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ORDERS

CONNECTICUT REPORTS

VOL. 335

THE BANK OF NEW YORK MELLON, TRUSTEE
v. WILLIAM RUTTKAMP ET AL.

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 43974) is denied.

Shlomit Ruttkamp, self-represented, in support of the petition.

Peter A. Ventre, in opposition.

Decided May 12, 2020

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE PROBATE APPEAL OF SHERYL BUCKINGHAM ET AL.

(AC 42548)

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

Syllabus

The plaintiffs appealed to the trial court from the decree of the Probate Court dismissing their action contesting the will of the defendant's decedent, which had named the parties as beneficiaries and the defendant as the executor of the decedent's estate. Following the decedent's death, the defendant filed with the Probate Court a petition to admit the will to probate. After the deadline to object to the admission of the will had passed without any objection having been filed, the Probate Court issued a decree admitting the will to probate. The plaintiffs, who had been served with notice by the Probate Court, did not appeal from that decree; however, 137 days after it issued, they filed two motions with the Probate Court, which sought, in effect, the decedent's medical records to contest the will. In response, the defendant filed a motion to dismiss the plaintiffs' will contest for lack of subject matter jurisdiction. The Probate Court thereafter issued a decree dismissing the action, from which the plaintiffs appealed to the trial court, alleging claims of fraud. The trial court subsequently granted the defendant's motion to dismiss and rendered judgment dismissing the appeal, concluding that it lacked subject matter jurisdiction because, inter alia, the plaintiffs lacked statutory authority to raise their claims outside of a timely appeal from the original decree admitting the will to probate. On the plaintiffs' appeal to this court, *held* that the trial court properly dismissed the probate appeal for lack of subject matter jurisdiction, as that court had no statutory authority to set aside the decree of the Probate Court admitting the decedent's will to probate, and, therefore, it lacked jurisdiction to hear the plaintiffs' claims of fraud, which directly attacked the decree: because, in probate appeals, the trial court exercises the same authority as the Probate Court, and the Probate Court lacked subject matter jurisdiction to set aside its prior probate decree admitting the decedent's will to probate, even for fraud, as there was no statutory authority to do so, the trial court, likewise, lacked subject matter jurisdiction to set aside the decree; moreover, contrary to the plaintiffs' contention that the trial court had jurisdiction to set aside the probate decree because, pursuant to statute (§ 45a-24), that court possesses subject matter jurisdiction in will contests claiming fraud, the plaintiffs instituted a separate action in the Probate Court seeking to set aside the prior decree admitting the will, which constituted a direct attack on the decree over which the Probate Court lacked jurisdiction, even in cases of fraud, and § 45a-24 permits only collateral attacks on probate decrees, and, therefore, it did not provide the trial court with jurisdiction

in the circumstances of this case, as a direct challenge to a probate decree based on fraud may be raised only by way of a separate equitable action.

Argued January 23—officially released May 26, 2020

Procedural History

Appeal from the decree of the Probate Court for the district of Housatonic dismissing the plaintiffs' action contesting the will of the defendant's decedent, brought to the Superior Court in the judicial district of Danbury, where the court, *Krumeich*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Michael A. D'Onofrio, with whom, on the brief, was *Dante R. Gallucci*, for the appellants (plaintiffs).

John A. Farnsworth, with whom was *Anthony E. Monelli*, for the appellee (defendant).

Opinion

DEVLIN, J. An unusual feature of Connecticut law involves the role of the Superior Court in probate appeals. In such appeals, the Superior Court sheds its status as a constitutional court of general jurisdiction and assumes the status of a statutory Probate Court of limited jurisdiction. See *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61, 209 A.3d 690 (2019); *State* v. *Gordon*, 45 Conn. App. 490, 494–95, 696 A.2d 1034, cert. granted on other grounds, 243 Conn. 911, 701 A.2d 336 (1997) (appeal dismissed October 27, 1998). In the present case, we are asked to decide whether, while adjudicating a probate appeal, a Superior Court may entertain a direct challenge to a probate decree admitting a will to probate based on a claim of fraud. Because, in the context of the present case, such claim of fraud may be raised only by way of a separate equitable action and not a probate appeal, we affirm the judgment of the Superior Court dismissing the probate appeal filed by the plaintiffs, Sheryl Buckingham and Darlene Dunn, for lack of subject matter jurisdiction.

The following undisputed facts and procedural history are relevant to this appeal. On October 21, 2011, the decedent, Steve T. Liscinsky, executed a will naming as beneficiaries his children, which include the plaintiffs and the defendant, Wayne S. Liscinsky. The will also named the defendant as executor of the decedent's estate. The decedent died on May 1, 2016. Following the decedent's death, the defendant filed a petition with the Probate Court for the district of Housatonic to admit the will to probate. On August 9, 2016, the Probate Court issued a notice of the defendant's petition, which listed the plaintiffs as recipients of the notice and explained that the will would be admitted on August 24, 2016, with a deadline to object to its admission of August 22, 2016. The plaintiffs never filed an objection to the will, nor did any other interested party. Subsequently, on August 24, 2016, the Probate Court issued a decree admitting the will to probate, and it served notice to the interested parties on August 25, 2016. The plaintiffs never appealed from this decree. See General Statutes § 45a-186 (b).

Nearly three months later, on November 10, 2016, the plaintiffs' counsel filed his appearance with the Probate Court. On January 9, 2017, 137 days after the Probate Court had issued its decree, the plaintiffs filed a motion titled "Notice of Intention to Contest Will" with the Probate Court. On January 11, 2017, the plaintiffs filed a related motion titled "Request for Court Order for Disclosure of Medical Information." In effect, these two motions sought the decedent's medical records in order to contest the will under the alternative theories that either the decedent lacked the capacity to knowingly and voluntarily execute his will or the will was the product of undue influence. On January 17, 2017, the defendant filed a motion to dismiss the will contest, arguing that the Probate Court lacked subject matter jurisdiction because the plaintiffs' contest was untimely, the court lacked statutory authority to con-

sider their claims, and their claims were barred by res judicata. The Probate Court agreed and, on June 28, 2018, dismissed the action.

From that decree, the plaintiffs timely appealed to the Superior Court. In their complaint to the Superior Court, the plaintiffs included additional allegations that they had not received proper notice of the defendant's petition to admit the will to probate and that the defendant had "fraudulently concealed" and "fraudulently presented" the will. The plaintiffs did not offer further factual allegations to support their new claims of fraud. In response, the defendant moved to dismiss the probate appeal on three grounds: (1) the Superior Court, in exercising the same authority as the Probate Court, lacked subject matter jurisdiction to decide the appeal; (2) the plaintiffs' claims were barred by res judicata; and (3) the plaintiffs' claims of fraud were legally insufficient. The Superior Court granted the motion and dismissed the appeal, concluding that it lacked subject matter jurisdiction because the plaintiffs lacked statutory authority to raise their claims outside of a timely appeal from the original probate decree admitting the will and those claims were barred by res judicata. This appeal followed.

On appeal, the plaintiffs claim that the Superior Court improperly dismissed their appeal from the Probate Court. Specifically, they contend that they sufficiently pleaded their claims of fraud, and, pursuant to General Statutes § 45a-24,[1] the Superior Court has jurisdiction to set aside prior probate decrees without any applicable statutory time limitation "when the claim involves fraud, including concealment of lack of capacity, and

[1] General Statutes § 45a-24 provides in relevant part: "All orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud."

undue influence."[2] We conclude that, in the circumstances of the present case, the Superior Court in this probate appeal had no jurisdiction to set aside prior decrees of the Probate Court—even on a ground of fraud. Thus, the Superior Court lacked subject matter jurisdiction to hear their claims.[3]

We begin by setting forth the relevant standard of review. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *In re Probate Appeal of Knott*, supra, 190 Conn. App. 61.

Moreover, "[a]n appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a

[2] Although the plaintiffs do not address the Superior Court's application of res judicata in their arguments to this court, we recognize that it is well settled that "[r]es judicata is not included among the permissible grounds on which to base a motion to dismiss. Res judicata with respect to a jurisdictional issue does not itself raise a jurisdictional question." *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 687, 490 A.2d 509 (1985). "Res judicata does not provide the basis for a judgment of dismissal; it is a special defense that is considered after any jurisdictional thresholds are passed." *Labbe* v. *Pension Commission*, 229 Conn. 801, 816, 643 A.2d 1268 (1994).

[3] Because our resolution of the issue of subject matter jurisdiction is dispositive of the appeal, we need not address the sufficiency of the plaintiffs' claims of fraud. See, e.g., *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 216 n.4, 815 A.2d 281 (2003).

probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Citations omitted; internal quotation marks omitted.) *State* v. *Gordon*, supra, 45 Conn. App. 494–95. "When . . . no record was made of the Probate Court proceedings, the absence of a record requires a trial de novo." *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009).

The ultimate question in this appeal, therefore, is whether the Probate Court possessed subject matter jurisdiction to set aside a prior probate decree. If so, then the plaintiffs would have had a cognizable cause of action, and the Superior Court, in exercising the same authority as the Probate Court, would have possessed subject matter jurisdiction as well. Accordingly, we now analyze the jurisdictional bounds of our courts of probate.

"The Probate Court is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties. . . . As a court of limited jurisdiction, it may act only when the facts and circumstances exist upon which the legislature has conditioned its exercise of power. . . . Such a court is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *In re Probate Appeal of Cadle Co.*, 129 Conn. App. 814, 820, 21 A.3d 572, cert. denied, 302 Conn. 914, 27 A.3d 373 (2011).

In 1904, our Supreme Court first addressed the issue of whether the Probate Court possesses the authority to reverse or to set aside its prior decrees. *Delehanty* v. *Pitkin*, 76 Conn. 412, 416, 56 A. 881 (1904), appeal dismissed, 199 U.S. 602, 26 S. Ct. 748, 50 L. Ed. 328 (1905). In *Delehanty*, the Probate Court issued a decree admitting a will to probate, which the plaintiff did not

appeal, and then, four years later, the plaintiff petitioned the Probate Court to admit a different will for the same decedent. Id., 413–15. The Probate Court denied the plaintiff's petition, and the Superior Court subsequently dismissed his appeal for want of jurisdiction. Id., 413. On appeal, the plaintiff claimed that his proposed will was the true will of the decedent and that one of the executors had fraudulently destroyed the original copy of this will. Id., 414. Upon reviewing the contemporaneous statutes governing the authority of the Probate Court, our Supreme Court concluded that "the power to set aside a decree of this kind, after the estate is settled, is not in express terms anywhere given to our courts of probate . . . ." Id., 416–17. Further, the court rejected the plaintiff's argument that the Probate Court possessed that authority by implication, holding that the courts of probate "have no such unregulated and unlimited power to modify, reverse, or set aside . . . their own final decrees . . . ." Id., 417–18. Instead, the legislature vested the right to overturn probate decrees with the Superior Court on appeal and, "save in the cases excepted by statute, a final probate decree can be set aside or reversed only upon appeal." Id., 420.

Our Supreme Court further concluded that there was no statutory exception permitting the Probate Court to set aside its final decrees, even in cases alleging fraud. Id., 423. The court examined General Statutes (1902 Rev.) § 194, the predecessor to § 45a-24, which provided that "[n]o order made by a court of probate upon any matter within its jurisdiction, shall be attacked collaterally, except for fraud, or set aside save by appeal." (Internal quotation marks omitted.) *Delehanty* v. *Pitkin*, supra, 76 Conn. 420. The court concluded that § 194 did not apply to the case before it, because a proceeding brought in the Probate Court to set aside a prior decree for fraud constitutes a direct attack, rather than a collateral attack, on the prior decree. Id., 423. The court reasoned that "[a] direct attack upon a judgment, if

successful, wipes it out of existence; while a collateral attack upon it, if successful, leaves it in full force, except as against the party who collaterally attacks it, and as regards the case in which it is so attacked. Clearly, the proceeding before the court of probate was a direct attack upon the decree in question, seeking to have it set aside by the court of probate for fraud; and this, we hold, the court of probate had no power to do, even for fraud." Id. The court therefore determined that, because § 194 did not provide the Probate Court jurisdiction to adjudicate direct attacks on probate decrees, no statute, as of 1904, provided the Probate Court with authority necessary to set aside its prior decrees, even for fraud. Id.

More recently, our Supreme Court has clarified that when a plaintiff fails to timely appeal a probate decree, "[h]er only recourse . . . would be by an appeal to the general equitable power of the Superior Court, which may, in proper cases, grant relief against decrees of the Probate Court procured by fraud, accident, mistake and the like." (Internal quotation marks omitted.) *VanBuskirk* v. *Knierim*, 169 Conn. 382, 388, 362 A.2d 1334 (1975). Likewise, this court previously has noted that, "[o]nly in exceptional circumstances, such as fraud, mistake or a like equitable ground, may [the Superior Court] consider an equitable attack on a probate order or decree." *Ferris* v. *Faford*, 93 Conn. App. 679, 691, 890 A.2d 602 (2006); id., 691 n.5 (citing § 45a-24).

Presently, just as in 1904, there is no statute conferring broad jurisdiction on the Probate Court to adjudicate a direct attack on its prior decrees for any reason. Instead, there are limited exceptions to the general rule that the Probate Court may not overturn its prior decrees, many of which are the same exceptions discussed by the court in *Delehanty*.[4] Therefore, our Supreme Court's conclusion in *Delehanty* remains rel-

[4] For instance, General Statutes § 45a-128 (a) provides in relevant part: "[A]ny order or decree made by a court of probate ex parte may, in the

evant in the present day: In the absence of a specific statutory exception, the Probate Court does not have subject matter jurisdiction to set aside its prior decrees, even for fraud. *Delehanty* v. *Pitkin*, supra, 76 Conn. 417. Furthermore, the specific exceptions that the plaintiffs presently seek—to contest an admitted will alleging fraud, undue influence, and incapacity—have no statutory basis. Specifically, in their brief to this court, the plaintiffs rely on two statutes that they argue provide subject matter jurisdiction here: §§ 45a-186 and 45a-24. We disagree.

In citing § 45a-186, the plaintiffs argue that the Superior Court possessed jurisdiction because they were aggrieved by the Probate Court's dismissal of their will contest and timely appealed that dismissal. Section 45a-186 (b) provides in relevant part: "Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . . [A]n appeal from an order, denial or decree in any . . . matter [excluding certain exceptions listed elsewhere in this section] shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree. . . ."[5] In order for the Superior Court to possess jurisdiction over an appeal from the Probate Court, the plaintiffs must meet the requirements of § 45a-186 (b). See *In re Probate Appeal of Knott*, supra, 190 Conn. App. 61–62. The plaintiffs must demonstrate that they were aggrieved by the decision of the Probate Court, because "the absence

discretion of the court, be reconsidered and modified or revoked by the court. . . ." See also *Delehanty* v. *Pitkin*, supra, 76 Conn. 418 ("in 1869 the [l]egislature provided that 'any court of probate may modify or revoke any order made ex parte, before an appeal therefrom, and, if made in reference to the settlement of any estate, before the final settlement' ").

[5] Although § 45a-186 (b) provides an alternative forty-five day window to file an appeal on certain grounds and General Statutes § 45a-128 (b) provides a 120 day window to seek reconsideration, modification, or revocation of a probate decree, the arguments put forth by both parties to this court have only concerned the thirty day limit.

of aggrievement, as required by that statute, is a defect that deprives the Superior Court of jurisdiction to entertain the appeal. . . . The concept of aggrievement depends only on the existence of a cause of action upon which a party may rest his plea for relief. The issue of whether [a party] was aggrieved under [§ 45a-186 (b)] by the actions of the Probate Court is to be distinguished from the question of whether, on a review of the merits, it will prevail. . . . If the plaintiff[s] had a cognizable cause of action in the Probate Court, [they] would be aggrieved by an order of that court denying [them] relief." (Citations omitted; internal quotation marks omitted.) *In re Baskin's Appeal from Probate*, 194 Conn. 635, 637–38, 484 A.2d 934 (1984).

Despite the plaintiffs' timely appeal, § 45a-186 (b) alone does not establish jurisdiction here because a dismissal in the Probate Court constitutes aggrievement *only* where "the plaintiff[s] had a cognizable cause of action in the Probate Court . . . ." (Internal quotation marks omitted.) Id., 638. Thus, § 45a-186 does not resolve the ultimate issue of whether the plaintiffs, in fact, possessed a cognizable cause of action in the Probate Court.

Next, the plaintiffs argue that the Superior Court possesses subject matter jurisdiction in will contests alleging fraud pursuant to § 45a-24, which provides in relevant part: "All orders, judgments and decrees of courts of probate . . . shall not be subject to collateral attack, except for fraud."[6] Generally, the plaintiffs' proposition is true; our appellate courts continually have reaffirmed the principle that the Superior Court may exercise its equitable jurisdiction to "grant relief against decrees of

[6] We note that the language of the predecessor statute to § 45a-24, as discussed by our Supreme Court in *Delehanty*, has changed little over the intervening century. See *Delehanty* v. *Pitkin*, supra, 76 Conn. 420 ("[t]he words of the statute are as follows: '[n]o order made by a court of probate upon any matter within its jurisdiction, shall be attacked collaterally, except for fraud, or set aside save by appeal' ").

the Probate Court procured by fraud, accident, mistake and the like." (Internal quotation marks omitted.) *VanBuskirk* v. *Knierim*, supra, 169 Conn. 388. The plaintiffs, however, misunderstand their procedural posture in the present case. When a decision of the Probate Court is appealed pursuant to § 45a-186, "[t]he Superior Court, in turn . . . acts as a court of probate with the same powers and subject to the same limitations." (Internal quotation marks omitted.) *In re Probate Appeal of Knott*, supra, 190 Conn. App. 61. Similar to the plaintiff in *Delehanty*, the plaintiffs here instituted a separate action in the Probate Court seeking to set aside the prior decree admitting the will. If successful, the plaintiffs' challenge to the will would wipe the prior decree out of existence. The *Delehanty* court plainly held that such an attack is not a collateral attack; instead, the plaintiffs' action is properly characterized as a direct attack on the prior decree, over which the Probate Court lacks jurisdiction, *even in cases of fraud*. See *Delehanty* v. *Pitkin*, supra, 76 Conn. 417, 423. Section 45a-24 provides only for collateral attacks, just as its predecessor provided in 1904, and has no provision permitting direct attacks on probate decrees. Consequently, for the Superior Court to possess jurisdiction, the plaintiffs would need to institute a separate action collaterally attacking the probate decree admitting the will and invoke the court's equitable jurisdiction by alleging fraud or other equitable grounds. See *VanBuskirk* v. *Knierim*, supra, 388; *Delehanty* v. *Pitkin*, supra, 417. Thus, because no such independent action was before the Superior Court, § 45a-24 does not provide jurisdiction here.

Beyond the arguments put forth by the plaintiffs, our review of the statutory authority governing our courts of probate similarly does not uncover any source for subject matter jurisdiction to set aside the probate decree in the present case. Instead, our appellate courts have long established that there are only two recourses

for the remedy that the plaintiffs seek: they either could have timely appealed the admission of the will to the Superior Court pursuant to § 45a-186 or filed an independent action with the Superior Court, invoking its equitable jurisdiction by claiming fraud, mistake, or a like equitable ground. The plaintiffs took neither approach. Instead, they filed a separate action with the Probate Court to contest the will without any statute granting the court jurisdiction to hear such matters. Therefore, because the Probate Court "is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation," the Probate Court lacked subject matter jurisdiction to hear the plaintiffs' motion. (Internal quotation marks omitted.) *State* v. *Gordon*, supra, 45 Conn. App. 495. On appeal, the Superior Court likewise lacked jurisdiction, because in a probate appeal, even in cases in which the plaintiffs allege fraud, the Superior Court may act only with the same authority possessed by the Probate Court. We therefore conclude that the Superior Court properly dismissed the appeal for lack of subject matter jurisdiction because there was no statutory authority permitting the court to grant the remedy the plaintiffs sought.

The judgment is affirmed.

In this opinion the other judges concurred.

COLLEEN POWERS *v.* KAVEESH HIRANANDANI
(AC 40470)

Lavine, Keller and Devlin, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and issuing certain orders. Prior to the parties' marriage, the defendant and his brother, M, purchased two pieces of real property together, property L and property B. The defendant owned 99 percent of property L and one percent of property

B, whereas M owned 1 percent of property L and 99 percent of property B. Property L was the marital home of the defendant and the plaintiff. M died in April, 2014 and, in his will, M devised his interest in both pieces of real property to the defendant. During the dissolution proceedings, the trial court ordered the defendant to transfer his rights, title, and interest in property L to the plaintiff and to retain ownership of property B, free and clear of any claim by the plaintiff. On appeal, the defendant raised several claims regarding the trial court's orders concerning certain real property and its financial orders. *Held*:

1. The trial court did not lack subject matter jurisdiction over the real property awarded as part of the parties' marital estate; the trial court has plenary and general subject matter jurisdiction over legal disputes in family relations matter pursuant to statute (§ 46b-1 (c)) and has authority to transfer property germane to a dissolution proceeding pursuant to statute (§ 46b-81), including title to real property; moreover, to the extent that the defendant's argument is construed as a challenge to the trial court's authority to order the defendant to transfer his rights, title, and interest in property L to the plaintiff, the court did not lack the authority to do so; the court is required by § 46b-81 to divide the marital assets of the parties at the time of dissolution and, therefore, properly ordered the defendant to transfer his rights, title, and interest in property L, which was listed on his financial affidavit, indicating it was part of the marital property to be divided.
2. The defendant could not prevail on his claim that the trial court's orders regarding the distribution of real property were predicated on a mistake and are impossible to execute; M devised his interest in property B to the defendant in his will and, on his death, the defendant became the sole owner of property B and it was irrelevant that M's estate had not been settled at the time of dissolution and that the defendant was not in possession of the property, as the defendant conflated ownership and possession, and, therefore, it was not clearly erroneous for the trial court to find that the defendant was the sole owner of property B.
3. The trial court did not abuse its discretion in ordering the defendant to pay 53 percent of the cost of the child's extracurricular activities; although the court set no upper limit as to that cost, at the time of the dissolution, the cost of extracurricular activities as listed on the plaintiff's financial affidavit was de minimus and the defendant failed to establish that the court's order constituted an abuse of discretion; moreover, if there is a substantial change in circumstances, the defendant has a remedy pursuant to statute (§ 46b-56) to seek a modification of the court's order.
4. The trial court did not abuse its discretion in distributing the real property between the parties without determining the value of that property; the defendant failed to provide evidence as to the value of property B, listing the estimating value of property B as "unknown" on one financial affidavit and, in a second financial affidavit, providing the value of property B as of the date of M's death, whereas the relevant value in a dissolution action is the value as of the date of dissolution.

5. The trial court abused its discretion in failing to divide the parties' personal property listed on their financial affidavits and ordering them to divide the property to their mutual satisfaction; nevertheless, this court concluded that reconsideration of the court's order as to the division of the parties' personal property did not merit reconsideration of all of the court's financial orders as the few items of personal property are clearly severable from the overall mosaic that was the court's financial orders.
6. The trial court did not abuse its discretion in ordering the defendant to pay the mortgage and other costs for property L until he transferred his rights, title, and interest to the plaintiff; the court's order required the defendant to pay the mortgage and costs for less than one month and, if he could not afford to do so, he could have transferred his interest in property L to the plaintiff immediately following the dissolution rather than wait until the end date set by the court.

Argued December 10, 2019—officially released May 26, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Jacobs, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Samuel V. Schoonmaker, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellant (defendant).

Tara C. Dugo, with whom were *Haseeb Khan* and, on the brief, *Norman A. Roberts*, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendant, Kaveesh Hiranandani, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Colleen Powers. On appeal, the defendant claims that the court (1) lacked subject matter jurisdiction over the real property it awarded to the plaintiff, (2) issued orders with respect to real property that were predicated on a mistake and are impossible to execute, (3) abused its discretion by dividing the real property between the parties without determining its value, (4) abused its discretion by failing

to divide the parties' personal property, (5) improperly ordered him to pay a percentage of the cost of all future extracurricular activities of the parties' child, and (6) abused its discretion by issuing financial orders in excess of his ability to pay. We agree with the defendant's fourth claim, but disagree with the remainder of his claims. We, therefore, reverse in part the judgment of the trial court and remand the case for further proceedings.

The Gordian knot at the heart of this appeal centers on the real property that the defendant inherited from his deceased brother, Monesh Hiranandani (Monesh). The facts regarding the property may be summarized as follows. In 2003, the defendant and Monesh together purchased and mortgaged residential properties in Stamford known as 63 Lantern Circle (Lantern Circle) and 17 Bend of River Lane (Bend of River). The defendant resided at Lantern Circle, which later became the parties' marital home. Monesh resided at Bend of River, which was his marital home. The defendant owned 99 percent of his Lantern Circle residence and Monesh owned 1 percent of it. Monesh owned 99 percent of his Bend of River residence and the defendant owned 1 percent of it. Monesh and his wife became estranged and, on October 17, 2013, Monesh executed a will (2013 will) in which he devised his interest in both Lantern Circle and Bend of River to the defendant. Monesh died in April, 2014. His widow contested the 2013 will in the Probate Court. The plaintiff commenced the present dissolution action on November 12, 2014. Following a protracted trial,[1] the court dissolved the parties' marriage on August 5, 2016, and ordered the defendant to transfer all of his rights, title and interest in Lantern Circle to the plaintiff by September 1, 2016. At the time

[1] Trial commenced on October 20, 2015, and continued for twenty nonconsecutive days, ending on April 20, 2016. Although custody of the parties' only child was the primary focus of the lengthy trial, the court's custody orders are not in dispute in the present appeal.

of dissolution, the widow had withdrawn her challenge to the 2013 will, but Monesh's estate was insolvent and had not yet been settled. Although the defendant had inherited real property from Monesh, including Monesh's 1 percent interest in Lantern Circle, the Probate Court had not yet ordered the distribution of the property in the estate. The defendant's inheritance, therefore, had not yet come into his possession at the time of dissolution.

The trial court issued a memorandum of decision on August 5, 2016, in which it made the following relevant factual findings.[2] The parties were married in March, 2010, and resided at Lantern Circle. Their only child was born in August, 2013. The plaintiff is a college graduate, who, at the time of the marriage, was employed full-time at an annual salary of approximately $150,000. After the birth of the parties' child, the plaintiff worked part-time, but she has not been employed since December, 2013. At the time of trial, the forty-three year old plaintiff resided with the parties' child at Lantern Circle.

The defendant, who was forty-five at the time of trial, suffers from a medical condition that has caused a discrepancy in the length of his legs and causes soreness in his joints. He has a degree in economics and was self-employed as a consultant, earning between $70,000 and $80,000 per year until the end of 2012, when he left his employment to help care for Monesh, who had been diagnosed with cancer. The defendant attributed his extended unemployment to his time spent taking care of Monesh, grieving Monseh's death and the parties' marital separation, and the demands of the court process. He was living in an apartment in Stamford at the time of trial.

[2] In rendering its decision, the court stated that it fully had considered the criteria set forth in General Statutes §§ 46b-62, 46b-81, 46b-82, and 46b-84 and the applicable case law.

The court found that the parties' marriage was deeply troubled. The parties did not know basic things about one another, including their health, education, and financial affairs. Because they did not communicate, the plaintiff did not know that the defendant had failed to file income tax returns for a number of years and he did not know that the plaintiff had filed separate income tax returns.

Each of the parties testified as to what he or she considered to be the other party's disturbing conduct. The defendant testified that the plaintiff continued to wear an engagement ring given to her by her former fiancé who died unexpectedly and used a greeting that the fiancé had recorded on the parties' landline. According to the defendant, the plaintiff did not set up a nursery for their child and twice had signed a lease for an apartment to move out of Lantern Circle with the child.

The plaintiff testified that she lived in fear of the defendant. She did not set up the child's nursery because she was afraid of the defendant's verbal abuse if she touched his belongings in the room. She twice signed a lease for an apartment intending to leave the marriage, only to return. The plaintiff presented evidence that the defendant was verbally abusive toward her, including three audiotapes on which the defendant could be heard making vicious, vituperative, and obscene comments about the plaintiff. The plaintiff produced photographs depicting damage the defendant had caused to the walls of Lantern Circle. The defendant acknowledged his voice on the audiotapes and admitted that he had damaged the walls of Lantern Circle. According to the defendant, he was in a period of personal crisis when the tapes were recorded and he caused the wall damage, but he could not remember the incidents. The court found that the plaintiff testified credibly about the defendant's verbal abuse and that

the defendant was more responsible than the plaintiff for the breakdown of the marriage.[3]

With respect to the parties' assets, the court made the following findings. The defendant owned 99 percent and Monesh owned 1 percent of Lantern Circle. When Monesh died in 2014, he devised his 1 percent interest in Lantern Circle to the defendant. The parties stipulated that the fair market value of Lantern Circle was $510,000. The defendant's April 11, 2016 financial affidavit stated that Lantern Circle was encumbered by a $367,921 mortgage, leaving a net equity of $142,079. Although the plaintiff and the parties' child resided at Lantern Circle, the defendant continued to pay the mortgage and bills with funds he had borrowed from his mother, Mohini Hiranandani (Mohini). In addition, the court found that Monesh also had devised his 99 percent interest in Bend of River to the defendant. In his April 11, 2016 financial affidavit, the defendant listed Bend of River as an asset and valued it at $767,656.89 as of the *date of Monesh's death in 2014*. The affidavit stated that Bend of River was encumbered by a mortgage of $600,350.

The court dissolved the parties' marriage on the ground of irretrievable breakdown and found that it was in the child's best interest for the plaintiff to have sole legal custody and final decision-making authority in consultation with the defendant. The court issued extensive orders regarding the location of the child's residence vis-à-vis the defendant, visitation with the defendant, and the financial responsibilities of the parties with respect to the child.[4] Those child-related finan-

[3] Midtrial, the court appointed a guardian ad litem for the child. Following her investigation, the guardian ad litem reported that she had concerns about the mental health of each of the parties. She recommended that they undergo psychological evaluations and that they participate in coparenting counseling.

[4] Consistent with the child support guidelines, the court ordered the defendant to maintain medical and dental insurance for the child, and ordered the plaintiff to reimburse him 47 percent of the insurance premiums. All unreimbursed medical expenses for the child are to be borne 47 percent

cial orders, except the order related to the child's extracurricular expenses, are not at issue in the present appeal.

With regard to the division of the marital assets, the court ordered the defendant to "transfer to the plaintiff all of his rights, title and interest in" Lantern Circle on or before September 1, 2016. Until he transfers Lantern Circle to the plaintiff, the defendant "shall be solely responsible for all future costs associated with said property including the mortgage(s), taxes, insurance, utilities, maintenance, and the like and shall indemnify and hold the plaintiff harmless therefrom. Upon such transfer, the plaintiff shall be solely responsible for all future costs associated with said property including the mortgage(s), taxes, insurance, utilities, maintenance, and the like and shall indemnify and hold the defendant harmless therefrom." The court ordered the defendant to retain ownership of Bend of River free and clear of any claim by the plaintiff.

As to their personal property, the court ordered the plaintiff to retain her jewelry listed on her financial affidavit. The parties were to divide the home furnishings listed on the plaintiff's April 11, 2016 financial affidavit to their mutual satisfaction. The court also ordered the parties to retain their respective financial accounts and assume liability for their respective debts. See footnote 2 of this opinion.

by the plaintiff and 53 percent by the defendant. The plaintiff is to maintain life insurance in the amount of at least $250,000 for the benefit of the child and name the defendant beneficiary until the child reaches the age of twenty-three years old. The defendant is to maintain life insurance in the same amount and under similar terms. The plaintiff is to pay 47 percent of the cost of work-related child care and the defendant is to pay 53 percent of such costs. The plaintiff shall pay for 47 percent of the child's extracurricular expenses and the defendant shall pay 53 percent of those expenses. The court retained jurisdiction regarding postmajority educational support for the child pursuant to General Statutes § 46b-56c.

The court also ordered each party to pay the other alimony of one dollar per year as long as any order for child support or postsecondary educational support remains in effect.

On August 24, 2016, the defendant filed a motion for reargument or reconsideration, asking the court to value his interest in Bend of River and reconsider its order that he transfer his interest in Lantern Circle to the plaintiff, among other things. The court reconsidered its decision and modified its order only with respect to the defendant's request regarding Mother's Day visitation. The defendant appealed.

On December 15, 2017, the defendant filed a motion for articulation stating that the court "did not find that [he] owns" Lantern Circle and Bend of River or that "he would solely own" Lantern Circle as of September 1, 2016. He also stated that the court did not value his interest in Bend of River. He, therefore, asked the court to articulate whether it found that he owned 100 percent of Lantern Circle on the date of dissolution, whether he could transfer his entire interest in Lantern Circle to the plaintiff on or before September 1, 2016, the basis of its order regarding postjudgment expenses for Lantern Circle, and whether he owned 100 percent of Bend of River on the date of dissolution. He also asked the court to state the factual and legal basis of its determinations. In addition, the defendant asked the court to articulate whether it had determined the dollar value of his interest in Bend of River and the basis for that determination, whether it divided responsibility for the mortgage on Lantern Circle twice, and whether it had denied his motion regarding payment of fixed expenses for Lantern Circle.

The court articulated its decision on May 1, 2018, stating that the defendant inherited Monesh's 1 percent interest in Lantern Circle on the date of Monesh's death. It ordered the defendant to transfer his *ownership interest* in Lantern Circle to the plaintiff on or before September 1, 2016, pursuant to his testimony regarding his inheritance from Monesh and that the will contest had been resolved. The court ordered the defendant to pay all future costs, including the mortgage associated

with Lantern Circle from the date of dissolution to the date of transfer on the basis of his testimony and financial disclosure that he had continued to pay those costs to the date of dissolution. The court ordered that the plaintiff be responsible for future costs, including the mortgage, associated with Lantern Circle after ownership was transferred to her.

The court also articulated that the defendant inherited Monesh's 99 percent interest in Bend of River on the date of his death. At the time of Monesh's death, Bend of River was valued at $767,656.89 and was encumbered by a mortgage of $600,350. The court's determinations were predicated on the defendant's testimony that the will contest brought by Monesh's widow had been resolved and the values listed on the defendant's financial affidavits. The articulation, however, failed to value the defendant's interest in Bend of River on the date of dissolution. The defendant filed a motion for review with this court.

This court granted the defendant's motion for review and ordered the trial court to "articulate whether it determined the dollar value of the [defendant's] interest in [Bend of River], and, if so, to identify that dollar value, as well as the factors that it took into consideration when making its determination as to that dollar value, including whether it considered the [defendant's] claim that the value of his interest in [Bend of River] would be impacted by the insolvency of [Monesh's] estate and the need to sell that property in order to pay for the estate's debts and administrative expenses."

In response to this court's articulation order, the trial court stated that neither party provided the court with expert testimony regarding the value of Bend of River. As a result, the court relied on the testimony of the parties and their financial affidavits to establish the value of Bend of River. The court found the market value of Bend of River to be $767,656.89. The defendant

inherited the property from Monesh, making him the sole owner of Bend of River. In making its findings, the court considered the defendant's testimony, his financial affidavits, the testimony of Attorney John Vecchiolla, the administrator of Monesh's estate, and the estate inventory. The court did not assign a specific value to the defendant's interest in Bend of River. In reaching its conclusions in distributing the marital property, the court stated that it had considered the testimony of the parties and the witnesses, including the defendant's claim that the value of his interest in Bend of River would be affected by the insolvency of Monesh's estate and the need to sell that property to pay for the debts of the estate and administrative expenses. The court considered the financial resources available to the defendant, including the substantial support Mohini afforded him.[5] The defendant filed a motion for review of the court's second articulation. This court granted review but denied the relief requested. Additional facts will be set forth as needed.

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action . . . . Furthermore, [t]he trial court's findings [of fact] are binding upon

[5] A January, 2016, Probate Court decree was placed in evidence by the plaintiff. The decree authorized Vecchiolla to borrow funds because the debts and claims of the estate exceeded its liquid assets. At the time of Monesh's death, he had an interest in a jointly owned checking account at Citibank, N.A., with Mohini and the defendant. The account had a date of death value of $474,254.29. The funds were borrowed from a Citibank, N.A., checking account which at one time was jointly held by Monesh, Mohini, and the defendant. The estate twice borrowed funds in the account in the amounts of $50,000 (from the defendant and Mohini) and $68,462.22 (from Mohini).

this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Oudheusden* v. *Oudheusden*, 190 Conn. App. 169, 177–78, 209 A.3d 1282, cert. granted on other grounds, 332 Conn. 911, 209 A.3d 1232 (2019).

I

The defendant first claims that the trial court in this action for marital dissolution "lacked subject matter jurisdiction over the real property it awarded to the plaintiff."[6] Specifically, the defendant claims that the court lacked subject matter jurisdiction over the real property, but the issue, as it is briefed, is whether the court had authority at the time it dissolved the parties' marriage to order the defendant to transfer all his rights, title, and interest in Lantern Circle to the plaintiff on or before September 1, 2016, because Monesh's estate had not yet been settled and Lantern Circle was in the possession of the Probate Court. We disagree that the trial court lacked subject matter jurisdiction over the parties' marital estate, including Lantern Circle. Insofar as the defendant's argument can be construed as a challenge to the trial court's authority, we also disagree that the court lacked authority to order the defendant to transfer his rights, title, and interest in Lantern Circle to the plaintiff.

[6] The defendant did not raise the question of the court's subject matter jurisdiction at trial. "Nevertheless, because a question of subject matter jurisdiction must be decided once raised . . . we will review the jurisdictional claim only so far as the court's subject matter jurisdiction is concerned." (Citation omitted.) *Kores* v. *Calo*, 126 Conn. App. 609, 619, 15 A.3d 152 (2011). See also *Lichtman* v. *Beni*, 280 Conn. 25, 30, 905 A.2d 647 (2006) (question of jurisdiction must be addressed whenever raised).

We begin with the well established standard of review regarding subject matter jurisdiction. "A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Stepney Pond Estates, Ltd.* v. *Monroe*, 260 Conn. 406, 417, 797 A.2d 494 (2002). "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 1 Restatement (Second), Judgments § 11. A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727, 724 A.2d 1084 (1999). "Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 417.

A

We first address the defendant's subject matter jurisdiction claim. "The question of whether the trial court had subject matter jurisdiction to hear this case can be raised at any time and must be answered before we can proceed to the issues originally raised on appeal." *O'Donnell* v. *Waterbury*, 111 Conn. App. 1, 4, 958 A.2d 163, cert. denied, 289 Conn. 959, 961 A.2d 422 (2008). See also *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 703, 894 A.2d 259 (2006) (jurisdictional question must be decided before court may decide case).

The action before the trial court was for the dissolution of the parties' marriage. "General Statutes § 46b-1 (c) provides the Superior Court with plenary and general subject matter jurisdiction over legal disputes in

family relations matters." (Internal quotation marks omitted.) *Sachs* v. *Sachs*, 60 Conn. App. 337, 345–46, 759 A.2d 510 (2000). Section 46b-1 (c) provides in relevant part: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage, contested and uncontested . . . ." When rendering a dissolution of marriage, the court may divide equitably the assets and property of the parties. It is settled law that "[c]ourts have no inherent power to transfer property from one spouse to another; instead, that power must rest upon an enabling statute. . . . The court's authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81. . . . [T]he court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage." (Internal quotation marks omitted.) *Schneider* v. *Schneider*, 161 Conn. App. 1, 5–6, 127 A.3d 298 (2015).

Section 46b-81 (a) provides in relevant part: "At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party . . . without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect." Moreover, General Statutes § 46b-66a (a) provides in relevant part: "At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may order the husband or wife to convey title to real property to the other party or to a third person."[7]

[7] We are mindful that § 46b-81 (c) "directs the court to consider numerous separately listed criteria in distributing marital property at the time of the dissolution judgment. . . . Section 46b-81 (c) provides in relevant part: In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition

"The purpose of a property division pursuant to a dissolution proceeding is to unscramble existing marital property in order to give each spouse his or her *equitable* share at the time of the dissolution." (Emphasis in original; internal quotation marks omitted.) *Falkenstein* v. *Falkenstein*, 84 Conn. App. 495, 501, 854 A.2d 749, cert. denied, 271 Conn. 928, 859 A.2d 581 (2004). "The court may order that title to real property pass to either party or to a third party, or it may order the sale of the real property." Id., 502. "Generally, [this court] will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Rozsa* v. *Rozsa*, 117 Conn. App. 1, 4, 977 A.2d 722 (2009). Pursuant to the statutes regarding the dissolution of marriage enacted by the legislature, we conclude that the trial court had subject matter jurisdiction over the division of the real property in the parties' marital estate.

B

The defendant also claims that the court improperly ordered him to transfer all of his rights, title, and interest in Lantern Circle to the plaintiff because the property was under the jurisdiction of the Probate Court and in the possession of the executor of Monesh's estate. In asserting this claim, the defendant overlooks the fact that he listed Lantern Circle on his financial affidavit dated April 11, 2016,[8] indicating that Lantern Circle was

of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." (Citation omitted; internal quotation marks omitted.) *Coleman* v. *Coleman*, 151 Conn. App. 613, 617, 95 A.3d 569 (2014). See footnote 2 of this opinion.

[8] In the assets portion of his financial affidavit, the defendant listed, among other things, real estate.

"[A] 63 Lantern Circle, Stamford, CT (99 [percent] interest subject to Probate of [Monesh's] estate)

"Appraised Value:$510,000

"Less

part of the marital property the court was to divide. He also testified that he inherited Monesh's 1 percent of Lantern Circle when Monesh died. The court articulated that, in dividing the marital estate, it relied on the defendant's testimony and financial affidavit.

We disagree with the defendant that the court improperly ordered him to transfer his rights, title, and interest in Lantern Circle to the plaintiff by September 1, 2016. He claims that he cannot comply with the court's order because Lantern Circle was "in the possession" of the Probate Court at the time of dissolution. The record discloses that the defendant has owned 99 percent of Lantern Circle since he and Monesh purchased the property in 2003. Monesh owned 1 percent of the property, which the defendant inherited when Monesh died. "[U]pon the death of an owner of real property, title to the decedent's property passes to his or her heirs." *Bender* v. *Bender*, 292 Conn. 696, 721, 975 A.2d 636 (2009). "[U]pon the death of the owner of real estate, neither the executor nor the administrator holds title. . . . Title immediately descends to the heirs or devisees of real estate, subject to the right of administration." (Internal quotation marks omitted.) *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 433 n.28. The defendant, therefore, held title to his share and Monesh's share of Lantern Circle at the time of dissolution.

Although he testified at trial that he inherited Monesh's 1 percent interest in Lantern Circle, on appeal the defendant in this court argues that because Monesh's estate had not been settled at the time of dissolution, his inheritance had not yet been valued,

"Mortgage:[$367.921]

"Net Equity:$142,079*

"*This does not include the cost of sale, should the court order this property shall be sold. Anticipated costs of sale are: 7 [percent] of the sale price, which includes broker's commission, conveyance taxes, and [attorney's] fees."

particularly his interest in Bend of River,[9] nor had it been distributed to him. He continues that settlement of the estate was complicated by the widow's will contest and the estate's insolvency. Due to the estate's insolvency, the defendant argues that the real property the defendant inherited from Monesh may need to be sold to pay estate debts and he may never come into possession of his 1 percent inherited interest in Lantern Circle. The status of Monesh's estate in the Probate Court is not before us. The question we must answer is whether, at the time it dissolved the parties' marriage, the court properly ordered the defendant to transfer his rights, title and interest in Lantern Circle to the plaintiff. We conclude that the court's order was proper.

"The scope of our review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 619, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014).

[9] The defendant's financial affidavit dated April 11, 2016, stated the *date of death value* of Bend of River and the mortgage debt pursuant to the inventory of Monesh's estate.

"The division of property in dissolution proceedings is governed by . . . § 46b-81(a), which provides in relevant part: At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. . . . Our Supreme Court has recognized that [t]he only temporal reference in the enabling legislation refers us to the time of the decree as controlling the entry of financial orders. It is neither unreasonable nor illogical, therefore, to conclude that the same date is to be used in determining the value of the marital assets assigned by the trial court to the parties. *Sunbury* v. *Sunbury*, 216 Conn. 673, 676, 583 A.2d 636 (1990). Accordingly, [i]n the absence of any exceptional intervening circumstances occurring in the meantime, [the] date of the granting of the divorce is the proper time by which to determine the value of the estate of the parties upon which to base the division of property." (Emphasis omitted; internal quotation marks omitted.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 521–22, 195 A.3d 458 (2018).

The division of marital property, as a general rule, may not be modified postdissolution judgment. "The court's authority to transfer property appurtenant to a dissolution proceeding rests on . . . § 46b-81. . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . General Statutes § 46b-86 (a) deprives the Superior Court of continuing jurisdiction over that portion of a dissolution judgment providing for the assignment of property of one party to the other party under . . . § 46b-81. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final." (Citations omitted; internal quotation marks omitted.) *Stechel* v. *Foster*, 125 Conn. App. 441, 446–47, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011). Because the court was required by statute to divide the marital assets of the parties at the time of dissolution, it properly ordered the defendant to transfer *all of his rights, title, and interest in Lantern Circle*, nothing more,[10] to the plaintiff, irrespective of the status of Monesh's estate.

For the forgoing reason, we conclude that the court had the authority to order the defendant to transfer his rights, title and interest in Lantern Circle to the plaintiff by September 1, 2016,[11] and therefore did not abuse its discretion by doing so.

[10] This appeal does not require us to define the defendant's rights, title, and interest to Lantern Circle, only that the court properly ordered that he transfer them to the plaintiff.

[11] The defendant also claims that the court improperly ordered him to pay the postjudgment expenses relating to Lantern Circle until he could transfer ownership. The basis of the defendant's claim is that he only possessed 99 percent of Lantern Circle and that the remaining 1 percent was under the control of the Probate Court. The defendant, again, has conflated possession and ownership. We have concluded that the court properly ordered the defendant to transfer his all of his rights, title, and interest in Lantern Circle to the plaintiff by September 1, 2016. The trial court's memorandum of decision was issued on August 5, 2016, less than one month before the defendant was ordered to transfer Lantern Circle to the plaintiff. On appeal,

II

The defendant's second claim is that the court's orders regarding the distribution of real property were predicated on a mistake and are impossible to execute. More specifically, the defendant claims that the court erred in finding that he was the sole owner of Bend of River. We disagree.

We review the defendant's claim pursuant to the abuse of discretion standard. *Fox* v. *Fox*, supra, 152 Conn. App. 619. "[T]he court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage." (Internal quotation marks omitted.) *Stechel* v. *Foster*, supra, 125 Conn. App. 446.

The defendant claims that, in its memorandum of decision, the court improperly ordered him to retain ownership of Bend of River and, in its articulation, found him to be the sole owner of Bend of River. He argues on appeal that the court failed to acknowledge that he was not in possession of Bend of River and that he may never take full possession of the property if it is sold to pay the debts of Monesh's insolvent estate. The defendant further contends that the court treated Bend of River as if he owned 100 percent of it, rather than 1 percent with a vested, but not distributed, interest in the remaining 99 percent. He also claims that the court was mistaken to find that he was the sole owner of Bend of River. As he did with respect to his rights, title, and interest in Lantern Circle, the defendant has

the defendant has failed to explain why the court's order that he pay the expenses for Lantern Circle, which he had been paying throughout the divorce proceedings, for less than one month constituted an abuse of the court's discretion or how he was harmed by the order. Nothing prevented the defendant from transferring all of his rights, title, and interest in Lantern Circle to the plaintiff prior to September 1, 2016, thus reducing the amount of time for which he was responsible for the expenses related to the property. The court ordered the plaintiff to pay the mortgage and expenses subsequent to the transfer.

conflated ownership and possession. See part 1 of this opinion.

"In determining whether a trial court has abused its broad discretion in domestic relationship matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . ." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 155 Conn. App. 298, 301, 109 A.3d 546, cert. denied, 316 Conn. 912, 111 A.3d 886 (2015).

The facts in the record disclose that the defendant and Monesh purchased Bend of River together. Monesh had a 99 percent interest in the property and the defendant had a 1 percent interest therein. In his 2013 will, Monesh devised his interest in Bend of River to the defendant and, therefore, when he died in April, 2014, the defendant became the sole owner of Bend of River. See *Bender* v. *Bender*, supra, 292 Conn. 721 (upon death of owner of real property, title to decedent's property passes to heirs). It is of no consequence in the present dissolution action that Monesh's estate had not been settled at the time of dissolution. The defendant was the owner of Bend of River. We therefore conclude that the court's finding that the defendant is the sole owner of Bend of River is not clearly erroneous, and the defendant's claim fails.

III

The defendant also claims that the court abused its discretion by ordering him to pay a percentage of the child's extracurricular activities for which there was no evidentiary support. We disagree.

The following facts are relevant to this claim. The parties' child was born in August, 2013, and the court dissolved their marriage on August 5, 2016, when the child was three years old. In its memorandum of decision, the court stated in part with respect to its child support orders: "Consistent with the April 8, 2016 child support guidelines submitted by the defendant, the plaintiff shall pay [47] percent and the defendant shall pay [53] percent of the costs of all extracurricular expenses." The defendant argues on appeal that the order constitutes an abuse of the court's discretion because it does not contain an upper limit and there is no evidence of the child's extracurricular activities.

In her October 13, 2015 proposed orders, the plaintiff stated that the parties "shall equally share in the costs of extracurricular activities of the child. The term 'extracurricular activities' as used herein shall include, but not be limited to fees, equipment and supplies for: sports activities outside of school; art groups; theater groups; dance classes; Girl Scouts; music lessons, swim lessons, summer camps, and religious youth groups. The parties are to agree to these expenses in advance and in writing. If a party does not respond to a request within three (3) business days, the nonresponse shall be deemed acquiescence to the child participating and that party sharing in the cost. The parties shall keep each other apprised of an e-mail address where [he/she] can be reached." During trial, the defendant testified as to the activities in which the child participated: swimming, ice skating, and visits to the nature center activities in which he engaged the child for the child's growth and development. On her financial affidavit, the plaintiff listed the cost of the child's extracurricular activities as $1 per week. The defendant listed no expenses for the child's activities.

Although the defendant relies on *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 147 A.3d 188 (2016), to support his

claim, the facts of that case are distinguishable from the present case. In *Ferraro*, the court ordered the defendant father to pay for his children's extracurricular activities even though neither party had requested that the court enter such an order. Id., 726. In the present case, the plaintiff requested that the parties share equally the cost of the child's extracurricular activities and that they consult with one another prior to enrolling the child in the enumerated activities consistent with the court's order regarding custody. She testified at trial that she would consult with the defendant but that she would make the final decision.

We acknowledge that the court set no upper limit as to the cost of the child's extracurricular activities, but the defendant has failed to establish that the court's order that he pay 53 percent of the cost of extracurricular costs at the time of dissolution constitutes an abuse of discretion. The court granted custody and final decision-making authority to the plaintiff, who is to consult with the defendant regarding the child's health, welfare, maintenance, religious upbringing, and education. The defendant may voice his objection, if he disagrees with the plaintiff. The court's order is silent as to what occurs if he disagrees and refuses to pay.

At the time of dissolution, the cost of the child's extracurricular activities as listed on the plaintiff's financial affidavit was de minimus. The defendant has failed to demonstrate how he is harmed by the court's order, now, or will be harmed in the future. The trial court could not speculate as to the child's future interests, activities, and the costs thereof. It merely provided a means for the parties to pay for them in the present. If there is a substantial change in circumstances that warrants a change in the court's order regarding payment of the child's extracurricular activities, the defendant is not without a remedy. General Statutes § 46b-56 grants authority to the court to render orders of

custody and provides in relevant part: "(a) In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or *modify* any proper order regarding the custody, care, education, visitation and support of the children . . . . Subject to the provisions of section 46b-56a, the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent . . . . (b) In making or *modifying* any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve *the best interests of the child* and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . ." (Emphasis added.) For the foregoing reasons, we conclude that the court did not abuse its discretion by ordering the defendant to pay 53 percent of the cost of the child's extracurricular activities.

IV

The defendant's next claim is that the court abused its discretion by "equitably distributing property between the parties" without properly determining the value of the real property. We disagree.

In dividing the real property in the marital estate, the court awarded the plaintiff the defendant's rights, title, and interest in Lantern Circle and ordered the defendant to retain his interest in Bend of River. The court accepted the parties' stipulation as to the value of Lantern Circle. In its May 1, 2018 articulation the court stated that, at the time of Monesh's death, Bend of River was valued at $767,656.89 and was encumbered by a mortgage of $600,350, values that were predicated on the defendant's testimony that the widow's will contest had been resolved and the values were listed on the defendant's financial affidavit. In its October 17, 2018 articulation issued in response to this court's order, the

court stated in relevant part that neither party provided the court with expert testimony regarding the value of Bend of River and, as a result, the court relied on the testimony of the parties and the parties' financial affidavits to establish the value of Bend of River.

"In distributing the assets of the marital estate, the court is required by § 46b-81 to consider the estate of each of the parties. Implicit in this requirement is the need to consider the economic value of the parties' estates. *The court need not, however, assign specific values to the parties' assets.*" (Emphasis added.) *Bornemann* v. *Bornemann*, 245 Conn. 508, 531, 752 A.2d 978 (1998). "Both parties in a dissolution proceeding are required to itemize all of their assets in a financial affidavit and to provide the court with the approximate value of each asset. . . . *If the parties fail to do so, the equitable nature of the proceedings precludes them from later seeking to have the financial orders overturned on the basis that the court had before it too little information as to the value of the assets distributed.*" (Citation omitted; emphasis added.) Id., 535–36. "In a dissolution action, marital property is valued as of the date of dissolution . . . ." (Internal quotation marks omitted.) *Wendt* v. *Wendt*, 59 Conn. App. 656, 661, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000).

Here, the defendant submitted two financial affidavits. In his affidavit dated October 14, 2015, he listed the estimated value of Bend of River as "unknown." In his affidavit dated April 11, 2016, he listed the date of death value of Bend of River as $767,656.89 with a mortgage of $600,350. The relevant value in a dissolution action is the value as of the date of dissolution. See *Wendt* v. *Wendt*, supra, 59 Conn. App. 661. He listed debts and fees associated with Bend of River but valued them as "TBD" (to be determined) which is the equiva-

lent of not assigning a value to the property. It was the defendant's burden to provide the court with the value of the property on his financial affidavit, which he did not do. Moreover, in his proposed orders, the defendant requested that he be awarded his 1 percent interest in Bend of River.[12] Without evidence of the value of Bend of River, we conclude that the court acted well within its discretion by awarding the defendant the property as he proposed.

V

The defendant claims that the court abused its discretion by failing to divide all of the parties' personal property.[13] We agree that the court abused its discretion by ordering the parties to divide their household furnishings and computers to their mutual satisfaction.

The record discloses the following facts. In his April 11, 2016 financial affidavit, the defendant listed household furnishings under assets with a value "TBD" (to be determined). In his April 12, 2016 proposed orders the defendant stated, in relevant part, under personal property: "The [plaintiff] shall be entitled to own, have and enjoy, independent of any claim of right of the [defendant], the following: . . . Home furnishings at 63 Lantern Circle . . . in the approximate amount of $10,000, including the new Apple laptop computer, Ethan Allen dining table set and chairs [e]xcluding, however, the Ethan Allen couch. . . . " "The [defendant] shall be entitled to own, have and enjoy, independent of any claim of right of the [plaintiff] the following:

[12] Under Section VII of the financial affidavit, titled Personal Property, the defendant stated in relevant part: "B. The [defendant] shall be entitled to own, have and enjoy, independent of any claim or right of the [plaintiff], the following: 1. His 1 [percent] interest in . . . Bend of River . . . ."

[13] On the basis of our review of the defendant's arguments and the record, it appears that the defendant's claim is limited to household furnishings and a laptop computer. The court's financial order divided the parties' investments, retirement funds, motor vehicles, and bank accounts, and the defendant does not appear to dispute that portion of the court's order.

. . . The contents of his current rental residence . . . The Ethan Allen couch at . . . Lantern Circle . . . . The Lenovo think pad laptop that the [defendant] used since at least January 2013." The defendant did not value the property.

In her April 11, 2016 financial affidavit, the plaintiff listed under the heading "other assets": jewelry valued at $2500 and home furnishings valued at $10,000. In her proposed orders dated October 13, 2015, under "personal property," the plaintiff stated, in relevant part, that she retain all property in her possession, including all of the personal property left in Lantern Circle and receive from the defendant the "following items currently in his possession: AA1 laptop computer and related accessories, Mac Time Capsule, wine rack from her sister, print of St. John's gift of her parents, all Christmas decorations, iron table lamp, and Vera Bradley laptop bag."

In dissolving the parties' marriage, the court ordered that the plaintiff shall retain ownership of the 2002 Honda motor vehicle and hold the defendant harmless for all expenses associated with it. As to other assets, the court ordered that the "plaintiff shall retain ownership of the jewelry listed in Section IV H of her April 11, 2016 financial affidavit. The parties shall divide the home furnishings listed in Section IV H of the plaintiff's April 11, 2016 financial affidavit to their mutual satisfaction." The order is silent as to what is to occur if the parties could not agree on the division of their personal property. The defendant claims on appeal that by failing to divide every item of personal property, the court left them in limbo.[14]

As previously stated, under Connecticut law, "courts are empowered to deal broadly with property and its equitable division incident to dissolution proceedings.

[14] The record is silent as to what efforts, if any, the parties have made to divide the home furnishings listed on the plaintiff's financial affidavit.

. . . Generally, [appellate courts] will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Citation omitted; internal quotation marks omitted.) *Greco* v. *Greco*, 275 Conn. 348, 355, 880 A.2d 872 (2005). We acknowledge that a court trying a dissolution action is charged with the duty to divide the parties' personal property, and the court abused its discretion by ordering the parties to divide the property on the plaintiff's financial affidavit themselves. The question, however, remains whether the court's failure to do so implicates the mosaic of the court's financial orders.

Our Supreme Court has "characterized the financial orders in dissolution proceedings as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders. . . . [Our Supreme Court also has] stated, however, that [e]very improper order . . . does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of other orders in question. Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Internal quotation marks omitted.) *Krahel* v. *Czoch*, 186 Conn. App. 22, 45–46, 198 A.3d 103, cert. denied, 330 Conn. 958, 198 A.3d 584 (2018).

Although the court did not divide every item of personal property listed on the parties' financial affidavits

or proposed orders as it should have, it appears from the plaintiff's financial affidavit that the value of the undivided personalty is much less than $10,000. Indeed, the only items included in those "home furnishings" to which the defendant stated a claim, albeit a cursory one, were the Ethan Allen couch and Lenovo laptop. Given the value of the real property at issue in this appeal and the lack of disagreement with respect to child support, we "do not conclude that the mosaic rule is implicated"; id., 46; by the court's failure to divide the few home furnishings and computers at issue. Those items of personal property clearly are severable from the mosaic. We, therefore, reverse the judgment with respect to the parties' personal property and remand the case for further proceedings at which time the court is to divide the personal property, specifically the Ethan Allen couch and Lenovo laptop, that is left to divide, as the parties appear unwilling or unable to agree on matters of even minor value.

VI

The defendant's last claim is that the trial court abused its discretion when it entered financial orders because they are excessive and he does not have the ability to comply with them. The root of the defendant's claim is that the court improperly ordered him to transfer all his rights, title, and interest in Lantern Circle to the plaintiff by September 1, 2016, and to pay the mortgage and other costs associated with the property until he did so. He claims that it was not possible for him to transfer Lantern Circle to the plaintiff and that he lacked the funds to pay the mortgage and other costs. At most, the court's order required the defendant to pay the mortgage and costs for less than one month.[15] Significantly, the court ordered the plaintiff to pay the mortgage and all of the costs associated with Lantern

[15] We note that the defendant paid the mortgage and costs associated with Lantern Circle throughout the dissolution trial. He also testified that Mohini was providing him with financial support.

Circle and to hold the defendant harmless after he transferred the property to her.

As we previously have concluded, the court properly ordered the defendant to transfer all of his rights, title, and interest in Lantern Circle to the plaintiff. Although the court set an end date for the transfer, it did not set a prior date by which the defendant could transfer his interest in Lantern Circle to the plaintiff. If the defendant was unable to pay the mortgage and other costs, he could have transferred his interest in Lantern Circle to the plaintiff immediately following the dissolution. Upon transfer, the plaintiff became responsible for those costs. Whatever financial burden the defendant may have incurred by continuing to pay the mortgage and costs was of his own making as he failed to comply expeditiously with the court's order to transfer his rights, title, and interest in Lantern Circle to the plaintiff. The court, therefore, did not abuse its discretion.

The judgment is reversed only as to the division of the Ethan Allen couch and Lenovo laptop computer, and the case is remanded for further proceedings in that regard; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

SANDRA L. IGERSHEIM *v.* TIFFANY M. BEZRUTCZYK
(AC 41738)

Keller, Bright and Beach, Js.

Syllabus

The plaintiff grandmother filed a petition for visitation with her grandchild, the defendant mother's minor child, pursuant to statute (§ 46b-59). A guardian ad litem was appointed for the minor child. The trial court granted the petition, concluding that the plaintiff had proven by clear and convincing evidence that a parent-like relationship existed and that denial of visitation would cause real and significant harm to the minor child. The defendant appealed to this court and claimed that the trial

court erred in a number of its rulings. The guardian ad litem claimed on appeal, inter alia, that the trial court lacked subject matter jurisdiction to consider the petition. *Held*:

1. The trial court did not have subject matter jurisdiction over the plaintiff's petition for visitation, as the petition lacked the specific allegations necessary to meet the jurisdictional thresholds of § 46b-59 (b); the plaintiff's petition did not contain the required specific, good faith allegations of real and significant harm, in that other than a general statement that denial of visitation would jeopardize a relationship with the minor child's grandparents, the petition contained no specific references to harm, much less specific allegations of harm that the minor child would endure if visitation were denied.
2. This court declined to review the defendant's claims, the defendant having failed to adequately brief those claims.

Argued February 5—officially released May 26, 2020

Procedural History

Petition for visitation with the defendant's minor child, brought to the Superior Court in the judicial district of Tolland, where the court, *K. Murphy, J.*, granted the plaintiff's petition and rendered judgment thereon; thereafter, the court granted the plaintiff's motion for reconsideration, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Keith Yagaloff, for the appellant (defendant).

Maria F. McKeon, for the appellee (plaintiff).

David A. McGrath, with whom was *Justine Rakich-Kelly*, guardian ad litem, for the appellee (guardian ad litem).

Opinion

BEACH, J. The defendant, Tiffany M. Bezrutczyk, appeals from the trial court's judgment granting the petition filed by the plaintiff, Sandra L. Igersheim, for visitation with her grandson, the defendant's minor child. The defendant claims that the court erred in a number of its rulings. We conclude that the defendant did not adequately brief these claims and, therefore, we decline to review them. See *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014). We do, how-

ever, consider the claims raised in the brief of the court-appointed guardian ad litem[1] that the court (1) lacked subject matter jurisdiction to consider the petition, (2) improperly concluded that the denial of visitation to the plaintiff would cause real and significant harm, and (3) impermissibly precluded testimony and recommendations by the guardian ad litem. We agree with the guardian ad litem with respect to the issue of subject matter jurisdiction and, accordingly, reverse the judgment of the court and remand the case with direction to dismiss the petition.[2]

The record reveals the following relevant facts and procedural history. On August 23, 2017, the plaintiff, then unrepresented by counsel, served a verified petition for visitation with the minor child on her daughter, the defendant. On the petition form,[3] the plaintiff, inter alia, checked the boxes next to the statements: "I have a relationship with the child(ren) that is parent-like . . . (*State specifically how your relationship is parent-like*)" and "Denial of visitation will cause real and significant harm to the child(ren) . . . (*State specifically what harm would be caused to the child(ren) by a denial of visitation*) . . . ." As to the parent-like relationship, the plaintiff wrote: "[B]een [taking] care of [the minor child] up until this past April when he moved back with his mom." As to the harm, the plaintiff wrote: "Jeopardize relationship with grandparents."

The first hearing on the petition for visitation commenced on October 11, 2017, at which the defendant

[1] Practice Book § 67-13 provides that "[i]n family and juvenile matters and other matters involving minor children . . . counsel for the guardian ad litem shall, within ten days of the filing of the appellee's brief, file either: (1) a brief, (2) a statement adopting the brief of either the appellant or an appellee, or (3) a detailed statement that the factual or legal issues on appeal do not implicate the child's interests." In this matter, the guardian ad litem chose to file a brief.

[2] In light of our resolution of the guardian ad litem's jurisdictional claim, we need not reach the merits of her other two claims.

[3] The form, JD-FM-221, is entitled "Verified Petition for Visitation—Grandparents [and] Third Parties."

orally moved to dismiss the petition for lack of subject matter jurisdiction based on insufficient allegations. The court did not rule on the motion and, instead, continued the matter for three weeks. On November 9, 2017, the plaintiff, then represented by counsel, filed an amendment to her petition. The amendment alleged, inter alia, dates during which the minor child lived with the plaintiff and the manner in which the plaintiff cared for the minor child during those instances, medical conditions from which the minor child suffered, and possible instances of neglect, abuse, and/or abandonment in the defendant's care. Regarding harm, the amendment asserted that "[d]enial of the visitation will cause real and significant harm to the child because [the plaintiff] has been the only constant stable force in [the minor child's] life and has always kept him safe. She is the only one who can ensure that he is safe, well-nourished and psychologically protected." This amendment was not verified.

Also on November 9, 2017, the plaintiff filed a motion for the appointment of a guardian ad litem. The motion requested that the court "appoint a guardian ad litem . . . to determine whether [the minor child] would be significantly harmed if the court were to deny the [plaintiff's] request for [visitation]." On the same day, the Children's Law Center, Inc., was appointed guardian ad litem by agreement of the parties. The Children's Law Center, Inc., entered an appearance as guardian ad litem on November 15, 2017; Justine Rakich-Kelly entered an individual appearance as guardian ad litem on January 17, 2018.

After the hearings had concluded, the trial court issued its memorandum of decision in which it granted the plaintiff's petition for visitation, concluding that the plaintiff had proven by clear and convincing evidence that a parent-like relationship existed and "denial of the visitation would cause real and significant harm to [the minor child]." Although judgment was rendered

in her favor, the plaintiff thereafter filed a motion for reconsideration and/or clarification regarding specific requests contained in the petition. The court granted the motion and issued an order stating that it would "consider argument regarding appropriate orders to be entered in light of the court's findings." This appeal followed.

"At the outset, we note our well settled standard of review for jurisdictional matters. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . To determine whether the court had jurisdiction over a petition for visitation, we compare the allegations of the petition to the statutorily prescribed jurisdictional requirements." (Citation omitted; internal quotation marks omitted.) *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 730, 205 A.3d 716 (2019).

The statutory jurisdictional requirements relevant to the present case are prescribed in General Statutes § 46b-59,[4] the third-party visitation statute. Section 46b-59 (b) provides: "Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like

[4] "Section 46b-59 was amended in 2012 to essentially codify the judicial gloss the Supreme Court put on the then existing version of § 46b-59 in *Roth* [v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002)]. In *Roth*, the court concluded that, without the proper gloss, § 46b-59, as enacted at that time, would be subject to application in a manner that would be unconstitutional. . . . The court concluded that implicit in the statute was a rebuttable presumption that visitation that is opposed by a fit parent is not in the child's best interests. . . . Additionally, the court concluded that in order to avoid constitutional infirmity, a petition for visitation must include specific, good faith allegations both that the petitioner has a parent-like relationship with the child and that the denial of visitation would cause real and significant harm to the child." (Citations omitted.) *Firstenberg* v. *Madigan*, supra, 188 Conn. App. 730–31 n.5.

relationship exists between the person and the minor child,[5] and (2) denial of visitation would cause real and significant harm. Subject to subsection (e) of this section, the court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm." (Footnote added.)

At the October 11, 2017 hearing, the first court hearing, the defendant orally moved to dismiss the plaintiff's petition for lack of subject matter jurisdiction. She argued that the petition did not adequately allege how the denial of visitation would cause real and significant harm to the minor child, and this failure to satisfy the statutory requirements deprived the court of jurisdiction to hear the petition. The following procedural history is relevant to our disposition of this matter.

The defendant's counsel orally moved to dismiss at the outset of the hearing. The court then explained to

[5] General Statutes § 46b-59 (d) provides that "[i]n determining whether a parent-like relationship exists between a grandparent seeking visitation pursuant to this section and a minor child, the Superior Court may consider, in addition to the factors enumerated in subsection (c) of this section, the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child."

General Statutes § 46b-59 (c) provides: "In determining whether a parent-like relationship exists between the person and the minor child, the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent."

the plaintiff[6] the implications of the motion to dismiss and gave her an opportunity to respond. The court asked the plaintiff: "So, do you have any other—I mean this is an important piece, and we may not have a hearing after this depending on what your answer is. I probably would let you amend your allegation if you could make a sufficient indication, but if this is your only basis, I probably will dismiss the matter as requested. So, I mean do you have any other reason to believe that there's some type of real or significant harm to [the minor child] by withholding your contact with him?" In response, the plaintiff described concerns that she had regarding the defendant's husband.[7] The defendant's counsel contended that the allegations did not address adequately the issue of harm and renewed the defendant's claim that the allegations did not comply with the statutory requirements.

The court expressed its concern "that somehow the child's being used . . . to get back at the [plaintiff]. And that causes me concern, and that may be a basis under paragraph 6 [the harm prong of § 46b-59 (b) (2); see General Statutes § 46b-120 (6)]. But what we're going to do is continue the matter three weeks. I expect [the defendant] and [the plaintiff] to at least attempt in a civil way to have a conversation. If they can't, then I will rule on this and we may continue the hearing on the next court date." It continued: "Both parties should be able to, to resolve this matter. And I had expected before today that that would have occurred. It has not occurred. It gives the court great concern, and I may allow [the plaintiff] to amend her pleading based on whatever happens between now and the next court date." Prior to the next hearing on November 9, 2017, the plaintiff hired an attorney and filed an unverified amended petition for visitation.

[6] At this time, the plaintiff was self-represented.

[7] The plaintiff alleged, inter alia, that the defendant's husband was "very rough playing with [the minor child]."

On appeal, the guardian ad litem argues that the verified petition filed by the plaintiff in August, 2017, failed to allege with particularity how a denial of visitation would cause real and significant harm to the minor child and thereby failed to satisfy the statutory requirements of § 46b-59 (b), consequently depriving the court of subject matter jurisdiction. Because we agree with the guardian ad litem as to this jurisdictional claim and remand the case accordingly, we address only this claim.

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 153, 851 A.2d 1113 (2004). "A possible absence of subject matter jurisdiction must be addressed and decided whenever the issue is raised. The parties cannot confer subject matter jurisdiction on the court, either by waiver or by consent." *Sadloski* v. *Manchester*, 228 Conn. 79, 84, 634 A.2d 888 (1993). "It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be *immediately* acted upon by the court. . . . Our Supreme Court has explained that once raised . . . the question [of subject matter jurisdiction] must be answered *before* the court may decide the case." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Fennelly* v. *Norton*, 103 Conn. App. 125, 136–37, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

When the defendant's counsel made the oral motion to dismiss for lack of subject matter jurisdiction on

October 11, 2017, the court was required to address the jurisdictional issue. Once the motion to dismiss is made, "all other action in the case must come to a halt until such a determination is made." (Internal quotation marks omitted.) Id., 138. Furthermore, our Supreme Court has explicitly held that the court cannot consider any amended pleading before ruling on the motion to dismiss. See *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996) (inappropriate for court to consider amended third party complaint rather than initial complaint, when acting on state's motion to dismiss for lack of subject matter jurisdiction); *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991) ("[b]y considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made").

In light of the foregoing law, we now examine the initial, verified petition filed by the plaintiff to determine whether the court had subject matter jurisdiction. Exercising plenary review of the issue, we conclude that the initial, verified petition did not contain the required specific, good faith allegations of real and significant harm. Section 46b-59 (a) (2) defines " '[r]eal and significant harm' " to mean "that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section."[8] Other than a general statement that

[8] Pursuant to General Statutes § 46b-120 (4), "[a] child may be found 'neglected' who, for reasons other than being impoverished, (A) has been abandoned, (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child . . . ."

Pursuant to § 46b-120 (6), "[a] child may be found 'uncared for' (A) who is homeless, (B) whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires, or (C) who has been identified as a victim of trafficking, as defined in section 46a-170. . . ."

denial of visitation would "[j]eopardize [a] relationship with [his] grandparents," the plaintiff's verified petition contained no specific references to harm, much less specific allegations of harm that the minor child would endure if visitation were denied. See *Fuller* v. *Baldino*, 176 Conn. App. 451, 460, 168 A.3d 665 (2017). The petition, then, lacked the specific allegations necessary to meet the jurisdictional thresholds of § 46b-59 (b). Consequently, we conclude that the trial court did not have subject matter jurisdiction over the plaintiff's petition for visitation.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the petition for visitation.

In this opinion the other judges concurred.

DANA BERGER *v.* GUY DEUTERMANN ET AL.
(AC 42522)

Keller, Elgo and Lavery, Js.

Syllabus

The plaintiff sought to recover damages for breach of contract in connection with the purchase of certain real property owned by the defendants. Following a trial to the court, the trial court rendered judgment for the defendants. On appeal to this court, the plaintiff made numerous claims, including that the trial court's findings throughout the trial were based on fraudulent misrepresentations that the defendants presented as factual trial exhibits and were further supported by false testimony. *Held* that the plaintiff failed to provide an adequate record that would enable this court to review her claims on appeal; the plaintiff filed a form pursuant to the rules of practice (§§ 63-4 (a) and 63-8 (a)) in which she noted that she would not be ordering transcripts from the trial and, in the absence of the transcripts, this court could not evaluate the plaintiff's arguments in support of her appellate claims without resorting to speculation.

Argued February 10—officially released May 26, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London where the defendants filed a counterclaim; thereafter, the case was tried to the court, *Knox*, *J.*; judgment for the defendants on the complaint and in part for the plaintiff on the counterclaim, and the plaintiff appealed to this court. *Affirmed.*

Dana Berger, self-represented, the appellant (plaintiff).

Lloyd L. Langhammer, for the appellees (defendants).

Opinion

PER CURIAM. In this breach of contract action in connection with the attempted sale of real property by the defendants, Guy Deutermann and Diane Deutermann, the self-represented plaintiff, Dana Berger, appeals from the judgment of the trial court rendered in favor of the defendants on all counts of her complaint. She contends that the court (1) failed to recognize the defendants' fraudulent misrepresentations in trial exhibits, (2) improperly concluded that the roof of the property was properly installed, (3) failed to consider Diane Deutermann's answers to certain interrogatories that conflicted with Guy Deutermann's testimony, (4) improperly concluded that Guy Deutermann acted under an honestly held claim of right in retaining the plaintiff's deposit funds, and (5) improperly concluded that she failed to close on the purchase of the property and that the defendants rightfully retained her $12,000 deposit pursuant to the parties' agreement. We decline to reach the merits of the plaintiff's appeal due to an inadequate record. Accordingly, we affirm the judgment of the trial court.

The following facts, as found by the trial court, are relevant to the resolution of this appeal. On June 23,

2016, the parties entered into a purchase and sale agreement for a residential property at 5 Dunns Lane in Old Lyme (property). In accordance with General Statutes § 20-327b, the defendant sellers completed a residential property condition disclosure report, which indicated that the house was thirty-nine years old, with an oil generated heating system, central air, well water, ten year old roof with asphalt shingles, and fiberglass insulation. No further disclosures were made. Thereafter, the plaintiff hired Tiger Home & Building Inspections Group, Inc., to prepare an inspection report for the property, which was completed on June 27, 2016. The report indicated that multiple locations of the house were in need of repair, including: (1) a portion of the roof containing growth accumulation and discoloration that needed to be replaced, (2) a gap in the foundation of the garage floor, and (3) the chimney needed to be cleaned.

As a result of the inspection, the parties agreed to an inspection resolution addendum in July, 2016. The addendum set forth resolutions to the issues stated in the inspection report: "Issue 1: Roof . . . . Resolution: The [s]eller will pay [$8800] to re-roof affected portions, per the attached [p]roposal from Cris Construction, LLC . . . . Issue 2: Garage Foundation and Garage Floor . . . . Resolution: . . . The [s]ellers will, at [s]ellers' expense, have a licensed contractor . . . fill all the exterior and interior cracks/gaps in the garage foundation walls and the garage floor with concrete or bonding agent as appropriate. . . . Issue 3: Fireplace . . . . Resolution: The [s]eller will, at [sellers'] expense, have a licensed chimney sweep/inspector: (a) clean and inspect the chimney and fireplace; (b) provide a written inspection that will be provided to the [b]uyer two (2) weeks prior to closing; (c) attempt to locate a cleanout portal, or confirm that there is none."[1]

[1] The inspection resolution addendum also included (1) the removal of a dead-ended wire in the basement rafters, (2) the servicing of the home's

The plaintiff claims that the defendants' failure to address, to her satisfaction, the issues set forth in the addendum constitutes a breach of contract by the defendants. As a result, she commenced this action. On March 29, 2018, the plaintiff filed a request for leave to amend her complaint along with the proposed amended complaint, which the court granted on April 25, 2018. In the amended complaint, she asserted that the defendants breached the contract by "(a) [n]ot hiring Cris Construction, LLC, to perform the roof work as agreed, but rather someone else, who then failed to adhere to the shingle manufacturer's installation instructions when performing the work; (b) [n]ot having the chimney cleaned of creosote as agreed, but rather simply having the fireplace 'broom swept'; [and] (c) [n]ot hiring a licensed contractor as agreed to repair the garage foundation walls and floor, affix molding or siding, but rather attempting to perform those repairs personally." The amended complaint also included one count of negligent misrepresentation as to both defendants, six counts of fraudulent misrepresentation as to Guy Deutermann, and one count of civil theft as to Guy Deutermann pursuant to General Statutes § 52-564. The defendants filed an answer and counterclaim, asserting that the plaintiff breached her obligations under the contract by (1) failing to accept the completed, reparative work, (2) failing to comply with the time limits and notice provisions of the contract, and (3) refusing to close on the purchase price of the property.

On November 6 through 8, 2018, the trial court heard argument and testimony. Thereafter, on January 7, 2019, the court issued its memorandum of decision rendering judgment for the defendants on all counts of the plaintiff's complaint and partially for the defendants on their

heating system to seal the boiler flue joint to the chimney, and (3) the removal of a wooden shed from the back of the property. The defendants and their contractors timely addressed each of these additional items; they are not pertinent to this appeal.

counterclaim.[2] This appeal followed. Additional facts and procedural history will be set forth as necessary.

Our analysis of this appeal begins and ends with our consideration of the adequacy of the record provided by the plaintiff. After examining the record provided to us, we conclude that the plaintiff has failed to provide an adequate record that would enable our review of her claims on appeal. In the present case, the trial occurred over three days. The plaintiff contends in her brief that the court's findings throughout trial were based on "fraudulent misrepresentation[s] which the defendants presented as factual trial exhibits, and [were] further supported by false testimony." On February 4, 2019, however, she submitted a JD-ES-38 form pursuant to Practice Book §§ 63-4 (a)[3] and 63-8 (a),[4] on which she noted that she would not be ordering transcripts from the three day trial. In the absence of the transcripts, we cannot evaluate the plaintiff's argu-

[2] The court held that the defendants rightfully retained the plaintiff's $12,000 deposit. In reference to the defendants' counterclaim, which asserted that the plaintiff was in default by refusing to close on the purchase price of the property, the court stated: "The court does not find a wrongful withholding of the deposit. Rather, the defendant was acting under an honestly held claim of right to the funds pursuant to the parties' agreement and based on the buyer's default by her failure to close on the property.

* * *

"The court finds . . . that the plaintiff failed to close on the purchase of the property and is in default and the [defendants] rightfully retained the $12,000 deposit, pursuant to the terms of the agreement." Thereafter, the court ruled in favor of the plaintiff in regard to the defendants' request for attorney's fees. We, therefore, conclude that the judgment file issued on July 8, 2019, in which the court stated that it "entered judgment . . . for the plaintiff on the defendants' counterclaim," was a scrivener's error.

[3] Practice Book § 63-4 (a) provides in relevant part: "Within ten days of filing an appeal, the appellant shall also file with the appellate clerk . . . (2) A certificate stating that no transcript is deemed necessary, or a copy of the transcript order acknowledgement form (JD-ES-38) with section I thereof completed, filed with the official reporter pursuant to Section 63-8. . . ."

[4] Practice Book § 63-8 (a) provides in relevant part: "On or before the date of the filing of the Section 63-4 papers, the appellant shall, subject to Section 63-6 or 63-7 if applicable, order, using form JD-ES-38 . . . a transcript of the parts of the proceedings not already on file which the appellant deems necessary for the proper presentation of the appeal. . . ."

ments in support of her appellate claims without resorting to speculation. See, e.g., *Vasquez* v. *Rocco*, 267 Conn. 59, 71–73, 836 A.2d 1158 (2003) (concluding that plaintiff failed to provide adequate record regarding whether trial court's ruling precluding plaintiff from adducing certain evidence on cross-examination was harmful). As such, we decline to review the plaintiff's claims. See *Buehler* v. *Buehler*, 175 Conn. App. 375, 382, 167 A.3d 1108 (2017) (this court would not surmise, speculate, or guess at factual predicate for trial court's rulings and declined to review appellate claim when defendant failed to provide complete record of trial court proceedings); *Calo-Turner* v. *Turner*, 83 Conn. App. 53, 56–57, 847 A.2d 1085 (2004) (same); see generally *Rice* v. *Housing Authority*, 129 Conn. App. 614, 617–19, 20 A.3d 1270 (2011) (this court unable to determine whether evidence supported plaintiff's arguments regarding granting of motion to set aside verdict when no transcripts had been filed).

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." "This court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of an adequate record." (Internal quotation marks omitted.) *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 410, 46 A.3d 937, cert. denied, 307 Conn. 907, 53 A.3d 222 (2012). "The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties." (Internal quotation marks omitted.) *Buehler* v. *Buehler*, supra, 175 Conn. App. 382. "[A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . .

Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative." (Internal quotation marks omitted.) *Cianbro Corp.* v. *National Eastern Corp.*, 102 Conn. App. 61, 72, 924 A.2d 160 (2007). "If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 753, 201 A.3d 485 (2018), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019). "[A]lthough we afford self-represented parties some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Lucarelli* v. *Freedom of Information Commission*, supra, 410.

The judgment is affirmed.

KRISTINE S. ANTHIS *v.* ROBERT D. WINDOM
(AC 42183)

Bright, Moll and Bear, Js.

Syllabus

The plaintiff sought to recover damages allegedly sustained as a result of the defendants' negligence and recklessness, arising out of an incident in which the defendant's motor vehicle struck the front of the plaintiff's neighboring home. Prior to trial, the court denied the defendant's motion in limine seeking to preclude the plaintiff from offering evidence regarding her home repair costs, which he asserted were paid for by the plaintiff's homeowners insurer. The jury returned a verdict in favor of the plaintiff, and the court thereafter denied the defendant's motion for remittitur and rendered judgment for the plaintiff, from which the defendant appealed to this court. Subsequently, the court denied the defendant's motion to open the judgment, in which he argued that a payment made by his automobile liability insurer to the plaintiff's homeowners insurer constituted a payment by him, such that requiring him to pay the economic damages awarded by the jury would result in a double payment and that the plaintiff's insurer was equitably subrogated to the plaintiff's rights to seek recovery from the defendant. *Held*:

1. The trial court properly denied the defendant's motion in limine; although there was no dispute that the plaintiff's insurer paid the plaintiff on an insurance claim submitted by her in relation to the incident, the court observed that there may have been a discrepancy between the amount the plaintiff paid for the repairs and the amount she was reimbursed by her insurer, and the court addressed the defendant's double recovery claim when it adjudicated his motion for remittitur, as to which the parties had created an evidentiary record.
2. The defendant could not prevail on his claim that the trial court improperly denied his motions for remittitur and to open the judgment, because the court's denial of these motions resulted in a double recovery by the plaintiff, and a double payment by the defendant with respect to property damage expenses the plaintiff had incurred: the court properly declined to consider the defendant's double payment and equitable subrogation claims in deciding his motion for remittitur, as this court's review of the defendant's pleadings and prejudgment motions revealed no mention of the issues of double payment and equitable subrogation, the defendant did not assert payment as a special defense or plead a right of setoff, and, although the defendant asserted in his motion for remittitur that he was seeking to prevent a double recovery, the defendant did not refer to his automobile liability insurer or present his claims of double payment and equitable subrogation therein; rather, the record revealed that the defendant raised his double payment claim for the first time during argument on his motion for collateral source reduction, which immediately preceded argument on his motion for remittitur, the defendant's trial counsel did not cite any legal authority in presenting that particular argument, counsel made no perceivable reference to his related equitable subrogation claim during argument on his postverdict motions, and the defendant failed to raise his equitable subrogation claim to the court in any manner during the prejudgment proceedings; moreover, the court did not err by declining to consider the defendant's double payment and equitable subrogation claims in deciding the defendant's motion to open, when he failed to raise them, either adequately or at all, to the court prior to it rendering judgment in the plaintiff's favor; furthermore, even if this court were to agree with the defendant that he properly raised his double payment and equitable subrogation claims, the defendant could not prevail on the merits because, even though the defendant claimed that his automobile liability insurer reimbursed the plaintiff's homeowners insurer for the property damage expenses incurred by the plaintiff that constituted the majority of the economic damages awarded by the jury, the evidence in the record demonstrated only that the defendant's insurer made a payment to the plaintiff's insurer in relation to the plaintiff's insurance claim, it did not include a dollar for dollar breakdown of the payment, which did not match the sum remitted by the plaintiff's insurer to the plaintiff, and, therefore, it was unknown what portion, if any, of the defendant's insurer's payment was intended to recompense the plaintiff's insurer for

the property damage expenses incurred by the plaintiff, and without evidence detailing the precise nature of the payment by the defendant's insurer, the defendant's double payment and equitable subrogation claims failed.

Argued November 18, 2019—officially released May 26, 2020

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Pierson*, *J.*, denied the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Pierson*, *J.*; verdict and judgment for the plaintiff; subsequently, the court denied the defendant's motion for remittitur, and the defendant appealed to this court; thereafter, the court denied the defendant's motion to open the judgment, and the defendant filed an amended appeal. *Affirmed.*

Jack G. Steigelfest, for the appellant (defendant).

Lawrence C. Sgrignari, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Robert D. Windom, appeals from the judgment of the trial court denying various motions that he filed in the present action commenced by the plaintiff, Kristine S. Anthis, in favor of whom the court rendered judgment following a jury trial. On appeal, the defendant claims that the court improperly denied his (1) motion in limine, (2) motion for remittitur, and (3) motion to open, which, the defendant contends, effectively resulted in a double recovery by the plaintiff and a double payment by the defendant with respect to property damage expenses incurred by the plaintiff. We affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. On January 12, 2017, the plaintiff commenced the present action, sounding in negligence and recklessness, against the defendant, arising out of a July

12, 2015 incident during which the defendant, while attempting to back his motor vehicle toward the garage of his residence, lost control of his vehicle, which struck the front of the plaintiff's neighboring home.[1] On March 23, 2017, the defendant filed an answer, in which he did not assert any special defenses.

On April 10, 2018, the plaintiff filed a trial management report, stating in relevant part that "[t]he plaintiff expects to file a motion in limine seeking to preclude the defendant from referencing and/or introducing evidence of any documentation which relates to [the] plaintiff's recovery of damages from her [homeowners] insurer." The plaintiff did not file any such motion thereafter.

The matter was tried to the jury in August, 2018. On August 21, 2018, prior to the start of evidence, the defendant filed a motion in limine, dated August 20, 2018, seeking an order "prohibiting the plaintiff from offering into evidence the cost of [her] home repairs," which the defendant contended were paid for by the plaintiff's homeowners insurer, or, in the alternative, permission to "cross-examine the plaintiff on the fact that her home repair expenses were paid for by her own [homeowners] insurance company." The same day, following argument, the trial court denied the motion in limine. At trial, evidence was admitted into the record reflecting that, in the aftermath of the July, 2015 incident, the plaintiff and her spouse had paid, among other things, $36,750 in home repair expenses and incurred $14,264.23 in temporary housing costs.[2]

[1] Counts one and three of the plaintiff's operative complaint sounded in negligence and common law recklessness, respectively. In count two, the plaintiff alleged that (1) the defendant's operation of his motor vehicle violated General Statutes § 14-222, and (2) the defendant's violation of § 14-222 was a substantial factor in causing the injuries, damages, and losses claimed by the plaintiff, enabling her to recover double or treble damages pursuant to General Statutes § 14-295. The plaintiff later withdrew count two.

[2] One of the plaintiff's exhibits indicated that the total sum of temporary housing costs was $16,264.23, which included a $2000 refundable security deposit that the plaintiff did not claim as part of her damages.

On August 22, 2018, the jury returned its verdict in favor of the plaintiff, awarding $55,738.54 in compensatory damages, consisting solely of economic damages,[3] as to all counts. The jury also awarded the plaintiff punitive damages, the amount of which was later determined by the court, on the basis of the jury's finding that she had proven common-law recklessness.

On August 27, 2018, the defendant filed a motion for collateral source reduction and a motion for remittitur. In both motions, the defendant asserted that, in order to prevent a double recovery by the plaintiff, the court had to reduce the jury's verdict to account for insurance payments received by the plaintiff from her homeowners insurer. On August 30, 2018, the plaintiff filed objections to both motions. On September 17, 2018, the court held a hearing on those postverdict motions. The same day, the court denied the motion for collateral source reduction and sustained the plaintiff's objection thereto. On September 18, 2018, the court denied the motion for remittitur and sustained the plaintiff's objection thereto. Thereafter, the court rendered judgment on the jury's verdict in the amount of $75,723.05, consisting of $55,738.54 in compensatory damages, $19,205.25 in punitive damages, and $779.26 in taxed costs. On October 9, 2018, the defendant filed this appeal.

On November 7, 2018, the defendant filed a motion requesting that the trial court open the judgment and reconsider its decision declining to reduce the jury's verdict. On November 15, 2018, the plaintiff filed an objection thereto. On December 21, 2018, after hearing argument on December 10, 2018, the court denied

[3] As reflected in interrogatories answered by the jury, the economic damages award consisted of the following: $36,750 for home repair expenses; $14,264.23 for temporary housing costs; $149 for the cost of a sonogram for the plaintiff, who was pregnant at the time of the July, 2015 incident; $496.88 for the cost of an emergency tarp placed over the entryway of the home and other related services; and $4078.43 for professional services used by the plaintiff and her spouse to assist them in hiring a contractor to repair the damage to the home. The jury did not award noneconomic damages.

the motion to open. The defendant then amended this appeal to encompass that decision. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied his motion in limine. We disagree.

We begin by setting forth the standard of review governing this claim. "A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision thereon until a later time in the proceeding. . . . [T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 377–78, 28 A.3d 272 (2011).

In his motion in limine, the defendant moved to preclude the plaintiff from offering evidence regarding her home repair costs, which he asserted had been paid for by her homeowners insurer. The defendant contended that "[t]he plaintiff should not be able to double

dip, and unfairly suggest to the jury that all [of] her extensive repair costs were never paid," because, according to the defendant, this would create a risk that the jury might improperly inflate any noneconomic damages that it chose to award or be swayed to award punitive damages.

During argument on the motion in limine, the defendant's trial counsel asserted that it was inequitable for the plaintiff to "double dip" by seeking economic damages that included property damage costs paid for by her homeowners insurer. The defendant's trial counsel further argued that the plaintiff intended to offer into evidence personal checks reflecting payments made by her for the home repairs, which would falsely suggest to the jury that she had paid for them with her own funds without the contribution of insurance proceeds. In response, the plaintiff's counsel argued that the motion in limine was procedurally improper because (1) the defendant had failed to file a trial management report indicating that he intended to file any such motion, and (2) the defendant's trial counsel had represented in chambers that he would not be "inquiring on issues of insurance." The plaintiff's counsel further argued that the plaintiff would be prejudiced if evidence regarding her property damage expenses was precluded or, alternatively, the defendant was permitted to cross-examine her on the insurance payments remitted to her by her insurer. Additionally, the plaintiff's counsel argued that the plaintiff had not been made whole by the insurance payments and that her insurer was a collateral source, such that the insurance proceeds that it had remitted to her could not be deducted from the jury's economic damages award. Thereafter, the court asked the plaintiff's counsel whether it was his position "that to the extent the defendant is entitled to any sort of reduction for amounts received by [the plaintiff] that that reduction would be addressed appropriately in

some sort of posttrial proceeding." The plaintiff's counsel responded that the defendant "would have, obviously, the opportunity to file posttrial motions and the court would then have to entertain those issues." The court thereafter denied the defendant's motion in limine.

On appeal, the defendant asserts that the court abused its discretion in declining to preclude evidence regarding the plaintiff's home repair costs because her homeowners insurer had paid those expenses and, thus, admitting evidence of those costs enabled the plaintiff to seek a double recovery for the same expenses in the form of economic damages.[4] At the time of the court's denial of the motion in limine, however, although there was no dispute that the plaintiff's insurer had paid the plaintiff on an insurance claim submitted by her in relation to the July, 2015 incident, the total amount of the plaintiff's home repair expenses and the total amount and nature of the insurance proceeds received by the plaintiff were unknown. Indeed, during argument, the court observed that "the fact is that there may actually be a discrepancy between the amount [the plaintiff] paid out for [the] repairs and . . . the amount [the plaintiff] was reimbursed by [her] insurer." The court later addressed the defendant's double recovery claim in adjudicating his motion for remittitur, with respect to which the parties created an evidentiary record. Under these circumstances, we find no error in the court's denial of the defendant's motion in limine.[5]

[4] The defendant also contends that evidence of the home repair costs was prejudicial because it "would tend to suggest a starting point for evaluating the noneconomic damages sought by the plaintiff." This argument is unavailing as the jury did not award the plaintiff noneconomic damages.

[5] We also note that the defendant filed the motion in limine shortly before the start of evidence. The defendant did not file a trial management report indicating that any such motion would be filed, and the plaintiff represents that the defendant's trial counsel, in chambers, represented that he did not plan to file motions in limine. During argument on the motion in limine, the defendant's trial counsel conceded that the motion in limine had been filed "late." It was well within the court's discretion to deny the motion in limine under these circumstances, as well.

II

We next turn to the defendant's intertwined claims that the trial court improperly denied his motion for remittitur and his motion to open.[6] These claims are unavailing.

We begin by setting forth the relevant standards of review. With respect to a motion for remittitur, "the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test [that] must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has awarded damages that] are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions. . . . Accordingly, we consistently have held that a court should exercise its authority to order a remittitur rarely—only in the most exceptional of circumstances . . . and [when] the court can articulate very clear, definite and satisfactory reasons . . . for such interference. . . .

"[O]ur review of the trial court's decision [to grant or to deny remittitur] requires careful balancing. . . . [T]he decision whether to reduce a jury verdict because it is excessive as a matter of law . . . rests solely within the discretion of the trial court. . . . [T]he same general principles apply to a trial court's decision to order a remittitur. [Consequently], the proper standard of

[6] The defendant is not challenging on appeal the denial of his motion for collateral source reduction.

review . . . is that of an abuse of discretion. . . . [T]he ruling of the trial court . . . is entitled to great weight and every reasonable presumption should be given in favor of its correctness." (Citations omitted; internal quotation marks omitted.) *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 782–83, 208 A.3d 256 (2019).

With regard to a motion to open, "[t]he principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . . The exercise of equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Internal quotation marks omitted.) *Jepsen* v. *Camassar*, 196 Conn. App. 97, 119–20, A.3d (2020).

In his motion for remittitur, the defendant moved for a reduction of the jury's verdict "in order to account for homeowners insurance payments already received by the plaintiff." The defendant asserted that the economic damages awarded by the jury correlated to the property damage costs incurred by the plaintiff, and that the majority of the property damage expenses had been paid for by the plaintiff's insurer such that a remittitur was necessary to prevent the plaintiff from receiving a double recovery. The defendant cited *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 71, 557 A.2d 540 (1989), for the proposition that "a plaintiff may be compensated only once for his or her damages for the same injury." In her objection, the plaintiff argued that our Supreme Court in *Gionfriddo* determined that a plaintiff could not recover damages from a joint tort-

feasor after having recovered identical damages for the same injury in a prior action against the other joint tortfeasors. The plaintiff argued that the defendant's reliance on *Gionfriddo* was misplaced because the present action did not involve joint tortfeasors. The plaintiff further argued that the resolution of the defendant's motion was controlled by our Supreme Court's decision in *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 95 A.3d 1063 (2014), in which the court concluded that a defendant was not entitled to a reduction of a plaintiff's verdict to account for insurance proceeds received by the plaintiff because "[u]nder case law dating back more than one century, th[e] court has held that a defendant is not entitled to be relieved from paying any part of the compensation due for injuries proximately resulting from his [or her] act where payment comes from a collateral source, wholly independent of him [or her]." (Internal quotation marks omitted.) Id., 841.

During the hearing on the defendant's motions for collateral source reduction and remittitur, the court admitted into evidence two exhibits offered by the defendant's trial counsel. The first exhibit was a cover letter, dated October 20, 2015, accompanied by a packet of documents, sent by the plaintiff's homeowners insurer to the defendant's automobile liability insurer, requesting that the defendant's insurer pay $52,786.20 as reimbursement for the payment that it made to the plaintiff on her insurance claim. The second exhibit was a one page financial log indicating that a payment in the amount of $48,395.22 was remitted by the defendant's insurer to the plaintiff's insurer on February 12, 2016. The financial log categorized the payment as a "Loss Payment" with respect to "KRISTINE ANTHIS/Property Damage." The financial log provided no additional details concerning the nature of that payment.[7]

[7] The court also admitted into evidence as a plaintiff's exhibit a portion of the plaintiff's homeowners insurance policy.

In arguing in support of the motion for remittitur, the defendant's trial counsel asserted that the jury did not hear evidence of the payment by the plaintiff's homeowners insurer to the plaintiff for the property damage costs she incurred, and that maintaining the jury's verdict would provide the plaintiff with a windfall. The court questioned the defendant's trial counsel as to whether the plaintiff was enjoying a double recovery, given that the present case did not involve multiple tortfeasors, and that the plaintiff had paid premiums in order to receive the benefit of the insurance proceeds from her insurer. The defendant's trial counsel responded that the defendant's automobile liability insurer had reimbursed the plaintiff's homeowners insurer for its payment to the plaintiff, such that the present case was distinguishable from a situation in which an insured party simply receives insurance proceeds from his or her insurer. In opposition to the motion for remittitur, the plaintiff's counsel argued that *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 811, governed. The plaintiff's counsel further argued that the $48,395.22 payment remitted by the defendant's insurer to the plaintiff's insurer did not match the $51,786.20 sum paid to the plaintiff by her insurer,[8] and that the evidence did not detail the nature of the payment by the defendant's insurer to the plaintiff's insurer (i.e., the specific items it covered).

In denying the defendant's motion for remittitur, the court determined that the defendant was seeking a remittitur to prevent a double recovery by the plaintiff, where the plaintiff's homeowners insurer had paid "the great majority of the plaintiff's property damage expenses . . . ." (Internal quotation marks omitted.)

[8] The letter sent by the plaintiff's homeowners insurer to the defendant's automobile liability insurer indicated that the plaintiff's spouse had paid a $1000 deductible, which would be refunded to the plaintiff's spouse upon payment by the defendant's insurer in the amount of $52,786.20 to the plaintiff's insurer.

The court rejected the defendant's reliance on *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 67, stating that the present action involved neither joint tortfeasors nor satisfaction for a loss that was the subject of multiple judgments. Additionally, citing *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 841–42, the court observed that the plaintiff had paid premiums in exchange for the coverage provided by her insurer and that, "[i]f there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer [being] relieved of his [or her] full responsibility for his [or her] wrongdoing." (Internal quotation marks omitted.)

After the court rendered judgment in the plaintiff's favor and after the defendant filed this appeal, the defendant filed a motion to open the judgment. In that motion, he asserted that, in denying his motion for remittitur, the court addressed the issue of double recovery, but it did not consider the distinct issue of double payment; that is, whether the jury's verdict, in effect, obligated the defendant to pay the plaintiff twice for the same damages. The defendant argued that, although his motions for remittitur and collateral source reduction "on their face focus[ed] on the plaintiff's double recovery . . . the defendant at oral argument on the motions also argued that a failure to reduce the verdict in this case would amount to double payment." The defendant asserted that the payment by his automobile liability insurer to the plaintiff's homeowners insurer, in effect, constituted a payment by him, such that requiring him to pay the economic damages awarded by the jury, consisting of the plaintiff's property damage expenses, would result in a double payment by him. In addition, the defendant argued that the court's reliance on *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 811, in denying his motion for remittitur was misguided because

that case did not address a situation in which a plaintiff's insurer pursues a subrogation claim against a defendant's insurer. The defendant contended that the plaintiff's insurer, after paying the plaintiff for the property damage costs, had become equitably subrogated to the plaintiff's rights to seek recovery from the defendant and that, once the plaintiff's homeowners insurer had pursued the equitable subrogation claim against the defendant's insurer, the plaintiff was barred from seeking damages from the defendant on the basis of the property damage expenses that she had incurred.

In her objection to the motion to open, the plaintiff argued that no good and compelling reason existed to warrant opening the judgment because, inter alia, the defendant had failed to properly raise the issue of double payment before the court in his pleadings or in his postverdict motions. The plaintiff further argued that her loss "exceeds the damages recovered from [her] insurer and the amount [her] insurer recovered from the defendant's insurer . . . ." In a reply brief, the defendant asserted, inter alia, that (1) he raised the double payment issue during argument on his postverdict motions and that the parties, during argument on his motion in limine, had agreed to litigate issues regarding insurance payments posttrial, and (2) the plaintiff had been made more than whole with regard to her property damage expenses by way of the insurance proceeds received from her homeowners insurer and the jury's verdict.

In denying the defendant's motion to open, the court first turned to the defendant's double payment claim. Addressing the defendant's assertion that the court had failed to consider his double payment claim in denying his postverdict motions, the court determined that the defendant had failed to timely or properly raise that claim to the court, thereby abandoning it along with his related equitable subrogation claim. Specifically, the court determined that the double payment and equit-

able subrogation claims were not briefed by the defendant in either his motion for collateral source reduction or his motion for remittitur. The court further determined that the defendant raised the double payment claim for the first time during argument on his postverdict motions, without citation to any relevant legal authority. The court concluded that it had the discretion to decline to consider claims raised for the first time during argument without legal briefing or citation to relevant, supporting legal authority. In addition, observing that a defense based on payment had to be asserted by way of a special defense in accordance with Practice Book § 10-50,[9] the court stated that the defendant had failed to assert a payment defense in his answer and that it would "not allow [the defendant] to raise it for the first time on a postjudgment basis."

Turning next to the issue of double recovery, the court relied on the rationale set forth in its denial of the defendant's motion for remittitur and concluded that the plaintiff was not receiving a double recovery. The court acknowledged the defendant's argument that *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 811, was distinguishable on the ground that the plaintiff's homeowners insurer in the present case had pursued a subrogation claim against the defendant's automobile liability insurer; however, the court declined to address that argument "in light of the fact that in this case, the defendant did not seasonably or properly raise the issue of double payment . . . ."

The crux of the defendant's claims on appeal is that (1) the jury's verdict obligated him to double pay the plaintiff for her home repair expenses and (2) the plaintiff is barred from seeking recovery for those expenses

[9] Practice Book § 10-50 provides in relevant part: "No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of facts are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of

because her homeowners insurer pursued a subrogation claim against the defendant's automobile liability insurer. The defendant asserts that he adequately raised the issues of double payment and equitable subrogation in his motion in limine, in his motion for remittitur, and/or during argument on those motions, and, therefore, the court erred by declining to consider those issues in deciding his motion for remittitur and his motion to open. The defendant further asserts that, on the merits of his double payment and equitable subrogation claims, he is entitled to a reduction of the verdict. For the reasons that follow, we are not persuaded.

Our review of the defendant's pleadings and prejudgment motions reveals no mention of the issues of double payment and equitable subrogation. The defendant did not assert payment as a special defense[10] or plead a right of setoff.[11] In his motion in limine, the defendant cursorily stated that "[t]he plaintiff's home repair bills were paid . . . by her [homeowners] carrier, which was in turn reimbursed by the defendant's [automobile] insurance carrier," and that "[the] plaintiff's counsel is aware that the defendant's insurance carrier . . . reimbursed the plaintiff's [homeowners] carrier for most of these expenses"; however, the defendant did not make any cognizable assertion that he was facing a possible double payment, nor did he raise his equitable subrogation claim.[12] In his motion for remittitur, the defendant asserted that he was seeking a remittitur

action, must be specially alleged. Thus . . . payment (even though nonpayment is alleged by the plaintiff) . . . must be specially pleaded . . . ."

[10] In denying the defendant's motion to open, the trial court determined that the defendant had failed to assert a special defense of payment in compliance with Practice Book § 10-50. We need not consider the effect of the defendant's failure to plead payment as a special defense in resolving his claims on appeal.

[11] Practice Book § 10-54 provides in relevant part: "In any case in which the defendant has either in law or in equity or in both . . . [a] right of setoff . . . against the plaintiff's demand, the defendant may have the benefit of any such setoff . . . by pleading the same as such in the answer . . . ."

[12] During argument on the motion in limine, the defendant's trial counsel made a similar statement, that the defendant's automobile liability insurer

"in order to prevent a double recovery"; however, the defendant did not refer to his automobile liability insurer or present his claims of double payment and equitable subrogation therein.

The record reveals that the defendant raised his double payment claim for the first time during argument on his motion for collateral source reduction, which immediately preceded argument on his motion for remittitur. The defendant's trial counsel stated in relevant part that, "in this case, [the defendant's] insurance company has already paid these damages. . . . [The defendant's insurer], in effect, is being asked to pay this again to the plaintiff and that just doesn't make sense to me." He did not cite any legal authority in presenting that particular argument.[13] During argument on the motion for remittitur, at the outset of which the defendant's trial counsel asserted that "many of the same arguments [raised during argument on the motion for collateral source reduction] apply," counsel again argued that the defendant was being asked to double pay. He did not cite any legal authority in support of that

had reimbursed the plaintiff's homeowners insurer for its payment to the plaintiff. The defendant's trial counsel presented no cognizable arguments, however, concerning the defendant's claims of double payment and equitable subrogation.

[13] Earlier during argument on the motion for collateral source reduction, the defendant's trial counsel cited *Rathbun* v. *Health Net of the Northeast, Inc.*, 315 Conn. 674, 110 A.3d 304 (2015), to support the proposition that "Connecticut for many, many years has not allowed double recoveries." In *Rathbun*, our Supreme Court concluded that General Statutes § 17b-265 (a) authorized a designated assignee of the Department of Social Services to seek reimbursement from Medicaid recipients for medical costs recovered by the recipients from liable third parties. Id., 693, 703. *Rathbun* did not involve a claim of double payment. Later during argument, the defendant's trial counsel cited *Jones* v. *Riley*, 263 Conn. 93, 818 A.2d 749 (2003), which, he posited, illustrated why collateral source hearings are geared to prevent double recoveries. In *Jones*, our Supreme Court concluded that the plaintiff was entitled to offset a reduction of her economic damages award by the amount of premiums she had paid attributable to the medical payments coverage provision of her automobile liability insurance policy only, rather than by the amount of premiums she had paid for the entire policy. Id., 94–95. *Jones*, likewise, did not concern a double payment claim.

argument.[14] Additionally, the defendant's trial counsel made no perceivable reference to the defendant's related equitable subrogation claim during argument on the defendant's postverdict motions.

In light of the foregoing, the defendant failed to raise his equitable subrogation claim to the trial court in any manner during the prejudgment proceedings. He raised his double payment claim for the first time during argument on his motions for collateral source reduction and remittitur; however, he did not support those claims with citations to any relevant legal authorities. Under these circumstances, we conclude that the trial court did not err by declining to consider those claims in deciding the defendant's motion for remittitur. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 132 Conn. App. 85, 97, 30 A.3d 38 (2011) (noting that trial court properly exercised discretion not to consider claim raised for first time during argument and without citation to legal authority and, therefore, declining to review claim on appeal), aff'd on other grounds, 311 Conn. 123, 84 A.3d 840 (2014).

We further conclude that the court did not err by declining to consider the defendant's double payment and equitable subrogation claims in deciding the defendant's motion to open, notwithstanding that those claims were briefed and argued in connection therewith. In deciding a motion to open, a trial court is not required to consider a claim raised for the first time therein. See *Hirsch* v. *Woermer*, 184 Conn. App. 583,

[14] At the beginning of argument on the motion for remittitur, the defendant's trial counsel cited *Rent-A-PC, Inc.* v. *Rental Management, Inc.*, 96 Conn. App. 600, 901 A.2d 720 (2006), which, he contended, contained a "very good discussion by [this court] citing a lot of other older cases on how trial courts should not permit a double recovery." In *Rent-A-PC, Inc.*, this court affirmed the trial court's judgment rendered in favor of the plaintiff on its unjust enrichment claim and on a breach of contract claim raised by the defendant in a counterclaim. Id., 601–604. *Rent-A-PC, Inc.*, did not involve a claim of double payment.

593, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018). Similarly, a court need not grant a movant a proverbial second bite at the apple by considering a claim raised in a motion to open that the movant had failed to present properly to the court at an earlier juncture. Accordingly, we discern no error in the court's decision not to address the defendant's double payment and equitable subrogation claims when the defendant failed to raise those claims, either adequately or at all, to the court prior to it rendering judgment in the plaintiff's favor.

Even if we were to agree with the defendant that he had properly raised his double payment and equitable subrogation claims to the trial court, the defendant cannot prevail on the merits thereof on the record before us. The defendant's claims are grounded in his contention that his automobile liability insurer reimbursed the plaintiff's homeowners insurer for the property damage expenses incurred by the plaintiff that constitute the majority of the economic damages awarded by the jury. The evidence in the record—in particular, the cover letter and accompanying packet sent by the plaintiff's insurer to the defendant's insurer, and the financial log submitted by the defendant in support of his motions for collateral source reduction and remittitur[15]—dem-

[15] On September 19, 2018, one day after the trial court denied the defendant's motion for remittitur, the defendant filed a "supplemental memorandum" seeking to present to the court additional documents "evidencing that the defendant's insurance carrier . . . paid the majority of the plaintiff's property damage expenses." The majority of the appended documents appears to be a copy of the cover letter and a portion of its accompanying packet, which were introduced into evidence by the defendant during the hearing on his postverdict motions. The remaining appended documents include a purported check from the defendant's automobile liability insurer payable to the plaintiff's homeowners insurer in the amount of $48,395.22 and an apparent invoice regarding the payment by the defendant's insurer. These appended documents were not properly before the court, as the defendant filed them following the court's denial of his motion for remittitur and without permission from the court. Even if the defendant had timely and properly submitted them, and the plaintiff had no objection to them, we are not convinced that these appended documents, in conjunction with the evidence properly in the record, establish that the payment by the

onstrates only that the defendant's insurer made a $48,395.22 payment to the plaintiff's insurer in relation to the plaintiff's insurance claim. The evidence does not include a dollar for dollar breakdown of the $48,395.22 payment, which does not match the $51,786.20 sum remitted by the plaintiff's insurer to the plaintiff. It is unknown what portion, if any, of the payment by the defendant's insurer was intended to recompense the plaintiff's insurer for the property damage expenses incurred by the plaintiff. Without evidence detailing the precise nature of the payment by the defendant's insurer, the defendant's double payment and equitable subrogation claims fail.[16]

In sum, we reject the defendant's claims that the trial court improperly denied his motion for remittitur and his motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

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defendant's insurer to the plaintiff's insurer operated to reimburse the plaintiff's insurer with respect to the property damage expenses incurred by the plaintiff and awarded to her as economic damages by the jury.

[16] The defendant asserts that, in the event that we agree with the trial court that he failed to present his double payment and equitable subrogation claims properly to the court, the court committed plain error by failing to reduce the jury's verdict or, in the alternative, requests that we exercise our supervisory authority pursuant to Practice Book § 60-2 to review the merits of his claims. As we have concluded in this opinion, even assuming that the defendant had properly raised these claims to the trial court, the defendant cannot prevail on the merits thereof on the record before us. Thus, we need not address further the defendant's request to invoke these extraordinary remedies.

BRENDA GREENE *v.* KEVIN KEATING ET AL.
(AC 41333)

Prescott, Bright, and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant law firm R Co. for statutory (§ 52-568) vexatious litigation in connection with its representation of K and N in a prior action they had brought against her. In the prior action, K and N had filed a multicount complaint alleging various claims, including prescriptive easement, and the plaintiff filed a counterclaim alleging misuse of an easement and trespass. Following a trial in the prior action, the court found in favor of the plaintiff on all counts of the complaint and in favor of K and N on the counterclaim. Thereafter, the plaintiff commenced the present action for vexatious litigation as to each count alleged in the complaint in the prior action. The court found in favor of R Co. on all of the counts except the count alleging vexatious litigation in the pursuit of K and N's prescriptive easement claim. The court found that R Co. had lost probable cause to pursue that claim in October, 2008, following its receipt of certain disclosures that made the claim untenable and that continuing to pursue it violated § 52-568. The court determined that the plaintiff was entitled to an award of double damages under § 52-568 for litigation of that claim after October, 2008; however, because the only damages that the plaintiff sought were the attorney's fees incurred in defending the underlying action, the court declined to award damages because the plaintiff had not provided the required apportionment between the attorney's fees related to the defense of the prescriptive easement claim after October, 2008, and those related to the defense of the other claims. Thereafter, the plaintiff, at the court's direction, submitted an affidavit from her attorney, with accompanying exhibits, and claimed damages in the amount of $460,878.08 for attorney's fees. Following a hearing, the trial court rendered judgment in favor of R Co., concluding that the plaintiff had relied on the wrong legal standard and that she again had failed to meet her burden of proving, as close as possible, the actual portion of attorney's fees that were attributable directly to the litigation of the prescriptive easement claim. Thereafter, the plaintiff appealed and R Co. cross appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly concluded that she failed to present evidence that would allow it reasonably to calculate her damages and that the court erred when it failed to apply the common nucleus test for apportionment to her claim for attorney's fees: that court properly determined that the common nucleus test was inappropriate in this case because in a vexatious litigation case such as this case, in which the plaintiff has prevailed on only one of several claims and there is no additional costs borne in defending against

a vexatious claim, as those costs were necessary to the defense of viable claims or to the prosecution of a counterclaim, the plaintiff has not suffered any damages; moreover, the trial court's finding that the plaintiff failed to prove the amount of her damages was not clearly erroneous, as the court properly found that, although the defense of the prescriptive easement claim was significant in the underlying trial, the plaintiff's trespass counterclaim was basically the reciprocal of the prescriptive easement claim and would have necessitated the resolution of most of the same elements of prescriptive easement even if the prescriptive easement claim had not been pursued, and, consequently, it determined that the plaintiff had not proven the amount of her attorney's fees solely attributable to her defense of the prescriptive easement claim.

2. R Co.'s cross appeal challenging the trial court's conclusion that the plaintiff had established one of her causes of action was dismissed, R Co. having lacked standing because judgment had been rendered in its favor, and, therefore, it was not aggrieved by the judgment.

Argued January 14—officially released May 26, 2020

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion to substitute Nancy Keating, administratrix of the estate of Kevin Keating, as a defendant; thereafter, the court, *Heller*, *J.*, denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the defendant Nancy Keating et al. and rendered judgment thereon; subsequently, the case was tried to the court, *Lee*, *J.*; judgment for the defendant Rucci, Burnham, Carta, Carello & Reilly, LLP, from which the plaintiff appealed and the defendant Rucci, Burnham, Carta, Carello & Reilly, LLP, cross appealed to this court. *Affirmed*; *cross appeal dismissed.*

Colin B. Conner, with whom, on the brief, was *Robert D. Russo III*, for the appellant-cross appellee (plaintiff).

Robert C. E. Laney, with whom, on the brief, was *Liam M. West*, for the appellee-cross appellant (defendant Rucci, Burnham, Carta, Carello & Reilly, LLP).

Opinion

BRIGHT, J. The plaintiff, Brenda Greene, appeals from the judgment of the trial court rendered in favor of the defendant law firm, Rucci, Burnham, Carta, Carello & Reilly, LLP,[1] in the plaintiff's vexatious litigation action. On appeal, Greene claims that the court improperly concluded that, although she had established one of her vexatious litigation claims against the defendant, the defendant was entitled to judgment in its favor because Greene failed to prove the amount of her damages. Specifically, Greene claims that the court improperly concluded that she failed to present evidence that would allow the court reasonably to calculate damages in the form of attorney's fees. We affirm the judgment of the trial court.[2]

The following facts, as found by the trial court or as uncontested in the record, and procedural history are relevant to this appeal. In the underlying case, the Keatings had brought a multicount complaint against Greene sounding in prescriptive easement, implied easement, interference with a right-of-way, malicious erection of a structure, private nuisance, and disturbance of right of use. Greene asserted a two count counterclaim alleging

[1] Kevin Keating and Nancy Keating also were named as defendants. Kevin Keating died in February, 2013, and Nancy Keating, administratrix of the estate of Kevin Keating, was substituted as a defendant. For convenience, we refer in this opinion to those three defendants collectively as the Keatings. The trial court previously rendered summary judgment in favor of the Keatings, and Greene has not appealed from that judgment. Accordingly, references to the defendant in this opinion are to the law firm.

[2] The defendant filed a cross appeal claiming that the court had erred when it concluded that Greene had established one of her causes of action against it. Because judgment was rendered in favor of the defendant, it does not have standing to assert such a cross appeal. See Practice Book § 61-8 (appellee *aggrieved* by judgment from which appellant appealed may file cross appeal). Although we have the discretion to consider as an alternative ground for affirmance the issue raised by the defendant; see *Sekor* v. *Board of Education*, 240 Conn. 119, 121 n.2, 689 A.2d 1112 (1997); because we affirm the judgment of the trial court, we need not exercise that discretion.

misuse of an easement and trespass. After a trial to the court, the court, in an April 23, 2010 memorandum of decision, found in favor of Greene on all counts of the complaint and in favor of the Keatings on the counterclaim.

On October 1, 2010, Greene commenced the present action against the defendant and the Keatings for vexatious litigation as to each count that had been alleged by the Keatings in the underlying case. The Keatings raised the special defense of advice of counsel, and they filed a motion for summary judgment. Following the court's rendering of summary judgment in favor of the Keatings on their special defense, the vexatious litigation case against the defendant proceeded to a trial before the court.

In a July 19, 2017 memorandum of decision, the court found in favor of the defendant on all pursued counts, with the exception of the count alleging vexatious ligation in the pursuit of the Keatings' claim for a prescriptive easement. As to that count, the court found that, although the defendant initially had probable cause to allege a cause of action for prescriptive easement against Greene, it lost probable cause as to that count following sworn disclosures made to it by the Keatings' predecessor in title, who told the defendant in October, 2008, that she had widened the right-of-way at issue in the underlying case specifically at the request of, and with the permission of, Greene's predecessor in title. The court concluded, therefore, that the defendant thereafter knew that the permissive nature of the expanded right-of-way made the claim for a prescriptive easement untenable and that continuing to assert the claim violated General Statutes § 52-568 (1),[3] the vexatious litigation statute. The court further concluded that there was no basis for a finding of malice against the

[3] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint

defendant and that Greene, therefore, was not entitled to an award of treble damages but that, instead, she was entitled to an award of double damages as permitted under § 52-568 for litigation of the prescriptive easement claim after October, 2008. Because the only damages sought by Greene were the attorney's fees she incurred in defending against the Keatings' claims in the underlying action, to award damages the court had to determine how much of those fees related to the defense of the prescriptive easement claim after October, 2008. The court found, however, that the plaintiff had "not provided the required apportionment between (a) costs relating to the defendant's continued prosecution of the first count for a prescriptive easement after October, 2008, and (b) costs related to defending the [other counts]." In "fairness" to Greene, the court specifically permitted and requested "further submissions and a hearing on the issue of apportionment of damages," and it directed Greene to "submit an affidavit of claim with exhibits asserting how she believes her expenses should be apportioned between the cost of opposing the claim for the prescriptive easement after October, 2008, and her other costs."

Greene thereafter submitted an affidavit from her attorney, with accompanying exhibits. Greene asserted

commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

"The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages. . . . In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted. . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Internal quotation marks omitted.) *Scalise* v. *East Greyrock, LLC*, 148 Conn. App. 176, 181, 85 A.3d 7, cert. denied, 311 Conn. 946, 90 A.3d 976 (2014).

that she was billed $261,331.82 from October 1, 2008 through May 1, 2010, for attorney's fees, and, after some adjustments, that $230,439.04 was the actual amount of her damages, which, when doubled, amounted to $460,878.08. The defendant objected on several grounds, including that the amount of claimed attorney's fees clearly included matters well beyond the cost of defending against the prescriptive easement claim and that it included the cost of litigating the counts of Greene's counterclaim. The court concluded that Greene was relying on the wrong legal standard in arguing her damages and that she had the burden of proving, as closely as possible, the actual portion of attorney's fees that were attributable directly to the litigation of the prescriptive easement claim. After concluding that Greene again had failed to meet her burden, the court rendered judgment in favor of the defendant. This appeal followed. Additional facts will be set forth as necessary.

Greene claims that the court improperly concluded that she failed to present evidence that would allow the court reasonably to calculate her damages. She argues that she did provide sufficient evidence. Additionally, she argues that the court erred when it failed to apply the "common nucleus test for apportionment" of attorney's fees to her vexatious litigation claim. She proposes that the attorney's fees awarded in a vexatious litigation action are punitive in nature and that the appropriate test to be used in calculating damages is the one articulated in *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333, 63 A.3d 896 (2013) (*Total Recycling*) ("when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined"). We conclude that

the court used the proper test and that its finding that the plaintiff failed to meet her burden of proving the actual amount of her damages was not clearly erroneous.[4]

"It is axiomatic that the burden of proving damages is on the party claiming them. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 253–54, 96 A.3d 1175 (2014). Although the apportionment of damages in a vexatious litigation action may be difficult when a defendant had joined meritorious causes of action with vexatious causes of action in the underlying case, "the plaintiff in a vexatious [litigation] action, like any other plaintiff, has the burden of proving damages." *DeLaurentis* v. *New Haven*, 220 Conn. 225, 269, 597 A.2d 807 (1991). "The trial court's determination that damages have not been proved to a reasonable certainty is reviewed under a clearly erroneous standard." *Weiss* v. *Smulders*, supra, 254. "The trial court's

[4] Greene also claims that the court committed error in its determination of the date, specifically, October, 2008, on which the defendant lost probable cause to pursue the prescriptive easement count of the Keatings' complaint. She argues that the date should have been in 2006, when the defendant had its first interview with the Keatings' predecessor in title. We conclude that this claim is without merit. During oral argument before this court, Greene conceded that there was no evidence that the predecessor in title had told the defendant about the permissive nature of the widening of the right-of-way during its first interview with her, and that the trial court was not

determination of the proper legal standard in any given case [however] is a question of law subject to our plenary review." (Internal quotation marks omitted.) *Total Recycling*, supra, 308 Conn. 326.

In response to Greene's submission in support of her claim for $460,878.08 in damages, the defendant filed a memorandum of law in opposition, arguing that Greene had not met her burden and that the claimed amount of damages "borders on bad faith." Specifically, the defendant argued that Greene was not entitled to any fees that related to the cost of her pursuit of the counts of her counterclaim, and that she was entitled to claim only attorney's fees that she had incurred specifically in defending the prescriptive easement claim in the underlying case. The defendant further argued that the affidavit from Greene's attorney and the accompanying summary of the bills from the underlying case[5] did not apportion fees as instructed by the trial court and were insufficient to establish her claim for damages.[6]

During the hearing in damages, the court, citing to *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 944 A.2d 329 (2008), explained to the parties that the "purpose of [an action for vexatious litigation] is to compensate a wronged individual for damage to his reputation and to reimburse him for the expense of defending against the unwarranted action."

required to draw an inference that the defendant must have known this fact in 2006.

[5] Greene had provided copies of all bills during trial.

[6] For example, the defendant argued in its memorandum of law: "The inherent flaw in . . . Greene's analysis is also readily apparent from its ludicrous results. For example, of the 185.1 hours of time spent on trial preparation as reflected on [her counsel's] August 13, 2009 invoice . . . only 8.8 hours is attributed to preparing to defend six counts of the complaint and to pursue her counterclaim. This represents an allocation of only 4.7 [percent] of the total trial preparation—or, in other words, a claim by . . . Greene that 95.3 [percent] of [her counsel's] time spent in trial preparation was related to the one claim that this court has determined lacked probable cause. . . . The absurdity of . . . Greene's argument is obvious." (Emphasis omitted.)

The court then explained to Greene that the documents she submitted did not apportion the attorney's fees as the court had requested. Greene argued that the bulk of the attorney's fees were necessary to defend against the prescriptive easement claim because all of the claims were interrelated. The defendant, on the other hand, argued that the bulk of the claimed fees would have been necessary even if it had dropped the prescriptive easement claim in the underlying action, and, therefore, they were not attributable to the defense of the prescriptive easement claim. At the close of the hearing, the court stated that it would "do [its] best here."

In its January 16, 2018 memorandum of decision, the court explained: "Where [a] plaintiff cannot show that the [vexatious] claim caused additional expense beyond the defense of the proper claims, she has failed to prove her damages and no recovery can be had." The court also explained that the severity of this rule is mitigated by the rule that damages need not be proven with exactitude but that they, nonetheless, must be established with a fair and reasonable estimate. Thereafter, the court concluded that Greene had not proven her entitlement to $460,878.08 in damages, in part, because Greene's counterclaim for trespass, was "basically the reciprocal of the claim for a prescriptive easement, and would have necessitated the resolution of most of the same elements of prescriptive easement, even if the [defendant] had dropped the [prescriptive easement] count of the complaint [in the underlying action]." The court then held that "[b]ecause [Greene's] claim for fees relies on subjective opinion, lacks detail, and relies on an erroneous application of law, the court cannot award her any damages arising from the vexatious litigation of the prescriptive easement issue."

On appeal, Greene claims that the court improperly concluded that she failed to present evidence that would allow the court reasonably to calculate damages and that the court erred when it failed to apply the

"common nucleus test for apportionment" of attorney's fees. We are not persuaded.

We begin with a discussion of *Total Recycling* on which Greene principally relies. In that case, the defendant contracted to purchase the plaintiffs' oil recycling business. *Total Recycling*, supra, 308 Conn. 315. The contract involved three separate contracts, one by which the defendant purchased the plaintiffs' equipment, one by which it purchased the plaintiffs' goodwill, and one by which one of the plaintiffs agreed not to compete with the defendant after the business was sold to the defendant. Id. Two of the parties' three contracts entitled the defendant to attorney's fees in the event that the plaintiffs breached the contracts. Id. Following an alleged breach of the contracts by the defendant, the plaintiff commenced litigation for breach of the three contracts and for unjust enrichment, seeking damages, including attorney's fees. Id., 316. The defendant pleaded a five count counterclaim, alleging, inter alia, breach of the contracts, and it also sought attorney's fees. Id. The jury found in favor of the plaintiffs on their unjust enrichment claims but rejected each of their breach of contract claims. Id. On the defendant's counterclaim, the jury found that the plaintiffs had breached each of the three contracts, but it awarded damages only with respect to one of the breached contracts. Id. The trial court, thereafter, denied the defendant's motion for attorney's fees because the defendant had been awarded damages on only the contract that did not contain a provision for the recovery of attorney's fees. Id. The Appellate Court, holding that the defendant was entitled to attorney's fees even if it was not awarded damages on the two contracts that provided for an award of fees, reversed the judgment of the trial court with respect to the attorney's fees issue and remanded the case for a new hearing. *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 114 Conn. App. 671, 680–81, 970 A.2d 807 (2009).

On remand, the trial court concluded that the defendant had failed to apportion the attorney's fees between the two contracts that allowed for recovery of those fees and the one that did not permit recovery of those fees and that, therefore, the defendant had failed to meet its burden of proof. *Total Recycling*, supra, 308 Conn. 317–19. The trial court's decision thereafter was upheld by this court but reversed by our Supreme Court, which held that "when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined." Id., 319, 333. This court has reached the same conclusion when a plaintiff pursues both statutory claims that allow for the award of attorney's fees and common-law claims that do not. See *Heller* v. *D.W. Fish Realty Co.*, 93 Conn. App. 727, 735, 890 A.2d 113 (2006) (plaintiff not required to apportion fees between CUTPA claim that permitted recovery of attorney's fees and contract and negligence claims that did not because "they depended on the same facts").

Greene argues that the rationale of these cases applies to her damages claim in this case because her damages are comprised of the attorney's fees she incurred in defending against the prescriptive easement claim in the underlying case, and her defense of that claim was based on the same facts as her defense of the Keatings' other claims. Accordingly, she argues, it does not matter that she also needed these facts in her attempt to establish her counterclaim and to defend against the Keatings' nonvexatious claims. We disagree.

The approach in *Total Recycling* and *Heller* makes sense because a party that prevails on a claim that entitles it to an award of attorney's fees should not lose that entitlement simply because it has pursued other claims for which there is no entitlement. A rule requiring

apportionment in such a circumstance would discourage parties from pursuing potentially meritorious claims for fear that, by doing so, their right to an award of fees would be diminished. Furthermore, under the common nucleus of facts approach, the defendant has the same liability for attorney's fees regardless of whether there are claims for which attorney's fees may not be awarded. The existence of those claims does not prejudice the defendant in any way.

By contrast, in a vexatious litigation case such as this, in which the plaintiff has prevailed on only one of several claims, the common nucleus of facts rationale makes little sense. Where there is no additional cost borne in defending against a vexatious count because those costs were necessary to the defense of viable counts or to the prosecution of a counterclaim, the plaintiff has not suffered any damages.[7] See *DeLaurentis* v. *New Haven*, supra, 220 Conn. 268 (plaintiff "must prove the damages attributable to the vexatious charges"). Put another way, if there is an overlap of facts between the vexatious claim and the nonvexatious claims, the plaintiff would incur the same costs of defense had the vexatious claim not been brought. We, therefore, disagree, as did the trial court, with Greene's contention that the court should have applied the "common nucleus test for apportionment" to her claim for attorney's fees.

In the present case, the court properly considered whether Greene proved that she incurred costs related to the defense of the prescriptive easement claim that she would not have incurred if that claim had not been brought. Although acknowledging that the defense of

[7] The plaintiff certainly might be entitled to a judgment in her favor and an award of nominal damages in such a case. In the present case, however, the plaintiff neither argues that the form of the court's judgment was improper nor does she claim an entitlement to nominal damages. Any possible error in the form of the trial court's judgment or in its lack of an award of nominal damages, therefore, we will not address.

the prescriptive easement claim was significant in the underlying trial, the court also found that Greene's trespass counterclaim was "basically the reciprocal of the claim for a prescriptive easement, and would have necessitated the resolution of most of the same elements of prescriptive easement, even if the [defendant] had dropped [that count] of the complaint." Consequently, the court determined, in part, that Greene had not proven the amount of her attorney's fees solely attributable to her defense of the prescriptive easement claim. Significantly, despite the opportunities given to her by the court, Greene made no attempt to prove damages related solely to defense of the prescriptive easement claim. This left the court with no basis to award her damages.

We, therefore, conclude that the court properly determined that the common nucleus test was inappropriate for the present case and that its finding that Greene failed to prove the amount of her damages was not clearly erroneous.

The judgment is affirmed with respect to the plaintiff's appeal; the defendant's cross appeal is dismissed.

In this opinion the other judges concurred.

FACTOR KING, LLC *v.* HOUSING AUTHORITY OF THE CITY OF MERIDEN ET AL.
(AC 42270)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court granting summary judgment in favor of the defendant. The plaintiff and A Co., a nonparty entity, entered into a factoring and security agreement under which the plaintiff received the option to purchase any of A Co.'s accounts receivable that it deemed to be eligible accounts, and, additionally, received a security interest in all of A Co.'s accounts receivable. Thereafter, the plaintiff sent a notice to the defendant asserting that A Co.

had assigned to it an invoice due to A Co. from the defendant. The defendant remitted payment directly to A Co. The plaintiff commenced this action, claiming that payment should have been made to it pursuant to statute (§ 42a-9-406), and not to A Co. The trial court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion for summary judgment, that court having properly held that the plaintiff was not entitled to a direct payment of a receivable due to A Co. from an account not purchased through its agreement with A Co., but in which the plaintiff had a security interest; the factoring agreement did not constitute an outright sale of A Co.'s accounts but, rather, it gave to the plaintiff the sole discretion to purchase certain of A Co.'s accounts, the agreement did not indicate that either party to that agreement intended for the unpurchased accounts to be subject to collection upon the notice and demand of the plaintiff in the absence of a breach by A Co., and the agreement's security interest provision had no direct relationship to its separate provisions authorizing the plaintiff to purchase and collect on certain accounts; moreover, although the plaintiff was assigned a security interest in all of A Co.'s accounts receivable, including that of the defendant, there was no assignment of the amount due or to become due such as to trigger the payment provision of § 42a-9-406, and, thus, because the plaintiff had not been assigned that particular receivable it had no right to the proceeds from that account and the plaintiff incorrectly imported its status as an assignee of a security interest in A Co.'s accounts receivable into the term "assignee," as used in § 42a-9-406.
2. The trial court properly denied the plaintiff's motion for summary judgment; the court determined that there was no genuine issue of material fact that the plaintiff had never been assigned a specific legal right to recover on the specific invoice related to the payment and, this court having determined that an actual assignment of the amount due or to become due is a precondition to collecting on an invoice pursuant to § 42a-9-406, agreed with the trial court that there was no genuine issue of material fact that the requisite assignment of the defendant's invoice never occurred.

Argued January 16—officially released May 26, 2020

Procedural History

Action to recover damages for, intera alia, breach of contract, brought to the Superior Court in the judicial district of New Haven, where the court, *McNamara, J.*, denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Bruce Loren, pro hac vice, with whom was *Kasey Procko Burchman*, for the appellant (plaintiff).

Kent J. Mancini, for the appellee (named defendant).

Opinion

BISHOP, J. The plaintiff, Factor King, LLC, appeals from the judgment of the trial court granting summary judgment in favor of the defendant Housing Authority of the City of Meriden.[1] The question presented in this appeal is whether, pursuant to a factoring and security agreement between a factor (purchaser) and a seller, the purchaser is entitled to direct payment of a receivable due to the seller from an account not purchased through the agreement, but in which the purchaser has a security interest to secure the seller's obligations as delineated in the agreement. Because we answer that question in the negative, we affirm the judgment of the trial court granting summary judgment in favor of the defendant.

The record in this matter reveals the following undisputed facts and procedural history. The plaintiff is a factoring company.[2] The defendant is a public housing authority located in Meriden. In June, 2016, the defendant and AEG of New England, LLC (AEG), a nonparty entity, entered into a contract pursuant to which AEG would perform certain labor and provide certain materials in connection with construction projects being overseen by the defendant. On August 30, 2016, the plaintiff

[1] In the underlying litigation, the plaintiff brought claims against two additional defendants, Bristol Enterprises, LLC, and Maynard Road Corporation. On August 28, 2017, the plaintiff withdrew its claims as to those parties and withdrew counts one and two of the complaint. Accordingly, we refer to the Housing Authority of the City of Meriden as the defendant in this appeal.

[2] The trial court found that "[f]actoring is a process wherein one business—a factoring firm, purchases accounts receivable from another business at a discounted price and in exchange, the factoring firm advances working capital. See *Forest Capital, LLC* v. *BlackRock, Inc.*, 658 Fed. Appx. 675, 677 (4th Cir. 2016); *Brookridge Funding Corp.* v. *Northwestern Human Services*, 175 F. Supp. 2d 355, 358 (D. Conn. 2001)." Although our understanding of a factoring agreement, generally, does not differ from that of the trial court,

and AEG entered into a factoring and security agreement (agreement) under which the plaintiff received the option to purchase any of AEG's accounts receivable that it deemed to be eligible accounts,[3] and, additionally, received a security interest in all of AEG's accounts receivable, purchased or unpurchased.

In salient parts, the language of the agreement provides that AEG will provide the plaintiff with a schedule of certain of AEG's accounts available for purchase. Additionally, the agreement provides that the plaintiff may, but will not be required to, purchase any of those accounts that it deems eligible. The financial requirements for such purchases are set forth in detail elsewhere in the agreement.

Importantly, the agreement also contains security provisions. Section 7.1 of the agreement provides: "As collateral securing the [o]bligations, [AEG] grants to [the plaintiff] a continuing first priority security interest in the [c]ollateral." Collateral is defined under the agreement as "all [AEG's] now owned and hereafter acquired [a]ccounts, [c]hattel [p]aper, [i]nventory, [e]quipbment, [i]nstruments, [p]roperty, [d]ocuments, [l]etter of [c]redit [r]ights, [c]ommercial [t]ort [c]laims, and [g]eneral [i]ntangibles." The obligations secured by the collateral are defined in the agreement as "all present and future obligations owing by [AEG] to [the plaintiff] whether arising hereunder or otherwise, and whether arising before, during or after the commencement of any bankruptcy case in which [AEG] is a debtor."

With that factual background, we turn next to a review of relevant occurrences after the date of the agreement. The record reveals that the plaintiff purchased from AEG two accounts receivable pursuant to

the agreement in the present case provided the plaintiff only an option to purchase certain of the defendant's receivables.

[3] The agreement defines an "[e]ligible [a]ccount" as "an [a]ccount that is acceptable for purchase as determined by [the plaintiff] in the exercise

the option terms of the agreement. The debtor with respect to both of the purchased invoices was an entity known as Bristol Enterprises, LLC, and the invoices were for work performed by AEG in conjunction with two projects located in Bristol: the Bingham School project invoice, in the amount of $228,019.10, and the O'Connell School project invoice, in the amount of $265,980.90. Having exercised its option to purchase these two accounts, and pursuant to Uniform Commercial Code (UCC) § 9-406, codified in similar language as General Statutes § 42a-9-406,[4] notice of the plaintiff's purchase of these accounts was sent to Bristol Enterprises, LLC, and, subsequently, Bristol Enterprises, LLC, paid these two amounts to the plaintiff. In the present appeal, the parties agree that these two accounts receivable were the only ones purchased by the plaintiff pursuant to the terms of the agreement.

Nevertheless, by letter dated September 19, 2016, the plaintiff sent notice to the defendant asserting that AEG had assigned to the plaintiff all of its present and future accounts receivables.[5] The notice purported to be issued pursuant to § 9-406 of the UCC. On November

of its reasonable sole credit or business judgment." (Internal quotation marks omitted.)

[4] General Statues § 42a-9-406 (a) provides in relevant part: "an account debtor on an account . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor. . . ."

[5] The notice sent to the defendant on September 19, 2016, read in relevant part: "AEG of New England, LLC has assigned all of its present and future accounts receivables to FACTOR KING, LLC . . . . Enclosed is AEG of New England, LLC's Notice of Assignment and Change of Payee confirming this assignment. FACTOR KING has a perfected first security interest in all of AEG of New England, LLC's accounts receivables pursuant to the attached UCC-1 Financing Statement. All checks and other payments for any monies owed by you to AEG of New England, LLC, for any reason including materials provided or work performed by AEG of New England, LLC for you on any construction project now or in the future, must be made payable only to FACTOR KING, LLC . . . ." (Emphasis omitted.)

9, 2016, the defendant remitted payment in the amount of $2,217,750 directly to AEG, and not to the plaintiff, in response to an invoice sent by AEG for work AEG had performed for the defendant. The plaintiff commenced the present action, claiming that, pursuant to its notice, and in accordance with the terms of its agreement with AEG, the plaintiff was the entity to whom the payment of $2,217,750 should have been made.

The parties filed competing motions for summary judgment. In its opposition to the plaintiff's motion for summary judgment, the defendant argued that because the plaintiff had not purchased the invoice between itself and AEG, it was under no obligation to pay the invoice amount to the plaintiff and, instead, it complied with its contractual obligation to AEG. From the judgment of the trial court granting summary judgment in favor of the defendant, and from the court's denial of the plaintiff's own motion for summary judgment, the plaintiff now appeals. Additional facts will be set forth as necessary.

On appeal, the plaintiff argues that the court erred in ruling that (1) § 42a-9-406 applies only to invoices actually purchased by the party assigned an account, and (2) the plaintiff is not considered an "assignee" of the account in question under the agreement such as to trigger the protection of § 42a-9-406. The plaintiff also challenges the court's denial of its motion for summary judgment. In response, the defendant argues that (1) § 42a-9-406 contemplates the purchase of specific invoices in order for those amounts to become collectible by the plaintiff, and (2) the plaintiff is not an "assignee" of the account in question for purposes of triggering § 42a-9-406 because the plaintiff had only been "assigned" a security interest in the account, and had not been assigned the specific amount due on the invoice sent to the defendant. We agree with the defendant and, accordingly, affirm the judgment of the trial court.

We first set forth the appropriate standard of review and governing legal principles. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . .

"Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Smith* v. *Marshview Fitness, LLC*, 191 Conn. App. 1, 8, 212 A.3d 767 (2019). In analyzing the plaintiff's claim, we must interpret both the contract between the parties and the language of § 42a-9-406.

I

A

We look first to the language of the contract between AEG and the plaintiff in order to determine the nature of the agreement as it pertains to the plaintiff's option

to purchase accounts receivable, the security interest held by the plaintiff in all of AEG's accounts, and whether the contract provides the plaintiff with the right to receive payment on those AEG accounts that it has not purchased pursuant to the agreement.

"When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . [W]here there is definitive contract language, [however], the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review. . . .

"In determining whether a contract is ambiguous, the words of the contract must be given their natural and ordinary meaning. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101–103, 84 A.3d 828 (2014). We do not find the contract terms to be ambiguous and, accordingly, we undertake a plenary review of the agreement's provisions.

It is important to an understanding of the parties' transactional relationship that the agreement contains both factoring provisions (factoring agreement) and security provisions (security agreement). The factoring agreement provides that "[AEG] shall offer to [the plaintiff] as absolute owner certain of [AEG's] [a]ccounts and list same [in] [s]chedules of [a]ccounts. Upon purchase . . . [the plaintiff] will assume the risk of [nonpayment] on [p]urchased [a]ccounts up to the [i]nitial [p]urchase [p]rice . . . ." The contract further provides that "[the plaintiff] may, but need not purchase from [AEG] such [a]ccounts as [the plaintiff] determines to be [e]ligible [a]ccounts." The language makes clear that the factoring agreement did not constitute an outright sale of AEG's accounts but, rather, it gave to the plaintiff the sole discretion to purchase certain of AEG's accounts if it so desired. Notably, the provisions of the factoring agreement contain no language authorizing the collection the plaintiff seeks here, in the absence of some default by AEG on any of its obligations to the plaintiff. Nowhere does the agreement indicate that either party intended for unpurchased accounts to be subject to collection upon the notice and demand of the plaintiff in the absence of a breach by AEG. Instead, the plaintiff had the discretion to purchase accounts, after which purchase it could then send notice and collect on the chosen invoices. That is the process which the parties agreed to and followed regarding Bristol Enterprises, LLC's invoices.

With regard to the security agreement, the agreement provides that "as collateral securing the [o]bligations, [AEG] grants to [the plaintiff] a continuing first priority security interest in the [c]ollateral." This provision, viewed in conjunction with the relevant definitions in the agreement, makes clear that AEG has provided a security interest to the plaintiff in all of its accounts receivable, including the account in question, regardless

of whether the plaintiff purchased the accounts receivable pursuant to the factoring portion of the agreement. This interest in the accounts receivable secures the performance of AEG's obligations to the plaintiff, whether those obligations are then extant or may come into existence in the future. The agreement's security interest provision, however, has no direct relationship to its separate provisions authorizing the plaintiff to purchase certain accounts and collect on those debts. In short, the security agreement provisions and the factoring agreement provisions, although included in the same agreement, appear to operate independently. Accordingly, we conclude that the agreement between AEG and the plaintiff does not directly assign the account receivable at issue in the present appeal to the plaintiff beyond the interest created by the security agreement.

B

We next address the plaintiff's argument that the language of § 42a-9-406 referring to an "assignee" authorizes the plaintiff's collection on the invoice in this matter. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . [General Statutes §] 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative

history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *Wozniak* v. *Colchester*, 193 Conn. App. 842, 858–59, 220 A.3d 132, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

The plaintiff argues that it is the "assignee" to which the language of § 42a-9-406 refers and, pursuant to its status as the assignee of the security interest in AEG's accounts receivable, it is entitled to payment by the defendant on the invoice. The defendant rejects this position on the basis that the plaintiff's security interest in AEG's accounts would entitle the plaintiff only to payment by the defendant in the event that AEG breached its obligations to the plaintiff, triggering the security interest and allowing the plaintiff to foreclose.[6] The defendant further disagrees with the plaintiff's interpretation of the term "assignee" in this context, and argues that although the plaintiff was assigned a security interest in all of AEG's accounts receivable, including that of the defendant, there was no assignment of *the amount due or to become due* such as to trigger the payment provision in § 42a-9-406. We agree with the defendant.

Section 42a-9-406 provides in relevant part that "an account debtor on an account, chattel paper or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that *the amount due or to become due* has been assigned and that payment is to be made

[6] The plaintiff makes no claim of breach on the part of AEG, and is not seeking to foreclose on the security interest in the present case.

to the *assignee*. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor. . . .'' (Emphasis added.)

First, the statutory language is not vague or ambiguous. Therefore, we need not consider legislative history in order to ascertain the meaning of ''assignee'' and, instead, need only consider its plain meaning. Black's Law Dictionary defines ''assignee'' as ''[s]omeone to whom property rights or powers are transferred by another. Use of the term is so widespread that it is difficult to ascribe positive meaning to it with any specificity. Courts recognize the protean nature of the term and are therefore often forced to look to the intent of the assignor and assignee in making the assignment—rather than to the formality of the use of the term *assignee*—in defining rights and responsibilities.'' (Emphasis in original.) Black's Law Dictionary (11th Ed. 2019) p. 147. Although in this context we interpret the use of the term ''assignee'' in the text of a statute, and not only on the basis of the use of the term in the agreement, the understanding that the term ''assignee'' should be construed in accordance with the context surrounding its usage remains true here. Accordingly, the ordinary meaning of the term ''assignee'' should be applied to its use in § 42a-9-406.

In that regard, we find it instructive that decisional law in the federal courts previously has interpreted § 9-406 of the UCC in a manner consistent with the interpretation asserted by the defendant in this appeal. Here, both parties cite to *Platinum Funding Services, LLC* v. *Petco Insulation Co.*, United States District Court, Docket No. 3:09cv1133 (MRK), 2011 WL 1743417 (D. Conn. May 2, 2011) (*Petco*). The plaintiff argues that *Petco* is inapposite because, in the present case, it relies on a security agreement that exists between the parties to buttress its argument that it was entitled to collect on the defendant's invoice. The defendant argues that

Petco is squarely on point, and that the plaintiff's security interest in the account in question does not constitute an assignment, as that term is utilized in § 42a-9-406.

Petco is factually similar to the present case. *Petco* involved a claim by a factoring company for payment on an account that had not formally been assigned to it through selection and purchase pursuant to the terms of its factoring option agreement. *Petco*, supra, 2011 WL 1743417, *1. In *Petco*, the plaintiff, Platinum Funding Services, LLC (Platinum Funding), a factoring company, sought to recover payments it alleged were owed to it as a result of a factoring agreement with the defendant, Petco Insulation Co., Inc. (Petco Insulation). Id. The relevant factoring agreement was structured similarly to that in the present case, in that it provided Platinum Funding with the option to purchase a number of Petco Insulation's accounts receivable, but included no requirement that Platinum Funding actually do so. Id., *1–2 The plaintiff in *Petco*, like the plaintiff in the present case, sent notice to a third party who had performed work for Petco Insulation—but whose invoice Platinum Funding had not purchased—notifying it of the purported assignment of its account. Id., *2–3. When that third party made payment to Petco Insulation and not to Platinum Funding, Platinum Funding brought an action against the third party seeking to recover the amounts paid to Petco Insulation on the unpurchased invoices. Id., *3. The third party then moved for summary judgment. Id., *4.

The court in *Petco* determined, by a plain reading of the agreement, as well as the use of logic and common sense, that Platinum Funding could not recover from the account debtor on its UCC § 9-406 claim because the right to receive payment on the particular invoices at issue had never actually been assigned to it. Id., *8,*13. Although we acknowledge that the plaintiff in

Petco did not rely on any security interest to justify its claim of entitlement to payment from the account debtor, the logic underpinning the court's ruling is readily apparent.[7] Notably, the reasoning and conclusion of *Petco*—that a creditor who has not been assigned a particular receivable has no right to the proceeds from that account—have been widely followed in other jurisdictions. See *Forest Capital, LLC* v. *BlackRock, Inc.*, 658 Fed. Appx. 675, 680–81 (4th Cir. 2016) ("[t]he language of UCC § 9-406 . . . presumes that an assignor has already assigned its rights to receive payment from an account debtor to an assignee" (internal quotation marks omitted)); *First Bank & Trust* v. *Coventina Construction Corp.*, United States District Court, Docket No. 18-civ-6648 (NGG) (VMS), 2019 WL 4120363, *5 n.4 (E.D.N.Y. July 23, 2019) ("[p]laintiff has standing to bring the account stated claim because the rights to and amount owed under the relevant invoices *were assigned* to [the plaintiff]" where "[t]he [f]actoring [a]greements *transfer all legal and equitable title* in the accounts to [the] plaintiff" (emphasis added; internal quotation marks omitted)); *Durham Commercial Capital Corp.* v. *Select Portfolio Servicing, Inc.*, United

[7] The court in *Petco* alludes, in a footnote, to the existence of a security agreement between the parties, stating, in relevant part: "The First Agreement included a number of other terms which may be relevant later on in this case. For example, it provided that if Petco Insulation . . . 'receive[d] any collections or other proceeds of the [a]ccounts [r]eceivable assigned to Platinum [Funding], [s]ellers shall immediately deliver such payments . . . to Platinum [Funding],' and that '[f]ailure to deliver such payments shall be deemed a default' on related security agreements with Platinum Funding. . . . However, Platinum Funding has not made any arguments based on those other terms in opposition to the pending motion. Nor has it made any arguments based on the terms in the related security agreements. The [c]ourt therefore need not examine them in further detail here." *Petco*, supra, 2011 WL 1743417, *2 n.1.

The language of the footnote reveals that the relevant agreement or agreements between Petco Insulation and Platinum Funding likely contained a similar security agreement to the one at issue in the present case. Because the factoring company in *Petco* did not rely on the security provisions to justify its right to collect on the accounts, however, the court in *Petco* offered no guidance as to the merits of doing so.

States District Court, Docket No. 3:14-cv-877-J-34 (PDB), 2016 WL 6071633, *16 (M.D. Fla. October 17, 2016) ("Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger. . . . That statement suggests what common sense also dictates—that a notice of assignment obligates an account debtor to pay the purported assignee only to the extent there is an actual, valid assignment from the assignor." (Citation omitted; internal quotation marks omitted.)).

We agree with the interpretation of § 9-406 of the UCC adopted by the learned judge in *Petco* that, in order for a factoring company to collect on an account receivable, it must have purchased that account, or actually have been assigned its ownership, pursuant to the relevant factoring agreement. Section 42a-9-406 clearly states that the duty placed upon an account debtor to discharge its debt by paying the assignee, as opposed to the assignor, hinges on "the amount due or to become due [being] assigned . . . ." Our interpretation of "assignee" within the context of § 42a-9-406 necessarily requires consideration of the language that precedes that term. The phrase "due or to become due" makes clear that, for the "assignee" to become the party to whom payment must be made, the amount of that payment—which is either currently due, or will become due in the future—is what must be assigned to the "assignee."

As discussed, the plaintiff's interpretation of the term "assignee" within the statute relies on its status as an assignee of the security interest in AEG's accounts receivable pursuant to the security agreement. The UCC, as adopted by our legislature, defines a security interest, in part, as an interest in personal property or fixtures which secures payment or performance of an obligation. General Statutes § 42a-1-201 (35). Here, the

agreement provided collateral to the plaintiff in the form of AEG's accounts receivable as security for the performance of its obligations, then or in the future, to the plaintiff. Consequently, the plaintiff had a *collateral* interest in the receivable due to AEG from the defendant. Accordingly, the plaintiff is correct that, pursuant to the security agreement, it is an "assignee" of the secured interest in AEG's accounts.

The plaintiff, however, incorrectly imports its status as an assignee of the security interest into the term "assignee" as used in § 42a-9-406, which, as we have noted, unambiguously refers to an assignee of an amount due or to become due to the assignor—which is not a proper characterization of the defendant's invoice in the present case. No amount due on the subject account by the defendant was assigned to the plaintiff. Rather, that account, along with other accounts due to AEG and not purchased by the plaintiff, served only as collateral securing the plaintiff's rights against any default by AEG of its obligations to the plaintiff. Moreover, there is no evidence or claim that AEG defaulted on any of its obligations pursuant to the agreement, which would have been a precondition to the plaintiff's right to seek satisfaction from this receivable due from the defendant to AEG. In sum, the fact that the plaintiff has been "assigned" a security interest does not assign any present interest in the defendant's accounts receivable.

The plaintiff asserts, however, that it sent a notice of assignment of this account to the defendant. That claim lacks merit. The fact that a notice of assignment has been sent, alone, is not sufficient to trigger repayment to the factoring company. See *CapitalPlus Equity, LLC* v. *Glenn Rieder, Inc.*, United States District Court, Docket No. 17-CV-639 (JPS), 2018 WL 276352, *4 (E.D. Wis. January 3, 2018) (noting, in case in which no formal documentation of sale of accounts

receivable exists, that "the notice . . . sent to [the account debtor] demanding payment would have no force or effect unless the accounts had actually been assigned to it"). Thus, we conclude that in attempting to equate its security interest in the defendant's receivable with actual assignment of ownership of the account, the plaintiff is legally incorrect and, as a result, the court properly granted the defendant's motion for summary judgment.

II

Finally, the plaintiff claims that the court erred in denying its motion for summary judgment. Ordinarily, the denial of a motion for summary judgment is not an appealable judgment. See, e.g., *Westbrook* v. *ITT Hartford Group, Inc.*, 60 Conn. App. 767, 774–75, 761 A.2d 242 (2000). Because, however, the court granted the defendant's motion for summary judgment and, accordingly, the plaintiff was not afforded the opportunity of a full trial on the merits, this claim is properly before us. See *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 169–70, 7 A.3d 919 (2010).

The court denied the plaintiff's motion for summary judgment because it determined that there was no genuine issue of material fact that the plaintiff was never assigned any specific legal right to recover on the specific invoice related to the alleged misdirected payment. On the basis of our analysis as set forth in part I of this opinion determining that an actual assignment of the amount due or to become due is a precondition to collecting on an invoice pursuant to § 42a-9-406, we agree with the court that there is no genuine issue of material fact that the requisite assignment of the defendant's invoice never occurred. Accordingly, we affirm the court's denial of the plaintiff's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

TATAYANA OSBORN ET AL. *v.* CITY OF WATERBURY ET AL.
(AC 39574)

Lavine, Prescott and Harper, Js.

Syllabus

The plaintiff mother sought to recover damages for personal injuries that her minor child, T, sustained when she was assaulted by other students during a lunchtime recess at her public elementary school. After a trial to the court, judgment was rendered in favor of the plaintiffs. The municipal defendants appealed to this court, claiming, among other things, that the trial court improperly determined, in the absence of expert testimony, that one student intern and three or four staff members were insufficient to control as many as 400 students on the playground. This court reversed the trial court's judgment, concluding that expert testimony was required to prove the standard of care necessary to determine how many adults were required to control as many as 400 students on the playground. The plaintiffs, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and concluded that the fact finder did not need to apply scientific or specialized knowledge to determine whether the defendants adequately supervised the children in the present case, and remanded the case to this court with direction to consider the defendants' other claims on appeal. *Held* that the trial court's finding that there were as many as 400 students on the playground at the time T sustained her injuries was clearly erroneous and inextricably entwined with the court's conclusion that the defendants were negligent, constituting harmful error that required a new trial; such finding was in direct contrast to the evidence presented by school personnel, it was not supported by any other evidence and was premised on an additional clearly erroneous finding that the entire student body was released for recess simultaneously, rather than in waves.

(*One judge dissenting*)

Submitted on briefs January 6—officially released May 26, 2020

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the action was withdrawn as to the defendants Charles Stango et al.; thereafter, the case was tried to the court, *Hon. Barbara J. Sheedy*, judge trial

referee; judgment for the plaintiffs, from which the named defendant et al. appealed to this court, *Lavine*, *Prescott* and *Harper*, *Js.*; subsequently, the court, *Hon. Barbara J. Sheedy*, judge trial referee, issued an articulation of its decision, and the defendants Danielle Avalos et al. withdrew their appeal; thereafter, this court reversed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to our Supreme Court, which reversed the judgment of this court and remanded the case to this court with direction to consider the defendants' remaining claims on appeal. *Reversed*; *new trial.*

Daniel J. Foster, corporation counsel, filed a brief for the appellants (named defendant et al.).

Richard M. Franchi filed a brief for the appellees (plaintiffs).

Opinion

LAVINE, J. This negligence action against the defendants, the city of Waterbury (city) and the Waterbury Board of Education (board),[1] concerns the injuries that the minor plaintiff, Tatayana Osborn (child),[2] sustained during a lunchtime recess at her elementary school. This appeal returns to us on remand from our Supreme Court following its reversal of this panel's prior decision. See *Osborn* v. *Waterbury*, 333 Conn. 816, 834, 220 A.3d 1 (2019) (holding that expert testimony not necessary to determine whether "the defendants adequately supervised the children"). Our Supreme Court

[1] The plaintiffs also brought this action against Stephanie Pascale, a fifth grade teacher; Charles Stango, the president of the board; Danielle Avalos, a paraprofessional at the school; and Donna Perreault, the school principal. They withdrew the action against Pascale and Stango in the trial court. In its articulation, the court clarified that it did not find that Avalos and Perreault were liable for the plaintiffs' injuries. Avalos and Perreault, therefore, did not participate in the present appeal. Any reference in this opinion to the defendants is to the city and the board.

[2] The child commenced the present action by and through her mother, Tacarra Smith. Smith also alleged that she sustained damages as a result of the child's injuries. We refer to Smith and the child as the plaintiffs.

remanded the case to us "to consider the defendants' remaining claims on appeal." Id. Those claims are that "the trial court improperly (1) rejected [the defendants'] special defense of governmental immunity for discretionary acts, (2) concluded that the plaintiffs' injuries were caused when an inadequate number of adults were assigned to supervise up to 400 students when there was evidence that there were no more than 50 students on the playground . . . and [(3)] awarded damages intended to encourage continued therapy and occupational training for the child in the absence of evidence that she would need such services in the future." (Internal quotation marks omitted.) Id., 821–22. We agree with the defendants' second claim and, therefore, reverse the judgment of the trial court and remand the matter for a new trial.[3]

The following facts and procedural history, as set forth by our Supreme Court, are relevant to our resolution of the defendants' remaining claim. "On April 25,

[3] Because the defendants' second claim is dispositive of their appeal, our resolution of the present case does not depend on the other two claims. We note, however, our agreement with the dissent's resolution of the governmental immunity issue and our disagreement with the dissent's resolution of the damages issue. Specifically, unlike the dissent, we would characterize the $60,000 award as economic damages in light of the court's statement that "[i]t is this court's view the [child] would benefit from additional behavior counseling and the substantial award here determined is intended to encourage continued therapy and occupational training. . . . No evidence was offered to support an ongoing need for continued therapy in any form though the award here will permit the same should the family determine future treatment is desirable." In our view, the court abused its discretion in awarding $60,000 for future medical treatment because, in the absence of any evidence to support a reasonable likelihood that future treatment would be necessary, it was based on mere speculation. See *Calvi* v. *Agro*, 59 Conn. App. 732, 735–36, 757 A.2d 1260 (2000) ("[A]s to future medical expenses, the [trier of fact's] determination must be based upon an estimate of reasonable probabilities, not possibilities. . . . The obvious purpose of this requirement is to prevent the [trier of fact] from awarding damages for future medical expenses based merely on speculation or conjecture. . . . The evidence at trial must be sufficient to support a reasonable likelihood that future medical expenses will be necessary." (Citation omitted; internal quotation marks omitted.))

2012, the child was an elementary school student when she was assaulted by other students while they were on the playground during the lunchtime recess. As a result of the assault, the child sustained a cut to her face that required sutures . . . and [that] resulted in scarring. The plaintiffs commenced the present action against the city [and] the board, [among others]. . . . In their complaint, the plaintiffs alleged, inter alia, that the plaintiffs' injuries and damages were caused by the negligence and carelessness of the defendant[s] in that [they] . . . failed to adequately supervise the children both in and out of the classroom, including the [child].

"The parties tried the case to the court. Following the presentation of evidence, the court issued a memorandum of decision in which it found that the child was a fifth grade student at Sprague Elementary School in Waterbury when she was assaulted by two or more students on the playground. The playground was surrounded by brick walls and fencing, and, following lunch, students occupied the area for play and exercise. More specifically, the child was surrounded by a circle of students who physically assaulted her and pushed her into a stone wall, causing injuries to her nose and cheek with resulting facial scarring. The child experienced posttraumatic headaches for a sustained period of time, but the most serious effect of this schoolyard assault was its lingering effect on the child's emerging personality and self-image.

"The court also found that Danielle Avalos, a school paraprofessional, was assigned to monitor the students on the playground during recess. She was not provided with written documents that listed her duties during the lunchtime recess. Her two day professional development training occurred prior to the first day of school and focused on the forms of student bullying and the need to distinguish between bullying and students merely picking on other students or otherwise being unkind to them. . . .

"The trial court found that [t]here was also no evidence to suggest that only portions of the student body were released for [lunch] at a given time; it is more likely the student body ate together in the [lunch] room and then went outside for recreation—in large numbers. The trial court further found that, [a]t the time of the incident, classroom teachers were on [lunch] recess (and there was no evidence to establish that staff lunch times were staggered). The court concludes that 1 student intern and 3 or 4 staff members were not sufficient to exercise control over as many as 400 students [on the playground].

"With respect to the incident during which the child was injured, the court found that Avalos saw a student repeatedly punch the child in the face and push her into a wall. A precis prepared by the nursing division of the Waterbury Health Department referenced, a large, deep cut on the [child's] left cheek and a cut of lesser depth on the bridge of her nose. . . . The court rendered judgment in favor of the plaintiffs.

"After trial, the defendants sought an articulation from the trial court pursuant to Practice Book §§ 61-10 and 66-5. Specifically, the defendants requested that the trial court articulate (1) whether the court found either or both of the individual defendants who remain in the case to be liable for the plaintiffs' injuries and losses, and, if so, on what basis, and (2) whether the court found that the plaintiffs' injuries and losses were caused by the fact, as found by the court, that the number of adults present on the playground where the injuries took place was insufficient to exercise proper control over the number of students present.

"The trial court responded to the defendants' request for articulation as follows:

(1) This court did not find any remaining individual (specifically . . . Avalos or Donna Perreault) was liable for the plaintiffs' injuries or losses . . . . (2) This court found [that] the injuries and/or losses were as a

result of the [city's] failure to exercise proper control over the number of students present. (3) The court (in [an] August 12, 2016 ruling) found [that] the plaintiffs' injuries were caused by insufficient staffing of personnel to exercise proper control over the number of students on the playground at the time (perhaps as many as 400 students) . . . . (4) The court concluded [that] the injuries to the plaintiffs were proximately caused by an insufficient number of staff personnel—to monitor the actions of students on the playground on the date of injury. . . .

"The defendants appealed from the judgment of the trial court to the Appellate Court . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 819–21. Additional facts will be set forth as necessary.

The defendants claim on appeal that the court improperly found that the plaintiffs' injuries were caused by the fact that 1 student intern and 3 or 4 staff members were insufficient to exercise proper control over perhaps as many as 400 students. The defendants argue that the factual finding with regard to the number of students on the playground at the time the child was injured was clearly erroneous because there was no evidence that there were "perhaps as many as [400] students" on the playground. The plaintiffs counter that there was evidence of a total of 400 students in the school, and that the evidence varied as to the number of students on the playground at the time the child was injured, all of which the court could have chosen to ignore. On the basis of our careful review of the record, we are left with a firm conviction that the trial court made a mistake in finding that there were "perhaps as many as 400 students" on the playground at the time the child was injured. That conclusion, in our view, is clearly erroneous and unsupported by the facts.

We begin with the standard that governs our review of the defendants' claim. "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or *in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made*." (Emphasis added; internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 858, 905 A.2d 70 (2006). "As a reviewing court, [w]e cannot act as a [fact finder] or draw conclusions of facts from the primary facts found, but can only review such findings to determine whether they could legally, logically and reasonably be found, thereby establishing that the trial court could reasonably conclude as it did. . . . Moreover, the fact that there is support in the record for a different conclusion [than the one reached by the court] is irrelevant at this stage in the judicial process. On appeal, we do not review the evidence to determine whether a conclusion different from the one reached could have been reached. . . . [Instead] [w]e review the totality of the evidence, including reasonable inferences therefrom, to determine whether it could support the trier's decision." (Citation omitted; internal quotation marks omitted.) *Benchmark Municipal Tax Services, Ltd.* v. *Greenwood Manor, LLC*, 194 Conn. App. 432, 441, 221 A.3d 501 (2019).

At trial, the following evidence was before the court. Donna Perreault, the principal of the school at the time of the incident, testified that there were "around probably plus or minus 400 [students]" at the school and that there were approximately twenty-five classrooms in kindergarten through fifth grade at the school. Each school day, the students ate lunch in three waves in the "caf-gym-atorium" and staff members were assigned to cover those waves. After students ate and cleared their lunch tables, they were called by table to line up at a side door to go outside for recess. There was a

staff member positioned at the side door who walked them outside for recess and another staff member positioned outside waiting for the students. There were typically three or four staff members assigned to monitor the children at recess who were stationed around the playground with walkie-talkies to facilitate communication. They either watched the students or engaged the students in a game. At the end of recess, the assigned staff members had students line up and wait for their respective teachers to walk them back into the school.

Perreault testified that, on the date that the child was injured, there were no more than 150 students who had been dismissed from lunch to recess. That approximation was based on her understanding that there were three fourth grade classes and three fifth grade classes that comprised the lunch wave in question, and that each class had approximately twenty-five students. She also testified that there were four staff members assigned to cover recess at the time the child was injured. Danielle Avalos, a paraprofessional who was on recess duty and was the first staff member to respond to the incident, however, testified that she did not think that there were more than fifty students on the playground at the time of the incident. Significantly, in closing argument, counsel for the plaintiffs argued that "we know it was probably between 90 and 150 children on the playground" at the time the child was injured.

As stated previously, the court concluded in its memorandum of decision that "1 . . . student intern and 3 . . . or 4 . . . staff members were not sufficient to exercise proper control over perhaps as many as [400] students." The court further stated that "[t]here was also no evidence to suggest that only portions of the student body were released for luncheon at a given time; it is more likely that the student body ate together in the luncheon room and then went outside for recreation—in large numbers." The defendants subsequently

filed a motion for articulation requesting the court to articulate, inter alia, "whether the [c]ourt found that the [child's] injuries and losses were caused by the fact, as found by the [c]ourt, that the number of adults present on the playground where the injuries took place was insufficient to exercise proper control over the number of students present." In response, the court ruled that it "found the injuries and/or losses were as a result of the [c]ity of Waterbury's failure to exercise proper control over the number of students present"; "found the [p]laintiffs' injuries were caused by insufficient staffing of personnel to exercise proper control over the number of students on the playground at the time (perhaps as many as [400] . . . students)"; and "concluded the injuries to the [p]laintiffs were proximately caused by an insufficient number of staff personnel . . . to monitor the actions of students on the playground on the date of injury."

On the basis of our comprehensive review of the trial record, and giving due deference to the trial court, we are left with a firm conviction that the trial court made a mistake in finding that there were "perhaps as many as 400 students" on the playground at the time the child was injured. Although there was testimony that there were approximately 400 students who attended the school, there was absolutely no evidence that all of those students ate lunch together and were dismissed to recess at the same time. In fact, all of the evidence was to the contrary. As stated previously, the school had three separate lunch waves that were dismissed to recess following the lunch period. The principal of the school testified that there were approximately 150 students at recess when the child was injured and the paraprofessional who responded to the incident testified that there were no more than 50. In light of this evidence, it does not logically or reasonably follow that "perhaps as many as 400 students" were outside at recess at the time the child was injured. Moreover, even

though closing argument is not evidence at trial, the plaintiffs' own counsel conceded in closing argument that "we know it was probably between 90 and 150 children on the playground." We, therefore, are left with a firm conviction that the trial court based its finding that there were "perhaps as many as 400 students" at recess on speculation that was unsupported by the evidence. The finding is thus clearly erroneous.

Our conclusion is bolstered by the fact that the trial court's finding that there were "perhaps as many as 400 students" outside at recess was premised on another clearly erroneous factual finding. The court stated in its memorandum of decision that "[t]here was also *no evidence* to suggest that only portions of the student body were released for luncheon at a given time; it is more likely that the student body ate together in the luncheon room and then went outside for recreation—in large numbers." (Emphasis added.) This finding also is clearly erroneous because there was unquestionably evidence to the contrary—namely, testimony that the student body went to lunch and recess in three separate waves. In *In re Jacob W.*, 330 Conn. 744, 774, 200 A.3d 1091 (2019), our Supreme Court was left with a firm conviction that a mistake was made where the trial court stated that there was "no evidence" despite an abundance of evidence in the record to the contrary. We are left with a similar conviction in the present case.

We now turn to determine whether the trial court's clearly erroneous factual finding warrants reversal of the judgment rendered against the defendants. "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *73-75*

Main Avenue, LLC v. *PP Door Enterprise, Inc.*, 120 Conn. App. 150, 161, 991 A.2d 650 (2010).

In determining whether the court's clearly erroneous factual finding constituted harmful error, we must first acknowledge the following statements by our Supreme Court: "Unlike the defendants and the Appellate Court, we understand the trial court's response to the request for articulation, namely, that 'the injuries and/or losses were as a result of the [city's] failure to exercise proper control over the number of students present,' as a conclusion that there was inadequate supervision, not that there was solely an inadequate number of staff on the playground"; *Osborn* v. *Waterbury*, supra, 333 Conn. 822–23; "a review of the allegations of the plaintiffs' complaint, the evidence presented at trial, the transcripts of the trial, and a fair reading of the memorandum of decision and articulation in the light most favorable to sustaining the trial court's judgment demonstrate that the issue for the trial court to determine was whether the supervision was adequate, not merely whether the number of staff was sufficient"; id., 823 n.3; "[the] articulation makes clear that the supervisor to student ratio was not the *sole basis* of the trial court's conclusion that the defendants were negligent but that, regardless of the supervisor to student ratio, the defendants did not exercise proper control over the students"; (emphasis in original) id. n.4; "[t]he fact finder was not asked to determine solely the required ratio of children to staff members; instead, the question confronting the fact finder, based on the allegations in the complaint and the evidence presented at trial, was whether there was adequate supervision of the children involved in this particular incident"; id., 831; "adequacy is not based just on numbers, and nothing in the complaint limited the plaintiffs' claim to a mere numerical calculation between the number of students and the number of adults. This was an inadequate supervision case"; id., 832; and "the issue in the present case was

whether the supervision of the children was adequate when a large group of children was able to gather around the child, throwing stones at her, and with one student repeatedly punching the child in the face and pushing her into a wall." Id., 834.

Considering all of this language together as a whole, our Supreme Court determined that the trial court could have found the defendants negligent on the basis that there was an inadequate number of staff to students or on the basis that the act of supervision itself was inadequate—*or both*. It is not at all clear—in light of the convoluted trial record, including the trial court's ambiguous and internally inconsistent memorandum of decision and subsequent articulation, and the Supreme Court's reading of that record—whether the court found the defendants negligent solely on the basis of inadequacy in the act of supervision itself or on the basis of both grounds. Notwithstanding this caliginosity, however, we are still able to determine that the error was not harmless.

The trial court's memorandum of decision and its subsequent articulation repeatedly refer, both directly and indirectly, to the clearly erroneous fact that there were "perhaps as many as 400 students" on the playground, including references to the "number of students" and the "number of staff." Specifically, the only explicit finding of negligence in the trial court's memorandum of decision contained this clearly erroneous factual finding: "The court concludes that one (1) student intern and three (3)—or four (4)—staff members were not sufficient to exercise proper control over *perhaps as many as four hundred (400) students*." (Emphasis added.) Moreover, in its subsequent articulation, each of the court's three paragraphs which pertain to the court's finding of negligence contain some reference to or reliance upon this clearly erroneous factual finding: "[1] This [c]ourt found the injuries and/or losses were as a result of the [c]ity of Waterbury's failure to

exercise proper control over *the number of students* present. [2] The [c]ourt . . . found the [p]laintiffs' injuries were caused by insufficient staffing of personnel to exercise proper control over *the number of students* on the playground at the time (*perhaps as many as four hundred (400) students*) . . . . [3] The [c]ourt concluded the injuries to the [p]laintiffs were proximately caused by an *insufficient number of staff personnel . . . to monitor the actions of students* on the playground on the date of injury." (Emphasis added.)

Because the trial court's clearly erroneous finding that there were "perhaps as many as 400 students" on the playground was so inextricably intertwined with the court's conclusion that the defendants were negligent, we are constrained to conclude that the court's error was harmful.[4] Moreover, our careful review of the record has undermined our confidence in the court's fact-finding process to the point where there is no other adequate or just remedy but to order a new trial. See *73-75 Main Avenue, LLC v. PP Door Enterprise, Inc.*, supra, 120 Conn. App. 161.

The judgment is reversed and the case is remanded for a new trial.

In this opinion HARPER, J., concurred.

[4] We agree, of course, with the general proposition relied on by the dissent, that, as an intermediate appellate court, we are bound to follow the direction of our Supreme Court. But we differ with the dissent's conclusion as to how this general proposition applies in the present case.

Specifically, the dissent concludes that our Supreme Court reversed this court's determination that the plaintiffs' case failed as a matter of law without expert testimony on the number of teachers necessary to supervise adequately the children on two grounds, one of them being that "the plaintiffs' claim did not depend on a calculation of the ratio of the number of students to the teachers supervising them at the time the child was injured." It is on this basis that the dissent believes that the trial court's error was harmless. We, however, disagree with the dissent's characterization of our Supreme Court's decision. In our view, the Supreme Court did not state or suggest that the plaintiffs' claim did not depend *at all* on the numbers; instead it repeatedly used qualified language to state that the plaintiffs' claim was not based *solely* on the numbers. The logical conclusion to draw therefrom is that, although the plaintiffs' claim did not depend entirely on numbers, numbers were still integral to it. We, therefore, disagree with the dissent's conclusion that the trial court's error was harmless.

PRESCOTT, J., dissenting. I agree with the majority that the trial court's findings regarding the number of children on the playground at the time the minor plaintiff, Tatayana Osborn, was injured are clearly erroneous. I disagree, however, that this improper factual finding entitles the defendants, the city of Waterbury and the Waterbury Board of Education, to a new trial. Accordingly, I respectfully dissent.

I

The majority more than adequately sets forth the relevant facts and procedural history of this case, and I see no need to repeat them here. It is important to emphasize, however, that our Supreme Court, in a four to three decision, reversed our prior determination that the defendants were entitled to judgment because "the plaintiffs failed to present expert testimony as to the standard of care related to the number of supervisors needed on an elementary school playground to ensure the safety of the students during recess." *Osborn* v. *Waterbury*, 181 Conn. App. 239, 246, 185 A.3d 675 (2018), rev'd, 333 Conn. 816, 220 A.3d 1 (2019).

In reaching the conclusion that expert testimony on the number of teachers necessary to ensure the safety of the children on the playground was not required in this case, our Supreme Court provided two principal rationales. First, it concluded that expert testimony was not required because "a determination of adequate supervision of children is common knowledge, based on everyday life." *Osborn* v. *Waterbury*, 333 Conn. 816, 831, 220 A.3d 1 (2019). Thus, in the Supreme Court's view, the issue of whether the children were adequately supervised could be decided reliably by the fact finder without the assistance of expert testimony. Id.

Importantly, our Supreme Court offered a second and equally determinative rationale: "[W]e disagree with the Appellate Court that the plaintiffs' claim required the fact finder to determine the standard of care regarding

the number of supervisors needed to ensure the safety of elementary school students on a playground . . . . The fact finder was not asked to determine solely the required ratio of children to staff members; instead, the question confronting the fact finder, based on the allegations in the complaint and the evidence presented at trial, was whether there was adequate supervision of the children involved in this particular incident. Indeed, even if there had been expert testimony regarding the desired ratio of staff to children and the facts demonstrated that the school met that ratio, the fact finder still may have determined that the supervision was not adequate *because adequacy is not based just on numbers*, and nothing in the complaint limited the plaintiffs' claim to a mere numerical calculation between the number of students and the number of adults. This was an inadequate supervision case." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 831–32.

In sum, the Supreme Court reversed this court's determination that the plaintiffs' case failed as a matter of law without expert testimony on the number of teachers necessary to supervise adequately the children because (1) the question of adequate supervision was a matter of lay knowledge, and (2) the plaintiffs' claim did not depend on a calculation of the ratio of the number of students to the teachers supervising them at the time the child was injured. As to the second rationale, the Supreme Court determined, in essence, that the children could have been inadequately supervised even if enough teachers were present for the number of children on the playground at that time because, for example, the teachers present may not have been keeping a sufficient lookout and thus failed to exercise due care.

In my view, the Supreme Court's determination in this regard is the law of the case and is fully binding on us. Accordingly, even though I agree with the majority that the trial court's factual finding regarding the

ratio of teachers to students present on the playground is clearly erroneous, that error is not fatal to the plaintiff's case because, in our Supreme Court's view, the success of the case was not dependent on that finding.

Although the majority opinion acknowledges this aspect of the Supreme Court's decision, it nonetheless concludes that this error was harmful because it was "inextricably intertwined" with the court's ultimate conclusion that the defendants were negligent. I am inclined to agree with the majority that a reasonable reading of the trial court's short and opaque memorandum of decision, as well as its subsequent articulation, supports such a conclusion. As an intermediate appellate body, however, I am of the view that we are bound by the language in the Supreme Court's opinion that "the *fact finder still may have determined* that the supervision was not adequate because adequacy is not based just on numbers . . . ." (Emphasis added.) *Osborn* v. *Waterbury*, supra, 333 Conn. 832. In making this determination, our Supreme Court reviewed the trial court's memorandum of decision and subsequent articulation and concluded that the trial court's ultimate conclusion that the defendants were negligent was premised, at least in part, on a conclusion that the children on the playground were inadequately supervised regardless of the actual ratio of teachers to children. If our Supreme Court was of the view that the ratio of teachers to children was critical to the trial court's determination of negligence, then the Supreme Court would not have relied upon its second rationale as to why expert testimony was not required in the present case.

Moreover, the dissenting opinion of Justice Kahn, which was joined by two other justices, states that, "in the present case, the sole basis of the trial court's conclusion that the defendants' supervision of the children was negligent was the supervisor to student ratio . . . ." Id., 845. The Supreme Court's majority opinion

directly and explicitly rejects that view: "The dissent is premised on an interpretation of the trial court record with which we fundamentally disagree. The dissent repeatedly asserts that the sole basis of the trial court's conclusion that the defendants' supervision of the children was negligent was the supervisor to student ratio . . . . This conclusion ignores the articulation of the trial court that the injuries and/or losses were as a result of the [city's] failure to exercise proper control over the number of students present. This articulation makes clear that the supervisor to student ratio was not the sole basis of the trial court's conclusion that the defendants were negligent but that, regardless of the supervisor to student ratio, the defendants did not exercise proper control over the students." (Emphasis omitted; internal quotation marks omitted.) Id., 823 n.4.

It is immaterial whether I agree with the majority's characterization of the trial court's decision. I am bound by it, and therefore must conclude that the trial court's factually erroneous determination regarding the ratio of teachers to students is harmless error. Accordingly, I dissent from the majority's conclusion that the defendants are entitled to a new trial on that basis.

II

In light of my conclusion set forth in part I of this dissent, I am obligated to address the defendants' remaining claims on appeal to determine whether they are entitled to any relief on the basis of those claims. Those claims are whether the trial court improperly (1) rejected the defendants' special defense of governmental immunity for discretionary acts and (2) awarded damages for future medical expenses in the absence of any evidence that such expenses were reasonably likely to be incurred. I conclude that the defendants are not entitled to prevail on either of these claims.

A

The defendants claim that the trial court improperly rejected their claim that they were entitled to governmental immunity under the circumstances of this case. The record, however, is inadequate to review this claim and any further articulation by the trial court is not possible because Judge Sheedy, the trial judge in this matter, is fully retired from the bench.

The following procedural history is relevant to this claim. The remaining defendants in this case raised governmental immunity as a special defense. During their closing argument, they contended that the evidence submitted at trial entitled them to a judgment on that basis. The trial court's memorandum of decision is silent with respect to this special defense. Importantly, although the defendants sought articulation of the trial court's decision on other grounds, they did not ask the trial court to explain whether it had considered this defense, and, if it had done so, the factual basis for having rejected it.

"It is axiomatic that the appellant bears the burden of providing this court with a record adequate to review his claim of error. . . . Furthermore, a claim of error cannot be predicated on an assumption that the trial court acted erroneously. . . . Accordingly, our appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, 210 A.3d 620 (2019); see also *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991) ("[if] an appellant has failed to avail himself of the full panoply

of articulation and review procedures, and absent some indication to the contrary, we ordinarily read a record to support, rather than to contradict, a trial court's judgment").

In the present case, the defendants failed to avail themselves of the opportunity to seek articulation from the trial court on the issue of governmental immunity despite having filed a motion for articulation on other grounds. Thus, this case is unlike *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 397–98, in which we concluded that the appellant's failure to seek articulation was excused by the immediate retirement of the trial judge in that case following the issuance of his decision. In this case, the defendants enjoyed an opportunity to seek articulation but did not seek to remedy an obvious lacuna in the trial court's decision. Moreover, in light of Judge Sheedy's retirement from the bench, we are unable to exercise our authority, pursuant to Practice Book §§ 60-5 and 61-10, to order sua sponte articulation on this subject. Accordingly, I conclude that the defendants are not entitled to relief on this claim.

B

I turn next to the defendants' remaining claim on appeal. The defendants assert that the trial court improperly awarded the plaintiffs damages for future medical expenses in the absence of any evidence that such expenses were reasonably likely to be incurred. In my view, the factual premise of this claim is incorrect because I do not read the trial court's memorandum of decision as having awarded damages for future medical expenses. Moreover, to the extent that the trial court's decision is ambiguous in this regard, the defendants failed to seek articulation or clarification to resolve any ambiguity in the court's decision.

The following facts and procedural history are relevant to this claim. At trial, the plaintiffs offered, and the court admitted, evidence of the minor plaintiff's

medical expenses and her pain and suffering that she endured as a result of her injuries. The plaintiffs did not offer evidence of any future medical expenses that she was likely to incur.

The trial court, in its memorandum of decision, made the following findings regarding the minor plaintiff's injuries and resulting economic and noneconomic damages. "On the [day of the incident], [the minor plaintiff] found herself surrounded by a circle of students who physically assaulted her and pushed her into a stone wall, causing injuries to her nose and cheek with resulting facial scarring; she experienced post-traumatic headaches for a sustained period of time thereafter, but the most serious effect of this schoolyard assault was its lingering effect on [her] emerging personality and self-image. . . .

"At trial, it was clear the minor [p]laintiff was conscious of her facial scarring and that she considered that scarring to be her primary—perhaps 'only'—sequela of the incident. In point of fact, the scars have significantly diminished and she continues to present as a lovely appearing young woman. A review of the exhibits has persuaded the court the most serious of her injuries is the effect the incident has had on her behavioral presentation. Since the occurrence, the [minor] [p]laintiff has demonstrated unpleasant—even rude—behavior in the presence of family and other caregivers. She 'acts out' and the suggestion is strong that she presents at school as unfriendly—perhaps even hostile. It is this court's view the [minor] [p]laintiff would benefit from additional behavioral counseling and the substantial award here determined is intended to encourage continued therapy and occupational training.

"[The plaintiffs'] counsel did not provide the court a listing of the medical expenses incurred. The court has

carefully reviewed all exhibits and has concluded medical expenses were $7090.47. . . . No evidence was offered to support an ongoing need for continued therapy in any form though the award here determined will permit the same should the family determine future treatment is desirable. The court does not award specific damages for permanency in the absence of medical testimony supportive of the same.

"Judgment enters . . . in favor of the named [p]laintiffs as against the remaining [d]efendants in the total amount of sixty-seven thousand ninety dollars and forty-seven cents ($67,090.47)." (Footnote omitted.)

Although, as noted previously, the defendants moved for articulation on other grounds, they did not seek articulation on the award of damages, including whether the $60,000 portion of the judgment was awarded for pain and suffering or for future medical expenses. The trial court's subsequent articulation did not discuss the manner in which it calculated damages.

The following standard of review governs this claim. "The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Emphasis omitted; internal quotation marks omitted.) *Cimmino* v. *Marcoccia*, 332 Conn. 510, 522, 211 A.3d 1013 (2019). With respect to an ambiguous decision, and in the absence of a motion for articulation, we assume the trial court acted properly. See, e.g., *Caciopoli* v. *Howell*, 124 Conn. App. 273, 280, 5 A.3d 509 (2010).

With these principles in mind, and for the following reasons, I read the trial court's memorandum of decision as having awarded the plaintiffs $60,000 for noneconomic damages, and not as economic damages for future medical expenses. First, to construe the court's decision as having awarded the $60,000 for future medical expenses would mean it awarded the plaintiffs nothing for the minor plaintiff's pain and suffering despite her significant physical injuries. Such a ruling would be highly unusual, of dubious validity, and seems directly contradicted by the fact that the court mentions the minor plaintiff's headaches in the second paragraph of its decision. The court also makes clear in its decision that the minor plaintiff is suffering emotionally from the incident.

Second, the court arguably recognizes that there was an insufficient factual basis to award future economic damages (and damages for permanency) by stating in its memorandum of decision that "[n]o evidence was offered to support an ongoing need for continued therapy in any form though the award here will permit the same should the family determine future treatment is desirable." Construing the court's decision as a whole, it appears to me that the court's intent was to recognize that, although it did not have a basis to award economic damages for future medical costs, the family was free to use money awarded for pain and suffering, if necessary, to acquire mental health services to ameliorate the behaviors and symptoms the minor plaintiff had been exhibiting since the assault but that had been left untreated.

Third, the formal, amended judgment issued in conjunction with the trial court's memorandum of decision provides that the "plaintiff . . . sustained damages in the amount of $7090.47 in economic damages and $60,000 award in noneconomic damages." The record

supports the court's conclusion that the plaintiffs had incurred $7090.47 in prior medical expenses.

Future medical expenses simply do not fall in the category of noneconomic damages. "Economic damages are monies awarded as compensation for monetary losses and expenses which the plaintiff has incurred, or is reasonably likely to incur in the future, as a result of the defendant's negligence." Connecticut Civil Jury Instructions (2012) 3.4-1, available at http://jud.ct.gov/JI/Civil/Civil.pdf (last visited May 14, 2020); see also *Duncan* v. *Mill Management Co.*, 308 Conn. 1, 34, 60 A.3d 222 (2013).

At best, the court's decision on this question is ambiguous. The defendants did not seek articulation on this point, and Judge Sheedy, being fully retired, is unavailable to take additional steps to articulate. Accordingly, as I previously recognized with respect to the governmental immunity issue, we must presume that the court acted properly, and, therefore, the defendants cannot prevail on this claim.

For these reasons, I would affirm the judgment of the trial court and respectfully dissent from the decision of the majority to reverse the judgment and remand the case for a new trial.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 197

MEMORANDUM DECISIONS

LUIS WILLIAMS *v.* COMMISSIONER
OF CORRECTION
(AC 42440)

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

Argued May 11—officially released May 26, 2020

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

Per Curiam. The judgment is affirmed.

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Assault in first degree; claim that trial court violated defendant's constitutional right to be present at all critical stages of prosecution when it sentenced him in abstentia; whether defendant waived his constitutional right to be present at sentencing by deliberately absenting himself from sentencing proceedings; whether trial court improperly failed to make express finding that defendant waived his right to be present at sentencing; claim that trial court was constitutionally required to advise defendant, prior to sentencing, that sentencing would proceed in his absence if he did not appear.

State *v.* Holley 161

Motion to correct illegal sentence; criminal possession of firearm; statutory interpretation; rule of lenity; claim that trial court improperly denied motion to correct illegal sentence; whether trial court properly concluded that defendant's consecutive sentences did not violate constitutional prohibition against double jeopardy; whether trial court properly construed relevant statute ((Rev. to 2013) § 53a-217 (a) (1)) as criminalizing possession of single firearm; whether statute was ambiguous; claim that trial court improperly failed to apply rule of lenity.

State *v.* Holmgren 203

Home invasion; burglary in first degree; sexual assault in third degree; claim that there was insufficient evidence to sustain defendant's conviction of home invasion and burglary in first degree; whether state failed to prove that defendant entered dwelling while victim was present in that dwelling as required by home invasion statute (§ 53a-100aa (a) (1)); whether state failed to prove beyond reasonable doubt that defendant entered victim's apartment with intent to commit crime; whether jury reasonably could have inferred from certain evidence defendant's intent to sexually assault victim; claim that trial court improperly allowed state to introduce testimony of police detective regarding statements made by

defendant; whether probative value of evidence of bag in defendant's possession outweighed any prejudice caused to defendant by its admission.

State *v.* Nusser 76

Larceny in first degree; burglary in third degree; criminal violation of restraining order; subject matter jurisdiction; motion for presentence confinement credit; claim that trial court abused its discretion in denying defendant's motion for presentence confinement credit; claim that defendant's sentence was illegal because it breached plea agreement with state; claim that failure of Department of Correction to implement trial court's revised mittimus resulted in structural error and fundamental unfairness in sentencing process; whether trial court lacked subject matter jurisdiction to hear defendant's motion for presentence confinement credit.

State *v.* Tinsley 302

Manslaughter in first degree; risk of injury to child; motion to correct illegal sentence; claim that trial court improperly concluded that defendant's conviction for manslaughter in first degree and risk of injury to child did not violate prohibition against double jeopardy; whether legislature authorized multiple punishments under statutes in question.

State *v.* Vivo 363

Murder; assault in first degree; sentence enhancement pursuant to statute (§ 53-202k); whether trial court properly dismissed motion to correct illegal sentence; claim that trial court improperly concluded that it lacked subject matter jurisdiction to consider motion to correct; whether defendant's claim that state presented insufficient evidence to prove applicability of § 53-202k challenged underlying conviction rather than legality of sentence or sentence proceeding.

Stephenson *v.* Commissioner of Correction 172

Habeas corpus; larceny in fifth degree; larceny in sixth degree; ineffective assistance of trial counsel; whether habeas court properly dismissed petitioner's amended habeas petition as moot; whether prejudicial collateral consequences exist; whether petitioner's claim that his right to effective assistance of counsel was violated was reviewable.

U.S. Bank, National Assn. *v.* Mamudi 31

Foreclosure; claim that law days were automatically vacated as result of petition for bankruptcy; claim that foreclosure defendants were deprived of right to appeal concerning law days; whether trial court should have rendered judgment dismissing rather than denying motion to reargue.

Williams *v.* Commissioner of Correction (Memorandum Decision) 901

World Business Lenders, LLC *v.* 526-528 North Main Street, LLC 269

Foreclosure; whether guarantor of note was party to foreclosure action; whether guarantor had standing to bring appeal challenging foreclosure judgment; whether final judgment had been rendered by trial court with respect to all counts of complaint.

Practice Book Revisions
Being Considered by the
Rules Committee of the Superior Court

Rules of Professional Conduct
Superior Court Rules

Including Amendment Notes and
Commentaries to Proposals
May 26, 2020

NOTICE

Public Hearing on Practice Book Revisions Being Considered by the Rules Committee of the Superior Court

On June 5, 2020, at 2:00 p.m., the Rules Committee of the Superior Court will conduct a public hearing for the purpose of receiving comments concerning Practice Book revisions that are being considered by the Committee. The revisions proposed by the Rules Committee follow this notice and are published on the Judicial Branch website at www.jud.ct.gov/pb.htm. The public hearing will be followed by a Rules Committee meeting.

Pursuant to subsection (c) of section 51-14 of the Connecticut General Statutes, the Supreme Court has designated the Rules Committee to conduct this public hearing also for the purpose of receiving comments on any proposed new rule or any change in an existing rule that any member of the public deems desirable.

Because of the public health emergency and civil preparedness emergency declared by Governor Lamont on March 10, 2020, the Rules Committee public hearing will be conducted electronically using *Microsoft Teams* communication and collaboration platform. Individuals who would like to access the public hearing and/or meeting may do so by clicking here.

For every individual who wishes to access the public hearing and/or meeting, and for those who wish to speak at the public hearing, it is important that certain procedures are followed. All individuals who access the public hearing and meeting must at all times act in a professional and respectful manner. Any individual whose conduct is

deemed by the Rules Committee to be disruptive or inappropriate, will be removed from the public hearing or meeting.

Individuals who would like to speak at the public hearing should access the hearing one-half hour before the hearing begins in order to be recognized and queued to speak. Each such speaker will be allowed five minutes to offer their remarks. Anyone who believes that they cannot cover their remarks within the five-minute time period allowed during the public hearing, and anyone who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions, may submit their written comments to the Rules Committee by email at Joseph.DelCiampo@jud.ct.gov.

Any written comments should be received before May 29, 2020.

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

INTRODUCTION

The following are amendments that are being considered to the Practice Book. These amendments are indicated by brackets for deletions and underlines for added language.

Rules Committee of the
Superior Court

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

Rule 7.1. Communications concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENTARY: This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful. Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that leads a reasonable person to believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented without a disclaimer indicating that the communicated result is based upon the particular facts of that case so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to

the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's services or fees with those of other lawyers or law firms may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4 (3).**]** In addition to the provisions of this Rule, see Rule 8.4 (3) defining professional misconduct to include conduct involving dishonesty, fraud, deceit, or misrepresentation. See also Rule 8.4 (5) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not

associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as ``Springfield Legal Clinic,'' an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Letterhead identification of the lawyers in the office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0 (d), because to do so would be false and misleading.

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

AMENDMENT NOTE: The revision to this rule was made for clarity.

Rule 7.3. Solicitation of Clients

(a) ``Solicitation'' or ``solicit'' denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain unless the contact is:

(1) With a lawyer or a person who has a family, close personal or prior business or professional relationship with the lawyer;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization;

(4) With a person who routinely uses for business purposes the type of legal services offered by the lawyer or with a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by subsection (b) if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer;

(2) The target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;

(3) The solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or

(4) The solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the mailing of the solicitation, or the recipient is a person or entity within the scope of subsection (b) of this Rule.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Every written solicitation, as well as any solicitation by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from anyone known to be in need of legal services in a particular matter, must be clearly and prominently labeled ``Advertising Material'' in red ink on the first page of any written solicitation and the lower left corner of the outside envelope or container, if any, and at the beginning and ending of any solicitation by audio or video recording or other electronic means. If the written solicitation is in the form of a self-mailing brochure or pamphlet, the label ``Advertising Material'' in red ink shall appear on the address panel of the brochure or pamphlet. Communications solicited by clients or any other person, or if the recipient is a person or entity within the scope of subsection (b) of this Rule, need not contain such marks. No reference shall be made in the solicitation to the solicitation having any kind of approval from the Connecticut bar. Such written solicitations shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

(f) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENTARY: Subsection (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

``Liveperson-to-person contact'' means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can

be mailed or transmitted by e-mail or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

The contents of live person-to-person contact can be disputed and may not be subject to a third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Subsection (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee

or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c) (3), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 (c) (2) is prohibited. Live person-to-person **[**contact**]** solicitation of individuals who may be especially vulnerable to coercion or duress **[**is ordinarily not appropriate**]**, for example, the elderly, those whose first language is not English, or **[**the disabled**]** persons with a disability, is ordinarily not appropriate when a significant motive for the solicitation is pecuniary gain.

This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted

to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Subsection (f) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, subsection (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

AMENDMENT NOTE: The revisions to the Commentary to this rule are made to clarify that live, person-to-person solicitation of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate when a significant motive for the solicitation is pecuniary gain.

PROPOSED AMENDMENTS TO THE GENERAL PROVISIONS

Sec. 1-10B. Media Coverage of Court Proceedings; In General

(a) The broadcasting, televising, recording or photographing by the media of court proceedings and trials in the Superior Court should be allowed subject to the limitations set out in this section and in Sections 1-11A through 1-11C, inclusive.

(b) No broadcasting, televising, recording or photographing of any of the following proceedings shall be permitted:

(1) Family relations matters as defined in General Statutes § 46b-1;

(2) Juvenile matters as defined in General Statutes § 46b-121;

(3) Except as provided in subsection (q) of Section 1-11C. [P]proceedings involving sexual assault;

(4) Proceedings involving trade secrets;

(5) In jury trials, all proceedings held in the absence of the jury unless the trial court determines that such coverage does not create a risk to any party's rights or other fair trial risks under the circumstances;

(6) Proceedings which must be closed to the public to comply with the provisions of state law;

(7) Any proceeding that is not held in open court on the record.

(c) No broadcasting, televising, recording or photographic equipment permitted under these rules shall be operated during a recess in the trial.

(d) No broadcasting, televising, recording or photographing of conferences involving counsel and the trial judge at the bench or involving counsel and their clients shall be permitted.

(e) There shall be no broadcasting, televising, recording or photographing of the process of jury selection nor of any juror.

COMMENTARYÐ2014: The Judicial Branch may provide, at its discretion, within a court facility, a contemporaneous closed-circuit video transmission of any court proceeding for the benefit of media or other spectators, and such a transmission shall not be considered broadcasting or televising by the media under this rule.

COMMENTARYÐ2020: The changes to this section and to Section 1-11C permit the judicial authority to allow media coverage of a homicide case involving sexual assault provided the victim's family affirmatively consents to such coverage. If any member of the victim's family objects to such coverage or if the victim's family cannot be identified or located, the judicial authority should not allow such coverage.

Sec. 1-11C. Media Coverage of Criminal Proceedings

(a) Except as authorized by Section 1-11A regarding media coverage of arraignments, the broadcasting, televising, recording or photographing by media of criminal proceedings and trials in the Superior Court shall be allowed except as hereinafter precluded or limited and subject to the limitations set forth in Section 1-10B.

(b) Except as provided in subsection (q) of this section, **[**N**]**no broadcasting, televising, recording or photographing of trials or proceedings involving sexual offense charges shall be permitted.

(c) As used in this rule, the word ``trial'' in jury cases shall mean proceedings taking place after the jury has been sworn and in nonjury proceedings commencing with the swearing in of the first witness. ``Criminal proceeding'' shall mean any hearing or testimony, or any

portion thereof, in open court and on the record except an arraignment subject to Section 1-11A.

(d) Unless good cause is shown, any media or pool representative seeking to broadcast, televise, record or photograph a criminal proceeding or trial shall, at least three days prior to the commencement of the proceeding or trial, submit a written notice of media coverage to the administrative judge of the judicial district where the proceeding is to be heard or the case is to be tried. A notice of media coverage submitted on behalf of a pool shall contain the name of each news organization seeking to participate in that pool. The administrative judge shall inform the judicial authority who will hear the proceeding or who will preside over the trial of the notice, and the judicial authority shall allow such coverage except as otherwise provided.

(e) Any party, attorney, witness or other interested person may object in advance of electronic coverage of a criminal proceeding or trial if there exists a substantial reason to believe that such coverage will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns. In the event that the media request camera coverage and, to the extent practicable, notice that an objection to the electronic coverage has been filed, the date, time and location of the hearing on such objection shall be posted on the Judicial Branch website. Any person, including the media, whose rights are at issue in considering whether to allow electronic coverage of the proceeding or trial, may participate in the hearing to determine whether to limit or preclude such coverage. When such objection is filed by any party, attorney,

witness or other interested person, the burden of proving that electronic coverage of the criminal proceeding or trial should be limited or precluded shall be on the person who filed the objection.

(f) The judicial authority, in deciding whether to limit or preclude electronic coverage of a criminal proceeding or trial, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue.

(g) If the judicial authority has a substantial reason to believe that the electronic coverage of a criminal proceeding or trial will undermine the legal rights of a party or will significantly compromise the safety or privacy concerns of a party, witness or other interested person, and no party, attorney, witness or other interested person has objected to such coverage, the judicial authority shall schedule a hearing to consider limiting or precluding such coverage. To the extent practicable, notice that the judicial authority is considering limiting or precluding electronic coverage of a criminal proceeding or trial, and the date, time and location of the hearing thereon shall be given to the parties and others whose interests may be directly affected by a decision so that they may participate in the hearing and shall be posted on the Judicial Branch website.

(h) Objection raised during the course of a criminal proceeding or trial to the photographing, videotaping or audio recording of specific aspects of the proceeding or trial, or specific individuals or exhibits will be heard and decided by the judicial authority, based on the same

standards as set out in subsection (f) of this section used to determine whether to limit or preclude coverage based on objections raised before the start of a criminal proceeding or trial.

(i) The judge presiding over the proceeding or trial in his or her discretion, upon the judge's own motion or at the request of a participant, may prohibit the broadcasting, televising, recording or photographing of any participant at the trial. The judge shall give great weight to requests where the protection of the identity of a person is desirable in the interests of justice, such as for the victims of crime, police informants, undercover agents, relocated witnesses, juveniles and individuals in comparable situations. ``Participant''for the purpose of this section shall mean any party, lawyer or witness.

(j) The judicial authority shall articulate the reasons for its decision on whether or not to limit or preclude electronic coverage of a criminal proceeding or trial, and such decision shall be final.

(k) (1) Only one television camera operator, utilizing one portable mounted television camera, shall be permitted in the courtroom. The television camera and operator shall be positioned in such location in the courtroom as shall be designated by the trial judge. Microphones, related wiring and equipment essential for the broadcasting, televising or recording shall be unobtrusive and shall be located in places designated in advance by the trial judge. While the trial is in progress, the television camera operator shall operate the television camera in this designated location only.

(2) Only one still camera photographer shall be permitted in the courtroom. The still camera photographer shall be positioned in such

location in the courtroom as shall be designated by the trial judge. While the trial is in progress, the still camera photographer shall photograph court proceedings from this designated location only.

(3) Only one audio recorder shall be permitted in the courtroom for purposes of recording the proceeding or trial. Microphones, related wiring and equipment essential for the recording shall be unobtrusive and shall be located in places designated in advance by the trial judge.

(*l*) Only still camera, television and audio equipment which does not produce distracting sound or light shall be employed to cover the proceeding or trial. The operator of such equipment shall not employ any artificial lighting device to supplement the existing light in the courtroom without the approval of the judge presiding over the proceeding or trial and other appropriate authority.

(m) Except as provided by these rules, broadcasting, televising, recording and photographing in areas immediately adjacent to the courtroom during sessions of court or recesses between sessions shall be prohibited.

(n) The conduct of all attorneys with respect to trial publicity shall be governed by Rule 3.6 of the Rules of Professional Conduct.

(o) The judicial authority in its discretion may require pooling arrangements by the media. Pool representatives should ordinarily be used for video, still cameras and radio, with each pool representative to be decided by the relevant media group. Participating members of the broadcasting, televising, recording and photographic media shall make their respective pooling arrangements, including the establishment of necessary procedures and selection of pool representatives, without

calling upon the judicial authority to mediate any dispute as to the appropriate media representative or equipment for a particular trial. If any such medium shall not agree on equipment, procedures and personnel, the judicial authority shall not permit that medium to have coverage at the proceeding or trial.

(p) To evaluate and resolve prospective problems where broadcasting, televising, recording or photographing by media of a criminal proceeding or trial will take place, and to ensure compliance with these rules during the proceeding or trial, the judicial authority who will hear the proceeding or preside over the trial may require the attendance of attorneys and media personnel at a pretrial conference.

(q) In a homicide case involving sexual assault, the broadcasting, televising, recording or photographing by the media of the trial may be permitted by the judicial authority provided the victim's family affirmatively consents to such coverage, that no member of the victim's family objects to such coverage, and that the victim's family have been notified. As used in this section, ``victim'sfamily'' shall mean a person's spouse, parent, grandparent, stepparent, aunt, uncle, niece, nephew, child, including a natural born child, stepchild and adopted child, grandchild, brother, sister, half brother or half sister or parent of a person's spouse.

COMMENTARY: The changes to this section and to Section 1-10B permit the judicial authority to allow media coverage of a homicide case involving sexual assault provided the victim's family affirmatively consents to such coverage, that no member of the victim's family objects to such coverage, and that the victim's family has been notified.

If any member of the victim's family objects to such coverage or if the victim's family cannot be identified or located, the judicial authority should not allow such coverage. As used in this section, ``victim's family'' has the same meaning as ``relative''in General Statutes Section 54-201 (4).

Sec. 2-3. Bar Examining Committee

There shall be a**[**n**]** bar examining committee appointed by the judges of the Superior Court consisting of twenty-four members, of whom at least one shall be a judge of said court, and the rest attorneys residing in this state. The term of office of each member shall be three years from the first day of September succeeding appointment, and the terms shall continue to be arranged so that those of eight members shall expire annually. The appointment of any member may be revoked or suspended by the judges or by the executive committee of the Superior Court. In connection with such revocation or suspension, the judges or the executive committee shall appoint a qualified individual to fill the vacancy for the balance of the term or for any other appropriate period. All other vacancies shall be filled by the judges for unexpired terms only, provided that the chief justice may fill such vacancies until the next annual meeting of the judges, and in the event of the foreseen absence or the illness or the disqualification of a member of the committee the chief justice may make a pro tempore appointment to the committee to serve during such absence, illness or disqualification. At any meeting of the committee the members present shall constitute a quorum.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-4. —Regulations by Bar Examining Committee

The bar examining committee shall have the power and authority to implement these rules by regulations relevant thereto and not inconsistent therewith. Such regulations may be adopted at any regular meeting of the committee or at any special meeting called for that purpose. They shall be effective ninety days after publication in one issue of the Connecticut Law Journal and shall at all times be subject to amendment or revision by the committee or by the judges of the Superior Court. A copy shall be provided to the chief justice.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-4A. —Records of Bar Examining Committee

(a) All [The] records of the bar examining committee, including [and] transcripts, if any, of hearings conducted by the [state] bar examining committee or the several standing committees on recommendations for admission to the bar shall not be public [be available only to such committee, to a judge of the Superior Court, to the Statewide Grievance Committee, to disciplinary counsel or, with the consent of the applicant, to any other person, unless otherwise ordered by the court].

(b) Unless otherwise ordered by the court, all records that are not public shall be available only to the bar examining committee and its counsel, disciplinary counsel, the client security fund committee and its counsel, a judge of the Superior Court or, with the consent of the applicant, to any other person.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee and for clarity.

Sec. 2-5. —Examination of Candidates for Admission

The bar examining committee shall further have the duty, power and authority to provide for the examination of candidates for admission to the bar; to determine whether such candidates are qualified as to prelaw education, legal education, good moral character and fitness to practice law; and to recommend to the court for admission to the bar qualified candidates.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-6. —Personnel of Bar Examining Committee

Such personnel within the legal services division of the Office of the Chief Court Administrator as may be assigned from time to time by the chief court administrator shall assist the bar examining committee in carrying out its duties.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-8. Qualifications for Admission

To entitle an applicant to admission to the bar, except under Section**[**s**]** 2-13 **[**through 2-15**]** of these rules, the applicant must satisfy the bar examining committee that:

(1) The applicant is a citizen of the United States or an alien lawfully residing in the United States, which shall include an individual authorized to work lawfully in the United States.

(2) The applicant is not less than eighteen years of age.

(3) The applicant is a person of good moral character, is fit to practice law, and has either passed an examination in professional responsibility **[**administered under the auspices of the bar examining committee**]** which has been approved or required by the committee or has completed a course in professional responsibility in accordance with the regulations of the **[**bar examining**]** committee. Any inquiries or procedures used by the bar examining committee that relate to physical or mental disability must be narrowly tailored and necessary to a determination of the applicant's current fitness to practice law, in accordance with the Americans with Disabilities Act and amendment twenty-one of the Connecticut constitution, and conducted in a manner consistent with privacy rights afforded under the federal and state constitutions or other applicable law.

(4) The applicant has met the educational requirements as may be set, from time to time, by the bar examining committee.

(5) The applicant has filed with the administrative director of the bar examining committee an application to take the examination and for admission to the bar, all in accordance with these rules and the regulations of the committee, and has paid such application fee as the committee shall from time to time determine.

(6) The applicant has passed an examination in law in accordance with the regulations of the bar examining committee.

(7) The applicant has complied with all of the pertinent rules and regulations of the bar examining committee.

(8) As an alternative to satisfying the bar examining committee that the applicant has met the committee's educational requirements, the applicant who meets all the remaining requirements of this section may, upon payment of such investigation fee as the committee shall from time to time determine, substitute proof satisfactory to the committee that: (A) the applicant has been admitted to practice before the highest court of original jurisdiction in one or more states, the District of Columbia or the Commonwealth of Puerto Rico or in one or more district courts of the United States for ten or more years and at the time of filing the application is a member in good standing of such a bar; (B) the applicant has actually practiced law in such a jurisdiction for not less than five years during the seven year period immediately preceding the filing date of the application; and (C) the applicant intends, upon a continuing basis, actively to practice law in Connecticut and to devote the major portion of the applicant's working time to the practice of law in Connecticut.

COMMENTARY: Reference to Practice Book Sections 2-14 and 2-15 has been removed as these sections have been repealed. The change in subdivision (3) clarifies that while there is an ethics requirement for bar admission, the Bar Examining Committee does not administer the Multistate Professional Responsibility Examination (MPRE). The remaining changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-9. Certification of Applicants Recommended for Admission; Conditions of Admission

(a) The bar examining committee shall certify to the clerk of the Superior Court for the Judicial District where the applicant has his or

her correspondence address **[**county in which the applicant seeks admission and to the clerk of the Superior Court in New Haven**]** the name of any such applicant recommended by it for admission to the bar and shall notify the applicant of its decision.

(b) The bar examining committee may, in light of the **[**physical or mental disability of a candidate**]** health diagnosis, treatment, or drug or alcohol dependence of an applicant that has caused conduct or behavior that would otherwise have rendered the **[**candidate**]** applicant currently unfit to practice law, determine that it will only recommend an applicant for admission to the bar conditional upon the applicant's compliance with conditions prescribed by the committee relevant to the **[**disability and the**]** health diagnosis, treatment, or drug or alcohol dependence or fitness of the applicant. Such determination shall be made after a hearing on the record is conducted by the committee or a panel thereof consisting of at least three members appointed by the chair, unless such hearing is waived by the applicant. Such conditions shall be tailored to detect recurrence of the conduct or behavior which could render an applicant unfit to practice law or pose a risk to clients or the public and to encourage continued treatment, abstinence, or other support. The conditional admission period shall not exceed five years, unless the conditionally admitted attorney fails to comply with the conditions of admission, and the **[**bar examining**]** committee or the court determines, in accordance with the procedures set forth in Section 2-11, that a further period of conditional admission is necessary. The committee shall notify the applicant by mail of its decision and that the applicant must sign an agreement with the **[**bar examining**]**

committee under oath affirming acceptance of such conditions and that the applicant will comply with them. Upon receipt of this agreement from the applicant, duly executed, the committee shall recommend the applicant for admission to the bar as provided herein. The committee shall forward a copy of the agreement to the statewide bar counsel, who shall be considered a party for purposes of defending an appeal under Section 2-11A.

COMMENTARY: The changes to this section replace language referencing the disability of an applicant with language that is more neutral and inclusive, for consistency when referring to the Bar Examining Committee, and to conform the section to current practice.

Sec. 2-10. Admission by Superior Court

(a) Each applicant who shall be recommended for admission to the bar shall present himself or herself to the Superior Court, or to either the Supreme Court or the Appellate Court sitting as the Superior Court, at such place and at such time as shall be prescribed by the bar examining committee, or shall be prescribed by the Supreme Court or the Appellate Court, and such court may then, upon motion, admit such person as an attorney. The administrative director shall give notice to each clerk of the names of the newly admitted attorneys. At the time such applicant is admitted as an attorney the applicant shall be sworn as a Commissioner of the Superior Court.

(b) The administrative judge of said judicial district or a designee or the chief justice of the Supreme Court or a designee or the chief judge of the Appellate Court or a designee may deliver an address to

the applicants so admitted respecting their duties and responsibilities as attorneys.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-11. Monitoring Compliance with Conditions of Admission; Removal or Modification of Conditions

(a) If an applicant is admitted to the bar after signing an agreement with the bar examining committee under oath affirming acceptance of the conditions prescribed by the committee pursuant to Section 2-9 (b) and that he or she will comply with them, the statewide bar counsel shall monitor the attorney's compliance with those conditions pursuant to regulations adopted by the Statewide Grievance Committee governing such monitoring. The attorney so admitted or the statewide bar counsel may make application to the **[**bar examining**]** committee to remove or modify the conditions previously agreed to by such attorney as circumstances warrant. The **[**bar examining**]** committee, or a panel thereof consisting of at least three members appointed by its chair, shall conduct a hearing on the application, which shall be on the record, and shall also receive and consider a report from the statewide bar counsel on the matter. Such hearing may be waived by the applicant and the statewide bar counsel. If, upon such application, the **[**bar examining**]** committee modifies such conditions, the attorney shall sign an agreement with the bar examining committee under oath affirming acceptance of the modified conditions and that he or she will comply with them, and the statewide bar counsel shall monitor the attorney's compliance with them. The statewide bar counsel shall be considered

a party for purposes of defending an appeal under Section 2-11A. All information relating to conditional admission of an applicant or attorney shall remain confidential unless otherwise ordered by the court except that a copy of the signed agreement and information related to compliance with the conditions may be made available upon request to disciplinary counsel or, with the consent of the applicant or attorney, to any other agency or person.

(b) Upon the failure of the attorney to comply with the conditions of admission or the monitoring requirements adopted by the Statewide Grievance Committee, the statewide bar counsel shall apply to the court in the judicial district of Hartford for an appropriate order. The court, after hearing upon such application, may take such action as it deems appropriate. Thereafter, upon application of the attorney or of the statewide bar counsel and upon good cause shown, the court may set aside or modify the order rendered pursuant hereto.

COMMENTARY: The change to this section allows Disciplinary Counsel to have access to the fact that a person has been conditionally admitted in order to properly perform his or her duties. Such access is especially relevant when the attorney remains bound by the conditions, and will alert disciplinary counsel that inactive status may be appropriate if the attorney has ongoing disciplinary matters. Information on compliance from the Statewide Bar Counsel is likewise necessary so that Disciplinary Counsel can determine whether the issue that gave rise to the conditions may be having an impact on the attorney's performance.

Additionally, the attorney should be able to consent to the disclosure of the fact that he or she have been conditionally admitted, and has complied with the conditions. This is typically necessary when the person is applying for admission in another jurisdiction and wants the Bar Examining Committee and/or the Statewide Bar Counsel to disclose information relative to the conditional admission to the other jurisdiction. Absent this change, the attorney would need to obtain a court order authorizing the disclosure. That may result in unnecessary delay of the attorney's admission in the other jurisdiction.

The remaining changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

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

(a) A decision by the bar examining committee prescribing conditions for admission to the bar under Section 2-9 (b) or on an application to remove or modify conditions of admission under Section 2-11 (a) may be appealed to the Superior Court by the bar applicant or attorney who is the subject of the decision. Within thirty days from the issuance of the decision of the **[**bar examining**]** committee, the appellant shall: (1) file the appeal with the clerk of the Superior Court for the judicial district of Hartford and (2) mail a copy of the appeal by certified mail, return receipt requested or with electronic delivery confirmation, to the Office of the Statewide Bar Counsel and to the Office of the Director of the Bar Examining Committee as agent for the **[**bar examining**]** committee. The statewide bar counsel shall be considered a party for purposes of defending an appeal under this section.

(b) The filing of an appeal shall not, of itself, stay enforcement of the bar examining committee's decision. An application for a stay may be made to the **[**bar examining**]** committee, to the court or to both. Filing of an application with the **[**bar examining**]** committee shall not preclude action by the court. A stay, if granted, shall be on appropriate terms.

(c) Within thirty days after the service of the appeal, or within such further time as may be allowed by the court, the director of the bar examining committee shall transmit to the reviewing court a certified copy of the entire record of the proceeding appealed from, which shall include a transcript of any testimony heard by the **[**bar examining**]** committee and the decision of the **[**bar examining**]** committee. By stipulation of all parties to such appeal proceedings, the record may be shortened. The court may require or permit subsequent corrections or additions to the record.

(d) The appellant shall file a brief within thirty days after the filing of the record by the bar examining committee. The appellee shall file its brief within thirty days of the filing of the appellant's brief. Unless permission is given by the court for good cause shown, briefs shall not exceed thirty-five pages.

(e) The appeal shall be conducted by the court without a jury and shall be confined to the record. If alleged irregularities in procedure before the bar examining committee are not shown in the record, proof limited thereto may be taken in the court. The court, upon request, shall hear oral argument.

(f) Upon appeal, the court shall not substitute its judgment for that of the bar examining committee as to the weight of the evidence on questions of fact. The court shall affirm the decision of the committee unless the court finds that substantial rights of the appellant have been prejudiced because the committee's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions, rules of practice or statutory provisions; (2) in excess of the authority of the committee; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, rescind the action of the **[**bar examining**]** committee or take such other action as may be necessary. For purposes of further appeal, the action taken by the Superior Court hereunder is a final judgment.

(g) In all appeals taken under this section, costs may be taxed in favor of the statewide bar counsel in the same manner, and to the same extent, that costs are allowed in judgments rendered by the Superior Court. No costs shall be taxed against the bar examining committee, except that the court may, in its discretion, award to the appellant reasonable fees and expenses if the court determines that the action of the **[**bar examining**]** committee was undertaken without any substantial justification. ``Reasonablefees and expenses'' means any expenses not in excess of $7500 which the court finds were reasonably incurred in opposing the committee's action, including court

costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and such other expenses as were reasonably incurred.

(h) All information relating to the conditional admission of an applicant or attorney who is subject to the decision, including information submitted in connection with the appeal under this section, shall be confidential unless otherwise ordered by the court except that information submitted in connection with an appeal and the court's decision on the appeal may be made available upon request to disciplinary counsel or, with the consent of the applicant or attorney who is subject to the decision, to any other person.

COMMENTARY: Inclusion of ``applicantor'' in subsection (h) recognizes that an appeal under this section can be filed by an applicant (not yet admitted) or an attorney (the applicant after being admitted). The remaining changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-12. County Committees on Recommendations for Admission

[(a)**]** There shall be in each county a standing committee on recommendations for admission, consisting of not less than three nor more than seven members of the bar of that county, who shall be appointed by the judges of the Superior Court to hold office for three years from the date of their appointment and until their successors are appointed. The appointment of any member may be revoked or suspended by the judges or by the executive committee of the Superior Court. In connection with such revocation or suspension, the judges or the

executive committee shall appoint a qualified individual to fill the vacancy for the balance of the term or for any other appropriate period. Appointments to fill vacancies which have arisen by reasons other than revocation or suspension may be made by the chief justice until the next annual meeting of the judges of the Superior Court, and, in the event of the foreseen absence or the illness or the disqualification of a member of the committee, the chief justice may make a pro tempore appointment to the committee to serve during such absence, illness or disqualification.

[(b) Any application for admission to the bar may be referred to the committee for the county through which the applicant seeks admission, which shall investigate the applicant's moral character and fitness to practice law and report to the bar of the county whether the applicant has complied with the rules relating to admission to the bar, is a person of good moral character, is fit to practice law and should be admitted.**]**

COMMENTARY: The deletion of subsection (b) of this section conforms the rule to current practice.

Sec. 2-13. Attorneys of Other Jurisdictions; Qualifications and Requirements for Admission

(a) Any member of the bar of another state or territory of the United States or the District of Columbia, who, after satisfying the **[**state**]** bar examining committee that his or her educational qualifications are such as would entitle him or her to take the examination in Connecticut, and that (i) at least one jurisdiction in which he or she is a member of the bar is reciprocal to Connecticut in that it would admit a member of the bar of Connecticut to its bar without examination under provisions

similar to those set out in this section or (ii) he or she is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school and admitted in a reciprocal or nonreciprocal jurisdiction, shall satisfy the **[**state bar examining**]** committee that he or she:

(1) is of good moral character, is fit to practice law, and has either passed an examination in professional responsibility **[**administered under the auspices of the bar examining committee**]** or has completed a course in professional responsibility in accordance with the regulations of the **[**bar examining**]** committee;

(2) has been duly licensed to practice law before the highest court of a reciprocal state or territory of the United States or in the District of Columbia if reciprocal to Connecticut, or that he or she is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school and admitted in a reciprocal or nonreciprocal jurisdiction and (A) has lawfully engaged in the practice of law as the applicant's principal means of livelihood for at least five of the ten years immediately preceding the date of the application and is in good standing, or (B) if the applicant has taken the bar examinations of Connecticut and failed to pass them, the applicant has lawfully engaged in the practice of law as his or her principal means of livelihood for at least five of the ten years immediately preceding the date of the application and is in good standing, provided that such five years of practice shall have occurred subsequent to the applicant's last failed Connecticut examination;

(3) is a citizen of the United States or an alien lawfully residing in the United States, which shall include an individual authorized to work lawfully in the United States**[**; and

(4) intends, upon a continuing basis, to practice law actively in Connecticut**]**, may be admitted by the court as an attorney without examination upon written application and the payment of such fee as the **[**examining**]** committee shall from time to time determine, upon compliance with the following requirements. Such application, duly verified, shall be filed with the administrative director of the **[**bar examining**]** committee and shall set forth the applicant's qualifications as hereinbefore provided. **[**There shall be filed with such application the following affidavits:**]** The following affidavits shall be filed by the person completing the affidavit:

(A) affidavits from two attorneys who personally know the applicant certifying to his or her good moral character and fitness to practice law and supporting, to the satisfaction of the **[**state bar examining**]** committee, his or her practice of law as defined under subdivision (2) of this subsection;

(B) affidavits from two members of the bar of Connecticut of at least five years' standing, certifying that the applicant is of good moral character and is fit to practice law; and

(C) an affidavit from the applicant, certifying whether such applicant has a grievance pending against him or her, has ever been reprimanded, suspended, placed on inactive status, disbarred, or has ever resigned from the practice of law, and, if so, setting forth the circumstances concerning such action. Such an affidavit is not required if it

has been furnished as part of the application form prescribed by the **[**state bar examining**]** committee.

(b) For the purpose of this rule, the ``practice of law'' shall include the following activities, if performed after the date of the applicant's admission to the jurisdiction in which the activities were performed, or if performed in a jurisdiction that permits such activity by a lawyer not admitted to practice:

(1) representation of one or more clients in the practice of law;

(2) service as a lawyer with a state, federal, or territorial agency, including military services;

(3) teaching law at an accredited law school, including supervision of law students within a clinical program;

(4) service as a judge in a state, federal, or territorial court of record;

(5) service as a judicial law clerk;

(6) service as authorized house counsel;

(7) service as authorized house counsel in Connecticut before July 1, 2008, or while certified pursuant to Section 2-15A; or

(8) any combination of the above.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee; to clarify that while there exists an ethics requirement for admission, the Bar Examining Committee does not administer the Multistate Professional Responsibility Examination (MPRE) or any other ethics examination; to remove the requirement that the applicant intends to practice law in Connecticut on a continuing basis, so as not to be an impediment to attorneys who wish to apply for admission in certain jurisdictions;

and to reflect the policy of the Bar Examining Committee that the affidavits required to be filed, must be received directly from the affiant, not the applicant.

Sec. 2-13A. Military Spouse Temporary Licensing

(a) **Qualifications.** An applicant who meets all of the following requirements listed in subdivisions (1) through (11) of this subsection may be temporarily licensed and admitted to the practice of law in Connecticut, upon approval of the bar examining committee. The applicant:

(1) is the spouse of an active duty service member of the United States Army, Navy, Air Force, Marine Corps or Coast Guard and that service member is or will be stationed in Connecticut due to military orders;

(2) is licensed to practice law before the highest court in at least one state or territory of the United States or in the District of Columbia;

(3) is currently an active member in good standing in every jurisdiction to which the applicant has been admitted to practice, or has resigned or become inactive or had a license administratively suspended or revoked while in good standing from every jurisdiction without any pending disciplinary actions;

(4) is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;

(5) meets the educational qualifications required to take the examination in Connecticut;

(6) possesses the good moral character and fitness to practice law required of all applicants for admission in Connecticut;

(7) has passed an examination in professional responsibility administered under the auspices of the bar examining committee or has completed a course in professional responsibility in accordance with the regulation of the bar examining committee;

(8) is or will be physically residing in Connecticut due to the service member's military orders;

(9) has not failed the Connecticut bar examination within the past five years;

(10) has not had an application for admission to the Connecticut bar or the bar of any state, the District of Columbia or United States territory denied on character and fitness grounds; and

(11) has not failed to achieve the Connecticut scaled score on the uniform bar examination administered within any jurisdiction within the past five years.

(b) **Application Requirements.** Any applicant seeking a temporary license to practice law in Connecticut under this section shall file a written application and payment of such fee as the bar examining committee shall from time to time determine. Such application, duly verified, shall be filed with the administrative director of the **[**bar examining**]** committee and shall set forth the applicant's qualifications as hereinbefore provided. In addition, the applicant shall file with the **[**bar examining**]** committee the following:

(1) a copy of the applicant's military spouse dependent identification and documentation evidencing a spousal relationship with the service member;

(2) a copy of the service member's military orders to a military installation in Connecticut or a letter from the service member's command verifying that the requirement in subsection (a) (8) of this section is met;

(3) certificate(s) of good standing from the highest court of each state, the District of Columbia or United States territory to which the applicant has been admitted, or proof that the applicant has resigned, or become inactive or had a license administratively suspended or revoked while in good standing;

(4) an affidavit from the applicant, certifying whether such applicant has a grievance pending against him or her, has ever been reprimanded, suspended, placed on inactive status, disbarred, or has ever resigned from the practice of law, and, if so setting forth the circumstances concerning such action; and

(5) affidavits from two attorneys who personally know the applicant certifying to his or her good moral character and fitness to practice law.

(c) **Duration and Renewal.**

(1) A temporary license to practice law issued under this rule will be valid for three years provided that the temporarily licensed attorney remains a spouse of the service member and resides in Connecticut due to military orders or continues to reside in Connecticut due to the service member's immediately subsequent assignment specifying that dependents are not authorized to accompany the service member. The temporary license may be renewed for one additional two year period.

(2) A renewal application must be submitted with the appropriate fee as established by the bar examining committee and all other docu-

mentation required by the bar examining committee, including a copy of the service member's military orders.

Such renewal application shall be filed not less than thirty days before the expiration of the original three year period.

(3) A temporarily licensed attorney who wishes to become a permanent member of the bar of Connecticut may apply for admission by examination or for admission without examination for the standard application fee minus the application fee paid to the committee for the application for temporary license, not including any fees for renewal.

(d) **Termination.**

(1) Termination of Temporary License. A temporary license shall terminate, and a temporarily licensed attorney shall cease the practice of law in Connecticut pursuant to that admission, unless otherwise authorized by these rules, thirty days after any of the following events:

(A) the service member's separation or retirement from military service;

(B) the service member's permanent relocation to another jurisdiction, unless the service member's immediately subsequent assignment specifies that the dependents are not authorized to accompany the service member, in which case the attorney may continue to practice law in Connecticut as provided in this rule until the service member departs Connecticut for a permanent change of station where the presence of dependents is authorized;

(C) the attorney's permanent relocation outside of the state of Connecticut for reasons other than the service member's relocation;

(D) upon the termination of the attorney's spousal relationship to the service member;

(E) the attorney's failure to meet the annual licensing requirements for an active member of the bar of Connecticut;

(F) the attorney's request;

(G) the attorney's admission to practice law in Connecticut by examination or without examination;

(H) the attorney's denial of admission to the practice of law in Connecticut; or

(I) the death of the service member.

Notice of one of the events set forth in subsection (d) (1) must be filed with the bar examining committee by the temporarily licensed attorney within thirty days of such event. Notice of the event set forth in subsection (d) (1) (I) must be filed with the **[**bar examining**]** committee by the temporarily licensed attorney within thirty days of the event, and the attorney shall cease the practice of law within one year of the event. Failure to provide such notice by the temporarily licensed attorney shall be a basis for discipline pursuant to the Rules of Professional Conduct for attorneys.

(2) Notice of Termination of Temporary License. Upon receipt of the notice required by subsection (d) (1), the bar examining committee shall forward a request to the statewide bar counsel that the license under this chapter be revoked. Notice of the revocation shall be mailed by the statewide bar counsel to the temporarily licensed attorney.

(3) Notices Required. At least sixty days before termination of the temporary admission, or as soon as possible under the circumstances, the attorney shall:

(A) file in each matter pending before any court, tribunal, agency or commission a notice that the attorney will no longer be involved in the case; and

(B) provide written notice to all clients receiving representation from the attorney that the attorney will no longer represent them.

(e) **Responsibilities and Obligations.**

An attorney temporarily licensed under this section shall be subject to all responsibilities and obligations of active members of the Connecticut bar, and shall be subject to the jurisdiction of the courts and agencies of Connecticut, and shall be subject to the laws and rules of Connecticut governing the conduct and discipline of attorneys to the same extent as an active member of the Connecticut bar. The attorney shall maintain participation in a mentoring program provided by a state or local bar association in the state of Connecticut.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-15A. —Authorized House Counsel

(a) **Purpose**

The purpose of this section is to clarify the status of house counsel as authorized house counsel as defined herein, and to confirm that such counsel are subject to regulation by the judges of the Superior Court. Notwithstanding any other section of this chapter relating to admission to the bar, this section shall authorize attorneys licensed

to practice in jurisdictions other than Connecticut to be permitted to undertake these activities, as defined herein, in Connecticut without the requirement of taking the bar examination so long as they are exclusively employed by an organization.

(b) **Definitions**

(1) **Authorized House Counsel.** An ``authorizedhouse counsel'' is any person who:

(A) is a member in good standing of the entity governing the practice of law of each state (other than Connecticut) or territory of the United States, or the District of Columbia or any foreign jurisdiction in which the member is licensed;

(B) has been certified on recommendation of the bar examining committee in accordance with this section;

(C) agrees to abide by the rules regulating members of the Connecticut bar and submit to the jurisdiction of the Statewide Grievance Committee and the Superior Court; and

(D) is, at the date of application for registration under this rule, employed in the state of Connecticut by an organization or relocating to the state of Connecticut in furtherance of such employment within three months prior to starting work in the state of Connecticut or three months after the applicant begins work in the state of Connecticut of such application under this section and receives or shall receive compensation for activities performed for that business organization.

(2) **Organization.** An ``organization'' for the purpose of this rule is a corporation, partnership, association, or employer sponsored benefit plan or other legal entity (taken together with its respective parents,

subsidiaries, and affiliates) that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization for the activities of the authorized house counsel.

(c) **Activities**

(1) **Authorized Activities.** An authorized house counsel, as an employee of an organization, may provide legal services in the state of Connecticut to the organization for which a registration pursuant to subsection (d) is effective, provided, however, that such activities shall be limited to:

(A) the giving of legal advice to the directors, officers, employees, trustees, and agents of the organization with respect to its business and affairs;

(B) negotiating and documenting all matters for the organization; and

(C) representation of the organization in its dealings with any administrative agency, tribunal or commission having jurisdiction; provided, however, authorized house counsel shall not be permitted to make appearances as counsel before any state or municipal administrative tribunal, agency, or commission, and shall not be permitted to make appearances in any court of this state, unless the attorney is specially admitted to appear in a case before such tribunal, agency, commission or court.

(2) **Disclosure.** Authorized house counsel shall not represent themselves to be members of the Connecticut bar or commissioners of the

Superior Court licensed to practice law in this state. Such counsel may represent themselves as Connecticut authorized house counsel.

(3) **Limitation on Representation.** In no event shall the activities permitted hereunder include the individual or personal representation of any shareholder, owner, partner, officer, employee, servant, or agent in any matter or transaction or the giving of advice therefor unless otherwise permitted or authorized by law, code, or rule or as may be permitted by subsection (c) (1). Authorized house counsel shall not be permitted to prepare legal instruments or documents on behalf of anyone other than the organization employing the authorized house counsel.

(4) **Limitation on Opinions to Third Parties.** An authorized house counsel shall not express or render a legal judgment or opinion to be relied upon by any third person or party other than legal opinions rendered in connection with commercial, financial or other business transactions to which the authorized house counsel's employer organization is a party and in which the legal opinions have been requested from the authorized house counsel by another party to the transaction. Nothing in this subsection (c) (4) shall permit authorized house counsel to render legal opinions or advice in consumer transactions to customers of the organization employing the authorized house counsel.

(5) **Pro Bono Legal Services.** Notwithstanding anything to the contrary in this section, an authorized house counsel may participate in the provision of any and all legal services pro bono public in Connecticut offered under the supervision of an organized legal aid society or

state/local bar association project, or of a member of the Connecticut bar who is also working on the pro bono representation.

(d) **Registration**

(1) **Filing with the Bar Examining Committee.** The bar examining committee shall investigate whether the applicant is at least eighteen years of age and is of good moral character, consistent with the requirement of Section 2-8 (3) regarding applicants for admission to the bar. In addition, the applicant shall file with the **[**bar examining**]** committee, and the committee shall consider, the following:

(A) a certificate from each entity governing the practice of law of a state or territory of the United States, or the District of Columbia or any foreign jurisdiction in which the applicant is licensed to practice law certifying that the applicant is a member in good standing;

(B) a sworn statement by the applicant:

(i) that the applicant has read and is familiar with the Connecticut Rules of Professional Conduct for attorneys and Chapter 2 (Attorneys) of the Superior Court Rules, General Provisions, and will abide by the provisions thereof;

(ii) that the applicant submits to the jurisdiction of the Statewide Grievance Committee and the Superior Court for disciplinary purposes, and authorizes notification to or from the entity governing the practice of law of each state or territory of the United States, or the District of Columbia in which the applicant is licensed to practice law of any disciplinary action taken against the applicant;

(iii) listing any jurisdiction in which the applicant is now or ever has been licensed to practice law; and

(iv) disclosing any disciplinary sanction or pending proceeding pertaining or relating to his or her license to practice law including, but not limited to, reprimand, censure, suspension or disbarment, or whether the applicant has been placed on inactive status;

(C) a certificate from an organization certifying that it is qualified as set forth in subsection (b) (2); that it is aware that the applicant is not licensed to practice law in Connecticut; and that the applicant is employed or about to be employed in Connecticut by the organization as set forth in subsection (b) (1) (D);

(D) an appropriate application pursuant to the regulations of the bar examining committee;

(E) remittance of a filing fee to the bar examining committee as prescribed and set by that committee; and

(F) an affidavit from each of two members of the Connecticut bar, who have each been licensed to practice law in Connecticut for at least five years, certifying that the applicant is of good moral character and that the applicant is employed or will be employed by an organization as defined above in subsection (b) (2).

(2) **Certification.** Upon recommendation of the bar examining committee, the court may certify the applicant as authorized house counsel and shall cause notice of such certification to be published in the Connecticut Law Journal.

(3) **Annual Client Security Fund Fee.** Individuals certified pursuant to this section shall comply with the requirements of Sections 2-68 and 2-70 of this chapter, including payment of the annual fee and shall pay any other fees imposed on attorneys by court rule.

(4) **Annual Registration.** Individuals certified pursuant to this section shall register annually with the Statewide Grievance Committee in accordance with Sections 2-26 and 2-27 (d) of this chapter.

(e) **Termination or Withdrawal of Registration**

(1) **Cessation of Authorization To Perform Services.** Authorization to perform services under this rule shall cease upon the earliest of the following events:

(A) the termination or resignation of employment with the organization for which registration has been filed, provided, however, that if the authorized house counsel shall commence employment with another organization within thirty days of the termination or resignation, authorization to perform services under this rule shall continue upon the filing with the bar examining committee of a certificate as set forth in subsection (d) (1) (C);

(B) the withdrawal of registration by the authorized house counsel;

(C) the relocation of an authorized house counsel outside of Connecticut for a period greater than 180 consecutive days; or

(D) the failure of authorized house counsel to comply with any applicable provision of this rule.

Notice of one of the events set forth in subsections (e) (1) (A) through (C) or a new certificate as provided in subsection (e) (1) (A) must be filed with the bar examining committee by the authorized house counsel within thirty days after such action. Failure to provide such notice by the authorized house counsel shall be a basis for discipline pursuant to the Rules of Professional Conduct for attorneys.

(2) **Notice of Withdrawal of Authorization.** Upon receipt of the notice required by subsection (e) (1), the bar examining committee shall forward a request to the statewide bar counsel that the authorization under this chapter be revoked.

Notice of the revocation shall be mailed by the statewide bar counsel to the authorized house counsel and the organization employing the authorized house counsel.

(3) **Reapplication.** Nothing herein shall prevent an individual previously authorized as house counsel to reapply for authorization as set forth in subsection (d).

(f) **Discipline**

(1) **Termination of Authorization by Court.** In addition to any appropriate proceedings and discipline that may be imposed by the Statewide Grievance Committee, the Superior Court may, at any time, with cause, terminate an authorized house counsel's registration, temporarily or permanently.

(2) **Notification to Other States.** The statewide bar counsel shall be authorized to notify each entity governing the practice of law in the state or territory of the United States, or the District of Columbia, in which the authorized house counsel is licensed to practice law, of any disciplinary action against the authorized house counsel.

(g) **Transition**

(1) **Preapplication Employment in Connecticut.** The performance of an applicant's duties as an employee of an organization in Connecticut prior to the effective date of this rule shall not be grounds for the

denial of registration of such applicant if application for registration is made within six months of the effective date of this rule.

(2) **Immunity from Enforcement Action.** An authorized house counsel who has been duly registered under this rule shall not be subject to enforcement action for the unlicensed practice of law for acting as counsel to an organization prior to the effective date of this rule.

COMMENTARY: The changes in subsection (b) of this section clarify that authorized house counsel applications are accepted within three months before or three months after someone begins work in Connecticut. The other changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-18. —Filings To Become Foreign Legal Consultant

(a) An applicant for a license to practice as a foreign legal consultant shall file with the administrative director of the bar examining committee:

(1) a typewritten application in the form prescribed by the committee;

(2) a certified check, cashier's check, or money order in the amount of $500 made payable to the bar examining committee;

(3) a certificate from the authority in the foreign country having final jurisdiction over professional discipline, certifying to the applicant's admission to practice (or the equivalent of such admission) and the date thereof and to the applicant's good standing as an attorney or counselor at law (or the equivalent of either), together with a duly authenticated English translation of such certificate if it is not in English; and

(4) two letters of recommendation, one from a member in good standing of the Connecticut bar and another from either a member in good standing of the bar of the country in which the applicant is licensed as an attorney, or from a judge of one of the courts of original jurisdiction of said country, together with a duly authenticated English translation of each letter if it is not in English.

(b) Upon a showing that strict compliance with the provisions of Section 2-17 (1) and subdivisions (3) or (4) of subsection (a) of this section is impossible or very difficult for reasons beyond the control of the applicant, or upon a showing of exceptional professional qualifications to practice as a foreign legal consultant, the court may, in its discretion, waive or vary the application of such provisions and permit the applicant to make such other showing as may be satisfactory to the court.

(c) The bar examining committee shall investigate the qualifications, moral character, and fitness of any applicant for a license to practice as a foreign legal consultant and may in any case require the applicant to submit any additional proof or information as the committee may deem appropriate. The committee may also require the applicant to submit a report from the National Conference of Bar Examiners, and to pay the prescribed fee therefor, with respect to the applicant's character and fitness.

COMMENTARY: The changes to this section are made for purposes of consistency when referring to the Bar Examining Committee.

Sec. 2-27A. Minimum Continuing Legal Education

(a) On an annual basis, each attorney admitted in Connecticut shall certify, on the registration form required by Section 2-27 (d), that the attorney has completed in the last calendar year no less than twelve credit hours of appropriate continuing legal education, at least two hours of which shall be in ethics/professionalism. The ethics and professionalism components may be integrated with other courses. This rule shall apply to all attorneys except the following:

(1) Judges and senior judges of the Supreme, Appellate or Superior Courts, judge trial referees, family support magistrates, family support magistrate referees, workers' compensation commissioners, elected constitutional officers, federal judges, federal magistrate judges, federal administrative law judges or federal bankruptcy judges;

(2) Attorneys who are disbarred, resigned pursuant to Section 2-52, on inactive status pursuant to Section 2-56 et seq., or retired pursuant to Sections 2-55 or 2-55A;

(3) Attorneys who are serving on active duty in the armed forces of the United States for more than six months in such year;

(4) Attorneys for the calendar year in which they are admitted;

(5) Attorneys who earn less than $1000 in compensation for the provision of legal services in such year;

(6) Attorneys who, for good cause shown, have been granted temporary or permanent exempt status by the Statewide Grievance Committee.

(b) Attorneys may satisfy the required hours of continuing legal education:

(1) By attending legal education courses provided by any local, state or special interest bar association in this state or regional or national bar associations recognized in this state or another state or territory of the United States or the District of Columbia (hereinafter referred to as ``bar association''); any private or government legal employer; any court of this or any other state or territory of the United States or the District of Columbia; any organization whose program or course has been reviewed and approved by any bar association or organization that has been established in any state or territory of the United States or the District of Columbia to certify and approve continuing legal education courses; and any other nonprofit or for-profit legal education providers, including law schools and other appropriate continuing legal education providers, and including courses remotely presented by video conference, webcasts, webinars, or the like by said providers.

(2) By self-study of appropriate programs or courses directly related to substantive or procedural law or related topics, including professional responsibility, legal ethics, or law office management and prepared by those continuing legal education providers in subsection (b) (1). Said self-study may include viewing and listening to all manner of communication, including, but not limited to, video or audio recordings or taking online legal courses. The selection of self-study courses or programs shall be consistent with the objective of this rule, which is to maintain and enhance the skill level, knowledge, ethics and competence of the attorney and shall comply with the minimum quality standards set forth in subsection (c) (6).

(3) By publishing articles in legal publications that have as their primary goal the enhancement of competence in the legal profession, including, without limitation, substantive and procedural law, ethics, law practice management and professionalism.

(4) By teaching legal seminars and courses, including the participation on panel discussions as a speaker or moderator.

(5) By serving as a full-time faculty member at a law school accredited by the American Bar Association or approved by the state bar examining committee, in which case, such attorney will be credited with meeting the minimum continuing legal education requirements set forth herein.

(6) By serving as a part-time or adjunct faculty member at a law school accredited by the American Bar Association or approved by the state bar examining committee, in which case, such attorney will be credited with meeting the minimum continuing legal education requirements set forth herein at the rate of one hour for each hour of classroom instruction and one hour for each two hours of preparation.

(7) By serving as a judge or coach for a moot court or mock trial course or competition that is part of the curriculum at or sanctioned by a law school accredited by the American Bar Association or approved by the state bar examining committee.

(c) Credit computation:

(1) Credit for any of the above activities shall be based on the actual instruction time, which may include lecture, panel discussion, and question and answer periods. Credit for the activity listed in subsection (b) (7) shall be based upon the actual judging or coaching time, up

to four hours for each activity per year. Self-study credit shall be based on the reading time or running time of the selected materials or program.

(2) Credit for attorneys preparing for and presenting legal seminars, courses or programs shall be based on one hour of credit for each two hours of preparation. A maximum of six hours of credit may be credited for preparation of a single program.

Credit for presentation shall be on an hour for hour basis. Credit may not be earned more than once for the same course given during a calendar year.

(3) Credit for the writing and publication of articles shall be based on the actual **[**drafting**]** time required for both researching and drafting. Each article may be counted only one time for credit.

(4) Continuing legal education courses ordered pursuant to Section 2-37 (a) (5) or any court order of discipline shall not count as credit toward an attorney's obligation under this section.

(5) Attorneys may carry forward no more than two credit hours in excess of the current annual continuing legal education requirement to be applied to the following year's continuing legal education requirement.

(6) To be eligible for continuing legal education credit, the course or activity must: (A) have significant intellectual or practical content designed to increase or maintain the attorney's professional competence and skills as a lawyer; (B) constitute an organized program of learning dealing with matters directly related to legal subjects and the

legal profession; and (C) be conducted by an individual or group qualified by practical or academic experience.

(d) Attorneys shall retain records to prove compliance with this rule for a period of seven years.

(e) Violation of this section shall constitute misconduct.

(f) Unless it is determined that the violation of this section was wilful, a noncompliant attorney must be given at least sixty days to comply with this section before he or she is subject to any discipline.

(g) A Minimum Continuing Legal Education Commission (``commission'') shall be established by the Judicial Branch and shall be composed of four Superior Court judges and four attorneys admitted to practice in this state, all of whom shall be appointed by the chief justice of the Supreme Court or his or her designee and who shall serve without compensation. The charge of the commission will be to provide advice regarding the application and interpretation of this rule and to assist with its implementation including, but not limited to, the development of a list of frequently asked questions and other documents to assist the members of the bar to meet the requirements of this rule.

COMMENTARYÐ2017: It is the intention of this rule to provide attorneys with relevant and useful continuing legal education covering the broadest spectrum of substantive, procedural, ethical and professional subject matter at the lowest cost reasonably feasible and with the least amount of supervision, structure and reporting requirements, which will aid in the development, enhancement and maintenance of the legal knowledge and skills of practicing attorneys and will facilitate the delivery of competent legal services to the public.

The rule also permits an attorney to design his or her own course of study. The law is constantly evolving and attorneys, like all other professionals, are expected to keep abreast of changes in the profession and the law if they are to provide competent representation.

Subsection (a) provides that Connecticut attorneys must complete twelve credit hours of continuing legal education per calendar year. Subsection (a) also lists those Connecticut attorneys, who are exempt from compliance, including, among others: judges, senior judges, attorneys serving in the military, new attorneys during the year in which they are admitted to practice, attorneys who earn less than $1000 in compensation for the provision of legal services in the subject year, and those who obtain an exempt status for good cause shown. The subsection also provides an exemption for attorneys who are disbarred, resigned, on inactive status due to disability, or are retired. The exemption for attorneys who earn less than $1000 in compensation in a particular year is not intended to apply to attorneys who claim that they were not paid as a result of billed fees to a client. All compensation received for the provision of legal services, whether the result of billed fees or otherwise, must be counted. There is no exemption for attorneys who are suspended or on administrative suspension. Subsection (d) requires an attorney to maintain adequate records of compliance. For continuing legal education courses, a certificate of attendance shall be sufficient proof of compliance. For self-study, a contemporaneous log identifying and describing the course listened to or watched and listing the date and time the course was taken, as well as a copy of the syllabus or outline of the course materials, if available, and,

when appropriate, a certificate from the course provider, shall be sufficient proof of compliance. For any other form of continuing legal education, a file including a log of the time spent and drafts of the prepared material shall provide sufficient proof of compliance.

COMMENTARY: The change to the rule regarding credit for the writing and publication of articles clarifies that such credit shall be based on the actual time required for both researching and drafting such articles.

Sec. 2-29. Grievance Panels

(a) The judges of the Superior Court shall appoint one or more grievance panels in each judicial district, each consisting of two members of the bar who do not maintain an office for the practice of law in such judicial district and one nonattorney who resides in such judicial district, and shall designate as an alternate member a member of the bar who does not maintain an office for the practice of law in such judicial district. Terms shall commence on July 1. Appointments shall be for terms of three years. No person may serve as a member and/or as an alternate member for more than two consecutive three year terms, but may be reappointed after a lapse of one year. The appointment of any member or alternate member may be revoked or suspended by the judges or by the executive committee of the Superior Court. In connection with such revocation or suspension, the judges or the executive committee shall appoint a qualified individual to fill the vacancy for the balance of the term or for any other appropriate period. In the event that a vacancy arises on a panel before the end of a term by reasons other than revocation or suspension, the executive

committee of the Superior Court shall appoint an attorney or nonattorney, depending on the position vacated, who meets the appropriate condition set forth above to fill the vacancy for the balance of the term.

(b) Consideration for appointment to these positions shall be given to those candidates recommended to the appointing authority by the administrative judges.

(c) In the event that more than one panel has been appointed to serve a particular judicial district, the executive committee of the Superior Court shall establish the jurisdiction of each such panel.

(d) An attorney who maintains an office for the practice of law in the same judicial district as a respondent may not participate as a member of a grievance panel concerning a complaint against that respondent.

(e) In addition to any other powers and duties set forth in this chapter, each panel shall:

(1) On its own motion or on complaint of any person, inquire into and investigate offenses whether or not occurring in the actual presence of the court involving the character, integrity, professional standing and conduct of members of the bar in this state.

(2) Compel any person by subpoena to appear before it to testify in relation to any matter deemed by the panel to be relevant to any inquiry or investigation it is conducting and to produce before it for examination any books or papers which, in its judgment, may be relevant to such inquiry or investigation.

(3) Utilize an official court reporter or court recording monitor employed by the Judicial Branch to record any testimony taken before it.

(f) The grievance panel may, upon the vote of a majority of its members, require that a disciplinary counsel pursue the matter before the grievance panel on the issue of probable cause.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

Sec. 5-3. Administering Oath

The oath or affirmation shall be administered deliberately and with due solemnity, as the witness takes the stand. The official court reporter or court recording monitor shall note by whom it was administered.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

Sec. 6-1. Statement of Decision; When Required

(a) The judicial authority shall state its decision either orally or in writing, in all of the following: (1) in rendering judgments in trials to the court in civil and criminal matters, including rulings regarding motions for stay of execution, (2) in ruling on aggravating and mitigating factors in capital penalty hearings conducted to the court, (3) in ruling on motions to dismiss under Sections 41-8 through 41-11, (4) in ruling on motions to suppress under Sections 41-12 through 41-17, (5) in granting a motion to set aside a verdict under Sections 16-35 through 16-38, and (6) in making any other rulings that constitute a final judg-

ment for purposes of appeal under General Statutes § 52-263, including those that do not terminate the proceedings. The judicial authority's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by an official court reporter or court recording monitor and, if there is an appeal, the trial judge shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed in the trial court clerk's office.

This section does not apply in small claims actions and to matters listed in subsection (b).

(b) In any uncontested matter where no aspect of the matter is in dispute, in a pendente lite family relations matter whether contested or uncontested, or in any dismissal under Section 14-3, the oral or written decision as provided in subsection (a) is not required, except as provided in subsection (c). The clerk of the trial court shall, however, promptly notify the trial judge of the filing of the appeal.

(c) Within twenty days from the filing of an appeal from a contested pendente lite order or from a dismissal under Section 14-3 in which an oral or written decision has not been made pursuant to subsection (b), each party to the appeal shall file a brief with the trial court discussing the legal and factual issues in the matter. Within twenty days after the briefs have been filed by the parties, the judicial authority shall file a written memorandum of decision stating the factual basis

for its decision on the issues in the matter and its conclusion as to each claim of law raised by the parties.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

PROPOSED AMENDMENTS TO THE PROCEDURE IN CIVIL MATTERS

Sec. 16-12. View by Jury of Place or Thing Involved in Case

When the judicial authority is of the opinion that a viewing by the jury of the place or thing involved in the case will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the closing arguments, order that the jury be conducted to such place or location of such thing. During the viewing, the jury must be kept together under the supervision of a proper officer appointed by the judicial authority. The judicial authority and an official court reporter or court recording monitor must be present, and, with the judicial authority's permission, any other person may be present. Counsel and self-represented parties may as a matter of right be present, but the right may be waived. The purpose of viewing shall be solely to permit visual observation by the jury of the place or thing in question and to permit a brief description of the site or thing being viewed by the judicial authority or by any witness or witnesses as allowed by the judicial authority. Any proceedings at the location, including examination of witnesses, shall be at the discretion of the judicial authority. Neither the parties nor counsel nor the jurors while viewing the place or thing may engage in discussion of the significance or the implications of anything under observation or of any issue in the case.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

Sec. 23-55. –Hearing in Fact-Finding

In matters submitted to fact-finding a record shall be made of the proceedings and the **[**civil rules of evidence**]** Connecticut Code of Evidence shall apply.

COMMENTARY: The change to this section substitutes ``Connecticut Code of Evidence'' for ``civilrules of evidence'' as the appropriate reference to evidentiary rules.

Sec. 23-63. –Hearing in Arbitration

In matters submitted to arbitration no record shall be made of the proceedings and the strict adherence to the **[**civil rules of evidence**]** Connecticut Code of Evidence shall not be required.

COMMENTARY: The change to this section substitutes ``Connecticut Code of Evidence'' for ``civilrules of evidence'' as the appropriate reference to evidentiary rules.

PROPOSED AMENDMENTS TO THE PROCEDURE IN JUVENILE MATTERS

Sec. 33a-1. Initiation of Judicial Proceeding; Contents of Petitions and Summary of Facts

(a) The petitioner shall set forth with reasonable particularity, including statutory references, the specific conditions which have resulted in the situation which is the subject of the petition.

(b) A summary of the facts substantiating the allegations of the petition, including such facts as bring the child or youth within the

jurisdiction of the court, shall be attached thereto and shall be incorporated by reference.

COMMENTARY: The change to this section makes it consistent with General Statutes § 46b-129 (a).

PROPOSED AMENDMENTS TO THE PROCUDURE IN CRIMINAL MATTERS

Sec. 42-6. –View by Jury of Place or Thing Involved in Case

When the judicial authority is of the opinion that a viewing by the jury of the place where the offense being tried was committed, or of any other place or thing involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the closing arguments, order that the jury be conducted to such place or location of such thing. During the viewing the jury must be kept together under the supervision of a proper officer appointed by the judicial authority. The judicial authority and an official court reporter or court recording monitor must be present, and, with the judicial authority's permission, any other person may be present. The prosecuting authority, the defendant and defense counsel may as a matter of right be present, but the right may be waived. The purpose of viewing shall be solely to permit visual observation by the jury of the place or thing in question and to permit a brief description of the site or thing being viewed by the judicial authority or by any witness or witnesses as allowed by the judicial authority. Any proceedings at the location, including examination of witnesses, shall be at the discretion of the judicial authority. Neither the parties nor counsel nor the jurors while viewing the place or thing may engage in discussion of the significance or the implications of anything under observation or of any issue in the case.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

Sec. 43-10. Sentencing Hearing; Procedures To Be Followed

Before imposing a sentence or making any other disposition after the acceptance of a plea of guilty or nolo contendere or upon a verdict or finding of guilty, the judicial authority shall, upon the date previously determined for sentencing, conduct a sentencing hearing as follows:

(1) The judicial authority shall afford the parties an opportunity to be heard and, in its discretion, to present evidence on any matter relevant to the disposition, and to explain or controvert the presentence investigation report, the alternate incarceration assessment report or any other document relied upon by the judicial authority in imposing sentence. When the judicial authority finds that any significant information contained in the presentence report or alternate incarceration assessment report is inaccurate, it shall order the Office of Adult Probation to amend all copies of any such report in its possession and in the clerk's file, and to provide both parties with an amendment containing the corrected information.

(2) The judicial authority shall allow the victim and any other person directly harmed by the commission of the crime a reasonable opportunity to make, orally or in writing, a statement with regard to the sentence to be imposed.

(3) The judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence.

(4) In cases where guilt was determined by a plea, the judicial authority shall, pursuant to Section 39-7, be informed by the parties whether there is a plea agreement, and if so, the substance thereof.

(5) The judicial authority shall impose the sentence in the presence and hearing of the defendant, unless the defendant shall have waived his or her right to be present.

(6) In cases where sentence review is available, the judicial authority shall state on the record, in the presence of the defendant, the reasons for the sentence imposed.

(7) In cases where sentence review is available and where the defendant files an application for such review, the clerk shall promptly notify the official court reporter of such application pursuant to Section 43-24 and the official court reporter or court reporting monitor shall file a copy of the transcript of the sentencing hearing with the review division within sixty days from the date the application for review is filed with the clerk.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

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

In cases where sentence review is available pursuant to General Statutes § 51-195, the defendant may file, within thirty days from the date that sentence is imposed or from the date defendant's suspended sentence is revoked, with the clerk of the court for the judicial district or geographical area in which the judgment was rendered, an application for review of sentence by the review division. The clerk shall notify

the review division, the judge who imposed the sentence, the official court reporter, and all counsel of record upon the filing of the application for review. The official court reporter or court reporting monitor shall prepare a transcript of the sentencing hearing in accordance with the provisions of Section 43-10.

COMMENTARY: The amendments to this section conform the terminology for official court reporters and court recording monitors to the provisions of No. 19-64 of the 2019 Public Acts.

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

(a) Upon entry of a plea of not guilty to an infraction or to a violation which is payable by mail pursuant to statute, the clerk shall file such plea and forthwith transmit the file to the prosecuting authority for review.

(b) Unless a nolle prosequi or a dismissal is entered in the matter within ten days of the filing of a not guilty plea, the clerk shall schedule a hearing and shall send the defendant a written notice of the date, time and place of such hearing.

(c) Hearings shall be conducted in accordance with the **[**criminal rules of evidence**]** Connecticut Code of Evidence and with the provisions of chapter 42 insofar as the provisions of that chapter are applicable.

(d) A nolle prosequi or a dismissal may be entered in the absence of the defendant. In the event a nolle prosequi or a dismissal is entered in the matter, the clerk shall send a written notice of such disposition to any defendant who was not before the court at the time of such

disposition. The entry of a nolle prosequi hereunder shall not operate as a waiver of the defendant's right thereafter to seek a dismissal pursuant to Section 39-30.

COMMENTARY: The change to this section substitutes ``Connecticut Code of Evidence'' for ``criminal rules of evidence'' as the appropriate reference to evidentiary rules.

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

(a) Infractions and motor vehicle violations which may be submitted to a magistrate pursuant to statute may be heard by magistrates in those court locations where a magistrate has been appointed by the chief court administrator, except that magistrates may not conduct jury trials.

(b) Hearings by magistrates shall be conducted in accordance with the **[**criminal rules of evidence**]** Connecticut Code of Evidence and with the provisions of chapter 42 insofar as the provisions of that chapter are applicable. A magistrate shall sign all orders the magistrate issues, such signature to be followed by the word ``magistrate.''

(c) A decision of the magistrate, including any penalty imposed, shall become a judgment of the court if no demand for a trial de novo is filed. Such decision of the magistrate shall become null and void if a timely demand for a trial de novo is filed.

A demand for a trial de novo shall be filed with the court clerk within five days of the date the decision was rendered by the magistrate and, if filed by the prosecuting authority, it shall include a certification

that a copy thereof has been served on the defendant or his or her attorney, in accordance with the rules of practice.

(d) If the defendant is charged with more than one offense, and not all such offenses are motor vehicle violations within the jurisdiction of a magistrate, a judicial authority shall hear and decide such case.

(e) This section shall be inapplicable at any court location to which a magistrate has not been assigned by the chief court administrator.

COMMENTARY: The change to this section substitutes ``Connecticut Code of Evidence'' for ``criminal rules of evidence'' as the appropriate reference to evidentiary rules.

SUPREME COURT PENDING CASES

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

JOSEPH MOORE *v.* COMMISSIONER OF CORRECTION, SC 20252
Judicial District of Tolland

Habeas; Whether Trial Counsel Rendered Ineffective Assistance in Advising Petitioner Regarding Pretrial Plea Offers. The petitioner was convicted following a jury trial on charges of robbery in the first degree and commission of a class B felony with a firearm. He filed this habeas action, claiming that his trial counsel rendered ineffective assistance in failing to adequately advise him concerning the state's pretrial plea offers. The petitioner argued that, although his attorney advised him on the maximum sentence that he faced on the robbery charge, the attorney failed to advise him that the maximum sentence he faced even if he was successful in proving a theory of defense that he wished to present at trial—which amounted to conceding that he was guilty only of the lesser included offense of robbery in the third degree—would be as severe as, or exceed, the sentences recommended in the plea offers made to him. The habeas court denied the petition, and the petitioner appealed. The Appellate Court (186 Conn. App. 254) affirmed the judgment, holding that the petitioner failed to demonstrate that his attorney provided ineffective assistance. The Appellate Court found that the petitioner's attorney adequately advised him on the best course of action given the facts of the underlying case, which included overwhelming evidence against the petitioner, and informed him of the potential total sentence to which he was exposed. The Appellate Court noted that the attorney had many discussions with the petitioner throughout the course of his representation, advised the petitioner to accept each of the plea deals offered to him, properly explained the state's evidence and provided adequate information for the petitioner to make an informed decision as to whether to accept the plea offers. Finally, the Appellate Court found that the attorney had not performed deficiently in failing to inform the petitioner of the potential total sentence he faced in the unlikely event that he was convicted only of the lesser offense or in failing to persuade the petitioner to accept one of the plea offers. The petitioner was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly concluded that the petitioner's trial counsel did not render ineffective assistance in advising the petitioner regarding the state's plea offers.

STATE *v.* HAJI JHMALAH BISCHOFF, SC 20302
Judicial District of Fairfield

Criminal; Whether Appellate Court Properly Held that Public Act Reducing Punishment for Possession of Narcotics in Violation of General Statutes § 21a-279 Does not Apply Retroactively; Whether Supreme Court Should Apply Amelioration Doctrine. The defendant was convicted of possession of narcotics in violation of General Statutes § 21a-279 in connection with a crime he committed in 2014, and sentenced to seven years of incarceration, execution suspended after five years, followed by three years of probation. In 2015, the legislature enacted No. 15-2 of the 2015 Public Acts, which reclassified the violation of § 21a-279 for first time offenders as a class A misdemeanor carrying a maximum sentence of one year of incarceration. The defendant brought this action by a motion to correct an illegal sentence, claiming that the public act applies retroactively and accordingly that his sentence of seven years incarceration is illegal because it exceeds the maximum sentence now allowed by the law. The trial court dismissed the motion to correct, finding that it lacked jurisdiction to consider it, and the defendant appealed. He acknowledged that his case was seemingly controlled by *State* v. *Moore*, 180 Conn. App. 116 (2018), and *State* v. *Kalil*, 314 Conn. 529 (2014), but asked that that precedent be overruled. In *Moore*, the Appellate Court held that, because the public act contained no language indicating that it should apply retroactively, only prospective application would be consistent with both appellate precedent and with the savings statutes, General Statutes §§ 54-194 and 1-1 (t). The savings statutes provide that, when a crime is committed and the statute violated is later amended or repealed, a defendant remains liable under the version of the statute that existed at the time of the commission of the crime. In *Kalil*, the Supreme Court refused a defendant's request that the court adopt the amelioration doctrine, which provides that amendments to statutes that lessen the statutes' penalties apply retroactively, finding that application of the doctrine would be in contravention of the provisions of the savings statutes. The Appellate Court (189 Conn. App. 119) declined the invitation to overrule or disturb the precedent established by *Moore* and *Kalil* and remanded the case to the trial court with direction to deny the motion to correct. The Appellate Court noted that, as Connecticut's intermediate appellate court, it was bound by the Supreme Court's decision in *Kalil* and that, as to *Moore*, it would not overrule another panel of the Appellate Court absent en banc reconsideration. The defendant was granted certification to appeal, and the Supreme Court will consider (1) whether the Appellate Court properly determined in *Moore* that No. 15-2 of the 2015 Public

Acts does not have retroactive effect; and (2) whether the Supreme Court should overrule *Kalil* and apply the amelioration doctrine to give retroactive effect to the public act here.

STATE *v.* JOSE DIEGO GONZALEZ, SC 20317
Judicial District of New Haven

Criminal; Whether Defendant's Right to Due Process Violated by Prosecutorial Impropriety During Closing Arguments. The defendant was convicted of home invasion, sexual assault in the first degree and risk of injury to a child. He appealed, claiming that he was entitled to a new trial because prosecutorial impropriety during closing argument deprived him of his constitutional rights to due process and a fair trial. The defendant argued that the prosecutor improperly presented a substantive discussion of the evidence during the rebuttal portion of her closing argument, which prevented his attorney from knowing how the state intended to marshal the evidence and from being able to effectively rebut the state's position during his closing argument. The defendant also argued that, during rebuttal argument, the prosecutor mischaracterized DNA and fingerprint evidence and improperly introduced new claims. The Appellate Court (188 Conn. App. 304) affirmed the judgment of conviction, noting that the defendant did not object to the prosecutor's closing argument at trial or seek to correct any of the prosecutor's claimed misstatements. The Appellate Court also noted that the defendant failed to present any authority suggesting that a closing argument must be made in a particular order or that the state's initial argument should contain the majority of its argument. The court observed that the closing arguments of the prosecutor and defense counsel demonstrated that each was aware of the evidence and the opposing party's theory of the case, that the defendant addressed the evidentiary issues raised by the prosecutor in closing argument, and that defense counsel vigorously argued the weaknesses of the state's case. The Appellate Court further found that the prosecutor's DNA argument was predicated on the evidence, that the prosecutor's statement concerning fingerprint evidence had a basis in the record and that, in any case, the defendant could not have been prejudiced by the statement because there was no fingerprint evidence that connected him to the crimes. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court correctly concluded that the defendant's rights to due process and a fair trial were not violated by prosecutorial impropriety during closing arguments.

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

CITY OF MERIDEN et al. *v.* FREEDOM OF INFORMATION COMMISSION et al., SC 20378

Judicial District of New Britain

Freedom of Information; Whether Appellate Court Properly Held that a Gathering of Less than a Quorum of Meriden City Council Members did not Constitute a "Meeting" Subject to FOIA's Open Meeting Requirements. On January 3, 2016, four political leaders of the Meriden City Council—the majority and minority leaders and their deputies (the leadership group)—met with the mayor and the retiring city manager to discuss the search for a new city manager. Following the gathering, a resolution was drafted detailing the names of people to be appointed to the search committee and the duties of the search committee and recommending suitable candidates for the city manager position to the city council. The resolution was subsequently adopted without discussion at a city council meeting. The Meriden Record Journal filed a complaint with the defendant Freedom of Information Commission (commission), alleging that the city had violated the Freedom of Information Act (act) in that the January 3, 2016 "leadership gathering" had not been conducted in compliance with the open meeting requirements of General Statutes § 1-225. The commission issued a decision finding that the gathering was a "proceeding" within the meaning of § 1-200 (2), that the proceeding constituted a "meeting" under that statute, and that the city had violated the open meeting requirement by failing to give public notice of the leadership group gathering. The city appealed from the commission's final decision to the Superior Court, and the trial court dismissed the appeal on concluding that the commission's findings were supported by substantial evidence. The city appealed, and the Appellate Court (191 Conn. App. 684) reversed the judgment and remanded the matter to the trial court with direction to render judgment sustaining the city's appeal from the commission. The Appellate Court held that the gathering of less than a quorum of the city council's members did not constitute a "meeting" under § 1-200 (2) that triggered the open meeting requirements. The Appellate Court held that the terms "hearing" and "proceeding" in the statute refer only to adjudicatory functions or activities and that, because the leadership group gathering did not involve in adjudication, it was not a hearing or other proceeding as contemplated by § 1-200 (2) and therefore not subject to the open

meeting requirements. The court held that the gathering instead constituted a "convening or assembly" for purposes of the statute and noted that, in a 1998 decision, the Appellate Court held that a gathering akin to a convening or assembly that constitutes less than a quorum of members of a public agency generally does not constitute a meeting as contemplated by § 1-200 (2). The Supreme Court granted the commission certification to appeal, and the Supreme Court will consider whether the Appellate Court properly construed the term "proceeding" in § 1-200 (2) to exclude a gathering of four political leaders of the city council at which they discussed the search for a new city manager.

DANIEL KLEIN *v.* QUINNIPIAC UNIVERSITY, SC 20405
Judicial District of New Haven

Negligence; Premises Liability; Whether Jury Should Have Been Instructed Concerning a Landowner's Duty of Care to a Licensee; Whether Appellate Court Correctly Concluded that, Even Assuming that Defendant Owed Plaintiff a Duty, Defendant did not Breach Duty. The plaintiff was injured when he fell off of his bicycle while riding over a speed bump at the campus owned by the defendant Quinnipiac University. He brought this premises liability action seeking monetary damages, claiming that the speed bump was dangerous and defective and that his injuries were caused by the defendant's negligence. The defendant denied the allegations and asserted as a special defense that the plaintiff was contributorily negligent. The case proceeded to a jury trial, and, while the trial court instructed the jury as to the duty of care owed by a landowner to a trespasser, the court refused to instruct the jury as to the duty of care owed to a licensee; that is, a person who is privileged to enter or remain upon the property because the owner consents to their presence. The trial court rendered judgment on the jury's verdict for the defendant, and the plaintiff appealed, claiming that the trial court erred in refusing to charge the jury as to the duty of care that a property owner owes a licensee. He argued that, as the defendant had not posted "no trespassing" signs or installed gates on the campus, the jury reasonably could have found that the defendant had either explicitly or implicitly consented to his presence there. The Appellate Court (193 Conn. App. 469) disagreed and affirmed the judgment, concluding that the absence of "no trespassing" signs or a gate at every entrance to the campus, absent additional evidence demonstrating the defendant's consent, was insufficient to support submission of the question of whether the plaintiff was a licensee to the jury. The Appellate Court also ruled that, even assuming without deciding that the defendant owed the

plaintiff the duty owed a licensee, no jury reasonably could have concluded that the defendant breached that duty in failing to warn him about the speed bump. The court reasoned that the yellow speed bump was visible on a clear and sunny day such that it could not be considered a hidden, dangerous condition. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly determined that the trial court was correct in refusing to instruct the jury on the heightened duty of care owed to a licensee and whether the Appellate Court properly found that the trial court's refusal to instruct as to that duty of care amounted to something in the nature of harmless error.

NANCY BURTON *v.* COMMISSIONER OF ENVIRONMENTAL PROTECTION et al.;
NANCY BURTON *v.* DEPARTMENT OF ENVIRONMENTAL PROTECTION et al., SC 20466
Judicial District of Hartford

Environmental Protection; Nuclear Power; Whether Administrative Proceeding Concerning Renewal of Millstone's Wastewater Discharge Permit was Conducted in Violation of Connecticut Environmental Protection Act and Clean Water Act. In 2007, the plaintiff brought an action against the Connecticut Department of Energy and Environmental Protection (DEEP) and Dominion Nuclear Connecticut, Inc., the owner and operator of Millstone Nuclear Power Station in Waterford. She alleged that Millstone's "once-through" cooling system, which draws large volumes of seawater from Niantic Bay and discharges it into Long Island Sound, is causing "unreasonable pollution" of the waters of the state in violation of General Statutes § 22a-16 of the Connecticut Environmental Protection Act (CEPA). The plaintiff sought, among other things, an order that Millstone be converted to a "closed cooling" system to reduce the alleged environmental damage and a determination, pursuant § 22a-20 of the CEPA, that a pending administrative proceeding concerning renewal of the wastewater discharge permit was inadequate to protect her rights as an intervenor under CEPA. The plaintiff alleged that the permit renewal proceeding had not been conducted fairly and impartially by the hearing officer and the DEEP. In 2010, the permit renewal proceeding terminated when the DEEP issued a renewed wastewater discharge permit for Millstone, and the plaintiff brought an administrative appeal to challenge that decision. After a consolidated trial on both the CEPA action and the administrative appeal, the trial court rendered judgment in favor of the defendants in both cases. The plaintiff appeals. She

claims that the DEEP violated the federal Clean Water Act by failing to make a legally valid determination that Millstone's cooling water intake structures reflect the "best technology available" for minimizing adverse environmental impact, as required by § 316 (b) of the Clean Water Act. The plaintiff also contends that DEEP violated the Clean Water Act in refusing to consider "closed cooling" as the "best technology available" for Millstone's cooling water intake structures. Among the plaintiff's other claims are that (1) she established "unreasonable pollution" under § 22a-16 by showing that Millstone's continuing use of the once-through cooling system will result in pollution and overheating of trillions of gallons of seawater, (2) she proved that there were procedural irregularities in the administrative permit renewal proceeding and that the proceeding was biased against her, and (3) that the trial court erred in failing to conduct the proceeding in her CEPA action in accordance with the Connecticut Supreme Court's remand order.

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

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-U: Natchaug Hospital Inpatient Rate Increase

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

Changes to Medicaid State Plan

Effective on or after July 1, 2020, SPA 20-U will amend Attachment 4.19-A of the Medicaid State Plan to increase the inpatient hospital per diem rate for Natchaug Hospital to $975 during State Fiscal Year (SFY) 2021. The reason for this SPA is that state statute in section 315 of Public Act 19-117 requires DSS to implement this rate increase for SFY 2021.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $908,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

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

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-U: Natchaug Hospital Rate Increase''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than June 25, 2020.