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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CLAUDIA PUFF *v.* GREGORY PUFF
(SC 20058)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to the Appellate Court from certain postjudgment orders of the trial court modifying alimony, finding her in contempt for her wilful violation of a court order, and awarding, inter alia, attorney's fees to the defendant. After the trial court granted the plaintiff's motion for modification of alimony, increased the amount of monthly alimony and extended the duration of those payments, the plaintiff moved to open and vacate the judgment on the ground that the defendant had failed to disclose a pending employment offer at considerably higher compensation. The trial court granted the motion and opened the judgment for the purpose of hearing new evidence. Thereafter, the parties and their counsel appeared before the court, requesting to place on the record an oral stipulation regarding alimony payments and other terms that they had negotiated. The stipulation required the defendant to increase his alimony payments, with a provision that the plaintiff could assign those payments to a special needs trust, under which the defendant was to be a residuary beneficiary. The stipulation obligated the plaintiff to draft the special needs trust and to secure or endeavor to secure a legal opinion that the trust arrangement would not affect the defendant's right to deduct the alimony payments from his federal tax obligations. Following the trial court's canvass of the parties, the court approved and ordered the stipulation, and, subsequently, the defendant moved for an order, asking the court to approve a written embodiment of the oral stipulation prepared by his counsel, to which the plaintiff objected. The plaintiff claimed, among other things, that the parties were unaware when they drafted the stipulation that it was impossible to create a legally valid special needs trust or to afford the defendant a tax deduction for the alimony according to the terms of the stipulation and, therefore, that the defendant's motion for order should be denied and the stipulation should be vacated. The plaintiff then filed a motion to open and vacate the court's order approving the stipulation, to which the defendant objected. In support of her motion, the plaintiff asserted that she had received an opinion from an accountant who had determined that the defendant's alimony payments would not be deductible under the terms of the stipulation. Following several hearings, the court presented the parties with its memorandum of decision on the postjudgment motions resolved by stipulation, which reduced the oral stipulation to writing. The plaintiff objected on the ground that the decision did not reflect her counsel's statement that, if the parties were unable to

obtain an opinion that confirmed that the alimony payments were deductible and that the plaintiff would receive those payments as contemplated, the plaintiff would not agree to the stipulation. The trial court responded that a binding agreement had been approved and ordered and that it was not contingent in nature. The plaintiff declined to withdraw her motion to open, and the court declined to deny it because there had not yet been a hearing on the merits but stated that the motion was procedurally defective. The defendant then filed a motion for sanctions and for contempt, claiming that, after settling years of litigation by stipulating to the modification, the plaintiff failed to meet her obligations under that stipulation and contested her own settlement through improper procedural mechanisms. In connection with his request for sanctions, the defendant sought an award of attorney's fees and expert fees incurred for defense against the plaintiff's motions, and he asked that the court find the plaintiff in contempt for her wilful failure to create the special needs trust and to seek the legal opinion required by the order approving the stipulation, as well as for intentionally not acting in good faith to implement that order. He requested that the order of contempt include an award of expenses he had incurred in defending against the plaintiff's motion to open and in employing an expert to draft the special needs trust that the plaintiff had failed to produce. The trial court thereafter granted the defendant's motion for contempt and for sanctions, finding by clear and convincing evidence that the plaintiff had wilfully violated the trial court's order approving the stipulation. The court awarded the defendant attorney's fees and expert fees in an amount corresponding to all litigation expenses incurred by the defendant after the date on which the trial court entered the order approving the stipulation. On appeal to the Appellate Court, that court upheld the trial court's decision on the postjudgment motions resolved by stipulation but reversed its decision with respect to the contempt order, concluding that, in light of the undisputed fact that the plaintiff made at least some effort to obtain the legal opinion she was required to secure or endeavor to secure, it was left with a definite and firm conviction that the trial court's finding of contempt was clearly erroneous. In light of that conclusion, the Appellate Court did not address the reasonableness of the award of attorney's fees and expert fees. From the Appellate Court's judgment, the defendant, on the granting of certification, appealed, claiming that the plaintiff did not comply with the legal opinion requirement but that, in any event, the trial court's award was based on a broader course of conduct than the failure to secure the legal opinion. After oral argument, and in response to a request from this court, the trial court issued an articulation, stating, inter alia, that its order was based both on the plaintiff's wilful contempt of its order approving the stipulation and on the plaintiff's subsequent litigation misconduct, which caused undue delay and expense to the defendant. As the basis for its finding of wilful contempt, the trial court noted, inter alia, that the plaintiff violated three provisions in the parties'

stipulation, the first prohibiting the parties from disparaging each other, the second requiring the plaintiff to obtain the legal opinion, and the third limiting the parties' disclosure or publication of the settlement. The court cited, as an additional basis for its finding of wilful contempt, the parties' representation at the hearing on the order approving the stipulation that the parties would work together to reduce the stipulation to writing and that, in the event of a dispute, the parties would seek the court's involvement. *Held*:

1. The trial court's order of contempt must be reversed, as none of the bases on which the court relied for that order supported it, and, accordingly, this court upheld the Appellate Court's reversal of the contempt order: with respect to the plaintiff's purported violation of the nondisparagement and nonpublication provisions of the stipulation, the defendant did not advance either ground in his motion for contempt or at the hearing on that motion, the articulation did not identify any particular statement that violated either provision, and to allow the order of contempt to rest on either basis would contravene the plaintiff's due process rights; moreover, the trial court's reliance in its articulation on the undisputed fact that there was no letter from an accountant in the court file or submitted into evidence as proof of the plaintiff's wilful violation of the stipulation's provision requiring the plaintiff to secure or endeavor to secure a legal opinion was problematic, as there was a draft written opinion by an accountant appended to one of the plaintiff's motions, the court's requirement that the plaintiff prove the existence of the letter misallocated the burden of proof because the defendant had the burden, as the party moving for the contempt order, to prove by clear and convincing evidence that the plaintiff wilfully violated this provision, and the defendant offered no testimony regarding the availability of, or the plaintiff's failure to undertake good faith efforts to obtain, the legal opinion; furthermore, the court's finding of contempt on the basis of the parties' representation that they would work together to reduce the oral stipulation to writing was also problematic, as the defendant did not seek a contempt order on this ground, thereby raising due process concerns, the defendant did not offer any evidence to prove contempt on this basis and therefore could not meet his burden of proof, and the pleadings did not support the trial court's conclusion, as the defendant's motion for order did not allege that the defendant's counsel made any effort to work with the plaintiff or her counsel to memorialize the stipulation before the defendant filed his motion for contempt, and, insofar as the stipulation obligated the parties to bring disputes over its wording to the trial court's attention, the record clearly revealed that the plaintiff did so.

2. Insofar as the trial court's award of attorney's fees and expert fees was based on litigation misconduct, it lacked the requisite findings, and, accordingly, this court remanded the case for further proceedings on the defendant's motion for sanctions; although attorney's fees generally

are not awarded to the successful party in the absence of a contractual or statutory exception, a court has inherent authority to award attorney's fees when the losing party has acted in bad faith, but the trial court in the present case failed to make the findings necessary to support its award for litigation misconduct, that is, that the plaintiff acted in bad faith and did not advance any colorable claims.

Argued February 19, 2019—officially released January 14, 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, where the court, *Grogins*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Emons*, *J.*, granted the plaintiff's motion for modification of alimony; subsequently, the court, *Emons*, *J.*, granted the plaintiff's motion to open; thereafter, the court, *Heller*, *J.*, issued certain orders in accordance with the parties' stipulation; subsequently, the court, *Heller*, *J.*, denied the plaintiff's motion to reargue or reconsider, and the plaintiff appealed to the Appellate Court; thereafter, the court, *Tindill*, *J.*, granted the defendant's motion for sanctions and for contempt, and the plaintiff filed an amended appeal with the Appellate Court, *DiPentima*, *C. J.*, and *Beach* and *Bishop*, *Js.*, which reversed the trial court's judgment only as to the finding of contempt and remanded the case with direction to deny the motion for contempt, and the defendant, on the granting of certification, appealed to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Edward M. Kweskin, with whom, on the brief, was *Sarah Gleason*, for the appellant (defendant).

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellee (plaintiff).

Opinion

McDONALD, J. This postdissolution matter stems from the parties' oral stipulation following a motion for modification of alimony, the trial court's adoption of that stipulation as a court order, and subsequent litigation efforts by the defendant, Gregory Puff, on one hand, to carry the order into effect, and by the plaintiff, Claudia Puff, on the other hand, to challenge the order. At issue is the trial court's decision granting the defendant's motion for sanctions and for contempt and awarding him more than $169,000 in attorney's fees and expert fees, i.e., all the litigation expenses he had incurred following the entry of the order adopting the stipulation. In his certified appeal, the defendant challenges the Appellate Court's judgment reversing the judgment of contempt. See *Puff* v. *Puff*, 177 Conn. App. 103, 129, 171 A.3d 1076 (2017). He contends that the award was based on a broader course of conduct than the one part of the order considered by the Appellate Court and that the trial court's award was proper. On the basis of the trial court's articulation ordered by this court, we conclude that, insofar as the award is based on contempt, it cannot stand on any of the grounds articulated by the trial court. Insofar as the award is based on litigation misconduct, it lacks the requisite findings. We therefore affirm the Appellate Court's judgment but direct that court to remand the case to the trial court for further proceedings on the defendant's motion for sanctions for litigation misconduct.

I

The record reveals the following facts, either found by the trial court or otherwise undisputed. The parties' fourteen year marriage was dissolved in 2002. The judgment of dissolution incorporated a separation agreement, under which the defendant was obligated to pay periodic alimony of $5900 per month for a period of ten years, plus biannual payments totaling an additional

$10,000 for that same period.[1] In 2009, three years before those obligations were to terminate, the plaintiff filed a motion seeking to modify the alimony related orders. The grounds alleged for the modification were an increase in the defendant's income and the plaintiff's deteriorating health due to a recent diagnosis of a serious medical issue. The trial court, *Emons*, *J.*, granted the motion, increasing the monthly alimony to $6100 and extending the duration of those payments to February, 2016, with both the amount and the duration not subject to further modification. Weeks after that decision was issued, the plaintiff filed a motion to open and vacate the judgment on the ground that the defendant had not disclosed to the court an imminent offer of employment at considerably higher compensation, which became final days after the modification was ordered. The court granted the motion in April, 2013, opening the judgment for the purpose of hearing new evidence.[2]

A

Entry of an Oral Stipulation as a Court Order

In February, 2014, the parties and their counsel appeared before the court, requesting to put an oral stipulation on the record that they had negotiated. The

[1] Upon the termination of alimony payments, the defendant also was obligated to pay the mortgage encumbering the marital residence until the mortgage was paid in full.

[2] The plaintiff has characterized the court's ruling as resting on fraud because the defendant had claimed that his earnings were expected to decrease during the hearing on the motion to modify. The defendant disputes this characterization, contending that he was unaware of his obligation to disclose a pending offer of employment that had not been formally offered and that the trial court made no express finding of fraud, just a violation of the defendant's duty to disclose. The basis of the ruling was not stated on the record. Although the plaintiff cited this purported fraud as a basis of an unclean hands defense to the defendant's motion for contempt, the trial court did not address this defense in its order finding the plaintiff in contempt. In the absence of an articulation, which the plaintiff did not request, we interpret that omission as an implicit rejection of that defense.

defendant was represented by Edward M. Kweskin, and the plaintiff was represented by Norman Roberts. Kweskin made prefatory remarks about the agreement before stating the particulars on the record. He stated that it was the parties' intention to have the court enter the stipulation as an order if the court were to approve it. He explained that this process was intended to confirm the terms on which the parties had agreed before the defendant returned to his foreign residence. Kweskin stated that the parties' intention was to distill the agreement into writing, after experts had been consulted on certain mechanics of the agreement still to be determined, and to have any disputes about the writing brought to the court for resolution consistent with the oral stipulation. He made clear, however, that the parties intended for the stipulation to be an enforceable order that was not conditioned on the execution of the written agreement.

Kweskin then recited the twelve paragraphs that comprised the stipulation, while Roberts weighed in with any clarifications that he thought necessary. The principal substantive terms of the stipulation were as follows. The defendant was required to pay, along with certain other obligations, $10,000 per month for a period of ten years, as alimony taxable to the plaintiff and tax deductible by the defendant. The plaintiff had the right to assign those payments to a special needs trust.[3] The defendant would be made a residual beneficiary of the trust, in the same proportion to the payments that he had made to the trust. In order for the defendant to be secure in his right to a tax deduction under present law or in the event of changes to the law, should any tax deduction be disallowed, he had the right to recoup from the trust the value of that deduction and any penal-

[3] Roberts explained that the purpose of the special needs trust was to keep the plaintiff's income and assets below the threshold necessary to qualify for government disability benefits.

ties assessed if sufficient offsets could not be made from pending payment obligations to the plaintiff.

The defendant also was obligated to make a specific contribution toward the attorney's fees of a designated special needs trust attorney. His counsel had the right to review the terms of the trust before it was executed by the plaintiff to ensure that the trust conformed to the terms of the oral stipulation.

The stipulation obligated the plaintiff to "immediately . . . secure or endeavor to secure a legal opinion that the deductibility by the defendant of the alimony is not impacted by any action taken by the plaintiff to assign the alimony to the trust." Counsel acknowledged that the mechanics of transferring the alimony by means that would ensure the deduction had not yet been determined, but the stipulation further provided that, "in order to accomplish the deductibility . . . the parties, through counsel, will work in good faith to achieve [that method], with the result that the defendant shall have the right [under federal tax law] to deduct the alimony . . . ."

Roberts informed the court that he had been told that the tax deduction would not be a problem and that they were in the process of getting an opinion letter. Roberts explained that "the linchpin of this whole deal is that [the defendant] wants the income tax deduction on the $10,000 a month . . . and that [the plaintiff] wants to actually receive the $10,000 a month. You can imagine that the delta between those two things, given what the financial affidavits look like, is somewhere in the neighborhood of 40, 45 percent. So it's really, really important to each of these people to have the tax treatment that we believe, and have both been advised, exists. *In order* [*to*] *sign off on paragraph 10* [allowing the defendant to recoup disallowed deductions and penalties], [the plaintiff], in an, I don't even think it's

abundance of caution, just some, in prudent practice, is going to get an opinion letter from a special needs and a tax person, who will opine that, yes, [the defendant's] deductibility is not impacted at all by the scheme that we contemplate." (Emphasis added.) Just before Kweskin put the recoupment, or safety net, provision on the record, Roberts stated that this provision "is the reason that we are going to need the opinion letter *before this can be done*." (Emphasis added.)

After the stipulation was read into the record, the court canvassed the parties. It inquired whether their counsel had discussed the terms of the stipulation with them, whether they understood the terms, and whether they agreed that the terms were fair and equitable. The parties gave affirmative responses to each question. The plaintiff asked only one question, obtaining confirmation that she would be receiving $10,000 per month for ten years. The court then approved and ordered the stipulation. The court suggested that the parties "probably should have the full agreement with the terms of the trust . . . also so ordered by the court."

B

The Defendant's Motion for Order and the Plaintiff's Objection Thereto

In April, 2014, approximately two months after this order was entered, Roberts sought permission to withdraw as the plaintiff's counsel, which the court granted the following month. In May, 2014, the defendant filed a motion for order, asking the court to approve a written embodiment of the oral stipulation prepared by his counsel, a copy of which had been provided to the plaintiff on that date. The day before a June hearing on the motion, the plaintiff, through new counsel, Amy J. Greenberg, filed an objection. Although the objection addressed the defendant's proposed draft, asserting that it contained certain additions or omissions that

rendered it nonconforming to the oral stipulation, its principal thrust was numerous arguments as to why the stipulation itself was not binding or could not be enforced. The plaintiff claimed that, unbeknownst to the parties when they drafted the stipulation, it was impossible either to create a legally valid special needs trust or to afford the defendant a tax deduction for the alimony under the terms of the stipulation.[4] She further contended that the stipulation was too ambiguous and contained too many unknowns to result in an enforceable agreement, that these uncertainties precluded the parties' knowing consent, that the terms were unconscionable,[5] and that the canvass of the plaintiff had been insufficient. The plaintiff asserted that the defendant's motion for order should be denied and that the stipulation should be vacated.

The trial court held a hearing on the defendant's motion for order in June, 2014. Greenberg argued, among other things, that viability of the stipulation was dependent on the availability of the tax deduction and that, after the oral stipulation was made, Roberts had obtained an expert opinion from an accountant that the alimony would not be deductible under the oral stipulation's terms. In response to Kweskin's claim that he had never seen this opinion, Greenberg countered that Kweskin had been made aware of it, claiming that Roberts' records reflected communications between

[4] The plaintiff contended that the defendant's ability to invade the trust as a residuary beneficiary and as a means of recovering disallowed deductions rendered the trust invalid because the law requires the plaintiff to be the sole beneficiary and the government provider of disability benefits to be named as a beneficiary. She further contended that the provision making the defendant a residuary beneficiary of the trust into which he was to deposit the alimony payments prevented him from claiming those payments as a deduction under tax law.

[5] The plaintiff argued that the application of the provision that permitted the defendant to recoup any tax deduction disallowed plus any penalties assessed could result in the plaintiff's receiving less than she had before the modification, or even nothing.

counsel regarding the opinion and whether the defendant would be willing to forgo the residuary benefit to save the tax deduction. The court declined to address this matter, concluding that it was probably necessary to address the issues before the court in two steps, first determining whether the defendant's written stipulation accurately reflected the oral stipulation and then considering arguments as to why the agreement could not be carried out. The court acknowledged that the plaintiff's objection had included arguments as to discrepancies between the oral stipulation and the defendant's written stipulation and indicated that those concerns would be considered. The court scheduled another hearing on the matter for a later date.

C

The Plaintiff's Motion To Open and Vacate the February, 2014 Order

The day after the June hearing, the plaintiff filed a motion to open and vacate the February, 2014 order approving the oral stipulation. The grounds for the motion mirrored those enumerated in her objection to the defendant's motion for order, including mutual mistake and impossibility. One difference was that the motion to open acknowledged the parties' expectation that they would receive an "opinion from a tax expert" that the defendant's ability to deduct the payments would not be impacted by the scheme that they contemplated, and asserted that such expert—identified as certified public accountant Ryan C. Sheppard—had determined that the payments would not be deductible under the stipulation's terms.

The defendant objected to the motion to open and vacate on procedural and substantive grounds. He claimed that the motion was defective because it was not accompanied by a memorandum of law in violation

of the rules of practice.[6] He also claimed that the plaintiff's "scattershot challenge" sought to undo a carefully reviewed agreement to which she had consented in an effort to renegotiate terms more favorable to her. He further asserted that, if, as the plaintiff contended, the agreement contains a provision benefitting him that jeopardized creation of a valid special needs trust; see footnote 4 of this opinion; it was within the defendant's power to waive that provision in order to eliminate any infirmity.

The parties appeared again before the court for an August, 2014 hearing. The defendant submitted to the court a revised draft memorializing the oral stipulation, aimed at addressing the plaintiff's earlier objections. The plaintiff argued that the court should not sign off on the draft because the terms are unenforceable under the law for the reasons set forth in her objection and motion to open, and because the draft did not incorporate the terms of the special needs trust. She further argued that the defendant's draft did not include a critical term—Roberts' statement that the plaintiff would not sign off on the agreement if the expert's opinion did not confirm the expectations of the parties. Because these expectations could not be fulfilled, there was no agreement, according to the plaintiff. In response, the court stated: "I think [that] what the parties believed at the time may not be what they believe today." The court explained that it first would turn the stipulation into a written order and then would deal with any purported problems in carrying out that order. The plaintiff reiterated concerns about two matters omitted from the defendant's draft, which the court agreed to consider.

[6] The plaintiff's motion was, as the trial court recognized, more comprehensive than a typical motion, and it provided legal analysis and authority in support of its mistake of law and impossibility grounds. The defendant contested the propriety of treating the submission as a hybrid motion and memorandum of law, and pointed out that it did not provide legal analysis for all of the plaintiff's claims.

Another hearing was scheduled for November, 2014. Shortly before that hearing, each of the parties disclosed a special needs tax attorney as an expert witness who would offer an opinion in support of their respective views as to whether a legally valid trust, rendering the alimony payments tax deductible to the defendant, could be created under the terms of the oral stipulation. The plaintiff filed a motion in limine seeking to preclude the defendant's expert from offering such an opinion predicated on adding or deleting terms to the oral stipulation. At this time, the plaintiff also filed a memorandum of law in support of her motion to open, which the defendant objected to on the grounds that it was untimely and a "sham" that merely mirrored her motion. See footnote 6 of this opinion.

At the November, 2014 hearing, both parties had their expert witnesses present. At the commencement of the hearing, the court, apparently unexpectedly, presented the parties with a "Memorandum of Decision on Post-judgment Motions Resolved by Stipulation Approved and So Ordered on February 19, 2014," which distilled the oral stipulation into writing.[7] The court announced that the decision was intended to resolve the defendant's motion for order. The plaintiff objected that the decision did not reflect Roberts' uncontested statement setting forth a "condition precedent," namely, that, if they were unable to obtain an opinion confirming the linchpin of the agreement—that the defendant would get the deduction and the plaintiff would get the con-

[7] The same day as the hearing, the plaintiff filed a motion to dismiss and/or to strike the defendant's motion for an order approving his draft stipulation, which was dated the day before the trial court presented them with the written stipulation. In the plaintiff's motion, she argued that the oral stipulation was not viable because of the failure of the condition precedent of obtaining a tax opinion that the alimony would be tax deductible under the terms of the stipulation. Two months later, the defendant filed an objection, challenging the motion on procedural, jurisdictional (mootness), and substantive grounds. The court thereafter denied the plaintiff's motion.

templated payments—the plaintiff would not "sign off" on the stipulation. In response to these arguments, the court stated its view that a binding agreement had been approved and ordered in February, 2014, and that it was not contingent in nature.

After the plaintiff further argued that the parties' erroneous belief that these conditions could be fulfilled gave rise to a mutual mistake of law, the court sought clarification of the plaintiff's position. The court questioned whether the plaintiff was claiming that there was a condition precedent to the existence of an agreement or, alternatively, that a term of the contract could not be performed. The court explained that, if the former, the plaintiff's argument would mean that the February, 2014 order never was effective because the condition precedent would never occur. Only if the plaintiff's claim was the latter would she move to open an approved order on the ground that the agreement cannot be performed. The court acknowledged that the plaintiff could argue in the alternative.

Greenberg explained that she had filed the earlier motion to open without having reviewed all of the facts and the record, filing it as a "protective mechanism" because she had inherited the case near the four month deadline for filing a motion to open. She characterized the motion as unnecessary and "superfluous." Greenberg stated that the plaintiff's position was that there was no final judgment triggering the four month period to move to open because no notice of judgment had been sent out after the oral stipulation was ordered and because the stipulation was too indefinite and left too many things open to render it final.

Before ascertaining whether the plaintiff was withdrawing the motion to open, the court inquired whether any of the terms of the agreement had been carried out. Kweskin represented that the defendant had been

making the $10,000 monthly alimony payment and had provided funds to his counsel to hold in escrow for some of the other payments due. When the court stated to Greenberg that the defendant's alimony payments suggested that he believed that there was a final order, Greenberg characterized the payments as "gratuitous."[8]

Greenberg declined to withdraw the motion to open and, instead, attempted to recast it as a motion to vacate the oral stipulation rather than to open and vacate the February, 2014 order. The defendant challenged the recast motion as procedurally improper. The court declined to deny the motion to open because there had not yet been a hearing on the merits and it was unclear what direction the plaintiff was taking. The court nonetheless stated that the motion was procedurally defective for various unspecified reasons and advised that the plaintiff could not reclaim it.

The plaintiff requested that, because the parties' experts were present, the court hear their testimony regarding whether the alimony was tax deductible and whether a valid special needs trust could be formed under the terms of the stipulation. The court rejected the request in the absence of a proper pending motion.

In bringing the hearing to a close, the court stated that it interpreted the plaintiff's position to be that nothing that was legally binding occurred on February 19, 2014, that the plaintiff does not need to do anything, and that the defendant is paying $10,000 a month gratuitously. The court then stated: "It does seem the ball is probably in your court, Attorney Greenberg. Unless [the defendant] and his counsel decide that they want to take steps to enforce the stipulation—then, of course,

[8] Although not expressly stated, we interpret Greenberg's characterization of the payments as "gratuitous" to refer to the amount in excess of the defendant's obligation under the court's orders in place before the February, 2014 stipulation was ordered.

Attorney Kweskin would file the appropriate motion, presumably for contempt. But, I think that's where we are." Greenberg responded: "I don't think there was anything that my client probably even had to do at this point."

D

The Plaintiff's Motion To Reargue or Reconsider the Decision Adopting the Oral Stipulation

The plaintiff thereafter filed a motion to reargue or reconsider the court's November, 2014 order memorializing the oral stipulation. She asked the court to vacate both that decision and the oral stipulation, thereby reinstating the case to its position prior to the stipulation. The plaintiff contended that she had been denied a due process hearing on all of the issues that she had raised in her objection to the defendant's motion for order. The defendant objected to the motion principally on the ground that it reiterated arguments from the motion to open that the plaintiff had been given the opportunity but declined to pursue. The court denied the motion to reargue or reconsider.

E

Motion for Sanctions and for Contempt

Concurrently with his objection to the plaintiff's motion to reargue, the defendant filed a motion for sanctions and for contempt. Broadly stated, the factual premise of the defendant's motion was that, after settling five years of litigation by stipulating to a modification, the plaintiff failed to meet her obligations under that stipulation and instead contested her own settlement through improper procedural mechanisms. In the request for sanctions, the defendant sought an award of attorney's fees and expert fees incurred for defense against (1) the plaintiff's motion to open and vacate, which was not accompanied by the memorandum of

law required by the rules of practice and thereby shifted the burden of legal research to the defendant, and which the plaintiff ultimately did not pursue in the form presented to the court, and (2) the plaintiff's motion to reargue or reconsider, on the ground that the motion raised the same claims as the motion to open, despite the court's instruction that the plaintiff could not reclaim the latter motion after she had "withdrawn" it.

The defendant further asked the court to find the plaintiff in contempt for (1) her wilful failure to seek the legal opinion required by the order, i.e., an opinion from a lawyer, (2) her wilful failure to cause the special needs trust to be drafted, and (3) intentionally not acting in good faith to implement the order. The defendant requested that the order of contempt include an award of legal fees for expenses incurred in defending against the motion to open and costs incurred in having a special needs trust expert draft the trust that the plaintiff had failed to produce.

At the hearing on the motion for sanctions and for contempt, neither party presented testimony. The only documentary evidence submitted, other than the parties' financial affidavits, was an affidavit from Kweskin "in support of the defendant's request that the court order that . . . the plaintiff pay all or a significant portion of the defendant's legal fees and costs as part of the sanctions against the plaintiff for the proliferation of unnecessary, inconsistent, and oppressive litigation which unfairly has driven up the [defendant's] litigation expenses incurred since the parties stipulated to a post-judgment alimony modification order on February 19, 2014 . . . ."

With a limited exception that we will discuss later, the hearing was largely a colloquy between the parties' counsel and the trial court, *Tindill*, *J.* In comments to the parties, the court emphasized that the parties had

been canvassed as to their understanding of, and agreement to, the oral stipulation. The court took issue with inconsistencies in the plaintiff's legal positions, characterizing the plaintiff's position as: "It was an order, it wasn't, it was contingent, it wasn't." The court pointed to the fact that the plaintiff had accepted the $10,000 monthly alimony payments while at the same time arguing that the court order wasn't valid, and stated: "She doesn't get to pick and choose, counsel. You cannot have it all kinds of ways. It doesn't work that way." The court also pointed to the plaintiff's failure to go forward on her motion to open, which would have provided evidence from both sides' experts regarding the crux of the plaintiff's position.

After the court renewed concerns about the plaintiff's litigation efforts that took the position that the agreement was unenforceable, Greenberg argued that the plaintiff had "a good faith basis for raising all of the issues that she did. And saying it was . . . too many contingencies in that February 19th stipulation to make it a final, viable, definitive order. And that's what you need for contempt. You need something that's . . . a good faith belief, which I think she had, that this was not a final order, and was not something that she had to follow. And she did come through with an . . . opinion from an attorney, Lisa Davis."[9]

The only discussion that addressed the defendant's specific grounds for contempt related to the plaintiff's obligation to obtain a "legal opinion" that the tax deduction was available under the terms of the agreement. In discussing the impossibility argument, Greenberg mentioned that the plaintiff had sought an opinion letter from a tax person that revealed that the special needs trust would have been illegal under the terms of the

[9] Davis is the special needs trust lawyer who was designated as the plaintiff's expert in support of her motion to open and vacate.

order. The court inquired where the letter was, and Greenberg replied that she did not have it with her but would attempt to find it on her computer. The court then asserted that, even if it assumed that the letter existed, "[t]he problem with the whole thing is that [the plaintiff] agreed to what was made a court order and then she decided [that] she didn't like the agreement." Greenberg attempted to rebut this view by bringing to the court's attention an e-mail exchange between counsel in which Roberts informed Kweskin that research suggested that the deductibility of the alimony would be put in jeopardy if the defendant were a residuary beneficiary and inquired whether it would be a problem for the defendant not to be a residuary beneficiary of the trust. Kweskin questioned whether it was proper for Greenberg to read this e-mail to the court, to which the court replied: "Probably not." Nonetheless, Greenberg continued, noting that Kweskin indicated that the defendant would not agree to relinquish residuary benefits.

Kweskin's response on this subject was that the plaintiff was required to obtain a legal opinion from a lawyer, not an accountant. He pointed out that the letter that Greenberg referred to was "a draft letter for discussion purposes only from an accountant.'' Presumably in response to Greenberg's impossibility argument, Kweskin argued that the defendant had brought a special needs trust attorney to the hearing on the plaintiff's motion to open and vacate who came prepared to offer an opinion that the defendant's payments to the trust would be tax deductible.

After these exchanges, the court posed questions directly to the parties, who had been sworn in at the court's direction at the outset of the hearing. The only questions directed to the plaintiff related to her income, expenses, and needs. The questions directed to the defendant addressed whether he had made any of the payments required under the order (yes); whether he

had done so because he believed that he was obligated to do so (yes); and whether the special needs trust drafted by his expert afforded him the tax deduction for the alimony ("it did") and the residual benefits ("I think it did"; "[y]es"). At the close of the hearing, the court informed the parties that it would take judicial notice of the "entire file" to decide the motion.

The court thereafter issued an order, stating in relevant part: "The court, having reviewed relevant portions of the court file, considered the parties' respective financial affidavits, testimony of the parties, argument of counsel, and the criteria set forth in [General Statutes] § 46b-82, hereby grants the defendant's postjudgment motion for sanctions and for contempt. The court finds by clear and convincing evidence that a court order was entered on February 19, 2014, that the plaintiff violated that court order, and that the plaintiff's violation of the order was wilful.

"The defendant is awarded attorney's [fees] and expert fees, postjudgment, in the amount of $169,225.61 . . . ." This award corresponded to the amount Kweskin provided to the court at the hearing for all litigation expenses the defendant incurred after the date on which the oral stipulation was entered as an order.

After the plaintiff appealed from the judgment of contempt to the Appellate Court, the defendant filed a motion for an articulation. He asserted that the court's order could be construed as making the award based on contempt, on litigation misconduct, or on both, and asked the court to clarify this matter. The trial court denied the request, and the defendant did not seek review of that decision.

F

Appellate Proceedings

Before the Appellate Court, the plaintiff challenged (1) the decision on postjudgment motions resolved by

stipulation, both as to whether the underlying stipulation was enforceable and as to whether it was proper to issue that decision, and (2) the order of contempt, both as to the merits and the reasonableness of the award. See *Puff* v. *Puff*, supra, 177 Conn. App. 103. The Appellate Court affirmed the judgment with respect to the decision on postjudgment motions and reversed the judgment with respect to the contempt order. See id., 105–106. In reversing the order of contempt, the Appellate Court apparently assumed that the only basis for the award was the purportedly wilful violation of the plaintiff's obligation to "secure or endeavor to secure a legal opinion that the deductibility by the defendant of the alimony is not impacted by any action taken by the plaintiff to assign the alimony to the trust." (Internal quotation marks omitted.) Id., 114. In rejecting that basis, it reasoned: "It is undisputed that the plaintiff made some effort to secure such a letter. Relying on the draft opinion letter [from a certified public accountant], she contends that it was impossible to obtain a correct opinion that the defendant's tax deductibility was not jeopardized by his putative status as residual beneficiary. The defendant counters that not only was it possible to obtain such a letter, but that he had obtained such an opinion. In light of the undisputed fact that the plaintiff made at least some effort to secure the opinion letter, we are left with a definite and firm conviction that the court's finding of contempt was clearly erroneous." Id., 128–29. In light of its reversal on the merits, the Appellate Court did not address the reasonableness of the award.

This court denied the plaintiff's petition for certification to appeal from the Appellate Court's judgment insofar as it upheld the trial court's decision on postjudgment motions; see *Puff* v. *Puff*, 327 Conn. 994, 175 A.3d 1245 (2018); but granted the defendant's petition to appeal from that judgment insofar as it reversed the

contempt order. See *Puff* v. *Puff*, 327 Conn. 994, 175 A.3d 1245 (2018). In his certified appeal, the defendant contends that the plaintiff did not comply with the legal opinion requirement but that, in any event, the trial court's award was based on a broader course of conduct beyond the failure to obtain that opinion.

After oral argument, this court issued an order to the trial court, *Tindill*, *J.*, directing it to provide this court with an articulation as to five matters: (1) whether the court's order granting the defendant's motion for sanctions and for contempt was based solely on contempt or also on litigation misconduct; (2) which part(s) of the February 19, 2014 order provided the basis for the finding of contempt; (3) what facts supported the finding of contempt for each such part; (4) what competent evidence those factual findings rested on; and (5) the basis for the $169,225.61 award. See Practice Book § 61-10 (b) (permitting reviewing court to order articulation); see also Practice Book § 60-2 (permitting reviewing court to order judge to take any action necessary to complete record for proper presentation of appeal).[10]

In response, the trial court issued an articulation stating that its order was based both on the plaintiff's wilful contempt of the February, 2014 court order and her subsequent litigation misconduct, which caused undue delay and expense to the defendant. The trial

[10] We concluded that an articulation was necessary not merely because the court's order failed to identify what acts provided the basis for the finding of contempt. It also was necessary because the court indicated that its decision rested on undesignated, "relevant portions" of the entire judicial file for the protracted litigation in the case and because the amount of the award and the court's comments at the hearing focusing on the plaintiff's litigation efforts raised the distinct possibility that the court had rested the award in part on litigation misconduct. Moreover, this is not a case that could be conclusively resolved if we were to determine that there was one proper basis for making an award because that determination could be insufficient to address the open question of whether the amount of the award is reasonable.

court identified the parts of the February, 2014 order that were the bases for the court's finding of wilful contempt: (1) paragraph 8, which prohibits either party from disparaging the other personally or professionally; (2) paragraph 9, which requires the plaintiff to endeavor to secure a legal opinion; and (3) paragraph 11, which limits the parties' disclosure or publication of the settlement. An additional basis for the contempt, as explained by the trial court, was "the representation on February 19, 2014, that the parties would subsequently work together to reduce the agreement to writing consistent with the agreement read into the record. In the event of a dispute over the wording requiring the court's involvement, the parties asked that the court resolve the dispute consistent with the expressed oral agreement." The articulation set forth seven facts,[11] without assigning them as support for any particular violation of the order or designating them as applicable to contempt or litigation misconduct and cited generically to the following evidence in support of its factual findings: the parties' "testimony" and their financial affidavits filed at the contempt hearing; various transcripts or recordings of hearings; and thirty-two pleadings filed by the plaintiff between March, 2009, when she filed her motion for modification, and February, 2014, when the court adopted the stipulation as an order of the court. The basis of the court's award of litigation costs was not explained in relation to either contempt or litigation misconduct but as resting on "representations of counsel," the defendant's testimony at the hearing on the motion for sanctions and for contempt, and the affidavit of fees submitted by Kweskin.

We are compelled to conclude that the trial court's judgment of contempt must be reversed, although our decision is necessarily based on different and broader

[11] We will discuss these facts as they become relevant to the discussion that follows.

grounds than the one adopted by the Appellate Court in reaching the same conclusion. We further conclude that the sanction for litigation misconduct must be reversed.

II

The following principles are material to our review of the contempt order. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Leah S.*, 284 Conn. 685, 692, 935 A.2d 1021 (2007); see also *Blaydes* v. *Blaydes*, 187 Conn. 464, 467, 446 A.2d 825 (1982) ("[c]ourts have inherent power to coerce compliance with their orders through appropriate sanctions for contemptuous disobedience of them"). The present case involves allegations of indirect civil contempt. "A refusal to comply with an injunctive decree is an indirect contempt of court because it occurs outside the presence of the trial court." (Internal quotation marks omitted.) *Brody* v. *Brody*, 315 Conn. 300, 317, 105 A.3d 887 (2015).

"[C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts." (Emphasis omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 333, 152 A.3d 1230 (2016); see also *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 468, 165 A.3d 1124 (2017) (civil contempt may be founded only on clear and unambiguous court order). In part because the contempt remedy is "particularly harsh"; *Blaydes* v. *Blaydes*, supra, 187 Conn. 467; "such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 382, 107 A.3d 920 (2015).

To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. See, e.g., *Eldridge* v. *Eldridge*, 244 Conn. 523, 529, 710 A.2d 757 (1998); *Connolly* v. *Connolly*, 191 Conn. 468, 483, 464 A.2d 837 (1983). "The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. *Mallory* v. *Mallory*, 207 Conn. 48, 57, 539 A.2d 995 (1988)." (Internal quotation marks omitted.) *Eldridge* v. *Eldridge*, supra, 532.

It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. See, e.g., *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 671, 133 A.3d 482 (2016); *Marshall* v. *Marshall*, 151 Conn. App. 638, 651, 97 A.3d 1 (2014); *Statewide Grievance Committee* v. *Zadora*, 62 Conn. App. 828, 832, 772 A.2d 681 (2001); see also *Latino Officers Assn. City of New York, Inc.* v. *New York*, 558 F.3d 159, 164 (2d Cir. 2009). If the moving party establishes this twofold prima facie case, the burden of production shifts to the alleged contemnor to provide evidence in support of the defense of an inability to comply with the court order. See, e.g., *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, 294 Conn. 384, 397, 985 A.2d 319 (2009); *Eldridge* v. *Eldridge*, supra, 244 Conn. 532; *Leslie* v. *Leslie*, 174 Conn. 399, 403, 389 A.2d 747 (1978); see also *Gascho* v. *Global Fitness Holdings, LLC*, 875 F.3d 795, 800 (6th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 2576, 201 L. Ed. 2d 294 (2018); *Combs* v. *Ryan's Coal Co.*, 785 F.2d 970, 984 (11th Cir.), cert. denied sub nom. *Simmons* v. *Combs*, 479 U.S. 853, 107 S. Ct. 187, 93 L. Ed. 2d 120 (1986).

The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. See, e.g., *In re Leah S.*, supra, 284 Conn. 693. If we answer that question affirmatively, we then review

the trial court's determination that the violation was wilful under the abuse of discretion standard. See id., 693–94.

In conducting this review, we must be mindful of due process concerns that arise in cases of indirect contempt, i.e., where the court has not personally observed the contempt. In the absence of an admission of contempt, indirect contempt must be proven by clear and convincing evidence. See *Brody* v. *Brody*, supra, 315 Conn. 318–19; see also *Edmond* v. *Foisey*, 111 Conn. App. 760, 771, 961 A.2d 441 (2008) ("A finding of indirect civil contempt must be established by [clear and convincing evidence] that is premised on competent evidence presented to the trial court and based on sworn testimony. . . . A trial-like hearing should be held if issues of fact are disputed." [Emphasis omitted; internal quotation marks omitted.]). "A judgment of contempt cannot be based on representations of counsel in a motion, but must be supported by evidence produced in court at a proper proceeding." (Internal quotation marks omitted.) *Kelly* v. *Kelly*, 54 Conn. App. 50, 60, 732 A.2d 808 (1999); accord *Edmond* v. *Foisey*, supra, 772; see also *Baker* v. *Baker*, 95 Conn. App. 826, 832–33, 898 A.2d 253 (2006).

In applying these standards to the record in the present case, we are compelled to conclude that the order of contempt must be reversed. Insofar as the articulation cites paragraphs 8 and 11 of the oral stipulation, respectively setting forth nondisparagement and nonpublication obligations, as bases for contempt, the defendant did not advance either ground in his motion. The record does not indicate that either ground was belatedly advanced at the hearing on the motion. Nor does the articulation identify any particular statement that violates either provision. It is evident that to allow the order of contempt to rest on either basis would contravene the plaintiff's due process rights. "[D]ue process

of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.'' (Internal quotation marks omitted.) *Brody* v. *Brody*, supra, 315 Conn. 317.

The articulation also relies on paragraph 9 of the oral stipulation, which obligated the plaintiff to "secure, or endeavor to secure, a legal opinion that deductibility by the defendant is not impacted by any action taken by the plaintiff to assign the alimony to the trust."[12] The articulation recites as proof of the plaintiff's wilful violation of this provision the "undisputed" fact that there was no letter from a certified public accountant in the court file or such a letter submitted into evidence. There are two problems with this reasoning. First, the accountant's draft written opinion was in the court file; a copy is appended to the plaintiff's motion to reargue and reconsider the court's November, 2014 memorandum of decision memorializing the parties' oral stipulation.[13] Second, and more fundamental, the court mis-

[12] The defendant conceded at oral argument before this court that a legal opinion that the deductibility would be impacted if the alimony were assigned to the trust would meet this obligation.

[13] The thirteen page document, dated March 1, 2014, is stamped "Draft—For Discussion Purposes Only." It opines that payments by a former spouse to a third party (i.e., the special needs trust) could qualify as tax deductible alimony but that such payments would be disqualified if the payor (the defendant) is a residuary beneficiary of the trust. The draft cites various federal tax code provisions and related agency regulations/rulings, applicable case law, and a trust treatise in support of its opinion. It is unclear whether the document's stamp for "discussion purposes only" was related to a footnote appended to the section heading entitled "Conclusion" that stated: "The advice was not intended or written by the practitioner to be used, and that it cannot be used by any taxpay[er], for the purpose of avoiding penalties that may be imposed on the taxpay[er]." Comments from Kweskin during the hearing on the motion for sanctions and for contempt reflect that he had seen this opinion letter.

This opinion letter also was referenced in the plaintiff's earlier filed motion to open and vacate, which indicated that the opinion was "annexed" to that motion. We did not find a copy of the opinion appended to this motion and

allocates the burden of proof to the plaintiff. It was the defendant's burden, as the moving party, to prove by clear and convincing evidence that the plaintiff had wilfully violated this obligation. An allegation contained in the defendant's motion for contempt does not suffice. See *Kelly* v. *Kelly*, supra, 54 Conn. App. 60. The defendant offered no testimony regarding the availability of the written opinion despite the plaintiff's claim of responsibility, or the plaintiff's failure to undertake good faith efforts to obtain the opinion letter. The only documentary evidence he submitted relevant to contempt, his counsel's affidavit in support of the request for attorney's fees, did not address this obligation.

Even if the trial court could have viewed statements by Greenberg asserting that the plaintiff had obtained the accountant's opinion to meet her legal opinion obligation as a judicial admission that relieved the defendant of his burden of production; see *Kanopka* v. *Kanopka*, 113 Conn. 30, 39, 154 A. 144 (1931) (noting that judicial admission, which "may be made by a party as well as by his counsel," does away with need for evidence to prove fact admitted); see also *Brye* v. *State*, 147 Conn. App. 173, 178, 81 A.3d 1198 (2013) ("Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . They excuse the other party

have no way of knowing whether it never was included or whether it was included but became separated from the motion after it was filed.

We agree that the opinion letter was never submitted into evidence. When Greenberg attempted to state the contents of the opinion letter at the November, 2014 hearing on the motion to open and vacate, the defendant objected. The court, *Heller*, *J.*, sustained the objection and noted that the plaintiff could introduce the letter later. She did not do so in that proceeding. When the location of the letter was raised at the subsequent contempt hearing, the trial court, *Tindill*, *J.*, effectively conveyed that the opinion was immaterial because, even if it assumed that the letter existed, "[t]he problem with the whole thing is that [the plaintiff] agreed to what was made a court order and then she decided [that] she didn't like the agreement." Nonetheless, it would have been the better practice for the plaintiff to formally submit this document into evidence.

from the necessity of presenting evidence on the fact admitted and are conclusive on the party making them." [Internal quotation marks omitted.]); the judicial admission would not suffice as proof of the fact admitted.[14]

The last basis on which the court's articulation rested its finding of contempt was the parties' representation to the court that they would subsequently work together to reduce the agreement to writing consistent with the oral stipulation put on the record and that, in the event

[14] We observe that the trial court's reliance on the absence of the accountant's opinion from the record necessarily implies that it disagreed with the defendant that the "legal opinion" required was one from an attorney. The accountant's opinion would otherwise be immaterial. The record does not reflect the reason for the court's disagreement. It may be that the court concluded that the term "legal opinion" did not plainly and unambiguously mean one from an attorney and reasonably could mean an opinion on tax law from a professional qualified to provide that opinion for the purpose for which it was given. That determination would have permitted the court to consider Roberts' statement when the oral stipulation was put on the record, referring to the parties' intention to seek advice from "a special needs trust and a tax person." See *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 390 ("[b]ecause a stipulation is considered a contract, [o]ur interpretation of a separation agreement that is incorporated into a dissolution decree is guided by the general principles governing the construction of contracts" [internal quotation marks omitted]); see also *Parisi* v. *Parisi*, supra, 315 Conn. 382–83 (agreement incorporated into dissolution judgment is construed under contract principles, under which clear and unambiguous language renders parties' intent question of law, and extrinsic evidence is admissible to explain ambiguity in instrument). Alternatively, the court may have relied on estoppel. At the hearing on the defendant's motion for order, when the plaintiff first brought the accountant's opinion to the court's attention, the defendant argued that the plaintiff had never provided him with that opinion, as she was required to under the stipulation. This statement clearly implied that an opinion from an accountant could meet that obligation. The plaintiff's assumption that this was the case is reflected in two court filings prior to the defendant's moving to hold her in contempt. See, e.g., *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 708, 47 A.3d 364 (2012) ("[t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done" [internal quotation marks omitted]). Whether an accountant's letter is sufficient demonstrates an ambiguity, making contempt inappropriate. In other words, it was a reasonable interpretation to believe that an accountant's letter was enough.

of a dispute over the wording, they would ask the court to resolve the dispute consistent with the expressed oral agreement. There are at least three problems with a finding of contempt on this basis. First, this too was not a ground on which the defendant sought an order of contempt, raising the same due process concerns previously cited.[15] Second, presumably because this ground was not included as part of his contempt motion or related pleadings, the defendant did not offer any evidence to prove contempt on this basis, and, therefore, he could not meet his burden of proof. Third, the pleadings do not support the conclusion that the trial court reached. The defendant's motion for order does not allege that his counsel made any effort to work with the plaintiff or her counsel to memorialize the stipulation prior to filing that motion. The motion indicates that the defendant's draft was provided to the plaintiff for the first time on the same day that the defendant filed the motion. Insofar as the stipulation obligated the parties to bring disputes over wording to the court's attention, the record clearly reveals that the plaintiff did so. The court's finding of contempt on this basis also cannot stand.

None of the bases relied on by the trial court for its order of contempt supports that order. Although there were two other bases advanced in the defendant's motion that the court did not cite in its articulation, we must infer that the trial court rejected them. See footnote 2 of this opinion (applying similar inference to court's failure to address plaintiff's unclean hands defense). Therefore, the order granting the defendant's motion for contempt must be reversed.

[15] The defendant did include in his allegations of fact that the trial court's memorandum of decision memorializing the oral stipulation "became necessary as a result of the plaintiff's refusal jointly to submit in writing the terms the parties had orally agreed to on February 19, 2014. However, the defendant never claimed that the plaintiff's conduct in this particular regard constituted contempt.

III

This leaves the ground of litigation misconduct as a purported basis for the court's $169,225.61 award of attorney's fees and expert fees. The trial court's order, even as supplemented by the articulation, is fatally flawed.

An exception to the common-law rule that attorney's fees are not allowed to the successful party in the absence of a contractual or statutory exception "is the inherent authority of a trial court to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . [A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the [bad faith] exception absent *both clear evidence* that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . *and a high degree of specificity in the factual findings* of [the] lower courts. . . . Whether a claim is colorable, for purposes of the [bad faith] exception, is a matter of whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts had been established. . . . To determine whether the [bad faith] exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations of court orders; [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation. . . .

"[Our case law] makes clear that in order to impose sanctions pursuant to its inherent authority, *the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in*

bad faith." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Berzins* v. *Berzins*, 306 Conn. 651, 661–63, 51 A.3d 941 (2012); see *Maris* v. *McGrath*, 269 Conn. 834, 846–47, 850 A.2d 133 (2004); *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 394, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999); see also *Lederle* v. *Spivey*, 332 Conn. 837, 848 n.8, 213 A.3d 481 (2019) (concluding that, although subordinate findings must have high degree of specificity, trial court need not separately indicate which factual findings relate to which prong, colorability or bad faith, because subordinate factual findings that support bad faith could also support lack of colorability).

In the present case, even after the court was afforded an opportunity to articulate the basis of its award, it not only failed to support its decision with a high degree of specificity, it failed to make the two critical findings necessary to support its award for litigation misconduct—that the plaintiff acted in bad faith and failed to advance any colorable claims.[16] Perhaps the trial court operated under the misimpression that no such findings are required when litigation misconduct arises in connection with contempt. Such an approach, however, clearly would be in tension with our case law not only as to litigation misconduct, but also as to contempt, which directs parties to resort to the courts rather than to self-help to obtain relief from court-ordered obligations. See, e.g., *Sablosky* v. *Sablosky*, 258 Conn. 713, 720, 722, 784 A.2d 890 (2001); see also *In re Leah S.*, supra, 284 Conn. 700 (court's contempt case law enforces "important public policy against resorting to

[16] Certain comments by the court at the hearing on the motion for sanctions imply that the court may have held this view, including the court's complaint that the plaintiff had accepted the $10,000 monthly alimony payments while disputing the validity of the agreement. The implication is not a necessary one, however, and we will not supply it by inference in the present context.

self-help tactics"). The defendant did allege facts in support of such findings. In other cases in which the trial court has failed to make the essential findings due to the application of an incorrect legal standard, we have reversed and remanded for further proceedings. See, e.g., *Berzins* v. *Berzins*, supra, 306 Conn. 663 (reversing and remanding for further proceedings when trial court had failed to make finding of bad faith). Cf. *Rinfret* v. *Porter*, 173 Conn. App. 498, 510, 513–16, 164 A.3d 812 (2017) (when trial court made twenty-eight factual findings but did not state "which of those facts supported its finding of 'entirely without color' and which supported its finding of 'bad faith conduct,' " reviewing court considered various theories under which facts could support both litigation misconduct prongs).

We conclude that it is appropriate to remand this case for further proceedings on the defendant's motion for sanctions and that such proceedings should be conducted by a new judge. At that time, the court is free to consider postappeal matters that the plaintiff has raised in this court regarding the defendant's purported judicial admission that the parties were mutually mistaken that the oral stipulation would provide the parties with their intended benefits.[17]

The judgment of the Appellate Court is affirmed insofar as that court reversed the trial court's finding of contempt, remanded with direction to deny the defendant's motion for contempt, and affirmed the trial court's rul-

[17] The plaintiff filed a motion for a supervisory order that informed us that, after oral argument before this court, the defendant successfully moved to open and vacate the order on which the contempt rested on the ground of mutual mistake. She contends that the defendant's position in the motion was consistent with her position during litigation and that he should be judicially estopped from claiming otherwise. In his motion to vacate, the defendant admitted that the parties had mistakenly believed that the terms of the oral stipulation would allow the tax deduction and would provide the basis for a valid special needs trust, and contended that the parties could have rectified these concerns by adding and deleting certain terms, but the plaintiff would not agree to execute a trust that would afford him the benefits intended.

ings on postjudgment motions; the judgment of the Appellate Court is reversed with respect to the trial court's ruling on the defendant's motion for sanctions on the basis of litigation misconduct, the award of attorney's fees and expert fees is vacated, and the case is remanded to the Appellate Court with direction to remand the case to the trial court for further proceedings on the defendant's motion for sanctions in accordance with this opinion.

In this opinion the other justices concurred.

JENZACK PARTNERS, LLC *v.* STONERIDGE ASSOCIATES, LLC ET AL.
(SC 20188)
(SC 20189)

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

Syllabus

The plaintiff sought to foreclose a mortgage executed by the defendant T in support of her personal guarantee of a promissory note. The named defendant had obtained a construction loan from the original lender, S Co., and executed a promissory note in connection with that transaction. Subsequently, the note was modified, and T executed a limited guarantee in favor of S Co. ensuring payment of the amount due under the modified note. In order to secure T's guarantee, T executed a mortgage in favor of S Co. on certain of T's real property. S Co. subsequently assigned T's mortgage and interest in the note to the plaintiff. At that time, S Co. and the plaintiff executed an allonge endorsing the note to the plaintiff as the obligee. After the named defendant defaulted on the note, the plaintiff sought, inter alia, to collect on T's guarantee and to foreclose the mortgage on T's property. At the foreclosure trial, the plaintiff introduced into evidence an exhibit that documented its computation of the amount then due on the note, which incorporated an initial entry concerning the original balance on the note that was based on information that S

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

Co. had provided to the plaintiff in conjunction with S Co.'s sale of the note. The trial court rendered a judgment of strict foreclosure, and T appealed to the Appellate Court, claiming that the plaintiff lacked standing to foreclose the mortgage and that the plaintiff's exhibit failed to establish the amount then due on the note because the initial entry in the exhibit was inadmissible hearsay. The Appellate Court concluded that the trial court correctly determined that the plaintiff had standing to foreclose the mortgage but reversed with respect to the admission of the exhibit under the statutory (§ 52-180) business records exception to the hearsay rule, concluding that the original note balance for the computation of debt was not calculated by the plaintiff and that it was received, rather than made, in the ordinary course of business, and, thus, the exhibit failed to satisfy the requirements of the business records exception. The Appellate Court reversed the trial court's judgment of foreclosure as to T and remanded the case for a new trial. On the granting of certification, the plaintiff and T filed separate appeals with this court. *Held*:

1. The Appellate Court correctly determined that the plaintiff had standing to foreclose T's mortgage: although the allonge that was executed in conjunction with the assignment of the note from S Co. to the plaintiff did not explicitly incorporate or mention T's guarantee, T's guarantee, when read in its entirety, clearly provided that its benefit would continue to any and all future holders of the note, which included the plaintiff as the uncontested owner of the note; moreover, S Co.'s assignment of the note to the plaintiff operated as an assignment of T's guarantee because the explicit language in T's guarantee indicated that it was the intention of S Co. and T that T's guarantee would follow the note to future note holders, including the plaintiff.
2. The Appellate Court incorrectly concluded that the initial entry provided by S Co. and contained in the exhibit setting forth the plaintiff's calculation of debt owed on the note was not admissible under the business records exception to the hearsay rule and that, without that entry, the trial court could not properly determine the amount owed: when one business provides information to another business in the context of a business transaction, as is often the case with loan records transferred in connection with the purchase and sale of debt, the business acquiring the information and seeking to introduce the information under the business records exception simply must show that the information it acquired became part of its own business record as part of the transaction in which the provider of the information had a business duty to transmit accurate information, as it is the providing business' duty to report the information in the business context that provides the reliability to justify its admission under the business records exception; in the present case, the plaintiff did not introduce a document as a business record that was created by a third party to prove the debt owed on the note at the time it was assigned to the plaintiff but, rather, introduced its own record of the debt that incorporated an initial entry that S Co.

had provided to the plaintiff in conjunction with the sale of the note, and, because S Co. had a business duty to report the amount due on the note to the plaintiff as part of the sale of the note and the plaintiff incorporated the amount due as provided by S Co. into its own business records, this was sufficient to establish that the exhibit setting forth the plaintiff's calculation of debt owed on the note, including the initial entry that S Co. had provided, was admissible under the business records exception to the hearsay rule; moreover, although T could have disputed the accuracy of the initial entry by highlighting the fact that the plaintiff failed to introduce supplemental documentation or testimony indicating that the plaintiff had accurately recorded the amount of debt as provided by S Co. in the initial entry or by offering contradictory evidence as to the amount due in order to discredit the weight of that evidence, the trial court found that T had failed to do so.

Argued September 24, 2019—officially released January 14, 2020

Procedural History

Action seeking, inter alia, to foreclose a mortgage, brought to the Superior Court in the judicial district of Middlesex, where the named defendant et al. were defaulted for failure to appear; thereafter, the action was withdrawn as to the defendant Joseph Tine; subsequently, the case was tried to the court, *Domnarski, J.*; judgment of strict foreclosure, from which the defendant Jennifer Tine appealed to the Appellate Court; thereafter, the court, *Domnarski, J.*, granted the plaintiff's motion for attorney's fees, and the defendant Jennifer Tine filed an amended appeal with the Appellate Court, *DiPentima, C. J.*, and *Lavine* and *Eveleigh, Js.*, which reversed the judgment of the trial court only as to the defendant Jennifer Tine and remanded the case for a new trial, and the plaintiff and the defendant Jennifer Tine, on the granting of certification, filed separate appeals with this court. *Reversed in part*; *judgment directed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant in Docket No. SC 20188 and the appellee in Docket No. SC 20189 (defendant Jennifer Tine).

Houston Putnam Lowry, for the appellee in Docket No. SC 20188 and the appellant in Docket No. SC 20189 (plaintiff).

KAHN, J. The plaintiff, Jenzack Partners, LLC (Jenzack), and the defendant[1] Jennifer Tine (Tine) separately appeal from the judgment of the Appellate Court, which reversed the judgment of the trial court ordering strict foreclosure.[2] See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 143, 192 A.3d 455 (2018). These appeals require us to consider (1) whether an entity that was assigned a promissory note as well as a mortgage granted as collateral to secure a personal guarantee of that promissory note has standing to foreclose on the mortgage despite the fact that the guarantee was not explicitly assigned to the foreclosing party, and (2) whether an initial entry into a record of debt is admissible under the business records exception to the hearsay rule when that entry was provided by a

[1] Stoneridge Associates, LLC, Premier Building & Development, Inc., Ronald Gattinella, Joseph Tine, Patrick T. Snow, and Webster Bank were also named as defendants. With the exception of Tine and Joseph Tine, all defendants were defaulted for failure to appear or to plead. During the pendency of the foreclosure action, Joseph Tine, Tine's former husband, filed a bankruptcy petition, and the claims against him were subsequently discharged. For the purposes of this opinion, any reference to the defendant or Tine is to Jennifer Tine only. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 131 n.1, 192 A.3d 455 (2018).

[2] In Docket No. SC 20188, this court granted Tine's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that [Jenzack] had standing to foreclose the Tine mortgage because Sovereign Bank had assigned the Stoneridge note to [Jenzack], even though Sovereign Bank did not assign the Tine guarantee, for which the Tine mortgage was collateral, to [Jenzack]?" *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 330 Conn. 921, 193 A.3d 1213 (2018).

In Docket No. SC 20189, this court granted Jenzack's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that exhibit 22 was not admissible under the business records exception?" *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 330 Conn. 922, 194 A.3d 288 (2018).

The two appeals were not consolidated; the parties submitted separate briefs, and the appeals were not heard together before this court. We resolve the appeals, however, in the same decision, as they share the same facts and procedural history.

third party in the course of the sale of the debt. As to the issue of standing, Tine claims that the Appellate Court incorrectly concluded that Jenzack had standing to foreclose a mortgage executed in support of a personal guarantee of a promissory note given by a third party because Jenzack did not receive a written assignment of the personal guarantee. As to the issue of hearsay, Jenzack claims that an adequate foundation was laid for the entirety of the record of debt to be admitted into evidence (exhibit 22) pursuant to the business records exception even though the initial entry was provided by a third party. Although we agree with the Appellate Court's conclusion that Jenzack had standing to foreclose the mortgage, we conclude that the Appellate Court incorrectly determined that the business records exception did not apply to Jenzack's calculation of the debt owed on the promissory note. Accordingly, we reverse in part the judgment of the Appellate Court.

The Appellate Court set forth the following facts and procedural history. "On July 13, 2006 . . . Stoneridge Associates, LLC (Stoneridge), obtained a construction loan in the amount of $1,650,000 from a nonparty, Sovereign Bank (Sovereign). At that time, Stoneridge executed a promissory note (Stoneridge note) evidencing its promise to repay the loan. The note was secured by various personal guarantees; Premier [Building & Development, Inc.], [Ronald] Gattinella, [Patrick T.] Snow and Joseph Tine each executed guarantees in favor of Sovereign guaranteeing repayment of the sums due under the note." *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 131; see footnote 1 of this opinion. "On December 23, 2008, the Stoneridge note was modified via a modification agreement. On the same date, [Tine] executed a limited guarantee in favor of Sovereign guaranteeing repayment of the sum due under the Stoneridge note as modified [(Tine guarantee)]. In order to secure their respective

guarantees, [Tine] and Joseph Tine executed a mortgage (Tine mortgage) in favor of Sovereign on their residential property . . . in Cromwell.[3] [Tine's] nonrecourse guarantee limited her liability solely to her interest in the Cromwell property. On August 27, 2009, and May 6, 2010, [Tine] executed reaffirmations of her guarantee in connection with subsequent modifications of the Stoneridge note.

"On March 22, 2012, Sovereign assigned [the Tine] mortgage and interests in the Stoneridge note to [Jenzack]." (Footnote in original.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 131–32. "Specifically, Sovereign and [Jenzack] executed an allonge endorsing the Stoneridge note to [Jenzack] as the obligee of the note. The Tine mortgage was assigned to [Jenzack] through an 'Assignment of Open-End Mortgage Deed.' " Id., 132 n.3. "In August, 2012, [Jenzack] commenced this action, seeking, inter alia, to foreclose the Tine mortgage. In the operative revised complaint dated April 2, 2013, [Jenzack] alleged that, because Stoneridge had defaulted on the underlying Stoneridge note, [Jenzack] was entitled to declare the entire balance of the note due and payable. [Jenzack] alleged that Sovereign had assigned all of its interests in the Stoneridge note, including continuing guarantees executed by Premier, Gattinella, Snow, and Joseph Tine, the limited guarantee executed by [Tine], and the Tine mortgage. Because [Jenzack] was the current holder of the Stoneridge note, [Jenzack] claimed it was entitled to collect on all underlying guarantees and [to] foreclose the [Tine] mortgage. On April 26, 2013, [Tine]

[3] "The Tine mortgage was recorded in the Cromwell land records on January 7, 2009. When [Tine] executed her limited guarantee, she and Joseph Tine were joint owners of the Cromwell property. Joseph Tine subsequently transferred his interest in the property to [Tine] in connection with his bankruptcy proceedings. At the time of the foreclosure judgment, [Tine] was the sole owner of the Cromwell property." *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 132 n.2.

filed an answer that denied the substance of the complaint . . . ."[4] (Footnote omitted.) Id., 132–33.

"A bench trial was held on August 16, 2016. At trial, [Jenzack] claimed that the assignment of the Stoneridge note necessarily carried with it an assignment of all underlying guarantees, including [Tine's] limited guarantee secured by the Tine mortgage. [Jenzack] also introduced into evidence exhibit 22, a computation of the current amount due on the [Stoneridge] note. In response, [Tine] claimed that the court lacked subject matter jurisdiction to render a judgment of foreclosure against her because her guarantee was not specifically assigned to [Jenzack] in the allonge. [Tine] also claimed that [Jenzack] failed to establish the amount of debt due on the [Stoneridge] note because evidence of the computation of debt, which included a starting balance provided to [Jenzack] by Sovereign, was inadmissible hearsay."[5] Id., 133. "On December 1, 2016, the trial court issued a memorandum of decision [and entered] an order of strict foreclosure on the Tine mortgage. The court held that [Jenzack] had standing to foreclose the [Tine] mortgage that secured the [Tine] guarantee and that [Jenzack] had established the amount of debt due on the [Stoneridge] note through the testimony of William Buland, [Jenzack's] authorized representative, and the computation of debt in exhibit 22." Id.

Before the Appellate Court, Tine argued that "the trial court improperly (1) held that [Jenzack] had standing to foreclose the Tine mortgage [and] (2) determined that [Jenzack's] exhibit 22 was sufficient to establish

[4] The answer also asserted, as special defenses, lack of consideration, unclean hands, and equitable estoppel, none of which is at issue in this appeal.

[5] Tine concedes that the portion of exhibit 22 reflecting interest accrual, payments, or other transactions that occurred after Jenzack acquired the Stoneridge note was properly admitted under the business records exception. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 139 n.7.

the amount due on the [Stoneridge] note . . . .'"[6] Id. Although the Appellate Court agreed with the trial court that Jenzack had standing to foreclose the Tine mortgage; id., 139; it reversed the trial court's decision on the admissibility of the record of debt owed on the Stoneridge note under the business records exception, concluding that the starting balance for the computation of debt "was not calculated by [Jenzack], and, therefore, it was received, rather than made, in the ordinary course of business." Id., 143. On the basis of this conclusion, the Appellate Court held that the initial entry did not satisfy the requirements of the business records exception, and, therefore, the trial court could not properly determine the amount of debt. Id., 142–43. The Appellate Court reversed the trial court's judgment of strict foreclosure as to Tine and remanded the case for a new trial. Id., 146. These certified appeals followed. See footnote 2 of this opinion.

I

STANDING

Because the question of standing implicates subject matter jurisdiction, we first consider Tine's claim in Docket No. SC 20188 that the Appellate Court improperly held that Jenzack had standing to foreclose the Tine mortgage. Tine claims that Jenzack does not have standing to foreclose the Tine mortgage because Sovereign did not expressly assign the Tine guarantee to Jenzack in the allonge, and, therefore, Jenzack is not a party to the Tine guarantee.[7] Although Tine correctly

[6] Tine also argued that the trial court improperly awarded Jenzack attorney's fees and expenses, but that issue is not before this court in this appeal. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 144–45.

[7] The allonge, dated March 22, 2012, provides in its entirety:

"Allonge to that certain Promissory Note, as modified, dated July 13, 2006 in the original principal amount of One Million Six Hundred Fifty Thousand and 00/100 ($1,650,000.00) Dollars given by Stoneridge Associates, LLC (the " 'Borrower' ") to Sovereign Bank, N.A., f/k/a Sovereign Bank (" 'Bank' ").

"Pay to the order of Jenzack Partners, LLC, a Maryland Limited Liability Company. This Allonge and endorsement is made without recourse and

points out that the allonge did not explicitly incorporate or mention the Tine guarantee, we conclude that Jenzack nonetheless had standing according to the language of the Tine guarantee.

"[S]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 161, 75 A.3d 651 (2013). "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." (Internal quotation marks omitted.) *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 155, 953 A.2d 1 (2008). "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.) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 226, 105 A.3d 210 (2014).

"The language of the assignment . . . does not by itself govern our resolution of the issue. We also turn to the language of the guarantee." *D'Amato Investments, LLC* v. *Sutton*, 117 Conn. App. 418, 422, 978 A.2d

without any representation or warranty, express or implied, by operation of law or otherwise, including but not limited to any warranty under [New Jersey Statutes Annotated §] 12A:3-416 (a)."

Jenzack also argues that it is the holder of the guarantee due to its assignment in fact, or equitable assignment, by Sovereign. Tine argues, however, that Jenzack did not plead an alternative form of assignment of the Tine guarantee. We resolve the issue of standing on other grounds and, therefore, make no conclusions as to whether Jenzack's claim of standing could have been resolved on any grounds other than those expressed in this opinion.

1135 (2009). Even though a guarantee is not explicitly assigned along with the underlying obligation it is ensuring, guarantors are "bound by the contractual provisions [in the guarantee] to which they agreed." See, e.g., *One Country, LLC* v. *Johnson*, 137 Conn. App. 810, 820, 49 A.3d 1030 (2012), aff'd, 314 Conn. 288, 101 A.3d 933 (2014). Although the allonge expressly assigned only the Stoneridge note to Jenzack, the language of the Tine guarantee should be considered to determine whether the parties to the guarantee—Tine and Sovereign—intended the guarantee to follow the Stoneridge note. See *Hudson United Bank* v. *Endeavor Group*, 96 Conn. App. 447, 452, 901 A.2d 64 (2006) ("[i]n interpreting the intention of the parties to the guarantee, the referee was entitled to rely on, inter alia, the language of the guarantee"); see also *One Country, LLC* v. *Johnson*, supra, 816 ("[a] guarantee, similar to a suretyship, is a contract, in which a party, sometimes referred to as a secondary obligor, contracts to fulfill an obligation upon the default of the principal obligor" [internal quotation marks omitted]); cf. *Friezo* v. *Friezo*, 281 Conn. 166, 199, 914 A.2d 533 (2007) ("[c]ontracting parties are normally bound by their agreements . . . irrespective of whether the agreements embodied reasonable or good bargains" [internal quotation marks omitted]). This court has stated that, where the guarantee of a note is unconditional or absolute, "default of the maker or endorser to pay the note promptly . . . [causes] the guarantor [to] become liable to the holder, and the relation of debtor and creditor was at once established between the guarantor and the holder of the note." (Internal quotation marks omitted.) *Perry* v. *Cohen*, 126 Conn. 457, 459, 11 A.2d 804 (1940).

Although this court has not addressed this exact issue of the interpretation of a guarantee that was not explicitly assigned to a subsequent party seeking to enforce the guarantee, we are persuaded by the Appellate

Court's reasoning in applying the foregoing principles. In *Hudson United Bank*, the defendant executed a promissory note and continuous loan guaranty in 1995, in favor of a third-party bank. *Hudson United Bank* v. *Endeavor Group*, supra, 96 Conn. App. 449. The third-party bank then merged with a second third-party bank before being consolidated with the plaintiff bank. Id., 449–50. In 1998, the plaintiff bank provided a loan to the defendant, and the defendant executed a promissory note in favor of the plaintiff bank; a portion of the loan was used to pay off the 1995 loan. Id. The defendant then defaulted on the 1998 loan. Id., 450. The plaintiff bank sought to collect from the defendant under the 1995 continuous guarantee, and the defendant objected on the ground that he was liable under the 1995 guarantee only to the first bank and not to subsequent issuers of promissory notes, including the plaintiff bank. Id. The Appellate Court concluded that, "[i]n interpreting the intention of the parties to the guarantee, the [trial court] was entitled to rely on, inter alia, the language of the guarantee." Id., 452. In that case, the 1995 guarantee explicitly provided that the borrower guaranteed payment of "any and every obligation and liability of [the borrower] to [the original third-party bank] of whatsoever nature and howsoever evidenced, *whether now existing or hereafter incurred* . . . ." (Emphasis in original; internal quotation marks omitted.) Id. In addition, it stated that "[t]his guarant[ee] shall inure to the benefit of the [original third-party bank], its successors, legal representatives, and assigns." (Internal quotation marks omitted.) Id., 453. On the basis of this language, the court concluded that "the guarantee clearly provides that its benefit would continue to any and all successors of [the original third-party bank], including [the second third-party bank] and the [plaintiff bank]." Id.

Similarly, in *D'Amato Investments, LLC*, a third-party corporation entered into a commercial lease with third-

party property owners, and the defendant, who was the president of the third-party corporation, executed a personal guarantee of the lessee's obligation thereunder. *D'Amato Investments, LLC* v. *Sutton*, supra, 117 Conn. App. 420. The third-party property owners assigned the lease to the plaintiff, and, subsequently, the defendant's employment with the third-party corporation was terminated. Id. The third-party corporation failed to consistently pay rent and related fees before finally being evicted, and the plaintiff brought an action against the defendant to enforce the guarantee and to recover the amounts owed by the third-party corporation. Id., 420–21. "The defendant claim[ed] that the plaintiff lack[ed] standing to enforce the guarantee because the plaintiff [was] not a party to the guarantee. The defendant argu[ed] that although the lease was assigned from [the third-party property owners] to the plaintiff, the guaranty itself was never assigned to the plaintiff." Id., 421–22. The Appellate Court concluded that the assignment of the lease "did not explicitly incorporate or mention the guarantee signed by the defendant. The language of the assignment, however, [did] not by itself govern [the court's] resolution of the issue. [The court] also turn[ed] to the language of the guarantee." Id., 422. In that case, the guarantee provided that "[t]he undersigned guarantees to Landlord, *Landlord's successors and assigns*, the full performance and observance of all covenants, conditions and agreements . . . ." (Emphasis in original; internal quotation marks omitted.) Id. In light of this language, the court rejected the defendant's claim that the assignee lacked standing to enforce the personal guarantee. Id., 423.

In the present case, Sovereign did not explicitly assign the Tine guarantee to Jenzack, so we turn to the language of the Tine guarantee, titled "Limited Guaranty Agreement," to determine the intention of Sovereign

and Tine when the guarantee was executed.[8] The Tine guarantee provides in relevant part:

"The undersigned, JENNIFER J. TINE . . . (hereinafter referred to as 'Guarantor') is executing this Continuing Guaranty Agreement to induce SOVEREIGN BANK ('Lender') to amend a construction loan in the amount of $1,650,000 (the 'Loan') to STONERIDGE ASSOCIATES, LLC ('Borrower') made pursuant to a commitment letter dated July 13, 2006 ('Commitment'). The Loan is evidenced by a Promissory Note ('Note') in the above amount . . . ." The Tine guarantee further provided: "1. Payment and Performance. Guarantor does hereby fully guarantee to Lender that Borrower shall make due and punctual payment of the principal of the Note and the interest thereon . . . . If Borrower shall at any time fail to make any such payments or performance, then . . . Guarantor shall make such payment or payments to Lender, this Guaranty being a guaranty of payment and not of collection . . . .

* * *

"14. Bind and Inure. The provisions of this Guaranty . . . shall bind and inure to the benefit of the parties hereto *and their heirs, successors and assigns* . . . the word 'Lender' as used herein *shall mean not only the original Lender named in the first paragraph of this Guaranty, but also all future holders of the Note and Loan Documents* . . . ." (Emphasis added.)

When read in its entirety, the Tine guarantee clearly provides that its benefit would continue to any and all future holders of the Stoneridge note, which includes Jenzack. Under these circumstances, the assignment of the Stoneridge note operated as an assignment of the Tine guarantee because the explicit language included

[8] We observe that Jenzack physically possesses the Tine guarantee and entered it as a full exhibit in the trial court without objection.

in the Tine guarantee indicates that it was the intention of Sovereign and—more importantly—Tine that the guarantee would follow the Stoneridge note to future note holders. As it is uncontested that Jenzack owns the Stoneridge note, Jenzack has standing to foreclose the Tine mortgage.[9] See *Brentwood Scottsdale, LLC* v. *Smith*, Docket No. 1 CA-CV 14-0067, 2015 WL 728364, *2 (Ariz. App. February 19, 2015) (adopting general rule of law; see Restatement [Third], Suretyship & Guaranty § 13 [5], pp. 65–66 [1996]; but relying on language of personal guarantee as further evidence that assignment of note operated as assignment of guarantee).

II

HEARSAY

We next consider Jenzack's claim in its appeal in Docket No. SC 20189 that the Appellate Court incorrectly held that the initial entry in Jenzack's calculation of debt owed on the Stoneridge note as shown on exhibit 22 was not admissible pursuant to General Stat-

[9] Jenzack argues that this court should adopt § 13 of the Restatement (Third) of Suretyship and Guaranty in determining whether Jenzack has standing to foreclose the Tine mortgage. See Restatement (Third), Suretyship & Guaranty § 13 (5), p. 66 (1996) ("an assignment by the obligee of its rights against the principal obligor arising out of the underlying obligation operates as an assignment of the obligee's rights against the secondary obligor arising out of the secondary obligation," except "as otherwise agreed to or provided in subsection [1])." That subsection is based on the premise that "[a] secondary obligation, like a security interest, has value only as an adjunct to an underlying obligation." Id., comment (f), p. 68. Tine argues that we should explicitly reject this Restatement provision. This court has recognized that "guarantors are not obligated on a mortgage because they have a separate and distinct contractual obligation from the promissory note and mortgage under their guarantee." *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 673, 94 A.3d 622 (2014). Although we recognize that a note and a guarantee are separate and distinct obligations, the parties in the present case agreed to contractual language that tied the Tine guarantee to the Stoneridge note, and those two obligations remained connected regardless of the present owner of the Stoneridge note. Under these circumstances, we leave the question of whether to adopt § 13 of the Restatement (Third) for another day.

utes § 52-180,[10] colloquially referred to as the business records exception to the hearsay rule and that, without that initial entry, Jenzack was not able to establish the amount owed on the Sovereign note.[11] We conclude that the entirety of Jenzack's record of debt owed on the Sovereign note was admissible under the business records exception.

"To the extent [that admissibility] of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay . . . [is a] legal [question] demanding plenary review." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007); see also *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 599 n.7, 717 A.2d

[10] General Statutes § 52-180 provides in relevant part: "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . ."

Section 8-4 of the Connecticut Code of Evidence quotes § 52-180; we refer to § 52-180 throughout this opinion.

[11] For a business record to be admissible, "[t]he court must determine . . . that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter." (Internal quotation marks omitted.) *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 602, 717 A.2d 713 (1998). Tine does not challenge any individual element of this requirement but, rather, argues that it is not appropriate to reach this analysis because Jenzack did not provide evidence establishing the accuracy of the initial entry.

713 (1998) (*Bedford II*) ("[b]ecause we review the trial court's interpretation of the statute, and the statute's applicability to the proffered documents, our review is plenary").

In the present case—unlike in previous cases before this court—Jenzack did not attempt to introduce a document as a business record that was created by a third party, Sovereign, to prove the debt owed on the Stoneridge note at the time it was assigned to Jenzack. Instead, Jenzack introduced its own record of the debt owed on the Stoneridge note that incorporated an initial entry that Sovereign had provided to Jenzack in conjunction with the sale of the note. Jenzack offered this document as its business record of the debt owed on the note. Jenzack, however, did not offer into evidence documentation or witness testimony regarding the initial figure in the form it was actually received from Sovereign. Tine claims that the statement of the initial debt as contained in exhibit 22 is hearsay without documentation or testimony evidencing that Jenzack accurately recorded the amount of the debt provided by Sovereign. See footnote 5 of this opinion. This is an issue of first impression for this court. See *Bedford II*, supra, 246 Conn. 607 ("[i]f we had not decided in . . . this opinion that [the] exhibit was admissible, we would be required to determine whether a record created by a subsequent holder of a note, based on an initial figure from a failed bank's account books not in evidence, could be admitted as a business record of the second entity"); cf. *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 757–58, 680 A.2d 301 (1996) (*Bedford I*) (holding that witness testimony as to amount of debt was inadmissible when witness did not have personal knowledge of debt or produce documentation evidencing amount of debt, but noting that "[the witness'] testimony [was not offered] for the limited purpose of laying a foundation for the entry of the

documents into evidence, but, rather, as evidence of the debt").

"The initial rationale for the [business records] exception was that, although hearsay, business records [are] trustworthy because their creators had relied on the records for business purposes." *Bedford II*, supra, 246 Conn. 600. Because of the trustworthiness of business records, § 52-180 " 'should be liberally interpreted' in favor of admissibility." Id., 603; see also *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 485, 586 A.2d 1157 (1991). Section 52-180 (b) provides that a record "shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility." As such, we have held that the "witness introducing the document need not have made the entry himself or herself . . . [or] have been employed by the organization during the relevant time period. . . . In addition, [t]here is no requirement in § 52-180 . . . that the documents must be prepared by the organization itself to be admissible as that organization's business records." (Citation omitted; internal quotation marks omitted.) *Bedford II*, supra, 603. Furthermore, "[t]he proponent need not prove the accuracy of the record; its weight is an issue for the trier of fact." Id., 602.

When a party introduces a document that it did not create but that it received from a third party, the business records exception will apply only if the information contained in the document is "based on the entrant's own observation or on information of others whose

business duty it was to transmit it to the entrant." (Internal quotation marks omitted.) *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 794, 595 A.2d 839 (1991). "Where the prior owner of the note had a legitimate business duty to provide to the next holder the information used to generate the payment history, the printout of that information was the business record of the present holder." *Premier Capital, Inc.* v. *Grossman*, Docket No. CV-99-0334654-S, 2000 WL 1838695, *4 (Conn. Super. November 22, 2000) (citing *SKW Real Estate Ltd. Partnership* v. *Gallicchio*, 49 Conn. App. 563, 577, 716 A.2d 903, cert. denied, 247 Conn. 926, 719 A.2d 1169 [1998]), rev'd in part on other grounds, 68 Conn. App. 51, 52, 789 A.2d 565 (2002); see also *Bedford II*, supra, 246 Conn. 603 (" '[t]here is no requirement in § 52-180 . . . that the documents must be prepared by the organization itself to be admissible as that organization's business records' "). If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information. See *Premier Capital, Inc.* v. *Grossman*, supra, *5, citing *Bedford II*, supra, 604.

This court's precedents regarding the admission of business records that include information received from third parties have only involved instances in which documentation from the third party was offered into evidence as a business record of the offering party. As previously noted, Jenzack did not offer documentation from Sovereign as evidence of the initial entry into Jenzack's record of debt owed on the Stoneridge note. Tine claims that, without supporting documentation or testimony from Sovereign to attest to its accuracy,

the initial entry is not part of Jenzack's business record. We conclude, however, that—regardless of whether supporting documentation or testimony from the third party is offered—it is the third party's "duty to report [the information] in a business context which provides the reliability to justify [the business records exception to the hearsay rule]." *State* v. *Milner*, 206 Conn. 512, 521, 539 A.2d 80 (1988); see *D'Amato* v. *Johnston*, 140 Conn. 54, 59, 97 A.2d 893 (1953); see also *U.S. Bank Trust, N.A.* v. *Jones*, 925 F.3d 534, 538 (1st Cir. 2019) ("[t]he key question is whether the records in question are reliable enough to be admissible" [internal quotation marks omitted]). This reliability is further strengthened, in our view, when the entity receiving the information from a third party, with a business duty to report it, subsequently integrates that information into the entity's own business records and has a "self-interest in [ensuring] the accuracy of the outside information . . . ." (Internal quotation marks omitted.) *U.S. Bank Trust, N.A.* v. *Jones*, supra, 538; see also *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 369, 394, 739 A.2d 301, cert. denied, 251 Conn. 927, 742 A.2d 362 (1999). By relying on information from a third party, an entity stakes not only its livelihood on the accuracy of the information received but also its reputation as being a trustworthy entity with which to do business in the future. See generally *U.S. Bank Trust, N.A.* v. *Jones*, supra, 538–39.

Furthermore, a business record is admissible if the information therein is reliable, which, in the case of information provided by a third party, is established by the third party's business duty to report the information. "[T]here is no requirement that the accuracy of a business record be proved as a prerequisite to its admission." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Carabetta*, supra, 55 Conn. App. 375. In addition, once a reliable business record is

admitted, there is no presumption that it is accurate, and "the circumstances of the making of the [record] may be shown to affect the weight of that evidence," as its "credibility [remains] a question for the trier of fact." (Internal quotation marks omitted.) Id.; see also *State* v. *Ward*, 172 Conn. 163, 170, 374 A.2d 168 (1976). A defendant is free to undertake discovery concerning the accuracy of the information in a business record as well as to introduce or cross-examine witnesses about its accuracy. Any contention that the information might be inaccurate or lack veracity, therefore, "goes to the weight of the document, not its admissibility." *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 748, 725 A.2d 975 (1999); see also *Bedford II*, supra, 246 Conn. 602.

The First Circuit Court of Appeals recently issued a decision with facts similar to those at issue in the present case. We find that court's analysis persuasive. In that case, the bank "sought to establish the total amount owed on the loan account by introducing a computer printout [maintained by the current loan servicer of the borrower's account] that contained an account summary and a list of transactions related to the loan." *U.S. Bank Trust, N.A.* v. *Jones*, supra, 925 F.3d 536. Similar to Jenzack's record of debt in the present case, the record in *Jones* included "prior entries [that] were created by two other loan servicers . . . and were integrated into [the current loan processor's] database when [the current loan processor] succeeded them as servicer." Id., 537. Noting that "there is no categorical rule barring the admission of integrated business records under [the business records exception] based only on the testimony from a representative of the successor business," the First Circuit relied on the fact that the previous loan processors had a business duty to report the amount due on the loan to the current loan processor, and the current loan processor placed

"its own financial interest at stake by relying on" the records. Id., 537–38. Furthermore, the court noted that the borrower "did not dispute the transaction history by claiming overbilling or unrecorded payments, as she surely could have done if the records were inaccurate." (Internal quotation marks omitted.) Id., 538. On the basis of these circumstances, the First Circuit held that the computer printout evidencing the amount owed on the borrower's loan was admissible under the federal business records exception to the hearsay rule. Id., 539–40.

In the present case, the trial court credited the testimony of Buland that "Sovereign had attested to the balance due on the note as part of the transaction between Sovereign and [Jenzack]." Thus, Sovereign had a business duty to report the amount due on the Stoneridge note to Jenzack as part of the sale of the debt; Sovereign was not merely volunteering the information. See *State* v. *Milner*, supra, 206 Conn. 520–21 (holding that one page police report detailing contents of telephone call was inadmissible as business record when caller was anonymous and had no duty to report). In addition, the trial court noted that "[Buland] relied upon data provided by Sovereign to establish the outstanding principal balance and accrued interest on the note as of January 17, 2012—the starting date of [Jenzack's] computation," as evidenced by exhibit 22. Jenzack incorporated the amount due on the Stoneridge note provided by Sovereign into its business records and then calculated the accumulating debt from that point forward by applying its own interest rate, thereby placing its own financial interest at stake by relying on that information. This is sufficient to establish that the entirety of Jenzack's record of debt owed on the Stoneridge note—including the initial entry—was admissible as a business record.

At that point, Tine could have disputed the accuracy of the initial entry of Jenzack's business record by highlighting the lack of supplemental documentation or offering contradictory evidence as to the amount due on the note, thereby discrediting the weight of the evidence in the eyes of the trier of fact. The trial court found that "[n]one of the defendants presented any testimony or evidence that contradicted [the] figures" in Jenzack's business record, including the initial entry, as Tine surely could have done if the records were inaccurate.[12] See *U.S. Bank Trust, N.A.* v. *Jones*, supra, 925 F.3d 538.

The judgment of the Appellate Court is reversed with respect to the admissibility of the entry regarding the amount owed on the Stoneridge note under the business records exception to the hearsay rule and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

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[12] Tine claimed that she did not have any information regarding the payment history on the Stoneridge note because she had nothing to do with Stoneridge and Joseph Tine was not obligated to keep her apprised of when he made payments under the terms of their divorce decree. As a result, she was unable to evaluate whether the purported balance stated by Jenzack appeared to be accurate. Regardless of whether Tine had knowledge of the ongoing transactions between Stoneridge and Sovereign, the Tine guarantee included a disclaimer that she "assume[d] all responsibility for being and keeping herself informed of [Stoneridge's] financial condition and assets, and of all other circumstances bearing upon the risk of nonpayment of the [Stoneridge] [n]ote or any other indebtedness of [Stoneridge] to [Sovereign] and the nature, scope, and extent of the risks which [Tine] assume[d] and incur[red] [under the Tine guarantee], and agree[d] that [Sovereign] shall have no duty to advise [Tine] of information known to it regarding such circumstances or risk."

ORDERS

CONNECTICUT REPORTS

VOL. 334

ALPHA BETA CAPITAL PARTNERS, L.P. *v.* PURSUIT INVESTMENT MANAGEMENT, LLC, ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 193 Conn. App. 381 (AC 39388), is denied.

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

Michael S. Taylor and *Brendon P. Levesque*, in support of the petition.

James C. Graham and *Dennis M. Carnelli*, in opposition.

Decided January 2, 2020

ALPHA BETA CAPITAL PARTNERS, L.P. *v.* PURSUIT INVESTMENT MANAGEMENT, LLC, ET AL.

The plaintiff's cross petition for certification to appeal from the Appellate Court, 193 Conn. App. 381 (AC 39388), is denied.

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

James C. Graham and *Dennis M. Carnelli*, in support of the petition.

Michael S. Taylor, in opposition.

Decided January 2, 2020

STATE OF CONNECTICUT *v.* JEFFREY K. WARD

The defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 794 (AC 40534), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the trial court did not have jurisdiction over the defendant's

motion to correct an illegal sentence on the ground that the motion, on its face, did not raise a colorable claim that the defendant was incompetent at the time of his sentencing?"

Temmy Ann Miller, assigned counsel, in support of the petition.

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

Decided January 2, 2020

ROBBINS EYE CENTER, P.C. *v.* COMMERCE PARK ASSOCIATES, LLC, ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 697 (AC 41543), is denied.

Joseph DaSilva, Jr., in support of the petition.

James M. Moriarty and *Aaron A. Romney*, in opposition.

Decided January 2, 2020

ROBBINS EYE CENTER, P.C. *v.* COMMERCE PARK ASSOCIATES, LLC, ET AL.

The plaintiff's cross petition for certification to appeal from the Appellate Court, 193 Conn. App. 697 (AC 41543), is denied.

James M. Moriarty and *Aaron A. Romney*, in support of the petition.

Decided January 2, 2020

ASSELIN AND VIECELI PARTNERSHIP, LLC *v.* STEVEN T. WASHBURN

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 519 (AC 41439), is denied.

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

Steven B. Kaplan and *Carolyn A. Young*, in support of the petition.

Eugene C. Cushman, in opposition.

Decided January 2, 2020

STATE OF CONNECTICUT *v.* GAYLORD SALTERS

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 670 (AC 41597), is denied.

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

Melissa Patterson, assistant state's attorney, in opposition.

Decided January 2, 2020

ROBERT S. *v.* COMMISSIONER OF CORRECTION

The petitioner Robert S.'s petition for certification to appeal from the Appellate Court, 194 Conn. App. 382 (AC 41895), is denied.

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

Linda F. Currie-Zeffiro, assistant state's attorney, in opposition.

Decided January 2, 2020

IN RE ANTHONY L. ET AL.

The petition by the respondent mother for certification to appeal from the Appellate Court, 194 Conn. App. 111 (AC 42534), is denied.

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

James P. Sexton, assigned counsel, and *Megan L. Wade*, assigned counsel, in support of the petition.

Evan O'Roark, assistant attorney general, in opposition.

Decided January 2, 2020

IN RE F.H.

The petitioner Robert Pentland's petition for certification to appeal from the Appellate Court (AC 43265) is denied.

Robert Pentland, self-represented, in support of the petition.

Decided January 2, 2020

OFFICE OF CHIEF DISCIPLINARY COUNSEL
v. RICHARD PAUL SAVITT

The defendant's petition for certification to appeal from the Appellate Court (AC 43286) is denied.

Richard Paul Savitt, self-represented, in support of the petition.

Leanne M. Larson, assistant chief disciplinary counsel, in opposition.

Decided January 2, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 195

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

HSBC BANK USA, NATIONAL ASSOCIATION, TRUSTEE *v.* LESLIE I. NATHAN ET AL.

(AC 40222)

Bright, Moll and Harper, Js.

Syllabus

The plaintiff bank, H Co., sought to foreclose a mortgage on certain real property owned by the defendants L and W and the defendant trust, who filed special defenses and a counterclaim. Specifically, they alleged, inter alia, that the equitable doctrine of laches applied to the plaintiff's conduct and that the plaintiff had violated the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). The trial court granted the plaintiff's motion to strike the first amended laches defense and the counterclaim in its entirety. L and W and the trust then filed a second amended counterclaim and special defenses, in which, inter alia, they repleaded four counts of their first amended counterclaim and repleaded laches as a special defense. The trial court granted the plaintiff's motion to strike the second amended laches defense and the counterclaim in its entirety and, subsequently, rendered judgment of strict foreclosure, from which L and W and the trust appealed to this court. On appeal, they claimed that the trial court improperly granted the plaintiff's first motion to strike as to the nonrepleaded counts and the second motion to strike the second amended laches defense and second amended counterclaim. The plaintiff claimed that certain nonrepleaded counts of their first amended counterclaim as well as a special defense of unclean hands had been abandoned. *Held*:

1. Contrary to the plaintiff's claim, L and W and the trust preserved their right to appeal the nonrepleaded counts of their first amended counterclaim: the correct course of action for a litigant to take in order to preserve appellate rights as to a stricken pleading is to forgo pleading over, await the rendering of a final judgment and appeal therefrom, and

the defendants' statement in their objection to the plaintiff's second motion to strike that they were not reasserting counts involving only postdefault conduct was a decision by the defendants, in an effort to preserve their appellate rights, not to replead those counts with modified allegations in an effort to cure the purported deficiencies therein, rather than an abandonment of the counts; nevertheless, the defendants having expressly stated in their objection that the first amended unclean hands defense had been abandoned, that statement was an unequivocal relinquishment of the first amended unclean hands defense, and the defendants, having abandoned that defense, could not now ask this court to consider whether the trial court's striking thereof constituted error.

2. The trial court erred in striking the nonrepleaded counts, the second amended laches defense and the second amended counterclaim on the ground that they did not satisfy the making, validity or enforcement test; the allegations in the pleadings of L and W and the trust related to the enforcement of the note or mortgage in that those defendants raised allegations of postorigination misconduct by the plaintiff that, inter alia, increased their debt and hindered their ability to cure their default.

Argued January 15, 2019—officially released January 14, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Middlesex, where the defendant Gerri N. Russo was defaulted for failure to appear; thereafter, the defendant Webster Bank, National Association was defaulted for failure to plead; subsequently, the named defendant et al. filed an amended counterclaim; subsequently, the court, *Aurigemma, J.*, granted the plaintiff's motion to strike the amended special defenses and counterclaim in part; thereafter, the named defendant et al. filed a second amended counterclaim; subsequently, the court granted the plaintiff's motion to strike the second amended special defenses and counterclaim; thereafter, the court, *Domnarski, J.*, concluded that the plaintiff was entitled to enforce the note by foreclosing on the mortgage; subsequently, the court, *Aurigemma, J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named

defendant et al. appealed to this court; subsequently, this court dismissed, for lack of a final judgment, the portion of the appeal challenging the trial court's striking of the counterclaim as amended; thereafter, the court, *Frechette*, *J.*, granted the plaintiff's motion for judgment on the stricken counterclaim as amended and the named defendant et al. filed an amended appeal; subsequently, this court, sua sponte, issued an order staying the appeal pending the final disposition by the Supreme Court in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019); thereafter, following the release of the opinion in *Blowers*, the Appellate Court lifted the stay and, sua sponte, ordered the parties to submit supplemental briefing, and the parties thereafter filed supplemental briefs. *Reversed; further proceedings*.

Karen L. Dowd, with whom was *Scott Garosshen*, for the appellants (defendants).

David M. Bizar, for the appellee (plaintiff).

Opinion

MOLL, J. The defendants, Leslie I. Nathan, Lynne W. Nathan, and Lynne W. Nathan, Trustee of the Lynne W. Nathan Trust Agreement dated November 19, 2001,[1] appeal from the judgment of strict foreclosure and the judgment on their counterclaim, as amended, rendered by the trial court in favor of the plaintiff, HSBC Bank USA, National Association, Trustee.[2] On appeal, the

[1] The complaint also named Gerri N. Russo and Webster Bank, National Association, as defendants, but those parties were defaulted for failure to appear and for failure to plead, respectively, and are not participating in this appeal. For purposes of clarity, we will refer to Leslie I. Nathan as Leslie, Lynne W. Nathan as Lynne, Lynne W. Nathan, Trustee of the Lynne W. Nathan Trust Agreement dated November 19, 2001, as the Lynne Trustee, and to those three parties collectively as the defendants.

[2] The full name of the plaintiff is HSBC Bank USA, National Association, as Trustee for Wells Fargo Asset Securities Corporation Mortgage Pass-Through Certificates Series 2007-8.

defendants claim that the court erred in striking two of their special defenses, as amended, and their counterclaim, as amended.[3] We reverse the judgments of the trial court.

The following facts and procedural history are relevant to our disposition of this appeal. In August, 2014, the plaintiff commenced this foreclosure action. In its complaint, the plaintiff alleged the following relevant facts. On or about April 12, 2007, Leslie and Lynne executed a promissory note, in the principal amount of $560,000, in favor of Wells Fargo Bank, N.A. (Wells Fargo). To secure the note, the Lynne Trustee executed a mortgage on real property located at 115 Second Avenue in Westbrook. On April 17, 2007, the mortgage deed was recorded on the Westbrook land records. The mortgage was to be assigned to the plaintiff by virtue of an assignment to be recorded on the Westbrook land records, and the plaintiff was the holder of the note. Leslie and Lynne thereafter defaulted on the note,[4] and they failed to cure the default following receipt of written notice of the default from the plaintiff. Thereafter, the plaintiff elected to accelerate the balance due on

[3] In their principal appellate brief, the defendants also claimed that the trial court erred in concluding that the plaintiff had standing to pursue this foreclosure action. More specifically, the defendants asserted that the court erroneously presumed, upon the plaintiff's production of the note demonstrating that it was the valid holder thereof, that the plaintiff was the rightful owner of the debt and shifted the burden to the defendants to rebut that presumption. In their principal reply brief, however, the defendants concede that they cannot prevail on this claim because this court is bound by our Supreme Court's decision in *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 231–32, 32 A.3d 307 (2011), overruled in part by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.18, 71 A.3d 492 (2013), wherein our Supreme Court stated that "a holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes] § 49-17." The defendants represent that they have raised this claim solely to preserve it for review by our Supreme Court. Accordingly, we need not address the merits of this claim.

[4] In their second amended counterclaim, the defendants pleaded that the default occurred in January, 2010.

the note, to declare the note to be due in full, and to foreclose the mortgage.

On June 8, 2015, the defendants filed a first amended answer, special defenses, and counterclaim.[5] The defendants asserted three special defenses: (1) lack of standing; (2) laches; and (3) unclean hands. In the counterclaim, the defendants asserted the following twelve counts: (1) equitable reduction of interest on the ground that the plaintiff failed to mitigate its damages (count one); (2) the plaintiff was improperly pursuing attorney's fees and costs accrued in relation to a prior foreclosure action, with docket number MMX-CV-10-6002743-S (prior foreclosure action), which the plaintiff had commenced against the defendants in 2010 and which was dismissed in 2013 (count two); (3) intentional infliction of emotional distress (count three); (4) negligent infliction of emotional distress (count four); (5) breach of the covenant of good faith and fair dealing (count five); (6) unjust enrichment (count six); (7) violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (count seven); (8) violation of the Creditors' Collections Practices Act, General Statutes § 36a-645 et seq. (count eight); (9) vexatious litigation (count nine); (10) fraud (count ten); (11) negligence (count eleven); and (12) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. (count twelve). As relief, the defendants sought, inter alia, compensatory damages and an equitable reduction in principal and interest.

On July 8, 2015, the plaintiff filed a motion to strike the defendants' first amended special defenses and counterclaim, claiming, inter alia, that the defendants' claims and defenses did not relate to the making, validity, or enforcement of the note or mortgage. The defendants objected to the motion. On December 28, 2015,

[5] The defendants filed an original answer, special defenses, and counterclaim on May 20, 2015.

the trial court, *Aurigemma*, *J.*, issued a memorandum of decision granting the motion to strike as to the first amended laches defense, unclean hands defense, and counterclaim in its entirety.[6]

On January 12, 2016, the defendants filed a second amended counterclaim and special defenses. In the counterclaim, the defendants repleaded counts five, six, ten, and twelve of the first amended counterclaim. They did not replead counts one, two, three, four, seven, eight, nine, or eleven thereof. In addition, the defendants reasserted their first amended special defense asserting lack of standing, which had not been stricken by the court, and repleaded laches as a special defense, but they did not replead unclean hands as a special defense.

On February 9, 2016, the plaintiff filed a motion to strike the defendants' second amended laches defense and counterclaim, claiming, inter alia, that the defendants' claims and second amended laches defense failed to satisfy the making, validity, or enforcement test. The defendants objected to the motion. On March 28, 2016, the court issued an order granting the motion to strike the second amended laches defense and counterclaim in its entirety.

On August 25, 2016, following a one day court trial conducted on May 19, 2016, the court, *Domnarski*, *J.*, issued a memorandum of decision concluding that the plaintiff was entitled to enforce the note by foreclosing the mortgage. The court also made findings regarding the debt and the value of the subject property. Thereafter, the plaintiff filed a motion for a judgment of strict foreclosure, which the court, *Aurigemma*, *J.*, granted on February 21, 2017. This appeal followed.[7]

[6] The court denied the motion to strike as to the defendants' first amended special defense asserting lack of standing.

[7] Prior to oral argument in this matter, this court ordered the parties to be prepared to address whether the portion of the appeal challenging the trial court's striking of the defendants' counterclaim, as amended, was taken

On January 17, 2019, following oral argument held on January 15, 2019, this court, sua sponte, issued an order staying the appeal pending the final disposition by our Supreme Court of *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019), in which the court resolved the dispositive certified question of whether special defenses and a counterclaim asserted in a foreclosure action must "directly attack" the making, validity, or enforcement of the note or mortgage. On August 27, 2019, following the release of our Supreme Court's opinion in *Blowers*, this court lifted the appellate stay and, sua sponte, ordered the parties to submit supplemental briefs to address the impact, if any, of *Blowers* on the defendants' claims on appeal.[8] The parties thereafter filed supplemental briefs in accordance with this court's order.

I

Before reaching the merits of the defendants' claims on appeal, we first address the plaintiff's argument that the defendants abandoned (1) counts one, two, three, four, seven, eight, nine, and eleven of the first amended counterclaim (nonrepleaded counts) and (2) their first amended unclean hands defense, thereby forfeiting their appellate rights to challenge the court's decision

from a final judgment where no judgment had been rendered thereon. See Practice Book §§ 10-44 and 61-2; *Pellecchia* v. *Connecticut Light & Power Co.*, 139 Conn. App. 88, 90–91, 54 A.3d 658 (2012), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013); *Homecomings Financial Network, Inc.* v. *Starbala*, 85 Conn. App. 284, 285 n.1, 857 A.2d 366 (2004). On January 17, 2019, after having heard argument from the parties on January 15, 2019, with respect to, inter alia, the final judgment issue, this court issued an order dismissing, for lack of a final judgment, the portion of the appeal challenging the trial court's striking of the counterclaim, as amended. Thereafter, the plaintiff filed with the trial court a motion for judgment on the stricken counterclaim, as amended, which the court, *Frechette, J.*, granted. The defendants then filed an amended appeal to encompass the judgment rendered on the counterclaim, as amended.

[8] This court also ordered the parties to address the claims raised in the defendants' amended appeal. See footnote 7 of this opinion.

striking them. We conclude that the defendants (1) preserved their appellate rights as to the nonrepleaded counts, but (2) abandoned their first amended unclean hands defense and, therefore, cannot contest on appeal the court's striking thereof.

The following additional facts and procedural history are relevant to this claim. In their second amended counterclaim, the defendants repleaded counts five, six, ten, and twelve of their first amended counterclaim, but they did not replead the other eight counts thereof. Additionally, the defendants reasserted their special defense sounding in standing and repleaded laches as a special defense, but they did not replead unclean hands as a special defense. Thereafter, the plaintiff moved to strike the second amended laches defense and the second amended counterclaim. The defendants filed a written objection, stating in relevant part: "[The defendants' pleading setting forth their second amended special defenses and counterclaim] realleges the laches special defense . . . . It abandons the unclean hands special defense. It also realleges [counts five, six, ten, and twelve of the first amended counterclaim] . . . . [The nonrepleaded counts] involving only postdefault conduct have not been reasserted."

The plaintiff first argues that the defendants' failure to replead the nonrepleaded counts and their first amended unclean hands defense constitutes a waiver of any alleged error in the court's striking thereof. This contention is unavailing, as the correct course of action for a litigant to take in order to preserve his or her appellate rights as to a stricken pleading is to forgo pleading over, await the rendering of a final judgment, and appeal therefrom. See *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 32, 974 A.2d 820 (2009) (plaintiff preserved appellate rights with respect to stricken counts of original complaint by not repleading stricken counts in amended complaint), aff'd, 304 Conn. 298, 39

A.3d 1065 (2012); *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 64 Conn. App. 192, 194 n.2, 779 A.2d 822 (2001) (plaintiff sought to preserve appellate rights as to certain stricken counts by not repleading those counts in amended complaint), rev'd in part on other grounds, 260 Conn. 766, 802 A.2d 44 (2002).[9]

The plaintiff next argues that, on the basis of their statements in their objection to its February 9, 2016 motion to strike, the defendants expressly abandoned the nonrepleaded counts and the first amended unclean hands defense. "[T]he interpretation of pleadings is always a question of law for the court . . . ." (Internal

[9] Conversely, the defendants waived their right to challenge the court's striking of their first amended laches defense and counts five, six, ten, and twelve of their first amended counterclaim by repleading them. See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017) ("[A]fter a court has granted a motion to strike, [a party] may either amend his [or her] pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as the] filing of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the [motion to strike] the original pleading." [Internal quotation marks omitted.]).

We further observe that "[i]f the [pleading party] elects to replead following the granting of a motion to strike, the [opposing party] may take advantage of this waiver rule by challenging the amended [pleading] as not materially different than the [stricken] . . . pleading that the court had determined to be legally insufficient. That is, the issue [on appeal becomes] whether the court properly determined that the [pleading party] had failed to remedy the pleading deficiencies that gave rise to the granting of the motions to strike or, in the alternative, set forth an entirely new cause of action. It is proper for a court to dispose of the substance of a [pleading] merely repetitive of one to which a demurrer had earlier been sustained. . . . Furthermore, if the allegations in a [pleading] filed subsequent to one that has been stricken are not materially different than those in the earlier, stricken [pleading], the party bringing the subsequent [pleading] cannot be heard to appeal from the action of the trial court striking the subsequent [pleading]." (Internal quotation marks omitted.) *Sempey* v. *Stamford Hospital*, 194 Conn. App. 505, 512, A.3d (2019). The plaintiff does not argue on appeal that the second amended laches defense and the second amended counterclaim were not materially different from the stricken iterations thereof. Therefore, we do not consider that issue. Id., 512 n.4.

quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, 111 Conn. App. 197, 202 n.4, 958 A.2d 210 (2008), aff'd, 303 Conn. 205, 32 A.3d 296 (2011).

As to the nonrepleaded counts, the defendants stated in the objection that those counts, "involving only post-default conduct," had "not been reasserted" in the second amended counterclaim. We do not construe that statement as an abandonment of the nonrepleaded counts; rather, we interpret it to mean that the defendants, in an effort to preserve their appellate rights, decided not to replead those counts with modified allegations in an effort to cure the purported deficiencies therein. See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). Accordingly, we reject the plaintiff's argument as to the nonrepleaded counts.

In contrast, the defendants expressly stated in their objection that the first amended unclean hands defense had been "abandon[ed]." The defendants characterize their use of the term "abandon[ed]" as "not ideal" and "unfortunate"; however, they contend that the statement at issue should be interpreted as being synonymous with their other statement, located within the same paragraph of the objection, that the nonrepleaded counts had "not been reasserted." We are not persuaded. The defendants chose to describe their first amended unclean hands defense as having been "abandon[ed]," as opposed to not "reasserted" or "realleged." Litigants routinely and unambiguously use the term "abandon" to convey their decision not to preserve or otherwise pursue a claim, a defense, or a particular position, and we perceive no ambiguity in the defendants' use of the term here. Instead, we construe the defendants' statement as an unequivocal relinquishment of the first amended unclean hands defense. Having abandoned the first amended unclean hands defense, the defendants cannot now ask this court to

consider whether the trial court's striking thereof constituted error.[10]

II

We now address the merits of the defendants' claim that the court improperly granted (1) the plaintiff's July

[10] On January 12, 2016, in addition to filing their second amended counterclaim and special defenses, the defendants filed a notice of intent to appeal (notice) from the court's December 28, 2015 decision granting, in part, the plaintiff's July 8, 2015 motion to strike. The defendants contend that the notice preserved their appellate rights as to the December 28, 2015 decision. We are not persuaded.

First, the notice did not operate to preserve the defendants' appellate rights. Subsection (b) of Practice Book § 61-5, which governs the filing of notices of intent to appeal, provides in relevant part: "The use of the notice of intent to appeal is abolished in all instances except as provided in subsection (a) of this section, which sets forth the two instances in which a notice of intent must be filed. Except as provided in subsection (a), the filing of a notice of intent to appeal will preserve no appeal rights." Subsection (a) of § 61-5 provides in relevant part that a notice of intent to appeal must be filed in the following two instances only: "(1) [W]hen the deferred appeal is to be filed from a judgment that not only disposes of an entire complaint, counterclaim or cross complaint but also disposes of all the causes of action brought by or against a party or parties so that that party or parties are not parties to any remaining complaint, counterclaim or cross complaint; or (2) when the deferred appeal is to be filed from a judgment that disposes of only part of a complaint, counterclaim, or cross complaint but nevertheless disposes of all causes of action in that pleading brought by or against a particular party or parties." Section 61-5 (a) further provides in relevant part: "In the event that the party aggrieved by a judgment described in (1) or (2) above elects to defer the taking of the appeal until the disposition of the entire case, the aggrieved party must, [within the applicable appeal period], file in the trial court a notice of intent to appeal the judgment . . . ." Here, the December 28, 2015 decision, which itself is not a final judgment; see *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 618, 184 A.3d 761 (2018) ("[t]he granting of a motion to strike . . . ordinarily is not a final judgment"); Practice Book § 10-44; and footnote 7 of this opinion; is outside of the ambit of § 61-5 (a). Accordingly, the defendants did not preserve their appellate rights by filing the notice.

Second, the notice did nothing to counteract the defendants' simultaneous express abandonment of their first amended unclean hands defense in their objection. In the notice, the defendants represented in relevant part that they were "exercis[ing] their option to appeal from the [December 28, 2015 decision when] a final judgment is rendered which disposes of the cause of action for all purposes." The defendants made no representations in the notice contradicting their explicit abandonment of the first amended unclean hands defense.

8, 2015 motion to strike as to the nonrepleaded counts and (2) the plaintiff's February 9, 2016 motion to strike the defendants' (a) second amended laches defense and (b) second amended counterclaim. For the reasons set forth subsequently in this opinion, we agree.

The following additional facts and procedural history are relevant. On June 8, 2015, the defendants filed their first amended answer, special defenses, and counterclaim. In support of their first amended laches defense, the defendants alleged, in a conclusory manner, that the "[p]laintiff's action is barred by the equitable doctrine of laches." With respect to their first amended counterclaim, the defendants made various allegations concerning misconduct that the plaintiff purportedly engaged in following their January, 2010 default on the note. For instance, the defendants alleged that (1) Wells Fargo, the plaintiff's purported servicer of the loan, refused to accept certain payments from them, thereby causing them to incur exacerbated interest charges, and (2) the plaintiff and Wells Fargo repeatedly failed to send representatives to speak with the defendants at mediation sessions held during the course of the prior foreclosure action and otherwise frustrated the defendants' efforts to discuss modifications of their loan, causing them harm.

In its July 8, 2015 motion to strike, the plaintiff claimed that the first amended laches defense (1) was not supported by any allegations of fact, (2) did not relate to the making, validity, or enforcement of the note or mortgage, and (3) was not a legally cognizable defense. With respect to the twelve counts of the first amended counterclaim, the plaintiff asserted that they (1) did not relate to the making, validity, or enforcement of the note or mortgage, and (2) were not legally sufficient. In its December 28, 2015 memorandum of decision granting, in part, the July 8, 2015 motion to strike, the court struck the first amended laches defense on

the basis of its determinations that (1) the defense was devoid of any supporting factual allegations, and (2) to the extent that the defendants were relying on allegations in the first amended counterclaim that Wells Fargo delayed offering them a loan modification, Connecticut law does not impose a duty on a mortgagee to provide a loan modification. In striking the first amended counterclaim in its entirety, the court construed the allegations therein as concerning (1) payments remitted by the defendants subsequent to their default, (2) the parties' failed attempts to modify the loan, (3) the plaintiff's debt collection activities, or (4) litigation in the prior foreclosure action, all of which had occurred after the execution of the note or mortgage. The court concluded that the allegations in the first amended counterclaim did not relate to the making, validity, or enforcement of the note or mortgage, and, therefore, the first amended counterclaim could not be joined with the plaintiff's complaint.

Thereafter, the defendants filed their second amended laches defense and counterclaim. In support of the second amended laches defense, the defendants alleged that the plaintiff had engaged in dilatory behavior during the course of the prior foreclosure action, inter alia, by failing to send agents with knowledge of the case and/or settlement authority to mediation sessions and by initiating the prior foreclosure action despite lacking sufficient documentation to establish its standing to pursue that action. The defendants further alleged that the plaintiff's misconduct had prejudiced them, inter alia, by depleting their equity in the subject property. As to the second amended counterclaim, the defendants repleaded therein counts five, six, ten, and twelve—sounding in breach of the implied covenant of good faith and fair dealing, unjust enrichment, fraud, and a violation of CUTPA, respectively—of the first

amended counterclaim. In support thereof, the defendants set forth allegations primarily concerning purported misconduct by the plaintiff that predated their default on the note. For example, the defendants alleged that (1) in early 2009, prior to their default, Wells Fargo had represented to them that they could obtain a loan modification within three months, but Wells Fargo thereafter engaged in intentional dilatory conduct that resulted in an untimely loan modification offer that contained terms that were inconsistent with previous representations made by Wells Fargo, and (2) Wells Fargo made false representations to the defendants during their discussions regarding a loan modification. The defendants further alleged that they were harmed by these actions.

In its February 9, 2016 motion to strike, the plaintiff asserted that the allegations set forth in support of the second amended laches defense and the second amended counterclaim (1) were largely the same or substantively identical to the allegations in the prior versions thereof, and any new allegations provided by the defendants were immaterial, (2) did not relate to the making, validity, or enforcement of the note or mortgage, and (3) were legally insufficient. In its order striking the second amended laches defense and the second amended counterclaim in its entirety, the court concluded that the issues raised in the second amended laches defense, the second amended counterclaim, and the February 9, 2016 motion to strike "were previously adjudicated by this court in its memorandum of decision dated December 28, 2015."[11]

On appeal, the defendants, relying on our Supreme Court's decision in *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 656, claim that the allegations that

[11] In their briefs, the parties interpret this decision as the court concluding that the allegations set forth in support of the second amended laches defense and the second amended counterclaim did not relate to the making, validity, or enforcement of the note or mortgage. We do as well.

they pleaded in support of the nonrepleaded counts, their second amended laches defense, and their second amended counterclaim related to the "enforcement" of the note or mortgage. Thus, the defendants contend, the trial court erred in striking those claims and defenses on the ground that they did not relate to the making, validity, or enforcement of the note or mortgage. We agree.

We first observe that, in general, "[a]ppellate review of a trial court's decision to grant a motion to strike is plenary. . . . This is because a motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court . . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency. . . . The allegations of the pleading involved are entitled to the same favorable construction a trier would be required to give in admitting evidence under them and if the facts provable under its allegations would support a defense or a cause of action, the motion to strike must fail." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667–68. As in *Blowers*, the precise issue before us is whether the allegations set forth by the defendants in support of the nonrepleaded counts, the second amended laches defense, and the second amended counterclaim "bear a sufficient connection to enforcement of the note or mortgage,"[12] which "presents an issue of law over which we also exercise plenary review." Id., 670.

We next provide an overview of our Supreme Court's decision in *Blowers*. In *Blowers*, after the mortgagee

[12] We do not address whether all of the allegations that the defendants set forth in support of their claims and defenses have a sufficient nexus to enforcement of the note or mortgage. The parties and the trial court have generally addressed the allegations in toto, as will we. See *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 676.

had commenced an action to foreclose the mortgage encumbering the mortgagor's real property, the mortgagor filed special defenses sounding in equitable estoppel and unclean hands, and a counterclaim sounding in negligence and violations of CUTPA. Id., 659. In support thereof, the mortgagor alleged that the mortgagee committed various acts, which occurred either after the mortgagor's default on the promissory note or after the mortgagee had commenced the foreclosure action,[13] that, inter alia, frustrated his ability to obtain a proper loan modification and increased the amount of the debt, including attorney's fees and interest, claimed by the mortgagee in the foreclosure action. Id., 661. Additionally, in support of his negligence claim, the mortgagor alleged that the mortgagee's actions had ruined his credit score, which detrimentally affected his business and personal affairs, and caused him to incur significant legal and other expenses. Id. The mortgagor also asserted that the mortgagee should be estopped from collecting the damages that it had caused by its own alleged misconduct and barred from foreclosing the mortgage at issue due to its unclean hands. Id., 661–62. With respect to his counterclaim, he sought compensatory and punitive damages, injunctive relief, and attorney's fees. Id., 662.

The mortgagee moved to strike the mortgagor's special defenses and counterclaim, claiming that they were

[13] The mortgagor alleged, inter alia, that the mortgagee had (1) offered rate reductions lowering the mortgagor's monthly mortgage payments, only to later renege on the modifications following the mortgagor's successful completion of trial payment periods, (2) increased the mortgagor's monthly payment amount of modified payments that had been agreed to following the intervention of the state's Department of Banking, (3) erroneously informed the mortgagor's insurance company that the mortgagor's real property was no longer being used as the mortgagor's residence, resulting in the cancelation of the mortgagor's insurance policy and requiring the mortgagor to replace the coverage at higher premium costs, and (4) engaged in dilatory conduct during the course of approximately ten months of mediation sessions held after the commencement of the foreclosure action. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 659–61.

unrelated to the making, validity, or enforcement of the note and failed to state a claim upon which relief may be granted. Id. The trial court granted the motion to strike, concluding that the alleged misconduct by the mortgagee had occurred following the execution of the note and, therefore, neither the counterclaim nor the special defenses related to the making, validity, or enforcement thereof. Id., 662–63. Additionally, the court determined that the mortgagor had alleged sufficient facts to support his special defenses, but the court did not reach the issue of whether the counterclaim was supported by adequate facts. Id., 662. Thereafter, the court rendered a judgment of strict foreclosure. Id., 663. The mortgagor appealed to this court, which affirmed the judgment, with one judge dissenting. *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 638, 172 A.3d 837 (2017), rev'd, 332 Conn. 656, 212 A.3d 226 (2019); id., 638–51 (*Prescott*, *J.*, dissenting).

On certified appeal to our Supreme Court, the mortgagor challenged, inter alia, the propriety of the making, validity, or enforcement test, and, to the extent that the test applied in foreclosure actions, the proper scope of " 'enforcement' " under the test. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 664. Our Supreme Court explained that the making, validity, or enforcement test is "nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions."[14] Id., 667. Having clarified the proper standard, the court

[14] In their principal appellate brief in this appeal, the defendants claim that the pleading standards set forth in Practice Book §§ 10-10 (concerning counterclaims) and 10-50 (concerning special defenses) that apply in other civil actions should also be applicable in foreclosure actions in lieu of the making, validity, or enforcement test. As our Supreme Court established in *Blowers*, the making, validity, or enforcement test is not a separate pleading standard, but rather a "practical application" of the existing pleading standards set forth in our rules of practice. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667.

agreed with the mortgagor that "a proper construction of 'enforcement' includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default." Id.

The court observed that "[a]n action for foreclosure is 'peculiarly an equitable action' "; id., 670; and that "appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action." Id., 672. The court determined that "[t]his broader temporal scope is consistent with the principle that, in equitable actions, 'the facts determinative of the rights of the parties are those in existence at the time of final hearing' . . . [and] is not inconsistent with a requirement that a defense sufficiently relates to enforcement of the note or mortgage. The various rights of the mortgagee under the note and mortgage (or related security instruments) are not finally or completely 'enforced' until the foreclosure action is concluded." (Citations omitted.) Id., 673. The court further determined that "[t]he mortgagor's rights and liabilities . . . depend not only on the validity of the note and mortgage but also on the amount of the debt. That debt will determine whether strict foreclosure or foreclosure by sale is ordered, and, in turn, whether a deficiency judgment may be recovered and the amount of that deficiency. . . . The debt may include principal, interest, taxes, and late charges owed. . . . The terms of the note or mortgage may also permit an award of reasonable attorney's fees for expenses arising from any controversy relating to the note or mortgage . . . ." (Citations omitted.) Id., 674–75.

The court continued: "These equitable and practical considerations inexorably lead to the conclusion

that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement . . . . Such allegations, therefore, provide a legally sufficient basis for special defenses in the foreclosure action. Insofar as the counterclaims rest, at this stage, upon the same allegations as the special defenses, judicial economy would certainly weigh in favor of their inclusion in the present action."[15] (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 675–76. On the basis of that rationale, the court reversed this court's judgment and remanded the matter to this court with direction to reverse the judgment of strict foreclosure and remand the matter to the trial court for further proceedings. Id., 678.

Applying the rationale of *Blowers* to the present case, we conclude that the trial court erred in striking the nonrepleaded counts, the defendants' second amended laches defense, and the defendants' second amended counterclaim on the ground that they did not satisfy the making, validity, or enforcement test. The defendants raised allegations of postorigination misconduct by

[15] In striking the mortgagor's special defenses and counterclaim, the trial court also "acknowledged that a foreclosure sought after a modification had been reached during mediation could have the requisite nexus to enforcement of the note, but found that there had been no such modification . . . ." *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 662. On appeal, the mortgagor also challenged "the sufficiency of the allegations to establish that the parties had entered into a binding modification if such allegations are necessary to seek equitable relief on the basis of postorigination conduct." Id., 664. Our Supreme Court determined that "[t]o the extent that the pleadings reasonably may be construed to allege that the April, 2012 intervention by the Department of Banking resulted in a binding modification, there can be no doubt that the breach of such an agreement would bear the requisite nexus [to enforcement of the note or mortgage]." Id., 675.

the plaintiff that, inter alia, increased their debt and hindered their ability to cure their default. Such alleged misconduct is "directly and inseparably connected to enforcement" of the note or mortgage and, therefore, may form the basis of special defenses and a counterclaim in the present action.

Like our Supreme Court in *Blowers*, we note that we are not deciding whether the defendants' allegations, even if proven, "are sufficient to justify the remedy of withholding foreclosure or reducing the debt. . . . [T]he trial court would have to be mindful that [t]he equitable powers of the court are broad, but they are not without limit. Equitable power must be exercised equitably." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 676–77. We conclude only that the defendants' allegations relate to enforcement of the note or mortgage and, as a result, the court committed error in striking the nonrepleaded counts, the defendants' second amended laches defense, and the defendants' second amended counterclaim.[16]

The judgments are reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

[16] In its principal and supplemental appellate briefs, the plaintiff, as an alternative ground for affirmance, asserts that the nonrepleaded counts, the defendants' second amended laches defense, and the defendants' second amended counterclaim fail to state legally cognizable claims or defenses. Although the plaintiff raised that argument in each of its motions to strike, the trial court did not address it in its decisions adjudicating the motions. The defendants argue that the trial court should adjudicate that issue in the first instance and that, pursuant to Practice Book § 10-44, they are entitled to an opportunity to replead if the trial court, upon motion by the plaintiff, strikes their claims or defenses as otherwise legally insufficient. We agree with the defendants. Accordingly, we do not address the plaintiff's claim and leave it to the trial court to decide should the plaintiff choose to reassert it.

STATE OF CONNECTICUT *v.* JAMES MITCHELL (AC 41769)

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

Syllabus

The defendant, who previously had admitted to a violation of probation and been convicted on guilty pleas of two counts of possession of a controlled substance, appealed to this court from the judgment of the trial court denying his amended motion to correct an illegal sentence. In June, 2003, the defendant admitted to a violation of probation, pleaded guilty to two counts of possession of a controlled substance, and entered into a *Garvin* agreement. In October, 2005, the trial court found a *Garvin* violation, revoked the defendant's probation, and sentenced him to six years of incarceration for violating his probation and one year of incarceration for each of the possession charges to be served concurrently. Thereafter, the defendant filed a motion to correct an illegal sentence, which the trial court denied. In his motion, the defendant alleged that the conditions imposed on him by the *Garvin* agreement expired on March 12, 2004, and that the sentence was imposed illegally because he did not receive notice of the October, 2005 sentencing date as required under the applicable rule of practice (§ 43-29). On appeal to this court, the defendant claimed, inter alia, that the sentence was imposed in an illegal manner in violation of *Santobello* v. *New York* (404 U.S. 257) because he was sentenced after the nine month period of the *Garvin* agreement had ended. *Held*:

1. The defendant could not prevail on his claim that the sentence was imposed in an illegal manner in violation of *Santobello*; although the defendant contended that he was to be sentenced within nine months of the plea agreement, there was no indication that the terms of the plea agreement included a requirement that the defendant be sentenced within the nine month period and, during the plea canvass, the trial court recited the terms of the plea agreement twice to the defendant and neither of those recitations included language requiring sentencing to take place within the nine month period.
2. The defendant could not prevail on his claim that the sentence was imposed in an illegal manner because he was not given adequate notice of the sentencing hearing; although the defendant claimed that he did not receive notice of the sentencing hearing, he waived any challenge to notice where, as here, his counsel told the trial court that the defendant was prepared to be sentenced that day, he declined to speak at the hearing, and he expressed no opposition to defense counsel's statement at the hearing.
3. The trial court did not abuse its discretion in denying the motion to correct an illegal sentence, as the defendant's claim that he was not

provided the opportunity to be heard or to present evidence at the sentencing hearing was unavailing; defense counsel told the trial court that the defendant was ready to proceed, neither defense counsel nor the defendant protested to the trial court that the defendant was being denied the opportunity to be heard or to present evidence, and the trial court asked the defendant twice if he had anything he would like to say to the trial court during the hearing and in both instances he declined.

4. The defendant's claim that his sentence was illegally imposed because it did not comply with the requirements of Practice Book § 43-29 was unavailing, as the trial court did not abuse its discretion when it concluded that the defendant confused notice for a violation hearing with notice for a sentencing hearing and denied the motion to correct an illegal sentence; although the defendant claimed that, as a probationer, he should have been notified of a revocation of probation hearing, there was no evidence in the record that would allow for an interpretation of the plea agreement in which the defendant could violate the terms of the agreement and still be continued on probation, and the defendant admitted the violation of probation at the time he entered his *Garvin* plea.

Argued October 9, 2019—officially released January 14, 2020

Procedural History

Information, in the first case, charging the defendant with violation of probation, and information, in the second case, charging the defendant with two counts of the crime of possession of a controlled substance, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the defendant was presented to the court, *Solomon, J.*, on an admission of violation of probation and on pleas of guilty to possession of a controlled substance; thereafter, the court, *Miano, J.*, rendered judgments in accordance with the pleas and sentenced the defendant; subsequently, the court, *Hon. Edward J. Mullarkey*, judge trial referee, denied the defendant's amended motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Donna Mambrino*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, James Mitchell, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant challenges the trial court's denial of his motion to correct on four grounds: (1) that the sentence was imposed in an illegal manner in violation of *Santobello* v. *New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), because the defendant was sentenced after the nine month period of the *Garvin* agreement had ended; (2) that the sentence was imposed in an illegal manner because the defendant was not given adequate notice of the sentencing hearing; (3) that he was denied the opportunity to make a statement or present evidence in violation of Practice Book § 43-10; and (4) that the imposition of the sentence violated Practice Book § 43-29.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On November 14, 1997, the defendant was sentenced to ten years imprisonment, execution suspended after four years, and five years of probation for the underlying crime of robbery in the first degree with a firearm. The defendant's probation began on February 23, 2001. During this probation period, the defendant was arrested, subsequently convicted on or about October 25, 2001, for possession of a controlled substance in violation of General Statutes (Rev. to 2001)

[1] Although Practice Book § 43-29 was amended in 2017, those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current version of that rule.

§ 21a-279 (c) and fined $250. The defendant was incarcerated for failure to pay the fine on March 8, 2002, and later released. The defendant was arrested on March 7, 2002, for possession of narcotics and sale of a controlled substance in violation of General Statutes (Rev. to 2001) § 21a-279 (a) and General Statutes (Rev. to 2001) § 21a-277 (b). On April 19 and 30, 2002, the defendant tested positive for the presence of cocaine in two separate urine samples. On May 13, 2002, the defendant was charged with violating his probation. Subsequently, on or about May 25, 2002, the defendant was arrested for possession of a controlled substance in violation of General Statutes (Rev. to 2001) § 21a-279 (c) and sale of a controlled substance in violation of General Statutes (Rev. to 2001) § 21a-277 (b). The defendant was also charged with possession of a controlled substance for conduct occurring on or about October 17, 2002.

On June 18, 2003, after reaching a *Garvin* agreement with the state,[2] the defendant appeared before the court, *Solomon*, *J.* At the hearing, the court explained its understanding of the terms of the plea agreement: "Here is the deal as I understand it. You are going to admit [to the violation of probation]. You are going to get random drug screenings. You get one positive and if you fail to show up for a test because you don't want to know what the result is, that failure to show up in my opinion is a positive . . . . You are going to be working full time and you are not going to commit any more crimes. If you do any of those things in the course of the next nine months, I'm going to bring you back. You are going to get at least the six years that you owe on the violation of probation, and with respect to the

[2] "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." *State* v. *Stevens*, 278 Conn. 1, 7, 895 A.2d 771 (2006).

other charges, I can do whatever I want. I can run concurrent and I can run consecutive . . . . You make it for nine months, work full time, no crimes, no positive urines, I will continue you on probation at that point in time. Whether you go to jail is entirely in your hands. There is not going to be a negotiation if you come back and you failed. I'm not going to hear about [how] you did pretty good or you did really well for six months. As far as I'm concerned, if you fail, you failed, and you get the six years."

After the defendant admitted to violating his probation and pleaded guilty to two counts of possession of a controlled substance, the court canvassed the defendant and repeated the terms of the plea agreement. "Even though we discussed it on the record, I am going to go through it again with you. The deal, as I understand it, is if you do everything I indicated I expect you to do, no drugs, clean urines, show up for all tests, have full-time regular employment and no more criminal conduct. In other words, don't get arrested for anything. If you do all those things, you are going to come back in nine months and I'm going to continue you on probation. You will still be on probation, but you won't have to serve any jail time as a result of this violation. If you don't do the things that I have told you you have to do, then what's going to happen is I'm not going to wait the nine months. I'm going to bring you back as soon as I find out that there has been a positive urine, or as soon as I find out that you've been arrested, or as soon as I find out that you lose your job. I'm going to bring you back and I am going to sentence you to a minimum of six years, and as much as eight years."

Shortly after this hearing, on August 23, 2003, the defendant was arrested on several felony charges. On September 22, 2005, following a jury trial on these charges, the defendant was convicted of attempt to

commit murder in violation of General Statutes §§ 53a-54a, 53a-49 (a) and 53a-8; conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a; kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (A) and 53a-8; conspiracy to commit kidnapping in the first degree in violation of §§ 53a-48 and 53a-92 (a) (2) (A); sexual assault in the first degree in violation General Statutes §§ 53a-8 and 53a-70 (a) (1); conspiracy to commit sexual assault in the first degree in violation of §§ 53a-48 and 53a-70 (a) (1); assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8; conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (5); and criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1).

On October 12, 2005, the defendant was brought before the court, *Miano*, *J.*, to be sentenced on the violation of probation charge and the two counts of possession of a controlled substance pursuant to the *Garvin* agreement. During the sentencing hearing, the defendant communicated to the court as follows: "I was just called out of the blue to come to court so I, as far as what you're telling me now, is the first thing I am hearing what was going on." Defense counsel then requested a continuance of the hearing. The court met with defense counsel and the prosecutor in chambers to discuss the continuance request. Thereafter, the court continued the case to that afternoon. When the parties returned, defense counsel stated that the defendant "[was] prepared to be sentenced on these matters today." The court heard argument from the state and defense counsel, and the defendant declined to speak. The court found a *Garvin* violation, revoked the defendant's probation and sentenced the defendant to six years of incarceration for violating his probation and one year of incarceration for each of the possession of a controlled substance charges to be served concurrently.

Pursuant to Practice Book § 43-22,[3] the defendant filed a motion to correct an illegal sentence on October 4, 2013, and an amended motion on January 7, 2014. In the memorandum in support of this motion, the defendant argued that the conditions imposed on him by the *Garvin* agreement he entered into on June 18, 2003, expired on March 12, 2004. The defendant also argued that the sentence was imposed illegally because he did not receive notice of the October 12, 2005 sentencing date as required under Practice Book § 43-29.[4]

In opposition, the state contended that (1) the defendant had been thoroughly canvassed and had agreed with the conditions of the plea agreement, (2) he and his attorney knew that sentencing was pending when he was called before the court on October 12, 2005, and (3) the notice procedures of Practice Book § 43-29 were not applicable.

On October 3, 2017, the court issued its written memorandum of decision denying the defendant's motion to correct an illegal sentence. The court noted that during the sentencing hearing, defense counsel told the court that the defendant was "prepared to be sentenced

[3] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[4] Practice Book § 43-29 provides in relevant part: "In cases where the revocation of probation is based upon a conviction for a new offense and the defendant is before the court or is being held in custody pursuant to that conviction, the revocation proceeding may be initiated by a motion to the court by a probation officer and a copy thereof shall be delivered personally to the defendant. All other proceedings for revocation of probation shall be initiated by an arrest warrant supported by an affidavit or by testimony under oath showing probable cause to believe that the defendant has violated any of the conditions of the defendant's probation or his or her conditional discharge or by a written notice to appear to answer to the charge of such violation, which notice, signed by a judge of the Superior Court, shall be personally served upon the defendant by a probation officer and contain a statement of the alleged violation. . . ."

on these matters today." The court further noted that the defendant declined to speak when invited to and was provided with his right to a sentence review. Finally, the court concluded that "[t]he defendant's claim of lack of notice confuses notice of a violation hearing with notice for a sentencing hearing, which was waived by counsel after opportunities to speak with the judge and her client." This appeal followed.

We begin by setting forth the standard of review that guides our analysis. "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard." *State* v. *Tabone*, 279 Conn. 527, 534, 902 A.2d 1058 (2006). "In reviewing claims under the abuse of discretion standard, we have stated that the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Fairchild*, 155 Conn. App. 196, 210, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015).

I

The defendant first claims that he was sentenced in violation of the United States Supreme Court's decision in *Santobello* v. *New York*, supra, 404 U.S. 262, because the sentencing occurred after the nine month period discussed in the plea agreement. In other words, the defendant argues that he was sentenced in violation of the plea agreement because he was not sentenced on or before March 12, 2004. We disagree.

The United States Supreme Court in *Santobello* held that plea bargains "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id.

On appeal, the defendant contends that "[o]ne such explicit inducement in this matter was the promise that, whether or not the defendant was compliant with the conditions of his release, he was to be sentenced on or before March 12, 2004." We are not persuaded because the agreement simply does not contain any "such explicit inducement" that the defendant was to be sentenced on or before March 12, 2004, regardless of whether he was compliant with the terms of his release.

"The validity of plea bargains depends on contract principles." *State* v. *Garvin*, 242 Conn. 296, 314, 699 A.2d 921 (1997). Thus, because "a plea agreement is akin to a contract . . . well established principles of contract law can provide guidance in the interpretation of a plea agreement." *State* v. *Lopez*, 77 Conn. App. 67, 77, 822 A.2d 948 (2003), aff'd, 269 Conn. 799, 850 A.2d 143 (2004). Because, however, plea agreements "implicate the waiver of fundamental rights guaranteed to persons charged with crimes, [they] must . . . be evaluated with reference to the requirements of due process." (Internal quotation marks omitted.) *State* v. *Rivers*, 283 Conn. 713, 724, 931 A.2d 185 (2007). Therefore, "[p]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements." (Internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 7–8, 895 A.2d 771 (2006).

The plea agreement articulated by the court provided that the defendant was required to remain employed, drug free and free of criminal violations for a period of nine months, or until March 12, 2004. If the defendant were able to comply with these terms for the entire nine month period, he would be eligible to continue his probation. There is no indication that the terms of the plea agreement included a requirement that the defendant be sentenced within the nine month period. During the plea canvass, the court recited the terms of the plea agreement twice to the defendant. Neither of those

recitations included language requiring sentencing to take place within the nine month period. Therefore, this claim fails.[5]

II

The defendant also argues that his sentence was imposed illegally because he did not receive notice of the October 12, 2005 hearing. The state counters that the defendant waived any challenge to notice during the sentencing hearing. We agree with the state.

Our Supreme Court has clarified that "waiver is the intentional relinquishment or abandonment of a known right. . . . It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution. [*State* v. *Fabricatore*, 281 Conn. 469, 478, 915 A.2d 872 (2007)]. The mechanism by which a right may be waived, however, varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. See, e.g., *State* v. *Holness*, 289 Conn. 535, 544–45, 958 A.2d 754 (2008) (holding that defendant waived [his claim] . . . when counsel agreed to limiting instruction regarding hearsay statements introduced by state on cross-examination); *State* v. *Fabricatore*, supra, [481] (concluding defendant waived claim when he not only failed to object to jury instruction but also expressed satisfaction with it and argued that it was proper)." (Citations omitted; internal quotation

[5] The defendant's additional argument that the state "waived" its right to have him sentenced because he was not sentenced within the nine month period also fails. Because there was no requirement in the plea agreement that the court sentence the defendant on or before March 12, 2004, there was no requirement for the state to waive.

marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71–72, 967 A.2d 41 (2009). "[A]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. . . . As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts . . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 467–68, 10 A.3d 942 (2011).

During the sentencing hearing before the court, *Miano*, *J.*, the defendant first expressed surprise at the purpose of the hearing and counsel requested a continuance. Defense counsel and the prosecutor met with the judge in chambers and following this, the matter was continued to that afternoon. When the parties returned, defense counsel told the court that the defendant "[was] prepared to be sentenced on these matters today." The court later asked the defendant if he wanted to speak before the hearing was concluded, but he declined to do so.

The court, *Hon. Edward J. Mullarkey*, judge trial referee, in its memorandum of decision denying the defendant's motion to correct an illegal sentence, noted how defense counsel expressed to the court that the defendant was prepared to be sentenced. The court also noted how the defendant declined to speak at the hearing.

On appeal, the defendant argues with no support that "[t]here is absolutely no evidence in the record to suggest that the defendant intentional[ly] relinquished or abandoned his right to notice of sentencing, merely that the defendant conversed with counsel." This conclusory argument is belied by the record. It is clear that the defendant's counsel expressed to the court that the defendant was "prepared to be sentenced . . . ."

Defense counsel's statement did not implicate a basic right, such as the right to a jury trial, which would have required his "fully informed and publicly acknowledged consent . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Gore*, 288 Conn. 770, 782, 955 A.2d 1 (2008). Further, the defendant expressed no opposition to defense counsel's statement at the hearing. Accordingly, this claim fails.

III

Next, the defendant argues that he was illegally sentenced because he was not provided with the opportunity to be heard or to present evidence at the sentencing hearing in violation of Practice Book § 43-10.[6] The state argues that the defendant was given the opportunity to do so but declined. We agree with the state.

At the start of the hearing, defense counsel expressed concern that the defendant would be unable to have family with him because he did not have notice of the hearing. As discussed previously in this opinion, however, after the hearing was continued to that afternoon, defense counsel told the court that the defendant was ready to proceed. Neither defense counsel nor the defendant protested to the court that the defendant was being denied the opportunity to be heard or present evidence. Further, the court asked the defendant twice if he had anything he would like to say to the court

[6] Practice Book § 43-10 provides in relevant part: "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 . . . . (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. . . . "

during the hearing.[7] In both instances, the defendant declined. Accordingly, upon review of the record, we conclude that the court did not abuse its discretion in denying the motion on this ground.

IV

The defendant's final argument is that the sentence was illegally imposed because it did not comply with the requirements of Practice Book § 43-29. The state argues that the procedure of § 43-29 is not applicable to the sentencing hearing of October 12, 2005. We agree with the state.

Practice Book § 43-29 sets forth the procedure for a revocation of probation hearing when the revocation is based on a new criminal offense. The defendant argues that because he was not sentenced by March 12, 2004, he was continued "sub silencio" on probation thereafter. Accordingly, he argues, as a probationer, the defendant should have been notified of a revocation of probation hearing pursuant to § 43-29. This claim is without merit.

As discussed previously in this opinion, there is nothing in the record that indicates that the plea agreement required that the defendant be sentenced before March 12, 2004. Thus, there is no support for the defendant's claim that because he was not sentenced before March 12, 2004, he was automatically continued on probation. This reading of the plea agreement is contrary to the purpose of the *Garvin* agreement and is wholly contradicted by the record. During the plea canvass on June 18, 2003, the defendant agreed that if, and only if, he did not commit any criminal violations, and remained employed and drug free for nine months, would he be

[7] Our Supreme Court determined that a right of allocution exists during the disposition phase of a violation of probation proceeding. *State* v. *Strickland*, 243 Conn. 339, 354, 703 A.2d 109 (1997). Thus, the court properly provided the defendant with the opportunity to address the court. The defendant, however, declined to exercise that right.

continued on probation. As discussed previously, there is no evidence in the record that would allow for an interpretation of the agreement in which the defendant could violate the terms of the agreement and still be continued on probation. Further, the defendant admitted the violation of probation at the time he entered his *Garvin* plea. The court did not abuse its discretion when it concluded that the defendant "confuse[d] notice for a violation hearing with notice for a sentencing hearing" and denied the motion to correct an illegal sentence. Accordingly, this claims fails.

The judgment is affirmed.

In this opinion the other judges concurred.

KENNETH BARNES *v.* CONNECTICUT PODIATRY GROUP, P.C., ET AL.
(AC 39564)

Alvord, Moll and Beach, Js.

Syllabus

The plaintiff K sought to recover damages from the defendants for medical malpractice in connection with the alleged failure of the defendant D, a podiatrist, to rule out the possibility of impaired blood flow to K's feet and to refer K to a vascular specialist, resulting, inter alia, in the partial amputations of K's feet. K filed an expert witness disclosure identifying G as an expert on the standard of care and causation, and later filed an amended expert witness disclosure. The defendants filed a motion to preclude the amended expert witness disclosure, which the court denied without prejudice, but also ordered, on January 13, 2016, that K was precluded from disclosing additional experts. After the court denied K's motion for reargument and reconsideration of that order, K filed a motion to modify the court's scheduling order dated January 19, 2016, and filed an expert witness disclosure identifying R as an additional expert. The court sustained the defendants' objections thereto and granted their motion to preclude R's testimony, stating that it was adhering to its January 13, 2016 order. The court subsequently precluded G from offering expert testimony and rendered summary judgment in favor of the defendants, from which K appealed to this court. Thereafter, S, the administratrix of K's estate, was substituted as the plaintiff. *Held:*

1. The trial court did not err in ordering that K could not disclose additional experts:

   a. S could not prevail on her claim that the trial court's January 13, 2016 order constituted a sanction of preclusion subject to the applicable rule of practice (§ 13-4 [h]), which establishes procedures for the disclosures and depositions of experts in civil matters: the order was a case management decision that the court had the inherent authority to enter, as the court had expressed concern during argument on January 13, 2016, concerning a representation made by K's counsel that he might seek to disclose additional experts, because at that time, the trial in this action, which had been pending since 2012, was scheduled to begin on January 19, 2016, and nothing in the record indicated that the court entered the order as a result of a violation by K of any of the provisions of § 13-4; moreover, notwithstanding that the defendants did not request such an order and that S claimed that good cause existed to allow K to disclose additional experts, it was within the court's broad discretion, exercised pursuant to its authority to manage its docket, to preclude K from disclosing additional experts, particularly where the parties were on the eve of trial, which had been rescheduled, and where the date by which K had to disclose his experts had passed.

   b. The trial court did not err in adhering to the January 13, 2016 order; that court determined that it would not hear reargument on the January 13, 2016 order because a different judge had entered the order and had subsequently denied K's motion for reargument and for reconsideration, there was no basis for S's contention that the court improperly relied on the law of the case doctrine, and S did not present any other cognizable argument challenging the court's decision.

2. The trial court did not err in precluding G from offering expert opinions as to the standard of care and causation: that court reasonably determined that there was an inadequate factual basis to conclude that G knew the prevailing professional standard of care applicable to D in Connecticut in 2011, when the defendants' alleged professional negligence occurred, because G's knowledge of that standard of care was scant and there was no foundation for G to aver that the podiatric standard of care in Connecticut was the same as the standard of care in Pennsylvania, where G was licensed and had practiced exclusively; moreover, G averred that he did not know whether the partial amputations of K's feet could have been prevented and that a vascular surgeon was needed to opine as to whether the amputations could have been avoided but for the defendants' alleged breach of the standard of care, and S did not cite any part of the record that would have undermined the court's determination that G could not testify that the defendants' breach of the standard of care led to K's injuries.

3. S could not prevail on her claim that the trial court erred in rendering summary judgment in favor of the defendants; that court properly precluded K from disclosing additional experts and G from offering standard

of care and causation opinions, and, as a result, K was unable to produce expert testimony establishing the applicable standard of care, a breach of that standard and causation, and he, therefore, could not establish a prima facie case of medical malpractice.

Argued October 8, 2019—officially released January 14, 2020

Procedural History

Action seeking damages for the defendants' medical malpractice, brought to the Superior Court in the judicial district of New Haven, where the court, *A. Robinson, J.*, precluded certain expert testimony; thereafter, the court, *Lager, J.*, granted the motion for summary judgment filed by the defendants and rendered judgment thereon, from which the named plaintiff appealed to this court; subsequently, this court granted the motion to substitute Sherry West Barnes, the administratrix of the estate of the named plaintiff, as the plaintiff. *Affirmed.*

Joseph R. Mirrione, for the appellant (substitute plaintiff).

Ellen M. Costello, for the appellees (defendants).

Opinion

MOLL, J. In this medical malpractice action, the substitute plaintiff, Sherry West Barnes, administratrix of the estate of Kenneth Barnes (administratrix),[1] appeals from the summary judgment rendered by the trial court in favor of the defendants, Connecticut Podiatry Group, P.C., and Marc Daddio, a doctor of podiatric medicine. On appeal, the administratrix claims that (1) the court,

[1] On December 9, 2016, during the pendency of this appeal, counsel for the named plaintiff, Kenneth Barnes, filed a suggestion of death indicating that Kenneth Barnes had died. On September 26, 2017, Kenneth Barnes' counsel filed a motion to substitute Sherry West Barnes, administratrix of the estate of Kenneth Barnes, as the plaintiff, which this court granted on October 27, 2017. For purposes of clarity, we will refer in this opinion to Kenneth Barnes by his last name and to Sherry West Barnes as the administratrix.

A. Robinson, *J.*, erred in precluding Barnes from disclosing additional experts, and (2) the court, *Lager*, *J.*, erred in (a) adhering to Judge Robinson's order precluding Barnes from disclosing additional experts, (b) precluding the expert opinions of Barnes' disclosed expert, and (c) rendering summary judgment in favor of the defendants. We disagree and, accordingly, affirm the summary judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On February 29, 2012, Barnes commenced this medical malpractice action against the defendants. In a revised two count complaint filed on April 17, 2012, Barnes alleged that, while he was a patient of the defendants in 2011, the defendants deviated from the applicable standard of podiatric care by failing to suspect and rule out the possibility of an impairment in the blood flow to Barnes' feet and by failing to refer Barnes to a vascular specialist, resulting, inter alia, in the partial amputations of Barnes' feet. On April 26, 2012, the defendants answered the revised complaint, denying the material allegations therein.

On May 3, 2012, Barnes filed an expert witness disclosure identifying Jack B. Gorman, a podiatrist practicing in Pennsylvania, as his expert on the standard of care and causation. The disclosure indicated that Dr. Gorman was expected to testify that the defendants deviated from the applicable standard of care by failing to suspect and rule out the possibility of "vascular compromise" and make an appropriate and timely referral to a vascular specialist. In addition, per the disclosure, Dr. Gorman was expected to testify that the defendants' deviation from the applicable standard of care resulted in the partial amputations of Barnes' feet.

On June 25, 2013, the trial court, *A. Robinson*, *J.*, approved a scheduling order, inter alia, setting September 1, 2013, as the deadline by which Barnes had to

disclose all of his experts. The next day, a JDNO notice was issued providing that a jury trial was scheduled to begin on September 15, 2014. Barnes did not disclose any additional experts on or before September 1, 2013.

On March 12, 2014, the defendants filed a motion to preclude the expert testimony of Dr. Gorman on the basis that, despite their multiple attempts to depose him, Dr. Gorman refused to attend a deposition without a prepayment of his fees. On April 7, 2014, Judge Robinson issued an order declining to preclude Dr. Gorman's expert testimony, but requiring the parties to select a date, no later than May 14, 2014, on which to conduct Dr. Gorman's deposition, for which the defendants were not required to remit a prepayment. Notwithstanding the court's order, Dr. Gorman was not deposed on or before May 14, 2014.

On September 12, 2014, three days before the start of trial, Terence S. Hawkins, Barnes' prior counsel, filed a motion for a continuance of the trial, representing that Hawkins was scheduled to undergo an emergency medical procedure on September 15, 2014. The same day, Judge Robinson granted the motion and scheduled a status conference for October 15, 2014. On October 14, 2014, Hawkins filed a motion for a continuance of the status conference, representing that he was closing his legal practice on October 31, 2014.[2] The same day, Judge Robinson granted the motion and ordered the parties' counsel to select a new date for the status conference. Subsequently, Judge Robinson issued a separate order requiring an appearance to be filed on behalf of Barnes no later than November 21, 2014, or else the case would be dismissed. On November 17, 2014,

[2] On June 29, 2015, in relation to disciplinary proceedings commenced in 2014; see *Chief Disciplinary Counsel* v. *Hawkins*, Superior Court, judicial district of New Haven, Docket No. CV-14-6048369-S; Hawkins permanently resigned from the Connecticut bar and waived his privilege of applying for readmission.

Attorney Joseph R. Mirrione appeared on behalf of Barnes. On November 18, 2014, JDNO notices were issued providing, respectively, that a trial management conference was scheduled for December 22, 2015, and that the trial was rescheduled to January 19, 2016.

On September 25, 2015, Barnes filed a motion for a continuance of the trial on the ground that Attorney Mirrione was "relatively new counsel" who had taken over Barnes' case from Hawkins. The same day, Judge Robinson denied the motion for a continuance without prejudice to the motion being renewed at the trial management conference. Notably, Judge Robinson also stated that, if a continuance were granted at that time, it would be marked final and no additional continuances would be permitted.

On November 13, 2015, Barnes filed an amended expert witness disclosure with respect to Dr. Gorman. The amended expert witness disclosure indicated that Dr. Gorman was expected to testify that (1) "the history and physical were inadequate," (2) upon noting "gangrenous changes," the defendants failed to "take an adequate history and physical and did not order antibiotics or other appropriate tests," (3) the defendants failed to refer Barnes to a vascular surgeon in a timely manner, (4) the defendants failed to communicate with Barnes' family doctor and vascular surgeon, (5) the defendants allowed Barnes' condition to deteriorate, and (6) Barnes underwent multiple surgeries and amputations as a result of the defendants' conduct.

On November 24, 2015, the defendants filed a motion to preclude the amendment to Dr. Gorman's expert witness disclosure, to which Barnes objected. On January 13, 2016, after hearing argument on January 11, 2016,[3] Judge Robinson issued an order denying, without prejudice, the motion to preclude. Judge Robinson

[3] A recitation of what transpired at the January 11, 2016 hearing is provided in part I A of this opinion.

determined that Barnes should be allowed to supplement Dr. Gorman's testimony, provided that Dr. Gorman be made available for a deposition within fourteen days of the order. Additionally, Judge Robinson ordered that Barnes was "precluded from disclosing any additional experts." Judge Robinson then assigned the case to Judge Lager for the management of any pending and future pretrial motions, as well as for trial, and directed the parties to report to Judge Lager to address the scheduling of trial. On January 19, 2016, following a status and scheduling conference, Judge Lager issued a scheduling order, inter alia, rescheduling the trial date to August 15, 2016. The January 19, 2016 scheduling order did not provide for the additional disclosure of experts by Barnes.

On January 19, 2016, Barnes filed a motion for reargument and reconsideration of the portions of Judge Robinson's January 13, 2016 order precluding him from disclosing any additional experts and requiring Dr. Gorman's deposition to be conducted within fourteen days of the order. The defendants filed an objection to that motion later on the same day.

On January 29, 2016, Dr. Gorman was deposed. On February 18, 2016, upon the filing of a request to amend and without objection from the defendants, Barnes' amended revised two count complaint was deemed filed. Therein, Barnes alleged that the defendants deviated from the applicable standard of podiatric care, causing, inter alia, the partial amputations of Barnes' feet, on the grounds that (1) the defendants failed to suspect and rule out the possibility of an impairment in the blood flow to Barnes' feet, (2) they failed to refer Barnes to a vascular specialist, (3) "the history and physical were inadequate," (4) upon noting "gangrenous changes," they failed to "take an adequate history and physical and [to] order antibiotics or other appropriate tests,'' (5) they failed to communicate with

Barnes' treating kidney doctor and vascular surgeon, and (6) they allowed Barnes' condition to deteriorate. The defendants subsequently answered the amended revised complaint, denying the material allegations therein.[4]

On February 29, 2016, Barnes filed a motion to modify the January 19, 2016 scheduling order, wherein he, inter alia, sought permission to disclose an additional expert, to which the defendants objected. On March 4, 2016, following argument, Judge Lager issued a modified scheduling order, inter alia, amending the dates by which certain witnesses had to be deposed. The modified scheduling order did not contain any provision for the disclosure of additional experts by Barnes.

On March 9, 2016, notwithstanding the portion of Judge Robinson's January 13, 2016 order precluding Barnes from disclosing additional experts (January 13, 2016 order), Barnes filed an expert witness disclosure identifying Rakesh Shah, a cardiologist, as an additional causation expert.[5] On March 11, 2016, the defendants filed a combined objection to the expert witness disclosure of Dr. Shah and a motion to preclude Dr. Shah's expert testimony, asserting that the disclosure violated the January 13, 2016 order. Barnes subsequently filed a combined reply to the defendants' objection and an opposition to the defendants' motion to preclude.

On March 17, 2016, Barnes filed a request for argument regarding his motion for reargument and reconsideration of the January 13, 2016 order, and he reclaimed the motion to the short calendar of March 21, 2016. On

[4] The defendants also asserted a statute of limitations defense as to both counts of the amended revised complaint. Barnes subsequently filed a reply denying the allegations underlying that defense.

[5] The expert witness disclosure indicated that Dr. Shah was expected to testify as to the standard of care as well. At a subsequent hearing before Judge Lager, Barnes' counsel clarified that he was seeking to disclose Dr. Shah as a causation expert only.

March 24, 2016, Judge Robinson summarily denied both the request for argument and the motion for reargument and reconsideration. On May 12, 2016, following argument, Judge Lager sustained the defendants' objection to Barnes' expert witness disclosure of Dr. Shah and granted the defendants' motion to preclude Dr. Shah's expert testimony, stating that she was adhering to the January 13, 2016 order and noting that Judge Robinson had declined to reconsider that order.

Following Dr. Gorman's deposition on January 29, 2016, the defendants filed several motions in limine seeking to preclude the expert testimony of Dr. Gorman as to the standard of care and causation. Barnes objected to these motions. On July 26, 2016, after hearing argument on July 15, 2016, Judge Lager issued a memorandum of decision addressing the defendants' claims regarding the preclusion of Dr. Gorman's expert opinions.[6] With respect to Dr. Gorman's standard of care opinion, Judge Lager concluded that, although Dr. Gorman satisfied the minimum qualification requirements of General Statutes § 52-184c, there was an insufficient factual basis to determine whether Dr. Gorman knew the prevailing professional standard of care applicable to Dr. Daddio in Connecticut in 2011. Judge Lager stated that the court would provide Barnes with "one final opportunity" to establish the requisite foundation on August 3, 2016, the date scheduled for a *Porter* hearing, at which Barnes had to produce Dr. Gorman to be subject to examination. Turning then to the issue of causation, Judge Lager concluded that Dr. Gorman was

[6] In a motion in limine filed on April 18, 2016, and supplemented on June 23, 2016, the defendants asserted that Dr. Gorman's expert opinions failed to satisfy the requirements of *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), and requested that the court hold a hearing pursuant to *Porter*. Those claims were not argued on July 15, 2016, or addressed on the merits in the July 26, 2016 memorandum of decision; instead, Judge Lager scheduled argument on the *Porter* issues for August 3, 2016.

precluded from offering expert testimony as to causation because he was not qualified and his causation opinions exceeded the scope of his expertise and were speculative.

On August 1, 2016, Barnes filed a request to disclose Dr. Shah as a causation expert, to which the defendants filed an objection. On August 2, 2016, Barnes filed a letter with the court stating that he would not produce Dr. Gorman at the scheduled August 3, 2016 hearing in light of Judge Lager's decision precluding Dr. Gorman from testifying as to causation. On August 3, 2016, after hearing argument, Judge Lager denied Barnes' request to disclose Dr. Shah as an expert and sustained the defendants' objection to the request.

Additionally, on August 1, 2016, the defendants filed a motion for summary judgment, which they supplemented on August 8, 2016, on the ground that Barnes was unable to produce expert testimony as to the standard of care or causation and, thus, could not demonstrate a prima facie case of medical malpractice. Barnes objected to the motion for summary judgment. On August 10, 2016, following argument, Judge Lager granted the defendants' motion for summary judgment on the record. The following day, Judge Lager issued a memorandum of decision, determining that (1) there was an inadequate factual basis upon which the court could find Dr. Gorman qualified to testify as to the standard of care, (2) as she had previously concluded, Dr. Gorman was precluded from testifying as to causation, and (3) as a result of the court's rulings, Barnes lacked the expert opinions necessary to prove the elements of his medical malpractice claims and, therefore, the defendants were entitled to summary judgment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

At the outset, we set forth the legal principles governing medical malpractice actions. "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard. . . . Likewise, [e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person."[7] (Citations omitted; internal quotation marks omitted.) *Procaccini* v. *Lawrence & Memorial Hospital, Inc.*, 175 Conn. App. 692, 717–18, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017).

I

The administratrix raises several claims on appeal relating to the January 13, 2016 order. Specifically, the

[7] In rare cases, expert testimony is unnecessary to satisfy the elements of a medical malpractice claim. See *Rosa* v. *Lawrence & Memorial Hospital*, 145 Conn. App. 275, 303–304, 74 A.3d 534 (2013) ("An exception to the general rule with regard to expert medical opinion evidence is when the medical condition is obvious or common in everyday life. . . . Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief. . . . Expert opinion may also be excused in those cases where the professional negligence is so gross as to be clear even to a lay person." [Internal quotation marks omitted.]); *Harlan* v. *Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600, 613–14, 816 A.2d 719 ("[e]xcept in the unusual case where the want of care or skill is so gross that it presents an almost conclusive inference of want of care . . . the testimony of an expert witness is necessary to establish both the standard of proper professional skill or care on the part of a physician . . . and that the defendant failed to conform to that standard of care" [internal quotation marks omitted]), cert. denied, 264 Conn. 911, 826 A.2d 1155 (2003). The administratrix does not claim that any exceptions apply to negate the necessity of expert testimony in this case.

administratrix asserts that (1) the January 13, 2016 order was improper because (a) it constituted a sanction of preclusion governed by Practice Book § 13-4 (h), the requirements of which were not satisfied, (b) the defendants did not request that the court enter an order precluding Barnes from disclosing additional experts, and (c) good cause existed to allow Barnes to disclose additional experts, and (2) Judge Lager erred in adhering to the January 13, 2016 order. For the reasons set forth subsequently in this opinion, we reject these claims.

A

We first address the administratrix' claims that the January 13, 2016 order was improper because (1) it constituted a sanction of preclusion subject to the requirements Practice Book § 13-4 (h), which were not met, (2) the defendants did not request that the court preclude Barnes from disclosing additional experts, and (3) good cause existed to permit Barnes to disclose additional experts. We disagree.

The following additional facts and procedural history are relevant to our disposition of these claims. On January 11, 2016, the parties appeared before Judge Robinson to present argument on the defendants' motion to preclude Barnes' amendment to Dr. Gorman's expert witness disclosure. During argument, Barnes' counsel represented that he might seek to disclose other experts in addition to Dr. Gorman. Judge Robinson indicated that she was "concerned" by that representation. Barnes' counsel then reiterated that "there might be another disclosure . . . ." In response, the defendants' counsel stated that "if we're going to start getting into—into more experts, then, I really have a concern. I—I mean, that is really concerning, because this case is supposed to be going to trial next week."[8] Additionally,

[8] At the time of argument on the motion to preclude, the trial was scheduled to begin on January 19, 2016, eight days later.

the defendants' counsel stated that she "object[ed] . . . to any further disclosures."

Thereafter, on January 13, 2016, Judge Robinson denied the defendants' motion to preclude without prejudice, stating in relevant part: "Though the defendant[s] [make] many compelling and persuasive arguments, the court ultimately holds that [Barnes] should be allowed to supplement the opinions of his already disclosed [expert, i.e., Dr. Gorman], provided the expert is made available for [a] deposition within fourteen days of this order. *Further*, [*Barnes*] *is precluded from disclosing any additional experts*." (Emphasis added.)

1

The administratrix contends that the January 13, 2016 order was improper because it constituted a sanction of preclusion governed by Practice Book § 13-4 (h) and it did not satisfy the requirements set forth therein. The defendants argue that the January 13, 2016 order was a case management decision that Judge Robinson had the inherent authority to enter. We agree with the defendants.

Resolving this claim requires us to interpret the nature of the January 13, 2016 order. "The construction of an order is a question of law for the court, and the court's review is plenary. . . . As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The legal effect of an order must be declared in light of the literal meaning of the language used. The unambiguous terms of [an order], like the terms in a written contract, are to be given their usual and ordinary meaning. . . . [An order] must be construed in light of the situation of the court, what was before it, and the accompanying circumstances." (Citations omitted; internal quotation marks omitted.) *In re Jacklyn H.*, 162 Conn. App. 811, 830, 131 A.3d 784 (2016).

The administratrix urges us to construe the January 13, 2016 order as a sanction of preclusion governed by Practice Book § 13-4 (h). Section 13-4 establishes procedures, inter alia, for the disclosures and depositions of experts in civil matters. Section 13-4 (h) provides: "A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions." The administratrix contends that the January 13, 2016 order was entered without the hearing and findings required by this rule of practice.

In response, the defendants argue that the January 13, 2016 order was a case management decision that Judge Robinson had the inherent authority to enter. "[C]ase management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Citation omitted.) *Krevis* v. *Bridgeport*, 262 Conn. 813, 819, 817 A.2d 628 (2003). As our Supreme Court has observed, "[i]t is well known that justice delayed is justice denied. In order to fulfill our responsibility of dispensing justice we in the judiciary must adopt an effective system of caseflow management. Caseflow management is based upon the premise that it is the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards. Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system. To reduce delay

while still maintaining high quality justice, it is essential that we have judicial involvement in managing cases." *In re Mongillo*, 190 Conn. 686, 690–91, 461 A.2d 1387 (1983), overruled in part on other grounds, *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999).

As the defendants correctly posit, the January 13, 2016 order was a case management decision, rather than a sanction of preclusion. During argument on the defendants' motion to preclude the amendment to Dr. Gorman's expert witness disclosure, Judge Robinson expressed concern regarding the representation made by Barnes' counsel that he might seek to disclose additional experts. At the time of argument and when Judge Robinson entered the January 13, 2016 order, the trial in this action, which had been pending since February, 2012, was scheduled to begin on January 19, 2016. The trial had been rescheduled once before in November, 2014, following Attorney Mirrione's appearance on behalf of Barnes. In addition, pursuant to the scheduling order in effect at the time of argument and when the January 13, 2016 order was entered, the deadline by which Barnes had to disclose his experts—September 1, 2013—had long expired. By permitting Barnes to amend the expert witness disclosure of Dr. Gorman and continuing the trial date to accommodate that supplementation, Judge Robinson simultaneously ordered that Barnes could not disclose any additional experts, with the ostensible purpose of preventing any legerdemain. Furthermore, nothing in the record indicates that Judge Robinson entered the January 13, 2016 order as a result of a violation by Barnes of any of the provisions of Practice Book § 13-4, which, by its plain terms, is necessary in order to invoke § 13-4 (h).[9] For these reasons, we conclude that the January 13, 2016 order was

[9] In conjunction with her claim that the January 13, 2016 order was a sanction of preclusion, the administratrix asserts that the January 13, 2016 order fails to satisfy the test set forth in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001). In *Millbrook*, our Supreme Court established that "[i]n order for a trial court's order of

a case management decision, as opposed to a sanction of preclusion, that Judge Robinson had the inherent authority to enter. Therefore, the administratrix' reliance on § 13-4 (h) is misplaced.[10]

2

The administratrix also claims that the January 13, 2016 order was improper because, in seeking to preclude Barnes from amending the expert witness disclosure of Dr. Gorman, the defendants did not request, as relief, that Judge Robinson preclude Barnes from disclosing additional experts. In light of our conclusion in part I A 1 of this opinion that the January 13, 2016 order was a case management decision, we reject this claim. "[T]rial courts have wide latitude to manage cases consistent with judicial economy and justice . . . ." (Internal quotation marks omitted.) *Griswold* v. *Camputaro*, 331 Conn. 701, 709, 207 A.3d 512 (2019), quoting *Krevis* v. *Bridgeport*, supra, 262 Conn. 818–19. Thus, notwithstanding that the defendants did not request such an action, it was within Judge Robinson's broad discretion, exercised pursuant to her inherent authority to manage her docket, to preclude Barnes from disclosing additional experts.[11]

sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear. . . . Second, the record must establish that the order was in fact violated. . . . Third, the sanction imposed must be proportional to the violation." Id. As we have explained in this opinion, the January 13, 2016 order was a case management decision, rather than a sanction entered as a result of Barnes violating an order. Accordingly, *Millbrook* is inapposite.

[10] The administratrix notes that Judge Lager, during the May 12, 2016 hearing on the defendants' combined objection to Barnes' expert witness disclosure of Dr. Shah and motion to preclude Dr. Shah's expert testimony, characterized the January 13, 2016 order as a "sanction [that Judge Robinson] could appropriately impose under Practice Book [§] 13-4 (h)" and as a "discovery sanction . . . ." Because the construction of the January 13, 2016 order is a question of law subject to our plenary review; *In re Jacklyn H.*, supra, 162 Conn. App. 830; we do not defer to Judge Lager's interpretation of the January 13, 2016 order.

[11] We also observe that the issue of precluding Barnes from disclosing additional experts was raised during argument on the defendants' motion

The administratrix next claims that Judge Robinson abused her discretion in entering the January 13, 2016 order because good cause existed to permit Barnes to disclose additional experts. Specifically, the administratrix asserts that, as a result "of the manner in which [Hawkins] conducted this case" before Attorney Mirrione appeared on behalf of Barnes in November, 2014, Attorney Mirrione was initially unaware that he might need to retain other experts and Attorney Mirrione worked diligently to prosecute the case. This claim is unavailing.

As we concluded in part I A 1 of this opinion, the January 13, 2016 order constituted a case management decision. "We review case management decisions for abuse of discretion, giving [trial] courts wide latitude. . . . A party adversely affected by a [trial] court's case management decision thus bears a formidable burden in seeking reversal. . . . A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions because it is in a much better position to determine the effect that a particular procedure will have on both parties. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Internal quotation marks omitted.) *Levine* v. *Hite*, 189 Conn. App. 281, 296, 207 A.3d 100 (2019).

to preclude the amendment to Dr. Gorman's expert witness disclosure. After Barnes' counsel had represented that he was considering the possibility of disclosing additional experts and Judge Robinson had expressed concern with respect to that representation, the defendants' counsel stated that she was also concerned by Barnes potentially seeking to disclose additional experts and that she objected to any further disclosures.

In the present case, it was well within Judge Robinson's wide discretion to preclude Barnes from disclosing additional experts where the parties were on the eve of trial, which had been rescheduled previously, in a case pending since February, 2012, and where the date by which Barnes had to disclose his experts had passed.[12] Accordingly, we conclude that Judge Robinson did not abuse her discretion in entering the January 13, 2016 order.[13]

B

We next turn to the administratrix' claim that Judge Lager erred in adhering to the January 13, 2016 order. We are not persuaded.

The following additional facts and procedural history are relevant to our resolution of this claim. On January

[12] The administratrix also claims that Barnes was harmed as a result of the January 13, 2016 order. Because we conclude that Judge Robinson did not abuse her discretion in entering the January 13, 2016 order, we need not address this claim.

[13] In her principal appellate brief, the administratrix also claimed that Judge Robinson's March 24, 2016 denial of Barnes' motion for reargument and reconsideration of the January 13, 2016 order was erroneous. During oral argument before this court, however, the administratrix' counsel stated: "Now, you know, what we appealed on is Judge Robinson's decision not to allow any additional experts. A lot has been made . . . about the forty-six days between [counsel] making this motion to reargue and it ultimately being decided by Judge Robinson not to allow reargument. That somehow or another we did something wrong and that had that been argued or decided or something had happened earlier there would be a different outcome. You know, [the administratrix is] not challenging that [Judge Robinson] decided not to let [counsel] reargue. What [the administratrix is] challenging is that the initial decision was wrong." We interpret counsel's statements to be an abandonment of the administratrix' claim challenging the denial of the motion for reargument and reconsideration and, thus, we do not address that claim.

In addition, without citation to the record, the administratrix claims that Judge Robinson erred when she purportedly failed to give Barnes a continuance to disclose an additional expert. There is nothing in the record to indicate that Barnes requested that Judge Robinson grant him a continuance to disclose an additional expert and, therefore, this claim lacks merit.

19, 2016, after Judge Robinson had entered the January 13, 2016 order, Judge Lager issued a scheduling order that did not contain any provision permitting Barnes to disclose additional experts. On that same day, Barnes filed the motion for reargument and reconsideration of the January 13, 2016 order; however, he did not file a caseflow request for immediate consideration of the motion and he did not mark it "ready" or "take papers" when it printed on the February 1, 2016 short calendar.

On March 4, 2016, Judge Lager heard argument on Barnes' motion to modify the January 19, 2016 scheduling order, wherein Barnes, inter alia, requested permission to disclose an additional expert, and the defendants' objection thereto. On the record, Judge Lager stated that she was adhering to the January 13, 2016 order, which she described as "a very clear and direct order" precluding Barnes from disclosing additional experts. Judge Lager determined that she would not hear reargument on the January 13, 2016 order because Judge Robinson was the proper judicial authority from whom Barnes had to seek reargument and reconsideration of the order.[14] Judge Lager also stated that she "believe[d] at the moment [that the January 13, 2016 order was] the law of the case." Thereafter, Judge Lager issued a modified scheduling order, which did not contain any provision for the disclosure of additional experts by Barnes.

On May 12, 2016, following Judge Robinson's March 24, 2016 denial of Barnes' motion for reargument and reconsideration of the January 13, 2016 order, the parties presented argument to Judge Lager on the defendants' combined objection to Barnes' expert witness disclosure of Dr. Shah and motion to preclude Dr. Shah's expert opinion. During argument, Barnes' counsel argued that, notwithstanding Judge Robinson's

[14] At the time of argument on March 4, 2016, Barnes had not reclaimed the motion for reargument and reconsideration of the January 13, 2016 order.

denial of the motion for reargument and reconsideration, Judge Lager was not bound by the January 13, 2016 order and could examine its propriety. In response, Judge Lager stated that she incorrectly referred to the January 13, 2016 order as the law of the case during the March 4, 2016 proceeding and that she could not revisit the January 13, 2016 order on the basis that it was a "discovery sanction" over which Judge Robinson "had full and complete authority . . . ."[15] In the May 12, 2016 order sustaining the defendants' objection to Dr. Shah's expert witness disclosure and granting the defendants' motion to preclude Dr. Shah's expert opinion, Judge Lager reasoned that she was adhering to the January 13, 2016 order, noting that Judge Robinson had declined to reconsider it.

The administratrix asserts that Judge Lager erred in adhering to the January 13, 2016 order because she improperly construed the January 13, 2016 order as the law of the case. The record reveals, however, that Judge Lager did not rely on the law of the case doctrine[16] in adhering to the January 13, 2016 order. Although Judge Lager made a passing reference during the March 4, 2016 proceeding to the January 13, 2016 order as the

[15] As we concluded in part I A 1 of this opinion, the January 13, 2016 order was a case management decision.

[16] "The law of the case doctrine provides that when a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Levine* v. *Hite*, supra, 189 Conn. App. 297.

law of the case, the crux of Judge Lager's decision declining to hear reargument on the January 13, 2016 order was that Judge Robinson was the proper judicial authority from whom Barnes had to seek adjudication of his pending motion for reargument and reconsideration of that order. See Practice Book § 11-12 (c) ("The motion to reargue shall be considered *by the judge who rendered the decision or order*. Such judge shall decide, without a hearing, whether the motion to reargue should be granted. If the judge grants the motion, the judge shall schedule the matter for hearing on the relief requested." [Emphasis added.]) During the subsequent May 12, 2016 proceeding, Judge Lager explicitly stated that the January 13, 2016 order was not the law of the case, but rather a discovery sanction imposed by Judge Robinson that she could not revisit. There is no basis for the administratrix' contention that Judge Lager improperly relied on the law of the case doctrine, and she does not present any other cognizable argument challenging the basis of Judge Lager's decisions adhering to the January 13, 2016 order. Thus, this claim fails.

II

We next address the administratrix' claim that Judge Lager erred in precluding Dr. Gorman from offering expert opinions as to the standard of care and causation. For the reasons that follow, we disagree.

We first set forth the standard of review and legal principles governing our resolution of the administratrix' claim. "The decision to preclude a party from introducing expert testimony is within the discretion of the trial court. . . . On appeal, that decision is subject only to the test of abuse of discretion." (Internal quotation marks omitted.) *Ruff* v. *Yale-New Haven Hospital, Inc.*, 172 Conn. App. 699, 709, 161 A.3d 552 (2017).

"Our standard regarding the admissibility of expert testimony is well settled. Expert testimony should be

admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation marks omitted.) *Rockhill* v. *Danbury Hospital*, 176 Conn. App. 39, 61, 168 A.3d 630 (2017); see also Conn. Code Evid. § 7-2.[17]

A

We first turn to the administratrix' claim that Judge Lager improperly precluded Dr. Gorman's standard of care opinion. This claim is unavailing.

We begin by setting forth the following legal principles applicable to the disposition of this claim. General Statutes § 52-184c (a) provides: "In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b,[18] the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing

[17] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

[18] General Statutes § 52-184b provides in relevant part: "(a) For the purposes of this section, 'health care provider' means any person, corporation, facility or institution licensed by this state to provide health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment. . . ."

professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." (Footnote added.) General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' " General Statutes § 52-184c (d) provides: "Any health care provider may testify as an expert in any action if he: (1) Is a 'similar health care provider' pursuant to subsection (b) or (c)[19] of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or

[19] Dr. Daddio is a board certified podiatrist and, therefore, the definition of a "similar health care provider" set forth in subsection (c) of General Statutes § 52-184c is applicable in the present case. Subsection (b) of § 52-184c applies only to a "defendant health care provider [who] is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist"; (emphasis omitted; internal quotation marks omitted) *Grondin* v. *Curi*, 262 Conn. 637, 650 n.15, 817 A.2d 61 (2003); and, accordingly, that subsection is not germane here.

teaching of medicine within the five-year period before the incident giving rise to the claim." (Footnote added.)

Our Supreme Court has explained that the provisions of § 52-184c "have done nothing to abrogate the fundamental requirement . . . that an expert testifying about the standard of care must know what that standard is in a particular situation. . . . [T]he requirements under § 52-184c (d) do not affect the trial court's discretion to determine whether a proffered expert is qualified to testify as an expert. See Conn. Code Evid. §§ 1-3[20] and 7-2 . . . . Indeed, § 52-184c merely sets out minimum qualification standards for experts in medical malpractice cases. Thus, a trial court that permits a physician to testify as an expert without first determining whether he or she has a sufficient basis for knowing the 'prevailing' standard of care is abdicating its evidentiary gatekeeping responsibilities." (Citations omitted; footnotes altered.) *Grondin* v. *Curi*, 262 Conn. 637, 656–57, 817 A.2d 61 (2003).

The following additional facts and procedural history are relevant to our disposition of the administratrix' claim. After Dr. Gorman had been deposed on January 29, 2016, the defendants filed several motions in limine requesting, inter alia, that the trial court preclude Dr. Gorman's standard of care opinion on the basis that Dr. Gorman was not qualified to testify. On July 15, 2016, Judge Lager heard argument on, inter alia, the issue of whether preclusion of Dr. Gorman's standard of care opinion was warranted. Following argument, with Judge Lager's permission, Barnes filed an affidavit of Dr. Gorman dated July 18, 2016 (July 18, 2016 affida-

[20] Section 1-3 of the Connecticut Code of Evidence provides: "(a) Questions of admissibility generally. Preliminary questions concerning the qualification and competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

"(b) Admissibility conditioned on fact. When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts."

vit), and the defendants filed an affidavit of their expert, Joseph Treadwell.

On July 26, 2016, in addressing whether preclusion of Dr. Gorman's standard of care opinion was warranted, Judge Lager concluded that Dr. Gorman satisfied the "minimum qualification standards for experts in medical malpractice cases" because Dr. Gorman "was actively engaged in the practice of podiatric medicine" at the time of the defendants' alleged professional negligence in 2011 and, therefore, Dr. Gorman met the requirements of subdivision (d) (2) of § 52-184c. Citing *Grondin*, Judge Lager then observed that the next step was to determine whether Dr. Gorman had a sufficient basis for knowing the prevailing professional standard of care applicable to Dr. Daddio in Connecticut in 2011.

Following a review of Dr. Gorman's deposition and the affidavits of Dr. Gorman and Dr. Treadwell, Judge Lager determined that "[Dr.] Gorman's knowledge of the standard of care applicable to [Dr.] Daddio in Connecticut is scant." Judge Lager noted that Dr. Gorman averred in the July 18, 2016 affidavit that, in comparing his board certification to that of [Dr.] Daddio's, the "standard of care for treating patients is the same"; (internal quotation marks omitted); however, on the basis of the record before her, Judge Lager determined that "[t]here is no foundation for [Dr.] Gorman's statement that the podiatric standard of care in Connecticut is the same as the podiatric standard of care in Pennsylvania where [Dr. Gorman] is licensed and has practiced exclusively." Judge Lager proceeded to conclude that "[o]n the present record, there is an inadequate factual basis to conclude either that [Dr.] Gorman knows the prevailing professional standard of care applicable to [Dr.] Daddio in Connecticut in 2011 or that his Pennsylvania podiatric practice was governed by the same standard of care. The court is willing to give [Barnes] one final opportunity to establish the requisite foundation

by holding a hearing on August 3, 2016 . . . at which Dr. Gorman must appear and be subject to examination and cross-examination on this issue . . . .'' As discussed more comprehensively in part II B of this opinion, Judge Lager proceeded to rule that Dr. Gorman was precluded from offering expert testimony as to causation.

On August 2, 2016, Barnes filed a letter addressed to Judge Lager and the defendants' counsel indicating that, in light of Judge Lager's preclusion of Dr. Gorman's causation opinion, Barnes would not produce Dr. Gorman at the scheduled hearing on August 3, 2016. On August 3, 2016, the parties appeared before Judge Lager to, inter alia, present argument on Barnes' August 1, 2016 request to disclose Dr. Shah as a causation expert and the defendants' objection thereto. After Judge Lager had denied the request to disclose and sustained the defendants' objection, there was a discussion on the record about the defendants' pending motion for summary judgment. During that discussion, Judge Lager stated the following: ''I think the ruling [on July 26, 2016] is clear that the [c]ourt felt there was an inadequate factual basis for the [c]ourt to make that determination [regarding Dr. Gorman's knowledge of the applicable standard of care] and was going to provide today, not any other day, but today, [Barnes] that opportunity to establish that basis. That has not been done. So as of today, the [c]ourt can only conclude that there is no factual basis, based on the record before it.''

On August 10, 2016, Judge Lager heard argument on the defendants' motion for summary judgment, to which Barnes had filed an objection accompanied by an affidavit of Dr. Gorman dated August 8, 2016 (August 8, 2016 affidavit). On August 11, 2016, in her memorandum of decision granting the defendants' motion for summary judgment, Judge Lager stated in relevant part: ''In the ruling dated July 26, 2016 . . . this court focused on

the lack of foundational evidence upon which the court could make a finding that '[Dr.] Gorman knows the prevailing professional standard of care applicable to [Dr.] Daddio in Connecticut in 2011 or that his Pennsylvania podiatric practice was governed by the same standard of care.' . . . Although the court was aware that [Dr.] Gorman averred in [the July 18, 2016 affidavit] that the 'standard of care for treating patients is the same,' this conclusory statement lacked foundation. In [the August 8, 2016 affidavit], [Dr.] Gorman aver[red] that: 'The standard of care is the same for all podiatrists. The national standard of care as to what is expected of a reasonable, prudent podiatrist [with respect to] the diagnosis and treatment of a patient under the same circumstance is the same in Connecticut as it is in all other states.' The foundation for this averral is that podiatry students 'in the United States are trained in the same manner; [t]he same textbooks and reference materials are used.' " Judge Lager then concluded that, in light of Dr. Gorman's testimony during his deposition that he did not know the standard of care in Connecticut, the "conclusory statements in [the August 8, 2016 affidavit]" failed to provide the "requisite foundation for establishing [Dr.] Gorman's knowledge of the prevailing professional standard of care in this case" and "[t]here is an inadequate factual basis before the court to find [Dr.] Gorman qualified to testify as to the standard of care." For these reasons, Judge Lager, in effect, precluded Dr. Gorman's standard of care opinion.

The administratrix asserts that Judge Lager erred in precluding Dr. Gorman's standard of care opinion because physicians, including podiatrists such as Dr. Gorman, are governed by a national standard of care in medical malpractice cases. The administratrix also contends that Dr. Gorman was qualified to offer a standard of care opinion on the ground that evidence was produced illustrating, inter alia, that Dr. Gorman had

treated thousands of podiatric patients since 1967 and trained residents in the field of podiatry.[21] These contentions are unavailing.

The relevant inquiry here is whether Dr. Gorman knew what the prevailing professional standard of care applicable to Dr. Daddio was in Connecticut in 2011. Dr. Gorman's January 29, 2016 deposition testimony strongly suggested that he was *not* familiar with the standard of care.[22] Judge Lager found that the July 18, 2016 affidavit in which Dr. Gorman asserted knowledge of a national standard of care was conclusory and lacked foundation. Judge Lager then considered the August 8, 2016 affidavit, in which Dr. Gorman averred that, because (1) all students enrolled in podiatry schools in the United States are trained in the same manner, (2) all podiatrists attend the same seminars and conferences to earn continuing education credits, and (3) there are many organizations in the United States offering continuing education courses relating to podiatric medicine, "[t]he standard of care is the same for all podiatrists" and "[t]he national standard of care as to what is expected of a reasonable, prudent podiatrist [with respect to] the diagnosis and treatment of a patient under the same circumstance is the same in Connecticut as it is in all other states." Judge Lager found that such affidavit did nothing to cure the conclusory nature of, and lack of foundation for, Dr. Gorman's opinions as to standard of care. As Judge Lager reasonably determined, Dr. Gorman's averments failed to

[21] The administratrix also claims that Judge Lager erroneously concluded that Dr. Gorman failed to meet the requirements of § 52-184c. The administratrix apparently overlooks that, as set forth previously in this opinion, Judge Lager concluded that Dr. Gorman satisfied the requirements of subdivision (2) of § 52-184c (d).

[22] Dr. Gorman testified during his deposition that "it was [Dr. Daddio's] responsibility as the—as we say, captain of the ship, in Pennsylvania, I don't know what you have [in Connecticut]" and that he had "no idea" whether Connecticut abided by the same standard.

establish that Dr. Gorman had the requisite knowledge of the applicable standard of care in order to testify thereto. Accordingly, we conclude that Judge Lager did not abuse her discretion in precluding Dr. Gorman's standard of care opinion.

B

We next consider the administratrix' claim that Judge Lager erred in precluding Dr. Gorman's causation opinion. We are not persuaded.

"All medical malpractice claims, whether involving acts or inactions of a defendant physician, require that a defendant physician's conduct proximately cause the plaintiff's injuries. The question is whether the conduct of the defendant was a substantial factor in causing the plaintiff's injury. . . . This causal connection must rest upon more than surmise or conjecture. . . . A trier is not concerned with possibilities but with reasonable probabilities. . . . The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question. . . .

"To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony. . . . An expert . . . need not use talismanic words to show reasonable probability. . . . There are no precise facts that must be proved before an expert's opinion may be received in evidence. . . .

"To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused

the injuries. . . . As [our Supreme Court] observed . . . [l]egal cause is a hybrid construct, the result of balancing philosophic, pragmatic and moral approaches to causation. The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. . . . The second component of legal cause is proximate cause, which [our Supreme Court has] defined as [a]n actual cause that is a substantial factor in the resulting harm . . . . The proximate cause requirement tempers the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules which are feasible to administer, and yield a workable degree of certainty. . . . [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . .

"In other words, [p]roximate cause [is] defined as an actual cause that is a substantial factor in the resulting harm . . . . [T]he inquiry fundamental to all proximate cause questions . . . [is] whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Citations omitted; internal quotation marks omitted.) *Ward* v. *Ramsey*, 146 Conn. App. 485, 490–92, 77 A.3d 935, cert. denied, 310 Conn. 965, 83 A.3d 345 (2013).

The following additional facts and procedural history are relevant to our resolution of the administratrix' claim. Following Dr. Gorman's deposition on January 29, 2016, the defendants filed motions in limine seeking, inter alia, to preclude Dr. Gorman's expert testimony as to causation on the grounds that Dr. Gorman's causation opinions (1) had no factual basis underlying them,

(2) exceeded the scope of his expertise, and (3) were speculative. On July 15, 2016, the parties presented argument, inter alia, as to whether Dr. Gorman's causation opinion should be precluded. Thereafter, Barnes filed the July 18, 2016 affidavit, and the defendants filed the affidavit of Dr. Treadwell.

On July 26, 2016, Judge Lager ordered that Dr. Gorman was precluded from testifying as to causation. Judge Lager summarized Dr. Gorman's causation opinion to be that the cause of the partial amputations of Barnes' feet was Dr. Daddio's failures to suspect that Barnes had "vascular insufficiency" and to refer Barnes to a vascular surgeon. Judge Lager then observed: "While [Dr.] Gorman has treated patients with vascular problems and knows something about vascular insufficiency in diabetic podiatric patients [such as Barnes], he is not a vascular physician or vascular surgeon and does not perform the types of amputations that [Barnes' vascular surgeon] performed on Barnes. [The] mere fact that he is not a vascular physician or surgeon is not disqualifying. . . . However, in his deposition testimony, [Dr.] Gorman repeatedly deferred to the expertise of a vascular surgeon on the issue of causation. Both his deposition testimony and the [July 18, 2016 affidavit] support the conclusion that, while it is his practice to refer patients such as Barnes to a vascular surgeon in an effort to avoid outcomes such as the one which occurred in this case, [Dr.] Gorman does not have any basis other than speculation to render a causation opinion here. [Dr.] Gorman is unable to pinpoint whether an alleged breach of the standard of care . . . or some other underlying condition or behavior led to the amputations. Finally . . . [Dr.] Gorman could not identify the specific evidence that he relied upon in the underlying medical records which eliminate all other probable causes of the amputations other than [Dr.] Daddio's alleged negligence." (Citation omitted; footnotes omitted.) Concluding that "[Dr.] Gorman is insufficiently qualified to offer an opinion as to the actual

and proximate cause of Barnes' amputations, that his opinions admittedly exceed the scope of his expertise and that his opinions are speculative," Judge Lager precluded Dr. Gorman's causation opinion.

The administratrix contends that the record demonstrates that Dr. Gorman is a board certified podiatrist with over fifty years of experience in, inter alia, treating podiatric patients, teaching students, and attending lectures, and that Dr. Gorman was able to testify with reasonable medical probability that Barnes' injuries were caused by an untreated infection that led to additional complications and, ultimately, the partial amputations of Barnes' feet. As reflected in his deposition and/or in the July 18, 2016 affidavit, however, Dr. Gorman averred that he did not know whether the partial amputations of Barnes' feet could have been prevented and that a vascular surgeon was needed to opine as to whether the amputations could have been avoided but for the defendants' alleged breach of the standard of care. The administratrix fails to cite to any portion of the record undermining Judge Lager's determination that Dr. Gorman could not testify that the defendants' alleged breach of the standard of care led to the partial amputations of Barnes' feet. Accordingly, we cannot conclude that Judge Lager abused her discretion in precluding Dr. Gorman's causation opinion.

III

Finally, relying on the presumption that the trial court erred in precluding Barnes from disclosing additional experts and Dr. Gorman's expert opinions as to the standard of care and causation, the administratrix claims that there exist genuine issues of material fact and, thus, Judge Lager improperly rendered summary judgment in favor of the defendants. This claim merits little discussion. As set forth in parts I and II of this opinion, the court acted properly in precluding Barnes

from disclosing additional experts and Dr. Gorman from offering standard of care and causation opinions. As a result, Barnes was unable to produce expert testimony establishing the applicable standard of care, a breach of the standard of care, and causation, and, therefore, he could not establish a prima facie case of medical malpractice. See *Procaccini* v. *Lawrence & Memorial Hospital, Inc.*, supra, 175 Conn. App. 717–18; see also *Dorreman* v. *Johnson*, 141 Conn. App. 91, 98–99, 60 A.3d 993 (2013) (affirming summary judgment in favor of defendant in medical malpractice case where plaintiffs failed to provide expert opinions with regard to requisite standard of care, deviation from standard of care, and causation). Accordingly, we conclude that Judge Lager properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* OTERRIO R. BROWN (AC 41139)

Alvord, Devlin and Beach, Js.

Syllabus

Convicted under two informations of the crimes of breach of peace in the second degree, criminal violation of a protective order and assault in the third degree, the defendant appealed to this court. The defendant's convictions stemmed from two incidents, which occurred a few days apart, in which he assaulted his roommate at their apartment in a dispute involving the defendant's wife. After the first alleged assault, the trial court issued a protective order against the defendant, and shortly thereafter, the defendant violated the order by assaulting the victim again. During voir dire, the state characterized the allegations against the defendant as "domestic violence," and "family violence," to which the court advised the state against using such language. Thereafter, the state described the allegations as a "dispute between roommates." On appeal, the defendant claimed, inter alia, that the trial court improperly granted the state's motion for joinder of the cases for trial by allowing the jury to consider prejudicial evidence of two different crimes and that the

trial court improperly allowed the state to use prejudicial language during voir dire questioning, violating his federal right to a fair trial. *Held:*

1. The trial court did not abuse its discretion in granting the state's motion for joinder, as the defendant failed to demonstrate that joinder resulted in substantial prejudice to him; the two incidents leading to the charges against the defendant were discrete and easily distinguishable, even though they concerned the same victim and defendant, the record demonstrated that the events occurred at different times and locations, and resulted in different injuries, and although the assaults were violent, the defendant could not prevail on his claim that both assaults were so brutal or shocking as to interfere with the jury's ability to consider each offense fairly and objectively.

2. The defendant could not prevail on his unpreserved claim that his right to a fair trial was violated when the trial court allowed the state to use prejudicial language during its voir dire questioning of potential jurors and, thereafter, allowed the facts of the case to be introduced in an effort to remedy the use of the prejudicial language; the introduction of phrases such as "domestic violence," "family violence," and a "dispute between roommates" was not improper because the defendant did not dispute that the alleged crimes concerned disputes between roommates and the title of the protective order, which was admitted into evidence, referred to family violence, and, therefore, under the circumstances of the present case, the defendant failed to prove that a constitutional violation existed and that he was deprived of a fair trial.

3. The trial court did not abuse its discretion in denying the defendant's request for a continuance at the start of trial to accommodate the presence of a witness that the defendant claimed was crucial to his defense of property argument; because the defendant's request was made at the last moment, substantial delay of the jury trial was likely to result if the request had been granted, there was no guarantee from the defendant that the witness would have appeared had the request for the continuation been granted, and the defendant, at the time of the ruling, did not provide any additional reasoning for the importance of the witness' testimony, which had been discussed at earlier proceedings, nor did he make any representation regarding the witness' specific testimony.

Argued September 10, 2019—officially released January 14, 2020

Procedural History

Information, in the first case, charging the defendant with the crimes of breach of the peace in the second degree and failure to appear in the second degree, and information, in the second case, charging the defendant with the crimes of criminal violation of a protective order, assault in the third degree and breach of the

peace in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *K. Murphy, J.*, granted the state's motion for joinder; thereafter, the matter was tried to the jury; verdicts and judgments of guilty of two counts of breach of the peace in the second degree and of criminal violation of a protective order and assault in the third degree, from which the defendant appealed to this court. *Affirmed.*

J. Patten Brown, III, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc Ramia*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Oterrio R. Brown, appeals from the judgments of conviction, following a jury trial, of two counts of breach of the peace in the second degree, and of violation of a protective order and assault in the third degree. The defendant claims that the court improperly (1) granted the state's request for joinder of the two informations; (2) allowed the state to use prejudicial language during the voir dire process; and (3) denied the defendant's request for a continuance. We disagree and affirm the judgments of the trial court.

The jury reasonably could have found the following facts. On January 22, 2016, two police officers, Paul Calo and Kyle Cosmos, were called to a location in Waterbury to respond to a domestic disturbance. The officers found the defendant and the victim at the scene.[1] The defendant

[1] In accordance with our policy of protecting the privacy interests of the victim of family violence, we decline to identify the victim or others through whom the victim's identities may be ascertained. See General Statutes § 54-86e.

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

had blood on his shirt and a cut under his eye. When asked by Cosmos what had occurred, the defendant responded that there had been an altercation between him and the victim. The defendant further explained that he believed that the victim was sending naked photographs of himself to the defendant's wife, Grace Quackenbush, so the defendant "kind of went at him with clenched fist." After speaking with the defendant, the officers observed a trail of blood that led from the kitchen to the back hallway where the victim was found. Cosmos testified that the victim had a swollen left cheek and a bloody nose. The officers arrested the defendant.[2] He was charged with breach of the peace in the second degree, in violation of General Statutes § 53a-181 (a) (2), and, subsequently, a charge of failure to appear in the second degree[3] in violation of General Statutes § 53a-173 (a) (1) was added.

At a hearing on January 25, 2016, the trial court issued a protective order. The defendant was ordered not to have contact with the victim. The prohibition also included refraining from assaulting, threatening, abusing, harassing, following, or returning to the victim's home. Approximately thirty minutes after the issuance of the protective order, the defendant returned to the victim's home. Shortly thereafter, the police received a call regarding an incident at this location. Police found the victim outside the house, screaming that the defendant had just beaten him up. The officers also observed

[2] At trial, Cosmos stated his reasoning for arresting the defendant: "[W]ith . . . everything that we observed on the scene, with all the blood, the injuries to [the victim], and the motive that he had, we believed that [the defendant] was the one that should be arrested." Calo testified: "I took the whole scenario and it had a lot to do with credibility and motive. I found that [the defendant] was upset because he found pictures of his wife—he found pictures of [the victim] naked on his wife's phone. So he confronted [the victim] about it. And [the victim] really had no reason to lash out at the defendant."

[3] The defendant failed to appear for a scheduled hearing on August 26, 2016.

blood in the snow and physical injuries to the victim, including a swollen cheek and blood on his teeth. Calo testified that these injuries were in addition to those that he had observed on January 22, 2016.[4] The defendant was arrested and charged with criminal violation of a protective order in violation of General Statutes § 53a-223a; breach of the peace in the second degree in violation of § 53a-181 (a) (2); assault in the third degree in violation of General Statutes § 53a-61 (a) (1); and failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1).

Prior to trial, the state filed a motion for joinder of the separate informations, and the court granted the state's motion. After a week long jury trial, the defendant was convicted of breach of the peace in the second degree regarding the January 22, 2016 incident. He also was convicted of criminal violation of a protective order, breach of the peace in the second degree, and assault in the third degree arising from the January 25 incident. The defendant was sentenced to a total effective sentence of ten years of incarceration, execution suspended after two years, followed by three years of probation. This appeal followed. Additional facts and procedural history will be set forth as needed.

I

The defendant claims that the trial court improperly granted the state's motion for joinder. He contends that combining the two informations substantially prejudiced him according to the factors set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987). The state counters by asserting that the *Boscarino* factors were not met and that the evidence in this case

[4] Calo testified: "The injuries that he sustained on the 22nd were still there but there . . . were more injuries because there was blood in his mouth . . . . His face seemed more swollen and he showed me a laceration on the inside of his mouth."

was cross admissible. We agree with the state that the *Boscarino* factors were not met.[5]

We first set forth the appropriate standard of review. "The principles that govern our review of a trial court's ruling on a motion for joinder . . . are well established. Practice Book § 41-19 provides that, [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together. . . . In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Internal quotation marks omitted.) *State* v. *McKethan*, 184 Conn. App. 187, 194–95, 194 A.3d 293, cert. denied, 330 Conn. 931, 194 A.3d 779 (2018). "Despite our reallocation of the burden when the trial court is faced with the question of joinder of cases for trial, the defendant's burden of proving error on appeal when we review the trial court's order of joinder remains the same. See *State* v. *Ellis*, 270 Conn. 337, 376, 852 A.2d 676 (2004) ([i]t is the defendant's burden on appeal to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . .)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 550 n.11, 34 A.3d 370 (2012).

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation

[5] In light of our determination regarding the *Boscarino* factors, we need not decide whether the evidence was cross admissible.

under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against him. . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all. . . .

"The court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24] we have identified several factors that a trial court should consider in deciding whether a severance [or denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 544–45.

A

The defendant first claims that consolidating his cases allowed the jury to consider prejudicial evidence

of two different crimes. See *State* v. *Holliday*, 159 Conn. 169, 172, 268 A.2d 368 (1970). When a request for joinder is made, the state "bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19." *State* v. *Payne*, supra, 303 Conn. 549–50. To overcome this burden, the state must prove "by a preponderance of the evidence, either that the evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors." Id., 550.

In the present case, the defendant was charged in two separate informations with crimes that occurred on two different days. The trial court found that joinder was proper as none of the *Boscarino* factors were present. Specifically, the court reasoned that the informations were "easily distinguishable." On appeal, the defendant relies on the first and second *Boscarino* factors to support his claim that joinder of the two informations was improper. He concedes, in his brief, that the third factor was not met.

The first *Boscarino* factor is whether two or more factual scenarios were discrete and easily distinguishable. *State* v. *Boscarino*, supra, 204 Conn. 722–23. If the two events were not easily distinguishable, the first *Boscarino* factor is met. Id. The defendant asserts that the joinder of the informations was prejudicial because the jury was presented with factual scenarios that were not easily distinguishable. In particular, the defendant contends that the evidence of the scenarios presented to the jury created a "gross violation of his fundamental right to due process and a fair trial" because the two incidents involved the same defendant, the same victim, and similar alleged conduct, which occurred at the same location. The defendant further asserts that even if the state referred to each incident separately in its questioning and the court provided specific curative jury instructions, the defendant would still be prejudiced. We disagree.

In *State* v. *Herring*, 210 Conn. 78, 96, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989), our Supreme Court addressed the first *Boscarino* factor. The court concluded that the evidence involving two murders did not risk the degree of confusion and prejudice that were present in *Boscarino*. Id. The court in *Herring* explained that the two murders were discrete and easily distinguishable because the victims in the separate incidents suffered different injuries and the crimes occurred in different locations. Id.

Here, as in *Herring*, the jury was presented with evidence of two criminal scenarios, which occurred on January 22, 2016, and January 25, 2016. Even though the informations concerned the same victim and defendant and took place at the same general location, the events were easily distinguishable. Although both crimes occurred at the victim's home, the January 22, 2016 incident occurred inside the home, and the January 25, 2016 incident occurred outside the home. In reference to the January 22, 2016 incident, Cosmos and Calo both testified as to finding blood inside the home. With regard to the January 25, 2016 incident, Calo testified that blood was found in the snow, outside of the home.

Second, although the victim suffered a swollen cheek in both incidents, there was evidence of new injuries to the victim following the January 25, 2016 encounter. Specifically, when questioned as to whether the victim incurred new injuries during the January 25, 2016 incident, Calo responded: "The injuries that [the victim] sustained on the 22nd were still there but . . . there were more injuries because there was fresh blood on his mouth. . . . His face seemed more swollen and he showed me a laceration on the inside of his mouth. . . . It wasn't bleeding out but it was fresh. It looked fresh to me."Additionally, the two events occurred at different times of the day. The January 22, 2016 incident occurred at night, while the January 25, 2016 event occurred during the day.

On the basis of the foregoing, it is clear from the record that the two scenarios were easily distinguishable in that the events occurred at different times and locations, and resulted in different injuries. The court did not abuse its discretion in finding the two incidents discrete and easily distinguishable. Therefore, the defendant was not prejudiced by joinder under the first *Boscarino* factor.

B

The defendant next claims that joinder was improper under the second *Boscarino* factor. He maintains that his conduct in both assaults was violent and resulted in visible injuries to the victim, resulting in prejudice. We disagree.

"Whether one or more offenses involved brutal or shocking conduct likely to arouse the passions of the jurors must be ascertained by comparing the relative levels of violence used to perpetrate the offenses charged in each information." (Internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 551. The assault on January 22 must be compared to the assault on January 25 to determine whether the "alleged conduct in one incident is not so shocking or brutal that the jury's ability to consider fairly and objectively the remainder of the charges is compromised." *State* v. *LaFleur*, 307 Conn. 115, 160–61, 51 A.3d 1048 (2012).

In *Payne*, the court compared the charge of felony murder to a separate charge of jury tampering and determined that the second *Boscarino* factor regarding prejudice was satisfied "[b]ecause the defendant's conduct in killing the victim in the felony murder case was significantly more brutal and shocking than his conduct in attempting to tamper with the jurors . . . [t]he evidence from the felony murder case was prejudicial to the defendant with regard to the jury tampering case." *State* v. *Payne*, supra, 303 Conn. 552. Furthermore, in

Boscarino, the defendant committed multiple sexual assaults, all with the force of a deadly weapon. *State* v. *Boscarino*, supra, 204 Conn. 723. The court held that joinder was improper as it "gave the state the opportunity to present the jury with the intimate details of each of these offenses, an opportunity that would have been unavailable if the cases had been tried separately." Id.

In the present case, the defendant was charged with breach of the peace in the second degree with regard to the January 22 incident and breach of the peace in the second degree and with assault in the third degree with regard to the January 25 incident; both incidents involved punching the victim. Neither incident was shockingly violent. The defendant concedes that the alleged conduct was not as brutal as the conduct that occurred in *Payne* and *Boscarino*.

Our Supreme Court has addressed the second *Boscarino* factor in the context of an assault. In *State* v. *LaFleur*, supra, 307 Conn. 160, the court held that an assault, in which the defendant punched a woman in the face, was not "so shocking or brutal as to preclude joinder." In *State* v. *Jennings*, 216 Conn. 647, 659, 583 A.2d 915 (1990), our Supreme Court held that an assault was not so brutal or shocking as to create a serious risk of prejudice when tried with an allegation of kidnapping. Citing to *State* v. *Herring*, supra, 210 Conn. 97, the court noted that although physical harm was inflicted on the victim, it was not disabling and did not satisfy the second *Boscarino* factor. *State* v. *Jennings*, supra, 216 Conn. 659.

In the present case, the defendant assaulted the victim on two separate dates. These assaults, although violent, were not so brutal or shocking as to interfere with the jury's ability to consider each offense fairly and objectively. As such, we conclude that the second *Boscarino* factor is not met.

We conclude that the defendant has not shown that he was prejudiced under the *Boscarino* factors and that the trial court did not abuse its discretion in granting the state's motion for joinder.

II

The defendant claims that the trial court improperly allowed the state to introduce facts and prejudicial language during its voir dire questioning. The defendant argues that the trial court violated his sixth amendment right to a fair trial by allowing the state to use the terms such as "domestic violence," "family violence," and "dispute between roommates" during voir dire. We disagree.

The state argues preliminarily that the issue is unpreserved and, thus, unreviewable. We agree that the issue is not preserved. Practice Book § 60-5 states, in relevant part, that "[this] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." An unpreserved constitutional claim, however, may be considered by this court if all of the following conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [defendant] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

The record is adequate to review this claim, and the defendant is alleging a violation of his fundamental right to a fair trial pursuant to the sixth amendment of the United States constitution. Because the claim is reviewable, we address the merits of the defendant's claim.

The federal constitution guarantees a defendant the fundamental right to a trial by an impartial jury. U.S. Const., amends. VI and XIV. "Although the conduct of voir dire is within the broad discretion of the trial court . . . that discretion must be exercised within the parameters established by the right to a fair trial." (Citations omitted.) *State* v. *Mercer*, 208 Conn. 52, 58, 544 A.2d 611 (1988).

"The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But [the United States Supreme Court] has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. . . . Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. . . . Due to the serious constitutional implications of the defendant's claim, [courts] have the duty to make an independent evaluation of the circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Mercer*, supra, 208 Conn. 58.

The following additional facts are pertinent to this claim. On June 5, 2017, the voir dire process began. During the state's questioning of a venireperson, the state characterized the allegations against the defendant as "domestic violence." The state asked: "[T]he term 'domestic violence,' does that conjure up any thoughts, feelings, opinions or anything like that?" The state continued to use the term "domestic violence" until the court, on its own accord, cautioned against its use in voir dire. The court stated: "I will caution the state [not to] use [a] term as general as domestic violence. I don't know . . . that [the relationship between the parties] fits . . . the traditional definition of a domestic violence . . . so I don't want to disqualify jurors when this isn't even going to be the kind of case that they're talking about [referring to domestic

violence].'' The state then altered its questioning and used the term ''family violence'' rather than ''domestic violence.'' The court advised against using either term and suggested that an appropriate question would be, ''how do you feel about violence between roommates.'' The state indicated its concerns about discussing the facts of the case, to which the court responded: ''There's nothing getting into the facts of the case if it goes to a prejudice or bias . . . the allegations are violence between roommates. I don't have a problem with that.'' Ultimately, the state adopted the court's suggestion and referred to the allegation as a ''dispute between roommates.''

The defendant contends that the court's supervision of voir dire questioning was improper in two ways: (1) the court improperly allowed prejudicial language to be used initially; and (2) to remedy the process, the court improperly allowed facts of the case to be introduced during the voir dire process. The defendant further contends that the use of facts in voir dire gave the jurors preconceived notions about the case, thereby, violating the defendant's constitutional right to a fair trial.[6]

Our Supreme Court has warned counsel and the trial courts not to engage in voir dire questioning that touches on the facts of the case. ''We have noted with concern increasing abuse of the voir dire process . . . It appears that all too frequently counsel have engaged in wideranging interrogation of veniremen in a not too subtle attempt to influence the ultimate decision of a venireman if he should be selected for service or to

[6] With regard to the use of the term ''dispute between roommates,'' each of the three venirepersons who were informed that the parties were roommates indicated that the factual scenario would not affect his or her ability to be impartial. Ultimately, none of the jurors who were informed that the parties were roommates was selected to sit on the panel of jurors. One, however, was selected as an alternate juror.

ascertain the attitude of the venireman on an assumed state of facts." (Internal quotation marks omitted.) *Bleau* v. *Ward*, 221 Conn. 331, 339–40, 603 A.2d 1147 (1992). In the present case, however, we do not find that the challenged language gave potential jurors preconceived notions about the case.

We conclude that the introduction of the phrases "domestic violence," "family violence," and a "dispute between roommates," was not improper. Language in the protective order concerning "family violence" would be admitted into evidence. The order was titled "protective order—family violence." Under the circumstances of the incidents, we cannot conclude that the use of "family violence" or "domestic violence" was so harmful to the defendant. It was never disputed that the alleged crimes concerned "disputes between roommates." We, therefore, conclude that the defendant has failed to prove that a constitutional violation existed and that he was deprived of a fair trial.

III

Lastly, the defendant claims that the trial court improperly denied his request for a continuance, thus violating his sixth amendment right to a fair trial. We disagree.

"A reviewing court ordinarily analyzes a denial of a continuance in terms of whether the court has abused its discretion. . . . This is so where the denial is not directly linked to a specific constitutional right. . . . If, however, the denial of a continuance is directly linked to the deprivation of a specific constitutional right, some courts analyze the denial in terms of whether there has been a denial of [such right]." *In Re Shaquanna M.*, 61 Conn. App. 592, 601–602, 767 A.2d 155 (2001). "The defendant's burden on appeal is to show that the trial court acted arbitrarily, in light of the information available at the time of its decision, and thereafter, if an abuse of discretion has been established, that the defendant's ability to defend himself

has thereby been demonstrably prejudiced." *State* v. *Hamilton*, 228 Conn. 234, 246, 636 A.2d 760 (1994). Our analysis, then, first considers whether the court abused its discretion in denying the defendant's motion for a continuance. See *State* v. *Godbolt*, 161 Conn. App. 367, 374 n.4, 127 A.3d 1139, cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself. . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial. . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 374–75.

In the present case, the defendant contends that the denial of his request for a continuance was unreasonable. To support this claim, the defendant asserts three arguments: (1) because the court granted the state's request for a continuance earlier during the proceedings, the court should have also granted his request for a continuance; (2) the state did not object to the request for a continuance; and (3) the denial of the continuance greatly impaired the defendant's defense, because Quackenbush was a crucial witness in support of the defendant's claim that he was acting in defense of property. The state counters by asserting that the court properly denied the request for a continuance. We agree with the state.

The following facts are relevant to this issue. On June 13, 2017, the defendant informed the court that his witness, Quackenbush, would not appear at trial that day because she had a work conflict. In his view, the witness was important, and he orally requested a continuance to the following day. The court denied the defendant's request, reasoning that a continuance would "just [be] delaying this case." The court noted that it "had directed that [the defendant] be prepared to start evidence . . . on Friday the 9th," such that a continuance would disrupt the time frame of the trial. The court noted its concern that a delay might result in the loss of a juror: "[w]e told this jury they would potentially have this case on the 9th but we definitely would give it to them by the 13th and now we're telling them the 15th and . . . there is at least one juror who has work problems." In addition to the potential delay, the court also mentioned the timeliness of the request, stating, "If you had raised this issue at an earlier time . . . the witness was supposed to be here today. . . . So this is not a minor request. The record should reflect I would certainly consider this if it weren't for the fact that defense isn't available the 15th, the state's not available

the 16th. But the result of me granting this continuance is more likely forcing this case into next week and I'm potentially losing other jurors." Accordingly, the trial court properly considered the potential delay to the proceeding, the untimeliness of the defendant's request, and the resulting prejudice to the trial management. The trial court's ruling was not arbitrary.

The defendant further alleges that his sixth amendment right to present a complete defense was impaired because Quackenbush was a key witness in support of his claim that he exercised a reasonable degree of force in defense of property. He argues that he notified the court of the importance of Quackenbush's testimony, and that she was present at both altercations. The suggestion regarding the importance of Quackenbush's testimony was not made at the time of the request for a continuance, however, but, rather, was made earlier in the trial during a discussion regarding instructions to the jury. The defendant's attorney stated: "[I]n regards to the evidence about defense of property . . . the plan was that evidence was going to come through Grace Quackenbush, [she] did make the 911 call. I wasn't planning on introducing that, because I was going to elicit her testimony. If she doesn't appear . . . I'm going to call [the 911 dispatcher] in my case-in-chief and introduce her 911 call. . . ."[7] At the time of its ruling on the defendant's request for a continuance, the court stated that "Ms. Quackenbush's . . . her statement . . . has come in through a 911 call."

The defendant, at the time of the ruling, did not provide any additional reasoning for the importance of Quackenbush's testimony nor did he make any representation regarding her specific testimony. The defendant has not persuaded us that his sixth amendment

[7] The referenced 911 call was subsequently introduced into evidence by the state.

right to a fair trial was violated by the denial of his request for a continuance. See *State* v. *Godbolt*, supra, 161 Conn. App. 374 n.4.

Because the request for a continuance was made at the last moment, substantial delay was likely to result if the request had been granted, and there was no assurance that the witness would have appeared if the continuance had been granted, the court's ruling was not an abuse of discretion and, accordingly, did not violate the defendant's constitutional right to a fair trial.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMES JARMON (AC 42357)

Alvord, Prescott and Flynn, Js.

Syllabus

Convicted, after a jury trial, of the crimes of home invasion, burglary in the first degree, robbery in the first degree and stealing a firearm in connection with the theft of certain firearms from N's house, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the state presented insufficient evidence to prove beyond a reasonable doubt the operability of each of the stolen firearms, as the cumulative effect of the evidence, when construed in a light most favorable to sustaining the jury's verdict, supported the jury's ultimate conclusion that the state demonstrated operability beyond a reasonable doubt: the evidence presented supported an inference of operability because, from that evidence, the jury reasonably could have concluded that the guns were operable, as they were stored in N's bedroom in cases or bags with safety locks on and access was restricted to the bedroom, which evinced an awareness that the firearms were dangerous, and it was reasonable to infer that operable firearms would trigger such concern, and the fact that N's mother would not permit the firearms to be stored anywhere other than securely in the bedroom and that that ultimatum was assiduously followed by N further supported an inference that the firearms were operable; moreover, the jury reasonably could have inferred that N's storing of his handgun in a nightstand beside his bed where, while asleep, he might be most vulnerable permitted an inference that he possessed the handgun for security purposes, and the jury then could have inferred that

such a handgun was operable; furthermore, given that, at the time the firearms were stolen, they had been in N's possession for no longer than one year and sixteen days from N's earliest purchase and that the only time the firearms left N's bedroom was to go to the training grounds, which the jury reasonably could have inferred was a place to fire the guns, the guns were fired at least once during the time N possessed them, and the jury reasonably could have inferred that the firearms were operable upon purchase and remained operable when they were stolen.

(*One judge dissenting*)

2. The defendant could not prevail on his claim that the trial court erroneously admitted into evidence a letter that he had written to his mother while incarcerated, which was intercepted by a correction officer and forwarded to law enforcement: the defendant's claim that the trial court erred in determining that the correction officer followed a certain regulation when he turned over the correspondence to law enforcement was never distinctly raised at trial and, therefore, was unpreserved and not reviewable on appeal; moreover, the defendant did not prove that he had an objectively reasonable expectation of privacy such that his fourth amendment rights were violated, and, thus, there was no constitutional violation under the third prong of *State* v. *Golding* (213 Conn. 233); furthermore, the department regulation at issue was not void for vagueness as applied to the defendant, as the language of the regulation gave notice to the defendant that he could have his mail reviewed if doing so was deemed in the interest of security, order or rehabilitation by prison officials, and a prison official reasonably could have determined that the letter contained plans for criminal activity, such as witness tampering.

3. The defendant's claim that his conviction of home invasion and burglary violated his constitutional protection against double jeopardy was unavailing; the defendant failed to show that the two charges arose out of the same act or transaction, as the evidence allowed the defendant's crimes to be separated into parts, each of which constituted a completed offense.

Argued September 16, 2019—officially released January 14, 2020

Procedural History

Substitute information charging the defendant with crimes of home invasion, burglary in the first degree and robbery in the first degree, and with three counts of the crime of stealing a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to jury before *Cremins*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, James Jarmon, appeals from the judgment of conviction of home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and three counts of stealing a firearm in violation of General Statutes § 53a-212 (a). On appeal, the defendant claims that (1) the state presented insufficient evidence to prove beyond a reasonable doubt the operability of each firearm the defendant stole, (2) the trial court erroneously admitted into evidence a letter written by the then incarcerated defendant that was intercepted by a correction officer, and (3) the defendant's conviction of home invasion and burglary in the first degree violated his constitutional protection against double jeopardy. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On April 12, 2015, Nathaniel Garris attended a birthday party for his nephew. At the party, Garris spoke on the phone with the defendant, whom Garris knew all his life and whom, though they were unrelated, Garris referred to as his "cousin." It had been about four or five months since Garris and the defendant had seen each other last, and the defendant wanted to "chill" with Garris to "catch up." The two met up that same day and went to Niko Infanti's house.[1]

[1] On April 12, 2015, Garris was residing at Niko's house and sleeping in the same bedroom as Niko, whom he described as his "best friend, like a brother." Also living at the house then was Niko's mother, Michelle Infanti;

At Niko's home, the defendant and Garris began playing video games in Niko's bedroom. At one point, the defendant observed a case in Niko's bedroom and asked if it contained a guitar, to which Garris responded "no, that's a gun."[2] At another point, Garris retrieved a knife out of Niko's bedside nightstand, which also contained Niko's handgun. Thereafter, the defendant participated in a few phone calls; the defendant left Niko's bedroom to pick up each phone call.

While the defendant and Garris were in Niko's bedroom, Kade was in the kitchen using her laptop. An individual unknown to Kade, later identified by the police as Brett Vaughn, "peeked his head in the back door" and asked for the defendant. Kade went to Niko's bedroom, told the defendant that there was someone waiting for him at the back door and returned to the kitchen. Once Kade arrived back in the kitchen, Vaughn, who had entered the house, grabbed her and put a gun to the back of her head. Meanwhile, back in Niko's bedroom, Garris became upset with the defendant after hearing Kade's message because he perceived that the defendant had invited someone over without asking him. Garris walked out to the kitchen to see who was there waiting for the defendant and found Vaughn standing behind a seated Kade with a gun pressed to her head. Garris, who only knew Vaughn "from passing," pleaded with him to point the gun at him rather than Kade, to which Vaughn responded "[you're] beat, don't

Niko's siblings, Christina Infanti, Jesse Infanti, Michael Collins and Kade Collins; and Christina's eight year old daughter, all of whom "treated [Garris] just like family." Niko, his mother and Jesse were all absent from the house that evening as they were looking at houses in Arizona. For ease of reference, Niko, Christina and Kade will be referred to by their first names throughout this opinion.

[2] The record reflects that Niko lawfully had possessed four firearms: a twelve gauge, Maverick Arms shotgun; a .22 caliber, Henry Repeating Rifle Company rifle; a seven millimeter, Savage rifle; and a nine millimeter, Heckler & Koch handgun.

die over something stupid." Vaughn then yelled "hurry up." Christina heard the disturbance from her own bedroom, came out to see its cause and, after observing the scene, repeatedly told Vaughn to leave. The defendant had remained in Niko's bedroom after Garris walked to the kitchen and while this tumultuous scene unfolded. He then emerged from Niko's bedroom with all four of Niko's firearms in bags. The defendant and Vaughn proceeded to leave out the back door, with Vaughn being the first one out. As the defendant was exiting the back door, Garris jumped on his back and was able to retrieve one of the bags, which contained Niko's shotgun.

The defendant was arrested on May 20, 2015, and charged in a substitute information on September 29, 2016. On September 30, 2016, a jury returned guilty verdicts against the defendant for home invasion, burglary in the first degree, robbery in the first degree, and three counts of stealing a firearm. On March 2, 2017, the court imposed on the defendant a total effective sentence of ten years of incarceration, followed by six years of special parole.[3] This appeal followed.

I

The defendant first claims there was insufficient evidence to support his conviction of the three counts of stealing a firearm because no evidence was admitted that demonstrated the operability of the stolen firearms. The defendant argues that "[o]perability, especially when the guns were never recovered and there is no evidence the gun was fired during the incident, has never been proven with such scant evidence." The

[3] The defendant received ten years of incarceration followed by six years of special parole on his home invasion conviction, a concurrent ten years of incarceration on his burglary in the first degree conviction, another concurrent ten years of incarceration on his robbery in the first degree conviction, and concurrent two year sentences of incarceration on his conviction of each charge of stealing a firearm.

state responds that "it was reasonable to infer that [the guns] were operable at the time that they were purchased" and that "[t]he jury could reasonably have inferred that the firearms remained operable approximately one year later when they were stolen by the defendant." We agree with the state.

We first set forth our standard of review. "In reviewing a jury verdict that is challenged on the ground of insufficient evidence, we employ a two part analysis. We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, upon the facts thus established and the inferences reasonably drawn therefrom, the trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . . The evidence must be construed in a light most favorable to sustaining the jury's verdict. . . . In reaching its verdict, the jury can draw reasonable and logical inferences from the facts proven and from other inferences drawn from the evidence presented. Our review is a fact based inquiry limited to a determination of whether the jury's inferences drawn were so unreasonable as to be unjustifiable." (Citations omitted; internal quotation marks omitted.) *State* v. *Bradley*, 39 Conn. App. 82, 90–91, 663 A.2d 1100 (1995), cert. denied, 236 Conn. 901, 670 A.2d 322 (1996).

Section 53a-212 (a) states that "[a] person is guilty of stealing a firearm when, with intent to deprive another person of such other person's firearm or to appropriate the firearm to such person or a third party, such person wrongfully takes, obtains or withholds a firearm, as defined in subdivision (19) of section 53a-3." A "[f]irearm" is defined as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded *from which a shot may*

be discharged . . . .'' (Emphasis added.) General Statutes § 53a-3 (19). ''Operability of the [firearm is] an essential element of the [crime] charged under General Statutes [§ 53a-212 (a)] . . . .'' *State* v. *Carpenter*, 19 Conn. App. 48, 59, 562 A.2d 35, cert. denied, 213 Conn. 804, 567 A.2d 834 (1989). ''The operability of a firearm can be proven either by circumstantial or direct evidence.'' *State* v. *Bradley*, supra, 39 Conn. App. 91.

As in *Bradley*, the issue before us is ''whether the jury could have drawn reasonable inferences from the evidence to enable it to conclude, beyond a reasonable doubt, that the gun that the defendant possessed was operable.'' Id. The state points to the following evidence in the record that would support a conclusion that the firearms were operable. Niko lawfully bought his three stolen firearms from sportsmen retailers between March 27, 2014, and June 27, 2014.[4] Niko kept his guns confined to his bedroom. The three long guns were in the open space of his bedroom, but kept inside cases or bags and fastened with some form of safety lock. The handgun was kept in Niko's nightstand ''in a locked case.'' With the exception of Garris, who slept in Niko's bedroom, Niko ''[v]ery rarely let anybody in that room.'' If Niko was not so diligent about keeping his firearms in his bedroom, his mother would have put him ''out of the house in like point six seconds.'' As such, the firearms left Niko's bedroom only when he took them to the ''training grounds.''

The defendant argues that this evidence is inadequate to prove the operability of the firearms beyond a reasonable doubt. He contends that his case is distinguishable from a number of this court's past decisions in which operability was at issue. See *State* v. *Edwards*, 100

[4] Niko's Henry Repeating Rifle Company rifle was purchased on March 27, 2014, his Heckler & Koch handgun was purchased on May 12, 2014, and his Savage rifle was purchased on June 27, 2014.

Conn. App. 565, 575–76, 918 A.2d 1008 (testimony of witnesses describing gun used in robberies, which matched gun found in defendant's flight path and ballistics testing of which showed it was same gun fired in separate shooting deemed sufficient for operability inference), cert. denied, 282 Conn. 928, 929, 926 A.2d 666, 667 (2007); *State* v. *Miles*, 97 Conn. App. 236, 241, 903 A.2d 675 (2006) (operability proven where victim saw defendant with small silver handgun that matched gun introduced into evidence, defendant was only person victim saw with gun, and victim identified defendant as shooter in photographic lineup and at trial on cross-examination); *State* v. *Rogers*, 50 Conn. App. 467, 469, 475, 718 A.2d 985 (front seat passenger displaying gun and fire coming from passenger seat area sufficient evidence of operability), cert. denied, 247 Conn. 942, 723 A.2d 319 (1998); *State* v. *Hopes*, 26 Conn. App. 367, 376–77, 602 A.2d 23 (testimony that defendant pointed gun at witnesses inside restaurant, within one minute followed witnesses outside restaurant, then witnesses heard gunfire and "felt something pass close by their heads" sufficient to prove operability of defendant's gun), cert. denied, 221 Conn. 915, 603 A.2d 405 (1992); see also *State* v. *Beavers*, 99 Conn. App. 183, 190, 912 A.2d 1105 (police test of gun sufficient evidence of operability), cert. denied, 281 Conn. 925, 918 A.2d 276 (2007); *State* v. *Bradley*, supra, 39 Conn. App. 91 (same); *State* v. *Zayas*, 3 Conn. App. 289, 299, 489 A.2d 380 (same), cert. denied, 195 Conn. 803, 491 A.2d 1104 (1985). The defendant's reliance on these cases to demonstrate what evidence is minimally necessary to prove operability is unpersuasive. Each of these cases presents evidence sufficient to prove operability, but a compilation of these cases do not define a minimum standard of necessary evidence to establish operability.

"[T]he line between permissible inference and impermissible speculation is not always easy to discern. When

we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation." (Internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 518, 782 A.2d 658 (2001).

The evidence presented in this case supports an inference of operability because, from that evidence, the jury reasonably could have concluded that the guns were operable. Niko stored all of his firearms in his bedroom in cases or bags and with safety locks on. He restricted access to his bedroom. Niko's precautions evince an awareness that his firearms were dangerous. It is reasonable to infer that operable firearms would trigger such concern. Although a person might take similar steps to secure *inoperable* firearms, that possibility does little to negate the likelihood of reasonable jurors relying on their common sense understanding of firearms to infer that Niko's security measures reflected that his firearms were operable. See id., 519 ("an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference" [internal quotation marks omitted]).

The defendant argues that regardless of the guns' operability, "it is reasonable to infer that a mother would not want a very young child or teenagers to have access to two rifles and a handgun." The defendant again ignores the most obvious explanation for the position of Niko's mother: a gun is most dangerous if operable. The defendant also implies, incorrectly, that the

jury's refusal to draw an inference more favorable to the defendant makes the inference they did draw an unreasonable one. That is not so. See id., 518–19 ("[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis" [internal quotation marks omitted]). The fact that Niko's mother would not permit his firearms being stored anywhere other than securely in his bedroom, and that Niko assiduously followed his mother's ultimatum, further supports an inference that these guns were operable.

Additionally, Niko kept his handgun in a nightstand beside his bed. From this, the jury reasonably could have inferred that Niko's storing of his handgun in close proximity to his bed where, while asleep, he might be most vulnerable, permits an inference that he possessed the handgun for security purposes. The jury then could have further inferred that such a handgun was operable, or else it would be of little security value. Niko also kept this handgun in a locked case. As with the long guns, this permits an inference that Niko took this safety measure because the handgun was an operable firearm.

Lastly, Niko bought the three stolen firearms from retailers, with the earliest purchase made on March 27, 2014. The defendant stole the guns on April 12, 2015. Accordingly, when stolen, Niko's firearms were in his possession for no longer than one year and sixteen days. Kade testified that the only time Niko's firearms left his bedroom was to go to the "training grounds." Thus, the guns were taken to the "training grounds," which the jury reasonably could have inferred was a place to fire the guns, and that the guns were therefore fired at least once during the year and sixteen days[5] that Niko possessed them. Therefore, the jury reasonably could have inferred that the firearms were operable

[5] Two of the firearms were owned for slightly less than a year and sixteen days, but for ease of discussion we use the longer timespan.

upon purchase and, because Niko did take the guns to a firing range during the limited duration of his ownership, remained operable when they were stolen.

The defendant cites to *State* v. *Perez*, 146 Conn. App. 844, 79 A.3d 149 (2013), cert. denied, 311 Conn. 909, 83 A.3d 1163 (2014), for the proposition that "a firearm left in storage without the proper care and cleaning can become inoperable." In *Perez*, a firearm became inoperable in the sixteen months between a successful dry fire[6] of the firearm by law enforcement and subsequent testing because the gun became "gummed up by a residue in the . . . cylinder pin." (Internal quotation marks omitted.) Id., 847. The gun still was found to be operable because "the responding officer dry fired the gun and observed that its firing mechanism was functional shortly after the defendant possessed it . . . ." Id., 850. We fail to see how *Perez* informs our analysis in this case. *Perez* is a factually distinguishable case, and the evidence used to prove operability in that case is not required to prove operability in this case.

Our review of the record does not persuade us that the jury made unreasonable inferences regarding operability. To the contrary, the cumulative effect of the evidence in this case, when construed in a light most favorable to sustaining the jury's verdict, supports the jury's ultimate conclusion that the state has demonstrated operability beyond a reasonable doubt. See *State* v. *Bradley*, supra, 39 Conn. App. 90.[7]

[6] "The Officer removed the ammunition from the loaded gun and . . . squeeze[ed] the trigger and activat[ed] the hammer . . . ." *State* v. *Perez*, supra, 146 Conn. App. 847.

[7] The defendant also argues that "[t]he state presented no expert evidence that would have permitted the jury to properly infer from the circumstantial evidence that the state presented that the missing guns had been operable at the time they were taken beyond a reasonable doubt." The defendant cites to no authority, and we are aware of none, that supports the position that expert evidence is necessary to prove operability of a firearm under the facts of this case.

II

The defendant next claims that the trial court erroneously admitted into evidence a letter the defendant wrote to his mother while incarcerated, which was intercepted by a correction officer and forwarded to law enforcement. The defendant argues that (1) the "court erred in determining that the correction officer followed the [department of correction (department) regulation[8]] when he turned over the correspondence" (footnote added); (2) "[t]he defendant maintained a reasonable expectation of privacy in his letter written to [his] mother," making its seizure a violation of the fourth amendment to the United States constitution; and (3) the department regulation "regarding inmate correspondence is void for vagueness as applied to this case."

The following additional facts are relevant to this issue. At trial, on September 29, 2016, the state offered into evidence a letter written by the then incarcerated defendant to his mother, which was intercepted by a correction officer and forwarded to law enforcement. After reviewing the contents of the letter, the court was prepared to admit the letter as an admission by the defendant. Conn. Code. Evid. § 8-3 (1) (A). Defense counsel objected to the letter's admission, stating that "when someone is incarcerated in a Connecticut facility, they are stripped of most of their expectation of privacy, but not all" and that "I think [the department] has put a limit on themselves that not just anybody can open a letter at their own discretion." Defense counsel

[8] The regulation at issue is § 18-81-31 of the Regulations of Connecticut State Agencies. See footnote 8 of this opinion. In his brief, the defendant interchangeably references the regulation and the department administrative directive 10.7, § 4 (F) (1) (directive). The directive is, in part, authorized by the regulation, and the language relevant to the issue of inmate mail review is substantially similar in both the regulation and directive. Hereinafter, we will refer only to the regulation.

requested the opportunity to voir dire a department representative "to see whether or not this opening of a letter came at the direction of a unit manager by a person in writing." The court permitted the voir dire of Correction Officer Evan Charter. After the voir dire concluded, defense counsel argued that the department "did not follow the directive. Just because someone is in a category of high bond or pretrial doesn't necessarily . . . further substantial interest[s] of security, order or rehabilitation." The court asked defense counsel, "[w]ould you agree [that the regulation] was followed in this situation?" Defense counsel responded, "I would agree [Officer Charter] followed [the regulation]." The court "allow[ed] the letter to come in," and defense counsel stated, "I still stand by my objection . . . ." Additional facts will be set forth as necessary.

A

We begin with the defendant's claim that "[t]he trial court erred in determining that [Officer Charter] followed the [regulation] when he turned over the correspondence" to law enforcement. We conclude that the defendant never distinctly raised this claim at trial. It is therefore unpreserved and unreviewable on appeal.

The regulation governs the review of an inmate's outgoing general correspondence.[9] The regulation

[9] Section 18-81-31 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) Review, Inspection and Rejection. All outgoing general correspondence shall be subject to being read at the direction of the Unit Administrator, by person(s) designated in writing by such Administrator, for either a specific inmate(s) or on a random basis if the Commissioner or Unit Administrator has reason to believe that such reading is generally necessary to further the substantial interests of security, order or rehabilitation. Outgoing general correspondence may be restricted, confiscated, returned to the inmate, retained for further investigation, referred for disciplinary proceedings or forwarded to law enforcement officials, if such review discloses correspondence or materials which contain or concern: (1)The transport of contraband in or out of the facility. (2) Plans to escape. (3) Plans for activities in violation of facility or departmental rules. (4) Plans for criminal activity. (5) Violations of Sections 18-81-28 through 18-81-51, inclusive, of the Regulations of the Connecticut State Agencies or

authorizes the "Unit Administrator" to select "specific inmate(s)" or inmates "on a random basis" to have their outgoing general mail reviewed if there is "reason to believe that such reading is generally necessary to further the substantial interests of security, order or rehabilitation." The regulation further directs the "Unit Administrator" to designate in writing the "person(s)" who will review inmate mail. Under the regulation, those designated "person(s)" are given the authority to restrict, confiscate, return to the inmate, retain for further investigation, refer for disciplinary proceedings or forward to law enforcement officials any outgoing general correspondence that "contain[s] or concern[s]" a list of nine prohibited inmate actions. See Regs., Conn. State Agencies § 18-81-31 (a).

The focus of the defendant's voir dire of Officer Charter was on the decision to review the defendant's mail in the first instance, not on whether the mail could be provided to law enforcement. Defense counsel's initial objection to the court was that the department "put a limit on themselves that not just anybody can open a letter at their own discretion." Defense counsel requested the voir dire "to see whether or not this opening of a letter came at the direction of a unit manager by a person in writing." During voir dire, Officer Charter testified that he did not make the initial decision to review the defendant's general outgoing mail.[10] After

unit rules. (6) Information which if communicated would create a clear and present danger of violence and physical harm to a human being. (7) Letters or materials written in code. (8) Mail which attempts to forward unauthorized correspondence for another inmate. (9) Threat to the safety or security of staff, other inmates or the public. The initial decision to take action provided for in this Subsection except to read, which shall be at the discretion of the Unit Administrator, shall be made by the designee of the Unit Administrator. Such designee shall not be the same person who made the initial mailroom review. . . ."

[10] Section 18-81-31 (a) of the Regulations of Connecticut State Agencies provides in relevant part that "[a]ll outgoing general correspondence shall be subject to being read at the direction of the Unit Administrator, *by person(s) designated in writing by such Administrator* . . . ." (Emphasis

voir dire, defense counsel argued that the regulation was not followed because reviewing the mail of a high bond or pretrial inmate "doesn't necessarily . . . further substantial interest[s] of security, order or rehabilitation." The voir dire did not explore Officer Charter's decision to forward the defendant's letter to law enforcement after a review of the letter.

Now, on appeal, the defendant claims that "[t]he trial court erred in determining that [Officer Charter] followed the [regulation] when he turned over the correspondence." This claim, challenging Officer Charter's authority and decision to turn the defendant's letter over to law enforcement pursuant to the regulation, is a claim that was not distinctly raised at trial. As such, it is unpreserved and not reviewable. See Practice Book § 60-5; *State* v. *Morquecho*, 138 Conn. App. 841, 851, 54 A.3d 609, cert. denied, 307 Conn. 941, 56 A.3d 948 (2012).

In his reply brief, the defendant claimed for the first time that "[t]here is no doubt that [the] trial counsel was objecting on the basis that the correction officer was not authorized to read the defendant's outgoing

added.) The following testimony was elicited from Officer Charter on examination by the prosecutor and defense counsel:

"[The Prosecutor]: And why was [the defendant's] letter reviewed?

"[Officer Charter]: He was a member of the A-1 High Bond Unit. . . .

"[The Prosecutor]: Was he also in any kind of status?

"[Officer Charter]: Unsentenced pretrial.

"[The Prosecutor]: Does that affect when you review something?

"[Officer Charter]: Generally we do review all outgoing for the pretrial unit, A1 Unit, the High Bond Unit." . . .

"[Defense Counsel]: So according to the [regulation], it says that all outgoing general correspondence shall be subject to being read at the direction of the unit manager. Who is the unit manager?

"[Officer Charter]: That would be the warden. . . .

"[Defense Counsel]: And it appears to say the unit manager, in your case the warden, can designate in writing someone to open the mail, correct?

"[Officer Charter]: Correct.

"[Defense Counsel]: Is that you?

"[Officer Charter]: Yes.

"[Defense Counsel]: Was that done in writing?

"[Officer Charter]: Yes. . . ."

letter solely on the basis that he was being held on a high bond." We decline to review this claim because "arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017).

B

The defendant's second claim with respect to the letter is that his fourth amendment rights were violated. The defendant did not distinctly raise this claim at trial[11] but seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[12] For the purposes of this decision we assume that the record is adequate, and we agree that the claim is of a constitutional magnitude. There is, however, no constitutional

[11] Defense counsel began his objection to the letter's admission into evidence by stating that "when someone is incarcerated in a Connecticut facility, they are stripped of most of their expectation of privacy, but not all." After defense counsel requested, and the court granted, a voir dire of Officer Charter, the prosecutor stated: "[I]t's now turning into a miniature suppression hearing which I have no objection to." We disagree with the defendant, who argues that these statements adequately raised his fourth amendment claim. Defense counsel never sufficiently put the court on notice that the purpose of the voir dire was to mount a fourth amendment claim. See *State* v. *Faison*, 112 Conn. App. 373, 380, 962 A.2d 860 (trial counsel's "general exhortation[s]" were inadequate to preserve claims presented on appeal), cert. denied, 291 Conn. 903, 967 A.2d 507 (2009).

[12] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted; emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).

The state argues that the defendant's failure to file a pretrial motion to suppress the letter is a waiver of this claim pursuant to Practice Book §§ 41-2, 41-3 and 41-4. In light of our conclusion that the defendant's claim does not rise to the level of a constitutional violation, we do not determine whether the defendant's claim is waived.

violation. See *State* v. *Martin*, 77 Conn. App. 778, 800, 825 A.2d 835 ("[t]he defendant has failed to cite any authority, nor have we found any, for the proposition that a pretrial detainee has a reasonable expectation of privacy in his telephone calls and mail *after* being informed that his calls and mail would be monitored" [emphasis in original]), cert. denied, 266 Conn. 906, 832 A.2d 73 (2003). During the voir dire, Officer Charter testified that *all* inmates are notified that their calls and mail may be monitored upon entry into a facility.[13] The defendant presented no evidence that he lacked such notice. Accordingly, the defendant did not prove that he had an objectively reasonable expectation of privacy. See *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017) ("[t]he burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant" [internal quotation marks omitted]), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018).[14] The defendant's claim fails under *Golding's* third prong.

C

The defendant's third claim with respect to the letter is that the regulation is void for vagueness as applied

[13] Officer Charter testified as follows:

"[The Prosecutor]: When an inmate goes in a correctional facility, are they informed their mail is going to be monitored?

"[Officer Charter]: Yes.

"[The Prosecutor]: How's that done?

"[Officer Charter]: There's an acknowledgement form they sign.

"[The Prosecutor]: Everybody does that?

"[Officer Charter]: Absolutely. It's part of the admission package."

[14] The defendant analogizes his case to *United States* v. *Cohen*, 796 F.2d 20, 24 (2d Cir. 1986), cert. denied, 479 U.S. 854, 107 S. Ct. 189, 93 L. Ed. 2d 122 (1986), cert. denied sub nom. 479 U.S. 1055, 107 S. Ct. 932, 93 L. Ed. 2d 982 (1987) to argue that his fourth amendment rights were violated. In *Cohen*, an inmate's fourth amendment rights were found to be violated by a search of his cell, but the case is distinguishable because that search was ordered by a prosecutor to obtain information for a superseding indictment. Id. In the defendant's case, the review of his mail was authorized by prison officials for reasons of security, order or rehabilitation. See part II C of this

to this case.[15] This claim also was unpreserved but because the record is adequate and vagueness claims implicate the due process clause of the federal constitution, we review it under *Golding*. *State* v. *Thomas W.*, 115 Conn. App. 467, 471–72, 974 A.2d 19 (2009), aff'd, 301 Conn. 724, 22 A.3d 1242 (2011). The defendant, however, cannot establish a constitutional violation.

The defendant argues that "[he] had inadequate notice that his letter would be used against him and he was the victim of arbitrary and discriminatory enforcement." The state argues that the regulation "carries no penal consequences" and, even if the regulation does implicate due process, the defendant had "fair notice that his outgoing general correspondence may be subject to review, and that such correspondence may be forwarded to law enforcement officials . . . if . . . it contained a plan for criminal activity . . . ." In his reply brief, the defendant responds that "[t]he state, without citing to authority, simply dismisses this claim by contending that since [the regulation is nonpenal] . . . there is no implication of the due process clause." (Internal quotation marks omitted.)

"[T]he United States Supreme Court has stated that [t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment. . . . [P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." (Internal quotation marks omitted.) *Thalheim* v. *Greenwich*, 256 Conn. 628, 641,

opinion; cf. *United States* v. *Cohen*, supra, 24 ("[i]n this case it is plain that no institutional need is being served").

[15] The defendant argues the regulation's vagueness violates his state and federal due process rights. The defendant did not, however, provide a separate analysis under the Connecticut constitution, so we limit our discussion to the federal constitution. *State* v. *Ellis*, 232 Conn. 691, 692 n.1, 657 A.2d 1099 (1995).

775 A.2d 947 (2001). "The constitutional requirement of definiteness applies more strictly to penal laws than to statutes that exact civil penalties." *State* v. *Rivera*, 30 Conn. App. 224, 229, 619 A.2d 1146, cert. denied, 225 Conn. 913, 623 A.2d 1024 (1993). "The words 'penal' and 'penalty,' in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws." *Plumb* v. *Griffin*, 74 Conn. 132, 134, 50 A. 1 (1901); see also 82 C.J.S., Statutes § 529 (2019) ("[i]n common use, however, the term 'penal statutes' has been enlarged to include all statutes which define an offense and prescribe a punishment"). "[C]ivil statutes . . . may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes . . . ." (Internal quotation marks omitted.) *Sweetman* v. *State Elections Enforcement Commission*, 249 Conn. 296, 323, 732 A.2d 144 (1999).

The defendant fails to demonstrate that this regulation is penal and should receive closer scrutiny. See *State* v. *Rivera*, supra, 30 Conn. App. 229. Regardless, the defendant's claim fails even under the more exacting standard of review that applies to penal laws. "To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant] . . . must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement." (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). The defendant cannot carry his burden.

The regulation states in relevant part that "[a]ll outgoing general correspondence shall be subject to being read at the direction of the Unit Administrator . . . in writing . . . for either a specific inmate(s) or on a random basis if the Commissioner or Unit Administrator has reason to believe that such reading is generally

necessary to further the substantial interests of security, order or rehabilitation." Regs., Conn. State Agencies § 18-81-31 (a). This language gave notice to the defendant that he could have his mail reviewed if doing so was deemed in the interest of security, order or rehabilitation by prison officials. The regulation was followed when the defendant, as a high bond and pretrial detainee, was identified in writing as an inmate to have his mail reviewed. See *Washington* v. *Meachum*, 238 Conn. 692, 726, 680 A.2d 262 (1996) ("the United States Supreme Court [has] recognized the expertise of prison officials and that the judiciary is 'ill equipped to deal with the increasingly urgent problems of prison administration,' and [has] emphasized that courts should afford 'deference to the appropriate prison authorities' "). The regulation further provides that outgoing mail could be "forwarded to law enforcement officials, if such review discloses correspondence or materials which contain or concern . . . Plans for criminal activity." Regs., Conn. State Agencies § 18-81-31 (a) (4). This language provided sufficient notice to the defendant that his letters could be forwarded to law enforcement if they contained plans for criminal activity. In the defendant's letter to his mother, he wrote "mom find out how the [victims] feel about the [whole] situation. [S]ee if they [are] still in CT or [if] they moved to AZ try to talk to them tell them how sorry I am tell them if [anything] Britt's [girl] is willing to give them [$5000] after we come home. See if they want to take the stand. I need you to do this now." A prison official reasonably could have determined that the letter contained plans for criminal activity, such as witness tampering. See General Statutes § 53a-151. The regulation is not void for vagueness as applied to the defendant.[16]

[16] The defendant also argued that his state and federal rights to protected speech, to a familial relationship and to prepare and present a defense were violated. The defendant's briefing does not make it clear whether these claims, particularly the first amendment claim to free speech, are intended to stand on their own or are encompassed within the broader void for

III

The defendant's final claim is that the charges of home invasion[17] and burglary[18] are the same offense, making his conviction of both offenses a violation of his constitutional protection against double jeopardy. Thus, the defendant argues that his conviction of burglary in the first degree must be vacated.[19] We disagree.

"Double Jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d. 811 (2013). "At step one, it is not uncommon that we look to the evidence at trial and to the state's

vagueness argument. If they are intended as independent claims, they are inadequately briefed and we are not required to review them. See *State* v. *Monahan*, 125 Conn. App. 113, 122, 7 A.3d 404 (2010), cert. denied, 299 Conn. 926, 11 A.3d 152 (2011). If the defendant's first amendment argument is part of his vagueness claim, it makes no difference to our conclusion because that claim fails even under the standard of review most favorable to the defendant.

[17] The defendant was charged with home invasion in violation of General Statutes § 53a-100aa (a) (1), which provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

[18] The defendant was charged with burglary in the first degree in violation of Section 53a-101 (a) (3), which provides in relevant part: "A person is guilty of burglary in the first degree when . . . (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."

[19] The defendant's double jeopardy claim was not raised at trial, but the parties agree that it is reviewable under *Golding*. See *State* v. *Bumgarner-Ramos*, 187 Conn. App. 725, 744, 203 A.3d 619, cert. denied, 331 Conn. 910, 203 A.3d 570 (2019).

theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger*[20] test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both states in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . In applying the *Blockburger* test, we look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged. . . . Because double jeopardy attaches only if both steps are satisfied . . . a determination that the offenses did not stem from the same act or transaction renders analysis under the second step unnecessary." (Citations omitted; footnote added; internal quotation marks omitted) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018).

The defendant was charged in a substitute information with home invasion in violation of § 53a-100aa (a) (1)[21] and burglary in the first degree in violation of § 53a-

[20] *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[21] Count one of the substitute information states that the defendant committed home invasion "in that on or about April 12, 2015, at approximately 9:23 p.m., at or near 78 Eastwood Avenue, Waterbury, Connecticut, [the defendant], did enter or remain unlawfully in a dwelling, while a person other than a participant in the crime was actually present in such dwelling, with intent to commit a crime therein, and in the course of committing the offense: acting with another person, such person and another participant in the crime committed a felony (to wit: robbery) against the person of another person other than a participant in the crime who is actually present in such dwelling."

101 (a) (3)[22] as both the principal and as an accessory under General Statutes § 53a-8 (a). The state's theory of the case was that the home invasion occurred based on "[Vaughn] go[ing] over there and bring[ing] a gun with him. Then he enters in that house to commit a crime to help the larceny. He puts a gun to Kade's head," and the burglary occurred when the defendant remained in the house at night with the intent to steal Niko's firearms.

Under step one, "[t]he same transaction . . . may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense. . . . [T]he test is not whether the *criminal intent* is one and the same and inspiring the whole transaction, but whether *separate acts* have been committed with the requisite criminal intent and are such as are made punishable by the [statute]. . . . When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found a separate factual basis for each offense charged." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Bennett*, 187 Conn. App. 847, 853, 204 A.3d 49, cert. denied, 331 Conn. 924, 206 A.3d 765 (2019). In *Bennett*, the defendant was charged under the same subsections of the statues criminalizing home invasion and burglary in the first degree as the defendant in the present case. Id., 848. This court concluded in *Bennett* that the two crimes could be separated into parts. "[T]he burglary charge arose from the distinct and separate act of *entering* the dwelling at night with the intent to commit a larceny,

[22] Count two of the substitute information states that the defendant committed burglary in the first degree "in that on or about April 12, 2015, at approximately 9:23 p.m., at or near 78 Eastwood Avenue, Waterbury, Connecticut, [the defendant], did enter and remain unlawfully in a dwelling at night with intent to commit a crime therein."

while the home invasion charge arose from the separate act of *threatening the use of physical force* against [the victim] after the defendant and [the codefendant] entered the home and were committing the larceny." (Emphasis in original.) Id., 855; see also *State* v. *Schovanec*, 326 Conn. 310, 328–29, 163 A.3d 581 (2017).

In the present case, the evidence allows the defendant's crimes to be separated into parts. While the defendant and Garris were playing video games in Niko's bedroom, the defendant inquired as to what Niko's cases contained, and Garris responded that Niko's guns were stored in the cases. Later, the defendant took multiple phone calls, leaving Niko's bedroom for each one. After these phone calls, Vaughn, who was unknown to Kade and not well known to Garris, showed up at the back door of the house. Kade went to Niko's bedroom and told the defendant that someone was there to see him. This upset Garris because the defendant had not first asked Garris about Vaughn's coming over.

After both Kade and Garris left Niko's bedroom for the kitchen, the defendant remained alone in Niko's bedroom. Lastly, when Vaughn had a gun pressed to Kade's head and Garris was pleading with Vaughn to point the gun at him, Vaughn yelled "hurry up," which the jury reasonably could infer was directed at the defendant. On the basis of the foregoing, the jury reasonably could have concluded that the defendant formulated the intent to take Niko's firearms before Vaughn's arrival when he was in Niko's bedroom, learned of the guns' existence and participated in numerous phone calls that he took outside of Garris' presence. In other words, the defendant had remained in Niko's house unlawfully with the intent to commit a larceny prior to Vaughn's arrival. The jury also reasonably could have determined that the home invasion occurred when Kade returned back to the kitchen and

Vaughn grabbed her and pressed a handgun to the back of her head. That act, to which the jury reasonably could have convicted the defendant as being an accessory, constituted the separate act of threatening the immediate use of physical force element for robbery, which is an element of the offense of home invasion. See General Statutes § 53a-133.[23]

Because the defendant failed to show that the two charges arose out of the same act or transaction, there is no need to proceed to step two and perform a *Blockburger* analysis. See *State* v. *Porter*, supra, 328 Conn. 663 n.11. The defendant's double jeopardy argument fails.

The judgment is affirmed.

In this opinion PRESCOTT, J., concurred.

FLYNN, J., concurring and dissenting. I write separately because I respectfully dissent from part I of the majority opinion. I disagree that the evidence was sufficient to show that each of the three weapons stolen was operable at the time of the theft. I therefore would reverse the defendant's conviction of the three counts

[23] The defendant's argument that he "had not been remaining unlawfully in [Niko's home], he had been an invited guest" and that "[t]he gathering of the guns, the unlawful remaining all occurred at the same time when Vaughn arrived with a gun" is unavailing. There was sufficient evidence for the jury to reasonably conclude that the defendant was remaining unlawfully in the house with the intent to commit larceny prior to Vaughn's arrival, which allows for the home invasion and burglary in the first degree crimes to be separated into parts.

The defendant's argument is unsupported by *State* v. *Holmes*, 182 Conn. App. 124, 127, 189 A.3d 151, cert. denied, 330 Conn. 913, 193 A.3d 1210 (2018). The defendant cited to *Holmes*' procedural history, which recited a trial court decision to vacate the conviction of burglary in the first degree as a lesser included offense of home invasion. Id. There was no claim made in *Holmes* to challenge the propriety of that decision and, as such, this court neither discussed the factual background for the home invasion and burglary charges nor discussed whether they could reasonably be separated into parts. Therefore, *Holmes* is unhelpful to the defendant's argument.

of stealing a firearm in violation of General Statutes § 53a-212 (a). I concur in both the reasoning and result reached in parts II and III of the majority opinion.

The defendant was charged in three separate counts of the information with stealing a firearm in violation of § 53a-212 (a). An element of § 53a-212 (a) requires that the stolen instrumentality be a firearm, as defined by General Statutes § 53a-3 (19). *State* v. *Sherman*, 127 Conn. App. 377, 395, 13 A.3d 1138 (2011), cert. denied, 330 Conn. 936, 195 A.3d 385 (2018). Pursuant to this definition of "[f]irearm," the weapon must be one "from which a shot may be discharged . . . ." General Statutes § 53a-3 (19). Thus, operability is an essential element of stealing a firearm. *State* v. *Carpenter*, 19 Conn. App. 48, 59, 562 A.2d 35, cert. denied, 213 Conn. 804, 567 A.2d 834 (1989). I agree with the majority that the General Assembly, by defining firearm in such a manner that it must be operable, burdened the state to prove beyond a reasonable doubt the operability element of the crime as to each theft count charged. The state had to prove beyond a reasonable doubt that each of the three weapons, when stolen, constituted a "[f]irearm," meaning that they were operable on the date of the criminal act of taking them, not simply operable at some earlier time. See *State* v. *Bradley*, 39 Conn. App. 82, 91–92, 663 A.2d 1100 (1995), cert. denied, 236 Conn. 901, 670 A.2d 322 (1996). "[W]e presume that the legislature intends sensible results from the statutes it enacts." (Internal quotation marks omitted.) *State* v. *Pommer*, 110 Conn. App. 608, 614, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). The legislature's enactment of a statutory operability requirement for violations of § 53a-212 (a) would make no sense if a weapon could be inoperable on the date of the crime involving its theft.

Where I disagree with the majority, is that in my opinion, the state has not established by sufficient evidence beyond a reasonable doubt that each of the stolen

weapons was "operable" at the time stolen. Proof beyond reasonable doubt is the highest form of proof and requires more than the tipping of the scales by a preponderance of evidence. Where proof is offered by circumstantial evidence, this means that although not each fact of the circumstances needs to be proved, beyond a reasonable doubt, the cumulative force of all of the evidence must suffice to convince the jury of each element of the crime beyond a reasonable doubt. See *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011). The defendant at the close of the state's case moved for a judgment of acquittal on the three counts of stealing a firearm in violation of § 53a-212 (a) because of insufficiency of the evidence.[1] The court denied the motion. The defense counsel premised his motion on the lack of evidence of any eyewitness seeing the defendant fleeing with firearms. On appeal, he now argues the evidence was insufficient to show operability of each of the stolen firearms. In *State* v. *Adams*, 225 Conn. 270, 623 A.2d 42 (1993), our Supreme Court followed the ruling of the United States Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), in holding that "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right" and is entitled to review as the court does with "any properly preserved claim." *State* v. *Adams*, supra, 276 n.3

None of the weapons stolen was recovered and their owner, Niko Infanti (Niko), did not testify. Therefore, the state's case as to these charges was reliant on inferences to be drawn from circumstantial evidence based on: testimony of three witnesses; photographs of Niko's

[1] Practice Book § 42-40 expressly provides that a defendant may do so, as it states in relevant part: "After the close of the prosecution's case-in-chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged . . . for which the evidence would not reasonably permit a finding of guilty. . . ."

shotgun and case that were not stolen; a photograph of Niko's empty nightstand drawer; various photographs of Niko's bedroom depicting his bed, laundry baskets, television, and other miscellaneous items without the stolen weapons present; and Niko's firearm registrations.

One of the difficulties I see with the sufficiency of the proof in this case is that not only did the long form information fail to identify any of the three weapons stolen by manufacturer, serial number or other identifying characteristics, but the testimony elicited from witnesses referred in general to weapons owned by Niko rather than relating to individual weapons. The jury was instructed by the court: "Just to let you know, these counts are contained in one paragraph, but they have to be considered separately by you in your deliberations," which is an accurate statement of our law. Although the jury was so instructed, and some of the evidence differed as to each weapon, I do not see how the jury could weigh each weapons count separately where none of the stolen weapons counts identified the weapon charged in that particular count.

Where inferences are asked to be drawn from circumstantial evidence, the point at which inferences become too remote and venture off into the realm of impermissible speculation is largely a matter of judgment. See *State* v. *Niemeyer*, 258 Conn. 510, 518, 782 A.2d 658 (2001). The evidence as to operability in this case is a close question. In all cases where evidentiary sufficiency is an issue, however, the requirement that evidence should be given the most favorable construction in favor of the verdict does not end the analysis. When inferences become too stretched, remote, and speculative, they cannot constitute proof beyond a reasonable doubt. See id., 518–19.

The defendant's involvement in the separate crimes of home invasion, robbery, and burglary is reprehensible. However, the United States Supreme Court has held that: "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Jackson* v. *Virginia*, supra, 443 U.S. 323. It is my opinion that the evidence in this case was insufficient to prove guilt beyond a reasonable doubt as to the element of operability regarding the three charged counts of stealing a firearm.

The crime of stealing a firearm requires, because of the statutory definition of "[f]irearm," that the weapons taken be operable at the time of the taking on April 12, 2015, not months earlier. An exhibit in evidence, state's exhibit 24, shows that Niko took possession of: a Henry Repeating Rifle Company .22 caliber rifle, serial number US089867B, over a year before the theft; a Heckler and Koch 9 millimeter pistol, serial number 129055936, eleven months before the theft; and a Savage .7 caliber bolt action rifle, serial number J135063, over nine months before the theft.[2] None of these purchases was close in time to April 12, 2015. For that reason, even if the jury credited the documentary evidence of when Niko purchased the three weapons at issue, and inferred that each such weapon probably was an operable weapon at the time purchased, it would not be sufficient to show beyond a reasonable doubt that the stolen weapons were still operable on the day they were taken.

The state elicited testimony as to Niko's general habits regarding his weapons. The testimony, however, was vague and failed to establish a temporal proximity from which the jury reasonably could infer that the general habits, to the extent that they could indicate operability, occurred and continued close enough in time to the incident so that an inference of operability would be reasonable.

[2] The exhibit also gave details for the shotgun, which was not stolen.

First, there was evidence that Niko kept a safety on his weapons and the state asked the jury to infer that one would not keep a safety on weapons unless they were operable. This was evidence of a general habit. For an inference of operability to be drawn as to each gun's operability on the day in question, because they were left stored with a safety on, there would have to be evidence that each weapon stolen was so stored with the safety in the "on" position on the date stolen or very close in time to it.

Second, the evidence that Niko sometimes went to "training grounds" could not support an inference that all weapons stolen were operable. No additional evidence was offered, such as whether the "training grounds" were actually a pistol range or rifle range at which weapons like those stolen could be fired; no evidence of how recently Niko went to the training grounds prior to the weapons being stolen; and no evidence of whether Niko took the stolen pistol and rifles with him. There was no further evidence as to what a training ground is or was. The jury could only speculate as to whether the training grounds had a pistol range or rifle range at which guns could be shot or whether Niko went to such a range close in time to the date of the theft.

Third, there was evidence that Niko kept the handgun in a night table near his bed in a lockbox, and the state urges the jury could infer from that fact that he must have kept it there for protection and would not have done so unless it could be fired. However, Niko's sisters, Kade and Christina, did not often go into that room nor did they say when they had last seen the handgun stored there that way in relation to the date of the crime. Kade testified that Niko "[v]ery rarely let anybody" into his bedroom and that she had not been in his room for approximately one month prior to the incident.

Additionally, there was evidence that the long guns were stored behind some cans of food in a bedroom, in what are sometimes described as bags and sometimes described as cases. The state urges that they would not have been so obscured from view or so kept in the bags or cases unless they were dangerous and unless they could be fired and, thus, were operable. In addressing the obscuration issue, I note that although Christina testified that the long guns were stored behind food cans, she testified that prior to the incident, she had not been in Niko's room since he had left for Arizona days earlier. Her sister, Kade, also testified that they were hidden behind cans of food. The testimony that had the closest temporal nexus came from Nathaniel Garris. Garris, who lived in the same room as Niko and occupied it on the day of the theft, however, testified as to the long guns that "[l]ike, they're not hidden," but rather "were just out, but they were in cases." He further testified that if one walked into Niko's room "you would be able to see at least three. . . . Two rifles and a shotgun." This state's evidence could not suffice to permit a finding of operability on the basis of obscuration.[3]

The testimony at trial variously describes the containers in which the guns were stored as bags or cases. That disparity in description is problematic in itself. However, the state argues that the jury could permissibly draw an inference from testimony that these containers were locked that they were, in effect, dangerous and therefore operable. However, there is no evidence that somehow bags could be locked. In my opinion, the jury could not permissibly have drawn an inference from the testimony that these containers were locked. A photograph of a similar bag, which had housed the shotgun not stolen, introduced into evidence did not have a lock on it.

[3] While in Niko's room, the defendant saw a gun case or bag and asked if it was a guitar case. The defendant was able to see the long guns well enough in Niko's room to locate and remove them.

The state maintains that the circumstantial evidence, the cumulative force of which given the most favorable construction in support of the verdict as the law requires, permitted a finding beyond a reasonable doubt that the guns were operable on the day they were stolen. However, the cases decided on the basis of circumstantial evidence that stolen weapons were operable at the time of their theft generally permit a finding by the jury that that close temporal operability connection exists because it links the evidence of operability to the time of the robbery of the weapons. For example, witness testimony that an explosive bang was heard at the time of the incident, testimony from ballistic experts who, shortly after a crime, successfully fire a weapon seized, or other evidence showing the link between the operability of the weapon that the statute requires at the time of the theft. See, e.g., *State* v. *Rogers*, 50 Conn. App. 467, 469, 475, 718 A.2d 985, cert. denied, 247 Conn. 942, 723 A.2d 319 (1998) (sufficient evidence of operability where front passenger displayed gun and witness saw gunfire from passenger seat area); *State* v. *Bradley*, supra, 39 Conn. App. 91 (firearm operable when tested three days after defendant possessed it); *State* v. *Hopes*, 26 Conn. App. 367, 377, 602 A.2d 23 (jury could infer operability from evidence that nearby witnesses heard gunshots and felt something pass by them), cert. denied, 221 Conn. 915, 603 A.2d 405 (1992). In the present case, the evidence was too vague and remote in time from the theft to provide the jury with any reasonable basis on which to infer operability at the time of the theft.

For all of these reasons, I do not believe, that from the evidence before it, the jury could logically infer beyond a reasonable doubt that the stolen weapons were operable at the time they were stolen. Accordingly, I would reverse the conviction of the three counts of stealing a firearm in violation of § 53a-212 (a).

KATERI STREIFEL *v.* WILLIAM R. BULKLEY
(AC 41239)

Lavine, Prescott and Harper, Js.

Syllabus

The plaintiff registered nurse sought to recover damages from the defendant for negligence in connection with injuries she sustained while providing medical care to the defendant, who was a patient in the radiation oncology department at the hospital where she worked. In her complaint, the plaintiff alleged that as she was assisting the defendant during the diagnostic procedure or medical treatment he was undergoing, he grabbed hold of her while he attempted to transition from a supine to a seated position on the examining table, and, as a result, she suffered several physical injuries. She claimed that her injuries were proximately caused by the defendant's negligence. The defendant filed a motion for summary judgment, asserting that the plaintiff's action was not viable because allowing a medical care provider to recover damages from her patient was contrary to public policy. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiff failed to demonstrate that there was a genuine issue of material fact that the defendant, as a patient at the hospital, owed a duty of care to the plaintiff, who was providing him medical care as a registered nurse. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly rendered summary judgment because the defendant's motion for summary judgment effectively challenged the legal sufficiency of her cause of action, and, therefore, that court should have treated the motion as a motion to strike to provide her with the opportunity to replead; because the plaintiff failed to object to the trial court's deciding the case through summary judgment or, in the alternative, to offer to amend her complaint if the court determined that the allegations were legally insufficient, she waived any claim that the trial court improperly failed to treat the motion for summary judgement as a motion to strike.
2. The plaintiff could not prevail on her claim that the trial court improperly granted the defendant's motion for summary judgment because the question of whether the defendant owed her a duty of care involved a question of fact reserved for the jury, which was based on her assertion that the court was obligated to first address, but failed to do so, whether the harm that she suffered was foreseeable before concluding whether a duty existed; the determination of whether a duty of care existed under the circumstances of this case was a question of law that the court was permitted to make at the summary judgment stage of the proceedings, and, in making that determination, the court was permitted to decide that no duty existed solely on public policy grounds.
3. The plaintiff's claim that applying the test articulated in *Murillo* v. *Seymour Ambulance Assn., Inc.* (264 Conn. 474) to determine whether recognizing

a duty of care is inconsistent with public policy conflicts with this state's abolition of the doctrine of assumption of risk as a complete bar to recovery was unavailing; because our Supreme Court has continued to consider in cases involving medical treatment the normal expectation of the participants in analyzing the activity under review, including the statuses of the parties, even after the state's abolition of the doctrine of assumption of risk, this court was not prohibited by the abolition of that doctrine from applying the test articulated in *Murillo* to determine whether recognizing a duty of care was inconsistent with public policy, and the plaintiff reliance on *Sepega* v. *DeLaura* (326 Conn. 788) was misplaced, as there was no language in that case that even implied that our Supreme Court intended to abolish or retreat from the test in *Murillo*.

4. The plaintiff could not prevail on her claim that the trial court incorrectly determined that imposing a duty of care on the defendant while the plaintiff was furnishing medical care him was inconsistent with public policy, this court having declined to recognize, as a matter of law, that a patient owes a duty of care to avoid negligent conduct that causes harm to a medical care provider while the patient is receiving medical care from that provider: this court's application of the relevant public policy considerations articulated in the test in *Murillo* indicated that all four factors weighed against recognizing a duty of care, specifically, the normal expectations of registered nurses and patients under the circumstances, balancing the unlikely enhancement to medical care provider and patient safety by recognizing a duty of care against the potential for higher medical care costs for patients caused by increased litigation, jeopardizing the confidentiality of medical information and the availability of a workers' compensation remedy for medical care providers, and the fact that no other jurisdiction has imposed a duty of care on a patient while receiving medical care from a medical care provider all weighed against recognizing a duty of care; moreover, this court's decision not to recognize a duty of care was predicated on the conclusion that uninhibited access to medical care for all prospective patients, the goal of encouraging patients to share sensitive information with their medical care providers without fearing the loss of confidentiality, and the safety of patients and medical care providers alike are vitally important to the integrity of the health care system in Connecticut.

Argued September 17, 2019—officially released January 14, 2020

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion for summary judgment and rendered judgment

thereon, from which the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, with whom was *Peter Rotatori III*, for the appellant (plaintiff).

Janis K. Malec, with whom was *Mary B. Ryan*, for the appellee (defendant).

Opinion

PRESCOTT, J. This appeal raises an issue of first impression in Connecticut: whether a patient may be liable under a theory of negligence for causing physical injuries to a medical care provider while that provider was furnishing medical care to the patient. We conclude, as a matter of law, that the law does not impose a duty of care on a patient to avoid negligent conduct that causes harm to a medical care provider while the patient is receiving medical care from that provider.[1]

The plaintiff, Kateri Streifel, appeals from the trial court's summary judgment in favor of the defendant, William R. Bulkley. She claims that the trial court improperly rendered summary judgment because (1) the court should have decided the defendant's motion for summary judgment as a motion to strike so as to afford her the opportunity to replead a legally sufficient cause of action, (2) determining whether a duty existed involves a question of fact for the jury to decide, and (3) assuming that determining whether a duty exists is a question of law for the court to decide, the court incorrectly determined that imposing a duty of care on the defendant while the plaintiff was furnishing medical care to him was inconsistent with public policy. We disagree with all three of the plaintiff's claims and, therefore, affirm the judgment of the trial court.

[1] For a discussion about what we do not purport to decide in reaching this conclusion, see part III E of this opinion.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history.[2] On March 18, 2014, the defendant was a patient in the radiation oncology department of Griffin Hospital undergoing an examination. At the time of the examination, "[t]he [d]efendant had a large body habitus." During the diagnostic procedure or medical treatment he was undergoing, the defendant was lying in a supine position.

The defendant then attempted to transition from a supine to a seated position on the examining table. In attempting to change positions, he grabbed hold of the plaintiff, who was the registered nurse assisting him. As a result of the defendant's physical contact with her, the plaintiff suffered several physical injuries.

The plaintiff commenced this action on February 25, 2016. In her one count complaint sounding in negligence, the plaintiff alleged that the injuries she suffered were proximately caused by the defendant's negligence. Specifically, the plaintiff alleged that the defendant caused harm to her in one or more of the following ways: "[1] [the defendant] applied pull force and/or

[2] Because we must view the record in the light most favorable to the plaintiff as the nonmoving party and neither the plaintiff nor the defendant submitted an affidavit or any documentary evidence, we limit our recitation of the facts to what is alleged in the complaint. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 358, 143 A.3d 638 (2016) ("[i]n deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party" [internal quotation marks omitted]).

In her appellate brief, the plaintiff nevertheless attempted to add to the material allegations of the complaint. For example, the plaintiff accuses the defendant of having engaged in "rough, boisterous, buffoonery clown like conduct while [the defendant] was fully aware of his large body size." The complaint, however, does not allege that the defendant engaged in this type of conduct. Moreover, the plaintiff did not submit an affidavit or documentary evidence to the trial court in support of these allegations. See Practice Book §§ 17-45 (b) and 17-49.

torsion on the plaintiff while attempting to go from a supine position to a seated position; [2] [h]e applied an excessive amount of pull force and/or torsion on the plaintiff while attempting to go from a supine position to a seated position; [3] [h]e failed to immediately let go of the plaintiff when falling back on the examining table; [4] [h]e failed to ask for medical and health care staffing for additional support to allow him to sit up; [5] [h]e failed to maintain proper balance while going from the supine position to the sitting position; [6] [h]e failed to give verbal notice to the plaintiff that he was not able to maintain his balance, position or posture on the examining table; [7] [h]e failed to provide adequate effort to transition himself from a supine position to a seated position when he was physically and intellectually able to do so; and [8] [h]e engaged in horseplay while on the examining table."

On November 9, 2016, the defendant filed a motion for summary judgment in accordance with Practice Book § 17-49. He asserted that "[t]he [p]laintiff does not have a viable cause of action because allowing a health care provider to recover against her patient is contrary to public policy . . . ." The trial court granted the motion for summary judgment on December 28, 2017, and issued a memorandum of decision setting forth its reasoning.

In its memorandum of decision, the trial court concluded that the plaintiff failed to demonstrate that there was a genuine issue of material fact that the defendant, as a patient at the hospital, owed a duty of care to the plaintiff, who was the nurse providing him medical care. In arriving at this conclusion, the trial court analyzed whether imposing a duty of care on the defendant was inconsistent with public policy. To support this determination, the trial court stated that recognizing a duty "would be more than opening the floodgates [to litigation; it] would be creating a tsunami with regard to

actions against patient[s].'' Furthermore, the trial court observed that the duty of care that the plaintiff sought to be recognized had not been acknowledged in other jurisdictions. In fact, the court stated that the only authorities the plaintiff cited to support the existence of a similar duty in other jurisdictions ''involved not a claim of negligence but [instead] claims for assault and intentional acts by the patient.'' On the record, the trial court concluded that, as a matter of law, the defendant did not owe the plaintiff a duty of care under these circumstances, and, thus, the defendant was entitled to summary judgment.[3] This appeal followed.

We begin our analysis with the appropriate standard of review for a trial court's granting of a motion for summary judgment. ''On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . [O]ur review is plenary and we must decide whether the [trial court's] conclusions are legally and logically correct and find support in the facts that appear on the record. . . .

[3] In its memorandum of decision, the trial court stated that the test for whether recognizing a duty of care to a plaintiff is inconsistent with public policy is comprised of two factors, namely, ''the avoidance of increased litigation and . . . the decisions of other jurisdictions.'' The trial court concluded that both factors militated against imposing a duty of care on a patient while receiving medical care.

That test, however, contains four factors. See *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 480, 823 A.2d 1202 (2003) (determining that there are ''four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions'').

In our application of the public policy test, we consider *all* four factors and conclude that all four weigh against imposing a duty of care on the defendant under these circumstances. In the end, we arrive at the same conclusion as the trial court; the defendant owed no duty of care to the plaintiff while receiving medical care from her.

"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. . . .

"A material fact is a fact that will make a difference in the outcome of the case. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 357–58, 143 A.3d 638 (2016).

I

The plaintiff first claims that, because the motion for summary judgment effectively challenged the legal sufficiency of the pleadings, the court should have treated the motion for summary judgment as a motion to strike to provide her with the opportunity to replead. Specifically, the plaintiff asserts that "[t]he pleadings

in this case . . . could be cured by the plaintiff being allowed to replead the complaint to allege [a] specific allegation to establish the duty the defendant had to refrain from engaging in [conduct that put the plaintiff at risk of injury]." Furthermore, the plaintiff argues that, if she had been allowed to replead, then she could have pleaded assault and battery causes of action, which, she asserts, would amount to a legally sufficient complaint. We conclude that, by failing to raise this issue before the trial court, the plaintiff waived any claim that the trial court improperly failed to treat the motion for summary judgement as a motion to strike.

Our Supreme Court has set forth the appropriate circumstances in which a motion for summary judgment may be used instead of a motion to strike to challenge the legal sufficiency of a complaint. "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate [if] the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading. . . . If it is clear on the face of the complaint that it is legally insufficient and that an opportunity to amend it would not help the plaintiff, we can perceive no reason why the defendant should be prohibited from claiming that he is entitled to judgment as a matter of law and from invoking the only available procedure for raising such a claim after the pleadings are closed. . . . It is incumbent on a plaintiff to allege some recognizable cause of action in his complaint. . . . Thus, failure by the defendants to demur to any portion of the . . . complaint does not prevent them from claiming that the [plaintiff] had no cause of action and that a judgment [in favor of the defendants was] warranted. . . . Moreover, [our Supreme Court] repeatedly has recognized that the desire for judicial efficiency inherent in the summary judgment procedure would be frustrated if parties were forced to try a case

where there was no real issue to be tried." (Citations omitted; internal quotation marks omitted.) *Larobina* v. *McDonald*, 274 Conn. 394, 401–402, 876 A.2d 522 (2005).

To avoid waiving a right to replead, a nonmoving party must, before the trial court decides the summary judgment motion, either object to the trial court's deciding the case through summary judgment and argue that it should instead decide the motion as a motion to strike to afford it the opportunity to replead a legally sufficient cause of action or, in the alternative, the nonmoving party may maintain that its pleading is legally sufficient, but it must offer to amend the pleading if the court concludes otherwise. See *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 124, 971 A.2d 17 (2009) ("a party does not waive its right to replead by arguing that the pleading is legally sufficient, but offering, if the court were to conclude otherwise, to amend the pleading").

In *Larobina* v. *McDonald*, supra, 274 Conn. 402, our Supreme Court stated that it "will not reverse the trial court's ruling on a motion for summary judgment that was used to challenge the legal sufficiency of the complaint when it is clear that the motion was being used for that purpose and the nonmoving party, by failing to object to the procedure before the trial court, cannot demonstrate prejudice. A plaintiff should not be allowed to argue to the trial court that his complaint is legally sufficient and then argue on appeal that the trial court should have allowed him to amend his pleading to render it legally sufficient. Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him." (Internal quotation marks omitted.)

Turning to the present case, the defendant moved for summary judgment after the plaintiff served a complaint

sounding in negligence and the defendant filed his answer and special defenses. In his motion for summary judgement, the defendant stated that "[t]he [p]laintiff does not have a viable cause of action because allowing a health care provider to recover against her patient is contrary to public policy . . . ." In her objection to the motion for summary judgment and at oral argument before the trial court on the motion, the plaintiff failed to object to the court's deciding the motion as a motion for summary judgment and did not argue that the court should instead decide it as a motion to strike to allow her the opportunity to replead and set out a cause of action that is legally sufficient. Furthermore, the plaintiff failed to offer to amend her complaint if the trial court determined that the cause of action alleged was legally insufficient.

Because the plaintiff failed to object to the court's deciding the case through summary judgment instead of deciding the defendant's motion as a motion to strike or, in the alternative, to offer to amend the complaint if the court determined the allegations to be legally insufficient, she "has waived any objection to the use of the motion for that purpose and any claim that [she] should be permitted to replead." See *Larobina* v. *McDonald*, supra, 274 Conn. 403. Therefore, we conclude that the trial court properly decided the defendant's motion as a motion for summary judgment instead of as a motion to strike.

II

The plaintiff also claims that the trial court improperly granted the defendant's motion for summary judgment because the question of whether the defendant owed the plaintiff a duty of care involves a question of fact.[4] Central to this claim is the plaintiff's assertion

[4] "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994).

that the trial court was obligated to address, but failed to do so, the question of whether the harm allegedly suffered by the plaintiff was foreseeable before concluding whether a duty existed in this case. In other words, the plaintiff argues that the trial court improperly decided whether the defendant owed the plaintiff a duty of care as a matter of law because the analysis in which the court *should have* engaged involves a question of fact reserved for the jury. We disagree.

We first set forth the well settled legal principles concerning whether a court is required to address the foreseeability prong if, as a matter of law, the court determines that recognizing a duty of care on the defendant is inconsistent with public policy, and whether determining if a duty of care is owed is a question of law that the court may decide at the summary judgment stage. "Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Internal quotation marks omitted.) *Fogarty* v. *Rashaw*, 193 Conn. 442, 446, 476 A.2d 582 (1984). Nevertheless, "[t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Mozeleski* v. *Thomas*, 76 Conn. App. 287, 290, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003).

"The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . [Our Supreme Court has] stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether

the defendant's responsibility for [his] negligent conduct should extend to the particular consequences or *particular plaintiff* in the case. . . . The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Emphasis added; internal quotation marks omitted.) *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 217–18, 905 A.2d 1135 (2006). A court, however, is "not required to address the first prong as to foreseeability if [it] determine[s], based on the public policy prong, that no duty of care existed." Id., 218. "Foreseeability notwithstanding, it is well established that Connecticut courts will not impose a duty of care on [a defendant] if doing so would be inconsistent with public policy." *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 116, 869 A.2d 179 (2005). "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 539, 51 A.3d 367 (2012).

In the present case, the trial court granted the defendant's motion for summary judgment because it determined that, as a matter of law, the defendant, as a patient, did not owe a duty "to protect the [plaintiff] medical provider from falling forward when the [defendant] sought her assistance" when transitioning from a supine position on the examining table. In arriving at this conclusion, the trial court refrained from determining whether the harm the plaintiff suffered was foreseeable and proceeded to determine that, as a matter of public policy, the defendant did not owe the plaintiff a duty of care while receiving medical care from her. Because the determination of whether a duty of care exists under the circumstances is a question of law that the court is permitted to make at the summary judgment stage and, in making this determination, the court

may decide that no duty exists solely on public policy grounds, we conclude that the trial court did not improperly decide a factual question reserved for the jury. Accordingly, we reject this claim.

III

The plaintiff next claims that, even if determining whether a duty exists is a question of law that may be decided at the summary judgment stage, the court improperly granted the defendant's motion for summary judgment because recognizing that a patient owes a duty of care to a medical care provider (medical provider) while that provider is furnishing medical care to that patient is in fact consistent with public policy. We disagree with the plaintiff and, therefore, decline to recognize that a patient owes a duty of care to a medical provider while receiving medical care from that provider.[5]

[5] In *Sepega* v. *DeLaura*, 326 Conn. 788, 792, 167 A.3d 916 (2017), quoting *Levandoski* v. *Cone*, 267 Conn. 651, 661, 841 A.2d 208 (2004), our Supreme Court stated that, "because the firefighter's rule is an exception to the general rule of tort liability that, as between an innocent party and a negligent party, any loss should be borne by the negligent party, the burden of persuasion is on the party who seeks to extend the exception beyond its traditional boundaries." (Internal quotation marks omitted.) The defendant in *Sepega* argued that the firefighter's rule should be extended in order to bar the plaintiff police officer's action for negligence against him. See id., 789–92. In that case, our Supreme Court concluded that the defendant failed to meet his burden of persuasion. *Sepega* v. *DeLaura*, supra, 815.

It is unclear whether a defendant who argues that a duty of care should not be recognized because it is inconsistent with public policy has the burden of persuading that a plaintiff should not be allowed to recover from him or her for negligence. We note that, in cases in which our Supreme Court used the test to determine whether recognizing a duty is inconsistent with public policy, the court did not opine on whether the defendants in those cases had the burden of persuasion. See generally *Jarmie* v. *Troncale*, 306 Conn. 578, 50 A.3d 802 (2012); *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 823 A.2d 1202 (2003). If, however, the defendant in the present case had the burden of persuading the court that the plaintiff was not allowed to recover from him for negligence, then we conclude that the defendant met his burden for the reasons stated in this opinion.

Our Supreme Court has set forth the inquiry to determine if recognizing a duty of care contradicts public policy. "A simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . [Although] it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 479–80, 823 A.2d 1202 (2003).

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." (Internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 571, 717 A.2d 215 (1998). "[I]t is well established that Connecticut courts will not impose a duty of care on [a defendant] if doing so would be inconsistent with public policy." *Monk* v. *Temple George Associates, LLC*, supra, 273 Conn. 116. As previously noted, our Supreme Court recognizes "four factors to be considered in determining the extent of a legal duty as a matter of public

policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480; see also *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, 185 Conn. App. 340, 358, 197 A.3d 415 (2018). In the present case, all four factors weigh against recognizing that a patient owes a duty of care to a medical provider while receiving medical care from that provider.[6]

[6] The plaintiff asserts that the trial court incorrectly rendered summary judgment because the court improperly "shift[ed] the burden of proof to the plaintiff to establish facts and evidence to support a claim of horseplay when it is the defendant's burden on summary judgment to prove the absence of horseplay in order to prevail." Having read and considered the complaint in its entirety, we construe the plaintiff's allegation that the defendant engaged in horseplay to be a specification of negligence. See *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002) (stating that "[t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically . . . [and that] [a]lthough essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties" [citations omitted]). Assuming that the defendant engaged in horseplay, we do not address this issue because we conclude that the trial court correctly determined that, as a matter of law, the defendant did not owe the plaintiff a duty of care while the defendant was receiving medical care from her. Thus, whether the defendant engaged in horseplay does not affect our decision that the plaintiff cannot recover from the defendant for negligence for harms sustained while the defendant was a patient receiving medical care from the plaintiff.

For similar reasons, we do not address the plaintiff's argument that the defendant is liable for negligence because "[a] person lacking coordination or suffering from an infirmity must use a degree of reasonable care that one lacking normal coordination would also use." That argument involves whether the defendant *breached* a duty of care to the plaintiff. We, however, conclude that the trial court correctly determined that, as a matter of law, the defendant owed no duty of care to the plaintiff while the defendant was receiving medical care from her. Therefore, we do not address whether the defendant breached a nonexistent duty.

A

Before we address the factors for determining whether imposing a duty of care on the defendant is inconsistent with public policy, we first consider the plaintiff's argument that, if we consider the normal expectations of the parties in the activity under review and do not recognize that the defendant owed the plaintiff, a health care provider, a duty of care, then we are improperly basing that conclusion on the doctrine of assumption of risk, a tort principle that Connecticut has abolished as a complete bar to recovery. In making this argument, the plaintiff relies primarily on our Supreme Court's decision in *Sepega* v. *DeLaura*, 326 Conn. 788, 803–804, 167 A.3d 916 (2017), and asserts that "a defendant cannot escape liability for conduct simply by relying on the plaintiff's occupation placing them in a class from whom the defendant needs immunity from liability." We disagree with the plaintiff's argument that our conclusion that no duty exists in the present case may be premised only by relying on the doctrine of assumption of risk.

The doctrines of last clear chance and assumption of risk have been abolished in Connecticut. General Statutes § 52-572h (*l*); see also *Wendland* v. *Ridgefield Construction Services*, *Inc.*, 190 Conn. 791, 797, 462 A.2d 1043 (1983) ("[t]he central purpose of § 52-572h was to abolish the harsh common law rule that the doctrines of contributory negligence, last clear chance and assumption of risk operated as a complete bar to recovery" [emphasis omitted]). In *Wendland*, our Supreme Court concluded that, "[i]n determining the relative negligence of each party . . . the factors relevant to the assumption of risk doctrine may be considered by the trier. As long as the jury is properly instructed concerning the doctrine of comparative negligence . . . [then] elements involving the failure of the plaintiff to comprehend a risk may be specially pleaded

and weighed by the trier in determining the propriety and totality of the plaintiff's conduct in relation to that of the defendant." (Citation omitted.) *Wendland* v. *Ridgefield Construction Services, Inc.*, supra, 797–98.

Although the doctrine of assumption of risk as a complete bar to recovery has been abolished, our Supreme Court has continued to consider the normal expectations of parties in cases involving medical treatment in order to analyze whether recognizing a duty of care is inconsistent with public policy. See, e.g., *Jarmie* v. *Troncale*, 306 Conn. 578, 603–605, 50 A.3d 802 (2012); id., 605 ("[t]he normal expectations of the parties . . . weigh heavily against extending the duty of health care providers to victims of their patients' unsafe driving"); *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480–81; id., 480 ("[g]iven the urgent need of the plaintiff's sister for medical care, the normal expectations of the participants would be that the [medical providers] would focus their effort to provide medical assistance on the plaintiff's sister, their patient, who was in need of emergency surgery . . . [and] would not require the [medical providers] also to keep a watchful eye on the plaintiff, who chose to observe while her sister [received medical care]"). Furthermore, in assessing the normal expectations of the parties, we need to consider the statuses of those individuals providing and receiving medical care. See *Jarmie* v. *Troncale*, supra, 604 (court considered defendant's status as physician in concluding that "the [defendant] would not have expected [his] liability to extend to the plaintiff in this case"); *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 480 (court considered status of defendants as medical providers in concluding that "[t]he normal expectations of the participants would not require the defendants . . . to keep a watchful eye on the plaintiff, who chose to observe while her sister underwent the insertion of the IV needle into her arm"). Because our

Supreme Court has continued to consider the normal expectations of the participants in analyzing the activity under review, including the statuses of the parties, even after § 52-572h was last amended in 1999, we are not convinced that this state's abolition of the doctrine of assumption of risk as a complete bar to recovery prohibits this court from conducting the test articulated in *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480, and *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 358, for determining whether recognizing a duty of care is inconsistent with public policy.

Furthermore, our Supreme Court's decision in *Sepega* is distinguishable from the present case for two reasons. In *Sepega*, the court considered whether the common-law firefighter's rule, which "provides, in general terms, that a firefighter or police officer who enters private property in the exercise of his or her duties generally cannot bring a civil action against the property owner for injuries sustained as the result of a defect in the premises . . . should be extended beyond the scope of premises liability so as to bar a police officer from recovering, under a theory of ordinary negligence, from a homeowner who is also an alleged active tortfeasor." (Citation omitted.) *Sepega* v. *DeLaura*, supra, 326 Conn. 789.

First, the Supreme Court concluded *only* that one of the policy considerations[7] in support of the *firefighter's rule* "operate[d] as a veiled form of an assumption of risk analysis."[8] Id., 803. Importantly, however, the court

[7] The policy consideration in support of the firefighter's rule that the Supreme Court scrutinized is "[t]o avoid placing too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters . . . ." (Internal quotation marks omitted.) *Sepega* v. *DeLaura*, supra, 326 Conn. 802.

[8] When weighing this policy consideration in support of the firefighter's rule, our Supreme Court took issue with "focusing on a firefighter or police officer as a *class* from whom a premises owner needs immunity from liability, not on the reasonableness of the activity of the premises owner in the

did not opine more broadly on the relationship between (1) the general test for determining whether a court should recognize as a matter of public policy a duty on a class of individuals and (2) the state's abolition of assumption of risk.[9] There is no language in *Sepega* that would even imply that the court intended to abolish or retreat from the four-pronged test articulated in *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480, and other cases. See, e.g., *Jarmie* v. *Troncale*, supra, 306 Conn. 603; *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 358.

circumstances . . . [because the] legislature of this state . . . has abolished the assumption of risk doctrine." (Emphasis added.) Id., 803. Therefore, the court determined that "the first policy consideration operates as a veiled form of an assumption of risk analysis" and that "this policy consideration fails to support an extension of firefighter's rule in the present case." Id. The court then concluded that "[i]t would be both unfair and incongruous, therefore, for this court to rely on the assumption of risk doctrine as a basis for extending the firefighter's rule beyond premises liability claims when the clear public policy of our state is contrary to the very rationale for that doctrine. Regardless of the continuing vitality of the firefighter's rule as it relates to premises liability claims, it certainly should not be extended on the basis of the common-law doctrine of assumption of risk." Id., 803–804.

[9] There are some noticeable differences between the factors used to determine whether recognizing a duty of care is inconsistent with public policy and the policy considerations in support of the firefighter's rule. Compare *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480 ("[w]e previously have recognized four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions"), with *Sepega* v. *DeLaura*, supra, 326 Conn. 802–803 ("The most often cited policy considerations [in support of the firefighter's rule] include: (1) [t]o avoid placing too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters; (2) [t]o spread the risk of . . . injuries to the public through workers' compensation, salary and fringe benefits; (3) [t]o encourage the public to call for professional help and not to rely on self-help in emergency situations; and (4) [t]o avoid increased litigation. . . . Proponents also cite double taxation as another policy consideration in favor of the firefighter's rule." [Citations omitted; internal quotation marks omitted.]).

Second, in *Sepega*, the court determined that barring police officers, *as a class*, from bringing actions sounding in negligence amounted to assumption of risk. See id., 804. In the present case, however, our determination that the defendant did not owe the plaintiff a duty of care is predicated on our conclusion that imposing a duty of care on a patient *while receiving medical care* is inconsistent with this state's public policy. Thus, our decision does not preclude medical providers from recovering from patients for negligence in all circumstances. For these reasons, we disagree with the plaintiff's argument that applying the test to determine whether recognizing a duty of care is inconsistent with public policy conflicts with this state's abolition of the doctrine of assumption of risk as a complete bar to recovery.

B

Having addressed the plaintiff's assumption of risk argument, we now consider the first factor of the test for determining whether recognizing a duty of care is inconsistent with public policy, namely, the normal expectations of the participants in the activity under review. In the present case, on March 18, 2014, the defendant was a patient in the radiation oncology department at Griffin Hospital undergoing a diagnostic procedure or receiving medical treatment that required him to lie in a supine position on an examining table. The plaintiff was a registered nurse in that department and was assisting the defendant during the diagnostic procedure or medical treatment he was undergoing. Our consideration of the normal expectations of a patient while receiving medical care and of a nurse while furnishing it is tempered by whether those expectations are reasonable. See *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480–81; see also *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 322, 87 A.3d 546 (2014) ("[w]ith respect to

the first factor, we can perceive no reason why a reasonable person would not expect the owner or keeper of a domestic animal to take reasonable steps to prevent the animal from causing foreseeable injuries").

The plaintiff argues that a medical provider in this situation would not expect to suffer the injuries she sustained because she would not have expected the patient to make physical contact with her. Furthermore, she argues that, if the defendant anticipated that he could not maintain his balance, then he had an obligation to ask for "additional support."

The defendant argues that the "[p]laintiff's description of expectations is nonsensical and would require a patient to announce his every move and ask for virtually continual assistance." Additionally, the defendant asserts that "[b]ased upon the specific allegations of the defendant's behavior, there is a clear implication that the plaintiff was positioned physically close to the defendant at the time she was 'assisting' the defendant. It is reasonable to expect that, by training, the plaintiff would be aware that the patient, as a large person supine on an examination table in a hospital radiation oncology department, might have difficulty sitting up and might fall back when attempting to transition." The defendant then implies that "it was reasonable for the defendant [in the present case] to expect that the plaintiff . . . would render such assistance. Further, it was reasonable for the defendant to expect the plaintiff to anticipate that he may have difficulties, and for the plaintiff to seek the assistance of other staff members with his transition to a sitting position."

Having considered these arguments and the public policies of this state, we conclude that it is reasonable for a patient to expect that, while receiving medical care, a medical provider will focus on and address the medical needs of the patient, who often may request

and rely on the assistance of his or her medical provider. Conversely, it is reasonable for a medical provider to expect that he or she is responsible for the patient's medical needs and safety while furnishing medical care to the patient. Moreover, if a patient requests assistance, then a medical provider can reasonably expect that it is his or her responsibility to furnish the requested aid to the patient, and that, if the medical provider is unable to provide the requested aid on his or her own, then the provider is expected to summon help to assist in providing the requested aid to the patient.

In analyzing the relevant factors in determining whether recognizing a duty in a particular instance is inconsistent with public policy, we note that "our statutes themselves are a source of public policy, and may militate in favor of recognizing a common-law duty of care when doing so advances the general policies and objectives of the statute. . . . Thus, in determining the normal expectations of the parties, our appellate courts have often looked to Connecticut's existing body of common law and statutory law relating to th[e] issue." (Citation omitted; internal quotation marks omitted.) *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 359.

Our determination of the reasonable expectations of a patient and a medical provider during the provision of medical care to the patient is buttressed by what our legislature has determined are the expectations of a registered nurse. "The practice of nursing by a registered nurse is defined as the process of diagnosing human responses to actual or potential health problems, *providing supportive and restorative care*, health counseling and teaching, case finding and referral, *collaborating in the implementation of the total health care regimen*, and executing the medical regimen under the direction of a licensed physician, dentist or advanced practice registered nurse." (Emphasis

added.) General Statutes § 20-87a (a). Although this statute pertains to occupational licensing, it nevertheless establishes that our legislature expects registered nurses, like the plaintiff, to focus on the needs of the patient and to collaborate with others if necessary to address the patient's medical needs.

Similarly, our Supreme Court has stated that medical providers are expected to prioritize the needs of the patient to whom they are administering medical care. See *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 478, 480 (defendant medical providers did not owe duty of care to plaintiff who was watching her sister receive medical care because, in part, "[g]iven the urgent need of the plaintiff's sister for medical care, the normal expectations of the participants would be that the defendants would focus their effort to provide medical assistance on the plaintiff's sister, their patient, who was in need of emergency surgery . . . [and] would not require the defendants also to keep a watchful eye on the plaintiff, who chose to observe while her sister underwent the insertion of the IV needle into her arm"); *Maloney* v. *Conroy*, 208 Conn. 392, 403, 545 A.2d 1059 (1998) ("Medical judgments as to the appropriate treatment of a patient [should not be] influenced by the concern that a visitor may become upset from observing such treatment . . . . The focus of the concern of medical care practitioners should be upon the patient and any diversion of attention or resources to accommodate the sensitivities of others is bound to detract from that devoted to patients.").

In light of the expectations of registered nurses and medical providers stated in this mosaic of authorities, in the present case, it was reasonable for the defendant, as a patient, to expect that he could receive assistance from the nurse attending to him if he needed it and that if she required help transitioning him from a supine position, then she could request it from another hospital

staff member. Conversely, it was reasonable for the plaintiff, as a nurse, to expect that her patient, whom she described as having a "large body habitus" and who may have been suffering from an illness or disease, would require assistance transitioning from a supine position on the examining table and that, if she were unable to help him sit up on her own, then she could have requested help from a hospital staff member. For these reasons, the first factor of the public policy prong of our duty analysis weighs against the plaintiff's claim that the defendant owed her a duty of care.

C

We next consider the second and third factors, namely, "the public policy of encouraging participation in the activity, while weighing the safety of the participants . . . [and] the avoidance of increased litigation . . . ." *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480. Because those factors are analytically related, we consider them together. See *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 658, 126 A.3d 569 (2015); see also *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 370.

With respect to these factors, the plaintiff argues that failing to recognize that a patient owes a medical provider a duty of care while that provider is furnishing medical care to that patient would discourage medical providers from providing medical care to their patients out of fear of being injured. Furthermore, the plaintiff argues that failing to recognize a duty of care may increase the likelihood that medical providers use force against their patients to protect themselves and thus put patients at a greater risk of harm. She also argues that litigation will not increase, even if we recognize this duty, because "[t]his case is an anomaly in the law."

In response, the defendant argues that there is an inherent benefit to society in encouraging persons to

seek or to continue to receive medical treatment. Recognizing a duty of care, the defendant asserts, would chill prospective patients from seeking treatment and put current patients at a greater risk of harm because they may be less likely to request the physical assistance of medical providers while receiving treatment.

"We recognize that, with respect to the third factor which contemplates the concern of increased litigation, [i]t is [often] easy to fathom how affirmatively imposing a duty on the defendants . . . could encourage similarly situated future plaintiffs to litigate on the same grounds; that is true anytime a court establishes a potential ground for recovery. . . . Because of this, in considering these two factors, our Supreme Court at times has employed a balancing test to determine whether, in the event that a duty of care is recognized by the court, the advantages of encouraging participation in the activity under review outweigh the disadvantages of the potential increase in litigation." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 371. Thus, the relevant inquiry in the present case is whether recognizing a duty in this context would further encourage patients to use reasonable care when receiving medical care and, if so, whether the advantages of encouraging such behavior would outweigh the negative effects of a corresponding increase in litigation and the barriers to obtaining medical care that recognizing a duty of care might create. Cf. id.

Having considered the arguments of the parties and having balanced (1) the unlikely enhancement to patient and medical provider safety by recognizing a duty of care against (2) the potential for higher medical care costs for patients caused by increased litigation, (3) jeopardizing the confidentiality of medical information,

and (4) the availability of a workers' compensation remedy for medical providers, we conclude that the second and third factors militate against recognizing a duty of care.

1

Safety of Patients and Medical Providers

The plaintiff argues that declining to recognize a duty of care under these circumstances would result in medical providers being discouraged from providing care to their patients out of fear of being injured. Furthermore, the plaintiff argues that, by not recognizing a duty of care, patients and medical providers would be less safe in circumstances in which medical care is being furnished than if we recognize a duty. Although we take seriously the safety of patients and medical providers alike, we disagree with the plaintiff.

Medical professionals every day have provided high quality health care to patients for generations in the absence of a recognized duty of care on their patients. The plaintiff has offered no empirical evidence that would suggest that individuals considering the medical field as a profession have chosen to pursue other occupations because of concerns that they would be barred from recovering against patients that might injure them in the course of providing medical care to those patients. Thus, history, experience, and common sense tell us that, even though this court declines to impose a duty of care on patients receiving medical care, providers will not be chilled from continuing to provide care to their patients. Therefore, the plaintiff's argument is unavailing.

2

Cost of Medical Care and Risk of Increased Litigation

On the other hand, permitting medical providers to bring an action against patients for negligence while

receiving medical care potentially will impose financial disincentives on patients to seek medical care, which is inconsistent with the public policy of this state. As with the first factor, we look to statutes and the common law, which themselves are a source of public policy, to determine whether recognizing a duty of care is inconsistent with the public policy of this state. See id., 359. Our legislature has averred that cost should not be a barrier to Connecticut residents from obtaining medical care. General Statutes § 19a-7a provides: "The General Assembly declares that it shall be the goal of the state to assure the availability of appropriate health care to all Connecticut residents, *regardless of their ability to pay*. In achieving this goal, the state shall work to create the means to assure access to a single standard of care for all residents of Connecticut, on an equitable financing basis and with effective cost controls. In meeting the objective of such access, the state shall ensure that mechanisms are adopted to assure that care is provided in a cost effective and efficient manner." (Emphasis added.)

Were we to conclude that patients owe medical providers a duty of care while receiving medical care, patients ultimately would bear the cost of this decision, either directly by having to litigate claims of negligence that could be brought against them as a consequence of seeking medical care, or indirectly through increased insurance premiums. As our Supreme Court has stated, creating a new cause of action creates benefits for some at the expense of others. See *Mendillo* v. *Board of Education*, 246 Conn. 456, 487, 717 A.2d 1177 (1998), overruled on other grounds by *Campos* v. *Coleman*, 319 Conn. 36, 37–38, 123 A.3d 854 (2015). Thus, recognizing a cause of action against patients for harms sustained by medical providers furnishing medical care to the patients would likely place a heftier financial burden on patients receiving medical care.

Nevertheless, the plaintiff argues that, because "[t]his case is an anomaly in the law," we would not be opening the floodgates to litigation if we recognize a duty of care under these circumstances. In other words, concern for increased litigation and, therefore, higher costs for patients is unwarranted because the plaintiff's case is unique and similar cases would rarely, if ever, appear on a court docket again. This reasoning, however, falsely assumes that, because there has been a scarcity of medical providers suing their patients for negligence *without* a duty of care having been recognized, the same would be true *after* a duty is recognized.

Moreover, contrary to what the plaintiff argues, recognizing a negligence cause of action against patients has the potential to turn a drought of litigation into a flood of it because providers could sue patients for acts that are unintentional and less outrageous than that for which a patient may already be held liable. As the trial court recognized, medical providers can sue patients "for an intentional act or an assault." In the present case, by deciding that, while receiving medical care, a patient does not owe a duty of care to a medical provider, we conclude neither that a medical provider is barred from suing a patient for intentional torts, such as a battery or an assault, nor that a provider is proscribed from suing a patient for reckless conduct resulting in injury. These causes of action, however, require more deliberate or extreme conduct for a defendant to be held liable than that of negligence, i.e., for an intentional tort, the act must be intentional, and for recklessness, the conduct must be wilful, wanton or reckless, whereas to be held liable for negligence, a plaintiff merely needs to show a defendant failed to "exercise that degree of care which is sufficient to avoid unreasonable risk of harm to the defendant." D. Pope, Connecticut Actions and Remedies: Tort Law (1996) §§ 1:03, 2:03, 25:04, 25:13. Thus, by allowing medical

providers to sue patients for negligence for harms sustained while furnishing medical care to those patients, we can reasonably infer that this would expose patients to a higher risk of being sued by their medical providers.

Because patients would be exposed to a higher risk of being sued by their medical providers and, thus, likely to incur greater medical costs, recognizing that a patient owes a duty of care to a medical provider while receiving medical care would have the potential to discourage patients from seeking medical care when they need it. When deciding whether to seek medical assistance, patients would have to account for the possibility that receiving aid from a medical provider could come at the cost of being sued for negligence. For instance, patients who have difficulty balancing themselves would have to decide whether to seek the assistance of the attending medical provider and risk an action, or to avoid potential costly litigation but possibly suffering physical harm by falling or by allowing their underlying illness to remain untreated. Therefore, the stated public policy of our legislature of ensuring that cost is not a barrier to obtaining medical care conflicts with imposing a duty of care on patients receiving medical care because the higher costs to patients associated with their greater exposure to liability would have a chilling effect on patients seeking medical care.

3

Confidentiality of Patient Medical Information

Our Supreme Court has expressed significant concerns regarding "interfere[nce] with the physician-patient relationship [that may] discourage patients from seeking treatment and care from their health care providers." *Jarmie* v. *Troncale*, supra, 306 Conn. 605–606; see also id., 624–25. Chief among the threats to the sanctity of the relationship between a patient and his or her medical provider is the loss of confidentiality of

the patient's medical information that would occur in an action brought by the provider against the patient. See id., 607–609 ("[w]hen [the] confidentiality [of a patient's medical information] is diminished to any degree, it necessarily affects the ability of the parties to communicate, which in turn affects the ability of the physician to render proper medical care and advice"). If such an action were permitted, the mere filing of the action may disclose confidential medical information about the patient and the patient arguably would be forced to divulge further confidential medical information about him or herself in order to argue that care was exercised in light of the limitations imposed on the patient by any medical conditions.

To promote and protect the confidentiality of patient information, our legislature has carved out *only* limited exceptions to the general rule that a patient's medical information may not be disclosed by a medical provider without the explicit consent of the patient or the patient's authorized representative.[10] General Statutes § 52-146o provides in relevant part: "Except as provided in [other statutes], in any civil action . . . a physician or surgeon . . . or other licensed health care provider, shall not disclose [any medical information of a patient], unless the patient or that patient's authorized representative explicitly consents to such disclosure. . . . Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) *by a physician, surgeon or other licensed*

[10] Although it is a matter of federal law and not necessarily indicative of the public policy of Connecticut, we are concerned that allowing a medical provider to sue a patient for negligence may result in the release of patient information that is protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq. Indeed, *in this case*, whether the release of the defendant's medical information violated HIPAA was raised before the trial court.

health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected." (Emphasis added.)

We determine that § 52-146o militates against recognizing a duty of care under the circumstances of the present case. Despite enumerating other limited exceptions to the general rule that a medical provider may not reveal a patient's medical information without the consent of the patient or the patient's authorized representative, our legislature has not recognized an exception to patient confidentiality if a medical provider decides to sue a patient. Indeed, our legislature did create an exception to confidentiality when a claim is made by a patient *against a health care provider*. See General Statutes § 52-146o (a) (2). The clear overall intent of this provision is to place in the patient's hands decision-making authority as to when his or her confidential medical information may be disclosed to third parties. Therefore, we conclude that this statute is instructive and weighs against recognizing a duty of care.

If we were to decide that a patient owes a duty of care to a medical provider to avoid negligence while receiving care from that provider, then patients would be more inclined to consider whether sensitive medical

information might be revealed with others as a consequence of seeking medical care. For example, in the present case, we reasonably can infer from the complaint that the defendant was receiving treatment for cancer because he was seen in the radiation oncology department of Griffin Hospital. This is information of a sensitive nature that the defendant may have wanted to shield from friends, coworkers, and the general public. Now that an action for negligence has been filed against him, however, this information is in the public domain. Having had his medical information disclosed through the initiation of the plaintiff's action, the defendant may be more inclined to consider whether his medical information will be revealed *the next time* he seeks medical care.

Recognizing a duty in this case would necessarily entail placing in the medical provider's hands greater decision-making authority as to when and how much confidential information may be disclosed to third parties. This power risks fundamentally interfering with the sanctity of patients' relationships with their medical providers and militates strongly against recognizing a duty of care in this case.

4

Workers' Compensation Remedy for Medical Providers

Another reason weighing against recognizing that a patient owes a medical provider a duty of care while the provider is furnishing medical care to the patient is that the provider, if harmed by a patient, often can recover workers' compensation benefits. See General Statutes § 31-291 et seq. Our courts previously have considered the availability of workers' compensation to a plaintiff as a factor militating against allowing subsequent recovery from the person who engendered harm. See *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 584; see also *Demers* v. *Rosa*, 102 Conn. App. 497, 502–

503, 505 n.6, 925 A.2d 1165, cert. denied, 284 Conn. 907, 931 A.2d 262 (2007).[11] Having medical providers recover workers' compensation benefits for injuries sustained while furnishing medical care instead of permitting them to recover from negligent patients allows providers to receive some measured compensation for injuries sustained at work while avoiding the societal costs of imposing a duty of care on patients receiving medical care. For these reasons, the likely availability of a workers' compensation remedy to medical providers militates against recognizing a duty of care.

The plaintiff nevertheless argues that workers' compensation is insufficient because it does not allow her to recover for *all* damages to which she might otherwise be entitled if the defendant were found liable for negligence. Full compensation of the plaintiff, however, is not the only consideration we must take into account when deciding whether to impose liability on a defendant. In deciding whether it is appropriate to impose liability on a defendant, "[w]e . . . note the three fundamental purposes of our tort compensation system,

[11] In *Sepega*, our Supreme Court disagreed with the argument that the firefighter's rule should be extended to preclude the plaintiff police officer from recovering for a claim of negligence because the police officer received workers' compensation benefits, which spreads the risk of injury to the public. See *Sepega* v. *DeLaura*, supra, 326 Conn. 805–807. The court stated that, if the firefighter's rule was extended for this reason, police officers would be treated differently than other public sector employees who are allowed to recover for injuries through *both* workers' compensation *and* tort claims. See id., 805–806.

Our conclusion that, in the present case, the plaintiff's ability to recover worker's compensation benefits militates against recognizing a duty of care is not inconsistent with *Sepega*. Rather, our analysis follows the balancing test our Supreme Court used in *Lodge*, in which the court weighed the benefit of allowing the plaintiff in that case to recover in tort after having received workers' compensation benefits against the societal costs of recognizing a duty of care. See *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 584. Thus, in accordance with *Sepega*, we do not predicate our conclusion that workers' compensation militates against recognizing a duty of care on the loss-spreading rationale.

which are the compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . .'' (Internal quotation marks omitted.) *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 358.

With the purposes of tort compensation in mind, our Supreme Court has refused to allow two public employees to recover damages from defendants for negligence when those public employees had a workers' compensation remedy available to them. See *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 578–79, 581, 584–86. In *Lodge*, our Supreme Court declined to impose a duty of care on the defendants, even though recognizing a duty would have allowed the plaintiffs to recover more than what workers' compensation provided, because ''the social costs associated with liability [were] too high to justify [the duty's] imposition . . . .'' Id., 584.[12] The

[12] At issue in *Lodge* was ''whether the defendants, who negligently caused the transmission of a false fire alarm, are liable to firefighters injured during an accident precipitated by the negligent maintenance and failure of the brakes on the responding fire engine.'' *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 566. The plaintiffs received workers' compensation benefits for their injuries and ''brought [an] action against [the defendants] seeking to hold them liable for the full extent of the plaintiffs' harm owing to the negligent transmission of the false alarm to which the plaintiffs were responding when they were killed or injured.'' Id., 570. Our Supreme Court reversed the trial court's judgment in favor of the plaintiffs, concluding that ''the defendants owed no duty to the plaintiffs in these circumstances because: (1) the harm was not reasonably foreseeable; and (2) the fundamental policy of the law, as to whether the defendant[s'] responsibility should extend to such results . . . weighs in favor of concluding that there should be no legal responsibility of the defendants to the plaintiffs under the circumstances. (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 567, 577. Furthermore, the court concluded that, ''[b]ecause firefighters knowingly engage in a dangerous occupation, [this court has] concluded that they are owed only the limited duty owed to licensees by landowners upon whose property they sustain injury in the course of performing their duty. . . . The policies supporting the application of a narrow scope of duty owed by individual landowners to firefighters counsels us to conclude that it would be inappropriate to establish a broad scope of duty owed by these defendants to guard against unforeseen consequences.

court then "[c]ounterbalanc[ed] the *limited benefit* of providing these plaintiffs with greater compensation than is available through workers' compensation and other statutory disability and survivor benefits [against] the significant costs that would derive from imposing liability under the facts presented." (Emphasis added.) Id. Having conducted this balancing, the court declined to recognize a duty because "when the social costs associated with liability are too high to justify its imposition, no duty will be found." Id.

Most medical providers, through workers' compensation, have an alternative remedy to that of tort compensation to recover for injuries sustained while working. Given the costs associated with allowing a medical provider to sue a patient for negligence for injuries sustained while furnishing medical care, we conclude, like our Supreme Court in *Lodge*, that the benefit of allowing this plaintiff to recover beyond what workers' compensation affords her is minimal. See id. Therefore, the availability of workers' compensation to the plaintiff

It would be irrational to conclude that firefighters are owed a greater duty by individual members of the public while they are en route to the scene of an emergency than when they arrive at the scene. The plaintiffs have been compensated for their risk by society as a whole by way of workers' compensation as well as other statutory benefits provided to injured firefighters. . . . To impose additional liability on the defendants under these circumstances would impose an undue burden on individual members of the public." (Citations omitted; footnote omitted.) Id., 580–81.

Moreover, in declining to recognize a duty of care under the circumstances in *Lodge*, the court concluded that the social costs weighing against recognizing a duty were "compelling," stating that "[i]f one who initiates a false alarm may be liable for those consequences that are not reasonably foreseeable, but, rather, are significantly attenuated from the original negligent conduct, that liability will impose an unreasonable burden on the public. The costs stemming from this undue burden may include a substantial chilling of the willingness to report an emergency prior to investigating further to determine whether it is legitimate. Such delay may cost precious time, possibly leading to the unnecessary loss of life and property. It also may reduce the willingness of property owners to install alarms for fear of liability." Id., 584–85.

weighs against recognizing a duty of care because the plaintiff is able to recover for some of her damages in a manner that avoids the social costs of imposing a duty of care on patients while receiving medical care.

Having considered the arguments of parties and various policy considerations stated by our legislature and our Supreme Court, we conclude that the costs of imposing a duty of care on a patient while receiving medical care outweigh the benefits. Specifically, the prospect of chilling patients from seeking medical care due to potentially higher expenses and concern for the loss of confidentiality of their medical information, both of which are a consequence of increased litigation, weigh heavily against recognizing a duty. Also weighing against recognizing a duty is that medical providers can be compensated for injuries sustained while providing medical care through workers' compensation. The insignificant advantages of recognizing a duty, namely, an unlikely improvement in patient and medical provider safety and the limited benefit of allowing providers to recover beyond workers' compensation, are significantly outweighed by the costs of doing so. For these reasons, the second and third factors militate against imposing a duty of care on patients while receiving medical care.

D

The fourth and final factor that we consider in conducting our public policy analysis is the law of other jurisdictions on this issue. See *Bloomfield Health Care Center of Connecticut, LLC* v. *Doyon*, supra, 185 Conn. App. 376; see also *Murillo* v. *Seymour Ambulance Assn., Inc.*, supra, 264 Conn. 480. In their appellate briefs, neither the plaintiff nor the defendant cite to case law of other jurisdictions that pertain to the exact issue in the present case, i.e., whether a patient can be held personally liable to a medical provider, under a

theory of negligence, for breaching a duty of care and causing physical harm to the provider while receiving medical care from that provider. Moreover, our independent research has not uncovered any reported decisions from other jurisdictions that have directly addressed this precise issue. Because the cases cited by the parties are readily distinguishable from the present case, and no other jurisdiction appears to have recognized a duty of care on a patient who is receiving medical treatment, we conclude that the fourth factor weighs against recognizing a duty.[13]

[13] The defendant cites to two lines of cases, but these, too, are distinguishable. In the first category, the defendant relies on Louisiana appellate court decisions involving negligence claims in which the court determined that a patient owed no duty of care to the patient's caretaker while the caretaker was performing tasks for which the caretaker was hired. See *Griffin* v. *Shelter Ins. Co.*, 857 So. 2d 603, 606 (La. App. 2003) ("[t]he risk of [the defendant] grabbing [the plaintiff's] arm while she was transferring from the wheelchair to the easy chair was clearly one of the types of risks that [the plaintiff] was contractually obligated to guard against," and, therefore, "[u]nder the facts and circumstances, [the defendant] simply did not owe a duty to [the plaintiff] to guard against the particular risk that gave rise to the [defendant's] injuries"), cert. denied, 864 So. 2d 635 (La. 2004); see also *Chirlow* v. *Gilotra*, 52 So. 3d 138, 139, 140 (La. App. 2010) (holding that plaintiff suffering from cerebral palsy owed no duty of care to caretaker when, "[f]or unknown reasons [the defendant] became agitated and grabbed [the] plaintiff by the arm," because the "[p]laintiff was contractually obligated to bathe [the defendant], and the risk of injury occurring due to his lack of muscular control was one that [the] plaintiff not only assumed, but which she had had at least some training in avoiding"); but see *Sanders* v. *Alger*, 242 Ariz. 246, 449–50, 394 P.3d 1083 (2017) (holding that "based on the direct relationship between caregiver and patient, the latter owes a duty of reasonable care with respect to conduct creating a risk of physical harm to the caregiver" but stating that "[r]ecognizing a duty by patients to their caregivers is not, of course, the same as saying that patients will be liable for injuries incurred by a caregiver in doing his or her job or that the patient's standard of care is the same as that of a caregiver").

The decisions in these cases are of a little value in our determination for two reasons. First, the plaintiffs in these cases were in-home caretakers, not medical providers. See *Griffin* v. *Shelter Ins. Co.*, supra, 857 So. 2d 604, 606; *Chirlow* v. *Gilotra*, supra, 52 So. 3d 139. In the present case, however, the plaintiff is a registered nurse. Second, the decisions relied heavily on the doctrine of assumption of risk. See *Griffin* v. *Shelter Ins. Co.*, supra, 857 So. 2d 606; *Chirlow* v. *Gilotra*, supra, 52 So. 3d 140. Connecticut, how-

The plaintiff proffered cases to this court in her appellate brief and to the trial court to support the proposition that courts in other jurisdictions have not rejected outright that a patient can be held liable for harms a medical provider suffered as a result of the patient's

ever, has abolished the doctrine of assumption of risk as a complete bar to recovery. Thus, these cases have limited applicability to the present case.

In the second category, the defendant cites to cases involving negligence claims in which courts in other jurisdictions have concluded that patients who are mentally ill, while receiving medical care, did not owe a duty of care to their hospital or nursing home caretakers. See *Colman* v. *Notre Dame Convalescent Home, Inc.*, 968 F. Supp. 809, 813, 814 (D. Conn. 1997) (holidng that "although a mentally disabled adult ordinarily is responsible for injuries resulting from her negligence, no such duty of care arises between an institutionalized patient and her paid caregiver" and stating that "[s]everal other states have found that there is no liability for injuries suffered by a paid hospital attendant as a result of a patient's negligence"); *Herrle* v. *Estate of Marshall*, 45 Cal. App. 4th 1761, 1770, 1772, 53 Cal. Rptr.2d 713 (1996) ("we [are not] aware of any body of case law which stands for the proposition that health care providers can sue their patients for injuries inherent in the very condition for which treatment was sought," and "[t]herefore it would be unfair to now impose on defendant the very duty of care which she had contracted for plaintiff to supply"); *Mujica* v. *Turner*, 582 So. 2d 24, 25 (Fla. App.) ("as a matter of law the defendant's decedent, as an institutionalized Alzheimer's patient, owed no duty of due care to plaintiff who was the decedent's caretaker at the . . . [nursing home]"), review denied, 592 So. 2d 681 (Fla. 1991); *Creasy* v. *Risk*, 730 N.E.2d 659, 667 (Ind. 2000) ("the relationship between [an Alzheimer's patient] and [his certified nursing assistant] and public policy concerns dictate that [the patient] owed no duty of care to [his certified nursing assistant]"); *Berberian* v. *Lynn*, 845 A.2d 122, 129 (N.J. 2004) (holding that "a mentally disabled patient, who does not have the capacity to control his or her conduct, does not owe his or her caregiver a duty of care"); cf. *Gould* v. *American Family Mutual Ins. Co.*, 198 Wis. 2d 450, 463, 543 N.W.2d 282 (1996) ("[w]hen a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not innocent of the risk involved," and "[t]herefore . . . a person institutionalized . . . with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation" [internal quotation marks omitted]). These cases, however, are also of limited utility in our determination because, unlike the present case in which the defendant's mental capacity is not at issue in determining whether he owed the plaintiff a duty of care, these cases rely heavily on the defendant's diminished mental capacity in determining whether a duty was owed.

conduct. See *Mullen* v. *Bruce*, 168 Cal. App. 2d 494, 498, 335 P.2d 945 (1959); *McGuire* v. *Almy*, 297 Mass. 323, 329–30, 8 N.E.2d 760 (1937); *Gioia* v. *Ratner*, Superior Court of Massachusetts, Essex County, Docket No. 1477CV00676, 2016 WL 4729355 (August 9, 2016) (33 Mass. L. Rptr. 508); *Van Vooren* v. *Cook*, 273 App. Div. 88, 93, 75 N.Y.S.2d 362 (1947), reargument denied, 273 App. Div. 941, 78 N.Y.S.2d 558 (1948). These cases are distinguishable, however, because they do not involve claims of negligence but, instead, seek recovery for assault and intentional acts by the patient. See *Mullen* v. *Bruce*, supra, 168 Cal. App. 2d 495–96; *McGuire* v. *Almy*, supra, 297 Mass. 324–25; *Gioia* v. *Ratner*, supra, 33 Mass. L. Rptr. 508; *Van Vooren* v. *Cook*, supra, 273 App. Div. 90–91. Thus, these cases offer no support for permitting a medical provider to sue a patient for *negligence* for harms that the provider incurred while furnishing medical care to the patient.

Because neither party has proffered, nor has our independent research yielded, a reported case from another jurisdiction that is sufficiently similar to the facts and issues at hand in the present case, we conclude that the fourth factor weighs against recognizing a duty in the present case. See *Jarmie* v. *Troncale*, supra, 306 Conn. 622.

E

Conclusion

Having considered the arguments of the parties and the public policy considerations stated by our legislature and our Supreme Court, we conclude that recognizing that a patient owes to a medical provider giving him or her medical treatment a duty to avoid negligent conduct is inconsistent with the public policy of this state. Our decision is predicated on our conclusion that

uninhibited access to medical care for all prospective patients, the goal of encouraging patients to share sensitive information with their providers without fearing the loss of confidentiality, and the safety of patients and providers alike are vitally important to the integrity of the health care system in Connecticut.

In reaching this conclusion, it is important to delineate what we do not purport to decide. First, our decision should not be read to encompass a conclusion regarding the viability of a cause of action brought by a medical provider against a patient for harm suffered as a result of the patient's intentional torts or for conduct that is reckless, wanton, or malicious. Our decision also should be construed as being limited only to circumstances in which the alleged negligence occurs while the patient is receiving medical treatment and results in physical harm to the medical provider. Furthermore, we do not opine on whether a medical provider may assert a claim for negligence against a patient for injuries sustained during a time or activity less directly involving the provision of medical care or treatment; for example, if a patient carelessly discarded a gown at the entrance to his or her hospital room and a nurse tripped and fell on it when entering the room. Indeed, paramount to our decision that the defendant did not owe the plaintiff a duty of care to avoid negligence in the present case is that the plaintiff sustained her injuries while she was providing medical care to her patient, the defendant. Accordingly, having conducted a plenary review of the record, we conclude that the trial court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

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Barnes *v.* Connecticut Podiatry Group, P.C. 212
Medical malpractice; motion to preclude expert testimony; motion for summary judgment; claim that trial court erred in precluding plaintiff from disclosing additional expert witnesses; claim that trial court erred in adhering to prior order precluding disclosure of additional expert witnesses; whether trial court erred in precluding expert opinions of plaintiff's disclosed expert as to standard of care and causation; whether trial court erred in rendering summary judgment in favor of defendants.
Cunningham *v.* Commissioner of Correction. 63
Habeas corpus; claim that habeas court improperly rejected petitioner's claim that his trial counsel rendered ineffective assistance by failing to conduct adequate pretrial investigation into his theory of self-defense; whether petitioner failed to establish that trial counsel's performance was deficient or that he was prejudiced as result of alleged deficient performance; claim that habeas court improperly rejected petitioner's claim that his trial counsel rendered ineffective assistance by referring to petitioner as bully during closing argument; whether trial counsel's use of term bully during closing argument constituted sound trial strategy and, therefore, did not amount to deficient performance or fall below objective standard of reasonableness; whether habeas court properly determined that petitioner had not proven prejudice; whether there was reasonable probability that, but for trial counsel's alleged deficient performance, result of criminal trial would have been different.
HSBC Bank USA, National Assn. *v.* Karlen. 170
Foreclosure; summary judgment; claim that trial court improperly granted motion for summary judgment as to liability; whether plaintiff established undisputed prima facie case that it was entitled to foreclosure as matter of law; failure of plaintiff to provide trial court with copy or any evidence of terms of loan modification agreement that affected promissory note; whether defendants' failure to file objection to motion for summary judgment or to raise issue concerning absence of loan modification agreement via special defense or otherwise before trial court had effect on plaintiff's burden to establish prima facie case; whether plaintiff presented evidence that defendants defaulted on loan as modified by loan modification agreement.
HSBC Bank USA, National Assn. *v.* Nathan 179
Foreclosure; special defenses; counterclaims; whether trial court properly granted motion to strike; whether defendants preserved right to appeal nonrepleaded counts of counterclaim; whether defendants preserved right to appeal certain special defense that they specifically had described as abandoned; claim that trial court erred in striking certain nonrepleaded counts of counterclaim, second amended laches defense and second amended counterclaim on the ground that they did not satisfy making, validity or enforcement test; whether allegations of postorigination misconduct by plaintiff satisfied making, validity or enforcement test.
Jacques *v.* Jacques. 59
Contracts; breach of parties' marital separation agreement; mootness; claim that trial court erred by concluding that action was barred by applicable statute of limitations (§ 52-576 [a]) and determining that it lacked continuing jurisdiction to enforce parties' separation agreement; whether claim that plaintiff's breach of contract action was not barred by statute of limitations was moot where plaintiff failed to challenge independent ground for court's adverse ruling.
Kolashuk *v.* Hatch 131
Writ of error; claim that this court lacked subject matter jurisdiction; claim that writ of error should be dismissed because it was not taken from final judgment; claim that sanctions and attorney's fees issued against plaintiff in error did not

terminate distinct and separate proceeding because relevant orders were issued during discovery phase of underlying personal injury case, requested cell phone records were necessary to resolve defendant in error's case, and those records were inextricably intertwined with defendant in error's case; claim that interlocutory order requiring witness to submit to discovery is not final judgment and, therefore, is not immediately appealable; claim that imposition of sanctions and attorney's fees against plaintiff in error did not terminate distinct and separate proceeding because trial court did not find plaintiff in error to be in contempt; whether trial court erred as matter of law by ordering plaintiff in error to produce cell phone records that neither he nor his client, who was defendant in underlying action, owned or possessed, and by issuing sanctions against plaintiff in error and awarding attorney's fees to counsel for defendant in error.

La Morte *v.* Darien (Memorandum Decision) 901

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

Michael D. *v.* Commissioner of Correction. 6

Habeas corpus; claim that petitioner's trial counsel provided ineffective assistance in failing to challenge admission of pornographic magazine into evidence; whether habeas court properly determined that trial counsel's conduct in attempting to preclude magazine did not constitute deficient performance; claim that trial counsel provided ineffective assistance by failing to request instruction that jury must unanimously agree on factual basis for each guilty verdict; whether habeas court properly determined that petitioner failed to establish prejudice resulting from trial counsel's failure to request specific unanimity instruction.

Rossell *v.* Rossell (Memorandum Decision) 902

Starboard Fairfield Development, LLC *v.* Gremp 21

Vexatious litigation; breach of contract; slander of title; intentional interference with contract; breach of fiduciary duty; claim that trial court improperly determined that defendants breached general release by pursuing civil action against plaintiffs; failure to brief claim adequately; claim that trial court improperly found that defendants slandered plaintiff's title to certain property by filing lis pendens and affidavit of fact pertaining to property on certain land records; whether trial court, as trier of fact, was free to discredit evidence provided at trial; whether this court was persuaded that trial court's finding of slander of title was either legally incorrect or factually unsupported; claim that trial court improperly found that defendants intentionally interfered with plaintiff's contract to sell certain property to third party; claim that trial court improperly awarded interest on amount held in escrow; whether defendants failed to brief argument beyond mere abstract assertion; claim that there was insufficient evidence for trial court to find that interference caused any actual loss; claim that trial court improperly awarded punitive damages without providing defendants adequate notice of hearing in accordance with rules of practice; whether defendants demonstrated that due process rights were violated or that trial court committed reversible error in calculating amount of punitive damages; whether record demonstrated that defendants had ample notice of hearing on punitive damages.

State *v.* Bradley 36

Sale of controlled substance; violation of probation; claim that trial court erred in denying motions to dismiss charges; whether defendant, who is Caucasian, lacked standing to raise claim that his prosecution under Connecticut's statutes criminalizing possession and sale of marijuana violated his rights under equal protection clause of United States constitution because such statutes were enacted for illicit purpose of discriminating against persons of African-American and Mexican descent; whether trial court misapplied rule set forth in State *v.* Long *(268 Conn. 508); whether defendant demonstrated that he had personal interest that had been or could be injuriously affected by alleged discrimination in enactment of relevant statute (§ 21a-277 [b]); whether defendant's claim alleged specific injury to himself beyond that of general interest of all marijuana sellers facing conviction under § 21a-277 (b); whether balancing of factors set forth in* Powers *v.* Ohio *(499 U.S. 400) pertaining to third-party standing weighed against defendant having standing to raise equal protection claim on behalf of racial and ethnic minorities who possessed constitutional rights that were allegedly violated; whether relationship between defendant and subject minority groups was close; whether there existed hindrance to ability of criminal defendant who is member of racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.*

State *v.* Brown 244
Breach of peace in second degree; criminal violation of protective order; assault in third degree; claim that trial court improperly granted motion for joinder of cases; claim that trial court improperly allowed jury to consider prejudicial evidence of two different crimes; claim that trial court improperly allowed state to use prejudicial language during voir dire questioning; whether joinder resulted in substantial prejudice to defendant; whether two incidents leading to charges against defendant were discrete and easily distinguishable; whether assaults were so brutal or shocking as to interfere with jury's ability to consider each offense fairly and objectively; unpreserved claim that defendant's federal right to fair trial was violated when trial court allowed state to use prejudicial language during state's voir dire questioning of potential jurors; whether trial court improperly allowed facts of case to be introduced in effort to remedy use of prejudicial language; whether introduction of phrases by state, such as "domestic violence," "family violence," and "dispute between roommates" during voir dire was improper; whether trial court abused its discretion in denying defendant's request for continuance at start of trial to accommodate presence of witness.

State *v.* Colon (Memorandum Decision) 902

State *v.* Francis 113
Murder; claim that trial court improperly denied motion for judgment of acquittal; whether there was sufficient evidence for jury to have found defendant guilty of murder beyond reasonable doubt; claim that there was insufficient evidence to establish that defendant caused death of victim or that he had specific intent to cause victim's death; consciousness of guilt evidence; request for this court to change its long-standing standard of review with respect to sufficiency of evidence claims to more rigorous standard that would require this court to determine if there was reasonable view of evidence that would support hypothesis of innocence; whether, as intermediate appellate court, this court could overrule Supreme Court authority.

State *v.* Jarmon 262
Home invasion; burglary in first degree; robbery in first degree; stealing firearm; claim that state presented insufficient evidence to prove beyond reasonable doubt operability of each stolen firearm; whether cumulative effect of evidence supported jury's ultimate conclusion that state demonstrated operability beyond reasonable doubt; claim that trial court erroneously admitted into evidence defendant's letter written while incarcerated, which was intercepted by correction officer and forwarded to law enforcement; whether defendant's claim that trial court erred in determining that correction officer followed department regulation was ever distinctly raised at trial; whether defendant proved that he had objectively reasonable expectation of privacy such that fourth amendment rights were violated; whether department regulation at issue was void for vagueness as applied to defendant; claim that defendant's conviction of home invasion and burglary violated constitutional protection against double jeopardy; whether defendant showed that two charges arose out of same act or transaction; whether evidence allowed defendant's crimes to be separated into parts, each of which constituted completed offense.

State *v.* Mekoshvili 154
Murder; self-defense; claim that testimony regarding statements made by victim was irrelevant as to whether defendant killed victim or whether he acted with criminal intent; whether testimony demonstrated that defendant had financial motive in killing victim; claim that victim's statements to wife were self-serving and backward looking, and did not satisfy state of mind exception to hearsay rule; whether trial court improperly allowed, pursuant to habit exception of hearsay rule, testimony regarding victim's customary habit of leaving portion of taxi fee in glove compartment of taxi; whether testimony was relevant to issue of motive for defendant to kill victim; claim that state failed to provide adequate foundation for admission of testimony regarding habit evidence; whether trial court properly instructed jury with general unanimity charge and did not err in failing to grant defendant's request for specific unanimity charge as to claim of self-defense.

State *v.* Mitchell 199
Motion to correct illegal sentence; claim that sentence was imposed in illegal manner in violation of Santobello *v.* New York *because defendant was sentenced after nine month period of* Garvin *agreement had ended; claim that sentence was imposed in illegal manner because defendant was not given adequate notice*

of sentencing hearing; claim that defendant was denied opportunity to make statement or to present evidence at sentencing hearing; claim that imposition of sentence violated applicable rule of practice (§ 43-29); whether trial court properly determined that defendant confused notice for violation hearing with notice for sentencing hearing.

State *v.* Mukhtaar 1

Murder; whether trial court improperly dismissed motion for second sentence review hearing and determined that it lacked subject matter jurisdiction to consider motion; whether defendant had right to second sentence review hearing.

State *v.* Tanner (Memorandum Decision) 901

Streifel *v.* Bulkley 294

Negligence; duty of care; summary judgment; claim that trial court improperly rendered summary judgment in favor of defendant; whether plaintiff waived any claim that trial court improperly failed to treat motion for summary judgment, which effectively challenged legal sufficiency of complaint, as motion to strike; claim that trial court improperly granted motion for summary judgment because question of whether defendant owed plaintiff duty of care involved question of fact reserved for jury; whether determination of whether duty of care existed under circumstances of this case was question of law; whether trial court was permitted to decide that no duty existed solely on public policy grounds; claim that applying test articulated in Murillo *v.* Seymour Ambulance Assn., Inc. *(264 Conn. 474) to determine whether recognizing duty of care is inconsistent with public policy conflicts with state's abolition of doctrine of assumption of risk as complete bar to recovery; whether plaintiff's reliance on* Sepega *v.* DeLaura *(326 Conn. 788) to support claim was misplaced; claim that trial court incorrectly determined that imposing duty of care on defendant while plaintiff was furnishing medical care to him was inconsistent with public policy; whether this court should recognize, as matter of law, that patient owes duty of care to avoid negligent conduct that causes harm to medical care provider while patient is receiving medical care from that provider; whether application of relevant public policy considerations articulated in test in* Murillo *weighed against recognizing duty of care.*

U.S. Bank, National Assn. *v.* Bennett 96

Foreclosure; special defenses; counterclaims; whether trial court properly rendered summary judgment as to vexatious litigation counterclaim; whether vexatious litigation counterclaim was premature; whether trial court properly rendered summary judgment as to abuse of process counterclaim; claim that genuine issues of material fact existed regarding trial court's previous dismissal of foreclosure action for failure to establish proper chain of custody; whether trial court properly determined that no genuine issues of material fact existed that plaintiff's primary purpose in filing present action was to prosecute foreclosure and that plaintiff was owner of note and mortgage; whether abuse of power counterclaim was premature; claim that trial court improperly relied on plaintiff's uncontested evidence of debt without holding evidentiary hearing.

Zillo *v.* Commissioner of Correction 71

Habeas corpus; sexual assault in first degree; risk of injury to child; ineffective assistance of trial counsel; whether habeas court abused its discretion when it denied petitioner's request to reinstate claim that had been withdrawn that trial counsel was deficient in failing to present certain medical testimony; claim that habeas court should have allowed into evidence documents that related to petitioner's medical condition; claim that trial counsel was ineffective in failing to pursue motion to dismiss based on statute of limitations in (§ 54-193a); whether there was any credible evidence to show actual commencement of statute of limitations in March, 1999; claim that trial counsel was ineffective in failing to object to allegedly harmful, inflammatory language in substitute information that was read by court clerk to jury; claim that trial counsel was ineffective by failing to assist petitioner in freely choosing whether to testify in own defense; claim that trial counsel was deficient in failing to pursue hearing pursuant to Franks *v.* Delaware *(438 U.S. 154) in pretrial stage of criminal proceedings; claim that trial counsel was ineffective in failing to obtain victim's education records in order to undermine allegations; whether petitioner demonstrated any harm that was caused by absence of education records; claim that trial counsel provided ineffective assistance by failing to file motion to suppress evidence concerning photographs taken of petitioner's apartment during allegedly illegal search.*

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Special Notice: Extension of Specified Public Comment Deadlines

**Medicaid State Plan Amendment (SPA) 20-K:
Connecticut Housing Engagementand Support Services (CHESS)
Initiative State Plan Home and Community-Based Services (HCBS)
Pursuant to Section 1915(i) of the Social Security Act;**

**SPA 20-L: Updates to Alternative Benefit Plan (ABP)
for the Medicaid Coverage Group for Low-Income Adults
Regarding CHESS Initiative; and**

**Selective Provider Contracting Waiver Pursuant to Section 1915(b)(4)
of the Social Security Act for CHESS Initiative**

The State of Connecticut Department of Social Services (DSS) provides notice that the deadlines to submit public comments to DSS about the above-referenced Medicaid State Plan Amendments (SPAs) and waiver have each been **extended until February 7, 2020**. In all other respects, the public notices for those SPAs and waiver that were published in the Connecticut Law Journal on December 31, 2019 remain in full force and effect. Please refer to those public notices for details regarding these proposed submissions, including where they are posted and instructions on how to submit public comments. For questions about this notice, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067).

NOTICES

Notice of Amendment

Connecticut Bar Examining Committee Regulations

At its meeting on December 4, 2019, the Connecticut Bar Examining Committee voted to amend its Regulations.

Jessica F. Kallipolites
Administrative Director
Connecticut Bar Examining Committee

ARTICLE I.

ORGANIZATION OF THE COMMITTEE

Art. I-1. MEETINGS.

The ~~bar examining~~ committee shall hold regular meetings to determine and announce the results of the bar examinations. Special meetings may be held upon reasonable notice at such time and place to be fixed by the chairperson. In the absence of the chairperson or in the event of his or her inability to act, the time and place of any meeting may be set by the administrative director or by any three members.

Art. I-2. OFFICERS.

The officers shall be a chairperson, a vice-chairperson, a secretary and a treasurer. They shall be elected at the first regular meeting in the calendar year and shall hold office for three years and until their successors shall be elected. No person shall serve as an officer for more than twelve years. Each officer shall perform the duties customarily incident to the office.

Art. I-3. EXAMINATIONS SUBCOMMITTEE.

There ~~shall~~ may be an examinations subcommittee for each examination, to be appointed by the ~~committee at the regular meeting next preceding each examination~~ chairperson, who shall have the duty, power and authority to provide for the examination of candidates and superintend the examination.

Art. I-4. SUBCOMMITTEE ON NON-STANDARD TESTING.

(~~a~~A) There shall be a subcommittee on non-standard testing for each examination, which shall have the power to act for the committee, to be appointed by the chairperson, which subcommittee shall have the duty, power and authority to consider and act upon all petitions for non-standard testing and to determine the terms and conditions upon which non-standard testing will be provided to applicants.

(~~b~~B) Petitions for non-standard testing shall be in writing on a form prescribed by the committee and shall be filed, together with such attachments as the committee may require, with the administrative director on or before ~~30~~ April 30 for a July examination and on or before ~~30~~ November 30 for a February examination. The

subcommittee may, in its discretion, hold a hearing on such petitions. The subcommittee shall notify the applicant of its decision in writing.

Art. I-5. OTHER SUBCOMMITTEES.

The chairperson may appoint from time to time such other subcommittees as he or she may deem desirable and, subject to the action of the committee, assign their duties and functions.

ARTICLE II.

LAW STUDY

Art. II-1.

Approved law schools shall be the following:

(A) Those law schools approved or provisionally approved by the American Bar Association at the time the applicant receives his or her law degree.

(B) Those law schools approved by the ~~Connecticut Bar Examining Committee~~ committee in accordance with the following requirements and with such policies and procedures from time-to-time established by said ~~C~~committee. In determining whether a law school should be approved by the ~~C~~committee under this subparagraph, the ~~C~~committee shall consider the following standards, requirements and criteria:

(~~i~~1) Whether the law school seeking the approval of the ~~C~~committee pursuant to this subparagraph shall have previously sought the approval of the American Bar Association, and if said approval has been denied or otherwise withheld, the reasons stated by the American Bar Association therefor.

(~~ii~~2) Whether the law school is licensed and approved by the state authority authorized by law to license and approve educational institutions within a state and to confer upon the law school the power and authority to grant a bachelor of laws, a juris doctor or other equivalent degrees within the state in which such law school is located.

(~~iii~~3) Whether the law school offers within its curriculum suitable courses in all of the subjects set forth in Article V-~~1~~4 hereof.

(~~iv~~4) Whether the law school offers within its curriculum as a mandatory requirement suitable courses in legal ethics and professional responsibility sufficient to enable students to comply with Article IV hereof.

(~~v~~5) Whether the law school offers suitable courses and training as a mandatory requirement in legal skills, including, but not limited to, drafting of legal instruments, pleadings, briefs and other legal documents, and further, whether the curriculum contains a mandatory requirement of courses and instruction in the law of civil and criminal procedure and the law of evidence.

(~~vi~~6) Whether and to what extent the law school makes faculty appointments for each academic year open to active, scholarly legal practitioners as adjunct faculty without discrimination against such persons.

(~~vii~~7) The law school shall also furnish to the ~~C~~committee appropriate statistical data concerning the passing percentages of its graduates taking the bar examination in the jurisdiction in which the law school is located or in any other jurisdiction in which its graduates are permitted to take the bar examination, said data to include the three immediately preceding years.

(~~viii~~8) The law school shall also furnish to the ~~C~~committee for its consideration information on such other matters as the ~~C~~committee shall deem as bearing upon the ability of the law school to educate and prepare competent lawyers for admission to the Connecticut bar.

(~~ix~~9) The ~~C~~committee will consider only such applications made by law schools seeking approval as hereinabove set forth. The ~~C~~committee will not consider applications for such approval on behalf of individual bar applicants. The ~~C~~committee will specify the manner and form of an application to be filed by the law school, and the law school by the filing of such application shall be deemed by the ~~C~~committee to have agreed to reimburse the ~~C~~committee for all reasonable and necessary expenses of the ~~C~~committee in considering and acting upon such application.

(~~x~~10) No law school shall be approved if that law school discriminates against any applicant for admission or any applicant for a faculty position based upon race, creed, religion, gender, sexual preference, country of origin or disability.

Art. II-2.

All applicants must receive a Juris Doctor or equivalent law degree from an approved law school not less than seven (7) days prior to the date of the examination for which the applicant has filed his or her application and proof of receipt of that degree must be received in the Office of the Administrative Director not less than seven (7) days prior to said examination.

Art. II-3.

An applicant who has studied in a foreign country may qualify to apply for admission by submitting to the ~~C~~committee satisfactory proof of the legal education required by all subsections of this article.

(A) The applicant shall show successful completion of the educational requirements for admission to the practice of law in a country other than the United States by:

(~~i~~1) successful completion of a period of study in a law school or schools each of which, throughout the period of the applicant's study therein, was approved by the government or an authorized accrediting body in such country, or of a political subdivision thereof, to award a first degree in law as evidenced by the report in subsection (C)(~~i~~1) of this article.

(~~ii~~2) said program of study must be substantially equivalent in duration to the legal education provided by an American Bar Association approved law school in the United States.

(B) The applicant shall show successful completion of an LL.M. degree program at an American Bar Association or ~~C~~committee approved law school in the United States meeting the following requirements:

(~~i~~1) The program shall consist of a minimum of twenty-four (24) credit hours (or the equivalent there of, if the law school is on an academic schedule other than a conventional semester system) which, except as otherwise permitted herein, shall be in classroom courses at the law school in substantive and procedural law and professional skills;

(~~ii~~2) all coursework for the program shall be completed at the campus of an approved law school in the United States, except as otherwise expressly permitted in this section;

(~~iii~~3) The program completed by the applicant shall include:

(a) a minimum of two (2) credit hours in a course or courses in professional responsibility;

(b) a minimum of two (2) credit hours in legal research, writing and analysis, which may not be satisfied by a research and writing requirement in a substantive law course;

(c) a minimum of two (2) credit hours in American legal studies, the American legal system or a similar course designed to introduce students to distinctive aspects and/or fundamental principles of United States law, which may be satisfied by a course in United States constitutional law or Federal or state civil procedure; credit earned in such course in excess of the required two (2) credit hours may be applied in satisfaction of the requirements set forth in subsection (B)(~~iii~~3)(d); and

(d) a minimum of six (6) credit hours in other courses that principally focus on subject matter tested on the Connecticut bar examination as set forth in Article V-4.

(e) The program completed by the applicant may include a maximum of four (4) credit hours in clinical courses or externships, provided that the time and effort required and anticipated educational benefit are commensurate with the credit rewarded and

(~~i~~i) the clinical course or externship includes a classroom instructional component in order to ensure contemporaneous discussion, review and evaluation of the clinical experience or externship; or

(~~ii~~ii) the clinical work or externship is done under the direct supervision of a member of the law school faculty.

(C) Petitions for determination on foreign education shall be in writing on a form prescribed by the ~~C~~committee and shall be filed, together with such attachments as the ~~C~~committee may require, with the administrative director. An applicant must receive approval of his or her petition for determination on foreign education prior to filing an application for admission by examination, an application for admission by UBE score transfer, or an application for admission without examination. Applicants wishing to apply for admission by examination shall file a complete petition for determination on foreign education no later than ~~01 March~~ April 01 for a July examination and no later than ~~01 October~~ November 01 for a February examination. Incomplete petitions will not be considered. To be considered complete, a petition for determination on foreign education must be filed together with the following documentation:

(~~i~~1) A course by course education evaluation report acceptable to the ~~C~~committee for every foreign law school attended;

(~~ii~~2) Official, final transcripts from all foreign undergraduate and foreign law schools attended;

(~~iii~~3) Copies of all diplomas or degree certificates from all foreign undergraduate and foreign law schools;

(~~iv~~4) Official transcript from the law school at which the applicant is currently enrolled in an LL.M. program or a statement from the applicant indicating that he or she is not currently enrolled in such a program; and

(~~v~~5) The fee prescribed by Article X~~-14~~(G). Applicants who receive approval of their petition for determination on foreign education may apply for admission by examination, admission by UBE score transfer, or admission without examination for the standard application fee.

The ~~C~~committee shall notify the applicant of its decision in writing.

(D) Upon the ~~C~~committee's approval of the petition for determination on foreign education, an application for admission may be filed. Applicants for admission by examination must provide the following directly from the LL.M. degree granting law school ~~no later than 01 July for a July exam and no later than 01 February for a February examination~~ not less than seven (7) days prior to the date of the examination for which the applicant has filed his or her application:

(~~i~~1) Official, final transcript from the LL.M. degree granting law school setting forth the date the degree was conferred and all courses taken; and

(~~ii~~2) Copies of official course descriptions for all courses taken at the LL.M. degree granting school.

ARTICLE III.

ADMISSION BY EXAMINATION AND ADMISSION BY TRANSFER OF A UNIFORM BAR EXAMINATION SCORE

Art. III-1.

(A) The application to take the bar examination and for admission to the bar (for which the official forms obtainable from the administrative director must be used) shall be filed between ~~01~~ March 01 and ~~30~~ April 30 for a July examination and between ~~01~~ October 01 and ~~30~~ November 30 for a February examination. Applications filed between ~~01~~ March 01 and ~~31~~ March 31 for a July examination or between ~~01~~ October 01 and ~~31~~ October 31 for a February examination shall be filed together with the fee prescribed by Article X~~(1)(a)~~(A)(1). Applications filed between ~~01~~ April 01 and ~~30~~ April 30 for a July examination or ~~01~~ November 01 and ~~30~~ November 30 for a February examination shall be filed together with the fee prescribed by Article X~~(1)(b)~~(A)(2).

(B) The application for admission by transfer of a Uniform Bar Examination (UBE) score (for which the official forms obtainable from the administrative director must be used) shall be filed within five (5) years after attaining a total scaled score of two hundred sixty-six (266) or higher on the UBE taken in any jurisdiction, together with the fee prescribed by Article X ~~(2)~~(B). A score is considered to have been attained on the date of the administration of the UBE that resulted in the score. Applications for admission by transfer of a UBE score may be filed concurrently any time after an application to sit for the UBE in another jurisdiction is filed with that jurisdiction. Any such concurrent application for admission by transfer of a UBE score must include a copy of the application filed in the other UBE jurisdiction in which the applicant will take the UBE. UBE scores for such concurrent applications must be transferred to the administrative office no later than ~~31~~ December 31 for a July exam and no later than ~~30~~ June 30 for a February exam. It is the applicant's responsibility to ensure that his or her qualifying UBE score is transferred to the administrative director by the National Conference of Bar Examiners (NCBE). Applicants shall submit official transcripts of undergraduate and legal education sufficient to satisfy the committee that the applicant's educational qualifications meet the requirements of Practice Book Section 2-8~~ of the Rules~~.

(C) Answers on the application must be typewritten or prepared by electronic means and the application to take the bar examination and for admission to the bar must be used only for the examination for which it is issued.

An application is considered filed on the day it is RECEIVED, properly completed with the appropriate fees paid, in the office of the administrative director.

An applicant who fails to pass a Connecticut bar examination shall be permitted to file an application for the next administration of the bar examination within three weeks of the release of the results of the prior examination.

Art. III-2.

Incidental to an application for admission to the bar by examination or an application for admission by UBE score transfer, each applicant shall be required to file the following supporting documents as appropriate:

(A) Certified copies of driving record ~~and accident history~~.

(B) Certificates of good standing from all courts (state and federal~~, except the U.S. Supreme Court~~) before which the applicant is admitted to practice.

(C) A copy of each application for admission to the bar and/or for admission to every bar examination submitted by the applicant in any jurisdiction other than Connecticut.

(D) Any other information requested by the ~~examining~~ committee.

~~All supporting documents required by this Article should be filed concurrently with the application.~~

Art. III-3.

An applicant who withdraws his or her application to take the bar examination at least thirty (30) days prior to the examination shall be entitled to a fee credit of seventy-five percent of the application fee paid by the applicant. Withdrawals for medical reasons accompanied by a doctor's certificate shall be entitled to a fee credit of seventy-five percent of the application fee paid by the applicant if received within ten (10) days after the examination. In extraordinary circumstances, the ~~Chair~~ chairperson, or the ~~Chair's~~ chairperson's designee, shall have the discretion to grant a credit of up to one hundred percent. In order to demonstrate extraordinary circumstances, the applicant must present evidence of exigent circumstances, such as serious illness or death in the family. All such requests related to exigent circumstances for a fee credit must be in writing and accompanied by appropriate supporting documentation, and must be received by the administrative director within thirty days after the examination. Any fee credits to which a withdrawing applicant may be entitled must be applied toward either of the next two succeeding examinations. All withdrawals must be in writing, addressed to the administrative director and are effective on the date received by the administrative director. ~~This regulation shall be effective upon adoption and shall apply to all applicants beginning with the July 2018 examination.~~

Art. III-4.

~~The administrative director shall make the applications available to the chairperson of the standing committee on recommendations in the appropriate county.~~ The administrative director shall give notice by publication on the committee's website and in the Connecticut Law Journal of the names of the applicants for the examination

and for admission by UBE score transfer. Any written objection received by the committee shall become part of the applicant's file. ~~Unless a written objection to an applicant is received by the appropriate standing committee on recommendations or by the examining committee within 10 days of publication, or the standing committee does not approve an applicant, the report of the standing committee shall be submitted to the county clerk without a meeting of the county bar. In the event that an objection shall be made to any applicant or the standing committee does not approve an applicant there shall be a hearing by the standing committee which shall make a special report on such applicant to be presented to a meeting of the bar of the county at which meeting said bar shall approve or disapprove such applicant.~~

Art. III-5.

The administrative director shall retain the applications ~~for not more than five (5) years and shall thereafter transmit them to the state library for permanent storage.~~ in accordance with the records retention schedule of the Judicial Branch.

Art. III-6.

(~~a~~A) No person who has been disbarred from the practice of law in any jurisdiction, or who is a party to pending disbarment proceedings in any jurisdiction, or who has resigned from the bar pending disciplinary proceedings in any jurisdiction may apply for admission to the Connecticut bar by examination or by UBE score transfer or ~~to~~ sit for the Connecticut bar examination until he or she has been readmitted to practice without condition or restriction in the jurisdiction disbarring or accepting the resignation of such person or until the pending disbarment proceedings have been resolved in favor of the applicant.

(~~b~~B) No person who has been suspended from the practice of law in any jurisdiction may apply for admission to the Connecticut bar by examination or by UBE score transfer or sit for the Connecticut bar examination until the expiration of the period of suspension in the jurisdiction imposing such suspension.

ARTICLE IV.

MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

Art. IV-1.

(A) All persons seeking admission to the practice of law in Connecticut by examination~~,~~ or by UBE score transfer or a military spouse seeking a temporary license to practice as an attorney in Connecticut shall, prior to being recommended for admission to the bar, produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

(B) Applicants for admission without examination without any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed shall not be required to produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination, but shall be required to provide evidence that he or she does not have any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed.

(C) Applicants for admission without examination with any history of discipline, including administrative discipline, in any jurisdiction in which he or she is licensed or has been licensed shall, prior to being recommended for admission to the bar, produce evidence of satisfactory completion of the Multistate Professional Responsibility Examination. The passing score on the Multistate Professional Responsibility Examination shall be a scaled score of eighty (80) and must be achieved within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar

Art. IV-2.

In lieu of the Multistate Professional Responsibility Examination an applicant may, prior to being recommended for admission to the bar, submit evidence of satisfactory completion of a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum. To be acceptable, the course must be completed with a grade of either ''C'' or ''Pass'' within four years before or within one year after the date the applicant files his or her application for admission to the Connecticut bar.

Art. IV-3.

In lieu of the requirements set forth in Articles IV-1(C) and IV-2, an applicant for admission without examination who is a full-time faculty member or full-time clinical fellow at an accredited Connecticut law school may, prior to being recommended for admission to the bar, submit evidence of a scaled score of eighty (80) on the Multistate Professional Responsibility Examination or a grade of either ''C'' or ''Pass'' in a course in professional responsibility/legal ethics offered by a law school approved by the bar examining committee as part of its regular curriculum.

ARTICLE V.

EXAMINATIONS

Art. V-1.

The ~~C~~committee shall hold sessions semi-annually for the examination in law of applicants for admission to the bar. The examination shall be held at such place or places within the State of Connecticut as the ~~C~~committee may designate, one to be held the last consecutive Tuesday and Wednesday of February and one to be held the last consecutive Tuesday and Wednesday of July, in each year. Such examination shall last two days, with two sessions each day.

Art. V-2.

The examinations shall be in writing. The ~~C~~committee shall provide pencils and pens. The ~~C~~committee may allow an applicant to utilize a portable electronic device capable of operating the designated software to answer performance tests and essay questions provided that the applicant follows the procedure set forth by the ~~C~~committee for electing such option. Special circumstances may, with the prior written approval of the committee, warrant a waiver, in whole or in part, of the requirements of this Article~~.~~ V-2.

Art. V-3.

An applicant may be examined at the examination next preceding his or her eighteenth birthday. If successful and otherwise qualified, he or she shall be admitted to the bar only upon attaining the age of eighteen (18).

Art. V-4.

The examination shall be the Uniform Bar Examination (UBE), prepared by the National Conference of Bar Examiners (NCBE) and comprised of two (2) Multistate Performance Test (MPT) items, six (6) Multistate Essay Examination (MEE) questions, and the Multistate Bar Examination (MBE). Applicants may be tested on any subject matter listed by the NCBE as areas of law to be tested on the UBE.

Art. V-5.

Raw scores earned on the MPT and MEE portions of the examination are combined and scaled to the MBE to calculate scaled written scores. The written scaled scores and the MBE scaled scores shall be combined to determine UBE total scores, with the MPT weighted 20%, the MEE weighted 30%, and the MBE weighted 50%. Scaled scores shall be used to assure that the standard used to measure competence is not affected by the difficulty of the particular test or the ability of the applicants sitting for a particular examination. A total UBE score of two hundred sixty-six (266) shall be the minimum passing score. An applicant's scaled MBE score shall be expressed to one decimal place. An applicant's total UBE score shall be expressed to the nearest whole number.

Art. V-6.

All applicants taking the bar examination in Connecticut must sit for the MPT, MEE, and the MBE in Connecticut during the same administration of the examination and will receive a UBE score.

(A) An applicant taking the bar examination in Connecticut may request certification of a UBE score earned in Connecticut to another jurisdiction. An applicant requesting certification of a UBE score earned in Connecticut to another jurisdiction must direct such request to the National Conference of Bar Examiners (NCBE).

(B) An applicant taking the bar examination in Connecticut may request the certification of an MBE score earned in Connecticut to another jurisdiction. An applicant requesting certification of an MBE score earned in Connecticut to another jurisdiction must direct such request to the ~~C~~committee's Administrative Office on a form provided by the ~~C~~committee and pay the fee prescribed in Article X ~~(9)~~(M).

Art. V-7.

(~~a~~A) In order for the examination to be graded, the applicant must attend both the MPT and MEE sessions at the designated location in Connecticut and both sessions of the MBE in Connecticut. Any applicant who does not attend all four (4) sessions of the examination will be deemed withdrawn from the examination and will not receive examination results.

(~~b~~B) Except in extraordinary circumstances, applicants must remain in the examination room for the first hour of the examination.

(~~c~~C) No applicant will be admitted to the examination more than one (1) hour after the examination session begins. An applicant who fails to appear for one (1) session of the examination shall not be admitted to a later session. Any applicant who is not present for both sessions of the MPT and MEE will not be permitted to take the MBE in Connecticut on the following day.

Art. V-8.

The committee shall meet at such time and place as may be fixed by the chairperson to determine the results of the examination and announce the names of the applicants recommended for admission to the bar. The administrative director shall certify ~~to the clerk of the superior court for each county~~ the names of the applicants who are recommended for admission to the bar and ~~shall likewise notify~~ the Office of the Chief Court Administrator ~~which~~ shall notify the clerks of the superior court for each Judicial District and the press. ~~Such certification shall expire after one hundred eighty (180) days.~~

Art. V-9.

Each applicant recommended for admission to the bar shall (unless specially excused by the clerk of the superior court) present himself or herself for admission as an attorney at a session of the superior court ~~to be held in the county in which such applicant seeks admission~~ or in such other place or places, on such date and at such hour as shall be prescribed by the committee.

Upon a showing of due excuse, the clerk of the superior court may arrange for the presentation for admission of an applicant at a session of the superior court to be held at another time and place to be fixed by the clerk.

Art. V-10.

The administrative director shall notify each applicant of his or her results on the examination. Notification to an applicant who fails to pass the examination shall include a statement of the applicant's scores on the examination and such other examination information as the committee shall from time to time determine.

ARTICLE VI.

GUIDELINES FOR ASSESSMENT OF CHARACTER AND FITNESS

Art. VI-1A. PURPOSE.

The purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are, at the time of admission, worthy of the trust and confidence clients may reasonably place in their attorneys.

Art. VI-1B. SUBCOMMITTEE.

There shall be a character and fitness subcommittee, appointed by the chairperson, which shall have the power to act for the committee as set forth below. The subcommittee shall have the duty, power and authority to order independent medical evaluations, conduct interviews, and approve conditional admission. The subcommittee shall report to the full committee regarding decisions made with respect to independent medical evaluations and conditional admission. The subcommittee shall also make recommendations to the full committee for formal hearings.

Art. VI-2. STANDARD OF CHARACTER AND FITNESS.

A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission. Conduct

that is merely socially unacceptable or the physical disability of the applicant is not relevant to character and fitness for law practice and will not be considered.

Art. VI-3. BURDEN OF PROOF.

The applicant bears the burden of proving his or her good moral character and fitness to practice law by clear and convincing evidence.

Art. VI-4. GOOD MORAL CHARACTER AND FITNESS TO PRACTICE LAW.

The concept of ''good moral character and fitness to practice law'' necessarily reflects the mores of the community as well as an estimate of the individual. The determination of present good moral character and fitness is made at the time of admission. In considering good moral character and fitness the ~~C~~committee will attempt to view the applicant as a whole person and take into account the applicant's entire life history rather than limit its view to isolated events in ~~his/her~~ his or her life. The ~~C~~committee's inquiry into an applicant's character and fitness emphasizes honesty, fairness and respect for the rights of others and for the law in general. There are no specific incidents, transgressions or misconduct which will result in disqualification. However, certain conduct indicates a lack of good moral character and/or fitness to practice law (See Article~~.~~ VI-11 below).

Art. VI-5. PROCEDURES.

(~~a~~A) The applicant shall be given the opportunity to demonstrate present good moral character and fitness to practice law despite particular past conduct.

(~~b~~B) When the ~~C~~committee has information weighing against a determination of good moral character and fitness to practice law:

(~~i~~1) The applicant shall be notified of the information, and

(~~ii~~2) The applicant shall be provided the opportunity to submit such material as the applicant deems appropriate.

(~~e~~C) When an applicant's past conduct raises a question as to ~~his/her~~ his or her character and fitness, the ~~C~~committee will take into consideration the following:

(~~i~~1) The number of incident(s) (offenses); i.e. whether single, sporadic or repeated;

(~~ii~~2) The seriousness of the incident(s) (offenses) and the degree of moral turpitude involved;

(~~iii~~3) The time of commission; e.g. whether recent or remote past;

(~~iv~~4) The age of the applicant at the time of the incident(s) (offenses);

(~~v~~5) Any mitigating circumstances;

(~~vi~~6) The opinion of others about the applicant's moral character and fitness;

(~~vii~~7) Evidence of rehabilitation;

(~~viii~~8) Activities, jobs and civil service;

(~~ix~~9) Any other pertinent information; e.g. degree of remorse.

(~~d~~D) If the applicant establishes present good moral character and fitness to practice law despite past conduct, the ~~C~~committee will certify the applicant.

~~e) i)~~(E)(1) If the ~~Committee~~ character and fitness subcommittee believes there are matters which may indicate a lack of good moral character and/or fitness ~~, the Committee may refer the file to the Standing Committee on Recommendations for Admission to the Bar in the county in which the applicant resides or, if the candidate is not a resident of Connecticut, to such Standing Committee as the Committee shall deem appropriate,~~ to practice law, a formal hearing may be scheduled. In determining whether a formal hearing on character and fitness is necessary, the subcommittee, or any member thereof, may elect to conduct an interview with the applicant, who may be represented by counsel.

~~ii) The Standing Committee shall review the file and shall notify the applicant by certified mail if it determines that an investigative hearing is necessary. The notice shall provide the date, time and location of the hearing and shall state in detail the matters to be inquired into at the hearing and shall advise the applicant that the hearing shall be recorded and that he or she may be represented by counsel. The Standing Committee shall report in writing to the Committee whether it recommends the applicant.~~

(2) The character and fitness subcommittee may elect to hold an application in abeyance for a set period of time if there is a pending criminal charge, significant pending litigation, an outstanding judgment, defaulted or delinquent student loan, or other unresolved issue(s) pertaining to character and fitness. When the period of abeyance expires, the applicant shall submit evidence of resolution together with a Supplemental Affidavit Updating Original Application by the deadline set by the subcommittee. Any application for which the evidence of resolution and supplemental affidavit are not submitted by the deadline shall be deemed withdrawn by the applicant. The deadline may be extended by the subcommittee upon good cause shown by the applicant. Any request for an extension must be filed by the applicant not less than thirty (30) days before the deadline.

~~iii) Upon receipt of the report of the Standing Committee the Committee shall either adopt the findings or hold a formal hearing on the application.~~

(3) If the ~~C~~committee determines that a formal hearing is necessary it shall prepare written specifications which shall be sent to the applicant by certified mail. The specifications shall provide the date, time and location of the hearing and shall state in detail the matters to be inquired into and the facts, which, if proved, would form the basis of the committee's determination of lack of good moral character and/or fitness. The specifications shall advise the applicant that the hearing shall be recorded and that he or she may be represented by counsel. However, an applicant may request a waiver of a formal hearing if the applicant is in agreement with the terms of the ~~C~~committee's recommendation of admission with conditions as provided in Practice Book Sections 2-9 and 2-11 ~~of the rules of the Superior Court~~.

(~~iv~~4) The formal hearing shall be conducted before a panel of the ~~C~~committee consisting of at least three (3) members appointed by the ~~chairman~~ chairperson which shall have the power to act for the ~~C~~committee. Following the conclusion of the formal hearing, the applicant shall be permitted to withdraw his or her application until an oral or written decision is rendered by the panel. T~~t~~he panel shall make its findings of fact and ~~recommendation~~ decision for or against the admission of the applicant. The applicant shall be notified of the findings of fact and ~~recommendation~~ decision. If the hearing is not completed within six (6) months of its commencement through no fault of the committee, the application shall be deemed to be withdrawn by the applicant. Said six (6) month period may be extended by the ~~C~~committee upon good and sufficient cause shown by the applicant. A request

for an extension must be filed by the applicant not less than thirty (30) days before the expiration of the six month period.

(~~v~~5) Any applicant who is ~~dissatisfied with~~ aggrieved by the ~~Committee's~~ panel's ~~recommendation concerning his or her character and fitness~~ decision may, within sixty (60) days after receipt of notice of the ~~Committee's~~ panel's ~~recommendation~~ written decision, file with the administrative director a petition for reconsideration. The petition must contain new and additional material which the ~~Committee~~ panel has not previously considered. Only one such petition for reconsideration may be filed. Within sixty (60) days of receipt of the petition for reconsideration, the ~~C~~committee shall make its findings of fact and recommendation for or against the admission of the applicant. The applicant shall be notified of the findings of fact and recommendation.

Art. VI-6. CONTINUING CRIMINAL ACTIONS.

Factors such as pending incarceration, probation, the restrictions of parole still in effect or unfulfilled sentences, while not determinative, will generally be considered to indicate that the rehabilitation process has not been completed.

Art. VI-7. CONDUCT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

Engaging in any conduct which would have subjected the applicant to discipline if ~~he/she~~ he or she had already been a member of the bar will weigh strongly against a determination of good moral character and/or fitness. Similarly, lack of good standing in a jurisdiction where the applicant is (or was) admitted to the bar is indicative of a lack of good moral character and/or fitness.

Art. VI-8. CANDOR IN THE ADMISSION PROCESS.

Lack of candor in responding to questions posed on the application for admission to the bar in Connecticut (or elsewhere) or otherwise posed by the ~~C~~committee or its staff may be independent grounds for a finding of lack of good moral character and/or fitness notwithstanding the fact that the underlying information would not, standing alone, have been grounds for such a finding. The ~~C~~committee expects that all applicants will provide a complete and candid response to its inquiries, whether on the application or as part of a subsequent inquiry.

Art. VI-9. PROTOCOL FOR INQUIRY INTO HEALTH DIAGNOSIS OR DRUG OR ALCOHOL DEPENDENCE.

(~~a~~A) Basis for Inquiry into Health Diagnosis or Drug or Alcohol Dependence. Any inquiry about a health diagnosis, drug or alcohol dependence, or treatment for either can occur only if it appears that the applicant has engaged in conduct that calls into question the person's good moral character and/or fitness to practice law and (1) the health diagnosis, drug or alcohol dependence, or treatment information was disclosed voluntarily to explain the conduct or as a voluntary response to any question on the application or follow-up inquiry by the ~~C~~committee or (2) the ~~C~~committee learns from a third-party source that the health diagnosis, drug or alcohol dependence, or treatment was raised as an explanation for the conduct.

(~~b~~B) Scope of Inquiry into Health Diagnosis or Drug or Alcohol Dependence. When a basis for an inquiry by the ~~C~~committee has been established, any such inquiry must be narrowly, reasonably, and individually tailored and adhere to the following:

(1) The first inquiry will be to request statements from the applicant;

(2) Following completion of the above inquiry, additional statements may be requested from treatment providers if reasonably deemed necessary by the ~~C~~committee. The statements of the treatment providers shall be accorded appropriate weight; and

(3) In those cases in which the statements from the applicant and treatment providers do not resolve reasonable concerns about the applicant's good moral character and/or fitness to practice law, the ~~C~~committee may seek medical or treatment records by way of narrowly tailored requests in preparation for an Independent Medical Evaluation.

(~~c~~C) Any testimony or records from medical or other treatment providers may be admitted into evidence at a formal hearing and transmitted with the record on review to the court. Records and testimony regarding the applicant's fitness shall otherwise be kept confidential in all respects.

Art. VI-10. APPLICATION REVIEW.

The ~~C~~committee establishes the following policies regarding review and approval of applications for admission:

(~~a~~A) Staff Review and Approval: Clear record; minor traffic violations (no felonies or misdemeanors); minor credit issues (no bankruptcy, judgment defaults or large loans in collection); honorable discharge from military; in good standing in each jurisdiction where admitted;

(~~b~~B) Committee review: All other cases.

Art. VI-11. CONDUCT THAT CREATES A PRESUMPTION OF LACK OF GOOD MORAL CHARACTER AND/OR FITNESS TO PRACTICE LAW.

The following conduct creates a presumption of and may result, in the absence of evidence to the contrary, in a finding of lack of good moral character and/or fitness to practice law:

(~~i~~A) Conviction of a felony

(~~ii~~B) Course of conduct evidencing disregard for the law and the rights of others

(~~iii~~C) Fraudulent conduct, which shall include, but not be limited to plagiarism and other forms of academic misconduct

(~~iv~~D) False, misleading or incomplete disclosure on application for admission to the bar in Connecticut or elsewhere

(~~v~~E) Significant financial problems evidencing fiscal mismanagement

(~~vi~~F) Suspension~~, or~~ disbarment or resignation pending disciplinary proceedings in another jurisdiction

(~~vii~~G) Revocation or suspension of another license or governmental authorization to conduct a profession, trade or business

(~~viii~~H) Substance abuse not under control

Art. VI-12. REAPPLICATION AFTER DENIAL.

(A) An applicant who is denied admission to the bar for lack of good moral character and/or fitness shall not be permitted to reapply within two (2) years of

denial; the denial may specify a longer period of time. An applicant so denied shall be required to either retake and pass the bar examination or apply for admission on motion or by UBE score transfer if qualified. ~~A bar examination applicant so denied shall be required to retake and pass the bar examination. A motion applicant so denied shall be required to either reapply for admission without examination if qualified or apply, sit for and pass the bar examination.~~

(B) An applicant who is denied certification as an Authorized House Counsel or Foreign Legal Consultant for lack of good moral character and/or fitness shall not be permitted to reapply within one (1) year of denial; the denial may specify a longer period of time. An applicant so denied shall be required to either apply for Authorized House Counsel or Foreign Legal Consultant status, or take and pass the bar examination or apply for admission on motion or by UBE score transfer if qualified.

~~Art. VI-13. TIME LIMITATION ON ADMISSION.~~

~~A bar examination applicant recommended by the Committee, but not admitted to the bar within five years of the date of such recommendation, shall be required to retake and pass the bar examination. A motion applicant recommended by the Committee, but not admitted to the bar within five years of the date of such recommendation, shall be required to either reapply for admission without examination if qualified or apply, sit for and pass the bar examination.~~

Art. VI-14. CHEATING AND OTHER DISHONEST CONDUCT.

(~~a~~A) If it shall appear to the ~~C~~committee that there is credible evidence which would establish that an applicant has:

(1) either by omission or commission falsified the application or proofs required for admission to the bar examination or misrepresented the applicant's eligibility to sit for the bar examination;

(2) either by omission or commission falsified the proofs required for admission to practice with or without examination or upon UBE score transfer or for certification as an Authorized House Counsel or a Foreign Legal Consultant;

(3) either by omission or commission falsified documentation submitted in support of a request for test accommodations under Article ~~Art.~~ I-4 or secured such documentation under false pretenses;

(4) brought unauthorized items or materials into the examination room or otherwise violated the ~~C~~committee's examination security policy;

(5) broken the seal on the question book, opened the question booklet, or reviewed the questions in the question book prior to the announcement that the examination has begun, or otherwise violated any of the oral or written instructions given in connection with the administration of the bar examination;

(6) possessed in any manner, reviewed and/or utilized any unauthorized notes, books, recordings, electronically retrievable data or other unauthorized materials during the bar examination, or secreted such materials for such use;

(7) written or designated any answers to questions on the bar examination prior to the announcement of the beginning of the examination session or written or designated any answers or other information on an answer sheet or booklet after the announcement of the conclusion of the session;

(8) sought, obtained or used answers or information from or given answers or information to another applicant or any other person during the bar examination;

(9) removed any examination materials or notes made during the examination from the examination room;

(10) memorized questions for the purpose of reporting and/or reported the substance of questions to any person or entity engaged in, or affiliated with any person or entity engaged in, the preparation of applicants to take the bar examination or otherwise violated the copyright protection afforded to bar examination materials;

(11) engaged in fraud, dishonesty or other misconduct in connection with an application to or the administration of the Multistate Professional Responsibility Examination (MPRE) or to a bar examination of any other jurisdiction;

~~(12) sat for the bar examination without having a bona fide intention to seek admission to practice law in the State of Connecticut; or~~

(~~13~~12) compromised or disrupted the process for admission to or administration of the bar examination; the ~~C~~committee shall serve written charges on such applicant by mail at the last address provided to the ~~C~~committee by the applicant, stating with particularity the facts upon which such charges are based. The applicant's examination results shall be withheld pending the determination of the charges by the ~~C~~committee.

(~~b~~B) The applicant, no later than thirty (30) days after the service of charges shall cause to be delivered to the ~~Administrative~~ Office of the ~~Committee~~ Administrative Director an answer, signed under oath, to such charges. Such answer shall identify with specificity the charges disputed by the applicant, who shall set forth any evidence which can be adduced by the applicant in contradiction of such charges. The applicant may include in such written answer a request that the ~~C~~committee hold a hearing.

(~~c~~C) In the event such applicant does not submit an answer signed under oath as provided in Subsection (~~b~~B), the ~~C~~committee shall deem the facts set forth in the written charges to be true.

(~~d~~D) In the event such applicant does not request a hearing, and the ~~C~~committee does not on its own motion determine to conduct a hearing, the ~~C~~committee shall make a determination based on the evidence submitted. For all matters presented to the ~~C~~committee, the rules of evidence shall be as in other administrative ~~hearings~~ proceedings as set forth in the Uniform Administrative Procedure Act. The ~~C~~committee shall have the burden of proof by the preponderance of the evidence. ~~If a hearing is held, the constitution of the panel hearing the matter shall be in accordance with Art. VI-5 (iv).~~

(~~e~~E) If the applicant shall request a hearing, or if the ~~C~~committee, on its own motion, determines to conduct a hearing, the ~~C~~committee shall set a date for a hearing ~~by the Committee or by three or more members of the Committee, who shall make a report and recommendation to the full Committee which shall render a written decision.~~ before a panel of the committee consisting of at least three (3) members appointed by the chairperson which shall have the power to act for the committee. Reasonable notice of the hearing shall be provided to the applicant.

(~~f~~F) If the applicant shall be found guilty by reason of:

(1) applicant's admission that such charges are true, in whole or in part; or

(2) applicant's default in answering the written charges, in whole or in part; or

(3) determination of the ~~C~~committee, after a hearing, or where no hearing was conducted, after the ~~C~~committee's review of the evidence submitted, such determination shall be set forth in the ~~C~~committee's written decision and one or more of the following penalties, and any other penalty which the ~~C~~committee may deem appropriate, may be imposed:

(~~i~~a) nullification of the examination taken or the application made by such applicant;

(~~ii~~b) disqualification of the applicant from taking the Connecticut Bar Examination or applying for admission on motion or by UBE score transfer or for certification as an Authorized House Counsel or a Foreign Legal Consultant for a period of five (5) years from the date of such admission or determination, unless the ~~C~~committee articulates reasons for a lesser period of time;

(~~iii~~c) invalidation or striking of one or more answers of the examination taken by such applicant, or the reduction of applicant's final score by one or more points; and/or

(~~iv~~d) transmission of a written report of the matter to the bar admission authority and/or disciplinary authority in every jurisdiction of the United States and, where applicable, to any foreign jurisdiction deemed appropriate by the ~~C~~committee.

(~~g~~G) The ~~C~~committee shall notify the applicant of its decision in writing as soon as practicable.

(~~h~~H) The applicant shall be entitled to be represented and advised by counsel, at his or her own expense, at every stage of the proceeding. Any person who voluntarily appears or who is compelled to attend, and submit proof or testimony, at any hearing held pursuant to Subsection (~~e~~E) of this ~~Part~~ Article shall be entitled to be represented and advised by counsel, at his or her own expense.

ARTICLE VII.

ADMISSION ON MOTION OF ATTORNEYS OF OTHER STATES

Art. VII-1.

The application for admission on motion under Practice Book Section 2-13 ~~of the rules~~ shall be made upon the official form obtainable from the administrative director, which forms shall be filed with the administrative director.

Art. VII-2.

~~Attached to said application for admission on motion shall be o~~Official transcripts of undergraduate and legal education sufficient to satisfy the committee that the applicant's educational qualifications meet the requirements of Practice Book Section 2-13 ~~of the Rules~~ shall be submitted directly to the committee from the school.

Art. VII-3.

Applicants for admission on motion shall submit satisfactory proof of compliance with the professional responsibility requirement sufficient to satisfy Article IV of these regulations and Practice Book Section 2-13 ~~of the Rules~~.

Art. VII-4.

There shall be a subcommittee on applications for admission to the Connecticut bar on motion ~~pursuant to Rules of Practice, Sec. 2-13~~, which subcommittee shall

have the duty and authority to ~~consider and act upon all applications on motion insofar as such applications require a determination as to whether at least one jurisdiction of which the applicant is a member of the bar would admit a member of the bar of the State of Connecticut to its bar without examination under provisions similar to those set forth in Rules of Practice, Sec. 2-13.~~ determine whether to accept, extend and/or revoke reciprocity to other jurisdictions.

~~All applicants will be required to satisfy the subcommittee as to compliance with Rules of Practice, Sec. 2-13, as set forth above. Upon written request of an applicant for such determination prior to requesting application materials and paying the fee therefor, the subcommittee shall make such investigation and inquiry as it shall deem appropriate and shall advise such applicant in writing thereof.~~

~~Any applicant dissatisfied with the decision of the subcommittee may request a hearing by the subcommittee for the purpose of setting forth other or additional information relating thereto.~~

Art. VII-5.

The administrative director shall give notice by publication on the committee's website and in the Connecticut Law Journal of the names of the applicants for admission on motion. Any written objection received by the committee shall become part of the applicant's file.

Art. VII-6.

(A) No person who has been disbarred from the practice of law in any jurisdiction, or who is a party to pending disbarment proceedings in any jurisdiction, or who has resigned from the bar pending disciplinary proceedings in any jurisdiction may apply for admission on motion to the Connecticut bar until he or she has been readmitted to practice without condition or restriction in the jurisdiction disbarring or accepting the resignation of such person or until the pending disbarment proceedings have been resolved in favor of the applicant.

(B) No person who has been suspended from the practice of law in any jurisdiction may apply for admission on motion to the Connecticut bar until the expiration of the period of suspension in the jurisdiction imposing such suspension.

ARTICLE VIII.

REGISTRATION AS AUTHORIZED HOUSE COUNSEL

Art. VIII-1.

The application for registration as authorized house counsel under Practice Book Section 2-15A ~~of the rules~~ shall be made upon the official form obtainable from the administrative director, which form shall be filed with the administrative director.

~~Art. VIII-2.~~

~~Attached to said application for registration as authorized house counsel shall be official transcripts of legal education sufficient to satisfy the committee that the applicant's educational qualifications meet the requirements of Section 2-8 of the Rules.~~

Art. VIII-~~3~~2.

Applicants for registration as authorized house counsel shall submit such documents necessary to satisfy the requirements of Practice Book Section 2-15A(d) including:

(~~1~~A) a sworn statement that the applicant has read the Connecticut Rules of Professional Conduct and Chapter 2 of the superior court rules and will abide by them;

(~~2~~B) a sworn statement that the applicant submits to the jurisdiction of the statewide grievance committee and the superior court and authorizes the notification to and/or from the jurisdiction(s) in which the applicant is licensed to practice law regarding any disciplinary actions against the applicant;

(~~3~~C) a sworn statement of all jurisdictions in which the applicant is now or has ever been licensed to practice law;

(~~4~~D) a sworn statement disclosing all disciplinary actions against the applicant;

(~~5~~E) the required certification from the applicant's employer;

(~~6~~F) the required affidavits from two Connecticut attorneys.

~~Art. VIII-4.~~

~~A. There shall be a subcommittee on applications for registration as authorized house counsel pursuant to Rules of Practice, Sec. 2-15A, which subcommittee shall have the authority to consider and act upon all applications for registration as authorized house counsel which subcommittee shall have the power to act for the Committee.~~

~~B. All applicants will be required to satisfy the subcommittee as to compliance with Rules of Practice, Sec. 2-15A.~~

~~C. The subcommittee may, in its discretion, require any applicant for registration as an authorized house counsel to obtain a background investigation report from the National Conference of Bar Examiners.~~

Art. VIII-3.

(A) No person who has been disbarred from the practice of law in any jurisdiction, or who is a party to pending disbarment proceedings in any jurisdiction, or who has resigned from the bar pending disciplinary proceedings in any jurisdiction may apply for Authorized House Counsel status until he or she has been readmitted to practice without condition or restriction in the jurisdiction disbarring or accepting the resignation of such person or until the pending disbarment proceedings have been resolved in favor of the applicant.

(B) No person who has been suspended from the practice of law in any jurisdiction may apply for Authorized House Counsel status until the expiration of the period of suspension in the jurisdiction imposing such suspension.

ARTICLE IX.

TIMELY FILING

Art. IX-1.

(A) Failure to file any required document in a timely manner may result in a delay in or a denial of the applicant's admission to the bar. Any application not completed within one (1) year of its filing shall be deemed to be withdrawn by the applicant. This one year period may be extended by the committee upon good cause shown by the applicant. Any request for extension must be filed by the applicant not less than thirty (30) days before the expiration of the one (1) year period.

(B) Failure to file an amendment in a timely manner may result in a delay in or a denial of the applicant's admission to the bar. An amendment is considered timely when made within thirty (30) days of any occurrence, but no later than twenty-four (24) hours before being sworn in, that would change or render incomplete any answer on the application.

Art. IX-2.

Any application not completed within nine (9) months of its filing must be updated by submission of a Supplemental Affidavit Updating Original Application (on a form to be designated by the administrative director). Failure to submit a Supplemental Affidavit Updating Original Application will render an application incomplete.

Art. IX-3.

If an application remains pending before the ~~C~~committee for character and fitness review for six (6) months from the date of the notice of such review, the applicant shall submit a Supplemental Affidavit Updating Original Application (on a form to be designated by the administrative director). Any application for which a Supplemental Affidavit Updating Original Application is not submitted within three (3) months thereafter shall be deemed withdrawn by the applicant. This three (3) month period may be extended by the ~~C~~committee upon good cause shown by the applicant. Any request for extension must be filed by the applicant not less than thirty (30) days before the expiration of the three (3) month period.

Art. IX-4.

Each applicant must diligently pursue his or her application with the committee after it has been referred for further inquiry pursuant to Article VI. Applicants must respond in writing to inquiries and forward requested documentation to the committee within ninety (90) days of the inquiry, unless a longer deadline is set by the committee. An extension of time for good cause may be requested in writing prior to the expiration of the ninety (90) days or other deadline set by the committee. A grant of an extension shall be for a date certain.

Art. IX-5.

In the absence of good cause shown to the contrary, failure to respond to inquiries by the committee after referral for further inquiry pursuant to Article VI or to make a timely request for an extension of time to respond to such inquiries shall result in the application being deemed withdrawn. The committee shall notify the applicant in writing at the applicant's last known correspondence address.

Art. IX-6.

Applicants recommended for admission to the bar or for certification as authorized house counsel or to practice as a foreign legal consultant shall be certified to a Connecticut Superior Court so that he or she may be sworn in. Such certification shall expire after one hundred and eighty (180) days. If such certification expires, an applicant must update his or her application, including the filing of a Supplemental Affidavit Updating Original Application, before he or she may be recertified for an additional one hundred and eighty (180) days.

Art. IX-7.

An applicant recommended by the committee, but not admitted to the bar within five (5) years of the date of such recommendation, shall be required to either retake and pass the bar examination or apply for admission on motion or by UBE score transfer if qualified.

ARTICLE X.

SCHEDULE OF FEES

Art. X.

The following shall be the fees in connection with applications for admission to the bar:

(~~1~~A) Application fee for admission by examination:

(~~a~~1) First filing deadline: $800

(~~b~~2) Final filing deadline: $900

(~~2~~B) Application fee for admission by UBE score transfer: $750

(~~3~~C) Application fee for admission without examination: $1,800

(D) Application fee for registration as authorized house counsel: $1000

~~(5) Copy of prior examination questions: $15~~

(E) Military Spouse Temporary Licensing:

(1) Application Fee: $750

(2) Renewal Fee: $300

(F) Application fee for foreign legal consultant: $500

(G) Petition for determination on foreign education: $500

(~~4~~H) Investigation under Sec. 2-8(8): $50

(~~6~~I) Copy of prior examination answers (includes questions): $35

(~~7~~J) Copy of applicant's application ~~for admission by examination~~: $15

(~~8~~K) Copy of applicant's ~~exam~~ written answers: $20

(L) Confirmation of applicant's written scores: $10

(~~9~~M) Transmittal of applicant's MBE score to another jurisdiction: $25

(~~10~~N) Replacement of examination scores and information: $15

(~~11~~O) Replacement of admission certificate: $20

~~(12) Application fee for foreign legal consultant: $500~~

~~(13) Application fee for registration as authorized house counsel: $1000~~

~~(14) Petition for determination on foreign education: $500~~

~~(15) Military Spouse Temporary Licensing:~~

~~(a) Application Fee: $750~~

~~(b) Renewal Fee: $300~~

All fees must be made payable to the Connecticut Bar Examining Committee by certified check or money order; personal checks are not accepted.

DIVISION OF CRIMINAL JUSTICE

(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF FAIRFIELD

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Fairfield (PCN 4866). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position please visit our website at: https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at: https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to: The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Fairfield JD (PCN 4866) and must be postmarked no later than **January 28th, 2020**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Application for Reinstatement to the Bar

On December 30, 2019 Josephine Smalls Miller filed in the Superior Court for the Judicial District of Danbury, in docket number DBD-CV-17-6022075-S an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Ann-Margaret Archer
Chief Clerk, Judicial District of Danbury