CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXI No. 41 April 7, 2020 75 Pages

Table of Contents

CONNECTICUT REPORTS

Cooke *v.* Commissioner of Correction (Order), 335 C 911 15
Diaz *v.* Commissioner of Correction, 335 C 53 3
Habeas corpus; claim of ineffective assistance of counsel; certification to appeal from habeas court's judgment; certification from Appellate Court; whether Appellate Court improperly raised and decided unpreserved issue of waiver without first providing parties opportunity to be heard on that issue, in contravention of this court's decision in Blumberg Associates Worldwide, Inc. *v.* Brown & Brown of Connecticut, Inc. *(311 Conn. 123); proper scope of order of remand to Appellate Court, discussed.*
Edward Kowalsky Revocable Trust *v.* B & D Properties, LLC (Order), 335 C 914 18
State *v.* Albert D. (Order), 335 C 913 17
State *v.* Francis (Order), 335 C 912 16
State *v.* Mitchell (Order), 335 C 912 16
State *v.* Randy G. (Order), 335 C 911 15
State *v.* Torres (Order), 335 C 913 17
State *v.* Watson (Order), 335 C 912 16
Streifel *v.* Bulkley (Order), 335 C 911 15
Thompson *v.* Commissioner of Correction (Order), 335 C 913 17
Volume 335 Cumulative Table of Cases 19

CONNECTICUT APPELLATE REPORTS

State *v.* Fortin, 196 CA 805 . . . . . 23A
Manslaughter in first degree with firearm; carrying pistol without permit; motion to preclude; motion for mistrial; claim that trial court improperly allowed state to introduce evidence of several instances of misconduct involving defendant's prior use of firearm that was used to shoot and kill victim; whether misconduct evidence lacked probative value and was unduly prejudicial to defendant because his offer to stipulate that he had shot victim with firearm obviated state's need to prove identity; whether defendant's reliance on Old Chief *v.* United States *(519 U.S. 172) for proposition that trial court erred in not balancing his offer to stipulate with prejudicial effect of misconduct evidence was availing; claim that trial court abused its discretion in denying motion for mistrial; unpreserved claim that defendant's constitutional right to confrontation was violated when trial court allowed state trooper to testify that town's first selectman told her that defendant did not have temporary town permit to carry firearm that he used to shoot and kill victim.*
Vaicunas *v.* Gaylord, 196 CA 785 . . . . . 3A
Undue influence; adverse possession; tortious interference with expectation of inheritance; motion to set aside verdict; whether trial court abused discretion in setting aside jury verdict as to count of adverse possession; whether trial court abused discretion in denying offer of evidence of character in form of opinion testimony; claim that trial court improperly charged jury as to count of undue influence.
Volume 196 Cumulative Table of Cases 43A

(continued on next page)

MISCELLANEOUS

Policies for the Establishment and Maintenance of a System of Law Libraries. 1B

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

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

CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION (SC 20233)

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

Syllabus

The petitioner, who had been convicted of the crime of home invasion, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance of counsel. The habeas court denied the petitioner's habeas petition, concluding, inter alia, that the petitioner's trial counsel did not provide ineffective assistance by failing to file a motion to dismiss the home invasion charge, to which the petitioner had pleaded guilty pursuant to *North Carolina* v. *Alford* (400 U.S. 25). On the granting of certification, the petitioner appealed from the habeas court's judgment to the Appellate Court, claiming that the habeas court incorrectly concluded that his trial counsel's failure to file a motion to dismiss the home invasion charge did not constitute ineffective assistance. In affirming the habeas court's judgment, the Appellate Court declined to address the merits of the petitioner's ineffective assistance claim, concluding, instead, that the petitioner had waived that claim by virtue of the entry and acceptance of his *Alford* plea. On the granting of certification, the petitioner appealed to this court. *Held* that the Appellate Court improperly raised and decided the unpreserved issue of waiver without first providing the parties an opportunity to be heard on that issue, in contravention of this court's decision in *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.* (311 Conn. 123) (*Blumberg*), the record having reflected that the issue of waiver was not raised by the parties in the habeas court or before the Appellate Court, that the Appellate Court did not instruct the parties to file supplemental briefs before or after oral argument or otherwise instruct the parties to be prepared to discuss the waiver issue at oral argument, and that the waiver issue served as the dispositive ground on which the Appellate Court affirmed the habeas court's judgment; moreover, this court rejected the petitioner's claim that, on remand to the Appellate Court, that court should consider only his ineffective assistance claim and not the waiver claim, as the Appellate Court has discretion, within the parameters set forth in *Blumberg*, to determine

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

whether to raise and decide an issue that was never the subject of a claim by the parties; accordingly, this court reversed the Appellate Court's judgment and remanded the case to that court with direction to determine, following briefing by the parties and in a manner otherwise consistent with this court's decision in *Blumberg*, whether it has discretion to raise and decide the waiver issue sua sponte and whether it should address the petitioner's ineffective assistance claim.

Argued November 20, 2019—officially released April 7, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Elgo* and *Bear*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Matthew Gedansky*, state's attorney, and *Melissa Patterson* and *David M. Carlucci*, assistant state's attorneys, for the appellee (respondent).

Opinion

PALMER, J. The petitioner, Raul Diaz, appeals, following our grant of certification, from the judgment of the Appellate Court, which affirmed the judgment of the habeas court denying his amended petition for a writ of habeas corpus alleging ineffective assistance of counsel. See *Diaz* v. *Commissioner of Correction*, 185 Conn. App. 686, 687, 691, 198 A.3d 171 (2018). The petitioner asserts, and the respondent, the Commissioner of Correction, agrees, that the Appellate Court improperly raised and decided the unpreserved issue of waiver without first providing the parties with an opportunity to be heard on that issue in contravention of *Blumberg*

Associates Worldwide, Inc. v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014) (*Blumberg*). We agree and, accordingly, reverse the judgment of the Appellate Court and remand the case to that court for further proceedings in accordance with this opinion.

The following facts and procedural history, as set forth in the opinion of the Appellate Court, are relevant to our resolution of this appeal. "On October 27, 2011, the petitioner entered the Ellington home of the seventy-seven year old victim when he was not there. While the petitioner was still in the home, the victim returned. The petitioner asked the victim to step aside so that he could flee the home, but the victim refused. The petitioner struck the victim with a jewelry box, resulting in a laceration [to the victim's] head and a broken nose and cheekbone. After taking the victim's wallet and car keys, the petitioner fled in the victim's car but was later apprehended.

"The petitioner was charged in a substitute information with two counts of home invasion in violation of General Statutes § 53a-100aa,[1] two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), one count of larceny in the third degree in violation of General Statutes § 53a-124, one count of larceny in the fourth degree in violation of General Statutes § 53a-125, one count of assault in the second degree in violation of General Statutes § 53a-60b, and one count of robbery in the first degree involving a dangerous instrument in violation of General Statutes § 53a-134 (a) (3). On April 26, 2013, after the petitioner entered into a plea agreement with the state, he pleaded guilty under the *Alford* doctrine[2] to one count of home

[1] "The second of the home invasion charges was added by the state immediately prior to the trial. All references herein to the home invasion charge are to the first home invasion charge." *Diaz* v. *Commissioner of Correction*, supra, 185 Conn. App. 688 n.3.

[2] "See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him

invasion in violation of § 53a-100aa (a) (2). After a thorough canvass, the court accepted the plea, rendered a judgment of conviction and sentenced the petitioner in accordance with the plea agreement to twenty-five years imprisonment. The petitioner did not appeal from the judgment of conviction.

"Thereafter, the petitioner commenced this habeas action. On February 25, 2016, the petitioner filed an amended petition for a writ of habeas corpus, alleging, [inter alia], that his trial counsel had rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge on the ground that it was duplicative of the first degree burglary charge. After a trial, the habeas court issued a memorandum of decision [and denied] the petition . . . [agreeing with the respondent] that the petitioner had failed to establish that his trial counsel deficiently performed by not filing a motion to dismiss the home invasion charge. The habeas court found that, although the petitioner's trial counsel agreed with the state's assessment that the petitioner violated the home invasion statute, he nonetheless argued, [albeit] unsuccessfully, to the [trial] court and the prosecutor that the home invasion charge should be dropped, and in any event that the petitioner should be allowed to plead to the first degree burglary charge instead of the home invasion charge. Moreover, the habeas court agreed with his trial counsel's testimony . . . that there was no good faith basis on which to bring a motion to dismiss the home invasion charge in the trial court. The habeas court further concluded that, even if the petitioner's trial counsel had deficiently performed, which he had not, the petitioner was not prejudiced." (Footnote added; footnote in original.) *Diaz* v. *Commissioner of Correction*, supra, 185 Conn. App. 687–89.

is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, supra, 185 Conn. App. 687 n.1; accord *State* v. *Simms*, 211 Conn. 1, 3–4, 557 A.2d 914 (1989).

The petitioner thereafter filed a petition for certification to appeal, which the habeas court granted, and the petitioner then appealed to the Appellate Court. The petitioner claimed on appeal that the habeas court incorrectly concluded that his trial counsel's failure to file a motion to dismiss the home invasion charge did not constitute ineffective assistance of counsel. Id., 689. In response, the respondent renewed the argument that he had made in the habeas court, namely, that the petitioner's claim of ineffective assistance lacked merit. In its opinion affirming the judgment of the habeas court, however, the Appellate Court did not address the merits of the petitioner's contention that his counsel had rendered ineffective assistance. Rather, the Appellate Court affirmed the habeas court's judgment on an altogether different ground, namely, that the petitioner had waived his ineffective assistance claim by virtue of the entry and acceptance of his *Alford* plea. Id., 691. The Appellate Court resolved the appeal on the basis of waiver even though the respondent had not raised a claim of waiver, either in the habeas court[3] or in the Appellate Court, and without first affording the parties the opportunity to be heard on the issue of waiver.

We thereafter granted the petitioner's petition for certification to appeal to this court, limited to the following issue: "Did the Appellate Court properly affirm the judgment of the habeas court on a legal ground that was not raised or decided in the habeas court and never raised or briefed by the parties in the Appellate Court?"

[3] In his brief to this court, the respondent contends that he did not waive or otherwise abandon a claim that the petitioner had waived his claim of ineffective assistance because, in his return, which the respondent filed in response to the petitioner's amended habeas petition, he alleged that the petitioner's ineffective assistance claim should be dismissed for failure to state a claim and on the basis of procedural default due to his *Alford* plea. We express no view on this contention. Nevertheless, we do not understand the respondent to be disputing that he did not distinctly raise a claim of waiver in the habeas court.

Diaz v. *Commissioner of Correction*, 330 Conn. 954, 198 A.3d 86 (2018). We answer that question in the negative.

"[T]he Appellate Court's decision to raise an unpreserved issue sua sponte in exceptional circumstances is subject to review of abuse of discretion." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 167–68. It is well settled that "appellate courts generally do not consider issues that were not raised by the parties . . . [because] our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues." (Citation omitted; internal quotation marks omitted.) *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016); see also *Murphy* v. *EAPWJP, LLC*, 306 Conn. 391, 399, 50 A.3d 316 (2012) (claim must be distinctly raised at trial to be preserved for appeal). "[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotations marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 142.

"[W]ith respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised . . . the reviewing court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided." Id., 128.

Exceptional circumstances exist when "the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims."[4] Id., 160. To satisfy concerns of fundamental fairness, "at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a *meaningful* opportunity . . . . The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response." (Citation omitted; emphasis in original.) *State* v. *Connor*, supra, 321 Conn. 372; see also *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 126 n.9, 172 A.3d 1228 (2017) ("*Blumberg* . . . calls for supplemental briefing when a reviewing court raises an *unpreserved* issue *sua sponte*" (emphasis in original)). Additionally, "[p]rejudice may be found, for example, when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 156–57.

In accordance with these principles, a reviewing court has discretion to determine, on a case-by-case basis, whether consideration of an unpreserved issue sua sponte is appropriate. Moreover, "we will not reverse the Appellate Court's decision to raise [an unpreserved issue] sua sponte simply because we might have reached a different conclusion." Id., 169. In other words, we will not second-guess the Appellate Court's

[4] In *Blumberg*, we provided a nonexhaustive list of circumstances that may qualify as exceptional circumstances. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 158–60. In doing so, we observed that the difficulty in formulating clear and consistent rules governing the review of unpreserved claims "reflects the reality that the decision to review an unpreserved claim is necessarily case specific, and it is impossible to anticipate all of the circumstances that may frame the presentation of an unpreserved claim." Id., 160 n.31.

decision to raise an unpreserved issue, as long as that decision is reasonable. Like this court, however, the Appellate Court must articulate "specific reasons, based on the exceptional circumstances of the case, to justify a deviation from the general rule that unpreserved claims will not be reviewed." Id., 161.

The record reflects that the issue of waiver was not raised by the parties in the habeas court or in the Appellate Court. The Appellate Court did not instruct the parties to file supplemental briefs before or after oral argument; nor did it direct the parties to be prepared to discuss the waiver issue at oral argument. Cf. *State* v. *Connor*, supra, 321 Conn. 371–72 (issuing order instructing parties to be prepared to discuss certain issue at oral argument may be sufficient to satisfy requirement of meaningful opportunity to be heard). The issue first arose in the opinion of the Appellate Court and served as the dispositive ground on which the Appellate Court affirmed the habeas court's judgment. Therefore, because the parties were not provided an opportunity to be heard on waiver, it was improper for the Appellate Court to raise and decide that issue. For that reason, the judgment of the Appellate Court must be reversed.

We briefly address the issue of the proper scope of our remand order. The petitioner contends that we should remand the case to the Appellate Court with direction to consider only his ineffective assistance claim because there are no exceptional circumstances that would justify review of the unpreserved waiver issue and also because he would be unfairly prejudiced if that claim were considered for the first time on appeal. The respondent disagrees with both of these contentions and maintains that we should remand the case to the Appellate Court with direction to allow the parties to brief the waiver issue in that court. Although the parties, in their briefs to this court, have addressed the question of whether the waiver issue properly may be

raised sua sponte on appeal and, if so, whether the petitioner's *Alford* plea constituted a waiver of his ineffective assistance claim, we decline the petitioner's invitation to reach those issues. As we have explained, the Appellate Court has discretion, within the parameters set out in *Blumberg*, to determine whether to raise and decide an issue that was never the subject of a claim by the parties. Moreover, on remand, the Appellate Court may elect simply to address the ineffective assistance claim that the petitioner raised on appeal irrespective of any discretion it may have under *Blumberg* to raise and decide the issue of waiver sua sponte. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 143 ("a reviewing court is not *bound* to consider claims that were not raised at trial," even if such review would be in scope of reviewing court's discretion [emphasis in original]). Accordingly, we remand the case to the Appellate Court so that it may decide, following briefing by the parties and in a manner otherwise consistent with our decision in *Blumberg*, how best to proceed.[5]

[5] The petitioner, in reliance on *State* v. *Connor*, supra, 321 Conn. 350, asserts that we should remand the case to the Appellate Court with direction to consider only his claim of ineffective assistance because, as a matter of law, he will be prejudiced if the Appellate Court considers the waiver issue. That case is distinguishable from the present appeal. In *Connor*, we concluded that the Appellate Court improperly decided the appeal against the state on the basis of an unpreserved issue because it had failed to afford the state an opportunity to be heard; id., 372; and we then remanded that case to the Appellate Court with direction to consider only the issue that the defendant raised on appeal before the Appellate Court. Id., 375. We observed that, in accordance with *Blumberg*, "once [a] party makes a colorable claim of . . . prejudice, the burden shifts to the other party to establish that the first party will not be prejudiced by the reviewing court's consideration of the issue." (Internal quotation marks omitted.) Id., 373–74. Because the state made a colorable claim that it would be unfairly prejudiced by consideration of the unpreserved issue and the defendant failed to advance *any* rebuttal of that argument, we concluded that the defendant failed to meet his burden of overcoming the presumption that the state was unfairly prejudiced and, therefore, that it would be inappropriate for the Appellate Court to have considered the unpreserved issue on remand. See id., 374. By contrast, in the present case, although the petitioner claims that he will be prejudiced by the Appellate Court's consideration of the waiver issue on remand, the respondent has offered counterarguments to that claim, and,

The judgment of the Appellate Court is reversed and the case is remanded to that court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

---

on remand, the Appellate Court will be able to assess whether review of the waiver issue is appropriate. Furthermore, as we have noted, the Appellate Court may choose to address the ineffective assistance claim that the habeas court decided, regardless of whatever discretion it may have under *Blumberg* to raise the waiver issue.

ORDERS

CONNECTICUT REPORTS

VOL. 335

IAN COOKE *v.* COMMISSIONER OF CORRECTION

The petitioner Ian Cooke's petition for certification to appeal from the Appellate Court, 194 Conn. App. 807 (AC 38272), is denied.

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

Ian Cooke, self-represented, in support of the petition.

Matthew A. Weiner, assistant state's attorney, and *Steven R. Strom*, assistant attorney general, in opposition.

Decided March 25, 2020

KATERI STREIFEL *v.* WILLIAM R. BULKLEY

The plaintiff's petition for certification to appeal from the Appellate Court, 195 Conn. App. 294 (AC 41239), is denied.

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

David V. DeRosa, in support of the petition.

Janis K. Malec and *Mary B. Ryan*, in opposition.

Decided March 25, 2020

STATE OF CONNECTICUT *v.* RANDY G.

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 467 (AC 41488), is denied.

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

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided March 25, 2020

STATE OF CONNECTICUT *v.* SEMMION WATSON

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 441 (AC 41563), is denied.

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

Peter G. Billings, assigned counsel, in support of the petition.

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

Decided March 25, 2020

STATE OF CONNECTICUT *v.* JAMES MITCHELL

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 543 (AC 41897), is denied.

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

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

Decided March 25, 2020

STATE OF CONNECTICUT *v.* MAURICE FRANCIS

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 113 (AC 42443), is denied.

Conrad Ost Seifert, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided March 25, 2020

STATE OF CONNECTICUT *v.* LUIS TORRES

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 902 (AC 42360), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

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

Decided March 25, 2020

ANTHONY THOMPSON v. COMMISSIONER OF CORRECTION

The petitioner Anthony Thompson's petition for certification to appeal from the Appellate Court, 196 Conn. App. 901 (AC 42370), is denied.

John C. Drapp III, assigned counsel, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided March 25, 2020

STATE OF CONNECTICUT *v.* ALBERT D.

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 155 (AC 42745), is denied.

Lisa J. Steele, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided March 25, 2020

EDWARD KOWALSKY REVOCABLE TRUST *v.*
B & D PROPERTIES, LLC

The defendant's petition for certification to appeal from the Appellate Court (AC 43843) is denied.

Bruce L. Elstein, in support of the petition.

Anthony J. LaBella, in opposition.

Decided March 25, 2020

Cumulative Table of Cases
Connecticut Reports
Volume 335

(Replaces Prior Cumulative Table)

Bagalloo *v.* Commissioner of Correction (Order) . . . 905
Bank of America, N.A. *v.* Balgobin (Order) . . . 903
Berka *v.* Middletown (Order) . . . 906
Boria *v.* Commissioner of Correction (Order) . . . 901
Chief Disciplinary Counsel *v.* Burbank (Order) . . . 906
Cooke *v.* Commissioner of Correction (Order) . . . 911
Diaz *v.* Commissioner of Correction . . . 53
Habeas corpus; claim of ineffective assistance of counsel; certification to appeal from habeas court's judgment; certification from Appellate Court; whether Appellate Court improperly raised and decided unpreserved issue of waiver without first providing parties opportunity to be heard on that issue, in contravention of this court's decision in Blumberg Associates Worldwide, Inc. *v.* Brown & Brown of Connecticut, Inc. *(311 Conn. 123); proper scope of order of remand to Appellate Court, discussed.*
Dombrowski *v.* New Haven (Order) . . . 908
Edward Kowalsky Revocable Trust *v.* B & D Properties, LLC (Order) . . . 914
Ervin *v.* Commissioner of Correction (Order) . . . 905
Federal National Mortgage Assn. *v.* Trojan (Order) . . . 910
Garcia *v.* Cohen . . . 3
Premises liability; negligence; contributory negligence; general verdict rule; certification from Appellate Court; whether Appellate Court correctly concluded that general verdict rule precluded it from reviewing plaintiff's claim of instructional error; whether proposed interrogatories were properly framed; nondelegable duty doctrine, discussed; whether Appellate Court incorrectly concluded that plaintiff's instructional error claim was not reviewable on ground that plaintiff had failed to raise independent claim of error on appeal with respect to trial court's decision not to submit her proposed interrogatories to jury.
Holliday *v.* Commissioner of Correction (Order) . . . 901
In re Brian P. (Order) . . . 907
Jason B. *v.* Commissioner of Correction (Order) . . . 903
Langston *v.* Commissioner of Correction . . . 1
Habeas corpus; certification from Appellate Court; claim that habeas court improperly dismissed habeas petition as untimely filed; whether Appellate Court correctly concluded that petitioner lacked good cause for his untimely filing when he had relied on advice of his attorney to withdraw previous, validly filed petition and to file present petition in its place, even though it would be subject to statutory (§ 52-470 (d)) presumption of delay; certification improvidently granted.
Lenti *v.* Commissioner of Correction (Order) . . . 905
Lopez *v.* Commissioner of Correction (Order) . . . 904
Nationstar Mortgage, LLC *v.* Washington (Orders) . . . 909
Seaport Capital Partners, LLC *v.* Speer (Order) . . . 903
State *v.* Albert D. (Order) . . . 913
State *v.* Bermudez (Order) . . . 908
State *v.* Brown (Order) . . . 902
State *v.* Douglas C. (Order) . . . 904
State *v.* Earley (Order) . . . 902
State *v.* Francis (Order) . . . 912
State *v.* Mitchell (Order) . . . 912
State *v.* Randy G. (Order) . . . 911
State *v.* Sawyer . . . 29
Possession of child pornography second degree; whether trial court incorrectly concluded that search warrant affidavit provided probable cause to search defendant's residence for evidence of possession of child pornography; unpreserved claim that this court should adopt more demanding standard under Connecticut constitution for assessing whether there is probable cause to issue search warrant.

State *v.* Torres (Order) 913
State *v.* Tyus (Order) 907
State *v.* Watson (Order). 912
State *v.* White (Order). 906
Streifel *v.* Bulkley (Order) 911
Thompson *v.* Commissioner of Correction (Order) 913
U.S. Bank National Assn. *v.* Rothermel (Order) 910

CONNECTICUT APPELLATE REPORTS

Vol. 196

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DAVID VAICUNAS ET AL. *v.* REGINA R. GAYLORD ET AL.
(AC 42251)

Lavine, Alvord and Keller, Js.

Syllabus

The plaintiffs, V and K, brought an action claiming, inter alia, that the defendants exerted undue influence on H to amend her trust, and a claim of adverse possession by V, against the defendants, M's heirs and R. H and her husband, F, owned four lots of certain real property, numbered 34 through 37. Their residence was located on lots 34 and 35. V's property abutted lot 37, which he used to store vehicles and to garden. V and K were F's and H's nephews and R was H's niece. After F died in 1998, H executed a trust whereby lots 34 through 36 were to be given to K and lot 37 was to be given to V. In 2003, H met M, and became close friends with M and his family. In 2010, H amended the trust and removed the provisions devising her real property to the plaintiffs and, instead, provided that the corpus of the trust, including lots 34 through 37, were to be distributed in equal shares to R and M. Following H's death, the plaintiffs became aware of the amended trust, and commenced the present action. V claimed that he gained title to

lot 37 through adverse possession. The jury found in favor of the defendants as to the counts of undue influence and tortious interference, and in favor of V as to the count of adverse possession. Subsequently, the trial court set aside the verdict as to the count of adverse possession. On appeal, the plaintiffs claim, inter alia, that the trial court improperly set aside the jury verdict as to the count of adverse possession and abused its discretion in declining to admit the plaintiffs' offer of evidence as to H's character. *Held*:

1. The trial court did not abuse its discretion in setting aside the jury's verdict in favor of V as to the count of adverse possession because the verdict was unsupported by the evidence; contrary to the plaintiffs' claim, the trial court did not consider V's familial relationship with H and F to be determinative of V's lack of adverse possession but, relying on relevant case law, recognized that it was an important factor to be considered with other elements, the record sufficiently demonstrated that F and H knew of V's use of the lot and granted him permission for such use and that V failed to demonstrate that he prevented F and H from using the lot, and V's belief that he would inherit the land in the future did not support his claim that he possessed the land to the exclusion of the true owners and, therefore, V did not prove that he occupied the property under a claim of right, a required element on a claim of adverse possession.
2. The trial court did not abuse its discretion in denying evidence as to H's character in the form of V's opinion testimony in determining H's tendencies to take certain actions: the plaintiffs failed to provide any case law to support their proposition that a person's character was relevant if she was the subject of an undue influence claim and, even if H's character was relevant under the applicable provision (§ 4-5 (d)) of the Connecticut Code of Evidence, the appropriate method to prove undue influence would have been through the presentation of specific instances of her character, the plaintiff's reliance on the applicable provision (§ 4-4 (a) (2)) of the Connecticut Code of Evidence, which permits character evidence of a deceased person in a homicide case in which the accused claims self-defense, was also misplaced, as § 4-4 (a) (2) did not apply to the present matter; furthermore, even if the court improperly excluded V's opinion testimony, such error was harmless as the evidence would have been cumulative of other properly admitted testimony.
3. The plaintiffs could not prevail on their claim that the trial court improperly charged the jury as to the count of undue influence on the basis that the court improperly placed emphasis on the causation element; the portion of the charge in question merely summarized the plaintiffs' burden of proof with respect to the undue influence claim, was proper and founded in controlling case law, and did not mislead or misguide the jury, and, although the plaintiffs claimed that the jury charge language was not supported by case law, the plaintiffs did not cite to any case law to support their claim.

Argued December 2, 2019—officially released April 7, 2020

Procedural History

Action to recover damages for, inter alia, undue influence, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Scholl*, *J.*; thereafter, the court directed a verdict for the defendants on the count of breach of fiduciary duty; verdict in part for the named plaintiff and in part for the defendants; thereafter, the court, *Scholl*, *J.*, granted the defendants' motion to set aside the verdict for the named plaintiff as to the count of adverse possession, and rendered judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Stuart G. Blackburn, for the appellants (plaintiffs).

Edward G. McAnaney, for the appellees (defendants).

Opinion

KELLER, J. The plaintiffs, David Vaicunas and Joseph Kobos, appeal from the judgment rendered by the trial court in favor of the defendants, Regina R. Gaylord, Kevin McGuire, Deborah Foster, John McGuire, and Scott McGuire, on the count of the complaint alleging undue influence exerted on Helen Rachel in amending The Helen K. Rachel Revocable Trust Indenture. The plaintiffs also appeal from the judgment of the trial court rendered after it granted the motion by the defendants to set aside the jury's verdict in favor of Vaicunas on the count for adverse possession of certain real property owned by Helen Rachel. On appeal, Vaicunas claims that the court improperly set aside the jury verdict with respect to adverse possession, and both plaintiffs claim that the court (1) abused its discretion by declining to admit the plaintiffs' offer of evidence as to the character of Helen Rachel, which was relevant to their claim for undue influence and (2) improperly charged the jury on the law of undue influence. We conclude that the trial court properly set aside the verdict

on the claim for adverse possession and, as to the plaintiffs' claim of undue influence, we reject their assertions of evidentiary and instructional error on the part of the court. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the plaintiffs' appeal. Frank Rachel and Helen Rachel (Rachels), who were husband and wife, owned four lots of real property on Webb Street in Windsor Locks. The lots are numbered 34, 35, 36, and 37, running east to west on the north side of Webb Street. The Rachels' residence was located on lots 34 and 35. Lots 34, 35, 36, and 37 are known as 60 Webb Street. Vaicunas' residence was located on lots 38 and 39 (known as 68 Webb Street), and his property abutted lot 37. Vaicunas and Kobos were the Rachels' nephews. Gaylord was the Rachels' niece.

Gaylord had a close relationship with the Rachels, which included assisting them with shopping, banking, and arranging their financial and legal affairs. After Frank Rachel's death, Gaylord continued to assist Helen Rachel with such affairs.

Vaicunas also had a close relationship with the Rachels for much of their lives. He and his wife, Doreen Pilotte, lived next door to the Rachels from 1988 until their deaths. Vaicunas visited regularly with the Rachels during this time period.

Frank Rachel died in 1998. On March 24, 1999, Helen Rachel, with the assistance of her attorney, George Bickford, executed The Helen K. Rachel Revocable Trust Indenture (1999 trust). The 1999 trust designated Gaylord as successor trustee. Helen Rachel placed the title to her real property in the 1999 trust and, pursuant to the trust, lots 34, 35, and 36 on Webb Street in Windsor Locks were to be given to Kobos upon Helen Rachel's death. The 1999 trust also provided that lot 37 was to be given to Vaicunas upon Helen Rachel's death if he

survived her and if he still owned 68 Webb Street (lots 38 and 39), at the time of her death. If either of those conditions were not met, the trust provided that lot 37 was to be given to Kobos. The 1999 trust also left all personal property,[1] the balance of the trust corpus, and any accumulated income to Gaylord.

Helen Rachel met Gary McGuire[2] in 2003. McGuire drove a van for the senior center frequented by Helen Rachel. Helen Rachel became close friends with McGuire and his family, as she began to attend holiday and family gatherings at McGuire's residence. Helen Rachel referred to McGuire as the son she never had, and she treated McGuire's grandchildren as if they were her own grandchildren. Helen Rachel divulged to members of the McGuire family that she was not happy with her nephew, Vaicunas.

Helen Rachel suffered a stroke on October 20, 2009. As a result of the stroke, Helen Rachel experienced expressive aphasia, which manifested as a loss of the ability to speak. Helen Rachel also lost most of her motor skills on the right side of her body, which affected her ability to write. Helen Rachel continued, however, to communicate after her stroke by nodding or shaking her head in response to questions.

On February 11, 2010, Helen Rachel, with the assistance of Bickford, executed the first amendment to the 1999 trust (2010 trust). The 2010 trust removed the provisions devising Helen Rachel's real property to Vaicunas and Kobos and, instead, provided that the balance of the trust corpus, including lots 34, 35, 36, and 37, be distributed in equal shares to Gaylord and McGuire. Prior to executing the 2010 trust, Bickford

[1] The 1999 trust provided that Helen Rachel's personal property was to be distributed by the trustee to Gaylord, after first adhering to any attached memorandum.

[2] Gary McGuire died prior to the commencement of the underlying action. The named defendants are McGuire's heirs. Subsequent references in this opinion to "McGuire" are to Gary McGuire.

communicated with Helen Rachel and confirmed that she was aware of the changes and that the changes were being made at her direction. Bickford met with Helen Rachel on three occasions before she executed the changes and communicated with her at each meeting. Bickford communicated with Helen Rachel by asking her questions and eliciting yes or no responses, until he arrived at an answer. At one of the meetings, Helen Rachel communicated to Bickford that she had been intending to make these changes to her trust for three years. Neither the plaintiffs nor the defendants were present at the meetings between Bickford and Helen Rachel.

In December, 2010, Vaicunas initiated a conservatorship proceeding in Probate Court with the goal of becoming Helen Rachel's conservator. The court denied Vaicunas' petition and the proceedings terminated on March 24, 2011.

McGuire's friendship with Helen Rachel continued after her stroke. Helen Rachel continued to celebrate with the McGuires at holiday and family gatherings. Similarly, Gaylord continued to assist Helen Rachel with her legal, medical, and personal affairs following her stroke. McGuire died on August 3, 2013. After McGuire's death, members of the McGuire family continued to maintain a relationship with Helen Rachel. Helen Rachel eventually was moved to a nursing home where she remained until her death on May 26, 2014.

Following Helen Rachel's death, the plaintiffs learned of the 2010 trust and initiated the present action against the defendants. The plaintiffs filed a complaint on September 11, 2014, sounding in two counts: undue influence brought against all defendants and breach of fiduciary duty brought against Gaylord. On April 16, 2015, the plaintiffs filed an amended complaint, adding a count of tortious interference with an expectation of

inheritance brought against Gaylord. On September 28, 2016, the plaintiffs filed an additional amended complaint adding a count of adverse possession by Vaicunas alone. A jury trial was held on October 10, 11 and 12, 2018. Following the presentation of evidence, and prior to the jury's deliberations, counsel for the defendants moved for a directed verdict on all four counts. The court granted the motion for a directed verdict only as to the count alleging breach of fiduciary duty. The jury then found in favor of the defendants as to the counts of undue influence and tortious interference, and in favor of Vaicunas as to the count of adverse possession. On October 25, 2018, the defendants moved to set aside the jury's verdict as to the count of adverse possession, arguing that the verdict was contrary to the law and unsupported by the evidence. On November 2, 2018, the court heard arguments from the parties on the motion. On December 7, 2018, the court granted the defendants' motion to set aside the jury's verdict on the count of adverse possession and ordered that judgment on that count be directed for the defendants. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiffs first claim that the court improperly set aside the jury verdict on the count of adverse possession. We disagree.

The record reveals evidence of the following relevant facts. From approximately 1989 through the time of the trial, Vaicunas used lot 37 on a daily basis. Specifically, he parked vehicles, split, stacked, and stored firewood, gardened, mowed the grass, and tended to snow removal.

Vaicunas, however, was not the only individual to use lot 37 during the relevant time period. When Vaicunas and Pilotte lived next door to the Rachels, "[they] just were always together. [They] crossed lots all the

time, [Helen Rachel] or [Vaicunas and Pilotte]." Further, Frank Rachel and Vaicunas gardened together on lot 37 before Frank Rachel's death in 1998. Helen Rachel also traversed lot 37 to pick tomatoes from the garden. Additionally, in 2009, Helen Rachel hired a landscaper, Kevin McGinnis, to tend to her Webb Street property. From 2009 until the time of trial, McGinnis mowed lot 37 on a biweekly basis during the growing season and performed fall and spring cleanup. Helen Rachel paid McGinnis for the landscaping services until her death, whereupon Gaylord, as the executrix to Helen Rachel's estate, began paying McGinnis. McGinnis mowed the grass on lot 37, going as far onto the lot as was possible due to the location of the garden and the vehicles that Vaicunas had parked on the property. On occasion, Vaicunas would come out of his residence, which was adjacent to lot 37, and observe McGinnis mowing the grass on lot 37. Vaicunas never spoke to McGinnis nor erected any fences or barriers to prevent McGinnis from tending to lot 37.

After Frank Rachel's death, Charles Gaylord, Gaylord's son, helped Helen Rachel clean up the Rachels' property and take some items to the dump. Charles Gaylord saw some items in the backyard and asked Helen Rachel if he should take them to the dump as well. Helen Rachel told him that the possessions belonged to Vaicunas and that Frank Rachel had permitted him to keep them on lot 37. She seemed to imply that she would similarly allow Vaicunas to keep the items on lot 37. Frank Rachel was "okay" with Vaicunas' use of lot 37 and both Frank Rachel and Helen Rachel agreed to the use.

On multiple occasions, Vaicunas discussed with Frank Rachel and Helen Rachel the distribution of lots 34 through 37 on Webb Street after their deaths. As a result of these discussions, Vaicunas understood that the Rachels would distribute lots 34, 35, and 36 to Kobos, and lot 37 to Vaicunas. Prior to Helen Rachel's death,

Vaicunas also saw testamentary documents which directed distribution of her property.

On the motion to set aside the verdict in favor of Vaicunas as to the adverse possession claim, the defendants argued that Vaicunas failed to present evidence as to a number of the elements of adverse possession. In particular, they argued that Vaicunas did not prove that his use of the property was exclusive, that he ousted the Rachels from the property, that his use of the property was without permission, or that he occupied the property under a claim of right. The court, after reviewing the evidence, agreed with the defendants and authored a memorandum of decision setting aside the jury verdict in favor of Vaicunas as to the adverse possession claim. The grounds on which the court granted the motion mirrored the arguments set forth by the defendants.

We begin by setting forth the applicable standard of review. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . 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. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion. . . . The trial court's decision is significant because the trial judge has had the same opportunity as the jury to view the witnesses, to assess

their credibility and to determine the weight that should be given to [the] evidence. Moreover, the trial judge can gauge the tenor of the trial, as [this court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Citations omitted; internal quotation marks omitted.) *Hall* v. *Bergman*, 296 Conn. 169, 179, 994 A.2d 666 (2010).

"The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner." (Internal quotation marks omitted.) *Kramer* v. *Petisi*, 53 Conn. App. 62, 67, 728 A.2d 1097, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999). Further, the plaintiff bears the burden of proving adverse possession "by clear and convincing evidence." (Internal quotation marks omitted.) Id.

After conducting a careful review of the evidence produced at trial, we agree with the trial court that the evidence was insufficient to support the jury's finding that Vaicunas acquired title to lot 37 through adverse possession.

In setting aside the verdict, the court relied, in part, on the familial relationship between Helen Rachel and Vaicunas. In order to obtain property through adverse possession, the possession must be hostile, which is the absence of consent, license, or permission. See *Woodhouse* v. *McKee*, 90 Conn. App. 662, 672, 879 A.2d 486 (2005). Further, the possession of the property in question must be hostile from its inception. Id. "In determining what amounts to hostility, the relation that the adverse possessor occupies with reference to the owner is important. If the parties are strangers and the possession is open and notorious, it may be deemed to be hostile. However if the parties are related, there may be

a presumption that the use is permissive. . . . It is a general principle that members of a family may not acquire adverse possession against each other in the absence of a showing of a clear, positive, and continued disclaimer and disavowal of title . . . . The existence of a family relationship between the parties will prevent or rebut a presumption of adverse holding." (Citation omitted; internal quotation marks omitted.) Id., 673.

"Historically, the existence of a familial relationship between claimants has been [only] a factor in determining whether possession of land is adverse. . . . A family relationship between parties is only one of the facts to be considered [with other facts]. . . . [A] family relationship without more is insufficient to support a finding that the use at the time was with permission. . . . [S]tanding alone a familial relationship neither puts an end to the inquiry regarding permissive use nor shifts the burden of proof. . . . Nevertheless, the familial relationship may be an important factor when evaluated in the context of all the other relevant factors guiding the [c]ourt in its resolution of the . . . claim." (Citations omitted; internal quotation marks omitted.) *Mulle* v. *McCauley*, 102 Conn. App. 803, 814–15, 927 A.2d 921, cert. denied, 284 Conn. 907, 931 A.2d 265 (2007).

Here, the court did not, as the plaintiffs claim in their brief, consider the familial relationship to be determinative of Vaicunas' lack of adverse possession of the property but, rather, relying on the relevant case law, recognized that it was an "important factor" to be considered in conjunction with the other elements of an adverse possession claim.

In addition to the presumption of permissive use, which arose by virtue of the familial relationship, the court also looked to direct evidence that supported the fact that Vaicunas occupied the property with license or consent of the owners. Both the plaintiffs and the defendants presented evidence demonstrating that

Frank Rachel and Helen Rachel knew of Vaicunas' use of lot 37 and, in fact, granted him permission for such use. Charles Gaylord testified that Frank Rachel allowed Vaicunas to keep his possessions on lot 37, and that Helen Rachel implied that she would allow the same use. Additionally, Kobos testified at his deposition that Frank Rachel was "okay" with Vaicunas' use of the property and that Helen Rachel agreed to the use as well.

"Although possession that is originally permissive may become hostile, it does so only if [the permission] is clearly repudiated by the occupant. . . . Such repudiation must be shown by some clear, positive, and unequivocal act brought home to the owner or the use will be presumed to be permissive." (Citations omitted; internal quotation marks omitted.) *Woodhouse* v. *McKee*, supra, 90 Conn. App. 675. Here, the evidence did not show that Vaicunas repudiated the permission granted to him by Frank Rachel and Helen Rachel to occupy lot 37. Therefore, Vaicunas' use of the property is presumed to have been permissive and at no point in time became hostile.

The evidence presented at trial also was insufficient to support the jury's finding that the Rachels were ousted from the property and that Vaicunas used lot 37 exclusively during the relevant time period. The plaintiffs merely presented evidence that Vaicunas used lot 37 on a daily basis from 1989 through the time of trial. The plaintiffs, however, in no way refuted the evidence presented by the defendants that demonstrated that during that time period Frank Rachel gardened on lot 37 until his death in 1998, Helen Rachel crossed lot 37 and went onto the lot to gather tomatoes from the garden, and that Helen Rachel directed and paid a landscaper, McGinnis, to tend to that particular lot. Further, Vaicunas did not erect any fences or physical barriers in an effort to keep the Rachels out of possession of the property. The fact that the Rachels

used lot 37 throughout the time period that Vaicunas claims to have used the property exclusively defeats his claim of adverse possession.

Further, the evidence was insufficient to prove that Vaicunas occupied the property under a claim of right. In *Brander* v. *Stoddard*, 173 Conn. App. 730, 745–48, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017), this court upheld the decision of the trial court that "[t]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other. . . . Occupation must not only be hostile in its inception, but it must continue hostile, and at all times during the required period of fifteen years challenge the right of the true owner, in order to found title by adverse use upon it. . . . Such an acknowledgement of the owner's title terminates the running of the statutory period. . . . The plaintiff's belief that he would inherit the land in the future does not support a belief that he presently possessed the land to the exclusion of the true owners . . . ." (Citations omitted; internal quotation marks omitted.)

Similarly, in the present case, as a result of discussions that Vaicunas had with Frank Rachel and Helen Rachel, he understood that lot 37, "which was in [Frank Rachel's and Helen Rachel's names]," would be distributed to him upon their deaths. Vaicunas' clear acknowledgement of Frank Rachel's and Helen Rachel's title to lot 37 and his expected inheritance of the property, contradicts his assertion that he possessed the land to the exclusion of the true owners. Therefore, Vaicunas did not prove that he occupied the property under a claim of right, as is required to prevail on an adverse possession claim.

On the basis of the foregoing, we conclude that the trial court did not abuse its discretion in setting aside the jury's verdict in favor of Vaicunas as to the count

of adverse possession because that verdict was unsupported by the evidence.

II

Next, the plaintiffs claim that the court abused its discretion by declining to admit the plaintiffs' offer of evidence as to the character of Helen Rachel.

The following additional facts are relevant to this claim. During the direct examination of Vaicunas, the plaintiffs' counsel sought to elicit testimony from Vaicunas regarding the character of Helen Rachel. Specifically, counsel for the plaintiffs asked the following question with regard to the 2010 amendment Helen Rachel made to her trust:

"Q. Would making a change like this—based on your knowledge of your aunt and your dealings with her over the years, would making a change like this be something she would do out of her free will?"

Counsel for the defendants objected to this question and the court heard argument from counsel outside the presence of the jury. Counsel for the plaintiffs argued that "[Helen] Rachel's character and her tendencies that she may have [had] for taking certain actions are really at the heart of a number of these issues in this case and I believe someone as familiar with her character and her traits as . . . Vaicunas should be permitted to testify concerning them in whether these actions are consistent or inconsistent with that character." Specifically, counsel for the plaintiffs argued that Helen Rachel's character was at issue because of the undue influence claim. Counsel for the defendants argued that Helen Rachel's character was not at issue and that to permit Vaicunas to testify as to whether, in his opinion, the 2010 trust amendment was something she would do of her own free will would allow the plaintiffs to impermissibly introduce an opinion. The court agreed with the defendants and sustained the objection. Similar

to the arguments that the plaintiffs advanced before the trial court, the plaintiffs claim before this court that "Helen Rachel's character was relevant to the jury's determination of whether she was unduly influenced." In particular, the plaintiffs argue before this court that "[t]he jury was entitled to hear the opinions of her relatives about whether [Helen] Rachel was susceptible to influence and whether changing the trust documents was consistent with her character." The plaintiffs submit, therefore, that the court improperly excluded character evidence of Helen Rachel in the form of Vaicunas' opinion.

We begin by setting forth the applicable standard of review. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable 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 [appellant] of substantial prejudice or injustice. . . . Additionally, even when an evidentiary ruling is improper, the [appellant] bears the burden of demonstrating that the error was harmful. . . . One factor to be considered in determining whether an improper ruling on evidence is a harmless error is whether the [evidence] was cumulative . . . ." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Poirier*, 121 Conn. App. 748, 751, 997 A.2d 604, cert. denied, 298 Conn. 904, 3 A.3d 68 (2010).

Having examined the plaintiffs' claim, we conclude that the court properly declined to admit Vaicunas' testimony as to Helen Rachel's character. Pursuant to § 4-4 of the Connecticut Code of Evidence, the general rule is that "[e]vidence 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 . . . .”[3] Section 4-5 (d) of the Connecticut Code of Evidence, however, permits character evidence in the form of specific instances of a person’s conduct “[i]n cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue . . . .”

At trial, counsel for the plaintiffs seemed to conflate the manner in which character evidence can be presented under §§ 4-4 and 4-5 of the Connecticut Code of Evidence. He argued that the undue influence claim put Helen Rachel’s character at issue, and, therefore, “one of the methods that I can prove character or reputation when character is an issue is by a personal opinion of someone who is familiar enough with the person.” In their brief, the plaintiffs did not cite to a single case to support the proposition that a person’s character is relevant if he or she is the subject of an undue influence

[3] There are several exceptions to § 4-4 of the Connecticut Code of Evidence, none of which applies to the testimony that counsel for the plaintiffs sought to elicit. The exceptions are as follows:

“(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

“(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

“(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness.

“(4) Character of a person to support a third-party culpability defense.” Conn. Code Evid. § 4-4 (a) (1) through (4).

Under these exceptions, “in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion.” Conn. Code Evid. § 4-4 (b).

claim. It appears to us that the plaintiffs were, in reality, attempting to describe Helen Rachel's personality trait of being a person susceptible to easy influence, rather than adduce evidence of her character. However, even if Helen Rachel's character were relevant, under § 4-5 (d) the appropriate method to prove such character would be through the presentation of evidence of specific instances of her character, not by the presentation of opinion testimony, as counsel for the plaintiffs was attempting to do.

In their brief, the plaintiffs rely solely on *State* v. *Maxwell*, 29 Conn. App. 704, 618 A.2d 43 (1992), cert. denied, 225 Conn. 904, 621 A.2d 287, cert. denied, 509 U.S 930, 113 S. Ct. 3057, 125 L. Ed. 2d 740 (1993), for the proposition that the character of a deceased person may be proved by opinion testimony. The plaintiffs' reliance is misplaced, however, because *Maxwell* involves one of the exceptions[4] in § 4-4 of the Connecticut Code of Evidence, and stands for the proposition that, "in a homicide prosecution where the accused has claimed self-defense, the accused may show that the deceased was the aggressor by proving the deceased's alleged character for violence. The deceased's character may be proved by reputation testimony [or] by opinion testimony . . . ." (Internal quotation marks omitted.) Id., 713. *Maxwell* clearly does not apply to the present case because § 4-4 (a) (2) is not applicable and, therefore, the plaintiffs' reliance on this case in no way furthers the plaintiffs' argument that the court should have admitted evidence in the form of opinion testimony.

[4] In *Maxwell*, the applicable exception was § 4-4 (a) (2) of the Connecticut Code of Evidence, which states: "Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused." Conn. Code Evid. § 4-4 (a) (2).

Further, even if the court improperly excluded Vaicunas' opinion of Helen Rachel, such error was harmless. One factor that affects our harmless error analysis is whether the excluded evidence was cumulative of other properly admitted evidence. See *State* v. *Eleck*, 314 Conn. 123, 129, 100 A.3d 817 (2014). Here, counsel for the plaintiffs elicited testimony from Vaicunas, which made the excluded evidence cumulative. Specifically, the following exchange occurred between counsel for the plaintiffs and Vaicunas during the direct examination of Vaicunas:

"Q. Did she have any tendencies to believe people?

"A. If you told her something, she believed it; doesn't matter what you told her.

"Q. Was she easily persuaded?

"A. Very easy. . . . [W]hen [Frank Rachel] was still alive if something was said she would always rely on [Frank Rachel] for a decision. But after he wasn't there she was on her own so very easy to persuade her to do just about anything." Given the similar nature of the aforementioned testimony and the excluded evidence in question, the court's decision to exclude the evidence, even if improper, was harmless because it would have been cumulative of other properly admitted testimony.

In light of the broad discretion possessed by the trial court in admitting evidence, we conclude that the court did not abuse its discretion in excluding character evidence as to Helen Rachel in the form of Vaicunas' opinion testimony.

III

Finally, the plaintiffs claim that the court improperly charged the jury on the law of undue influence. The plaintiffs argue that the jury charge on the claim of undue influence included a sentence that was improper and possibly misleading to the jury. We disagree.

The following additional facts are relevant to the plaintiffs' claim. On October 17, 2018, the court delivered the charge to the jury on the plaintiffs' three remaining counts.[5] After the court delivered the charge, counsel for the plaintiffs took exception to the last sentence of the undue influence charge, in which the court stated: "There must be proof not only of undue influence but that its operative effect was to cause [Helen] Rachel to make a trust [that] did not express her actual desires." Specifically, counsel for the plaintiffs questioned whether the sentence in question was supported by case law and argued that it was duplicative of other portions of the charge. Counsel for the plaintiffs also noted that, prior to the delivery of the charge, he had raised a similar concern regarding the language in question in chambers. The court responded that the relevant portion of the charge merely summarized an undue influence claim and that the court would not give any further instructions.

[5] The following portion of the jury charge is relevant to the claim of undue influence: "In the first count of their complaint, the plaintiffs claim that the 2010 amended trust was executed as a result of undue influence by the defendant, Regina Gaylord or Gary McGuire, over the will of [Helen] Rachel. The burden of proof of undue influence is on the plaintiffs. They must show by a fair preponderance of the evidence, as I have explained that phrase to you, that the influence was undue. Direct evidence of undue influence is often not available and you may rely on circumstantial evidence as I have instructed you earlier. But the plaintiffs' suspicions alone are not enough. Influence or fair persuasion of Helen Rachel by Gaylord or McGuire is acceptable.

"Undue influence is the exercise of sufficient control over a person whose acts are brought into question in an attempt to destroy her free agency and constrain her to do something other than she would do under normal control. There are four elements of undue influence: one, a person who is subject to influence; two, an opportunity to exert undue influence; three, a disposition to exert undue influence; and, four, a result indicating undue influence.

"Relevant factors you can consider include [Helen] Rachel's age and physical and mental condition, whether she had independent or disinterested advice in the transaction, whether she was under any distress, her predisposition to make the transfer in question, the extent of the transfer in relation to her whole worth, active solicitations and persuasions by the other party, and the relationship of the parties. There must be proof not only of undue influence but that its operative effect was to cause [Helen] Rachel to make a trust which did not express her actual desires."

"Our standard of review concerning claims of instructional error is well settled. [J]ury instructions must be read as a whole and . . . are not to be judged in artificial isolation from the overall charge. . . . The whole charge must be considered from the standpoint of its effect on the jurors in guiding them to a proper verdict. . . . The trial court must adapt its instructions to the issues raised in order to give the [jurors] reasonable guidance in reaching a verdict and not mislead them." (Internal quotation marks omitted.) *Champeau* v. *Blitzer*, 157 Conn. App. 201, 211, 115 A.3d 1126, cert. denied, 317 Conn. 909, 115 A.3d 1105 (2015). "Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 255, 194 A.3d 839 (2018).

In their brief, the plaintiffs argue that, by including the final sentence of the jury charge applicable to the undue influence claim, the court placed emphasis on the causation element and potentially misled the jury and misguided their determination of this claim. We agree with the court that the portion of the charge in question merely summarized the plaintiffs' burden of proof with respect to the undue influence claim, and that it in no way misled or misguided the jury. As part of their argument in opposition to the language of the instruction, counsel for the plaintiffs argued before the trial court, and in the plaintiffs' appellate brief, that the language is not supported by case law. The plaintiffs, however, fail to present a single case in support of this proposition. To the contrary, the questioned instructional language was taken almost verbatim from Connecticut case law governing claims of undue influence. Specifically, this court, in *Bassford* v. *Bassford*, 180 Conn. App. 331, 355, 183 A.3d 680 (2018), stated, "[t]here must be proof not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires."

Accordingly, we conclude that the court delivered a charge that was proper and founded in controlling case law, and that it was not reasonably probable that the jury was misled by such charge.

The judgment is affirmed.

In this opinion, the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL ROBERT FORTIN
(AC 42651)

Alvord, Moll and Devlin, Js.

Syllabus

Convicted, after a jury trial, of the crimes of manslaughter in the first degree with a firearm and carrying a pistol without a permit, the defendant appealed. The defendant's conviction stemmed from an incident in which he shot and killed the victim following a heated discussion and a brief physical altercation. Prior to trial, the defendant filed a motion to preclude the admission of evidence of certain incidents of prior misconduct, which the state sought to offer to prove the identity of the defendant as the shooter. At the hearing on the motion to preclude, the state conceded that evidence regarding an incident in which the defendant had shot his girlfriend, F, in the eye with a flare gun would not be admissible, and the trial court advised the state that, if it sought to introduce evidence of that incident, it should raise the issue outside the presence of the jury so that the court could assess its admissibility. In addition, the defendant offered an unsigned stipulation that he had shot and killed the victim, but the state refused the defendant's offer to stipulate, and the trial court did not consider it in ruling on the motion. Thereafter, the trial court denied in part the motion to preclude and allowed the state to present to the jury evidence of certain instances of misconduct related to the defendant's prior use of the firearm that was used to shoot and kill the victim. During trial, M, a state's witness, inadvertently testified regarding the flare gun incident. The defendant immediately objected to M's testimony, and the court sustained the objection and instructed the jury to disregard it. At the conclusion of M's testimony, the defendant moved for a mistrial, arguing that M's testimony was prejudicial because, inter alia, F was expected to testify for the state and she had a visible injury to her eye that she sustained during the flare gun incident. The trial court denied the defendant's motion for a mistrial. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly allowed the state to introduce evidence of several instances of misconduct involving his prior use of the firearm that was used to shoot and kill the victim: contrary to the defendant's contention that the misconduct evidence lacked probative value and was unduly prejudicial to him because his offer to stipulate that he had shot the victim with the firearm obviated the state's need to prove identity, the misconduct evidence was indisputably probative to establishing the identity of the defendant as the shooter of the victim, which was an issue that the defendant contested from the inception of the investigation of the victim's death until the hearing on his motion to preclude the admission of that evidence; moreover, the defendant's reliance on *Old Chief* v. *United States* (519 U.S. 172) for the proposition that the trial court erred in not balancing his offer to stipulate with the prejudicial effect of the misconduct evidence was unavailing, as that case was distinguishable from the present case, and the defendant's offer was not a forthright concession that he killed the victim and, therefore, there was no alternative evidence of identity for the trial court to consider in weighing the probative value of the misconduct evidence and its potential prejudice to the defendant.

2. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial after M inadvertently testified regarding the flare gun incident; although M's testimony was improper, the trial court found, and the record supported, that it was not invited by the state and that it was isolated, and, immediately following M's improper reference to the flare gun incident, the court instructed the jury to disregard it, and, therefore, even if M's isolated statement could be view as being unduly prejudicial to the defendant, any danger inherent in its admission would have been cured by the court's instruction, and this court deferred to the trial court's advantageous ability to observe the impact of M's statement on the jury.

3. The defendant could not prevail on his unpreserved claim that his constitutional right to confrontation was violated when the trial court allowed T, a state trooper, to testify that the first selectman of the town of Andover told her that the defendant did not have a temporary town permit to carry the firearm that he used to shoot and kill the victim; the defendant's claim failed under the fourth prong of *State* v. *Golding* (213 Conn. 233) because the admission of T's testimony was harmless beyond a reasonable doubt, as the defendant did not challenge the charge of carrying a pistol without a permit at trial, he did not object to T's testimony or cross-examine her and he testified that he was illegally carrying the subject firearm at the time of the shooting, which admission alone supported the jury's verdict on the charge of carrying a pistol without a permit.

Argued January 7—officially released April 7, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder, carrying a pistol without a permit and risk of injury to a child, brought to the Superior Court in the judicial district of Tolland, where the court, *Graham*, *J.*, denied in part the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury before *Graham*, *J.*; subsequently, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm and of carrying a pistol without a permit, and sentence enhanced for the commission of a class A, B or C felony with a firearm, from which the defendant appealed. *Affirmed*.

Mark Rademacher, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, was *Matthew C. Gedansky*, state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Michael Robert Fortin, appeals from the judgment of conviction, rendered after a jury trial, of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[1] On appeal, the defendant claims that (1) the trial court improperly allowed the state to introduce evidence of several instances of misconduct stemming from his prior use of the firearm that was used to shoot and kill the victim in this case, (2) the trial court abused its discretion by denying his motion for a mistrial after a state's witness inadvertently testified regarding a prior incident involving the defendant's

[1] The jury acquitted the defendant of murder and risk of injury to a child.

discharge of a flare gun that the state previously had conceded, and the trial court ruled, was inadmissible, and (3) his constitutional right to confrontation was violated when the trial court allowed into evidence certain hearsay testimony that he did not have a permit to carry a firearm. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. At approximately 9 p.m. on July 3, 2015, the defendant rode his motorcycle to Lakeside Drive in Andover to observe a fireworks display at Andover Lake. He parked his motorcycle in the middle of a gravel right-of-way that led to a boat launch and walked to the boat launch to watch the fireworks.

John Totri and Jason Marchand, the victim, lived on Lakeside Drive. Shortly after the defendant parked his motorcycle, Totri and the victim, who had both been drinking alcoholic beverages all day, approached the defendant at the boat launch and demanded that he move his motorcycle from the right-of-way. Following a heated discussion, the defendant agreed to move his motorcycle. As the defendant "took off" on his motorcycle, small rocks were sprayed from the roadway toward Totri and the victim. The victim ran after the defendant but was unable to catch him. Totri and the victim then went to the victim's house to roast marshmallows in his firepit.

Approximately one hour later, while Totri and the victim were sitting by the firepit, the defendant returned to Lakeside Drive. As the defendant dismounted his motorcycle, he heard the voices of Totri and the victim coming from the victim's yard. The defendant approached the victim's yard with his helmet on and "a loaded gun with a round chambered." The victim "bolted out of his chair" and ran into the roadway, toward the defendant. After a brief physical altercation, the defendant fired his gun into the ground. Approximately thirty seconds later, the defendant fired two

more shots, both of which hit the victim. The victim ultimately collapsed in his yard, and the defendant fled on his motorcycle. The victim was taken to a hospital in an ambulance and was pronounced dead shortly thereafter.

On the following day, the defendant, with the assistance of his girlfriend, Carli Fandacone, disposed of his gun and his motorcycle; he threw his gun into a swamp and pushed his motorcycle off a bridge and into the Connecticut River.

The lead case officer on the ensuing investigation, Connecticut State Police Detective Jeffrey Payette, issued a bulletin to law enforcement agencies in the area to be on the lookout for a motorcycle that fled the area of the crime scene on the night of July 3, 2015. Payette undertook an investigation of other incidents involving firearms in the Andover area, which ultimately led him to the defendant, who was arrested on November 17, 2015. By way of a third amended substitute information filed on April 6, 2017, the defendant was charged with murder in violation of General Statutes § 53a-54a, carrying a pistol without a permit in violation of § 29-35 (a), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k.

Following a trial, the jury found the defendant guilty of the lesser included offense of manslaughter with a firearm and carrying a pistol without a permit.[2] The court imposed a total effective sentence of thirty-two years incarceration, followed by ten years of special parole.[3] This appeal followed. Additional facts will be set forth as necessary.

[2] The jury also found, pursuant to § 53-202k, that the defendant committed manslaughter using a firearm.

[3] The court enhanced the sentence for the manslaughter conviction in accordance with § 53-202k.

I

The defendant first claims that the court erred in allowing the state to introduce evidence of misconduct involving the defendant's prior use of the firearm that was used to shoot and kill the victim. Specifically, the defendant argues that the court improperly admitted the misconduct evidence because he had offered to stipulate to the fact that he had shot the victim with that firearm, thereby obviating the state's need to prove identity, and, thus, that the misconduct evidence lacked probative value and was unduly prejudicial to him. We are not persuaded.

The following additional background is relevant to our consideration of this claim. On February 22, 2017, the defendant filed a motion in limine to preclude the admission into evidence of, inter alia, four instances of misconduct relating to the firearm that was used to shoot and kill the victim. Specifically, the defendant sought to preclude evidence that (1) on May 21, 2014, he stole that firearm from its lawful owner, (2) on September 25, 2014, he discharged that firearm on Hop River State Park Trail, (3) in the fall of 2014, he threatened another person by pointing that firearm at him, and (4) between the summers of 2014 and 2015, he fired that firearm. In his motion, the defendant argued that the misconduct evidence was irrelevant and highly prejudicial.

On March 2, 2017, the court held a hearing on the defendant's motion to preclude. At that hearing, defense counsel indicated that he had "prepared a stipulation in which [the defendant] will stipulate that [he] fired the [firearm] that resulted in the death of [the victim]." The court observed, and defense counsel acknowledged, that the stipulation was unsigned. The state refused the defendant's offer to stipulate on the ground that it had the burden to prove beyond a reasonable doubt every element of the crimes with which the defen-

dant was charged and that it was entitled to do so through the introduction of admissible evidence. The state argued that, because there was, in fact, no stipulation, the court could not consider it as alternative evidence in assessing the admissibility of the challenged misconduct evidence. The court agreed with the state, and explained: "I can't deal with theoretical stipulations." The court reasoned: "[I]f the two of you are going to enter a stipulation later . . . then I've got to ask myself . . . how that affects the prejudice versus the probative. . . . I am saying that I'm being asked to rule on these matters in advance of them being presented at trial, and if something significant changes, such as a stipulation that proves out the very facts this evidence is offered for, then I would reserve the right to revisit this because . . . I think it affects the balancing of probative versus prejudicial. . . . So, I'm going to proceed on the assumption [that] there is no stipulation because there is no stipulation yet, and if it turns out the stipulation occurs, then counsel will bring that to my attention because it may affect my ruling." The court and the parties thus proceeded to discuss the probative value versus the prejudicial effect of the offered misconduct evidence in the absence of any stipulation.

The court granted in part and denied in part the defendant's motion to preclude. The court summarized its ruling as follows: "As to the theft of the firearm in question, that it was stolen is—[the] motion [is] granted as to the fact it was stolen, but only to that extent. As to the discharge of the firearm on Hop River State Park Trail, the motion [is] denied. As to the incidents where the defendant pointed a firearm at someone in the fall of 2014, it is—the motion is granted only to the extent of the pointing of the firearm at someone, not otherwise, and the motion is denied as to the extent it is that the defendant possessed and fired a firearm between the

summers of 2014 and 2015." The court thus allowed the state to present evidence of the challenged instances of prior misconduct to the jury in accordance with its ruling. The defendant claims on appeal that the trial court erred in so doing.

"Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . [Because] the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only [if] it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State* v. *Abdus-Sabur*, 190 Conn. App. 589, 603–604, 211 A.3d 1039, cert. denied, 333 Conn. 911, 215 A.3d 735 (2019).

Here, the state offered the challenged misconduct evidence to prove identity, an exception to the general rule that prior misconduct evidence is inadmissible. The state argued that the prior misconduct evidence was probative of identity because each of the four instances of misconduct involved the defendant and his use of the same firearm that was used to shoot and kill

the victim.[4] It cannot reasonably be disputed that the misconduct evidence was probative to establishing the identity of the defendant as the shooter of the victim, which was an issue that the defendant had contested from the inception of the investigation of the victim's death until the hearing on his motion to preclude the admission of that evidence, as the defendant denied his presence at the boat launch on the night of July 3, 2015, and disposed of both his firearm and his motorcycle to avoid any connection of those items and himself to the events of that night.

The defendant asserts on appeal that "[his] admission that he fired the [firearm] in self-defense and killed the victim deprived the misconduct [evidence] involving possession of that gun of any probative value on the issue of identity, or at the very least, rendered its probative value so slight that the prejudice was overwhelming." The defendant argues that "the trial court was bound to consider [his] admission when determining the probative value of the misconduct and when weighing against its prejudicial effect." In so arguing, the defendant relies on the United States Supreme Court's decision in *Old Chief* v. *United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). In that case, the petitioner, Johnny Lynn Old Chief, had been charged pursuant to a federal statute that made it a crime for any person who had been convicted of a crime punishable by imprisonment for more than one year to possess a firearm. Id., 174. Old Chief offered to stipulate that he previously had been convicted of such a crime. Id., 176. Old Chief also proposed that the court instruct the jury that he "ha[d] been convicted of a crime punishable by imprisonment for a term exceeding one year." (Internal quotation marks omitted.) Id.

[4] The state represented to the court that the bullet casings recovered from the scene of each of the locations where the instances of misconduct occurred matched the bullet casings recovered from the crime scene in this case.

The prosecutor declined to stipulate, and the District Court ruled that he was not required to do so. Id., 177. At trial, the prosecutor presented evidence that Old Chief previously had been convicted of assault and that such assault resulted in serious bodily injury to the victim. Id. On appeal, the United States Supreme Court concluded that, because, under the relevant statute, "[t]he most the jury need[ed] to know [was] that the conviction admitted by [Old Chief fell] within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission"; id., 190–91; "the general presumption that the prosecution may choose its evidence" did not apply. Id., 191. Accordingly, the court concluded that, because Old Chief had offered to stipulate to the prior conviction, the admission into evidence of the record of conviction of assault was unduly prejudicial and constituted an abuse of discretion. See id., 191–92.

This case is distinguishable from *Old Chief* in that the defendant here did not, as he now contends, offer an "unequivocal admission" that he shot and killed the victim. Rather, he offered to stipulate to those facts by presenting to the trial court a purported stipulation that neither he nor the state had signed. Although Old Chief also offered to stipulate, he, in fact, presented the court with a judicial admission of his felon status. Old Chief provided to the court an instruction to be read to the jury as evidence of that admission, presumably during the state's case-in-chief, thus obviating the state's burden of proving the defendant's felon status. Here, the defendant claimed, for the first time at the hearing on his motion to preclude, that he was claiming self-defense, and, thus, that the misconduct evidence was unnecessary because he would stipulate that he shot and killed the victim. The defendant did not offer an admission of these facts; he did not propose a jury instruction that the facts had been proven beyond a

reasonable doubt. He, nevertheless, argues that the trial court was required to weigh his offer to so stipulate as alternative evidence.[5] The defendant's offer consisted of an unsigned stipulation and the representation that he would testify that he shot the victim. A judicial admission is a voluntary and knowing concession of fact by a party or a party's attorney occurring during judicial proceedings. See *Kanopka* v. *Kanopka*, 113 Conn. 30, 38–39, 154 A.144 (1931). Judicial admissions can take the form of a stipulation but can also be concessions by a party or an attorney. See *King* v. *Spencer*, 115 Conn. 201, 204, 161 A. 103 (1932); see generally E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) §§ 8.13.2 (c) and 8.13.3 (a), pp. 522, 523–25. The defendant's offer was not a forthright concession that he killed the victim, and, consequently, there was no alternative evidence of identity for the trial court to consider in weighing the probative value of the misconduct evidence and its potential to prejudice the defendant.

We further note that the ruling in *Old Chief* was confined to Old Chief's legal status as a felon, versus evidence offered to prove "some issue other than status . . . i.e. . . . identity . . . ." (Internal quotation marks omitted.) *Old Chief* v. *United States*, supra, 519 U.S. 190. In *Old Chief*, "the issue [was] not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact

[5] That evidence, however, would have been presented to the jury only when and if the defendant himself testified. Of course, because the state could not compel the defendant to testify during the presentation of its case, it would have had to rest its case without that evidence and gambled on the defendant so testifying. At oral argument before this court, counsel for the defendant acknowledged this potential issue but suggested that the state could have moved to reopen the evidence if the defendant failed to testify in accordance with the proposed stipulation.

of the qualifying conviction is alone what matters under the statute." Id. The court in *Old Chief* explained: "The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach." Id., 190–91.

Here, unlike the statute at issue in *Old Chief*, which required only that the prosecution prove that Old Chief previously had been convicted of any felony, the relevant crime with which the defendant was charged in this case required the state to prove beyond a reasonable doubt that the defendant shot and killed the victim. Under these circumstances, the "standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [g]overnment chooses to present it" clearly applies. Id., 186–87. Here, the proof of the identity of the defendant as the shooter was crucial to the narrative of the state's case, even if the defendant later admitted in his own testimony that he shot and killed the victim, but that he did so in self-defense.

On the basis of the foregoing, we conclude that the defendant's reliance on *Old Chief* for the proposition that the court erred in not balancing his offer to stipulate with the prejudicial effect of the challenged misconduct evidence is unavailing. Accordingly, the defendant's challenge to the admission of that evidence must fail.

II

The defendant next claims that the trial court abused its discretion by denying his motion for a mistrial after a state's witness inadvertently testified regarding a prior incident involving the defendant that the state previously had conceded, and the trial court ruled, was inadmissible. Specifically, the defendant claims that the court should have ordered a mistrial after Dwayne Mitchell, the defendant's former cellmate, testified that the defendant had previously shot Fandacone in the eye with a flare gun, in contravention of the court's pretrial ruling. We disagree.

The following additional facts are relevant to this claim. On February 22, 2017, the defendant filed a motion in limine to preclude, inter alia, evidence that the defendant shot Fandacone with a flare gun on February 23, 2015. Due to that incident, Fandacone sustained an injury resulting in the loss of her right eye, requiring her to wear a prosthetic eye. At a hearing on the motion in limine, the state conceded that the flare gun incident would not be admissible in its case-in-chief. The trial court advised the state that, if it sought to introduce evidence of the flare gun incident, it should raise the issue outside the presence of the jury so that the court could assess its admissibility.

During the trial, the jury heard about the flare gun incident during the state's direct examination of Mitchell. While discussing the various conversations that Mitchell had with the defendant, the state asked Mitchell to "take us through this series of conversations, how it evolves from getting out of the country to more."

Mitchell testified that he asked the defendant what was "going on" besides his assault charge that was causing him to want to get out of the country. Mitchell stated that the defendant "said something about a murder . . . somebody being shot." He said that they started talking about the assault and "that's when [the defendant] told me about shooting his girlfriend with a flare gun." The defendant immediately objected to Mitchell's testimony, and the trial court sustained the objection, instructing the jury to "disregard the last answer in its entirety. You will remove it from your minds, treat it as though you'd never heard it."

After Mitchell concluded his testimony, the defendant moved for a mistrial, arguing that the testimony about the flare gun incident was prejudicial because it "involved violence with a gun" and because Fandacone was expected to testify for the state and she had a visible injury to her eye that was sustained during the flare gun incident. The prosecutor countered that the testimony about the flare gun incident was not solicited, the court immediately gave a curative instruction, and Fandacone's injury was not visible. The trial court denied the motion for a mistrial on the ground that it had immediately given the jury a curative instruction, and that "the brief mention of the flare gun incident was not so prejudicial that it precludes a fair trial and did not cause substantial and irreparable prejudice to the defendant's case. . . . [T]he court's curative [instruction] obviates any prejudice that did occur."

At the conclusion of the trial, the court reminded the jury that it had ordered certain testimony and comments stricken during the trial and instructed: "You should disregard that testimony and those comments . . . and you must not give them any weight whatsoever in your deliberations." The defendant now challenges the denial of his motion for a mistrial.

"[T]he principles that govern our review of a trial court's ruling on a motion for a mistrial are well estab-

lished. Appellate review of a trial court's decision granting or denying a motion for a [mistrial] must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a [mistrial] is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. . . . In our review of the denial of a motion for [a] mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion. . . .

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse 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. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018).

On appeal, the defendant argues that the trial court abused its discretion when it denied the motion for a mistrial after Mitchell "blurted out that the defendant shot his girlfriend in the eye with a flare gun." The defendant contends that he was prejudiced by Mitchell's testimony because the jury would be able to observe that, as a result of the defendant shooting her in the eye with a flare gun, Fandacone had a glass eye. Contrary to the defendant's assertions, Mitchell did not testify that the defendant shot Fandacone in the eye; nor was there any mention of any injury to Fandacone. The

record likewise does not support the defendant's claim that Fandacone's eye injury was visible or noticeable to the jury.

Although Mitchell's testimony was improper, the court found, and the record supports, that it was not invited by the state and was an isolated statement. Immediately following the improper reference to the flare gun incident, the court instructed the jurors to disregard it and to put it out of their minds. "[E]ven improperly admitted evidence of this nature may not prove to be harmful when the court takes adequate corrective measures." *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 23, 60 A.3d 222 (2013). "It is well settled that the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary . . . . Thus, [a] jury is normally presumed to disregard inadmissible evidence brought to its attention unless there is an overwhelming probability that the jury will not follow the trial court's instructions and a strong likelihood that the inadmissible evidence was devastating . . . ." (Internal quotation marks omitted.) *Modaffari* v. *Greenwich Hospital*, 157 Conn. App. 777, 785, 117 A.3d 508, cert. denied, 319 Conn. 904, 122 A.3d 1279 (2015). Moreover, "[t]he trial judge can gauge the tenor of the trial . . . and can detect those factors, if any, that could improperly have influenced the jury." (Internal quotation marks omitted.) *Childs* v. *Bainer*, 235 Conn. 107, 113, 663 A.3d 398 (1995). Thus, even if Mitchell's isolated statement referencing the flare gun incident could be viewed as being unduly prejudicial to the defendant, any danger inherent in its admission would have been cured by the court's instruction, and we defer to the trial court's advantageous ability to observe the impact of that isolated statement on the jury. Accordingly, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

III

Finally, the defendant claims that his sixth amendment right to confrontation was violated when the court allowed a state trooper to testify that the first selectman of the town of Andover had told her that the defendant did not have a temporary town permit to carry the firearm that he used to shoot and kill the victim. We are unpersuaded.

Brianna Tassinari, a Connecticut state trooper assigned to the special licensing and firearms unit, testified that there was no record showing that the defendant possessed a state permit to carry a pistol or revolver on July 3, 2015. Tassinari conducted a further check with the town of Andover, the defendant's place of residence, to ascertain whether the town had issued a temporary sixty day permit during that time period. Tassinari testified that she "contacted the first selectman directly, and he said that—it had neither been issued nor denied at that time." The defendant did not object to Tassinari's testimony.

The defendant claims on appeal that Tassinari's testimony constituted testimonial hearsay, the admission of which violated his constitutional right to confrontation and deprived him of a fair trial. Because the defendant's claim is unpreserved, we review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[6] as the defendant requests in his appellate brief. Even if we assume, arguendo, that Tassi-

[6] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

nari's testimony was inadmissible testimonial hearsay that violated the defendant's right to confrontation, we conclude that his claim fails under the fourth prong of *Golding* because any alleged violation was harmless.

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the [evidence] in the prosecution's case, whether the [evidence] was cumulative, the presence or absence of evidence corroborating or contradicting the [evidence] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Smith*, 156 Conn. App. 537, 561–62, 113 A.3d 103, cert. denied, 317 Conn. 910, 115 A.3d 1106 (2015).

Here, the defendant did not challenge the charge of carrying a pistol without a permit at trial. As noted, the defendant did not object to Tassinari's testimony nor did he cross-examine her or challenge her testimony in any other way. In fact, the defendant testified that he was "illegally carrying" the gun with which he shot the victim on July 3, 2015.[7] The defendant's admission alone supports the jury's guilty verdict on the charge of carrying a pistol without a permit.[8] We thus conclude

[7] Although the arguments of counsel are not evidence, it is noteworthy that defense counsel acknowledged in his closing argument that the defendant "should not have had that gun."

[8] The defendant argues that his admission could have been interpreted by the jury as pertaining to the fact that he had stolen the firearm. Although that is one possible, albeit unlikely, interpretation of the defendant's testimony, "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,

that the admission of Tassinari's testimony regarding her conversation with the first selectman of the town of Andover was harmless beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other judges concurred.

---

instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crewe*, 193 Conn. App. 564, 570, 219 A.3d 886, cert. denied, 334 Conn. 901, 219 A.3d 800 (2019).

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 196

(Replaces Prior Cumulative Table)

Al-Fikey *v.* Obaiah 13
Dissolution of marriage; claim that trial court's finding that defendant was at fault for irretrievable breakdown of marriage was clearly erroneous; whether trial court properly found that defendant was intentionally underemployed when calculating his earning capacity; claim that trial court erred in calculating support orders on basis of defendant's earning capacity rather than his actual income; claim that trial court improperly determined which properties were part of marital estate.

American Tax Funding, LLC *v.* First Eagle Corp. 298
Municipal tax collection; special defenses; municipal tax lien assignment statute (§ 12-195h); extinguishment of liens pursuant to statute (§ 12-195); whether trial court properly found that plaintiff's claims for unpaid taxes were extinguished pursuant to § 12-195 when plaintiff or its assignee took title to property in foreclosure proceeding; whether plaintiff provided inadequate record for review of its claim that trial court incorrectly found that defendant's debt to plaintiff had been satisfied.

Board of Education *v.* Waterbury Teachers Assn., CEA-NEA 463
Arbitration; claim that trial court improperly vacated arbitration award, pursuant to applicable statute (§ 52-418 (a) (4)) on ground that arbitrator exceeded or so imperfectly executed his powers that mutual, final and definite award on subject matter submitted was not made; whether award conformed to submission; claim that trial court improperly determined that award violated the public policy set forth in Teacher Negotiation Act (§ 10-153a et seq.); whether award was inconsistently limited to group within collective bargaining unit.

Bordiere *v.* Ciarcia Construction, LLC 70
Motion to open judgment; motion to substitute as party plaintiff; whether trial court erred in premising its decision to open judgment and to substitute executrix as plaintiff on statute (§ 52-107) permitting intervention in case that had reached final judgment; claim that right of survival statute (§ 52-599) provided trial court with broad discretion to grant executrix' untimely motion to substitute herself as plaintiff on showing of good cause.

Bozelko *v.* Commissioner of Correction 627
Habeas corpus; motion to dismiss; motion to open judgment; motion to reargue; claim that habeas court abused its discretion in dismissing petitioner's habeas petition for failing to appear at status conference; whether habeas court improperly denied petitioner's motion to open judgment of dismissal; claim that habeas court improperly denied motions to reargue.

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

Carabetta Organization, Ltd. *v.* Meriden 147
Summary judgment; res judicata; whether trial court properly rendered summary judgment for defendants where plaintiffs claimed that certain defendants conspired to secure defeat of plaintiffs' effort to obtain approval of leaseback agreement of certain real property that had been subject of four prior unsuccessful actions by plaintiffs; claim that plaintiffs' action was founded on different types of conduct by different defendants and different effects of that conduct.

Cheswold (TL), LLC, BMO Harris Bank, N.A. *v.* Kwong 279
Foreclosure of tax liens; subject matter jurisdiction; standing; whether trial court properly denied defendant's motion to dismiss; claim that substitute plaintiff's failure to record certain assignment of tax liens on town land records deprived it of standing to pursue foreclosure action.

Cinotti *v.* Shred It U.S.A., LLC (Memorandum Decision) 907

Compass Bank *v.* Dunn 43
Foreclosure; whether trial court incorrectly granted motion for default for failing to disclose defense on ground that no "valid" defense was asserted; whether rule

of practice (§ 13-19) allows trial court to pass on legal sufficiency of proposed defense; claim that defendants interposed valid defense to foreclosure action.
Consiglio *v.* Al Dente, LLC (Memorandum Decision) . . . 904
Deutsche Bank National Trust Co. *v.* Jafri (Memorandum Decision) . . . 906
Dickau *v.* Mingrone . . . 59
Property; breach of contract; claim that trial court erred in finding that city building department had not made determination regarding use and occupancy status of plaintiff's property; whether record was sufficient to support trial court's finding; claim that trial court erred in not finding that plaintiff established existence of damages.
Halperin *v.* Halperin . . . 603
Dissolution of marriage; postjudgment order; claim that trial court improperly interpreted provision of parties' separation agreement in determining that income derived from plaintiff's interests in two entities was included in provision's definition of total income for purposes of calculating plaintiff's unallocated support obligation; whether trial court's determination that parties intended to include income at issue in plaintiff's total income for purposes of determining his unallocated support obligation was clearly erroneous; whether plaintiff's construction of disputed language of provision would render superfluous provision's specific exclusion of certain other income; whether plaintiff's conversion of cash assets awarded at time of dissolution to shares of certain partnership that produced income stream for purposes of calculating unallocated support; whether equitable principles required that plaintiff's income from entities be excluded from calculation of unallocated support.
Hamann *v.* Carl . . . 583
Civil theft; statutory (§ 52-564) treble damages for civil theft; unjust enrichment; claim that trial court erred in denying defendant's motion to dismiss for lack of personal jurisdiction; whether defendant waived claim of lack of personal jurisdiction; claim that trial court erred in finding defendant committed civil theft and in awarding treble damages; claim that trial court improperly set commencement date for prejudgment interest on unjust enrichment damages award.
Hannon *v.* Board of Education (Memorandum Decision) . . . 903
Hogfeldt *v.* Board of Education (Memorandum Decision) . . . 901
Holt *v.* Dolce (Memorandum Decision) . . . 904
In re Brooklyn O. . . . 543
Child neglect; motion to revoke commitment; claim that trial court improperly found that respondent father failed to prove that commitment of minor child to custody of Commissioner of Children and Families was no longer warranted.
In re Gabriel C. . . . 333
Termination of parental rights; whether trial court improperly denied respondent mother's motion to disqualify counsel acting as minor child's guardian ad litem on ground that attorney previously acted as mother's guardian ad litem when mother was minor; claim that trial court improperly admitted social studies pursuant to governing statutes (§§ 17a-112 (j) and 45a-717) and on ground that social studies contained hearsay; claim that trial court improperly concluded that mother failed to achieve requisite degree of personal rehabilitation required by § 17a-112.
In re Geoffrey G.. . . . 316
Termination of parental rights; whether trial court improperly failed to order, sua sponte, evaluation of respondent mother's competency to assist her counsel at trial; whether mother established violation of her right to due process; claim that evidence in record demonstrated that mother's mental health issues, at time of trial, interfered with her ability to provide her newly retained counsel with truthful, relevant data in presentation of her case.
Jackson *v.* Waterbury Police Dept. (Memorandum Decision) . . . 908
Jepsen *v.* Camassar . . . 97
Declaratory judgment; action seeking declaration that certain modifications made by beach association to restrictive covenants in beach deed were invalid; claim that trial court improperly denied plaintiffs' postjudgment motion for equitable relief because this court's order of remand in first appeal required trial court to address their claims for quiet title and injunctive relief; claim that trial court improperly denied postjudgment motion for fees and costs; claim that, even assuming that this court's mandate in first appeal did not encompass claims of certain plaintiffs to quiet title, equitable relief, and fees and costs, trial court

improperly denied their motion to open to provide them with their requested relief; claim that trial court violated several state and federal constitutional rights of certain plaintiffs by failing to hear or grant their postjudgment motions.

Jolley *v.* Vinton 379

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

Kaminski *v.* Semple 528

Declaratory judgment; whether trial court properly granted motion to dismiss filed by defendant state employees; whether plaintiff lacked standing to raise claims as to certain defendants; claim that trial court improperly concluded that defendants were entitled to sovereign immunity and statutory (§ 4-165) immunity; adoption of trial court's memorandum of decision as statement of facts and applicable law on issues.

Kenneson *v.* Eggert 773

Fraud; absolute immunity; litigation privilege; motion to dismiss; claim that trial court erred in concluding that litigation privilege implicates subject matter jurisdiction; claim that trial court improperly granted motion to dismiss because statements at issue were not made during judicial proceeding and were not relevant to subject matter of proceeding.

Lemanski *v.* Commissioner of Motor Vehicles (Memorandum Decision) 901

Mendieta *v.* Perry (Memorandum Decision) 906

Morton *v.* Syriac 183

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

MTGLQ Investors, L.P. *v.* Hammons 636

Foreclosure; summary judgment; Emergency Mortgage Assistance Program notice (§ 8-265cc et seq.); whether statutory (§ 8-265ee (a)) notice provision is subject matter jurisdictional; whether notice sent in separate foreclosure action satisfied notice provision requirement in present foreclosure action.

Nietupski *v.* Del Castillo 31

Marital dissolution; separation; claim that trial court violated free exercise clause of first amendment by rendering judgment of marital dissolution; whether trial court abused its discretion when it entered certain orders regarding minor child's travel and education as part of judgment of dissolution.

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

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

Peterson *v.* Torrington 52

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

Platt *v.* Tilcon Connecticut, Inc. 564

Breach of contract; whether trial court properly concluded that plaintiff could not prevail on breach of contract claims; holdover tenant; lease agreements; expiration of leases.

Presto *v.* Presto 22

Declaratory judgment; whether trial court properly granted motion to dismiss plaintiff's declaratory judgment action on ground that claims were not ripe for adjudi-

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.* Fortin 805

Manslaughter in first degree with firearm; carrying pistol without permit; motion to preclude; motion for mistrial; claim that trial court improperly allowed state to introduce evidence of several instances of misconduct involving defendant's prior use of firearm that was used to shoot and kill victim; whether misconduct evidence lacked probative value and was unduly prejudicial to defendant because his offer to stipulate that he had shot victim with firearm obviated state's need to prove identity; whether defendant's reliance on Old Chief *v.* United States *(519 U.S. 172) for proposition that trial court erred in not balancing his offer to stipulate with prejudicial effect of misconduct evidence was availing; claim that trial court abused its discretion in denying motion for mistrial; unpreserved claim that defendant's constitutional right to confrontation was violated when trial court allowed state trooper to testify that town's first selectman told her that defendant did not have temporary town permit to carry firearm that he used to shoot and kill victim.*

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

Vaicunas *v.* Gaylord 785

Undue influence; adverse possession; tortious interference with expectation of inheritance; motion to set aside verdict; whether trial court abused discretion in setting aside jury verdict as to count of adverse possession; whether trial court abused discretion in denying offer of evidence of character in form of opinion testimony; claim that trial court improperly charged jury as to count of undue influence.

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.

NOTICE

The Connecticut Supreme Court Policies for the Establishment and Maintenance of a System of Law Libraries

(Approved by the Connecticut Supreme Court on January 18, 2018)

1. Law libraries are established in the Judicial Districts of Danbury at Danbury, Fairfield at Bridgeport, Hartford at Hartford, New Britain at New Britain, Litchfield at Torrington, Middlesex at Middletown, New Haven at New Haven, New London at New London, Stamford/Norwalk at Stamford, Tolland at Rockville, Waterbury at Waterbury and Windham at Putnam.

2. Access to current legal publications shall be provided at each of the above-mentioned law libraries in a format and manner sufficient to meet the needs of the user, including but not limited to print, electronic or microform format. Each law library shall have as a minimum the materials specified in Appendix A.

3. All law libraries shall be open to the public from 9:00 a.m. to 5:00 p.m., Monday through Friday, exclusive of state holidays, unless otherwise posted, and such times as they may be closed due to adverse weather conditions, staff shortages, or as may be ordered by the Chief Court Administrator.

4. In accordance with generally accepted library science principles and practices, law libraries shall provide reference, circulation, bibliographic instruction, computer-assisted research, interlibrary loan, document delivery, computer printer, photocopier, and microform reader-printer services to the courts and citizens of the state at all times the libraries are open and staffed. These services shall be provided free of charge, except that a reasonable fee shall be charged for the photocopier, computer printer, document delivery, and microform reader-printer services.

5. (a) A law library advisory committee, consisting of thirteen members, is hereby established. The members of the committee shall be appointed by the Chief Justice for a term commencing on the date of their appointment and expiring three years after the July 1st following their appointment. The Chief Justice shall designate from among the members of the committee a chairperson and a vice chairperson who shall act in the absence of the chairperson, each for terms of one year commencing July 1st. The Deputy Director of Law Libraries shall attend all meetings and act as Secretary to the Committee.

   (b) The committee shall meet at least annually and more often if its business so dictates. Meetings may be called by the chairperson on the chairperson's own motion or on the request of any three members of the committee.

   (c) The committee, annually and at such other times as it deems necessary, may report to the Chief Justice and the Chief Court Administrator any recommendations it may have concerning the adequacy of the funding and services provided by the various law libraries, whether additions or deletions should be made to the list of law libraries so established,

whether amendments should be made to the minimum collection standards (Appendix A) for the law libraries, and such other matters as the committee believes are pertinent to the operation of the law libraries.

6. These policies shall be published annually in the Connecticut Law Journal.

APPENDIX A

(Approved by the Connecticut Supreme Court on January 18, 2018*)*

LAW LIBRARY MINIMUM COLLECTION STANDARDS

(1) Connecticut Materials

(A) Official and commercially published judicial decisions
(B) Official and commercially published digests
(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service
(D) Official session laws
(E) Official and commercially published statutory compilations
(F) Administrative code and published agency decisions
(G) Official and commercially published practice books
(H) Bar association ethics opinions, Statewide Grievance Committee decisions and the Rules of Professional Conduct
(I) Local charters and ordinances for towns in the judicial district in accordance with C.G.S. § 7-148a
(J) A comprehensive collection of Connecticut textbooks, treatises, looseleaf services, form books, and practice aids
(K) A collection of Connecticut legal newspapers, law reviews, and journals
(L) Records and briefs of cases heard in the appellate courts of the state
(M) Proposed bills, legislative bulletins, list of bills, file copies, calendars, public acts, and journals for the current session
(N) Transcripts of the House and Senate proceedings and the public hearings
(O) Attorney General Opinions
(P) Current state constitution, and various historical versions of the constitution

(2) Federal Materials

(A) Official or another reporter of the decisions of the Supreme Court of the United States
(B) All published decisions of the U.S. District Courts, U.S. Courts of Appeal, and U.S. Bankruptcy Courts
(C) A digest of United States Supreme Court reports, or electronic equivalent
(D) A digest of federal reports, or electronic equivalent
(E) A citation service, such as Shepard's or KeyCite, or a comparable citation service
(F) United States Code Congressional and Administrative News, or a comparable online resource for researching federal legislative history
(G) United States Code Annotated or United States Code Service
(H) Federal Register and Code of Federal Regulations
(I) Federal Cases
(J) United States Statutes At Large
(K) United States Treaties And Other International Agreements
(L) United States Government Manual
(M) Federal court rules
(N) Local federal rules and forms for courts within jurisdiction

(3) **General National Publications**

(A) Case law from the courts of last resort in all fifty states
(B) Decennial Digests, or electronic equivalent
(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service for the courts of last resort in all fifty states
(D) American Law Reports
(E) A collection of textbooks, treatises, practice aids, and looseleaf services of contemporary value on legal subjects of interest to the legal community and the public
(F) A collection of legal periodicals
(G) A legal encyclopedia, two law dictionaries, a general dictionary, a medical dictionary, and a general reference collection
(H) A basic form set, a general pleading, a general evidence and a general trial practice set
(I) A legal periodical index, or comparable online service
(J) Restatements Of The Law
(K) Uniform Laws Annotated
(L) Statutory compilations for all fifty states
(M) American Bar Association standards and professional ethics opinions
(N) The published reports of decisions of the courts of last resort prior to the National Reporter System
(O) A collection of general legal and self-help titles on subjects of interest to the public and self-represented parties