trial court found that, while the plaintiff had a statutory right to appeal Dodds' decision declaring its special permit application void to the city's zoning board of appeals, it had failed to do so. The plaintiff appealed, and the Appellate Court (190 Conn. App. 743) affirmed the trial court's judgment. The Appellate Court ruled that the trial court properly concluded that Dodds, as zoning administrator, had the authority under the zoning regulations to declare the plaintiff's application void and that the plaintiff had failed to exhaust its administrative remedies by appealing to the zoning board of appeals. Finally, the Appellate Court rejected the plaintiff's claim that an appeal to the zoning board of appeals would have been futile. The Supreme Court granted the plaintiff's petition for certification to appeal, and it will consider whether the Appellate Court properly held that the plaintiff failed to exhaust its administrative remedies.

STATE *v.* BRUCE JOHN BEMER, SC 20429
Judicial District of Danbury at Danbury

Criminal; Prostitution; Trafficking in Persons; Whether Evidence Sufficient to Show that Defendant Knew that Prostitutes Were Victims of Trafficking; Whether Trial Court Properly Instructed Jury on Coercion. Following a trial to a jury, the defendant was convicted of four counts of patronizing a trafficked person in violation of General Statutes (Rev. to 2016) § 53a-83 (c) and a single count of trafficking in persons in violation of General Statutes § 53a-192a as an accessory. Section 53a-83 (c) provided that patronizing a prostitute was a class C felony if the defendant "knew or reasonably should have known at the time of the offense that [the person he engaged in sexual conduct with] . . . was the victim of conduct of

another person that constitutes . . . trafficking in persons in violation of section 53a-192a." The defendant appeals, claiming that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he knew or should have known that the prostitutes he was patronizing were the victims of conduct of another person that constituted trafficking in persons as contemplated by § 53a-192a. The defendant claims there was no evidence presented at trial that, if the prostitutes were trafficked, the defendant knew or should have known anything about it. The defendant also claims that the state's case was premised on the theory that the prostitutes were trafficked in that they were compelled or induced by "coercion" to engage in prostitution, and he argues that the trial court did not properly instruct the jury concerning "coercion" as defined by General Statutes § 53a-192.

LESLEY FAJARDO et al. *v.* BOSTON SCIENTIFIC CORPORATION et al., SC 20455
Judicial District of Waterbury

Informed Consent; Product Liability; Whether Trial Court Erred in Concluding that Referring Physician did not Assume Duty to Obtain Patient's Informed Consent; Whether the Trial Court Erred in Refusing to Charge Jury on Reasonable Alternative Design Test. The plaintiff's gynecologist, Lee Jacobs, diagnosed her with conditions associated with pelvic organ prolapse and proposed gynecological repair surgery. Jacobs referred the plaintiff to a urologist, Edward Paraiso, who diagnosed her with stress urinary incontinence and recommended surgery to implant Obtryx, a transvaginal mesh sling. The plaintiff consented to both surgeries, and Jacobs and Paraiso performed the separate surgeries on the same day. The plaintiff subsequently brought this action against Jacobs and against Boston Scientific Corporation, the manufacturer of Obtryx (the manufacturer), seeking to recover for injuries she sustained as a result of the implant surgery. She asserted various causes of action, including lack of informed consent and negligent and intentional misrepresentation against Jacobs, and she asserted a product liability claim against the manufacturer. The plaintiff alleged that Jacobs failed to properly advise her of the risks associated with Obtryx and that he misrepresented the risks associated with use of the product in order to induce her to undergo the procedure. She also alleged that Obtryx was defectively designed and that the manufacturer's warning regarding the product was deficient. Jacobs moved for summary judgment, arguing that he had no duty to obtain the plaintiff's informed consent for the surgery that had been performed by Paraiso and that he had made no

misrepresentations regarding Obtryx or the procedure. The trial court granted the motion and rendered judgment in Jacobs' favor, rejecting the plaintiff's claim that Jacobs assumed the duty to obtain her informed consent for Paraiso's surgery because Jacobs noted in the plaintiff's medical file that he had discussed the risks, benefits and alternatives of the implant surgery with her. The plaintiff's product liability claim was subsequently tried to a jury. The jury returned a verdict for the manufacturer, finding that Obtryx was not defectively designed and that, although the manufacturer's warning was defective, the warning was not a proximate cause of the plaintiff's injuries. The plaintiff moved to set aside the verdict and for a new trial, claiming that the trial court improperly denied her request to charge the jury on the reasonable alternative design test. Applying that test, a product is in a defective condition if a reasonable alternative design was available that would have avoided or reduced the risk of harm and the absence of that alternative design renders the product unreasonably dangerous. The trial court denied the motion on the grounds that the plaintiff failed to disclose an expert witness to testify as to reasonable alternative designs and that the plaintiff failed to produce evidence at trial to support the charge. The plaintiff appeals, and the Supreme Court will decide (1) whether the trial court properly determined that only Paraiso had a duty to obtain the plaintiff's informed consent for the implant surgery, and (2) whether the trial court properly refused to charge the jury on the reasonable alternative design test.

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

John DeMeo
Chief Staff Attorney

Notice of Meeting of the Rules Committee of the Superior Court Under Practice Book Section 1-9B

Practice Book § 1-9B provides the Superior Court Rules Committee certain emergency powers in the event that the governor declares a public health emergency or a civil preparedness emergency pursuant to C.G.S. §§ 19a-131a and 28-9 or both. On March 10, 2020, Governor Ned Lamont declared a public health emergency and a civil preparedness emergency pursuant to his statutory authority. As such, and pursuant to Practice Book § 1-9B, on March 20, 2020, Chief Justice Richard A. Robinson called a meeting of the Superior Court Rules Committee at which the Rules Committee shall consider and shall have the power to adopt on an interim basis any new rules and to amend or suspend in whole or in part on an interim basis any existing rules concerning practice and procedure in the Superior Court that the Committee deems necessary in light of the circumstances of the declared emergency.

In compliance with and furtherance of the actions taken by the Chief Justice pursuant to Section 1-9B of the Practice Book, a meeting of the Superior Court Rules Committee was held on Tuesday, March 24, 2020, at 10:00 a.m. Because of the public health concerns raised by the current declared emergencies, and consistent with the spirit of Executive Order No. 7B issued by Governor Lamont which suspended in-person meeting requirements pursuant to the Freedom of Information Act, the meeting was conducted by the Committee electronically by teleconference and is available to the public through an audio recording posted on the Judicial Branch website.

At the meeting, the Rules Committee suspended the rules in Appendix A of this notice and adopted the new rule set out in Appendix B of this notice, effective immediately. Pursuant to Section 1-9B of the Practice Book, suspension of existing rules and the adoption of the new rule shall remain in effect for the duration of the declared emergency or until such time, as soon as practicable, as a meeting of the Superior Court Judges can be convened to consider a vote on the changes.

Hon. Andrew J. McDonald, *Chair*
Rules Committee of the Superior Court

Appendix A (032420)

Superior Court – General Provisions

Chapter 1 – Scope of Rules

- **Sec. 1-24. Record of Off-Site Judicial Proceedings**

Sec. 1-24 requires an on-the-record summary off-site judicial proceedings ‘‘by the next court day.’’ Suspending this rule would allow flexibility for the court given limited resources.

Chapter 2 – Attorneys

- **Sec. 2-11A. Appeal from Decision of Bar Examining Committee concerning Conditions of Admission**

Sec. 2-11A provides that an appeal of a decision of the Connecticut Bar Examining Committee be filed within 30 days of the decision. Given the suspension of statutes of limitation it is consistent to suspend this requirement.

- **Sec. 2-27A. Minimum Continuing Legal Education.**

Sec. 2-27A prescribes the requirements for MCLE. Due to limitations of public gatherings, it is appropriate to suspend this rule.

- **Sec. 2-28B (c) and (e). – Advisory Opinions.**

Sec. 2-28B (c) prescribes timelines by which the Statewide Grievance Committee must issue advisory opinions. Sec. 2-28B (e) states that the failure of the Committee to issue a timely opinion means that the Committee acquiesces that relevant advertisement or communication is compliant with the Rules. Current staffing levels require greater flexibility.

- **Sec. 2-32. Filing Complaints against Attorneys; Action; Time Limitation**

Sec. 2-32 contains various deadlines, including deadlines that are akin to a statute of limitations. Sec. 2-32 (a) requires the statewide bar counsel to review and process complaints within seven days of receipt. Current staffing levels require greater flexibility.

- **Sec. 2-35. Action by Statewide Grievance Committee or Reviewing Committee**

Sec. 2-35 contains various deadlines including a requirement that Disciplinary Counsel has 14 days to respond to a request for review. Current staffing levels require greater flexibility.

- **Sec. 2-36. Action by Statewide Grievance Committee on Request for Review**

Sec. 2-36 requires that the Statewide Grievance Committee must issue its decision on a request for review within 60 days. The current situation requires greater flexibility.

- **Sec. 2-38. Appeal from Decision of Statewide Grievance Committee or Reviewing Committee Imposing Sanctions or Conditions**

Sec. 2-38 provides that an appeal of a grievance decision must be taken within 30 days. Given the suspension of statutes of limitation it is consistent to suspend this requirement.

- **Sec. 2-39 (b). Reciprocal Discipline**

Sec. 2-39 (b) sets forth time limits with regard to reciprocal discipline. The current situation requires greater flexibility.

- **Sec. 2-40 (f). Discipline of Attorneys Found Guilty of Serious Crimes in Connecticut**

Sec. 2-40 (f) requires that a hearing on a presentment complaint shall be held within sixty days of the filing of the presentment. The current situation requires greater flexibility. Note that it is not recommend that the Sec. 2-40 (d) be suspended. Sec. 2-40 (d) requires that the ''any attorney found guilty of any crime shall send written notice of the finding of guilt to the disciplinary counsel and the Statewide Grievance Committee, by certified mail, return receipt requested, or with electronic delivery confirmation, within ten days of the date of the finding of guilt.''

- **Sec. 2-41 (f). Discipline of Attorneys Found Guilty of Serious Crimes in Another Jurisdiction.**

Sec. 2-41 (f) Sec. 2-40 (f) requires that a hearing on a presentment complaint shall be held within sixty days of the filing of the presentment. The current situation requires greater flexibility. Note that it is not recommend that the Sec. 2-41 (d) be suspended. Sec. 2-41 (d) requires that the ''any attorney found guilty of any crime in another jurisdiction shall send written notice of the finding of guilt to the disciplinary counsel and the Statewide Grievance Committee, by certified mail, return receipt requested, or with electronic delivery confirmation, within ten days of the date of the finding of guilt.''

- **Sec. 2-47 (a). Presentments and Unauthorized Practice of Law Petitions**

Sec. 2-47 (a) requires a hearing on the merits of the complaint shall be held within sixty days of the date a complaint was filed with the court. The current situation requires greater flexibility.

- **Sec. 2-53 (h) and (j). Reinstatement after Suspension, Disbarment or Resignation**

Sec. 2-53 (h) requires that the Statewide Grievance Committee and the Office of the Chief Disciplinary Counsel file a report with the standing committee within 60 days of referral from the chief justice. Sec. 2-53 (j) requires that the standing committee shall complete its work within 180 days of the referral. The current situation requires greater flexibility.

- **Sec. 2-70 (a). –Client Security Fund Fee**

Sec. 2-70 (a) requires the collection of the Client Security Fund Fee. Suspension of the rule would allow for flexibility in assessing the fee.

- **Sec. 2-71 (a) (3). –Eligible Claims**

Sec. 2-71 (a) (3) requires that claims for reimbursement be filed within four years. Given the suspension of statutes of limitation it is consistent to suspend this requirement.

- **Sec. 2-75 (a). –Processing Claims**

Sec. 2-75 (a) sets forth timelines by which the client security fund committee and attorney must take certain actions. The current situation requires greater flexibility.

- **Sec. 2-79 (a). –Enforcement of Payment of Fee**

Sec. 2-79 (a) sets out the timeframe for administrative suspensions. The current situation requires greater flexibility.

Chapter 3 – Appearances

- **Sec. 3-2. Time To File Appearance**

Appearances must be filed within two days of the return day to avoid the filing of a Motion for Default for Failure to Appear. We propose suspending this requirement as no default orders are issuing at this time.

Chapter 4 – Pleadings

- **Sec. 4-5 (b). Notice Require for Ex Parte Temporary Injunctions**

Temporary Injunction orders expire 30 days after issuance unless the court holds a hearing and makes factual findings. This may not be possible under prevailing circumstances.

Chapter 6 – Judgments

- **Sec. 6-1 (c). Statement of Decision; When**

This section involves appeals of § 14-3 dismissals for lack of diligence and requires parties to file briefs within 20 days of filing the appeal. This isn't a problem if they are e-filed or filed on paper (by excluded attorneys and self-represented parties). The problem is that the judicial authority is required to issue a memorandum of decision within 20 days of briefs being filed. It is likely that the appeals will not be processed in a timely manner, if at all, and that judges will be unable to meet this deadline.

Chapter 7 – Clerks; Files and Records

- **Sec. 7-4B (d). Motion To File Record under Seal**

Sec. 7-4B (d) provides that the clerk shall return or destroy a lodged record upon the expiration of the appeal period. Given the current situation destruction on such a tight schedule may not be advisable.

- **Sec. 7-13. –Criminal/Motor Vehicle Files and Records**

Sec. 7-13 addresses the destruction of files and mandates the destruction of certain criminal files. The timelines for such destruction may not be appropriate given the current situation.

- **Sec. 7-14. –Reports from Adult Probation and Family Division**

Sec. 7-14 addresses the destruction of Reports from the Adult Probation and Family Division. The timelines for such destruction may not be appropriate given the current situation.

- **Sec. 7-17. Clerks' Offices**

Sec. 7-17 provides that each clerk's office shall be open at least five days per week, except during weeks with a legal holiday. The current situation requires that the Chief Court Administrator have greater flexibility to operate the clerk's offices and courthouses.

Superior Court – Procedure in Civil Matters

Chapter 11 – Motions, Requests, Orders of Notice and Short Calendar

- **Sec. 11-14. –Short Calendar; Frequency; Time; Lists**

This section requires short calendar to be held at least once a month. Unfortunately, we may not be able to comply with this.

- **Sec. 11-19 (a). –Time Limit for Deciding Short Calendar Matters**

This section imposes a 120 day time limit for decisions on short calendar matters. Currently, all civil short calendars are cancelled, but even if this were to change, we may not be able to process the orders due to reduced staffing levels even if they are completed. Also, those judges who are unable to work from home will not be able to complete their decisions.

- **Sec. 11-20A. Sealing Files or Limiting Disclosure of Documents in Civil Cases**

According to this section, all sealing motions must be placed on short calendar within 15 days of filing. Until short calendar is recommenced, this section cannot be complied with.

Chapter 17 – Judgments

- **Sec. 17-30 (a) and (b). –Summary Process; Default and Judgment for Failure To Appear or Plead**

Subsection (a) requires summary process defendants to appear within two days of the return day or be subject to being defaulted for failure to appear. Under subsection (b), if the defendant fails to plead within two days of return date, the plaintiff can file a motion for judgment and if no responsive pleading is filed within three days of the motion, the judicial authority shall enter judgment of possession. Clearly, we don't want these provisions to be enforced against tenants right now.

Chapter 23 – Miscellaneous Remedies and Procedures

- **Sec. 23-20. Review of Civil Contempt**

This section requires that those held on civil contempt orders be brought to court within 30 days for a hearing. This may not be possible under current circumstances.

- **Sec. 23-68. Where Presence of Person May Be by Means of an Interactive Audiovisual Device**

Suspension recommended to permit the Chief Court Administrator to issue orders or directives which allow that during the pendency of the Governor's public health emergency and civil preparedness emergency declarations of March 10, 2020 a judicial authority may, after giving due consideration to public health concerns, order that any person be present for any proceeding in any civil matter, including all proceedings within the jurisdiction of the small claims section, or any family matter, including all proceedings within the jurisdiction of the family support magistrate division, by means of an interactive audiovisual device if the interests of justice permit such appearance.

Chapter 24 – Small Claims

- **Sec. 24-15 (a). –Scheduling of Hearings; Continuances**

This section requires Small Claims hearings to be held between six and 45 days after the answer date. This is clearly impossible right now given the fact that Small Claims court is suspended.

Superior Court – Procedure in Family Matters

Chapter 25 – General Provisions

- **Sec. 25-3. Action for Custody of Minor Child**

This rule requires hearings on new custody applications to be held no more than thirty days from filing. We are continuing, and should continue, to accept new filings and the clerks must set dates for hearings and for service of the papers on the opposing party, but under current circumstances it is not feasible to set a hearing date within the thirty-day time limit.

- **Sec. 25-4. Action for Visitation of Minor Child**

This rule requires hearings on new visitation applications to be held no more than thirty days from filing. We have the same concern as for custody applications described above.

- **Sec. 25-17. –Date for Hearing**

This rule requires that a motion to strike in a family case be placed on a short calendar within fifteen days. Such motions in family are very rare, but if one were to be filed the court likely would be unable to meet the time requirement.

- **Sec. 25-59A. Sealing Files or Limiting Disclosure of Documents in Family Matters**

This rule, in subsection (f) (1), requires that a motion to seal a file in a family case be placed on a short calendar within fifteen days, which likely would not be possible.

Superior Court – Procedure in Family Support Magistrate Matters

Chapter 25a – Family Support Magistrate Matters

- **Sec. 25a-2. Prompt Filing of Appearance**

This section requires appearances in Title IV-D child support matters (which could include appearances by Support Enforcement Services), to be filed ''promptly,'' which may not be possible.

- **Sec. 25a-3. Withdrawal of Appearance; Duration of Appearance**

This section establishes automatic time periods for the withdrawal of appearances which may not be feasible and may result in the premature elimination of attorney appearances.

- **Sec. 25a-14. –Continuances when Counsel's Presence or Oral Argument Required**

This section only allows for continuances from certain short calendar matters for good cause shown, unless the parties agree or the court orders otherwise.

- **Sec. 25a-15. Statements To Be Filed**

This rule imposes on parties and counsel the obligation to file certain documents before a hearing. It may not be necessary to address this as it involves time periods binding on the parties, not the court, and would likely be deemed moot if the hearing did not go forward due to the limited court operations.

- **Sec. 25a-17. Motion To Open Judgment of Paternity by Acknowledgment**

This rule requires hearings on motions to open acknowledgments of paternity to be held no more than thirty days from filing. Under current circumstances it is not feasible to set a hearing date within the thirty-day time limit.

- **Sec. 25a-19. Standard Disclosure and Production**

This rule imposes on parties and counsel the obligation to exchange certain documents by way of discovery within thirty days of a request or order. It involves time periods binding on the parties, not the court.

- **Sec. 25a-23. Answers to Interrogatories**

This rule imposes on parties and counsel the obligation to respond to interrogatories within sixty days. It also involves time periods binding on the parties, not the court, although a request for extension of time may be filed with the court.

Superior Court – Procedure in Juvenile Matters

Chapter 30 – Detention

- **Sec. 30-7. Place of Detention Hearings**

Pursuant to the Branch's consolidation of courts, only two of the 11 juvenile courthouses remain open. Priority 1 delinquency cases are being heard only in the Hartford and Bridgeport juvenile courthouses.

Chapter 31a – Delinquency and Family with Service Needs Motions and Applications

- **Sec. 31a-1A (a). Continuances and Advancements**

Non-priority 1 cases are not being processed or assigned court dates.

Chapter 34a – Pleadings, Motions and Discovery: Neglected, Abused and Uncared for Children and Termination of Parental Rights

- **Sec. 34a-1 (c). Motions, Requests and Amendments**

Termination of Parental Rights (TPRs) are now deemed non-priority 1 cases as are all other child protection matters except for Orders of Temporary Custody (OTCs).

- **Sec. 34a-5. Continuances and Advancements**

Same as above.

Chapter 35a – Hearings Concerning Neglected, Abused and Uncared for Children and Termination of Parental Rights

- **Sec. 35a-12 (b), (c), and (e). Protective Supervision —Conditions, Modification, and Termination**

Protective supervision cases require an in court review hearing no less than thirty days prior to protective supervision ending. These are not priority 1 cases and therefore cannot be scheduled or addressed.

- **Sec. 35a-14 (c), (f), and (h). Motions for Review of Permanency Plan**

Children adjudicated abused/neglected and/or uncared for and committed to DCF until further order of the court. Nine months after commitment (or date of entering DCF care) DCF must file permanency plan and a court hearing to approve a permanency plan must occur every 12 months. Adherence to such a timetable is not possible under the present circumstances. These are not priority 1 cases.

- **Sec. 35a- 21 (a) and (c). Appeals in Child Protection Matters**

Child protection appeals, except those involving OTC, are not priority 1 cases.

Superior Court – Procedure in Criminal Matters

Chapter 37 – Arraignment

- **Sec. 37-1. Arraignment; Timing**

The request is being made to allow flexibility in the timing of the presentment of a defendant before a court. In the event that arraignment procedures needed to be modified to a more restricted schedule, the suspension of the rule would permit the arraignments to be conducted in a manner consistent with the court's ability to operate.

- **Sec. 37-12. Defendant in Custody; Determination of Probable Cause**

The courts have continued to maintain probable cause findings, specifically as it relates to weekend arrests. In the event that it is not possible to have this finding within 48 hours, the suspension of the rule would permit the court to make the probable cause determination at the soonest date available under the circumstances. The suspension would also address the sealing requirement so as not to require a party to respond within seven days for recommendations as to the court order and also allows the court to continue its sealing order beyond fourteen days. This suspension of the rule would allow for appropriate notice and a full hearing to take place on the merits of any sealing order.

Chapter 38 – Pretrial Release

- **Sec. 38-6. Appearance after Release**

The suspension of the rule only applies to a defendant who is not in custody. Currently, the courts are receiving all domestic arraignments on the next court date. All domestic arraignments have protective orders issued by law enforcement which remain in effect until the defendant is seen before the court. In the event that it is not possible to conduct an arraignment on the next court date, the suspension of the rule would allow for the court to schedule the first presentment on a different, but still expedited date. In cases where the defendant is not in custody and it is not a domestic arraignment, the suspension of the rule requiring an initial appearance of not more than fourteen days allows the courts to maintain appropriately sized dockets and provides notice to all parties as to the scheduling of the cases.

- **Sec. 38-18. –Review of Detention Prior to Arraignment, Trial or Sentencing**

The rule requires the review of any detained person's bail within 45 days and within 30 days if the person is held on a misdemeanor or class D felony. The suspension of the rule would remove mandatory bail reviews within these time restraints. A court could still conduct bail reviews by way of motion or through a video-conference at an appropriately scheduled date.

- **Sec. 38-21. –Forfeiture of Bail and Rearrest Warrant**

The rule requires any person whose bond has been forfeited to be returned to custody within 6 months in order to release a surety from their bond obligation. The suspension of the rule would allow the surety additional time to locate the person and is consistent with the court focusing on designated priority cases.

Chapter 40 – Discovery and Depositions

- **Sec. 40-11. Disclosure by the Prosecuting Authority**

The rule requires the prosecution to disclose certain materials within 45 days from the filing of a request to disclose. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

- **Sec. 40-13. Names of Witnesses; Prior Record of Witnesses; Statements of Witnesses**

The rule requires the prosecution to disclose the names of witnesses, the records of witnesses and the statements of witnesses within 45 days from the filing of a request to produce these materials. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

- **Sec. 40-13A. Law Enforcement Reports, Affidavits and Statements**

The rule requires the prosecution to disclose certain materials within 45 days from the filing of a request to disclose. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

- **Sec. 40-17. Defense of Mental Disease or Defect or Extreme Emotional Disturbance; Notice by Defendant**

The rule requires the defendant, when relying on one of the above-captioned affirmative defenses, to notice the prosecution within 45 days of the intention to use said defense. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

- **Sec. 40-18. –Notice by Defendant of Intention To Use Expert Testimony regarding Mental State; Filing Reports of Exam**

The rule requires the defendant to notice the prosecution within 45 days of the intention to use an expert witness and to produce the report of the expert within 5 days of receipt. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

- **Sec. 40-21. Defense of Alibi; Notice by Defendant**

The rule requires the defendant to notice the prosecution within 20 days after written demand of the intention to use said defense. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have the court direct the time period in which the defense needs to comply with the notice.

- **Sec. 40-22. –Notice by Prosecuting Authority concerning Alibi Defense**

The rule requires the prosecution to notice the defense within 20 days, but no less than 10 days before trial, the use of witnesses to rebut an alibi defense. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have the court direct the time period in which the prosecution needs to comply with the notice.

- **Sec. 40-26. Disclosure by the Defendant; Information and Materials Discoverable by the Prosecuting Authority as of Right**

The rule requires the prosecution to disclose certain materials within 45 days from the filing of a request to disclose. By suspending the rule, it would allow the court to permit an extension of this time period without requiring each case to have a finding of good cause shown for the delay.

Chapter 41 – Pretrial Motions

- **Sec. 41-5. –Time for Filing Motion To Suppress**

The rule requires the filing of pretrial motions not later than 10 days after the first pretrial conference. By suspending the rule, the court will not be required to grant permission for an extension of time due to the current circumstances.

Chapter 42 – Trial Procedure

- **Sec. 42-49A. Sealing or Limiting Disclosure of Documents in Criminal Cases**

The rule pertains to any motion sealing or limiting order on criminal documents which must be held not less than 15 days following the filing of the motion and must notice the public as to the date, time and place of the hearing. By suspending the rule, it would allow the court to provide appropriate notice and to schedule a full hearing to take place on the merits of any sealing order.

- **Sec. 42-52. –Time for Filing Motion for Judgment of Acquittal**

The rule pertains requiring the motion to be filed within 5 days after a mistrial or verdict. By suspending the rule for those cases affected by the current situation, the court would be allowed to extend the timing as it deems appropriate.

- **Sec. 42-54. – Time for Filing Motion for New Trial**

The rule pertains to requiring the motion to be filed within 5 days after a verdict. By suspending the rule for those cases affected by the current situation, the court would be allowed to extend the timing as it deems appropriate.

Chapter 43 – Sentencing, Judgment and Appeal

- **Sec. 43-24. – Time for Filing Application for Sentence Review**

By suspending the rule, it would dispense with the 30 day time requirement for filing an application for sentence review. Because of the limited courthouse access, some filings may not be able to be processed within the time frame allowed.

- **Sec. 43-33. –Appointment of Initial Counsel for Appeal by Indigent Defendant**

The rule requires the application to be heard within 20 days. By suspending the rule, it will allow the courts to maintain appropriately sized dockets and not require a finding of good cause shown under the circumstances.

- **Sec. 43-39. Speedy Trial; Time Limitations**

The suspension of the rule would allow the court flexibility in scheduling a trial, in the event that trials are restricted. The suspension would still allow courts the ability to schedule trials as expeditiously as possible.

Chapter 44 – General Provisions

- **Sec. 44-10A. – Where Presence of Defendant May Be by Means of an Interactive Audiovisual Device**

Suspension recommended to permit the Chief Court Administrator to issue orders or directives which allow that during the pendency of the Governor's public health emergency and civil preparedness emergency declarations of March 10, 2020 a judicial authority may, after giving due consideration to public health concerns, order that any person be present for any proceeding in any criminal matter by means of an interactive audiovisual device if the interests of justice permit such appearance.

- **Sec. 44-13. –Scheduling of Proceedings before Trial; Continuances**

The rule requires that a continuance shall not exceed two weeks. The suspension of the rule would give the courts the flexibility necessary to maintain appropriately sized dockets and attend to those matters designated as priority cases.

- **Sec. 44-14. –Assignments for Plea in Judicial District Court Location**

The rule requires that the assignment to a Judicial District shall not exceed two weeks. The suspension of the rule would give the courts the flexibility necessary to maintain appropriately sized dockets and attend to those matters designated as priority cases.

- **Sec. 44-27. Hearing of Infractions, Violations to Which Not Guilty Plea Filed**

The rule requires that within 10 days of filing a not guilty plea, the clerk shall schedule a hearing in the matter. By allowing the suspension of the rule, it will allow the courts to delay scheduling of infractions so that they may focus on those matters designated as priority cases.

- **Sec. 44-30. –Hearing by Magistrates of Infractions and Certain Motor Vehicle Violations**

Suspension of the rule will dispense with the 5 day time requirement imposed on the defendant to file a trial de novo during this time period.

Appendix B (032420)

(New) Adjustment or Suspension of time or location requirement

The Chief Administrative Judge of each division, in consultation with the appropriate Presiding Judge of each Judicial District, if possible, and subject to the approval of the Chief Court Administrator, shall have the authority to adjust or suspend any time or location requirement in the Practice Book. Any such adjustment or suspension, as approved by the Chief Court Administrator, shall be effective immediately upon the issuance of an order by said Chief Administrative Judge; provided, however that (1) any such adjustment or suspension shall be reported to the Rules Committee of the Superior Court and (2) the Rules Committee may, on a prospective basis only, reject any such adjustment or suspension. Absent such rejection, any adjustment or suspension made hereunder shall be effective until further notice.

COMMENTARY:

It is expected that any adjustment or suspension under this rule shall be promptly reported to the Rules Committee of the Superior Court.

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the forbearance section of the CHESLA Loan Program Manual (''Program Manual'') by adding the following subsection to Section G.8:

''(d) The provisions of Section G.8. may be modified at the discretion of the Executive Director of the Authority.''

Such amendment shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendment to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board, provided that in the event the publication requirements of Connecticut General Statutes § 1-121 are not required after March 24, 2020, such amendment shall be effective immediately.

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

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

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Refi CT Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the CHESLA Refi CT Loan Program Manual (''Program Manual'') by adding the following sentence at the end of the definition for Hardship Forbearance:

''These provisions may be modified at the discretion of the Executive Director of the Authority.''

Such amendment shall become effective 30 days after this notice has been published in the Connecticut Law Journal, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendment to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board, provided that in the event the publication requirements of Connecticut General Statutes § 1-121 are not required after March 24, 2020, such amendment shall be effective immediately.

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

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

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.